

**The Quixotism of a Relationally Constituted Contract Law**

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## **Abstract**

Relational contract theory is often seen as a rival to classical contract. Despite its inception in the early 1970s, the full theory does not seem to have made much headway into the substantive law of contract within England and Wales outside of doctrinal rhetoric in good faith. Part of this stagnation is due to the convolution that surrounds relational contract theory, both in its descriptive and normative claims. This thesis will attempt to rectify the situation and elucidate relational contract theory as the neutral analytic tool that it was designed to be. It will be shown that relational theory is not inherently opposed to the continuation of the classical law and that a change to a relationally constituted law of contract would be damaging. While the classical law is founded on false premises, the effect is not as dire as academics posit, and in a world that is better off with this flawed doctrine relational theory will encounter the awkward question of its utility. The fact that the theory would not do well in substantive law does not make its norms and narrative any less accurate, and this thesis maintains it still has a place. In determining an adequate place the thesis will reference an obscure jurisprudential theory developed by Niklas Luhmann known as Autopoietic Systems Theory. With reference to this, the thesis determines that relational contract theory is a description of the interplay between psychic and social systems. The theory is both separate and distinct from the legal subsystem of society, which observes the theory's noises and generates its own internal communications. On this abstract theoretical level, the thesis will deduce that further distortion of the theory by the legal system is highly likely, and therefore integration is unlikely to find any real success.

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## **ii. Declaration**

I, Ryan Cushley-Spendiff, declare that the thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere. No parts of the thesis have been published or submitted for a higher degree elsewhere

## 1. Chapter One: Introduction

Certainty is perhaps the most valued ideal within classical contract. Despite our common law having no general theory of contract,<sup>1</sup> our system still prides itself in the legal certainty and consistency that our historic doctrine maintains. Contract is a meeting of the minds between individuals, an ideal exemplified by the will theory of contract.<sup>2</sup> Our system is winning the market for contractual governance due to its certain and steady approach meeting business needs.<sup>3</sup> Individuals can feel secure knowing that when they contract, they will not be subject to creatively-composed judgements, judicial moral values, or any obligation that they have not expressly consented to. Freedom of contract, and its foundational liberal values, have survived centuries due to their inherent value to the business world and the intellectual superiority of the classical doctrine.

Except, none of these statements are true. Classical contract is riddled with inconsistencies, both internal and external. Internally, no single value reigns supreme, though this is not for lack of trying. The liberal idealist's hope for the dominance of will theory was castrated at inception when the doctrine had to deal with real world contract disputes and not mere academic hypothesis. It had failed to get a stranglehold of contract due to a rudimentary mistake: the classical theory completely disregarded what contracts were, how they worked, or what their purpose was. In a prime example of ideological puritanism, classical theory ignored the reality of contractual behaviour and instead focused on its ideal world populated by homo economicus.<sup>4</sup>

Such a conception would be adequate should humans be nothing but black-boxes with selective input-output functions. By stripping away the human from the party, classical contract could present a world of individuals who governed their relations via consensual obligations in order to achieve self-actualisation. Thus the pursuit of freedom of contract was seen as a moral endeavour.<sup>5</sup> Such a conception of contract is teleological in nature; it is seeking to define contract by its effects as opposed to the

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<sup>1</sup> David Parry, *The Sanctity Of Contracts in English Law* (Stevens & Sons Limited 1959) 3.

<sup>2</sup> Pothier, *A Treatise on the Law of Obligations, or Contracts*, translated by William David Evans (3<sup>rd</sup> Ed, Philadelphia, Robert H Small, 1853) 30-31.

<sup>3</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013).

<sup>4</sup> Menachem Mautner, 'Contract, Culture, Compulsion or: What is so problematic in the application of Objective Standards in Contract Law' (2002) 3(2) *Theoretical Inquiries in Law* 545.

<sup>5</sup> Patrick Atiyah, *Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 261.



subject matter. This radical liberalism reached its peak in the nineteenth century, during which time it burrowed itself deep within the law of contract and its platitudes of 'the will' soon found itself cited as the justification for multiple doctrines.<sup>6</sup>

Will theory has remarkably managed to survive despite heavy inaccuracies, with classical law still managing to propagate itself into the 21st century. Two fundamental reasons can be deduced. The first is that classical law is not the same as classical doctrine. English Law, in its piecemeal pragmatic fashion, never shied away from abandoning logical deductions of will theory whenever it deemed appropriate. Ideological consistency would not be given priority over practical and tangible concerns of procedural fairness, legal certainty, and merchantability. While English judges never bowed to the whims of the mercantile class, they were also never blind to the legitimate concerns of merchants who had to govern day to day business.<sup>7</sup> The blackboard economics of liberalism and the individualist ideology were of no concern to the common law judge attempting to find practical solutions to real problems presented in front of them.

The second reason is that the classical model of contract, that of a bi-lateral executory agreement, has never had a real competitor within the law itself.<sup>8</sup> Given the classical law's dissonance from reality, it is not surprising that a rival programme emerged. Ian Macneil, one of the founders of the relational contract theory, would soon fill this gap.<sup>9</sup> In his early work, Macneil criticised the classical theory of contract, from its requirements on total presentation<sup>10</sup> and its emphasis on formalities.<sup>11</sup> Doing this, he goes through the norms of contracting at great length and great detail; with ten basic norms and a further four 'universal norms'.<sup>12</sup> An etiological exercise, Macneil generated a theory of contract that was based off the four roots of contract (society, specialisation of labour, conceptual choice and awareness of future)<sup>13</sup> in order to provide a progressive

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<sup>6</sup> John Wrightman, *Contract, A Critical Commentary* (Pluto Press 1996) 50-80.

<sup>7</sup> Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 281.

<sup>8</sup> Patrick Atiyah, *Essays on Contract* (Oxford University Press 1986) 12-13.

<sup>9</sup> Richard Austen-Baker, Qi Zhou, *Contracts in Context* (Routledge 2013) 76-77.

<sup>10</sup> Ian Macneil, 'Restatement (Second) of Contracts and Presentation' (1974) 60 *Virginia Law Review* 589, 594.

<sup>11</sup> Ian Macneil, 'Economic Analysis of Contractual Relations: The Need For a Rich Classificatory Apparatus' (1981) 75(6) *Northwestern University Law Review* 1018, 1031.

<sup>12</sup> Ian Macneil, 'Values in Contract: Internal and External' (1983) 78(2) *Northwestern University Law Review* 340, 347

<sup>13</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1-4.

theory on the workings of contractual governance. The theory attempts to encompass all forms of contractual behaviour, with no exceptions or anomalies.

Given the superior intellectual force of relational contract theory in its descriptive claims it is unsurprising that there would be calls for a relationally constituted contract law.<sup>14</sup> After all, there is force in Macaulay's claims that classical contract is 'a flawed product that would seem to breach the warranty of merchantability'.<sup>15</sup> Such a call has been pervasive in academia, with Catherine Mitchell, in *Contract Law and Contract Practice*,<sup>16</sup> espousing relational contract law's desirability and how that is best achieved. Such calls are not homogenous in nature. Some suggest for the replacement of rules with standards as to accommodate relational interests.<sup>17</sup> Some wish for a change to legal reasoning as to reflect relational norms within relationships, essentially using Macneil's apparatus in the legal system to generate a holistic view of the contract.<sup>18</sup> Others merely request changes to the meaning of the current rules and doctrines in what Tan has called 're-interpretative relationalism'.<sup>19</sup>

Of course, no call for regulatory change will be unanimous within academia. Relational contract theory is 'contextual with a vengeance'<sup>20</sup> and so it is unsurprising that relationalists are oft-times seeking contextualist variation within the law. This immediately incurs the ire of neo-formalists, arguing for more of a focus on the written agreement and less on contextual justifications.<sup>21</sup> A plethora of reasoning is cited by formalist objections, from allowing parties to create their own efficiencies<sup>22</sup> to doubts regarding the ability of judges to properly analyse contextual evidence.<sup>23</sup> These objections seem to be gauged at the practical level, in a world where we must consider

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<sup>14</sup> Zhong Xing Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 38 *Legal Studies* 98.

<sup>15</sup> Stewart Macaulay 'Almost Everything That I Did Not Want To Know About Contract Litigation: A comment on Galanter' (2001) 2001(3) *Wisconsin Law Review* 629, 629.

<sup>16</sup> Catherine Mitchell, *Contract Law and Contract Practice* (Hart Publishing 2013).

<sup>17</sup> Ewan McKendrick, 'The Regulation of Long Term Contracts in English law' in Jack Beatson, Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995); Catherine Mitchell 'Behavioural Standards in Contract and English Contract Law' (2016) 33 *Journal of Contract* 234.

<sup>18</sup> Mitchell, *Contract Law and Contract Practice* (n16) 191-197.

<sup>19</sup> Tan, 'Disrupting Doctrine?...' (n14) 106.

<sup>20</sup> Jay M Feinman, 'Relational Contract Theory In Context' (Spring 2000) 94(3) *Northwestern University Law Review* 737, 742.

<sup>21</sup> Robert E Scott, 'The Case for Formalism in Relational Contract' (2000) 94(3) *Northwestern University Law Review* 847.

<sup>22</sup> *ibid* 851-852.

<sup>23</sup> Eric A Posner, 'A Theory of Contract Law Under Conditions of Radical Judicial Error' (Spring 2000) 94(3) *Northwestern University Law Review* 749.

the dangers of 'competent parties and incompetent courts'.<sup>24</sup> However it would be unjust to frame this debate as 'we are all relationalists now'<sup>25</sup> in light of Morgan's *Contract Law Minimalism*.<sup>26</sup> Completely disregarding the relationalist stance, Morgan questions any inherent need for contract law or doctrine to be changed by the upsurge in relationalist thinking.<sup>27</sup>

It is this debate that this thesis responds to, but in an unconventional way. Rather than join either the chorus of harmonisation with relational contract theory or responding via the propagation of liberal tenets of classical law,<sup>28</sup> the author rejects both. This stance is not one of ambivalence or an attempt to justify the classical doctrine through the relational spectrum. Both attempts to justify the law of contract,<sup>29</sup> and the promise-led theory<sup>30</sup> have been attempted by others. Rather, this thesis shall attack the quixotism of the pursuit of a relationally constituted law. While the harmonisation of commercial practice and commercial law might seem desirable as a prima facie bromide, this thesis posits that calls for a relationally constituted contract law are a pursuit of an ideal with insufficient regard to the logistical and practical concerns of the legal system.

As both sides have been equally prolific at strawmanning their ideological opponents, a care warning is needed. This thesis is not advocating for the fetishisation of deregulation or for the advancement of more liberal ideas into the law of contract. This thesis is advocating for the application of the true Coase theorem into the debate: that the cost to fix an externality must not exceed the externality itself.<sup>31</sup> Regulatory theory has been scarce within the relationalist debate, with little recognition or engagement that any shift towards a relationally constituted law is a legal change regardless if done by legislation or by common law precedent. No legal change is costless,<sup>32</sup> and arguments for a relationally constituted law fail if they cannot show that the potential benefits of a legal change outweigh the potential costs.

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<sup>24</sup> Scott, 'The Case for Formalism...' (n21) 875.

<sup>25</sup> Randy Barnett, 'Conflicting Visions: A critique of Ian Macneil's Relational Theory of Contract' (1992) 78(5) *Virginia Law Review* 1175, 1200.

<sup>26</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013).

<sup>27</sup> *ibid* 64-69.

<sup>28</sup> Charles Fried, *Contract as Promise: A Theory of Contract Obligation* (Harvard university Press 1981);

<sup>29</sup> Richard Austen-Baker, 'A Relational Law of Contract?' (2004) 20 *Journal of Contract Law* 60.

<sup>30</sup> Joel Levin, Banks McDowell, 'The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations' (1983) 29 *McGill Law Journal* 24.

<sup>31</sup> Ronald Coase, 'The Problem of Social Cost' (2013) 56 *Journal of Law and Economics* 837.

<sup>32</sup> Micheal P. Van Alstine, 'The Costs of Legal Change' (2002) 49(3) *UCLA Law Review* 789.

This is not an argument for static conservatism or that no change may happen due to the potentially unquantifiable costs. After all, an argument against bad regulation is not an argument for no regulation.<sup>33</sup> Rather the goal of harmonisation between legal reasoning and commercial practice through relational contract theory creates insurmountable problems for the legal system for little tangible benefits. The costs of the regulatory divergence are unclear at best. As will be shown, the non-use of contract law, which created much academic bewilderment in the 1960s after the revelations of Macaulay,<sup>34</sup> is not inherently a problem. One may connect that classical contract has an inherent bias towards the discrete transaction,<sup>35</sup> and so more relational contracts will be hesitant to utilise the system. However, where is the harm? Gudel may be correct in calling the contract law's bias to discreteness intuitively unfair when applied to relational contracts,<sup>36</sup> though feelings of moral outrage should not be the justification for legal change. An ideological march for the legal system to mirror commercial practice is but a quixotist endeavour if such a march is not motivated by a net-benefit.

It is strange that we must even entertain the possibility that the dissonance between law and commercial practice is preventing a slew of relational relationships. After all, as Morgan has argued 'combined effect of Macneil's and Macaulay's work is that relational contracts flourish in spite of the discrete formal nature of the law'.<sup>37</sup> Multiple reasons exist for this that shall be explored in further detail in chapter four but a quick overview will suffice as an introductory matter. Parties in relational contracts will rely more on values of trust and cooperation over legal sanctions. One must be careful not to place this as a 'substitution argument' that Mitchell criticises.<sup>38</sup> In fact, one can easily explain such behaviour through Macneil's apparatus as the norms within the extreme relational end of the relationship will create different effects when presented with environmental stimuli. Performance and dispute resolution are but two provinces within the world of contractual governance, and it should not be odd to imagine that the

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<sup>33</sup> Ronald Coase, 'Social Cost and Public Policy' in George Edwards, *Exploring the Frontiers of Administration* (York University 1970) 40.

<sup>34</sup> Stewart Macaulay, 'Non-Contractual Relations in Business' (1963) 28(1) *American Sociological Review* 55.

<sup>35</sup> Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72(6) *Northwestern University Law Review* 854.

<sup>36</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) *Buffalo Law Review* 763, 766.

<sup>37</sup> *ibid* 214

<sup>38</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 89-90.

implementation of legal instruments may not be the preferred measure of parties dependant on the context.

It is this self-observation of relational contract theory that is often overlooked within relationalist arguments. Few would argue that Macneil's norms merely cease to apply to contracts on certain ends of the spectrum, and in fact doing so would override Macneil's fundamental point that all contracts are in some way relational.<sup>39</sup> There is a hidden cost to creating a relationally constituted contract law; the catalytic effect change would have on the parties. One must remember that the base root of all contract is society.<sup>40</sup> Macneil's norms do not live in a vacuum to be invoked when an agreement is placed on a sector of Macneil's axis. The operations and results of the norms only occur by going through a catalyst of the environment of the contract; that is to say society. An oft-missed, or underappreciated at any rate, background within society is the legal system. Relational contracts only exist in their current function within the current backdrop of the legal system. It is a fallacy to assume that changing a key element of the premise of the relationship will not affect the entire relationship, rather than just the dispute-resolution unfairness that relationalists claim is obscene.

Is this not a contradiction in terms? We have just said that there is a non-use of contract law but also that the current state of contract law is fundamental for the development of current relational contracts. This can be explained via a simple transaction cost analysis. Put simply, Merchants are accustomed with the fact that current law will not apply to most of their relationship, and legal instruments need not be invoked, until the end-game norms are instituted due to irreparable breakdown. As Macaulay claims, merchants do not spend nights reading case judgements.<sup>41</sup> While it is true that the tacit assumptions of business people need not come from law,<sup>42</sup> this does not mean that law does not shape the environment that contracting parties have adapted to. Where blackletter law has kept a historic arms-length distance from the intricate details of

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<sup>39</sup> Richard Austen-Baker, Qi Zhou, *Contracts in Context* (Routledge 2013) 76-77; Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 71.

<sup>40</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1.

<sup>41</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge of Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 77.

<sup>42</sup> Stewart Macaulay, 'Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building' (1996) 1996(1) *Wisconsin Law Review* 75, 77.

commercial dealings, there is no trigger for commercial parties to rely heavily on legal formalities.

The reduced need to rely upon legal options lowers transaction costs of drafting, negotiation, and even dispute resolution as social sanctions and trust begin to play key roles within contractual performance. A hard law cure for a non-existent problem can easily warp the current cost-saving benefits that trust and other social sanctions provide, creating a potential net-deficit that has not been addressed in current literature. This is not merely through the non-use of law becoming the non-use of trust, but through an intersecting of end-game norms into performance norms. With a contract law currently skewed in favour of the discrete transaction, merchants can be assured of their legal obligations and what evidence may be adduced in court at the start of the relationship. The more contextual and holistic the court's approach, the more that this clarity is blurred.

This is assuming that hard law will work as expected. As will be discussed, any possible benefits of a relationally constituted contract law become overshadowed by the margin of error and the effects of erroneous judgements. There are currently actors who choose not to know the law, and those who know the law merely to exploit it,<sup>43</sup> and it is entirely possible that the same people will continue to do so and thus increase the risk of failure. Regulatory failure often has a delegitimizing effect,<sup>44</sup> and it would be unwise to think that a building distrust in the commercial world towards law would stop only at recent changes in regulatory relationism. Such failure may be not even be the fault of the regulator or the court, but of the problem of externality entrepreneurs who capture externalities in order to influence legal outcomes.<sup>45</sup> Any large change towards contextualism within the court would create naturally high barriers of entry, systemically disadvantaging smaller actors in favour of repeat market players who have the resources to overcome the cost of entry. Dangers arise of larger actors being able to influence the legal system far more than normal as they may capitalise the vague nature of Macneil's norms as to generate a corporate narrative that will not be challenged by the lay-person, who often is only a free-rider on the information dissemination of larger

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<sup>43</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1-4.

<sup>44</sup> David Campbell, 'The Sense in Coase's Criticism of the Ceteris Paribus Case for Intervention' (2017) 13 *The Journal of Law and Policy* 39, 54.

<sup>45</sup> Lisa Sun, Brigham Daniels, 'Externality Entrepreneurism' (2016) 50(1) *University of California Davis Law Review* 321, 327.

entities.<sup>46</sup> The danger of regulatory failure, and of corporate capture, is too great to sideline.

The combination of an unclear benefit and the hidden costs of legal change create a bleak prospect for relationally constituted contract law. Even in cases where the externality of the non-recognition of relational agreements has adversely affected a party, such as *Baird Textile Holdings Ltd v Marks and Spencer plc*.<sup>47</sup> it is barely arguable that the parties were even contemplating the end-game norms of the legal system at the beginning of, or even during, their contractual performance. Their extra-legal behaviour was guaranteed ex ante in spite of legal non-enforcement, making observable harm virtually non-existent for the majority of contractual behaviour. It is unclear how any move to a relational system of law would have changed their behaviour in a way that would affect their business interest, outside of larger parties implementing legal strategies with the goal of cost-bombardment in order to economically bind the other. This creates a tri-fold obstacle to any implementation of relational law. For any legal change, there must be either a) a benefit in change or b) a harm in the status quo and c) the cost of such change must not outweigh the rationale be it (a) or (b). With obscure benefits, obscure status-quo harms, potential harms in change, and ostensible costs in change, the relationalist has managed to do the most impressive feat of failing all three categories.

Yet, this thesis seeks to go further than merely highlight logistical difficulties in the formation of relational contract law. Of course, practical difficulties that are deemed too onerous should be enough to deter all but the most bumptious relationalist. However, confining the hurdles of a theoretical paradigm to a functionalist critic may put us into a dire situation in which we are both delegitimising the classical theory of contract while simultaneously admitting defeat in replacing the classical framework with anything remotely operable. This is where the thesis aims to distinguish itself from most discourses on relational contract by applying both it and the classical theory of contract law within an even larger and more encompassing framework. This framework is autopoietic systems theory. Developed by Niklas Luhmann,<sup>48</sup> and to a lesser extent

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<sup>46</sup> Timure Kuran, Cass Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51 Stanford Law Review 683, 721.

<sup>47</sup> [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737.

<sup>48</sup> Niklas Luhmann, *Social Systems* (Translated by J Bednarz and D Beacker, Stanford University Press 1995).

Gunther Teubner,<sup>49</sup> autopoietic systems theory is a notoriously complicated paradigm that is often misunderstood by academics attempting to comprehend it. The high entry costs make those of relational contract theory pale in comparison, for example while there are language difficulties in Macneil's work, these are often the fault of the observer who are attaching an ideological connotation to words such as "cooperation". This is a world apart from Luhmann using words such as 'communication' in a way that is utterly alien to its normal usage in the English language.<sup>50</sup>

Difficulties aside, the author does consider himself a strong Luhmannian and so will be integrating relational contract theory into autopoietic systems theory as to critique the relationalist standpoint from a theoretical level. As a theory of theories,<sup>51</sup> autopoietic systems theory claims to encompass the entirety of society. As any progressive theory cannot permit exceptions, autopoietic systems theory cannot permit an exception of the relational theory of contract, the classical theory of contract, or the actual practice of contract law. As such, after the necessary explanatory springboard on the details of autopoietic systems theory is completed within chapter six the author will place relational contract theory within the larger framework as a compatible element focused on a particular area of society; that of contractual relations. This is a novel approach, though such a statement should be unsurprising as few would seek to assimilate a complex, to the point of impenetrability,<sup>52</sup> theory with a theory considerably more complex and impenetrable.

The hesitation of doing so is obvious; like Macneil, Luhmann has been mischaracterised and poorly understood by academia. Few have grasped the sheer ambition of his work to provide no exception to his theory of society. Yet, it is not particularly difficult to determine where Macneil's work would lie in Luhmann's work. As a pin-point analysis of contracting, Macneil's norms are the exposition of the structural coupling between the human psychic system, the economic subsystem, and the legal subsystem. Macneil's norms are merely more complexity on the bones of Luhmann's work. This is not to say

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<sup>49</sup> Gunther Teubner, *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988), Gunther Teubner, *Law As An Authopoietic System* (Blackwell Publishers 1993).

<sup>50</sup> Hubert Rottleuthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989) 23(5) *Law and Society Review* 779.

<sup>51</sup> Micheal King, 'The Construction and Demolition of the Luhmann Heresy' (2001) 12 *Law and Critique* 1, 4-5.

<sup>52</sup> William Whitford, 'Ian Macneil's Contribution to Contracts Scholarship' (1985) 1985(3) *Wisconsin Law Review* 545, 556.



that Luhmann's work was not detailed, in fact he wrote a great deal on a great many topics.<sup>53</sup> Rather, Macneil has provided norms that exist between two psychic systems whose internal observations of their relationship has been influenced by the meanings that have been generated by society's sub-systems. While the entry costs of applying an often misunderstood view of contract to an enigmatic and, at times, cryptic, view of society are ostensibly high, the illuminations of doing so outweigh the costs.

It is through this prism that we can discover lessons on the application of relational contract theory that, while awkward for the most ardent of relationalists, still must be addressed. Lessons on the evolution of meaning and understanding within a social system can still carry weight, even where the origin of the lessons is an inherently abstract exercise. Social subsystems are never guaranteed to mutually understand each other. Taking Luhmann's concept of the double contingency, one can see that social subsystems will only create meaning from their observations that they internally generate. The impossibility of direct communication between social subsystems means that any meaning generated by the social subsystems will only be generated by internal elements. That is to say, a social sub-system has autonomous control over its own meaning generation. At which point, misunderstandings are not only possible, but incredibly likely. When a system generates a meaning based off internal communications, it will generate noise that other social subsystems may only observe through their own internal mechanisms. Similar to how academics have precious little control of the interpretation of their work post-publication, social sub-systems have little control of the interpretation of their meanings.

It is not only this likelihood of misunderstanding that harms the concept of transplanting relational contract theory into law from the outset, but rather that the legal system has already done so. Relational contract theory has already infiltrated the courts through cases such as *Yam Seng Pte Ltd v International Trade Corp Ltd.*,<sup>54</sup> and *Alan Bates and Others v Post Office Ltd.*<sup>55</sup> While these cases will be subject to a case study in the final chapter, it will be clear to anyone who has both a working understanding of relational contract theory that these cases were a slow, but sure, distortion of relational analysis. While academics may fulminate about the divergence between relational analysis in law

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<sup>53</sup> Hubert Rottleuthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989) 23(5) *Law and Society Review* 779, 782.

<sup>54</sup> [2013] EWHC 111 (QB); [2013] 1 CLC 662.

<sup>55</sup> [2019] EWHC 606 (QB).

and relational analysis in theory, the Luhmannian sees this as the typical misunderstanding that occurs as a result of double contingency. That is not to say that all non-legal concepts will always be misrepresented, and it would be foolish to proclaim that autopoiesis creates set outcomes,<sup>56</sup> but rather that the divergence in meaning and understanding between two meaning-generating systems is a natural, and likely, phenomena.

Yet, if autopoiesis has no set outcomes, then what is the purpose of application other than mere description of why the legal theory has failed to understand Macneil's work? As will be discussed, the current trajectory of relational analysis within the legal system mirror that of another irritant-prone area of law; the doctrine of consideration. The old medieval doctrine was, like the classical doctrine, bombarded with outside noise which it had to react to. React it did, but in a highly unexpected and outright bizarre manner, combining both its former status with the, at the time, emerging liberal doctrine. This thesis does not make the stale point of "prior reform failed therefore all reform will" but rather that, like consideration, the initial acceptance of relational analysis within the legal system has become a Pandora's box where there is now little true control of how the doctrine is being understood and applied within legal circles.

As a final care warning prior to the thesis proper. It would be tempting to write off these warnings as ultra conservatism, and Luhmann was certainly accused of that,<sup>57</sup> but this thesis does not demand the return to classical contract. In fact, it is far too late for that. When noise is accepted into the system and ascribed meaning, it is within the system forever acting as an element the system will self-recursively rely on. Nor does this thesis advocate for no change whatsoever within the legal system, but rather that change will not have the simple input-output paradigm that relationalists implicitly adhere to as a basic premise of relational contract law. It is outside of the thesis' purview to give a comprehensive list of all possible alternative uses of relational contract theory, and such an effort has already been attempted by others.<sup>58</sup> Rather, this thesis comes to the conclusion that it would be better for both law and relational theory for relationalists to use their analysis as the knife tool that Macneil intended. To examine law and their effects. Where law has a negative effect, it may be better suited to proscribe reforms

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<sup>56</sup> Niklas Luhmann, *Introduction to Systems Theory* (Translated by Peter Gilgen, Policy Press 2013).

<sup>57</sup> MBW Sinclair, 'Autopoiesis, Who Needs it?' (1992) 15(1) Legal Studies Forum 81.

<sup>58</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 Journal of Contract Law 216.

that classical law can understand with more certainty, although such mutual understanding is never truly guaranteed. Therefore, the paramount point within this thesis is that it may be better for relational theory and the classical doctrine to co-exist, albeit in a far different relationship as previously imagined.

## 2. Chapter Two: Classical Contract Law's Limerence To Will Theory

### 2.1 Introduction

Contract doctrinal theory is filled with fictional platitudes that sound pleasing but do not hold to scrutiny. We are told that assent is the root of contract, despite the existence of contracts of adhesion.<sup>59</sup> We are told that contract is central to commerce, despite the empirical non-use of contract.<sup>60</sup> More absurdly, we are told that will theory is the embodiment of classical contract law and its internal values.<sup>61</sup> It is the latter myth that this chapter shall focus on, as will theory's claim of descriptive hegemony seems contradictory to classical law's internal values. Stemming from a nineteenth century concept of liberalism, will theory preaches a form ideological individualism.<sup>62</sup> Contracts pivoted around the individual, specifically the model of the man as an autonomous, economically rational individual.<sup>63</sup> These individuals were to be left alone to pursue self interest without any intervention from the state based on its perception of the common good.<sup>64</sup> More than just ideological fantasy, these values are said to be a 'historical construct holding present legal thought firmly in its grip'.<sup>65</sup> A value with the lifespan of centuries may well be considered sacred; provided its integrity remains intact

It will come to little surprise that the author shall challenge this fundamental premise. Yet, this will not be done in the style of Gilmore in *Death of Contract*.<sup>66</sup> Gilmore's posturing is ostensibly refutable for its ahistorical scholarship and its general ineffectiveness, not merely because its predictions have proven to be wrong by experience.<sup>67</sup> Rather, this chapter shall work on exposing the true values of classical contract law as observed through its internal observations. It would be disingenuous to say that the values of will theory are not present in the classical doctrine; They are not

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<sup>59</sup> Ian R Macneil, 'Beureaucracy and Contracts of Adhesion' (1984) 22(1) Osgoode Hall Law Journal 5.

<sup>60</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 63-73.

<sup>61</sup> Patrick Atiyah, *Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 407-408.

<sup>62</sup> Anat Rosenberg, 'Contract's Meaning and the Histories of Classical Contract Law' (2013) 59(1) McGill Law Journal 165, 168.

<sup>63</sup> *ibid* 167.

<sup>64</sup> Michel Rosenfeld, 'Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory' (1985) 70(4) Iowa Law Review 769, 777-778.

<sup>65</sup> Rosenberg 'Contract's Meaning...' (n62) 167.

<sup>66</sup> Grant Gilmore, *The Death of Contract* (The Ohio State University Press 1974).

<sup>67</sup> Donal Nolan, 'The Classical Legacy and Modern English Contract Law' (1996) 59(4) Modern Law Review 603, 604.

only present but are prominent.<sup>68</sup> The classical ideas of consent, individual autonomy, and freedom are not dead; they hold a strong cultural narrative that allow humans to maintain necessary coherence.<sup>69</sup> It will instead be put forward that contract law embraces, maintains, and even promotes multiple values in a form of legal pluralism.<sup>70</sup> While relational contract theory often puts forward the claim that contract law enhances discreteness, as argued by Macneil,<sup>71</sup> this is not a distinct internal value but rather a meta-level categorisation of the whole. This meta-analysis will occur in the following chapter, as this chapter is dedicated to refuting the internal claim by will theory that the law of contract has a singular ascendant principle.

It would be tempting to go through every individual doctrine and point out inconsistencies. To prevent this work becoming a tedious monologue of will theory's absurdities, only three areas shall be under consideration; offer and acceptance, objectivity, and duress. The first is being put forward as it is considered one of the few bastions left of classical contract.<sup>72</sup> Ironically, the doctrine does not particularly concern itself with classical conceptions of the will, but rather doctrinal certainty, a value Eisenburg has categorised as paramount to common law.<sup>73</sup> Objectivity is included primarily because it never fit in very well with will theorists, to the point that even the founders of the will doctrine could never agree on if was supportive or hostile to the theory.<sup>74</sup> Lastly, duress will get attention as courts did enjoy using the rhetoric of will during the formative years, yet the development of economic duress has made it astonishingly hard to maintain this narrative even with the overborne will doctrine.<sup>75</sup> Analysis of these doctrines shall reveal that will theory cannot claim to be alone in the governance of contractual regulation. Contrary to classical academia, no one value is

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<sup>68</sup> Lawrence M Friedman, *The Republic of Choice: Law Authority and Culture* (Harvard University Press 1990) 80.

<sup>69</sup> Chunlin Leonhard, 'The Unbearable Lightness of Consent in Contract Law' (2012) 63(1) *Case Western Reserve Law Review* 57, 64.

<sup>70</sup> Leon Trakman, 'Pluralism in Contract Law' (2010) 58(5) *Buffalo Law Review* 1031.

<sup>71</sup> Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo Classical and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854.

<sup>72</sup> Shawn Bayer, 'Offer and Acceptance in Modern Contract Law: A Needless Concept' (2012) 103(1) *California Law Review* 67.

<sup>73</sup> Melvin Eisenburg, 'The Emergence of Dynamic Contract Law' (2001) 2 *Theoretical Inquiry of Law* 1, 3-4.

<sup>74</sup> David Parry, *The Sanctity of Contracts in English Law* (Stevens & Sons Limited 1959) 16.

<sup>75</sup> Rodger Brownsword, *Contract Law: Themes for the Twenty First Century* (Oxford University Press 2006) 304.

supreme, as contract law has interwoven multiple values into its doctrine, through its archetypal piecemeal method, in an attempt to balance the needs of a complex society.

An important clarification to make: there will be no separation between classical law and neoclassical law. This is a discussion of values, and there is virtually no difference of values between the two.<sup>76</sup> In reality, the only divergence is that neoclassical presents itself as more soft and cuddly by giving more scope to judges to plug gaps in the law where inequitable results would take place.<sup>77</sup> However, it still fundamentally accepts the primacy of will theory, and so it cannot be considered a substantial leap away from the purported values of classical law. It was not an ideological shift as much as it was a response to the twentieth century's feeling of injustice at the lack of redress in certain contract situations.<sup>78</sup> Having dispensed with what could be a misleading detour around fruitless categorisations, the remainder of this chapter shall be dealing with the interplay of values in classical contract. It would be unfortunate if needless and unwanted classifications of different approaches of the same values distracted from the main point: Classical Contract Is Complex.

## 2.2 Ideological Values

It would be useful to first discuss the ideological 'classical model of contract'. The supposed classical model is derived from nineteenth century thought.<sup>79</sup> It was in this era of radical change that general principles of contract law emerged.<sup>80</sup> Classical liberalism had strong influence in the creation of this law as a political, social, and economic revolution was taking place.<sup>81</sup> This revolution has been characterised by Maine's phrase that society and social relations were moving 'from status to contract'.<sup>82</sup> New and pervasive ideas began emerging from the economic and philosophical schools of thought primarily around ideas of liberty, particularly around individualism.<sup>83</sup> Atiyah points out that in the years that the classical model was being developed, individualism

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<sup>76</sup> Macneil, 'Contracts: Adjustment of Long-Term Economic Relations...' (n71) 870.

<sup>77</sup> Richard Austen-Baker, Qi Zhou, *Contract in Context* (Routledge 2015) 78.

<sup>78</sup> Nolan, 'The Classical Legacy...' (n67) 605.

<sup>79</sup> Morton Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press 1977) 160.

<sup>80</sup> Atiyah, *The Rise and Fall* (n61) 398.

<sup>81</sup> Francesco Parisi, 'Autonomy and Private Ordering in Contract Law' (1994) 1(3) *European Journal of Law and Economics* 213, 213.

<sup>82</sup> Rodger Cotterrell, *The Sociology of Law* (2n edn, Butterworths, 1992) 119.

<sup>83</sup> Samuel Williston, 'Freedom of Contract' (1920-1921) 6(4) *The Cornell Law Quarterly* 365, 366-367.

was asserted not only as socially desirable, but morally just.<sup>84</sup> This revolution of principles would not take place in a vacuum and such a massive change in societal values was bound to affect law even if only by osmosis. Contract law was in a special position as contracts were corollary to the idea of individual liberty, with roots as far as Adam Smith.<sup>85</sup> The argument dictated that enforceable contracts were the primary way for society to advance as individuals would engage in bargains to provide incentives of co-operation.<sup>86</sup> Society saw contract not only as a useful tool, but necessary for social development.

The main link between this school of thought and contract law was the doctrinal pursuit of freedom of contract. Contract is sacred and party autonomy even more so as without party's consent there is to be no contract.<sup>87</sup> When these ideas began to enter into judicial thought change would come slow and incrementally.<sup>88</sup> A care warning must be given however, as Swain points out, English judges were not ones to expressly look towards academia when considering a case.<sup>89</sup> Rather, the ethics and values that stemmed from this cultural revolution began to harmonise with English Judges sense of what was just.<sup>90</sup> These values can be seen in multiple nineteenth century cases such as *Egerton v Brownlow*<sup>91</sup> in which Parke B. made the point that individuals are able to sell their property at their 'will and pleasure, and are free to make such contracts as they please.'<sup>92</sup> Of course, this was a case regarding a will, however contract cases later echoed the same rationale such as *Printing and Numerical Registering Co. v Sampson*.<sup>93</sup> Here, the then Master of the Rolls made it explicit that it was fundamental public policy that 'Men of full age and understanding shall have the upmost liberty of contracting and that their contracts...shall be held sacred'.<sup>94</sup> Regardless of internal motives, the judiciary were at least paying lip-service to the broad cultural phenomenon at the time.

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<sup>84</sup> Atiyah, *Rise and Fall* (n61) 261.

<sup>85</sup> Adam Smith, *The Wealth of Nations* (First Published 1776, Wilder Publications 2008).

<sup>86</sup> *ibid* 16.

<sup>87</sup> Philip Hamburger, 'The Development of the Nineteenth-Century Consensus Theory of Contract' (1989) 7(2) *Law and History Review* 241, 241.

<sup>88</sup> Stroud Francis Charles Milsom, *The Natural History of Common Law* (Columbia University Press 2003) 75.

<sup>89</sup> Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 278.

<sup>90</sup> Atiyah, *Rise and fall* (n61) 405.

<sup>91</sup> (1853) 10 ER 359 (HL).

<sup>92</sup> *ibid* 409 (Parke B).

<sup>93</sup> (1875) 19 LR-Eq 462.

<sup>94</sup> *ibid* 465 (George Jessel MR).

Lip service means very little without substantive doctrine to translate legal rules. This doctrine was will theory. Will theory is a rather simple concept; a contract is the result of the mutual will of the individuals.<sup>95</sup> Pothier, one of the founders of this school of thought, categorised this as:

'As every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of every decision respecting its operation and extent, and the ground object of consideration in every question with regard to its construction'<sup>96</sup>

This product of liberal thought would not remain solely in academia. Rather, courts explicitly began to use the language of the will of the parties. In *Dickinson v Dodds*<sup>97</sup> an open offer was given to Mr Dickinson to buy Mr Dodds' property for £800. However, before the deadline of the offer, Dickinson heard that Dodds was planning to sell the property to a third party, and so obtained a confirmation of acceptance from Dodds' mother-in-law.<sup>98</sup> James LJ dismissed this, explicitly because there was not a meeting of the minds between the two parties.<sup>99</sup> Mellish LJ added that it is 'the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance'.<sup>100</sup> Such language became commonplace within judicial rhetoric on contract. In *Cundy v Lindsay*<sup>101</sup> Cairns LC spoke of a 'consensus of the mind'<sup>102</sup> being absent in a case regarding mistake. These were not novel ideas for the judiciary as, more than a decade prior, VC Kindersley pointed out that the requisites to creating a contract was the will of the parties to enter into one and the communication of that will.<sup>103</sup> Atiyah makes the observation that the language employed in this judgement is very similar to the work of the academic will theorist Savigny.<sup>104</sup> These parallels show that the judiciary had begun to integrate the language of will theory into hard doctrine.

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<sup>95</sup> Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94(5) Yale Law Journal 997, 1012.

<sup>96</sup> Pothier, *A Treatise on the Law of Obligations, or Contracts*, translated by William David Evans (3<sup>rd</sup> Ed, Philadelphia, Robert H Small, 1853) 30-31.

<sup>97</sup> (1876) 2 ChD 463.

<sup>98</sup> *ibid* 464.

<sup>99</sup> *ibid* 472 (James LJ).

<sup>100</sup> *ibid* 474 (Mellish LJ).

<sup>101</sup> [1874-1880] All ER Rep 1149.

<sup>102</sup> *ibid* 1149 (Cairns LC).

<sup>103</sup> *Haynes v Haynes* (1861) 62 ER 442, 445 (Kindersley VC).

<sup>104</sup> Atiyah, *Rise and fall* (n61) 407.



These judicial movements led academia to create the classical model of contract. This paradigm is outlined by Atiyah:

'A bi-lateral executory agreement. It consists of an exchange of promises; the exchange is deliberately carried through by process of offer and acceptance with the intention of creating a binding deal'<sup>105</sup>

This paradigm is the very manifestation of will theory. The purpose of this model is to display contract in such a way that law must give effect to the intention of the parties.<sup>106</sup> The normative avenue is, unsurprisingly, that law should have fundamental respect for the individual and their property rights.<sup>107</sup> It would be rather odd if the classical school was not defending the rights of the individual since the individualistic approach of was a 'board cultural resonance' according to Rosenberg.<sup>108</sup> The outcome of these premises were significantly less important than the liberty-driven narrative as the academic culture of the nineteenth century had escaped the confines of classrooms and found a home in judicial thought.

The ideological thrust of the classical doctrine is clear. Its premise was built upon classical ideas of rational individuals.<sup>109</sup> It is fundamentally true that this model has not had serious competition at law since its inception,<sup>110</sup> but it has never been the unitary value. The incursion of competing values was not via external legislative action, but instead legal evolution that undermined the descriptive power of will theory. Will theory was not built from legal tradition alone, but from political and philosophical ideals which regarded government interference as an evil.<sup>111</sup> It should not be astonishing that an independently evolved legal tradition contained values that were divergent to these political and philosophical ideals. While nineteenth century academics were fervently supportive of will theory, Swaine points out that many had serious problems with squaring the theory with the state of the law.<sup>112</sup> This raises the concern, and noticeably damaging allegation, that will theory is not actually representative of the law of contract. Rather it is an imposition by academic ideologues in an attempt to conform

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<sup>105</sup> Patrick Atiyah, *Essays on Contract* (Oxford University Press 1986) 12.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid* 122.

<sup>108</sup> Rosenberg, 'Contract's meaning...' (n62) 167.

<sup>109</sup> *ibid.*

<sup>110</sup> Atiyah, 'Essays on contract...' (n105).

<sup>111</sup> Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553.

<sup>112</sup> Swain, *The Law of Contract* (n89) 205.

the law, not describe it. How much of the ideological values of contract have survived judicial thought can only be determined by a close view at the doctrines that were developed.

### 2.3 Offer and Acceptance

The rules of offer and acceptance are the starting point for will theory. After all, should contracts be based on assent to promises, then it logically follows that the promise must be offered by the promisor and accepted by the promisee.<sup>113</sup> The initial cases do seem to match the ideas espoused by will theory. A pivotal case was *Carlill v Carbolic Smoke Ball Company*<sup>114</sup> which dealt with the legal effects of unilateral offers. Two things are of note in this case: Firstly, Lindley LJ explicitly uses the language of promises throughout his judgement.<sup>115</sup> Secondly, Bowen LJ uses language that is almost exactly that of will theory when he states that communication to the offeror of acceptance should be made as 'the two minds may come together. Unless this is done the two minds may be apart'.<sup>116</sup> Here the fundamental premise of contract, the catalyst for legal relations, is being prefixed with the language of will theory. The values of will theory have been imported at such a rudimentary stage of contractual governance that it is almost impossible to deny their existence or importance within the judicial zeitgeist. The significance of these sentiments cannot be understated as they formed the rationale behind future legal authority. In a common law system, future judges, who may not hold the same principles, will find it increasingly difficult to deviate from this rhetoric.<sup>117</sup> Cementing its importance within the early stages of contractual formation was key to developing will theory as a platform. As all contracts must be offered and then accepted, all contracts will be bound by these early values that resonate with will theory.

However, the analysis cannot stop at this juncture because the simple rules of offer and acceptance were soon contrasted with commercial practice. Not all contracts are agreed upon face-to-face between the parties, but rather long-distance communication is

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<sup>113</sup> *ibid* 182.

<sup>114</sup> [1893] 1 QB 256. (QB)

<sup>115</sup> *ibid* 261-265 (Lindley LJ).

<sup>116</sup> *ibid* 269(Bowen LJ).

<sup>117</sup> Williston (n83) 369.

employed.<sup>118</sup> Before the digital era, delays in communication were a basic reality.<sup>119</sup> To combat the problem of delay between an offer and an acceptance, the courts developed the postal rule. This doctrine stems from the case *Adams v Lindsell*.<sup>120</sup> Law J held that when the acceptance of the offer is posted, then the contract is binding, and that the delay in notification of the acceptance is the mistake of the offeror.<sup>121</sup> Explicit policy reasons for this decision were cited, mainly that if one required that asset to the offer needed to be communicated, then assent of that assent would also need to be, making a possibly infinite process and thus preventing contracts being completed by post.<sup>122</sup> This, already, departs from will theory analysis. Should the offeror change their mind on the contract, yet fail to notify before the offeree posts acceptance, they will be bound into contractual relations despite at no point in time was there a genuine meeting of the minds.<sup>123</sup> From its inception, we can see the clear dissonance from the rationale of will theory.

Of course, it can be pointed out that this case was decided prior to the wholesale acceptance of will theory by the judiciary. Will theorists would even get sympathy at the admission that this rule is from a period before the classical doctrine, and that it persists due to the justifiable constraint on the judiciary of ensuring doctrinal stability.<sup>124</sup> Yet this rule not only persisted as an excusable anomaly, but courts attempted to harmonise it with will theory, further confusing and undermining the doctrine. In *Household Fire and Carriage Accident Insurance Co Ltd v Grant*<sup>125</sup> Thesiger LJ attempted to fit in analysis of meeting of the minds by saying that it would be difficult to see how the minds would ever meet outside of the acceptance of the offer by the offeree.<sup>126</sup> Twenty years later, Lord Herschell would try to attribute the postal rule to party contemplation that acceptance would be communicated by post.<sup>127</sup> Yet, these still have problems with compatibility with the fundamental tenant of will theory:

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<sup>118</sup> Kathryn O'Shea, Kylie Skeahan, 'Acceptance of Offers by E-Mail- How Far Should The Postal Acceptance Rule Extend' (1997) 13 Queensland University of Technology Law Journal 247, 250.

<sup>119</sup> *ibid.*

<sup>120</sup> (1818) 1 Barnewall and Alderson 681 (QB).

<sup>121</sup> *ibid* 683 (Law J).

<sup>122</sup> *ibid* 682.

<sup>123</sup> Cohen (n111) 576.

<sup>124</sup> Eisenburg 'The Emergence of Dynamic...' (n73) 3.

<sup>125</sup> (1878-79) LR 4 Ex D 216 (CA).

<sup>126</sup> *ibid* 220 (Thesiger LJ).

<sup>127</sup> *Henthorn v Fraser* [1892] 2 Ch 27 (CA), 33 (Lord Herschell).

the meeting of minds.<sup>128</sup> It is hard to accept that this value dominated doctrinal substance when the same doctrine allows for a party, who no longer wishes to contract, to now be bound to an acceptance they did not know exists.

The obvious distortion between will theory and the postal rule inspires consideration of other rationales behind the rule. One of the most prominent justifications is that of convenience and practicality.<sup>129</sup> Courts have never spurned explicit rationale of this value. Lord Cottenham confirmed that the rule was invoked because 'common sense tells us that transactions cannot go on without such a rule'.<sup>130</sup> Mellish LJ had warned of great mischief if an offeror could revoke before acceptance was communicated.<sup>131</sup> Finally, Lord Brandon gave the reasons of commercial expediency as to why the rule was in place.<sup>132</sup> It is for these reasons that Suask has referred to the postal rule as being merely a useful evidentiary tool, historically, for reasons that do not come under general principles of contract law.<sup>133</sup> Even if but a tool, its existence suggests that courts were never dogmatically loyal to the values of will theory. Courts have demonstrated they will go for the practical solution, so long as it can be made to sound doctrinally coherent, and will purposefully not take it to its logical conclusion as to not undermine the system.<sup>134</sup> While this may be a credit to judicial innovation, it does nothing for the claim that will theory is the accurate representation of law.

Furthermore, the modern era has created special issues with the application of the classical offer and acceptance in light of will theory. The rise of standard form contracts has created unique problems, but the most damning for will theory is the battle of the forms. Of course, the issues surrounding what happens when two companies have contrasting standard form contracts is not of much controversy in practice, though it does inspire much academic debate for being outside the classical model.<sup>135</sup> The law is rather simple as it follows the counter-offer paradigm. In *Butler*

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<sup>128</sup> Swain, *The Law of Contract* (n89) 185.

<sup>129</sup> Simon Gardner, 'Thrashing with Trollope: A Deconstruction of Postal Rules in Contract' (1992) 12 *Oxford Journal of Legal Studies* 170.

<sup>130</sup> *Dunlop v Higgs* (1848) 9 ER 805, 813.

<sup>131</sup> *Re Imperial Land Co. of Marseilles, ex p Harris* (1872) LR7 Ch App 587 (CA), 594.

<sup>132</sup> *Brinkibon v Stahag Stahl und Stahlwarenhandles GMBH* [1983] 2 AC 34 (HL), 48 (Lord Brandon).

<sup>133</sup> Sanel Susak, 'Offer and Acceptance Appraised- The Postal Rule' (2013) 4 *Queen Mary Law Journal* 1, 8.

<sup>134</sup> Swain, *The Law of Contract* (n89) 185-186.

<sup>135</sup> Peter Winship, 'The Hague Principles, The CISG and the Battle of the Forms' (2015) 4 *Penn State Journal of International Affairs* 151, 154-155.

*Machine Tool Co. Ltd v Ex-Cello-O Corp. Ltd*<sup>136</sup> the court had held that discrepancy in terms and conditions between the standard forms would invoke a last shot doctrine; meaning that the last document sent prior to performance would govern the contract.<sup>137</sup> As Bridge LJ pointed out, this is merely because it goes back to the classical doctrine that counter offers will terminate the original offer.<sup>138</sup> Of course, this was not a novel way of dealing with the counter offer issue as courts have had this doctrine for more than a century.<sup>139</sup> It should then come as no surprise that courts have not meddled with this doctrine, even when given the opportunity by lower courts to change the law.<sup>140</sup> English judges have, at the very least, shown loyalty to the classical doctrine by refusing to modify this aspect to the modern world for at nearly two centuries.

The will theorist would be pleased when first seeing this analysis. Where there is not a mirror image of the terms and conditions, there cannot possibly be a meeting of the minds. Without this assent the state is not morally justified to use force, via the courts, to enforce the promise.<sup>141</sup> The performance of the contract after the last document shows assent to the new terms, absent any form of fraud. However, reality soon creates significant problems for this ideal world. The first point of note is that firms will never have mirrored standard forms.<sup>142</sup> This then needs to be seen in the light of the fact that firms do not actually read each others standard forms, as their *raison d'être* is to remove punitive transaction costs surrounding ancillary terms.<sup>143</sup> This means that while a 'meeting of the minds' occurred prior to the last document being sent and subsequent performance, both doctrine and will theory would have labelled such a meeting to be flawed for there not being a mirror image that reflects a unified common will. Will theory does not present a hierarchy of importance within the will of the parties, and thus ancillary terms are considered to be on par with more salient matters. While issues about price and delivery will be a priority for the merchant, issues regarding choice of forum will usually not be, leading to situations in which a meeting of the minds occur for commercially important terms but not for all standard form terms. Given that

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<sup>136</sup> [1979] 1 WLR 401.

<sup>137</sup> *ibid* 404-405.

<sup>138</sup> *ibid* 407 (Bridge LJ).

<sup>139</sup> *Hyde v Wrench* (1840) 49 ER 132.

<sup>140</sup> *Tekdata Interconnections Ltd v Amphenol* [2009] EWCA Civ 1209; [2009] 2 CLC 866.

<sup>141</sup> Randy Barnett, 'Contract is Not Promise, Contract is Consent' (2012) 45(3) *Suffolk University Law Review* 647, 650.

<sup>142</sup> Corneill Stephens, 'On Ending the Battle of the Forms: Problems with Solutions' (1992) 80 *Kentucky Law Journal* 815, 817.

<sup>143</sup> Austen-Baker, Zhou, *Contract in Context* (n77) 118-119.

standard forms make up more than 99% of transactions,<sup>144</sup> this is a substantive black hole in the pursuit of will theory. If unable to explain the reality of contracting for one of the most used means of modern contracting, its suitability in the modern world is put into question.

Despite the language of wills, courts both the postal rule and the mirror image doctrine imply that courts have sidelined the actual will of the parties. The reason for this is legal certainty, a value of contract law that should never be under-estimated. As Stephens points out, the classical rules are rather clear and unequivocal.<sup>145</sup> Of course this set of rules came more from the old doctrine and not new policy considerations,<sup>146</sup> but the policy of the initial law carries forward and ensures the survival of the old rules. The benefit of legal certainty and bright line rules is that the law is readily transparent to the parties prior to the transaction.<sup>147</sup> Courts, prior to the dominance of will theory, have made this concern rather explicit.<sup>148</sup> This was particularly true in the instance of Lord Mansfield, who clearly stated that 'nothing is more mischievous than uncertainty in mercantile law'<sup>149</sup>. Of course, this does not mean that the values of the will theorist were ever in jeopardy, as ideas are incredible durable.<sup>150</sup> Yet, practicality always had to be considered when real life problems occurred outside of the safety of the classroom. The postal rule, the mirror image rule, and the rhetoric that surrounds both, seem to be an attempt to square the circle of two competing values.

## 2.4 Objectivity

One of the forefront reasons for this particular doctrinal development of offer and acceptance is the objective approach taken by English judges. It would be a mistake to label the objective doctrine of interpretation to be an actual legal rule. Rather, it is a tool for evaluation and interpretation of facts.<sup>151</sup> The objective theory is rather simple; a

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<sup>144</sup> Corneill Stephens, 'Escape From the Battle of Forms: Keep it Simple Stupid' (2007) 11 *Lewis & Clark Law Review* 233, 234.

<sup>145</sup> Corneill Stephens, 'Escape From the Battle of Forms...' (n144) 238.

<sup>146</sup> Shawn Bayern, 'The Nature and Timing of Contract Formation' in Larry DiMatteo (ed), Martin Hogg (Ed), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016).

<sup>147</sup> Robert Scott, 'The Death of Contract Law' (2004) 54(4) *University of Toronto Law Review* 369, 372.

<sup>148</sup> *Vallejo v Wheeler* (1774) 1 *Cowp* 143, 153 ; *Buller v Harrison* (1777) 2 *Cowp* 565, 567.

<sup>149</sup> *Medcalf v Hall* (1782) 3 *Doug* 113, 115.

<sup>150</sup> Swain, *The Law of Contract* (n89) 230.

<sup>151</sup> Brian Blum, 'Assent and Accountability in Contract: An Analysis of Objective Standards in Contemporary Contract Adjudication' (1984) 59(1) *St John's Law Review* 1, 5.

contract only exists according to the manifestation of the parties' will.<sup>152</sup> It is worth quickly noting that Smith attempted to differentiate the objective approach to terms of a contract and the acceptance of the contract.<sup>153</sup> Smith manages to undermine his own argument when he goes on to say, rightly, that signing a birthday greeting which is actually a promise to donate money is not a true promise.<sup>154</sup> What he fails to explain is how this is different from determining the content of a promise when the content is the very thing that must be agreed. Dispensing with this rather confusing categorisation, it is better that the theory of objectivity is treated as a whole rather than slotted into separate categories.

This turns us to the approach of Oliver Wendell Holmes. Holmes is rather notorious for championing the objective view, to the point of obsession.<sup>155</sup> This can particularly be seen in his analysis of *Raffles v Wichelhaus*.<sup>156</sup> Holmes went as far as to say 'the law has nothing to do with the actual state of the parties' minds'.<sup>157</sup> This approach was not unique by any means, as classical scholars moved away from subjective interpretation of contracts in favor of objective-based approaches.<sup>158</sup> This, however, creates significant conceptual issues from the mere premise. As Hillman explains, the objective interpretation can easily mean that that promisors may find themselves legally bound despite having no intent to be bound.<sup>159</sup> This outcome seems dissonant to the judicial rhetoric of the 'meeting of the minds' and then makes such an ideal look more like legal fiction than legal doctrine.<sup>160</sup> It is then unsurprising that this issue was highly divisive for contract law scholarship, even at the hey-day of the will theory.<sup>161</sup> Should courts have blindly followed the work of Holmes, there would have been serious questions over will theory's mere existence within classical law.

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<sup>152</sup> Robert Birmingham, 'Holmes on Peerless: *Raffles v Wichelhaus* and The Objective Theory of Contract' (1985) 47(1) *University of Pittsburgh Law Review* 183, 184.

<sup>153</sup> Stephen Smith, *Contract Theory* (Oxford University Press 2004) 61.

<sup>154</sup> *ibid* 174.

<sup>155</sup> Herbert Lionel Adolphus Hart, *Punishment and Responsibility* (Oxford University Press 1968) 242.

<sup>156</sup> (1864) 2 H&C 906; 159 ER 375.

<sup>157</sup> Oliver Wendell Holmes, *The Common Law* (Macmillan 1881) 309.

<sup>158</sup> KM Sharma, 'From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts' (1999) 18(2) *New York Law School of International and Comparative Law* 95, 106-108.

<sup>159</sup> Robert Hillman, 'Contract Lore' (2002) 27(4) *Journal of Corporation Law* 505, 511.

<sup>160</sup> *ibid*.

<sup>161</sup> Parry, *The Sanctity of Contracts* (n74) 16.

Yet case law itself does not inspire much hope in those wishing to see actual intentions being considered. *Smith v Hughes*<sup>162</sup> regarded the buying of oats that the plaintiff believed were old, and thus suitable for horse-feed. They were, in fact, new, and so unsuitable for the buyer's intention. Cockburn CJ made very clear that the contract must not be held void because:

'The seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality and honour would do under such circumstances.'<sup>163</sup>

This was furthered by the argument that real intentions do not matter when a person's conduct would demonstrate assent to the contract to the reasonable person.<sup>164</sup> This is not, by any means, a novel judgement, as Pollock CB made similar remarks in *Cornish v Abington*<sup>165</sup> regarding the use of looking at conduct from the stance of a reasonable person. It is clear, then, that there is authoritative precedent for the objective approach. Dalton, however, claims that this was not originally the case.<sup>166</sup> Claiming that English judges initially followed the will theory to a logical conclusion, and so employed a subjective analysis, Dalton proclaims that the objective approach was enforced only in the later part of the nineteenth century.<sup>167</sup> This seems rather odd given that by 1816 courts were already moving away from allowing parties to claim their intention of a word mattered more than the ordinary meaning.<sup>168</sup> In fact, Dalton's claim seems so removed from the actual historical evolution of contract doctrine that Perillo claimed to be stunned by the vast generalisation.<sup>169</sup> Rather, courts liked to flirt with the rhetoric of subjectivity but this rarely effected the actual outcome of cases.<sup>170</sup> As such, it is misleading to say that subjectivity ever properly took root in English law.

Yet, it would be strange to claim that the development of objectivity was the legacy of Holmes. Such an interpretation would be ahistorical as Holmes' works only appeared

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<sup>162</sup>(1871) LR 6 QB 597.

<sup>163</sup> *ibid* 605 (Cockburn CJ).

<sup>164</sup> *ibid* 607 (Blackburn J).

<sup>165</sup> (1859) 4 H&N 549, 556.

<sup>166</sup> Clare Dalton, 'An Essay in The Deconstruction of Contract Doctrine' (1985) 94(5) Yale Law Journal 997, 1012.

<sup>167</sup> *ibid*.

<sup>168</sup> *Throckmerton v Tracy* (1816) 75 English Reports 222, 251.

<sup>169</sup> Joseph Perrillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69(2) Fordham Law Review 427, 428.

<sup>170</sup> *ibid*.



ten years after *Smith v Hughes*, making it rather impossible that either Blackburn or Cockburn were influenced by his work.<sup>171</sup> As a historical internal evolution of the law, it is unsurprising that attempts were made to reconcile objectivity with the principles of will theory that developed concurrently. Barnes has made an impassioned defence of the objective approach claiming that it furthers freedom of contract by protecting a parties reasonable expectations based on manifestations of will.<sup>172</sup> This is defended by the truism that humans are not telepathic and therefore need language to communicate.<sup>173</sup> This is not an unconvincing argument, as Blum has went as far as to say that protecting justifiable expectations is clearly a rationale for the theory.<sup>174</sup> While this is an admirable defence of the doctrine from a liberal standpoint, it does not really address the fundamental dissonance with will theory. It does not particularly matter what a party's justifiable expectation is for the purposes of will theory, merely that there is a meeting of the minds. Will theory's basic premise is that the individual party's states of mind are key, and it would go against the foundations of the theory to substitute individual will with the state's perception of what the individual's will is or should be. While a good defence, it is not a relevant defence.

Yet, Blum's argument does hit upon the crux of the matter. This issue is best described by Lord Blackburn as 'for even the devil does not know what the thought of a man is'.<sup>175</sup> Trying to take a subjective approach to the question of wills was completely unpragmatic from an evidentiary standpoint.<sup>176</sup> Perillo makes the point that the rhetorical flirtation with the subjective will theory quickly ended when parties were allowed to testify on their own behalf.<sup>177</sup> Faced with the prospect of perjury from opportunistic parties, courts had to quickly move to shut down a doctrine that encouraged distortion of facts.<sup>178</sup> This argument is a strong one as Mitchell, an advocate of allowing party narratives to be of evidential importance, admits that credibility problems will need to be addressed by judges.<sup>179</sup> The ability to scrutinise these claims to determine credibility will often require experts, thus substantially increasing court costs

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<sup>171</sup> Austen-Baker, Zhou, *Contract in Context* (n77) 47.

<sup>172</sup> Wayne Barnes, 'The Objective Theory of Contract' (2008) 76(4) *University of Cincinnati Law Review* 1119, 1130.

<sup>173</sup> *ibid* 1127.

<sup>174</sup> Blum (n151) 34.

<sup>175</sup> *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 (HL), 692 (Lord Blackburn).

<sup>176</sup> Barnett, 'Contract is not Promise..' (n141) 651.

<sup>177</sup> Perrillo (n169) 428-429.

<sup>178</sup> *ibid* 460.

<sup>179</sup> Catherine Mitchell, 'Narrativising Contract Law' (2009) 29(1) *Legal Studies* 19, 39-41.

and potentially blocking out niche markets from courts.<sup>180</sup> Faced with this, the judiciary followed a more pragmatic approach rather than stay in line with rigid, if logical, doctrinarism.

Similarly, a focus on subjectivism could easily have undermined legal certainty, an internal value we have already seen clash with the demands of will theory. Taking an objective stance means that parties could easily determine how a court would read into an agreement.<sup>181</sup> It would be rational to assume that courts have not turned a blind eye to the advantages of objectivity when it furthers the goals of certainty and predictability, especially when these advantages have been pointed out by numerous academics.<sup>182</sup> Friedman goes as far to say that the development of the objective theory was an exercise in reducing business risk and enchainning transactions.<sup>183</sup> Of course, one must be careful in ascribing commercial pressures as a reason for a shift in judicial thought, as doing so is notoriously hard to pin down.<sup>184</sup> It is submitted that, while courts did not blindly follow commercial considerations, they were not completely blind to them either. Lord Mansfield's judgements included overtures to commercial considerations such as 'I desire nothing so much, that all questions of mercantile law should be fully settled and ascertained'.<sup>185</sup> While this does not make the law subject to unchecked commercial influence, it does demonstrate at least a sympathetic ear to business necessity.

This leads to the argument that the parties willed the manifested contract to be enforced as surrogate for actual intention and so this is the true meeting of the minds.<sup>186</sup> This rationalisation is not convincing as it requires the parties to know ex-ante that the courts will interpret the contract a certain way, which is rather complicated given that courts routinely used the rhetoric of subjective will theory.<sup>187</sup> Additionally, Macaulay makes the point that parties do not actually spend many sleepless night concerned with the actual way how courts will read their contract.<sup>188</sup> Finally, on this point, contracts existed

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<sup>180</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity, and The Urge for Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 52.

<sup>181</sup> Robert Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows, Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 103.

<sup>182</sup> Leonhard, 'The Unbearable Lightness...' (n69) 72.

<sup>183</sup> Lawrence Friedman, *Contract Law In America* (University of Wisconsin Press 1965) 87.

<sup>184</sup> Swain, *The Law of Contract...* (n89) 281.

<sup>185</sup> *Buller v Harrison* (n148) 567.

<sup>186</sup> Lawrence Solan, 'Contract as Agreement' (2007) 83(1) *Notre Dame Law Review* 353, 364.

<sup>187</sup> Hillman (n159) 510.

<sup>188</sup> Macaulay, 'The Real Deal...' (n180) 77.

before courts actually interpreted them, which means they existed before the doctrine was wide-known enough to influence behaviour, making it farcical that law was following this version of will theory in developing the doctrine.

A further, often under-theorised, value when one considers the objective theory is that of fairness. Since this can, easily, be misinterpreted as attempting to claim that one should impose an interpretation on the parties based on an external party's moral feelings, it is useful to use Van Schalkwyk's dual approach to fairness:

'The first holds that it is only fair that the parties are bound by the meaning of their words because this is what the parties agreed to be bound by. The second tries to attain a fair resolution by imposing, with the help of hindsight, what seems to be a fair interpretation of the meaning of the words.'<sup>189</sup>

The word choice of imposition is rather unfortunate, as it is contended that by looking at a fair interpretation, one is not imposing anything on the parties that they would not have considered. Schalkwyk does point out parties cannot read each others' minds and so would need to interpret the others communications via language, so it is unlikely this contention goes against his definition of fairness.<sup>190</sup> Nevertheless, the objective theory does directly promote this value. In the first approach, it does this by protecting the reliance interest as it allows parties to rely on the ordinary conduct of strangers.<sup>191</sup> It is worth noting that is this not a conscious endeavour of the courts, but rather the rise of the need of trust in modern commercial practice meant that judges and lawyers began to protect such reliance on reflex.<sup>192</sup> The second approach is embodied in the fact that, by acting objectively, the judge is acting impersonally and not denoting their own standard of what is right.<sup>193</sup> One should not mistake this for a claim that judges stop becoming human merely because they wield a gavel.<sup>194</sup> Even should they try to be above their human prejudices, selecting what a reasonable and impartial party would interpret

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<sup>189</sup> Sybrand van Schalkwyk 'Subsequent Conduct as an Aid to Interpretation' (2000) 7(3) *Canterbury Law Review* 541, 541.

<sup>190</sup> *ibid* 543.

<sup>191</sup> Menachem Mautner, 'Contract, Culture, Compulsion, or : What is so Problematic in the Application of Objective Standards in Contract Law' (2002) 3(2) *Theoretical Inquires in Law* 545, 554-555.

<sup>192</sup> *ibid* 556-557.

<sup>193</sup> Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739, 744.

<sup>194</sup> Karl Llewellyn, *The Bramble Bush* (First Published 1930, Oxford University Press 2008) 31.

carries its own subjectivities.<sup>195</sup> While it is by no means a perfect failsafe it is still an institutional safeguard added, in spite of will theory, to at least curtail judicial abuse that would otherwise undermine procedural fairness.

It should come to little surprise then that will theory does not find fertile ground in objectivity. While it is true that Holmes attempted to banish subjectivity from his theory,<sup>196</sup> there is no need to attribute this thinking solely to him. The classical law has clearly valued more things than a party's actual intention or an actual meeting of the minds. Wightman makes the argument that the purpose of the objective theory was to stop the will theory getting out of hand.<sup>197</sup> There is, perhaps, more truth to this than is realised. The rhetoric of consent and voluntariness has less to do with substantive law and far more to do with the aspiration of how contract law should operate if reality did not constrain it.<sup>198</sup> Subjectivity would have been heavily damaging to the commercial sphere and thus the classical law of contract had to make a concession to commercial reality.<sup>199</sup> Due to the dangers of the logically consistent approach, the general rules of contract had to detach themselves from the ideas.<sup>200</sup> This means that the values of will theory do not govern this branch of law, but this branch was not a rejection of the values either. It was merely a concession to stop mischief.

## 2.5 Duress

Finally, duress must be considered as an example of lipservice to the doctrine that carries little normative weight. At first, it would seem to mirror offer and acceptance by explicitly bearing reference to the will of the parties.<sup>201</sup> This is commonly known as the 'overborne will'<sup>202</sup> theory and the linguistic similarity to will theory is no coincidence. For will theory to be the guiding principle of contract law, then the methods used to discharge contractual liability, after procedural agreement, must be based on the parties wills. The fundamental argument, therefore, is that duress overrides the party's ability to

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<sup>195</sup> George R Wright, 'Objective and Subjective Tests in the Law' (2017) 16(1) University of New Hampshire Law Review 121, 126-127.

<sup>196</sup> Patrick Kelley, 'Objective Interpretations and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory' (2001) 1 Nevada Law Journal 112, 116.

<sup>197</sup> John Wightman, *Contract a Critical Commentary* (Pluto Press 1996) 78.

<sup>198</sup> Hillman (n159) 515.

<sup>199</sup> Wightman, *Contract* (n197) 75.

<sup>200</sup> *ibid* 80.

<sup>201</sup> *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 93.

<sup>202</sup> Patrick Atiyah, 'Economic Duress and The Overborne Will' (1982) 98 Legal Review Quarterly 197, 198.

consent to the contract; that they are not a free agent.<sup>203</sup> The logical conclusion of the argument that there is no assent in duress is that there was never a meeting of the minds, but an oppression of one mind over another.<sup>204</sup> If this analysis is correct, then the acceptance is not true acceptance and courts are legitimate in invalidating the contract. It should be noted here that duress merely makes a contract voidable and not void,<sup>205</sup> but this is not too much of a conceptual concern as it can be explained as merely allowing there to be a future meeting of the minds on a contract even where illegitimate conduct exists.

Case law gives a similar impression. Initially, duress would be found where one person threatens to commit a crime or tort against another unless they agree to contractual liability.<sup>206</sup> It logically follows from this that physical threats against a person will be considered duress.<sup>207</sup> This restrictive history was based on the judicial rationale duress must be enough to destroy the will of a party.<sup>208</sup> Accordingly, common law would not cover 'duress of goods', or economic duress. In *Skeate v Bale*,<sup>209</sup> depriving a person of goods does not deprive them of agency according to the rationale of Lord Denman.<sup>210</sup> The waters of this were muddied in the Privy Council case of *Barton v Armstrong*<sup>211</sup> in which it was held that the actual pressure need not be the predominate reason for signing the contract but merely that the pressure existed and were one of the reasons.<sup>212</sup> This does create some conceptual concerns as one would expect that if the will of the parties were paramount, then where the will would exist regardless of the duress then the will would be recognised, yet case law seems to focus on the conduct of the oppressor to determine legitimacy.

There is, however, a significant conceptual difficulty; the absence of consent. The will theorist justification for duress of claiming that duress invalidates the will of one of the parties, has been called both inconsistent and contradictory by Atiyah.<sup>213</sup> There are two

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<sup>203</sup> David Tiplady, 'Concepts of Duress' (1983) 99 *Legal Review Quarterly* 188, 192-194.

<sup>204</sup> John Dawson, 'Economic Duress- An Essay in Perspective' (1947) 45(3) *Michigan Law Review* 253, 256-257.

<sup>205</sup> *IFR Ltd v Federal Trade Spa* [2001] EWHC 519.

<sup>206</sup> *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40.

<sup>207</sup> *Friedeburg-Seeley v Klass* [1957] CLY 1482.

<sup>208</sup> *Pao On v Lau Li Long* [1980] AC 616, 635.

<sup>209</sup> (1841) 11 AD & E 983, 113 ER 688.

<sup>210</sup> *ibid* 690 (Lord Denman).

<sup>211</sup> [1976] AC 104.

<sup>212</sup> *ibid* 118-119.

<sup>213</sup> Atiyah 'Economic Duress...' (n202) 201.

extreme stances that can be taken.<sup>214</sup> The first is that choice in duress still exists.<sup>215</sup> A person is still exercising choice when they choose they would rather keep their life than their car, and they have full ability to choose to keep their car and sacrifice their life. This may seem a ruthless and unfair approach to wills, but if we are to talk about real consent then there is nothing more sure than a person's consent to protect life and limb.<sup>216</sup> In deciding that some actions are not acceptable the court is essentially placing the cost of resistance to the pressure as paramount in its analysis.<sup>217</sup> This stance has been lambasted by Smith who has claimed that it is a parody of the ordinary meaning of the word consent.<sup>218</sup> However, this attack misses the point. Should we attempt to shoehorn a normative doctrine into the law of contract, then all ideas must be taken to their logical conclusion. Rationality needs to be compatible with the rules, and there is nothing rational about claiming that duress means there is no choice, then proceeding to analyse the choices they had.<sup>219</sup>

The second extreme, as stated by Hale, is that all contracts have elements of duress in them.<sup>220</sup> Llewellyn makes the point that agreement is not really consent, but rather a choice of a lesser evil, with the law deciding what type of pressure is not acceptable.<sup>221</sup> Lord Northington's words must be remembered that 'necessitous men are not, truly speaking, free men'.<sup>222</sup> Hale makes the argument that unless someone is completely self sufficient, they are coerced into contracts lest they starve.<sup>223</sup> Should one buy water from a supermarket chain then surely the fact that water is required for survival is a pressure upon a person's will. This pressure can easily be as much as a physical threat as death by dehydration and death by gunshot are both equally unappealing. More puzzling is case law which confirms that threats are legitimate if they are based on a legal wrong, such as lawful imprisonment<sup>224</sup> or threats to prosecute for a criminal<sup>225</sup> or civil<sup>226</sup>

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<sup>214</sup> Stephen Smith 'Contracting Under Pressure: A Theory of Duress' (1997) 56(2) Cambridge Law Journal 343, 358.

<sup>215</sup> Patrick Atiyah, 'Duress and The Overborne Will Again' (1983) 99 Legal Review Quarterly 353, 355.

<sup>216</sup> Roger Halson, 'Opportunism, Economic Duress and Contractual Modifications' (1991) 107(2) Law Quarterly Review 649, 665.

<sup>217</sup> Brian Coote, 'Duress by Threatened Breach of Contract' [1980] Cambridge Law Journal 40, 45.

<sup>218</sup> Smith, 'Contracting Under Pressure...' (n214) 360.

<sup>219</sup> Atiyah 'Economic Duress...' (n202) 201.

<sup>220</sup> Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470.

<sup>221</sup> Karl Llewellyn, 'What Price Contract- An Essay in Perspective' (1931) 40(5) Yale Law Journal 704, 728.

<sup>222</sup> *Vernon v Bethell* (1761) 2 Eden 110, 113 (Lord Northington LC).

<sup>223</sup> Hale (n220) 473-474.

<sup>224</sup> *Cumming v Ince* (1847) 11 QB 112.

wrong. It cannot possibly be said that the will of the party exists where they are threatened with a tortious lawsuit that can permanently bankrupt them yet the will is negated if one party threatens to break the others fingers. The effects of so-called justified threats and unjustified threats have the same effect, or lack of effect, on a person's will. Therefore, the will cannot be said to be a distinguishing factor in duress.

There is one, quite large, distinguishing factor between them that would seem fairly obvious; fairness.<sup>227</sup> Now, prior to any misunderstanding, this is not the welfarist definition of substantial fairness but rather procedural fairness.<sup>228</sup> If courts were concerned about substantive fairness then inequality of bargaining power would be at the forefront of duress, and the absence of this does inspire ire in the most welfarist of academics.<sup>229</sup> Accepting that legitimate pressure exists, while opposing actions that are in contrast to basic morality, allows consent to have some utility in justice.<sup>230</sup> After all, it is fair if a massive economic entity wishes to contract for the sale of water, but it is equally not fair for it to threaten to cut off all the water supplies should one not buy at monopolistic prices. This rationale explains judgements such as Lord Hoffmann's in *R v Attorney General for England And Wales*<sup>231</sup> in which he pointed out that lawful actions are not necessarily legitimate and can be made illegitimate due to unpalatable purposes.<sup>232</sup> This would not be out of step with how the courts used to treat contracts they believed were unconscionable as prior to the advent of will theory courts did not think twice in striking down bargains they felt went against public policy.<sup>233</sup>

It would be open for the will theorist to say that the existence of this principle is merely a hang-on from an era of judicial intervention. Yet this would fail to explain the modern development of duress law that has practically jettisoned the concept of will.<sup>234</sup>

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<sup>225</sup> *Fisher & Co v Appolinaris Co* (1875) 10 Ch App 297 (CA).

<sup>226</sup> *Powell v Hoyland* (1851) 6 Exch 67.

<sup>227</sup> MH Ogilvie, 'Economic Duress in Contract: Departure, Detour or Dead End?' (2000) 34(2) Canadian Business Law Journal 194, 195.

<sup>228</sup> Dalton (n95) 1026.

<sup>229</sup> Carolyn Edwards, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' (2009) 77(3) UHMC Law Review 647, 647-648.

<sup>230</sup> Edwin Patterson, 'Compulsory Contracts and the Crystal Ball' (1943) 43(5) Columbia Law Review 731, 741

<sup>231</sup> [2003] UKPC 22.

<sup>232</sup> *ibid*, H7 1 (Lord Hoffman).

<sup>233</sup> Williston (n83) 373.

<sup>234</sup> Rick Bigwood, 'Coercion in Contract: That Theoretical Constructs of Duress' (1996) 46(2) University of Toronto Law Review 201, 207.

The case of *Lynch v D.P.P. of Northern Ireland*<sup>235</sup> made this rather explicit. While this was a criminal case, Lord Wilberforce relied on the law of contract:

'One may note - and the comparison is satisfactory - that an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law.'<sup>236</sup>

Lord Simon also mentioned that duress merely deflects the will rather than nullify it.<sup>237</sup> It is not surprising that Atiyah has called this case a 'unanimous and authoritative rejection of the overborne will theory'.<sup>238</sup> This has been translated into contract law per *The Universe Sentinel*<sup>239</sup> in which Lord Scarman had made it explicit that duress was founded not on the absence of will but '1) pressure amounting to compulsion of will and 2) the illegitimacy of the pressure exerted'<sup>240</sup>. Bigwood points out that this should, in reality, be the other way around, as it is the legitimacy of the pressure that determines its validity in coercing the other party to the contract.<sup>241</sup> Of course, normal commercial bargaining will not be considered duress.<sup>242</sup> This is in line with the idea of fairness as all contracts are inherently an exercise in advantage taking.<sup>243</sup> The exchange of goods only happens as parties have a good the other does not have in the quantity that they desire, and this is seen as perfectly moral, but what duress strikes at is illicit, objectionable methods society refuses to tolerate.<sup>244</sup> The movement away from merely talking about party's vindicated wills and onto the illegitimacy of the pressure shows classical law's internal value of fairness.

What has been left is a doctrine which uses the language of consent and will, but logically must follow a different set of principles as to avoid unpalatable conclusions. There are multiple reasons for this, including that the doctrine of duress was made in an

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<sup>235</sup> [1975] AC 653 (HL).

<sup>236</sup> *ibid* 680 (Lord Wilberforce).

<sup>237</sup> *ibid* 695 (Lord Simon).

<sup>238</sup> Atiyah, 'Economic Duress' (n202) 200.

<sup>239</sup> *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366.

<sup>240</sup> *ibid* 400 (Lord Scarman).

<sup>241</sup> Bigwood (n234) 212-214.

<sup>242</sup> *Capital Structures Plc v Time & Tide Construction Ltd* [2006] EWHC 591 (TCC), Para 15.

<sup>243</sup> Anthony Kronman 'Contract Law and Distributive Justice' (1980) 89(3) *Yale Law Journal* 472, 480

<sup>244</sup> *ibid*.



ad hoc manner.<sup>245</sup> The doctrine being developed in a piecemeal fashion means there was always the possibility that multiple principles would get intertwined with the legal reasoning. Smith does point out that the major problem with the previous extremist points of view is that they fail to recognise that it is not just one principle that is invoked in pressure cases.<sup>246</sup> This is not a new argument, as other academics have pointed out that law often does run with multiple values.<sup>247</sup> Hillman has pointed out that duress shows that a host of factors are considered by judges.<sup>248</sup> It is hard to imagine this not being the case as the society that judges must contend with is filled with conflicting ideals that are permanently ingrained.<sup>249</sup> The judiciary are not going to be immune from this which leads to the result that yet another doctrine does not follow merely one value.

None of this is to say that will theory has had no impact on the state of the law as it stands. After all, Lord Simon in *Lynch* still felt the need to relate the duress back to the idea of the will, albeit a deflection rather than destruction.<sup>250</sup> It must be remembered that will theory was often under-explained, and under-developed, but this did not bother most judges who used it as an influence.<sup>251</sup> This is fundamentally different in duress, a concept that necessarily involves wrong doing and immorality. English judges found that attempting to apply overborne will to problems revealed its inappropriateness, particularly regarding economic duress.<sup>252</sup> What courts can take great credit for is filtering abstract concepts into rules that they may apply.<sup>253</sup> There is the problem that the stated justification does not logically relate to the rule, thus creating a form of cognitive dissonance. It may be valid for courts to engage in doublethink for the sake of justice and certainty, but it is equally invalid for will theory to claim supremacy and dominance over an area where it sees little tangible results.

## 2.6 The Death of Contract?

Given the apparent divergence between classical law and classical will theory, it was only natural that academic dissent would emerge. One of the most notorious of these

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<sup>245</sup> David Campbell, 'The Relational Constitution of the Discrete Contract' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 46-47.

<sup>246</sup> Smith, 'Contracting Under Pressure:...' (n214) 359.

<sup>247</sup> Leon Trakman, 'Pluralism in Contract Law' (2010) 58(5) *Buffalo Law Review* 1031.

<sup>248</sup> Robert Hillman 'Crisis in Modern Contract Law Theory' (1988) 67(1) *Texas Law Review* 103, 108.

<sup>249</sup> *ibid* 109.

<sup>250</sup> *Lynch* (n235) 695.

<sup>251</sup> Swain, *The Law of Contract...* (n89) 276-277.

<sup>252</sup> Ogilvie, 'Economic Duress in Contract...' (n227) 221-222.

<sup>253</sup> *ibid* 220.

dissents is Grant Gilmore's *Death of Contract*.<sup>254</sup> This work is by no means unnoticed, generating over 150 pages of reviews in the first three years of being published despite to the fact that the book itself is only 100 pages.<sup>255</sup> These reviews were rarely kind, with the book being called both a 'perverse dictum'<sup>256</sup> to the slightly kinder 'delightful myth'.<sup>257</sup> Without doubt this work has raised the ire of many contract scholars, to the point of ridicule and vehement attacks on Gilmore.<sup>258</sup> Gilmore himself told one of his colleagues that he was 'absolutely astonished'<sup>259</sup> with the reception that the work had received. The work quickly became one of the most controversial pieces of literature, generating a review of the reviews.<sup>260</sup> Given the scholarly discussion on Gilmore's work, then serious academic debate has occurred even if Gilmore did not see the *Death of Contract* as serious scholarship.<sup>261</sup>

Gilmore makes a significant amount of claims within his work. There are three that are best discussed now. The first is that the classical doctrine was created arbitrarily by Langdell, Holmes and Williston.<sup>262</sup> The second is that Holmes managed to provide the groundwork for what was the ideological basis of the classical theory, not from case law but purely from conjecture.<sup>263</sup> The third is that contract theory is dead and so the law is to be reabsorbed into tort.<sup>264</sup> The first point has been lambasted by legal academia. Austen-Baker makes the point that it is incredibly hard to credit Langdell with the creation of any theory given that all he did was reprint cases with very little commentary.<sup>265</sup> From with this starting point, one can see why Feinman went as far as to claim 'death of contract is good literature, bad history and questionable theory'.<sup>266</sup> This is not far from the truth with regards to history. It is just implausible to lay Holmes

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<sup>254</sup> Gilmore, *The Death of Contract* (n66).

<sup>255</sup> Richard Danzig, 'The Death Of Contract and the Life of the Profession: Observations on the intellectual State of Legal Academia' (1977) 29(6) *Stanford Law Review* 1125, 1125.

<sup>256</sup> Robert Braucher, 'Contracts' in Bernard Schwartz (ed), *American Law: The Third Century* (Fred B Rothman & Co 1976) 122.

<sup>257</sup> Peter Linzer, 'Uncontracts: Context, Contorts and the Relational Approach' (1988) *Annual Survey of American Law* 139, 147.

<sup>258</sup> Ronald KL Collins, 'Gilmore's Grant' (1995-1996) 90 *Northwestern University Law Review* 7, 13.

<sup>259</sup> Anthony Jon Waters, 'For Grant Gilmore' (1983) 42(4) *Maryland Law Review* 865, 869.

<sup>260</sup> *ibid* 870.

<sup>261</sup> Collins, 'Gilmores Grant' (n258) 13-15.

<sup>262</sup> Gilmore, *The Death of Contract* (n66) 15.

<sup>263</sup> *ibid* 39-52.

<sup>264</sup> *ibid* 95.

<sup>265</sup> Richard Austen-Baker, 'Gilmore and The Strange Case of The Failure of Contract to Die After All' (2002) 18(1) *Journal of Contract* 1, 3.

<sup>266</sup> Jay Feinmann, 'The Significance of Contract Theory' (1990) 58(4) *University of Cincinnati Law Review* 1283, 1290.

as the creator of the objective theory when English cases were already using the theory before Holmes published,<sup>267</sup> as commented earlier. Even at the basic steps of describing the development of the law, Gilmore seems to have failed.

Turning to Gilmore's assessment on Holmes is much more interesting. Part of this is that Holmes made a rather critical error of judgement. In *The Common Law*, Holmes attempts to claim that there is no duty to perform a contract, rather a contract is merely a promise to pay damages.<sup>268</sup> This is quite briefly put down by Austen-Baker as 'plain wrong'<sup>269</sup> and even Holmes himself admits that parties do not think of breach before they contract.<sup>270</sup> This, in effect, would be a repudiation of will theory. A more pressing attack by Gilmore is in the 'revolutionary doctrine'<sup>271</sup> of the bargain theory. The bargain theory is very simply put as seeing consideration as the bargain, or price, for a promise.<sup>272</sup> Atiyah did attempt to say that this had far less influence in England, but then admits that it is accepted in the House of Lords.<sup>273</sup> Austen-Baker points out that not only has no Court moved to rule out *Dunlop Pneumatic Tyre Co v Selfridge*,<sup>274</sup> but later cases such as *Chappell & Co Ltd v Nestlé Co Ltd*<sup>275</sup> confirm that the bargain theory is affirmed in English law.<sup>276</sup> Thus, Holmes cannot be said to be completely detached from the classical theory.

What does remain controversial is if Holmes actually invented this concept. Mooney notes that if this was truly revolutionary, then it was a secret revolution until Gilmore brought it to light.<sup>277</sup> With trepidation, Austen-Baker does point out that the case of *Stilk v Myrick*<sup>278</sup> does show that consideration was seen as the price of a promise long before Holmes.<sup>279</sup> It would not be hard to attribute the reason for Gilmore's comments as part of the bulk of the work which ignores the economic and legal development of over three

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<sup>267</sup> Austen-Baker, Zhou (n77) 47.

<sup>268</sup> Holmes, *The Common Law* (n157) 236.

<sup>269</sup> Austen-Baker, 'Gilmore and the Strange Case' (n265) 10.

<sup>270</sup> Holmes, *The Common Law* (n157) 237.

<sup>271</sup> Gilmore, *The Death of Contract* (n66) 22.

<sup>272</sup> Austen-Baker, 'Gilmore and the Strange Case' (n265) 12.

<sup>273</sup> Atiyah, *Essays on contract* (n105) 69.

<sup>274</sup> [1915] AC 847.

<sup>275</sup> [1960] AC 87.

<sup>276</sup> Austen-Baker 'Gilmore and the Strange Case' (n265) 12.

<sup>277</sup> Ralph James Mooney, 'The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore' (1976) 55(1) *Oregon Law Review* 155, 169.

<sup>278</sup> [1809] EWHC KB J58.

<sup>279</sup> Austen-Baker 'Gilmore and the Strange Case' (n265) 12.

centuries.<sup>280</sup> It is not the scope of this chapter to analysis the concept of consideration with regards to will theory or its internal values as this will happen in later chapters regarding the evolution of law to external influence. This is partly because consideration predates will theory to the point that judges had to modify it subtly to make it fit around the new will theory.<sup>281</sup> It must be remembered that courts are generally restricted by direct precedents, even if only from a single case.<sup>282</sup> Due to the inherent differences in values between consideration, stemming before liberalism, and the classical theory, there have been significant attacks on this doctrine for the past century.<sup>283</sup> It would be of little use to add to this chorus when consideration cannot be defended by logic but rather was created by historical development.<sup>284</sup> As such, it would be better to swiftly move on to Gilmore's third argument.

The third argument, that contract is doomed to be subsumed by tort, is highly suspect. This claim has been subject to increasing amounts of revisionism with Kastely attempting to say that Gilmore was writing to purposefully shock the reader into embracing the classical doctrine.<sup>285</sup> If this was true, it would make Gilmore one of the most subliminal forms of reverse psychology seen in academic history. Even more so as scholars such as Yablon actually believed Gilmore's falsifications about Holmes.<sup>286</sup> If the purpose of the work was to inspire legal academics to create defences for the law of contract, it certainly succeeded. Yet, this seems rather implausible given Waters' insistence that Gilmore was astonished this his work had actually received the reaction it did.<sup>287</sup> It would seem that he had actually believed that the exceptions to classical law had eroded the legal rules to the point that the tenets of the theory had turned to

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<sup>280</sup> Robert Hillman, 'Triumph of Gilmore's the Death of Contract' (1995-1996) 90(1) Northwestern University Law Review 32, 38.

<sup>281</sup> Swain, *The Law of Contract...* (n89) 186.

<sup>282</sup> AL Goodhart, *English Law and the Moral Law* (Stevenson & Sons 1959) 77.

<sup>283</sup> Edwin Patterson, 'An Apology For Consideration' (1958) 58 Columbia Law Review 929, 929.

<sup>284</sup> Alan Farnsworth, 'The Past of Promise: An Historical Introduction to Contract' (1969) 69 Columbia Law Review 576, 598-599.

<sup>285</sup> Amy Kastely, 'Cogs or Cyborgs: Blasphemy and Irony in Contract Theories' (1995-1996) 90(1) Northwestern University Law Review 132, 142-145.

<sup>286</sup> Charles M Yablon, 'Grant Gilmore, Holmes, and the Anxiety of Influence' (1995-1996) 90(1) Northwestern University Law Review 236.

<sup>287</sup> Waters (n259) 870.

nothing.<sup>288</sup> At the point at which the voluntariness of the obligation is no longer held critical, it is conceivable to see why one would believe the law of tort would take over.

This, however, just has not happened. Austen-Baker went as far as to call the idea that contract is dead 'really rather stupid'.<sup>289</sup> Strikingly, other scholars in the 'Contract is Dead' school did not go as far as to say the theory of contract is dead, rather they concerned themselves more with the non-use of contract.<sup>290</sup> This will be dealt with in a later chapter, but it is important to signpost here that Gilmore's thesis was rarely ever defended.<sup>291</sup> Not only was it not defended by academics, but Courts seem to have taken the opposite approach. The case of *Carlton Communications plc and Granada Media plc v The Football League*<sup>292</sup> illustrates this. This was a rather simple case, involving the privity of contract as The Football League attempted to burden Carlton Communications with contractual liability as they were in control of the bidding process, yet not party, agent, or principle of the contract.<sup>293</sup> Mitchell warns that this case serves as a cautionary tale to lawyers who believe that the classical doctrine is gone.<sup>294</sup> The mistakes made by the league were so basic that anyone schooled in classical law would have considered it rudimentary.<sup>295</sup> It does seem that the classical law has no intention of dying just yet.

It would be rather disingenuous to claim that the classical law does not have any form of academic support. Fried, in his *Contract As Promise* heavily defends what he sees as the classical theory of law; the promise principle, the foremost value of which is personal autonomy.<sup>296</sup> The only reason this defence exists is because of the attacks that Gilmore and others made which doubted the coherence of contract doctrine.<sup>297</sup> Lipshaw points out that it was attacks such as this which Fried perceived as an abandonment of

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<sup>288</sup> Kurt Strasser, 'Contracts Many Futures After Death; Unanswered Questions of Scope and Purpose,' (1981) 32(3) South Carolina Law Review 501, 503-507.

<sup>289</sup> Austen-Baker, 'Gilmore and the Strange Case' (n265) 30.

<sup>290</sup> Lawrence M Friedman, Stewart Macaulay, 'Contract Law and Contract Teaching: Past Present and Future' (1967) 1967(4) Wisconsin Law Review 805.

<sup>291</sup> Waters (n259) 870.

<sup>292</sup> [2002] EWHC 1650.

<sup>293</sup> *ibid.*

<sup>294</sup> Catherine Mitchell, 'Contract: There's Still Life in the Classical Law' [2003] Cambridge Law Journal 26.

<sup>295</sup> *ibid* 27-28.

<sup>296</sup> Charles Fried, *Contract as Promise: A Theory of Contract Obligation* (Harvard university Press 1981) 10-14.

<sup>297</sup> Barnett, 'Contracts is Not Promise...' (n141) 647.

the classical liberal ideals that the state endorsed via the classical contract doctrine.<sup>298</sup> Given this focus on ideology, it is unsurprising that Fried labels one of the main critiques, the critical legal studies movement, as a 'Marxist tinged avatar'<sup>299</sup>. In contrast to this, Fried asserts contract's moral force to be tied in the moral duty that arises after a promise is freely made an individual which creates mutual trust.<sup>300</sup> Thirty years after his work he confirmed the liberal tinge of his original concept by rejecting the idea of contract as consent because it had the mere potential to be less individualistic.<sup>301</sup> We can then see that Fried's work was primarily a defence of what he saw as the primary values of the classical law.

One will notice that the author has omitted to mention Fried in defence of any of the previous discussions of contract law doctrine. At first, this would appear to be a huge oversight, given Atiyah's statement that Fried's liberal theory of contract is 'close to, if not wholly identical with...the classical theory of contract'<sup>302</sup>. However, Atiyah himself gives the reason as to why the author has omitted this, the liberal theory of contract is normative not descriptive.<sup>303</sup> Not only this, but it completely fails to harmonise well known doctrines of common law into the promise principle.<sup>304</sup> Economic duress and objectivity are merely dismissed as laying outside the promise principle and using other values.<sup>305</sup> Yet, it must be remembered that when courts have invoked these doctrines, they have still used the language of will theory. Fried attempts to put forward a variation of will theory,<sup>306</sup> but the failure to harmonise these doctrines means that he is then detached from the reasoning of the courts, and thus the internal values of law. Fried himself writes:

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<sup>298</sup> Jeffrey M Lipshaw, 'Contract as Meaning: An Introduction to Contract as Promise at 30' (2012) 45(3) Suffolk University Law Review 601, 602.

<sup>299</sup> Charles Fried, 'Contract as Promise Thirty Years On' (2012) 45(3) Suffolk University Law Review 961, 962.

<sup>300</sup> Fried, *Contract as Promise* (n296) 17.

<sup>301</sup> Fried, 'Contract as Promise Thirty Years On' (n299) 973-974.

<sup>302</sup> Atiyah, *Essays* (n105) 121.

<sup>303</sup> *ibid.*

<sup>304</sup> Barnett, 'Contracts is Not Promise...' (n141) 650.

<sup>305</sup> Fried, *Contract as Promise* (n296) 61, 94.

<sup>306</sup> Brian H Bix, 'Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried' (2012) 45(3) Suffolk University Law Review 719, 720.

I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement.<sup>307</sup>

There are then large, often irreconcilable, gaps between the common law of contract and Fried's theory.<sup>308</sup> It must be remembered, that the purpose of Fried was to provide a moral defence to the perceived values of contract law in the face of other scholars at the time who were hesitant to use the language of morality after Holmes.<sup>309</sup> Even in discussing the concept of expectation damages, often defended by amoral law and economics theories, Fried maintains his trust about the morality of the law rather than its actual coherence.<sup>310</sup> Barbara Fried does perhaps shed light into this when she claims that liberal contract theory does not force the wills of the parties to always take priority.<sup>311</sup> Rather, it merely states that will theory cannot give insights into these other external values.<sup>312</sup> Yet again, this does not explain why courts performed amazing feats of mental gymnastics over concepts such as duress with the overborne will theory. Clearly, the classical theory of law saw a logical thread throughout contract law that *Contract as Promise* does not touch base with.

So we now have an attack on the classical doctrine that is just bad history, and a defence of the doctrine that is not doctrine. The question must be asked: why have courts kept fair weather faith with the classical doctrine? An answer comes from the appeal to the values of choice and freedom.<sup>313</sup> The very concepts of consent and choice hint at what it means to be a responsible human being and these concepts have retained significant and lasting power.<sup>314</sup> Even more so, Movsesian points out that even in the disputes about freedom of contract between realists and classical theorists never threatened the central tenet of freedom of contract.<sup>315</sup> Leonhard makes the point that making consent the

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<sup>307</sup> Fried, *Contract as Promise* (n296) 37-38.

<sup>308</sup> Bix, 'Theories of Contract Law' (n306) 723.

<sup>309</sup> Jean Braucher, 'The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law In Action' (2012) 45(3) *Suffolk University Law Review* 667, 671-673.

<sup>310</sup> Charles Fried 'The Convergence of Contract and Promise' (2007) 120 *Harvard Law Review* 1.

<sup>311</sup> Barbara H Fried, 'The Holmesian Bad Man Flubs His Enterence' (2012) 45(3) *Suffolk University Law Review* 627, 628.

<sup>312</sup> *ibid.*

<sup>313</sup> Friedman, *The Republic of Choice* (n68) 80.

<sup>314</sup> *ibid.*

<sup>315</sup> Mark L Movsesian, 'Two Cheers for Freedom of Contract' (2002) 23(4) *Cardozo Law Review* 1529, 1532

lynchpin for enforcement is 'an easy story to tell and sell'.<sup>316</sup> This is primarily because these values still carry very strong emotional connotations which courts are more than willing to cater to.<sup>317</sup> The fact that these values were shoe-horned into classical law does not matter much, what matters is that they are now here to stay.

Yet, this does fail to explain why classical law seems to diverge from classical theory. The answer is rather simple: contract law has never been about one simple value.<sup>318</sup> Contractual pluralists have argued incessantly that contract law is multi-valued, similar to how society often has colliding ethical values.<sup>319</sup> Leaving aside the idea that judges should actually pronounce these values, it does seem to have great descriptive power. Contract law has always held competing principles as it reflects the values of the community it governs.<sup>320</sup> While being heavily influenced by liberal ideals, were never quite willing to allow it to dominate all areas of the law and allow a form of economic Darwinism.<sup>321</sup> Procedural fairness, economic efficiency, transparency, and certainty are all values which the classical law sought to accommodate. None of these would ever dominate, for example if certainty was dominant, there would be no doctrine of estoppel.<sup>322</sup> What is left is a complex theory which is a chimera of principles, rules and policies.<sup>323</sup> Rather than attempt to shoe-horn in any further conjecture about the supremacy of one overriding value, it is perhaps time to accept that the classical theory was never quite as simple as scholars would have liked.

## 2.7 Conclusion

Three centuries of contract doctrine has produced complex and rather messy results. Common law never developed consistently, instead it developed in a piecemeal fashion by responding to specific instance problems, a process that is often small and dismissed at the time of judgement.<sup>324</sup> The gaps between these developments included significant

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<sup>316</sup> Leonhard (n69) 65.

<sup>317</sup> *ibid* 64.

<sup>318</sup> Bix, 'Theories of Contract Law' (n306) 724.

<sup>319</sup> Bertram Lomfeld, 'Contract as Deliberation' (2013) 76(2) *Law and Contemporary Problems* 1, 8.

<sup>320</sup> Movsesian (n315) 1547.

<sup>321</sup> Eric M Holmes, 'Is There Life After Gilmore's Death of Contract - Inductions from a Study of Commercial Good Faith in First-Party Insurance Contracts' (1979-1980) 65(3) *Cornell Law Review* 330, 334.

<sup>322</sup> Macaulay, 'The Real Deal...' (n180) 63.

<sup>323</sup> Hillman, 'Crisis in Modern...' (n248) 133.

<sup>324</sup> Milsom (n88).



social and cultural changes.<sup>325</sup> If we are to accept that the root of contract is society, as Macneil tells us,<sup>326</sup> then changes in society will impact the values of law. It is a basic and fairly obvious truth that the nineteenth century saw an influx of liberalism into the courts.<sup>327</sup> Political theory emerged from the fight against feudalistic tyrants, leading to the historic conclusion that political restraint is an evil to be avoided.<sup>328</sup> It was always a significant logical oversight by the liberal theorists to believe that values from the nineteenth century could remain durable, yet the values that preceded that would be wiped completely. Courts, prior to the classical theory, were never shy about cutting down contracts that they deemed immoral or unjust.<sup>329</sup> While liberalism contained this, the values that this mindset created would seem to be as durable as will theory.

Three more values can then be said to exist in contract. Doctrinal certainty was always going to be a significant value. This is rather unsurprising given that the English common law system has often had fetish for precedent, where so much as a single case may bind all future courts.<sup>330</sup> This can be seen in all the three major doctrines that have been examined, as courts wished to keep clear and transparent rules to allow for legal certainty. This was interlinked with the need to promote the second value of commercial convenience in the law, as uncertainty in the law was seen as increasingly hostile towards the needs of business people.<sup>331</sup> All of this was then also justified on procedural fairness grounds. The classical law was never concerned with welfarism in the form of outcome fairness, but was dedicated to ensuring that the system, and what the courts would choose to enforce, was procedurally fair.<sup>332</sup> Of course, the values of will theory were present and were often interwoven with the other values, but it was an asinine belief that these values were the only ones that governed the classical contract.

These reasons are why not only is Gilmore wrong when he says contract is dead, but Fried is wrong when he says contract is promise. Despite decades of work, no one has demonstrated the supremacy of one principle.<sup>333</sup> Contract has always been elastic, trying

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<sup>325</sup> Linda Mulcahy, *Contract Law in Perspective* (5th edn, Routledge-Cavendish 2008) 34.

<sup>326</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1.

<sup>327</sup> Atiyah, *Rise and Fall* (n61) 405.

<sup>328</sup> Cohen (n111) 559.

<sup>329</sup> Williston 'Freedom of Contract' (n83) 373.

<sup>330</sup> Goodhart (n282) 77.

<sup>331</sup> Wightman, *Contract a Critical Commentary* (n197) 75-76.

<sup>332</sup> Schalkwyk (n189).

<sup>333</sup> Efi Zemach, Omri Ben-Zvi, 'Contract Theory and the Limits of Reason' (2017) 52(2) *Tulsa Law Review* 167,167.

to fit in the values of society and so was never going to remain static or fixed on one principle.<sup>334</sup> There is no other reason why English judges would consistently make rhetoric about wills yet seem to make judgements based on completely different principles.<sup>335</sup> It was always trying to pander to multiple values that came with contract. Contract was never about getting doctrinal certainty but rather dealing with the conflicting norms and principles that come from having a complex society with evolving and conflicting ideas and ideologies.<sup>336</sup> If any theory of law is going to claim dominance of contract, it needs to be one that reflects that society, or contract for that matter, is not simple enough to be pigeonholed into a singular generalised value.

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<sup>334</sup> Sharma, 'From Sancity to Fairness' (n158) 111-112.

<sup>335</sup> Smith, 'Contracting under Pressure' (n214) 343.

<sup>336</sup> Hillman, 'Crisis in Modern Contract...' (n248) 109, 133.

### 3. Chapter Three: Relational Contract Theory: A Challenge

#### 3.1 Introduction

After the 'death of contract' thesis began a radical demolition of the idea of a general theory of contracts, it was hard to imagine that the classical hegemony would ever be under serious threat. In the 1970s-1980s, however, Ian Macneil embarked on this challenge with his attempt to create a theory on contract, contract behaviour, and contract law.<sup>337</sup> This theory started with a intriguing premise: the embeddedness of society and social context in all exchange relations.<sup>338</sup> It should come to no surprise that this was not an impassioned defence of the classical doctrine, especially when Macneil had already launched attacks on the American system of acceptance,<sup>339</sup> and contractual remedies.<sup>340</sup> The new attack upon contract was not merely of doctrinal flaws but instead on its irrelevance and disjunction with reality.<sup>341</sup> This 'relational' theory of contract wanted to provide an accurate account of the world of contract.<sup>342</sup> The real world of contracting behaviour is messy, intricate, and complex. This stood at great odds with the two greatest assets of classical law: its ease and simplicity.<sup>343</sup>

This chapter deals with the details of the theory in order to set a suitable platform for discussion of a potential relational law of contract. It is unfortunate that just describing the theory is an argument in of itself, as it is constantly misinterpreted and misunderstood by contemporary academics.<sup>344</sup> A large part of this is due to the over-complicated nature and painful detail that Macneil went into in describing his theory.<sup>345</sup> This is only eclipsed by structural oversights in the form of terminological issues such as the repeated use of the word relational; which added confusion on if the theory was

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<sup>337</sup> Richard Austen-Baker, Qi Zhou, *Contracts in Context* (Routledge 2013) 76-77.

<sup>338</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 171.

<sup>339</sup> Ian Macneil, 'Time of Acceptance: Too Many Problems for a Single Rule' (1964) 112(7) *University of Pennsylvania Law Review* 947.

<sup>340</sup> Ian Macneil, 'Power of Contract and Agreed Remedies' (1961) 47(4) *Cornell Law Review* 495.

<sup>341</sup> Ian Macneil, 'The Many Futures of Contract' (1974) 47(3) *Southern California Law Review* 691.

<sup>342</sup> Chapin Cimino 'The Relational Economics of Commercial Contract' (2015) 3(1) *Texan A&M Law Review* 91, 92.

<sup>343</sup> *ibid.*

<sup>344</sup> Jay Feinman, 'The Reception of Ian Macneil's Work in the USA' in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001) 63.

<sup>345</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 221.

about only one sub-set of contracts or them all.<sup>346</sup> In an effort to simplify the theory for accessibility, categorisation must be a priority. The two primary aspects of Macneil's theory, the relational spectrum and the common contract norms, will be need to be separated conceptually in order provide an accurate representation of their character. This does not mean that either are dispensable. After all, Macneil's purpose was for both the spectrum and the common contract norms to be used in unison for analytical purposes.<sup>347</sup> The separation is more of functionality within the analytical apparatus as opposed to their utility. The spectrum is a grouping mechanism for contracts; where they are likely to sit based on contractual behaviour, which in turn provides different environments for the behavioural norms and their effects.<sup>348</sup> The ten common contract norms are found within all contracts, regardless of where they exist on the spectrum, but their effects and social meaning change dependant on their environment.

The relational theory then attempts to encompass all forms of contract. It does not permit any exceptions in its attempt to harmonise all forms of contractual behaviour as an explainable phenomenon of social life. This is highly different from the classical system which is inherently ideological.<sup>349</sup> Set ideological premises were generated for all further outcomes to be based on logical deduction. This has lead to a situation in which it continuously creates exceptions on an ad hoc basis;<sup>350</sup> an implicit concession to its multiple competing internal values. While still under an ideological pull from will theory, the presence of other values acted as a failsafe, preventing classical doctrine plunging into complete absurdity. This constant list of exceptions meant that when placed in social reality, the doctrine seemed more detached and irrelevant.<sup>351</sup> Classical doctrine counterproductively became more obsolete the more it attempted to adapt to the social reality. Macneil's analysis exposed this dissonance from reality, casting serious doubts on classical theory's claim to intellectual superiority.

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<sup>346</sup> David Campbell, 'Good Faith and the Ubiquity of the Relational Contract' (2004) 77(3) *Modern Law Review* 460, 484.

<sup>347</sup> Peter Vincent-Jones, 'The Reception of Ian Macneil's Work on Contract in the UK' in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001).

<sup>348</sup> Macneil, 'The Many Futures' (n341).

<sup>349</sup> Anat Rosenburg 'Contract's Meaning and the Histories of Classical Contract Law' (2013) 59(1) *McGill Law Journal* 165.

<sup>350</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) *Buffalo Law Review* 763, 778.

<sup>351</sup> *ibid.*

A cautionary note should be made regarding the purpose of relational contract theory. The inherent purpose of relational contract theory is not to provide a justification for general paternalism or left-wing economic ideas.<sup>352</sup> Macneil has explicitly stated that his apparatus is neutral and it can be used for any purpose or application.<sup>353</sup> This, in Macneil's hyperbolic example, would include Stalin using the apparatus to analyse gulags and finding the conditions completely satisfactory.<sup>354</sup> In essence, any ideological premise can use relational contract theory in order to examine relations and then produce value judgements and consequential prescriptions. A suitable analogy would be to compare Macneil's to Raz's description of rule of law as a knife.<sup>355</sup> It can be used for many purposes, both good and bad, but it is only effective at either when it is sharp and precise. The classical doctrine in this analogy is more akin to a club. Useful at bludgeoning malleable objects into quasi-recognisable shapes but not apt for performing any level of intricate work.

### 3.2 The Relational Spectrum Against the Classical Law

A commonly missed point when discussing Macneil's work is that it starts with a different premise from classical thought. This premise is the four roots of contract, all of which are necessary for exchange relations.<sup>356</sup> This is alien to the classical theory, and certainly a conceptual challenge that classical law has little experience with; given its inorganic, academically-manufactured premise. The doctrine appeared as a result of a philosophical revolution in which the basic morality, that commercial law should be governed by, changed.<sup>357</sup> For the classical theory, this was individualism and how to achieve self-interested utility maximisation.<sup>358</sup> This is a teleological argument. It is defining contract by its effects and by its use, as opposed to what it actually is. Much of the critics that contract law has been able to successfully defend against are guilty of the same sin, whether they define contract through efficiency,<sup>359</sup> empowerment,<sup>360</sup>

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<sup>352</sup> David Campbell, 'The Incompleteness of Our Understanding of the Law and Economics of Relational Contract' (2004) 2004(2) *Wisconsin Law Review* 645, 661.

<sup>353</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 215.

<sup>354</sup> *ibid.*

<sup>355</sup> Joseph Raz, *Essays on Law and Morality* (Clarendon Press 1979).

<sup>356</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1-4.

<sup>357</sup> Patrick Atiyah, *The Rise and Fall of Freedom Of Contract* (Oxford University Press 1979).

<sup>358</sup> David Campbell, 'On What is Valuable in Law and Economics' (1996) 8(4) *Otago Law Review* 489, 490.

<sup>359</sup> Charles Goodhart, 'Economics and the Law: Too Much One Way Traffic' (1997) 60 *Modern Law Review* 1.

<sup>360</sup> Robin Kar, 'Contract as Empowerment' (2016) 83(2) *University of Chicago Law Review* 759.

commodified promise,<sup>361</sup> or patriarchy.<sup>362</sup> Classical doctrine, after hundreds of years of wealth creation, does have an advantage when it is in a struggle on the effects of contract. It is then not surprising that classicists would double down on this strength, leading to a conflation between contract's causal effect and the reality of exchange relations.

Macneil's first observation is not teleological, but etiological. His first observation was the causation of contract, namely the four primal roots of contract. The first root is society and is the most fundamental root.<sup>363</sup> All contracts need mutual communication and minimum socio-economic stability in order for them to have any form of existence outside of theft by plunder.<sup>364</sup> The second root is that of specialisation of labour, as when individuals cannot produce what they need due to their specialised jobs, they need to exchange with other individuals to obtain life needs.<sup>365</sup> The third root is that of conceptual choice and the fourth is an awareness of the future.<sup>366</sup> These roots combine to make all recognisable contractual behaviour. This behaviour is not inherently prescribed, and can take many forms outside of the promise mechanism.<sup>367</sup> With no set outcome stemming from the roots, it is natural that there will be a wide variety of potential exchange relations based on different patterns of behaviour that the parties utilise. Macneil explained this using the analogy of a spectrum of contractual behaviour.<sup>368</sup> On one axis was the discrete transaction, an impersonal, immediate, and limited exchange.<sup>369</sup> On the other was the relational contract, which was characterised by its long-term and more informal nature.<sup>370</sup> In multiple works, Macneil created twelve different axes in order to determine where a contract fell on the spectrum which Austen-Baker has helpfully grouped together as:<sup>371</sup>

1. Overall relationship type
2. Measurability and actual relationship

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<sup>361</sup> Erik Encarnacion 'Contract as Commodified Promise' (2018) 71(1) *Vanderbilt Law Review* 61.

<sup>362</sup> Carole Pateman, *The Sexual Contract* (Pluto Press 1988).

<sup>363</sup> Macneil, *The New Social Contract* (n356) 1.

<sup>364</sup> *ibid.*

<sup>365</sup> *ibid* 2.

<sup>366</sup> *ibid* 3-4.

<sup>367</sup> *ibid* 13-20.

<sup>368</sup> Macneil, 'Many Futures...' (n341) 720.

<sup>369</sup> Ian R Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a Rich Classificatory Apparatus' (1980-1981) 75 *Northwestern Law Review* 1018.

<sup>370</sup> *ibid.*

<sup>371</sup> Austen-Baker, Zhou, *Contracts in Context* (n337) 80.

3. Basic sources of socio-economic support
4. Duration
5. Commencement and termination
6. Planning
7. Degree of further co-operation required post-commencement
8. Incidence of benefits and burdens
9. Obligations
10. Transferability
11. Number of participants
12. Participant views

This, in typical Macneil style, is highly comprehensive and complicated, and thus will not be the focus of this section. Doing so would create unnecessary levels of detail one would be required to penetrate to understand a relatively loose analogy. For purposes of comprehension, one can just as well take the axes at face value when deciding if a contract is more discrete or complex. Instead, it is more useful for theoretical purposes to focus upon Macneil's criticism of the classical doctrine for encouraging discreteness by shoe-horning all contractual behaviour into the discrete model.<sup>372</sup> That is to say, presuming all contracts are at the discrete end of the spectrum. Classical law did this in two ways; a) promoting discreteness and b) demanding presentation at the time of acceptance.<sup>373</sup> In doing so it gave a false view of the relationship of the parties, and the more it was placed in context the less sense the doctrine made.<sup>374</sup> This was in part due to the fact that the legal doctrine was autonomous to social reality, mechanically applying and expanding principles deductively.<sup>375</sup> This foundational premise was never based on reality, but on ideological pursuit of individualism that fitted within the liberal tradition despite the model rarely being present in reality.<sup>376</sup> As a note, Macneil's work focused primarily on law within the United States, which has evolved into neo-classicalism from the Second Restatement of Contracts. Macneil admitted that he felt

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<sup>372</sup> Macneil, *The New Social Contract* (n356) 1.

<sup>373</sup> Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72(6) *Northwestern University Law Review* 854.

<sup>374</sup> Jay M Feinman, 'Relational Contract Theory In Context' (Spring 2000) 94(3) *Northwestern University Law Review* 737, 738.

<sup>375</sup> Jay M Feinman, 'Un-Making Law: The Classical Revival in the Common Law' (2004) 28(1) *Seattle University Law Review* 1, 52.

<sup>376</sup> William Woodward, 'Clearing the Underbrush For Real Life Contracting' (1999) 24(1) *Law and Social Inquiry* 99, 113.

unqualified to assess the state of England, which has largely kept the classical law rules.<sup>377</sup> To determine if the criticisms of the American contract regime carry forward, then Macneil's observations must be assessed in light of English contract law directly related to the principles.

### 3.2.a Discreteness

There are two significant issues with attempting to promote discreteness as a paradigm of contract law: the empirical and the conceptual. The empirical argument is very simply that a significant proportion of contracts are relational and pure discrete transactions are in the minority.<sup>378</sup> The reason for this is that the discrete model omits key characteristics of contractual relations that are generally part of party behaviour, and those it does not omit it distorts.<sup>379</sup> For example, one of the key roles of contract has always been that of cooperation and coordination in order to fulfil an enterprise.<sup>380</sup> This fact is not merely omitted from classical analysis but viewed with outright hostility as contract is, under its ideological premise, a method for actors to act in a self-interested manner rather than a facet of altruism.<sup>381</sup> This attitude is rather unsurprising, after all it is a logical extension of classical contract law's thinking that contract is the exercise in an individual's autonomy.<sup>382</sup> This highly individualistic thinking would be appalled at any obligation that stemmed from non-consented to expectations, even where the majority of contracts display these characteristics.

This hostility forgets that humans are social animals that are reliant on social cues in their interactions. Contract, as a vehicle of human interaction, contains symbolic properties stemming from the social matrix.<sup>383</sup> Normative expressions arise from contractual documents and behaviour that influences future party behaviour and the relation as a whole.<sup>384</sup> Parties, therefore, have great incentives to not follow the classical

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<sup>377</sup> Ian R Macneil, 'Review of H. Collins, Law of Contract' (1987) 14(3) *Journal of Law and Society* 373, 374.

<sup>378</sup> Charles J. Goetz, Robert E Scott, 'Principles of Relational Contracts' (1981) 67(6) *Virginia Law Review* 1089, 1089-1092.

<sup>379</sup> Ian R Macneil, 'Barriers To The Ideas of Relational Contracts' (1987) in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet and Maxwell 2001) 126.

<sup>380</sup> Harold Havighurst, *The Nature of the Private Contract* (Northwestern University Press 1961) 21.

<sup>381</sup> Rodger Brownsword, 'From Cooperative Contracting to a Contract of Cooperation' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 14-15.

<sup>382</sup> Feinman, 'Un-making Law...' (n375) 4.

<sup>383</sup> Mark Suchman, 'Contract as a Social Artefact' (2003) 37(1) *Law & Society Review* 91.

<sup>384</sup> *ibid* 100.



model and signal that they are prepared to be cooperative through branding mechanisms.<sup>385</sup> Additionally, each transaction itself influences the branding of the parties, which in turn influences both present and future party behaviour.<sup>386</sup> Empirically, this is seen in the non-use of formalistic legal enforcement of written contracts in favour of informal non-legal mechanisms.<sup>387</sup> Studies recurrently show that parties continuously opt-out of legal mechanisms.<sup>388</sup> Though this is not to say that parties solely rely on non-legal sanctions, as they will use legal means where appropriate.<sup>389</sup> This empirical dissonance is primarily due to the classical model not harmonising the need for co-operation in contract.

It would be a mistake to think that cooperative behaviour exists solely among long-term relational contracts, as all contracts contain some elements of cooperative behaviour.<sup>390</sup> Macneil did, in fact, make a grave terminological error in referring to one end of the spectrum as relational, as it implied that relational norms were only on this axis.<sup>391</sup> It would be just as fatal an error to see this cooperation as purely altruistic, but rather is part of the self-interest of the parties.<sup>392</sup> This is where the roots of contract come into force again. With the specialisation of labour and exchange, humans are forced to cooperate so that their individual goals can be met via mutual performance of another who is specialised in a different area.<sup>393</sup> Therefore, it is in the interest of specialised individuals to cooperate for mutual gain. The existence of collective interest does not make humans any less self-interested. Instead, it means that instant gratification must be delayed in order to achieve long term goals. By such cooperation, humans amplify their power to achieve mutual desires. It is then illogical to presuppose that accepting

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<sup>385</sup> Gordon D Smith, 'The Branding Effect of Contracts' (2007) 12(1) *Harvard Negotiation Law Review* 189.

<sup>386</sup> *ibid* 198.

<sup>387</sup> Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

<sup>388</sup> Robert Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press 1991); Lisa Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions' (2001) 99 *Michigan Law Review* 1724.

<sup>389</sup> Scott Baker, Albert Choi, 'Contracts Role in Relational Contract' (2015) 101 *Virginia Law Review* 559, 568.

<sup>390</sup> Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 71.

<sup>391</sup> Campbell, 'Good Faith...' (n346) 484.

<sup>392</sup> Collins, 'Competing norms...' (n390) 70.

<sup>393</sup> David Campbell, Donald Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-operation' (1993) 20(2) *Journal of Law and Society* 166, 181.

cooperation as a natural consequence of contractual relations is ideologically anti-individualistic when cooperation is a catalyst for realising self-interested goals that cannot be achieved unilaterally.

The model that classical law has adopted is not merely ignored by commercial parties, but would be a flawed system for them to base relations off. The discrete paradigm does not permit the need to change behaviour based on new circumstances that is inherent in all long term economic relations and thus does not provide for economic stability.<sup>394</sup> This is partly due to what a pure discrete transaction would look like in the eyes of Macneil:

'A truly discrete transaction would be entirely separate not only from all other present relations but from all past and future relations as well. In short, it could occur, if at all, only between total strangers brought together by chance...Moreover, each party would have to be completely sure of never seeing each other again or having anything else to do with each other.'<sup>395</sup>

This definition leads to a second more encompassing criticism of the discrete model, which is that it is a logically impossible when one considers the very first fundamental root of contract: society. Contract exists in society and all contracts have societal relations present, though the degree can vary.<sup>396</sup> Even something as simple as mutual communication, as linguistically communication requires meaning which is only given through society.<sup>397</sup> At the point at which humans cannot telepathically adduce the wills of others, communication based on social norms and social meaning must be utilised in order for the parties to even come close to the fabled meeting of the minds.<sup>398</sup> It is completely impossible to imagine any form of exchange relation without society as a background.<sup>399</sup> Contracts simply do not exist in vacuums with no influence from the outside world and there is always more to the contract than the forms.<sup>400</sup> Interestingly, the forms themselves are evidence of the societal root, as without social meaning

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<sup>394</sup> Macneil, 'Contracts: Adjustment of Long-Term...' (n373) 860.

<sup>395</sup> *ibid* 856.

<sup>396</sup> Macneil, 'Economic Analysis...' (n369) 1020.

<sup>397</sup> *ibid*.

<sup>398</sup> Wayne Barnes 'The Objective Theory of Contract' (2008) 76(4) University of Cincinnati Law Review 1119, 1127.

<sup>399</sup> Macneil, *The New Social Contract* (n356) 1.

<sup>400</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge of Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 53.

provided by classical law their evidentiary value would be diminished. This basic point needs to be made, as Campbell notes, because of the rather absurd rhetoric that neo-classical populists sprouted such as 'there is no such thing as society'.<sup>401</sup> This significant divergence from reality is a fatal flaw to the classical doctrine being able to be used for an accurate representation of party behaviour.

It is from this that Macneil concludes that there is no such thing as a truly discrete contract. All contracts have some form of relation between the parties and it would be a grave error to attempt to confine relations to the relational end of the axis.<sup>402</sup> This does not, however, mean that the discrete transaction is an exception to Macneil's theory or even undesirable. After all, if relational contract theory wishes to call itself a progressive theory of contract law, then it cannot permit exceptions.<sup>403</sup> Just as all contracts have some form of relational aspects, they will also have some element of discreteness present as well.<sup>404</sup> Humans, with bounded rationality and simple human error, tend to think in both discrete and relational terms at the same time.<sup>405</sup> The purpose of relational contract theory is to then analyse the elements of the contract, including those that are discrete. Macneil even criticised critical legal theorists that attempted to disparage discrete contracts merely because they were discrete.<sup>406</sup> After all, some exchanges are better served in a discrete environment, with highly competitive negotiation and a lesser feeling of personal solidarity.<sup>407</sup> While relational contract theory proclaims that all contracts have degrees of relational norms, it would be a mistake to presume discrete relations are exceptions or anomalies to this analysis.

Relational contract theory will not consider any form of contract as acting outside of its framework. By way of example, one can look at the contract that comes close to the perfect discrete contract: the smart contract. The smart contract is a computerised protocol that is self-enforcing and self-performing.<sup>408</sup> This needs not be immensely

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<sup>401</sup> David Campbell, 'Ian Macneil and the Relational Theory of Contract' in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001) 13.

<sup>402</sup> Austen-Baker, Zhou (n337).

<sup>403</sup> David Campbell, 'The Undeath of Contract: A Study in the Degeneration of a research Programme' (1992) 22(1) Hong Kong Law Journal 20, 33.

<sup>404</sup> Macneil, 'The Many Futures...' (n341) 725.

<sup>405</sup> Macneil, *The New Social Contract* (n356) 12.

<sup>406</sup> Macneil, 'Barriers...' (n379) 37.

<sup>407</sup> Campbell, 'Ian Macneil...' (n401) 24.

<sup>408</sup> Nick Szabo, 'Smart Contract: Building Blocks For Digital Markets' (Amsterdam 1996)

<[http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart\\_contracts\\_2.html](http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html)>.

complex, but rather like a digital vending machine.<sup>409</sup> Nevertheless, it has links to the perfect discrete contract. So much so that Wheeler fears that it will be the rise of the "Technical Man" within Macneil's work.<sup>410</sup> There are no personal relations between the buyer and seller, it is immediate and self performing with no room for error or breach, it is highly specific regarding goals and no further cooperation between parties is required.<sup>411</sup> However, it is only by looking through the lenses of relational contract theory that one can see these aspects of the smart contract. It is worth noting that classical law is still puzzled on how exactly to deal with the smart contract, or if it is even a contract at all.<sup>412</sup> Given that these contracts are what crypto-currencies, such as Bitcoin, use then this is more than a mere curiosity but can have serious financial implications.<sup>413</sup>

More so, one can apply Macneil's criteria to the smart contract as to show that this near-perfect discrete contract is not perfectly discrete. Firstly, the parties must place faith in the blockchain that it is legitimate, accurate, and not duplicated.<sup>414</sup> This is because the smart contract is irrevocable and cannot be interrupted during its process.<sup>415</sup> This trust is necessarily based off social norms which give rise to the legitimacy of the codes. Without the social matrix giving a seal of approval to the system, it would be deemed to untrustworthy for major financial transactions: a primary reason why we do not have vending machines for diamonds. Thus, Wheeler has overlooked a basic point when she claims that there are no social cues within a blockchain.<sup>416</sup> Due to the lack of personal representation, more trust and legitimacy needs to be placed within the algorithm itself, acting as a form of pre-contractual social cue. Contracts are not discrete merely because one norm, party identity, is geared onto the discrete end of the spectrum. The overall contractual relationship still needs highly relational norms in order to function, albeit in a unique way to conventional contracting. As a final rebuttal to the idea that this is a perfect discrete contract, while the enforcing blockchain could be an example of Macneil's neutral and external god,<sup>417</sup> the code of this god is still created by a human

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<sup>409</sup> *ibid.*

<sup>410</sup> Sally Wheeler, 'Visions Of Contract' (2017) 44(1) *Journal of Law and Society* 74, 87-92.

<sup>411</sup> Kevin Werbach, Nicolas Cornell, 'Contracts Ex Machina' (2017) 67(2) *Duke Law Journal* 313, 318-322.

<sup>412</sup> *ibid.*

<sup>413</sup> *ibid* 324.

<sup>414</sup> *ibid* 326.

<sup>415</sup> *ibid* 330-335.

<sup>416</sup> Wheeler, 'Visions of Contract' (n410) 92.

<sup>417</sup> Macneil, *The New Social Contract* (n356) 11.

with creative oversight over the acceptable inputs and outputs. What is deemed acceptable is necessarily dictated by society over what is acceptable to be exchanged via pre-determined by computerised algorithms without negotiations by the parties. Short of a system that can write its own codes, the smart contract is still firmly set in social relations, and it is only by using Macneil's formula that this can be seen.

Macneil's criticism was then not on the fact that discrete contracts exist, but rather that neo-classical analysis tries to force all contracts into the model. It does this by encouraging discreteness within the law of contracts. In his critique of the US law, Macneil identified the following way discreteness is encouraged :

'To implement discreteness, classical law initially treats as irrelevant the identity of the parties to the transaction. Second, it transactionizes or commodifies as much as possible the subject matter of the transaction...Third, it limits strictly the sources to be considered in establishing the substantive content of the transaction...Fourth, limited contract remedies are available, so that should the initial presentation fail to materialize because of non-performance, the consequences are relatively predictable...Fifth, the classical contract law draws clear lines between being in and not being in a transaction...Finally, the introduction of third parties into the relation is discouraged.'<sup>418</sup>

Does the above carry weight in the English legal system? The discussion on remedies is better placed in promoting presentation as promoting predictable remedies also enhances the likelihood of presentation.<sup>419</sup> The identity of the parties is a rather troubling position in English contract law. It is true that statute has changed the position of certain contracts based on the identity of the parties. This is primarily the consumer with the unfair contract terms act,<sup>420</sup> then the sale of goods act,<sup>421</sup> and then the consumer rights act,<sup>422</sup> all of which impart extra rights and obligations to protect consumer interest. It could potentially be argued that this would bring society back to status again, as the consumer is now receiving special consideration based on their status in

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<sup>418</sup> Macneil, 'Contracts: Adjustment of Long Term...' (n373) 863-864.

<sup>419</sup> *ibid* 864.

<sup>420</sup> Unfair Contract Terms Act 1977.

<sup>421</sup> Sale Of Goods Act 1979.

<sup>422</sup> Consumer Rights Act 2015.

society.<sup>423</sup> It would be highly unwise, however, to link this with relational contract theory. Relational contract theory analyses the actual identity and characteristics of the parties, particularly the status and effect of their roles.<sup>424</sup> Statute's definition of a consumer is not near this but rather 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.<sup>425</sup> This is not relational analysis and is still a form of discreteness as the classical law is merely trying to avoid problems of the social reality with a description that is highly generalist and practically open-ended. It is more concerned with predictable consequences than any form of detailed and rigorous analysis.

Though classical law has had to concede to social reality, after all it can only distort the world around it so much before it becomes too absurd to be tolerated. It would be seemingly paradoxical for a legal system that supposedly emphasises discreteness to look at societal custom yet, this is the case with implied terms of custom. *Cunliffe-Owen v Teather & Greenwood*<sup>426</sup> has held that the court will look upon custom where a term is implied that the contract is silent on. In doing so, the court will identify any custom that is 'certain, notorious and reasonable'.<sup>427</sup> Courts have justified this approach as a fear of absurdity should courts attempt to look at contracts outside their factual matrix.<sup>428</sup> Social reality was still deemed to be more important to the legal system than ideological purity, betraying its multi-valued history discussed in the previous chapter. Yet, the will theorist should not be overjoyed with this as a potential rebuttal to Macneil's criticisms, as courts have simultaneously held that a person's actual knowledge of the custom is irrelevant if the term is reasonable.<sup>429</sup> Of course, this is phrased as being part of the party's intention due to constructive knowledge,<sup>430</sup> though this is not the first time that a court has attempted to wedge consent into a doctrine that is not based in the grounds of intention. Social reality was deemed too important to ignore in this regard and the classical law met this, rather stereotypically, with a half-way house doctrine that neither meets the reality of the parties or the ideological demands of will theory.

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<sup>423</sup> Katharina Isabel Schmidt, 'Henry Maine's Modern Law: From Status to Contract and Back Again' (2017) 65(1) *American Journal of Comparative Law* 145, 147.

<sup>424</sup> Macneil, *The New Social Contract* (n356) 40-44.

<sup>425</sup> Consumer Rights Act 2015, s2.

<sup>426</sup> [1967] 1 WLR 1421 (Ch).

<sup>427</sup> *ibid* 1439 (Ungoed-Thomas J).

<sup>428</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 (HL), 1384 (Wilberforce LJ).

<sup>429</sup> *Reynolds v Smith* (1893) 9 TLR 494 (HL). 495 (Herschell LC).

<sup>430</sup> *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 661 (CA), 676.

One should be careful to treat this as a movement away from the discrete model. After all, custom is merely an annex to the written contract where there is a contractual gap.<sup>431</sup> Courts have been careful to try to fix the doctrine around the themes of effectuation of consent of the written contract.<sup>432</sup> Multiple courts might have given judgements that would suggest that courts are looking at the whole factual matrix,<sup>433</sup> thought this should not be confused with a proper relational analysis. Express terms will always win out over implied terms by custom, and courts have been clear that they will not make a contract for the parties via this method.<sup>434</sup> Additionally, modern courts are cautious to actually enlarge or vary contracts via this method.<sup>435</sup> Courts are still concerned of the potentially infinite variety of custom that society can provide.<sup>436</sup> It would then not be wise to claim that this is the courts accepting the existence of the social matrix or that the root of contracts is society.

However, the existence of custom as a legally implied term does show a concession of the classical doctrine against pure discreteness. The reasons for the concessions are an acceptance of the reality that humans make tacit assumptions regarding what they need to say and do not need to say based on internalised preconceptions of society. Parties simply do not wish to deal with specific points that are already covered by custom and the normal dealings of fellow merchants.<sup>437</sup> After all, general patterns of behaviour allow for collective wisdom, understanding and knowledge of the benefits and burdens of behaving in a certain way.<sup>438</sup> Where there is collective knowledge on both sides, parties do not need to commit to vast amounts of planning as such communication is pre-emptively deemed superfluous due to socially established or entrenched norms. Doing so would waste time, effort and money, and so courts are happy to encourage less complete contracts so that parties are not forced into ludicrous word-games to cover

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<sup>431</sup> *Hutton v Warren* (1836) 150 ER 517.

<sup>432</sup> J.A.C. Thomas, 'Custom and Roman Law' (1963) 31.1 *Tijdschrift voor Rechtsgeschiedenis/Legal History Review* 39, 51.

<sup>433</sup> *Produce Brokers Co Ltd v Olympia & Cake Co Ltd* [1916] 1 AC 314 (HL); *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444.

<sup>434</sup> *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL).

<sup>435</sup> Christopher Staughton, 'How Do Courts Interpret Commercial Contracts' (1999) 58 *CLJ* 303, 311.

<sup>436</sup> Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar Publishing 2011) 80.

<sup>437</sup> Antoine Vey, 'Assessing the Contents of Contracts: Implied Terms From a Comparative Perspective' (2011) University of Cambridge Faculty of Law Research Paper No. 26/2011, 4 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1837545](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837545)> accessed 20 April 2018.

<sup>438</sup> Charles Goetz, Robert Scott 'The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms' (1985) 73(2) *California Law Review* 261, 277.

subjects they both can ascertain from their social matrix.<sup>439</sup> This is a sensible concession as such norms would probably be binding regardless of their legal enforceability.<sup>440</sup> Thus, implied terms by custom are not an adequate response to the social matrix, but a form of strategic papal indulgence; the existence of the factual matrix may be relevant but is cloaked in the quasi-religious rhetoric of consent.

### 3.2.b Presentation

The second method of classical law in attempting to enhance discrete transactions is the encouragement of presentation.<sup>441</sup> Presentation is the moving of the future into the present, that is say that future events are to be treated as happening in the present time.<sup>442</sup> The aim of total presentation is to establish the entire relation of the parties at the time of the transaction.<sup>443</sup> This naturally favours transactions on the discrete section of the spectrum as parties wish to avoid expectations arising outside of the contractual documents and internal planning.<sup>444</sup> Where the transaction is short in time and the goals can be measured and specified easily, presentation can be highly useful, and is marginally easier.<sup>445</sup> It must be pointed out that encouraging presentation is ideologically aligned to the individualism of the classical doctrine. Classical contract law is supposed to be, ideologically speaking, the realm of consensual obligations.<sup>446</sup> This was the fundamental dividing line between contract law and tort law.<sup>447</sup> Total presentation would mean that all obligations of the parties would be settled at the acceptance stage of the contract, and so all party obligations would be backed by explicit consent. The value of commercial certainty would certainly have been influential here, but one cannot deny the attraction to the will theorist of a norm that ensures one's future is determined solely by one's consent.

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<sup>439</sup> George M Cohen 'Interpretation and implied terms in Contract Law' (2009) Virginia Law and Economics Research Paper No. 2009-12, 6, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473854)> accessed 19 April 2018.

<sup>440</sup> Thomas, 'Custom and Roman Law' (n432) 39.

<sup>441</sup> Macneil, 'Adjustment of Long-term...' (n373).

<sup>442</sup> Ian R Macneil, 'Restatement Second of Contracts and Presentation' (1974) 60 Virginia Law Review 589, 589.

<sup>443</sup> *ibid* 593.

<sup>444</sup> *ibid* 594.

<sup>445</sup> Campbell, 'Ian Macneil...' (n401).

<sup>446</sup> Feinman, 'Relational Contract Theory In Context' (n374) 738.

<sup>447</sup> *ibid*.



Yet, marching towards this goal will automatically create difficulty for long-term relational contracts. In relational contracts, gathering information about the whole of the relationship would be prone to much error and be increasingly costly.<sup>448</sup> It is true that real life parties got over these problems and still entered into relational contracts,<sup>449</sup> however this is not to say they found innovative ways of presentiating. Rather, they simply sidelined such concerns and would instead create incomplete contracts with gaps with their expectations evolving as the relationship continued.<sup>450</sup> The amount of planning required in a long term contract would be onerous if it had to be concluded in the beginning stages of a relation prior to the point of legal enforceability. The burden of this sunk-cost would deter parties from beginning long-term relations as such transaction costs become more prevalent than estimations of unpredictable future benefit. Planning has two main goals; the determination of goals alongside ascertaining costs, and communication.<sup>451</sup> The long term nature of relational contracts means that this is an interwoven process which is constantly happening and changing as the relationship progresses.<sup>452</sup> This flexible approach is to avoid the strict liability that presentiation subscribes to, particularly where there are inconceivable risks and the market transaction costs are infinite for large-scale relationships.<sup>453</sup> The existence of the long term contract provides a puzzle on how presentiation should be dealt with, as diversion from social reality has left classical doctrine with little correlation to contractual parties' interest, expectation, or even desire.

Akin to the argument that there is no such thing as a truly discrete contract, it is also true to say that there can never be total presentiation. Macneil points out that no one was ever so naive to believe that it could be a possibility, yet it is rather concerning how much influence this impossibility has.<sup>454</sup> While business practice has moved away from the even attempting total presentiation, classical theory of free agreement pushes towards full agreement of all terms of future behaviour.<sup>455</sup> Campbell has pointed out that neo-classical analysis presumes that actors are fully rational in carrying out

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<sup>448</sup> Eric A Posner, 'A Theory of Contract Law Under Conditions of Radical Judicial Error' (Spring 2000) 94(3) *Northwestern University Law Review* 749, 750.

<sup>449</sup> *ibid* 751.

<sup>450</sup> Macneil, 'Restatement Second...' (n442) 596.

<sup>451</sup> Ian R Macneil, 'A Primer of Contract Planning' (1975) 48 *Southern Californian Law Review* 627, 634.

<sup>452</sup> *ibid*.

<sup>453</sup> David Campbell, Donald Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-operation' (1993) 20(2) *Journal of Law and Society* 166, 168-169.

<sup>454</sup> Macneil, 'Restatement second...' (n442) 594.

<sup>455</sup> Woodward, (n376) 118.

exchanges to achieve individual utility maximisation.<sup>456</sup> Rational is the fatal flaw here, as even if we assume the perfect human, there must be a fully contingent market with perfect information about not only the events of the contract but the state of the world.<sup>457</sup> Even a basic transaction cost analysis would show that this blackboard economics is a complete fiction.<sup>458</sup> Though it would be a grave error to then discard this idea completely, as presentation is still a valid human behaviour. One must recall that one of the roots of contract is humanity's awareness of the future.<sup>459</sup> This awareness gives rise to the need for reliable planning, which is inherently linked with the concept of presentation.<sup>460</sup> It would be wrong to say that merely because the extreme form of presentation is a fantasy, then it follows that all encouragement of any form of presentation is inherently dangerous. Rather, presentation is treated differently by the parties in the short-term contract and in the long-term contract. Relational contract theory does not omit this need but instead adds it as a factor for analysis of relations.

There are two doctrines which can be linked to this area. The first are the common law remedies. For the case of damages, *Robinson v Harman*<sup>461</sup> in which Parke B. set down the fundamental principle of common law which is that:

'The rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract has been performed.'<sup>462</sup>

Nothing here immediately suggests that presentation is the goal of classical law. However, *Hadley v Baxendale*,<sup>463</sup> decided six years later, would serve to narrow down what this would be. Alderson B. held that only injury that would arise naturally from the breach would be considered for damages and that special circumstances were only actionable if communicated to the other party at the time of the transaction.<sup>464</sup> For example, if a contract for sale of land were to be breached, then the action in damages would be the difference between the contract price and the market value of the

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<sup>456</sup> Campbell, 'On What is Valuable...(n358) 490.

<sup>457</sup> *ibid.*

<sup>458</sup> Ronald Coase, *The Firm, The Market and the Law* (University of Chicago Press 1986) 22.

<sup>459</sup> Macneil, *Social Contract* (n363).

<sup>460</sup> Macneil 'Contracts: Adjustment of Long-Term...' (n373) 887.

<sup>461</sup> (1848) 1 Ex Rep 850.

<sup>462</sup> *ibid* 855 (Park B.).

<sup>463</sup> (1854) 9 Ex 341.

<sup>464</sup> *ibid* 355-357.

property.<sup>465</sup> If there was an external sublease that would be lucrative for the promisee, the promisor is not liable unless that sublease was within their reasonable contemplation at the time of signing the contract.<sup>466</sup> It then follows from this that ordinary profit that is lost due to breach will come under the first limb of the test, and so is actionable.<sup>467</sup> We see that for damages to not fall outside of the remoteness test they must have been contemplated at the time of signing the contract. In other words, they must have been fully presentiated at the point of legal enforceability.

This rule has come under some confusion due to the case of *Transfield Shipping Inc. v Mercator Shipping Inc*<sup>468</sup> in which their lordships were split on how the second limb is to be considered. Lord Hoffmann applies the concept that the charterer was not assuming responsibility.<sup>469</sup> He then goes on to claim that the point of *Hadley v Baxendale* is that the courts are to follow the presumed intentions of the parties.<sup>470</sup> This is an explicit nod to will theory and could be a reason for the divergence from the normal rules of remoteness. This test was disapproved by Baroness Hale and Lord Rodgers, both of which took an increasingly narrow approach.<sup>471</sup> This confusion has led for the Singapore court of appeal to not follow the decision as the ratio seems to be up for dispute.<sup>472</sup> While this seems to have particular interest to academics who are analysing the economic efficiency of an apparent new rule,<sup>473</sup> common law has not changed nearly so dramatically. Rather it seems to be linked with the rise of contextualism. In *Supershield Ltd v Siemens Building Technologies FE Ltd*<sup>474</sup> Toulson LJ maintained that the classic rule still has authority, but that where the loss was within the scope of the duty due to the commercial background then it will not be remote even if extraordinary.<sup>475</sup> This explanation has been accepted in recent court cases and so it can be presumed to be valid.<sup>476</sup> In essence, the classical rules are still dominating with

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<sup>465</sup> *Strategic Property Ltd v O'Se* [2009] EWHC 3512 (Ch).

<sup>466</sup> *Seven Seas Properties Ltd. v Al-Essa and Another (No. 2)* [1993] 1 WLR 1083, 1089.

<sup>467</sup> *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

<sup>468</sup> [2008] UKHL 48.

<sup>469</sup> *ibid* para 23.

<sup>470</sup> *ibid* 24.

<sup>471</sup> *ibid* para 58-60 (Rodger LJ), para 93 (Baroness Hale).

<sup>472</sup> *MFM Restaurants Pte Ltd v Fish & Co Restaurant Pte Ltd* [2011] 1 SLR 150.

<sup>473</sup> Cristian Paziuc, 'Remoteness of Damage in Contract and Its Functional Equivalents: A Critical Economic Approach' (2016) 5(1) UCL Journal of Law and Jurisprudence 87.

<sup>474</sup> [2010] EWCA Civ 7.

<sup>475</sup> *ibid* 43.

<sup>476</sup> *John Grimes Partnership Ltd v Grubbins* [2013] EWCA Civ 37, para 23.

the peppering of commercial context to add legitimacy and prevent the disjunction between itself and reality tipping into absurdity.

What common law protects then is expectation damages. Of course, reliance interest can be protected by law.<sup>477</sup> Nominal/amenity damages are also within the courts remit.<sup>478</sup> But the ordinary rule is that of expectation damages. The link to presentation here is that the rules of remoteness create large incentives for parties to disclose expected loss to business partners.<sup>479</sup> The classical doctrine is relying on its assumption of contractual behaviour in which parties detail in their documents all foreseeable contingencies and all disputes are to be interpreted from this planning stage.<sup>480</sup> This is the only sure-fire way that a party can safely secure its expectations. This then seems to follow the criteria that Macneil has set in place for a system that is using total presentation as a guide stone.<sup>481</sup> The law is attempting to force parties to put as much detail as possible into a point in time that mutual assent can be pinpointed.<sup>482</sup> In doing so, it is creating a pseudo-logical law, that is precise and predictable, which theoretically allows for parties to know exactly what will happen in the future even if performance is disrupted.<sup>483</sup> It would be fair to say that the classical law is attempting to force the parties to presentiate the outcome of breach and plan accordingly.

If this is true, then the issue of *Victoria Laundry* and its fall from grace remains. The actual knowledge test has been replaced with the contextual outlook of reasonable contemplation.<sup>484</sup> The answer to this lies in the practicality of the judiciary in attempting to mitigate against the absurdities that can arise from rigid application. Presentation is an impossible task long before one reaches the extreme end of total presentation. Eisenburg has argued that empirical data shows that people are unrealistically optimistic.<sup>485</sup> This is only one of the many factors that make human presentation unreliable at the best. Alongside disposition includes framing, bounded rationality, and

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<sup>477</sup> *Anglia TV v Reed* [1971] 3 All ER 690.

<sup>478</sup> *Jarvis v Swan Tours* [1972] 3 WLR 954; *Jackson v Horizon Holidays* [1975] 1 WLR 1468.

<sup>479</sup> Alan Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies' (June 1992) 21(2) *Journal of Legal Studies* 271, 280.

<sup>480</sup> Stewart Macaulay 'Relational Contracts Floating on a Sea of Custom--Thoughts About the Idea of Ian Macneil and Lisa Bernstein' (Spring 2000) 94(3) *Northwestern University Law Review* 775, 778.

<sup>481</sup> Macneil 'Restatement Second...' (n442) 594.

<sup>482</sup> *ibid* 594.

<sup>483</sup> Macneil 'Contracts: Adjustment of Long-Term...' (n373) 864.

<sup>484</sup> *Czarnikow v Koufos (The Heron II)* [1969] 1 AC 350.

<sup>485</sup> Melvin Aron Eisenburg, 'The Limits of Cognition and the Limits of Contract' (1995) 47(2) *Stanford Law Review* 211, 216-218.

availability heuristics.<sup>486</sup> Naturally, the more long-term the commitment the more these problems amplify to the point where determining future contingences accurately is impossible.<sup>487</sup> The law provides exceptions for when its discrete doctrine could cause absurdity. A theme seems to be emerging here that law routinely makes exceptions and repressions to the point that it is questionable what dominant theme is actually present.<sup>488</sup> Nevertheless, it is certain that, prima facie, the law demands that parties put their expectations on the table at the start. Developing expectations will not be covered by the law despite their unavoidable nature in the complex reality of society.

The second doctrine that promotes presentation is that of consideration. Like damages, the basic rules would not seem to support this linkage. Consideration must move from the promisee to the promisor.<sup>489</sup> Courts will not look into the adequacy of the consideration given.<sup>490</sup> These would not seem to have any form of link to the concept of presentation. There is one snag however; consideration must be fresh consideration. In the case of *Stilk v Myrick*<sup>491</sup> two sailors deserted a ship on a voyage from London to the Baltic. The captain, unable to find replacements offered to pay the remainder of the crew a dividend to the wages of the deserters, but upon arrival refused payment. Lord Ellenborough held that there was no fresh consideration as the sailors had contracted for the full voyage, and the two deserters were no different than any other emergency that they were contracted for.<sup>492</sup> Of course, had the voyage back been more than their pre-existing duty or if they had been let free of the original contract then a new contract with fresh consideration could be made.<sup>493</sup> This link to presentation is rather clear. No extra duties or necessities done in the contractual relationship will be valid unless they have been presentiated at the offer and acceptance stage. Parties are required to foresee any abnormality in performance that might require variation and flexibility, assess the likelihood, and then qualify it in the contract with a clause. For the same reasons of normal presentation, this is impossible in practice.

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<sup>486</sup> *ibid* 214-220.

<sup>487</sup> *ibid* 251.

<sup>488</sup> Roberto Mangaberia Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 617-646.

<sup>489</sup> *Tweddle v Atkinson* [1861] EWHC QB J57.

<sup>490</sup> *Chappell v Nestle* [1960] AC 87.

<sup>491</sup> (1809) 2 Camp 317.

<sup>492</sup> *ibid* 319-320.

<sup>493</sup> *Hartley v Ponsonby* (1857) 7 E&B 872.

This impossibility is why courts were then forced to make an exception. This exception is the doctrine of promissory estoppel. This exception has generated rather remarkable academic interest, with Campbell referring to it as a monster that 'threatened to devour the whole doctrine of consideration'.<sup>494</sup> While this exception is a lethal blow to the logical coherence of classical doctrine, one should not go as far as this in describing its effects. The equitable doctrine can be first illustrated in *Central London Property Trust v HighTrees House Ltd.*<sup>495</sup> The doctrine that originated from this is rather simple; where a person makes a promise intending for it to be relied upon then the court will enforce the promise regardless of if there is consideration to support it.<sup>496</sup> This may seem at odds with the common law, which Lord Denning was aware of, leading him to stress that this is the result of the fusion of law and equity.<sup>497</sup> Almost immediately, law set to work to curtail, contain and quarantine this foreign body that had entered its doctrine. This is not to say that the doctrine was to be repealed, as later cases continued to allow its existence.<sup>498</sup> Instead, its scope had to be castrated. *Combe v Combe* distinguished *High Trees* on the ground that it could only apply as a defence and can never do away with the fundamental root of consideration.<sup>499</sup> *D & C Builders v Rees* made the point that the doctrine would only apply where going back on the promise would be inequitable.<sup>500</sup> Fundamentally, the doctrine could only be used as a shield, not a sword.<sup>501</sup> In cutting down the ambit of the potentially dangerous exception, classical law seemed to buttress its logical doctrine while allowing an escape route for the judiciary faced with abuse of the presentation-demanding system.

This quarantine would not stop the inevitable mutation that would breach containment. This mutation was *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*<sup>502</sup> The case involved a carpenter subcontracted by building contractors for £20,000. After 5 months, and payments totalling £16,200, the carpenter entered financial difficulties due to the £20,000 being undervalue. In response to this, the building firm agreed to pay a further £10,300 at a rate of £575 per flat to ensure that the work was completed. After eight

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<sup>494</sup> David Campbell, 'The Undeath of Contract...' (n403) 28.

<sup>495</sup> [1947] KB 130.

<sup>496</sup> *ibid* 134-135.

<sup>497</sup> *ibid*.

<sup>498</sup> *Re Wyvern Developments Ltd* [1974] 1 WLR 1097.

<sup>499</sup> [1951] 2 KB 215, 220-221.

<sup>500</sup> [1966] 2 QB 617.

<sup>501</sup> *Syros Shipping Co SA v Elaghill Trading Co* [1981] 3 All ER 189.

<sup>502</sup> [1989] EWCA Civ 5; [1991] 1 QB 1.

flats had been completed, only £1,500 had been paid. While the further agreement would normally be invalid under the rules of consideration, the court departed from this analysis in favour of a practical benefit test. Glidewell LJ held:

'(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'

While slightly deviant from the pure aspect of promissory estoppel, it acted in the same fashion. More so, it cloaks its language in that of consideration and self interest, as to retain its guise as being logically consistent with the principles of the classical doctrine.<sup>503</sup> This cloak has not disguised it very effectively as subsequent court cases have cast doubt on if the reasoning fits with the classical doctrine.<sup>504</sup> Nevertheless, it is still good law and is still followed in modern cases.<sup>505</sup> Yet, so is *Stilk v Myrick*, leading to confusion over if the courts will really force presentation on the parties or if they will allow for practical benefits. Campbell claims that the answer comes from the fact that these were two different contracts which needed differing treatments.<sup>506</sup> *Stilk v Myrick* clearly had a practical benefit, so attempting to distinguish the two cases on that fact alone is doomed to fail.<sup>507</sup> The case was decided, though not explicitly, based on the fact that construction contracts generally do not agree prices at the start but rather create estimates.<sup>508</sup> This was, in effect, a policy decision in which the court was concerned that too rigid a doctrine of consideration would thwart commercial parties

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<sup>503</sup> Collins, 'Competing Norms...' (n390) 68.

<sup>504</sup> *South Caribbean Trading Ltd v Trafigura Beheer* [2005] 1 Lloyd's Rep 128, para 108 (Colman J).

<sup>505</sup> *Scomadi Ltd v RA Engineering Co Ltd* [2018] FSR 14; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.

<sup>506</sup> Campbell, 'Good Faith...' (n346) 478.

<sup>507</sup> *ibid.*

<sup>508</sup> *ibid* 479.

who need to make periodic contractual modifications to keep the relationship alive.<sup>509</sup> The court would not say so openly, but it was being pragmatic as to not let technicalities rip apart the economic system.

While this mutagen of consideration should not be underestimated, it should equally not be overstated. The rule in *Pinnel's Case* maintains that part payment of debt will not be consideration for discharging liability of a greater sum.<sup>510</sup> Even post *Williams v Roffrey Bros* this is still considered good law and courts have been hesitant to extend the principle of practical consideration.<sup>511</sup> It would be even worse a mistake to assume that due to the nature of *Williams v Roffrey Bros* that courts will be more sympathetic to relational contracts that have not completed presentation. A case of note here is *Baird Textile Holdings Ltd v Marks and Spencer plc*.<sup>512</sup> In *Baird Textile* a business relationship of thirty years was put in peril by M&S unilaterally determining all the supply agreements until the end of the season. Baird Textile soon felt the sting of the classical law as no obligation could be found that was certain enough for the court to construe terms.<sup>513</sup> This shows that long, successful relational agreements can still be thwarted by classical law if the agreement does not abide by it.<sup>514</sup> Baird wanted flexibility, something that total presentation does not account for, which was the purpose of the lack of an express umbrella agreement.<sup>515</sup> This would prove to be their undoing, as the court wished for the certainty that only presentation at the time of the initial arrangement could have provided. No leeway was given to the fact that this was a relational contract whose expectations, performance, and behaviour changed over time. The classical doctrine, despite its many exceptions, still refuses to die.

As has been shown, the English system is still founded on the same classical principles that encourage discrete transactions for ideological reasons. However, such a wholesale application was bound to create significant problems when put into real world context. Ad hoc exceptions had to be utilised in order to keep the economic system from

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<sup>509</sup> Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 Law Quarterly Review 433, 438.

<sup>510</sup> (1602) 5 Coke's Rep 117a.

<sup>511</sup> *Re Selectmove Ltd* [1993] EWCA Civ 8; *Collier v P & M J Wright (Holdings) Limited* [2003] EWCA Civ 1329.

<sup>512</sup> [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737.

<sup>513</sup> *ibid* para 30.

<sup>514</sup> Catherine Mitchell, 'Contract: There's Still Life in the Classical Law' [2003] Cambridge Law Journal 26.

<sup>515</sup> John Wrightman, 'Commentary on Baird Textile Holdings v Marks & Spencer Plc' in Clare McGlynn, Rosemary Hunter, Erika Rackley, and Dame Brenda Hale, *Feminist Judgements: From Theory to Practice* (Hart 2010) 186.



collapsing.<sup>516</sup> After all, no economic system would survive for long if it was based solely on discrete transactions.<sup>517</sup> Macneil's foremost attack was on the classical laws addiction to this,<sup>518</sup> but this should never be conflated with an attack on discreteness itself. There may be valid reasons for parties to pursue discrete contracts and forgo intimate contractual relations. It would be a mistake to force parties down an unintended path and attempt to impose the norms of a unwanted relationship on them. The normative behaviour of the spectrum arises organically from the four roots of contract. Individuals simply enter into relations that suit them and what they require for their mutual benefit, be it discrete or relational. The spectrum merely serves as a useful tool of analysis and classification.

### 3.3 Essential Contract Norms

In addition to the relational spectrum, Macneil identified common contract norms that exist in contractual relations. Macneil gives a list of 10 contract norms which are deemed to exist in all contracts.<sup>519</sup> Two important clarifications must be made here. The first is that the emphasis on all contracts cannot be overstated. Relational contract theory does not limit itself to the relational contract. All contracts, no matter how relational or discrete, will contain these norms.<sup>520</sup> Some confusion may arise as certain norms have different weight, effects, and importance in contracts at one end of the spectrum when compared to contracts at another.<sup>521</sup> The second clarification is that while all the norms will exist in all contracts, this does not suggest that they exist harmoniously.<sup>522</sup> Humans are both entirely selfish and entirely social, and so it is perfectly natural that the different patterns of behaviour associated with each norm will internally conflict.<sup>523</sup> The purposes of these clarifications is because Macneil's work is so detailed and comprehensive, that its descriptive qualities can be undermined by an inability of the reader to comprehend that there is no exception to the descriptive form.

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<sup>516</sup> Gudel, 'Relational Contract Theory...' (n350) 778.

<sup>517</sup> Macneil, 'Adjustments To Long Term...' (n373) 860-862.

<sup>518</sup> Macneil, *The New Social Contract* (n356).

<sup>519</sup> Ian R Macneil, 'Contracting Worlds and Essential Contract Theory' (2000) 9(3) *Social and Legal Studies* 431, 432.

<sup>520</sup> Mitchell, *Contract Law and Contract Practice* (n338) 177.

<sup>521</sup> *ibid.*

<sup>522</sup> Ian R Macneil, 'Values in Contract: Internal and External' (1984) 78 *Northwestern University Law Review* 340, 348-350.

<sup>523</sup> *ibid.*

As a general theory it does not permit exceptions and so all forms of behaviour, even those that conflict, are represented within the norms.

The ten common norms of contract are as follows:<sup>524</sup>

1. Role Integrity
2. Reciprocity
3. Implementation of Planning
4. Effectuation of Consent
5. Flexibility
6. Contractual Solidarity
7. The Restitution, Reliance and Expectation Interests
8. Creation and Restraint of Power
9. Propriety of Means
10. Harmonisation of the Social Matrix

These norms are not static throughout contractual behaviour and may constantly change throughout the existence of the relation. Perhaps one of the most significant changes is that behaviour caused by these norms, should they start dominating the contract, begin to create further norms dependant on where they lie on the contractual spectrum. These further norms are:<sup>525</sup>

1. Enhancing Discreteness and Presentation
2. Preservation of Relation
3. Harmonisation of Relational Conflict
4. Supracontract Norms

What is then left are a possible 14 norms that exist throughout contractual relations. This is a comprehensive, to the point of being cumbersome, apparatus. There is little explanation needed to understand the temptation of scholars who, as Peter Vincent-Jones points out, distort Macneil's message by using the spectrum analysis with no consideration towards the norms that have been provided.<sup>526</sup> A further confusion arises over the fact that these are norms which are non-consented-to obligations, thus inspiring knee-jerk reactions as they are clear violations of classical doctrine's principle of

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<sup>524</sup> Macneil, 'Contracting Worlds...' (n519).

<sup>525</sup> Macneil, *The New Social Contract* (n356) 59-70.

<sup>526</sup> Peter Vincent-Jones, 'The Reception of Ian Macneil's Work...' (n347) 59.

autonomy.<sup>527</sup> This can lead to the false assumption that Macneil is claiming that all contracts must proceed down certain routes; a concept that would immediately repulse many liberal scholars. Instead, one should see their normative aspect as Speidel frames it: 'The is of actual behaviour becomes the ought by which the relationship is governed'.<sup>528</sup> The norms change the relationship due to their influencing effect just as much as the behaviour of the parties effects the norms. This unusual form of circular logic, in which the descriptive becomes the normative which becomes the descriptive, is certainly a factor in the inherent complexity of the theory. Thus, the purpose of this section is an attempt to make these norms more accessible and understandable. Without this groundwork, there cannot be any hope of a compelling argument for a relational law of contract.

### **3.3.a The Ten Common Norms**

The first norm to be examined is the role integrity of the parties. Referring back to one of the primal roots of contract, humans will necessarily form roles due to the specialisation of labour.<sup>529</sup> This particular norm is defined as the party's ability to maintain what their role is within the contractual relation, and in doing so there are three relevant factors: consistency, conflict, and complexity.<sup>530</sup> The first of these is rather important in elucidating how this norm is prevalent in the discrete transition. The role of a character in the discrete transaction, according to classical theory, is that of the individual utility maximiser.<sup>531</sup> For the transaction to remain on the discrete end, this norm requires that parties retain their roles firmly and do not develop them into primary personal relations. After all, a customer of a supermarket would find it rather surprising that their purchase of gas comes with an offer of marriage. Conflict is taken to mean the internal conflict between immediate gratification and long term goals.<sup>532</sup> This is linked to a further root of contract which is awareness of the future. Since the uses of contract are often linked to long-term needs, namely enterprise, power, and peace,<sup>533</sup> this conflict of roles is inherent in all contracts. Finally complexity of role integrity

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<sup>527</sup> Macneil, 'Values in Contract...' (n522) 367.

<sup>528</sup> Richard Speidel, 'The Characteristics and Challenges of Relational Contracts' (Spring 2000) 94(3) Northwestern University Law Review 823, 827.

<sup>529</sup> Macneil, *The New Social Contract* (n525) 40.

<sup>530</sup> *Ibid* 41.

<sup>531</sup> *ibid* 40.

<sup>532</sup> *ibid* 42.

<sup>533</sup> Havighurst, *The Nature of the Private Contract* (n380) 21.

varies based on the spectrum, however it is made more complex in the relational contract, and equally far more vital.<sup>534</sup> It is made far more complex with the introduction of habits, custom, and behavioural history of the parties that change current expectations and thus future conduct.<sup>535</sup> What is then seen are clear, defined roles under discrete contracts that match the classical doctrine's ideal transaction, and the messy, unique, and comprehensive roles that are adopted in relational contracts.

The second contract norm is that of reciprocity. How this fits into the discrete transaction is rather self explanatory. In fact, it is amplified by the classical law through the doctrine of consideration. The bargain theory of consideration, the idea that consideration is simply the purchase price of a promise,<sup>536</sup> fits into this norm snugly. If anything, the classical law allows for the widest application of this norm by the parties as humanly possible at the first stage of the transaction, since there is no requirement for reciprocal consideration to be of matching value.<sup>537</sup> Relational contracts do not get to ignore this norm simply because it is archetypical to the discrete transaction. If anything, the question becomes much more pressing and complex as throughout the period of the relation, parties will question if their input is worth the output they are receiving.<sup>538</sup> It's important to note that exchanges simply do not happen without some form of benefit being perceived by either party.<sup>539</sup> The same concept applies to the more relational of contracts, the only difference being that parties in relational contracts may accept more unequal reciprocity than the utility maximiser in the discrete transaction.<sup>540</sup> Regardless of where relations sit on the spectrum, they can never overcome the basic human quality of self-interest as few would intend for their contractual relation to be a form of self-flagellation.

Planning, particularly the kind that discreteness demands, has already been dealt with in our discussion of presentiation. However, this norm is still fundamental to the existence of long-term complex contracts on the relational end of the spectrum. Planning for the relational contract is concerned more about frameworks for the relation as opposed to

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<sup>534</sup> Macneil, *The New Social Contract* (n356) 65-66.

<sup>535</sup> Macneil, 'Values in Contract...' (n522) 362.

<sup>536</sup> Richard Austen-Baker, 'Gilmore and the Strange Case of the Failure of Contract to Die After All' (2002) 18(1) *Journal of Contract* 14.

<sup>537</sup> *Chappell v Nestle* [1960] AC 87.

<sup>538</sup> Macneil, 'Values in Contract...' (n522) 363.

<sup>539</sup> Macneil, *The New Social Contract* (n356) 44.

<sup>540</sup> *ibid* 45.

specific and measured goals and methods; such as a franchising contract.<sup>541</sup> This is partly due to the fact that reciprocity is still essential to the continuation of contractual relations. In maintaining reciprocity, planning will have to take place to determine goals and to communicate circumstances between the parties in the relation.<sup>542</sup> It is no surprise then that a lot of contractual planning happens in contractual relations that already exist.<sup>543</sup> Even should a party be acting alone, their internal planning on how to address an issue or communicate is anticipatory planning.<sup>544</sup> While formal, black letter planning might seem more at home in the discrete contract, it would be a grave error to confine it there. With distinct purpose and effects, this norm is just as comfortable in the long-term contract as in the discrete.

Consent is a quite tricky norm, and much of classical law's mishandling of this concept has already been dealt with in the previous chapter. One would be forgiven for initially thinking that the discrete contract pivots around consent while the relational contract drags its parties into a quagmire of social norms and obligations that parties could not consent to ex ante. Part of this reaction comes from the rhetorically attractive phrase 'command is slavery, contract is freedom'<sup>545</sup> though this can be a red herring. Contracts, necessarily, involve the sacrifice of future choice and the consequences of even one-off transactions can never truly be consented to in full.<sup>546</sup> To use a hyperbolic example as an illustration, suppose an American widow owns two homes, both of which are part of a housing association. A wealthy socialite offers to buy one of the houses from her, of which she accepts, the terms of the deal being an immediate transfer of title and payment. The next day, said socialite reveals to the neighbourhood that he now owns 52% of the homeowners association votes, and so unilaterally passes a motion allowing for the creation of a half-way house for convicted child rapists to be opened. This crashes the property values and leaves the widow penniless, a consequence she could not have possibly consented to. This illustration is useful as it demonstrates the ability for effected and clear constant at the time of the transaction (the selling of the house), to be the causal root of the repudiation of consent in a more relational contract (the

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<sup>541</sup> John Adam, 'Franchising, the Draftmans Contract' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996).

<sup>542</sup> Ian Macneil, 'A Primer of Contract Planning' (1975) 48 *Southern Californian Law Review* 627, 634.

<sup>543</sup> *ibid* .

<sup>544</sup> *ibid* 635.

<sup>545</sup> Havighurst, *The Nature* (n380) 31.

<sup>546</sup> Macneil, *The New Social Contract* (n525) 48-49.

housing association). Fundamentally, the point being made that consent made once is not consent eternal.<sup>547</sup>

Though this does not mean that consent is a meaningless norm confined only to a trigger purpose as Macneil has described it.<sup>548</sup> Other norms interact with the norm of consent given the western liberal society that we currently inhabit. A highly important relating norm is harmonisation of the social matrix. This links back to the first root of contract (society) as all contractual relations are tempered with the norms of society, as contracts that act outside of what is morally tasteful tend to find themselves with limited lifespan.<sup>549</sup> Even in the most discrete transaction, society must at least be willing for the contract to be enforceable for the transaction to occur along such lines.<sup>550</sup> For this reason, this norm is indefinable and must change according to the peculiar circumstances.<sup>551</sup> For relational contracts, the actors are in even more of a precarious situation, as the parties roles are that of enemies of society if they consistently breach the social matrix to a large extent.<sup>552</sup> If we were to go back to our illustration, this could be seen via neighbourhood whiplash at the socialite in question for bringing hardened criminals in their neighbourhood as well as overriding them in an abuse of power at the housing association meeting. Such whiplash may then echo and amplify its way to a legislator who then sees it as a method of obtaining votes, who then uses sovereign power to override the initial discrete contracts. While the example is hyperbolic, it is useful in showing how these norms apply in all forms of contract to the most discrete to the most relational.

Flexibility, as a norm, comes from the internal inability for humans to completely presentiate the consequences of their actions.<sup>553</sup> Discreteness does have a questionable relationship with this norm, as the purpose of discrete transactions is that parties are irrevocably bound.<sup>554</sup> Naturally, this is inherently linked with the concept of planning, which is partially why parties in long term contractual relations are more prone to make

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<sup>547</sup> *ibid* 50.

<sup>548</sup> *ibid*.

<sup>549</sup> *ibid* 58.

<sup>550</sup> Macneil, 'Values in Contract...' (n522) 361.

<sup>551</sup> Macneil, 'Reflection on Relational Contract...' (n353) 214.

<sup>552</sup> Macneil, 'Values in Contract...' (n522) 364.

<sup>553</sup> Macneil, *The New Social Contract* (n356) 50.

<sup>554</sup> Macneil, 'Economic Analysis of Contractual Relations...' (n369) 1031.

incomplete contracts.<sup>555</sup> Contracts for longer durations have far more of a need for flexibility as circumstances change with a market always in flux and needs constantly changing.<sup>556</sup> discrete contracts, unable to be formed in a vacuum, are not immune from this. Rather, their flexibility comes from the limiting of the scope of the transaction.<sup>557</sup> The more limited in scope the transaction, the less the transaction will affect future choice, and therefore the more flexibility and personal autonomy the contract provides the parties. In essence, the flexibility of the relational end of the spectrum is internal flexibility, while on the discrete end it is external flexibility.<sup>558</sup>

Contractual solidarity is perhaps an unfortunate terminological decision on the part of Macneil, as solidarity gives rise to connotations of collectivism and other anti-individualistic tendencies. Macneil simply states contractual solidarity to be 'belief in being able to depend on another'.<sup>559</sup> This is an example of Macneil using terminology that is unique to him and therefore causing confusion over his ideas, a theme that is common through his work.<sup>560</sup> A much more useful definition is that of trust. This is not necessarily trust in the other party, but trust that the contract has worth. For the discrete contract, this is trust that the legal system will enforce the contract, trust that unforeseen circumstances have been kept to a minimal through presentation, and trust that the measured and specified goals will be performed.<sup>561</sup> In essence, trust is confirmed and reinforced by sources external to the contractual relation.<sup>562</sup> For the relational contract, this trust is internal having been based off a history of cooperative behaviour and the reputations that stem from such behaviour.<sup>563</sup> Naturally, without trust that the contract is worthwhile and some mutual benefit will be obtained, no contract would be made regardless of spectrum.

The restitution, reliance and expectation interests being set as a separate norm is puzzling. While referred to as a 'linking norm',<sup>564</sup> it is hard to precisely tell what the

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<sup>555</sup> Speidel, 'The Characteristics and Challenges...' (n528) 828-830.

<sup>556</sup> *ibid.*

<sup>557</sup> Macneil, *The New Social Contract* (n525) 51.

<sup>558</sup> *ibid.*

<sup>559</sup> Macneil, 'Values in Contract...' (n522) 349.

<sup>560</sup> William C Whitford, 'Ian Macneil's Contribution to Contracts Scholarship' (1985) 3 *Wisconsin Law Review* 545, 556.

<sup>561</sup> Macneil, 'Values in Contract...' (n522) 360.

<sup>562</sup> Macneil, *The New Social Contract* (n525) 14.

<sup>563</sup> Collins, 'Competing Norms...' (n390) 68-71.

<sup>564</sup> Macneil, *The New Social Contract* (n356) 52.

purpose of a linking norm is when all norms are necessarily interwoven with each other due to humanity's impressive capacity for cognitive dissonance. If one were to take the definition of 'analysis of these interests in contracts has centred on promises'<sup>565</sup> then these norms are really a hybrid of the consent norm and the reciprocity norm, but merely in the future tense. Of course, these comments were made in light of the influential Fuller and Perdue article which examined the three interests in damages of contracts.<sup>566</sup> However, while Macneil aptly shows how this paper does not merely apply to discrete contracts only, there is little to distinguish this norm as merely an explanatory extension of further norms.<sup>567</sup> This matter is further confused by the addition of the four further non-common norms which would wholly encompass what is meant by the restitution, reliance and expectation interests. The only relevance that Macneil seems to impart on this strand of reasoning is that legal analysis can properly stop when examining these norms alone.<sup>568</sup> If anything, this just further serves the argument that these interests are not norms but rather a method of describing the effects of a grouping of norms, including effects that may require legal protection.

With power comes great terminological confusion. Macneil's definition of power predates relational contract theory, as he first uses it to describe legal power: The power to obtain legal enforcement.<sup>569</sup> Macneil goes further and describes the norm of restraining power, particularly by the state, which also interplays as all contracts both create and restrain power.<sup>570</sup> One may wonder how the paradox of contracts both promoting and restricting power can work; the answer lies in the fact that the other common norms are still present and tamper with this norm.<sup>571</sup> In the discrete, the powerful can use legal power to its fullest extent, thus engaging the social matrix of the legal system and its doctrinal preference for the discrete transaction. There already exists empirical evidence of strategic legal bullying in companies,<sup>572</sup> and these problems are only amplified where there is no norm to restrict the power given. More so, those who are powerful can be assured of maintaining power by monopolising the usage of

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<sup>565</sup> *ibid* 53.

<sup>566</sup> Lon Fuller, William Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52.

<sup>567</sup> Macneil, *The New Social Contract* (n356) 53-56.

<sup>568</sup> *ibid* 56.

<sup>569</sup> Macneil, 'Power of Contract ' (n340).

<sup>570</sup> Macneil, *The New Social Contract* (n356) 56-57.

<sup>571</sup> *ibid*.

<sup>572</sup> David Orozco, 'Strategic Legal Bullying' (2016) *New York University Journal of Law and Business* 137.



legal power as such power comes only from right bargained for in the initial deal; a deal the powerful have much more resources to skewer to their favour.<sup>573</sup>

However, it would be delusional to attempt to paint relational contracts as being free of power abuse in favour of benevolent relationships. In fact, the more investment made into the relation, be it monetary, psychic, or personal effort, then parties might find themselves trapped by 'golden handcuffs'.<sup>574</sup> This can be significantly more devastating for parties compared to merely losing expectation losses that were presumed off a spot contract. No contractual relation is then free from the norm of power though how norm works on either end of the spectrum is inverted. In the discrete contract, the source of power is the internal contractual document, and its enforcement is the external legal system. In the relational contract, the source of power are ancillary to the original transactions and can be external to the relation (such as market reputation), however the enforcement is through internalised bullying.

Finally, the proprietary of means is the final common contract norm and the second that seems to simply be a hybrid of other norms. The definition of Macneil does not help this matter as its definition is confined to a footnote and even then the definition seems to be that procedural justice is not enough and the concept is linked to good faith.<sup>575</sup> From Macneil's comments on what this norm means to the discrete contract and to the relational contract, one can assume what Macneil meant here was determining acceptable means to the desired goal.<sup>576</sup> This was necessarily be the good faith of the parties to, at the very least, not commit fraud or murder to enforce an exchange. If we were to take the definition of good faith to parties not behaving with untrammelled self interest,<sup>577</sup> then one cannot see how this does not fit in wholly by other norms. The social matrix will naturally determine the rules of the game and therefore the proprietary of means, a fact acknowledged even by the most liberal of academics.<sup>578</sup> For example, in western liberal democracies, property interests are sacrosanct. Murder, theft, and physical duress are clamped down upon massively. The only discernable authority on what means are proper is that of the social matrix, and so proprietary of means is, in

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<sup>573</sup> Robert Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) *Wisconsin Law Review* 565, 570.

<sup>574</sup> Collins 'Competing norms...' (n390) 75.

<sup>575</sup> Macneil, 'Values in Contract...' (n522) 347, ft20.

<sup>576</sup> *ibid* 360-363.

<sup>577</sup> Campbell, 'Good Faith...' (n346) 483-485.

<sup>578</sup> Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1992) 15.

essence, only the method of which the social matrix implements itself into contractual relations.

### 3.3.b Extreme Contract Norms

The remaining four norms are not common norms found in all contracts, but rather norms found closer to the ends of the contractual spectrum. One of these (Enhancing discreteness and Presentation) is found towards the discrete end of the spectrum while the remainder are found towards the relational end of the spectrum. However, it will be shown that these supposedly separate norms are really just mere hybrids of the ten contract norms. Attempting to treat them as if they are separate will only cause more confusion. A great example here is the discrete norm, that Macneil defines himself as :

'The discrete norm is the product of great magnification of two of the common contract norms: Implementation of planning and effectuation of consent. Indeed, the discrete norm could in some ways be analyzed by exploring these common norms further.'<sup>579</sup>

Macneil's defence of separating this as a norm is that the more one goes to the extreme end of the discrete end, the more these two norms merge at the expense of others.<sup>580</sup> In essence, the norms begin to change the entire characteristic of the contract.<sup>581</sup> This characterisation does seem to have some tacit approval from the relational field of academia, with Mitchell saying that the norm is a conservative value for the status quo.<sup>582</sup> Unfortunately, this displays a misunderstanding of what norms are in the field of sociology. Norms, particularly social norms, are fundamentally about what ought and ought not be done in a pattern of human behaviour.<sup>583</sup> These then guide patterns of behaviour via offering incentives or disincentives to going down said path.<sup>584</sup> More importantly, they provide social meaning to actions and behaviour that is then translated into signals for other people who are also party to the social norms.<sup>585</sup> With this in mind, it is clear to see that what Macneil is describing is the meaning that the two common norms of contract make when they are put into a certain situation: that of an

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<sup>579</sup> Macneil, *The New Social Contract* (n356) 59-60.

<sup>580</sup> *ibid.*

<sup>581</sup> *ibid.*

<sup>582</sup> Mitchell, *Commerical Expectations...* (n520) 179.

<sup>583</sup> Cass Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903, 914.

<sup>584</sup> *ibid* 915.

<sup>585</sup> *ibid* 925.

as-if-discrete contract. The more that parties move towards this end of the spectrum via their desired choices, the more these social norms change their meaning as to acquire additional weight in the minds of the parties. This does not make for a new norm, but rather as further evidence that these two common contract norms take on a dominating position when in a habitable environment. The discrete norm is merely the effect of a combination of norms and not a norm of itself.

The first of the relational norms, that of preservation of relation, falls into the same trappings. As defined by Macneil as the 'intensification and expansion of the norm of contractual solidarity', this norm encompasses the preservation of individuals as well as the preservation of the collective organisation.<sup>586</sup> Yet, it is difficult to see how this would not simply fall under the norms of role integrity and reciprocity, both of which interplay at a far higher rate when under a relational contract. Additionally, harmonisation of relational conflict seems to merely be a method of this norm, a fact Macneil recognised.<sup>587</sup> If anything, planning becomes more involved as to how to deal with relational conflict in the future, meaning that another common contract norm can be used to describe both these phenomenon.<sup>588</sup> Sympathy begins to emerge for scholars who find this work impenetrable, as norms begin to overlap to such degrees that one begins to doubt the necessity for the separation of the common norms to begin with.

The final relational norm is that of supracontract norms. This is rather difficult to examine as Macneil does not actually give a definition of what these are. In *Values of Contract* he claims that their values are too open-ended are broad to deal with in the article.<sup>589</sup> In *The New Social Contract* he merely quotes his previous work to claim that they are norms that are not particularly contractual.<sup>590</sup> In *Adjustment of Long-term*, whose only linkage here is that *New Social Contract* quoted it, examples of justice, liberty, dignity, and equality are mentioned.<sup>591</sup> If we combine this with the example used of Maoism in communist China as a supcontract norm,<sup>592</sup> this confusion only amplifies. The confusion is not over what this norm encompasses, but rather how this is any different from the social matrix. It would seem to be a tautology that when relations

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<sup>586</sup> Macneil, *The New Social Contract* (n356) 66-67.

<sup>587</sup> *ibid.*

<sup>588</sup> Macneil, 'A Primer of Contract Planning' (n542) 676-702.

<sup>589</sup> Macneil, 'Values in Contract...' (n522) 363.

<sup>590</sup> Macneil, *The New Social Contract* (n356) 70.

<sup>591</sup> Macneil, 'Adjustment to Long Term...' (n373) 898.

<sup>592</sup> Macneil, 'Values in Contract...' (n522) 365.

between two parties become more intense that social norms dictating party behaviour would also become more intense. Inherently, nothing in this norm is anything other than what is proscribed in the norm of harmonisation with the social matrix. The only difference is that in a different environment the norm creates new meanings; an ordinary behaviour of any norm.

The purpose of this section was to elucidate Macneil's normative theory. After all, it is a critical part of Macneil's theory that the norms are just as important as the relational spectrum.<sup>593</sup> The only way that this has been achieved is through a process of creative destruction. Macneil had a talent for comprehensiveness, however his classificatory apparatus was perhaps a bit too rich. The four extreme contract norms are perhaps a great reminder of over-complication. As a useful historical analogy: Pre 1500s smallpox was prevalent throughout Western Europe; occasionally being a nuisance but its effects were often contained and managed. Post 1520s, it spread to Latin America, where the environment allowed it to dominate and its effects were amplified to apocalyptic proportions. Yet, it was still smallpox, not a new disease. For the same reasons, preservation of relations, the discrete norm, or supracontract norms are still only contractual solidarity, planning, and the social matrix respectively. Their effects and how their effects change the landscape that they are in does not make them any different from their origins. In pretending that they are, we miss the analytic opportunity to discover the full extent that these norms can effect behaviour when under certain situations.

### **3.4 Academic Problems and a Possible Solution to Failings**

Despite the apparent descriptive nature of Macneil's work, there has been a lacklustre acceptance of the contractual reality. Even with a high level of reference and citations, there is little meaningful engagement with the postulations of the theory and what its effects on law and contractual interpretation could mean.<sup>594</sup> There are two causes of this, one external to the theory and one internal to the theory. The external flaw is with regards to the inherent bias within academia to frame relational theory as itself, that is to say a theory that normatively provides for outcomes and demands contracts be decided accordingly. One should not be overly critical for this conclusion being reached first,

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<sup>593</sup> Vincent-Jones, 'The Reception of Ian Macneil's Work...' (n347).

<sup>594</sup> Feinman, 'Relational Theory in Context' (n374) 737.

after all the entire classical theory of contract was formed by imposition of ideology instead of the organic evolution of case law.<sup>595</sup> The internal flaw is the overly-complicated nature of Macneil's work few scholars attempt to engage with it.<sup>596</sup> Notice that in the preceding section, entire norms had to be struck out of Macneil's initial analysis as to avoid heavy confusion and convolution. It is posited that by mending the internal flaw in Macneil's work, then the challenges that are posed by misrepresentation will be mitigated even if not eradicated.

### 3.4.a External

Perhaps the first, and easiest, criticism of Macneil's work to rebut is the accusation that it encourages paternalism, socialism, and state intervention.<sup>597</sup> Teubner criticises the theory with a number of misconceptions, such as claiming that it encourages communitarianism.<sup>598</sup> He makes the rather amusing mischaracterisation of:

'Relational contracting is out of step with today's realities if it is understood as the warm, human, cooperative interpersonal relation that overcomes the cold economic instrumentalism with a communitarian orientation, as market transactionalism with a human face.'<sup>599</sup>

Campbell rightly points out that this is nonsense and that Macneil has always kept a kernel of discreteism and has readily accepted that there are contracts of which it is better to have a highly competitive relationship.<sup>600</sup> This accusation seems particularly puzzling since from the onset of relational contract theory Macneil has stressed that humans think selfishly and are by nature selfish, individualistic, creatures.<sup>601</sup> Cooperation is simply the method of which humans use contract to further their needs for enterprise, power, and peace.<sup>602</sup> It is remarkable how this could not be viewed as a self-interested desire that relational contract norms not only allow but can actively encourage. While the criticism could have ended with simple rebuttal, Campbell worried that such attacks can fuel the reaction of classical defenders to reject the

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<sup>595</sup> Warren Swain, *The Law Of Contract 1670-1870* (Cambridge University Press 2015).

<sup>596</sup> Feinman, 'The Reception of Ian Macneil's Work...' (n344) 63.

<sup>597</sup> Campbell, 'Good Faith...' (n346) 483.

<sup>598</sup> Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) *Social and Legal Studies* 399, 405.

<sup>599</sup> *ibid.*

<sup>600</sup> David Campbell, 'The Limits of Concept Formation in Legal Science' (2000) 9 *Social and Legal Studies* 439, 445.

<sup>601</sup> Macneil, *The New Social Contract* (n356) ; Ian R Macneil, 'Values in Contract' (n522).

<sup>602</sup> Havighurst, *The Nature of the Private Contract* (n380) 21.

prognosis of relational contract theory.<sup>603</sup> He was right to be worried. Barnett has encouraged such attacks by claiming that Macneil is communitarian for not placing consent first, for not offering a social theory of property, and his ill-treatment of contract freedom.<sup>604</sup> Like Teubner, this is an attack on an ideology that has been construed by the reader of Macneil's work, and not Macneil himself.

To cite a cliché, those who do not read history are doomed to repeat it. Barnett's argument should not be taken too seriously for the same reason as Teubner's: it is based on an incomplete understanding of the theory as a whole. This is evident from Barnett's statement that:

'First, as just explained, Macneil entirely fails to take into account the vital social functions performed by the liberal principle of freedom from contract, a subject I have discussed at length elsewhere. Consequently, his relational theory of contract makes no effort to deal with the danger of contractual overenforcement—that is, the enforcement of commitments that ought not be enforced. Without considering these dangers, the advantages of liberal contract theory and doctrine that, at least in part, address this problem will be seriously underestimated.'<sup>605</sup>

This entire argument falls at the point at which we remember that harmonisation with the social matrix is a fundamental and common contract norm. As mentioned before, this lacks universal definition, but in western liberal societies would almost certainly include factors such as freedom of contract, judicial capacity, and other liberal ideals.<sup>606</sup> So when Barnett attempts to claim that Macneil fails to take into account the 'vital social functions' of the liberal principle he could not be more mistaken. No theory that places society at the heart of contract could ignore that western society puts immense value on party autonomy and the freedom of individuals to contract. Such entrenched social norms will undoubtedly influence party behaviour, and thus are part of any analysis of contractual relations. The root purpose of relational contract is simply to act as a more accurate piece of apparatus for examining exchange relations.<sup>607</sup> It gives no conclusions based on this, but the applications of the theory are what lead to conclusions.<sup>608</sup>

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<sup>603</sup> Campbell, 'The Limits of Concept...' (n600).

<sup>604</sup> Randy Barnett, 'Conflicting Visions: A critique of Ian Macneil's Relational Theory of Contract' (1992) 78(5) *Virginia Law Review* 1175.

<sup>605</sup> *ibid* 1197.

<sup>606</sup> Macneil, 'Reflection on Relational Contract...' (n353) 214.

<sup>607</sup> *ibid* 212.

<sup>608</sup> *ibid* 212-215.

Macneil's apparatus is ill-suited to the creation of a simple and quick formula to produce results, rather you get rich analysis and accurate information.<sup>609</sup> Barnett is guilty of doing what the classical doctrine did many centuries ago; attempting to shoe-horn party behaviour into a model which reflects ideological purity.

It does seem comical that an ill-fitting grasp of the concepts of relational contract theory would equate to it being labelled as ideologically opposed to liberalism. There is an explanation for this however. The classical model is inherently linked with individualism and the idea of contractual liberty.<sup>610</sup> These thoughts include strong feelings about anti-state intervention and laissez-faire stretching as far back as Mill.<sup>611</sup> The classical doctrine's purpose, therefore, was not to examine actual party behaviour but to act as a surrogate for liberal ideals. In doing so it detached itself from the social reality when convenient to do so, all the while touching base to ensure it did not stray into absurdity.<sup>612</sup> Then comes a rival program that examines social reality and points out that the classical program does not connect with it. It is a perfectly natural response, also known as a siege mentality, to portray the assaulter as an enemy to all things valuable. This is understandable as the classical doctrine was just coming out of a siege based on Gilmore's attacks.<sup>613</sup> It is an easy, and common, mental short-cut to automatically substitute hard questions for easy questions if we cannot come up with a satisfactory answer.<sup>614</sup> As a self-defence mechanism, the question of 'does the classical doctrine represent human behaviour' was replaced with 'should classical doctrine accommodate [insert out of context quote]'. With this in mind, it is easy to see how contractual solidarity, cooperation, or social obligation were easily distorted.

Given the link with liberalism and non-state intervention, it was then a logical step that the counter-argument to Macneil's criticisms would implicitly assume that relational contract theory was premised on changing the law towards state intervention. The issue of 'should be a relational law of contract' will be answered elsewhere, however it is worth noting here that Macneil never created a theory that inherently called for a change

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<sup>609</sup> Stewart Macaulay 'Relational Contracts Floating on a Sea of Custom -- Thoughts about the Ideas of Ian Macneil and Lisa Bernstein'(2000) 94(3) Northwestern University Law Review 775, 783.

<sup>610</sup> Anat Rosenberg 'Contract's Meaning...' (n349).

<sup>611</sup> John Stuart Mill, *Principles of Political Economy* (Originally published 1848, University of Toronto Press 1965) 936-950.

<sup>612</sup> Feinman, 'Relational Contract Theory in Context' (n374) 738.

<sup>613</sup> Charles Fried, 'Contract as Promise Thirty Years On' (2012) 45(3) Suffolk University Law Review 961.

<sup>614</sup> Chunlin Leonhard, 'Dangerous or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law' (2017) 91(2) St. John's Law Review 385, 397-398.

in the law. Macneil was so beset by this assumption that he jokingly threatened to duel anyone who would say that his theory necessarily implies a change to the law.<sup>615</sup> Similar to the argument of ideology, Macneil's use of the apparatus he has given can be used for the purpose of encouraging the classical doctrine, or at least the goals that are behind it, as other authors have shown by example.<sup>616</sup> Of course, a reason why one may think that a change in the law is implied is due to the fact that relational contract theory takes into account many humanistic factors, in sharp contrast to current legal analysis.<sup>617</sup> An understandable interpretative mistake is still, however, a mistake and we are close to the point that academia should not take such allegations seriously.

As a final point, many relationalists have done themselves no favours in this matter. Comments such as 'Classical Contract and Relational Theory are rival programmes and cannot ultimately co-exist'<sup>618</sup> can be highly exploited by laissez-faire liberals into painting the theory into something it is not. As an explanatory note, in terms of analysis, Campbell does have the point that one cannot simultaneously accept relational contract theory as a description of contractual relations and simultaneously stipulate that current contract doctrine follows reality. One must give way to the other if seeking law that follows contractual reality is considered desirable. But this nuance is not universal among, even modern, relationalists. Tan's 2019 paper gives a false dichotomy of the consequences of the theory: 'Do we need to re-interpret existing doctrines, or is more radical reconstruction required'.<sup>619</sup> The underlying implication is that relationalists must demand for some change in the law, with the most minimal effort being to re-interpret doctrine to add small normative/value changes on a case by case basis.<sup>620</sup> This does nothing but add to the frustration of those who accept that the current law is disjointed from reality, but accepting that the cure to this is worse than the disease. One can accept that the classical doctrine should continue to exist, free of relational influence, and still believe that relational contract theory is intellectually superior in its description of contractual relations. While classical theory is bankrupt, the doctrine is a different

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<sup>615</sup> Ian R Macneil, 'Relational Contract Theory: Challenges and Queries'(2000) 94(3) *Northwestern University Law Review* 877, 899.

<sup>616</sup> Richard Austen-Baker, 'Consumer-Supplier Relations, Regulation and Essential Contract Theory' (2008) 24 *Journal of Contract Law* 60.

<sup>617</sup> Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' (n606).

<sup>618</sup> David Campbell, 'The Relational Constitution of the Discrete Contract' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 42.

<sup>619</sup> Zhong Xing Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 38 *Legal Studies* 98, 100.

<sup>620</sup> *ibid* 106-107.



matter, and changes to the law's machinations are not an inherent proscription of relational contract theory.

### 3.4.b Internal

The external backlash could be stripped from its emotional knee-jerk with more further reading of the basics of relational contract theory (as opposed to scholars seeking to use it to advance agendas). After all, there will always be scholars who use relational contract theory to promote general paternalist agendas, and in doing so undermine the theory's descriptive claims.<sup>621</sup> However, interpretation of the base theory has proven difficult. Macneil's work is often dubbed far too complex to grasp.<sup>622</sup> Objectively, it is rather difficult to read for many contract teachers, which limits its impact upon future generations.<sup>623</sup> Part of this is due to the fact that the work does not automatically lend itself to the production of doctrine, which causes issues for academics and teachers wishing to contribute work useful for practice.<sup>624</sup> There is some truth to this statement as Macneil's comprehensive works seem to have less critical engagement. Posner, in his attack of Macneil, makes the almost unbelievable claim that relational contract theory has little content.<sup>625</sup> One quickly understands how Posner reached this conclusion with a quick look at the bibliography: Only three works of Macneil are cited, two of which are unrelated to relational contract theory, and the third is a reflection.<sup>626</sup> Yet the non-engagement carries on. Recently in 2016, a paper by Kar was published outlying a potential new theory of contract, yet it completely omits any discussion of relational contract theory.<sup>627</sup>

This puts relational contract theory in a catch-22 situation. To not be misunderstood, it must be read. However it is too complex to be read without significant amounts of error. A potential solution to this problem comes in the form of comprehensive contract theory

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<sup>621</sup> David Campbell, 'The Incompleteness of Our Understanding of the Law and Economics of Relational Contract' (2004) 2004(2) *Wisconsin Law Review* 645, 661.

<sup>622</sup> William Whitford, 'Ian Macneil's Contribution to Contracts Scholarship' (1985) 1985(3) *Wisconsin Law Review* 545, 556.

<sup>623</sup> *ibid* 555.

<sup>624</sup> Feinman, 'The Reception of Ian Macneil's...' (n344) 63-64.

<sup>625</sup> Richard Posner, 'The New Institutional Economics Meets Law and Economics' (1993) 149(1) *Journal of Institutional and Theoretical Economics* 73, 84.

<sup>626</sup> *ibid* 87.

<sup>627</sup> Robin Kar, 'Contract as Empowerment' (2016) 83(2) *University of Chicago Law Review* 759.

by Austen-Baker.<sup>628</sup> In this paper, Austen-Baker outlines 4 contract norms that are to take the place of Macneil's 10 common and 4 extreme.<sup>629</sup> These are:<sup>630</sup>

1. Preservation of Relation
2. Harmonisation with the Social Matrix
3. Satisfying performance expectations
4. Substantial fairness

Characteristically of relational contract theory, terminology has become an issue again. While Austen-Baker uses the same terminology of two of Macneil's norms, they do not mean the same thing. Austen-Baker defines it as the same as contractual solidarity as well as including elements of planning and reciprocity, therefore compiling three norms into one in a way that can be logically understood.<sup>631</sup> Harmonisation with the Social Matrix includes not only societal morals but also local social expectations.<sup>632</sup> While a lot of work and effort is given to the role of law and if legally prohibited or compromised relations can survive,<sup>633</sup> this is irrelevant to the discussion of theory. It need only be said that the root of contract is society, and so every norm known to humanity will respond, and be responded to, by contractual behaviour.

Satisfying performance expectations seems to be a bit of a slam-dunk. In one sentence, the norms of planning, reciprocity, consent, power, and role integrity can all be summarised and logically categorised.<sup>634</sup> After all, parties plan to get their expectations, what they expect is based on their roles, they then consent to do so while restraining the power of other parties that could threaten their expectations. Parties, simply, would not be able to make expectations without all these being satisfied, and people do not contract unless there is expectation of some form of profit.<sup>635</sup> As all of these are stepping stones as to eventually reach that profit, they can be better understood as key characteristics of this norm, rather than norms of themselves. This is especially true, as

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<sup>628</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216.

<sup>629</sup> *ibid* 221.

<sup>630</sup> *ibid* 221-222.

<sup>631</sup> *ibid* 222-225.

<sup>632</sup> Richard Austen-Baker, Qi Zhou, *Contract in Context* (Routledge 2015) 88.

<sup>633</sup> *ibid* 88-92.

<sup>634</sup> Austen-Baker, 'Comprehensive Contract Theory...' (n628) 232-237.

<sup>635</sup> David Campbell, 'What do we Mean by The Non-Use of Contract' in Jean Braucher, John Kidwell, William Whitford (ed), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart Publishing 2013) 166-169.

Macneil recognised, that the further one gets down the spectrum the more these norms distort and change their effects drastically.<sup>636</sup> Finally, substantive fairness is an interesting application of reciprocity and the social matrix, essentially acting as an internal form of both.<sup>637</sup> While Austen-Baker does not explicitly say this, what can be deduced from his reasoning is that this norm essentially is the internal moral taste-test that parties undergo throughout the relation. Certain relations have a higher tolerance for unfairness at the discrete end, while the other end expects full good faith from their partners without it being an expectation interest.

The main problems of Macneil's rich classificatory apparatus was that it was too rich. It, ironically, failed to harmonise with its own social matrix in its publication. Its complexity made it comprehensive, but also challenging to read and even more so not to misinterpret. These reasons forced it into being shunned by mainstream academia. The solution that has been presented is that of the four norm model. This allows easier cognition of the relational model, so that whomever uses it, and for whatever purpose, will be able to do so with far more ease and less likely to make a significant cognitive error. This does not make Macneil's norms useless, however, as they are still specific subsets of the four norms and to proper analysis the four norms, similar questions will need to be asked. Macneil made many specific trees, but when trying to convince someone of a forest, grouping is essential.

### **3.5 Conclusion**

Ian Macneil's theory was an earthquake for bringing reality back into contract law. The analogy is appropriate, as an earthquake will only move the ground by only a few millimetres yet cause significant structural damage to anything built on the land. The classical doctrine has been severely undermined by relational contract theory. Classical law, founded on ideology, was too separate from reality to be an accurate representation of contractual behaviour.<sup>638</sup> In its march towards ideological purity, it had forgotten the roots that had made contract and the contractual norms that had steamed from these. This encouraged classical law to demand discreteness and full presentation, despite the fact that the pure version of these was impossible for any contract to have.<sup>639</sup> The

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<sup>636</sup> Macneil, *The New Social Contract* (n601) 36-71.

<sup>637</sup> Austen-Baker, 'Comprehensive Contract Theory...' (n628) 237-241.

<sup>638</sup> Feinman, 'Relational Contract Theory in Context' (n374) 738.

<sup>639</sup> Macneil, 'Restatement second...' (n442) 594.

reasoning of which is not unfamiliar. Liberals of the classical era came out of societies of heavy state intervention.<sup>640</sup> Some sympathy must be given to their natural response to then view society as the enemy,<sup>641</sup> proclaiming that it does not exist, as silly as this proposition may be. The conclusion of this reasoning meant that the more that the contract doctrine met reality, the more it was found to be nonsensical, distinct, and often irrelevant.

Yet, relational contract theory was unable to sweep the field and proclaim dominance. A lot of blame for this lies on the theory itself. Macneil went to pains to describe reality. He wished for an apparatus that was free from bias.<sup>642</sup> In doing so, he wanted it as detailed and comprehensive as possible in order to get the most reliable results. This, ironically, was disharmonious with the social matrix. Liberal academia was about getting results, something his theory could not do easily.<sup>643</sup> Additionally, classical doctrine is simplistic and easy to understand.<sup>644</sup> Compare this to Macneil's 12 axis for how a contract fits on the spectrum and a further 10 norms all contracts have and then an additional 4 extra norms to take effect where contracts near the polar edges. Macneil's work became unattractive, tedious and often repetitive. As has been shown, there are norms which are, in all honesty, just expanded or specific versions of different norms. Some norms have names which highly confuse the liberal reader into thinking that Macneil was promoting a form of left-wing utopia. None of this was Macneil's intention, but that does not escape that this was the effect.

Luckily, there is a simple answer to these issues, which is a further understanding and engagement with relational contract theory. However, it is a rather cheap shot to critics of a theory that they should just read more of what is, admittedly, a convoluted account of contracting behaviour. The purpose of this chapter was to boil down the very essentials and to make 40 years of work by scholars into something that is accessible. All contracts are embedded in relations. All contracts have common norms just to function, but how these norms operate depend on the level of relations the parties are in. In understanding these two points, parties can look to see what behaviours will satisfy norms and move the relationship in the direction they want, be that more relational or

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<sup>640</sup> Morris Cohen, 'The Basis of Contract' (1933) 46 Harvard Law Review 553, 559.

<sup>641</sup> *ibid.*

<sup>642</sup> Macneil, 'Reflection on Relational Contract...' (n353) 214.

<sup>643</sup> Feinman, 'The Reception of Ian Macneil's Work...' (n344) 63.

<sup>644</sup> Cimino 'The Relational Economics...' (n342).

more discrete. This is no academic fantasy, and is currently already being done by business groups.<sup>645</sup> Above all, relational contract theory needs to elucidate one key feature; there is no set answer. All ideologies can use this system, be they liberal or communitarian, for whatever purpose they desire.

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<sup>645</sup> David Frydlinger, Tim Cummins, Kate Vitasek, Jim Bergman, 'Unpacking Relational Contracts: The Practitioner's Go-To Guide for Understanding Relational Contracts' (2016) Thalm College of Business <[http://www.vestedway.com/wp-content/uploads/2016/10/Unpacking-Relational-Contracting\\_v19.pdf](http://www.vestedway.com/wp-content/uploads/2016/10/Unpacking-Relational-Contracting_v19.pdf)> Accessed 20 April 2018.

## 4: Chapter Four: Non-Use of Contract

### 4.1 Introduction

The non-use of contract is an interesting misnomer. Formal contracts, and the use of contractual relations, are not experiencing a death. Rather, the focus in contractual relations has a tendency to diverge from legality. As Macaulay observed in the 1960s, commercial parties are increasingly apathetic about the law during the performance stage of their contractual relationships.<sup>646</sup> The significance of documents in contractual relations is by no means as sacred as it is in the classical law of contract.<sup>647</sup> Often, markets operate without the direct assistance of legal systems such as courts or even enforceable contracts.<sup>648</sup> Consequently the discussion is not the 'non-use of contract', but the non-use of contract law. Contract seems to be perfectly alive and well but after negotiations have concluded there seems to be considerable indifference towards the legal obligations that parties found themselves in.<sup>649</sup> Of course, this comes with the caveat that performance expectations are being fulfilled as where parties no longer sense value in continuation, legal remedies become relevant.<sup>650</sup> It is at the relationship breakdown, and not performance, that law seems to influence party behaviour; a reality dissonant from classical law's form-based hierarchy.

The questions this chapter will explore are: why business is apathetic to the law, does this apathy represent a problem between matching the law with commercial expectations, and would the law be better off harmonising itself with reality by the introduction of a good faith requirement. Such questions need to be asked because classical law is accused of being utterly unsatisfactory in the governance of relational contracts.<sup>651</sup> One could presume that commercial law which lacks legitimising commercial engagement is due to the law being unsuitable for commercial interest. Yet

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<sup>646</sup> Stewart Macaulay, 'Non-Contractual Relations in Business' (1963) 28(1) *American Sociological Review* 55.

<sup>647</sup> Catherine Mitchell, *Contract Law and Contract: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 104.

<sup>648</sup> Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the Real Deal and the Paper Deal' (2009) 29(4) *Oxford Journal of Legal Studies* 675, 679.

<sup>649</sup> Daniel Keating, 'Exploring the Battle of Forms in Action' (2000) 98 *Michigan Law Review* 2678, 2696-2700.

<sup>650</sup> Andrew Hutchinson, 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134(2) *South African Law Journal* 296.

<sup>651</sup> David Campbell, 'What Do We Mean By the Non-Use of Contract' in Jean Braucher, John Kidwell, William Whitford, *Revisiting the Contracts Scholarship of Stewart Macaulay: On The Empirical and The Lyrical* (Hart Publishing 2013) 182.

this assumption is a premature one that lacks developed analysis. Exploring the non-use of contract shows that trust and relational sanctions are a fundamental reason for the lack of legal enforcement. While contract law is often not attuned to the reality of contracting, it has not created a perilous situation for relational contracts.

#### 4.2 The Non-Use of Contract Law

It would be disingenuous to begin any section regarding the non-use of contract without reference to Stewart Macaulay. In 1963 he published 'Non-Contractual Relations in Business' regarding his data regarding interviews with 68 business men and lawyers from 43 separate companies.<sup>652</sup> His findings were that merchants usually did not drag disputes towards courts or bother with legal enforceability.<sup>653</sup> There was distrust over the question of legal aid as one respondent put:

'You can settle any dispute if you keep the lawyers and accountants out of it. They just do not understand the give-and-take needed in business.'<sup>654</sup>

The statistics for lawyers seeking to make a debut in court are not encouraging, with a law firm of 40 lawyers handling only 6 court cases regarding contract problems in the span of a year.<sup>655</sup> Noteworthy here was the cited annoyance of in-house counsel of firms claiming that business-people would create contracts too casually, often over the phone with no regard for contingency planning or legal enforceability.<sup>656</sup> The explanation given for this laissez-faire attitude was due to the prevalence of non-legal sanctions, such as reputational damage, loss of future profit from lost deals, and social backlash within a group.<sup>657</sup> While this is disruptive to the idea that business people use the law of contract religiously, Mitchell warns against conflating these findings with the idea that law had no-relevance.<sup>658</sup> Rather that there was an interplay of factors involved in using what form of measure, whether legal or non-legal, would be used to govern a transaction.<sup>659</sup> Nevertheless, the fact that non-legal sanctions play a significant part in

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<sup>652</sup> Macaulay, 'Non-Contractual Relations' (n646).

<sup>653</sup> *ibid* 61.

<sup>654</sup> *ibid*.

<sup>655</sup> *ibid* 61-62.

<sup>656</sup> *ibid* 60.

<sup>657</sup> *ibid* 63-64.

<sup>658</sup> Mitchell, *Contract Law and Contract Practice* (n647) 69.

<sup>659</sup> *ibid*.

the day-to-day running of the business is a strong blow to classical contract's position of dominance in contractual relations.

There is little reason to believe that this was an American phenomenon. Beale and Dugdale tested the hypothesis with English manufacturing companies in 1975.<sup>660</sup> Their findings were similar as the merchants interviewed claimed little need to fall back on legal rights.<sup>661</sup> On the question of payment, a fairly salient contract term, most companies experienced late payments frequently.<sup>662</sup> Moreover, in the event of defects of products, consequential losses were very rarely paid.<sup>663</sup> It was a trade custom that the most a seller would do would be to take on the transport and labour costs to make a replacement despite it not being in the warranty to do so.<sup>664</sup> This evidence shows a direct contradiction with the current classical law. *Hadley v Baxendale* clearly has consequential losses within its two-limb test of natural losses.<sup>665</sup> Future case law also confirmed that the loss of normal profit would be recoverable at breach of a contract.<sup>666</sup> Despite this there was little indication that partners would assert their legal rights even with the temptation of immediate financial gain. Additionally, sellers would often go past their legal obligations set out in warranties and would stand by their product, replacing and repairing products past the warranty period as well as providing remedy to those whose products did not meet expectations even where there is no defect.<sup>667</sup>

However, studies should not be treated as sacrosanct merely because they have the markings of empiricism. Empirical evidence has the potential of creating vast generalisations as well as not supporting the conclusions reached by the original authors.<sup>668</sup> Beale and Dugdale are more open to this attack than most as their data was made from 33 people from 19 different firms all of which were from the same sector: Engineering.<sup>669</sup> This, unfortunately, is not the only methodologically limited data size

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<sup>660</sup> Hugh Beale, Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45.

<sup>661</sup> *ibid* 47.

<sup>662</sup> *ibid* 51.

<sup>663</sup> *ibid* 56.

<sup>664</sup> *ibid*.

<sup>665</sup> (1854) 9 Exch 341, 356.

<sup>666</sup> *Victoria Laundry (Windsor Ltd) v Newman Industries Ltd* [1949] 2 KB 528; *Czarnikow v Koufos (The Heron II)* [1969] 1 AC 350.

<sup>667</sup> *ibid*.

<sup>668</sup> Russell Korobkin, 'Empirical Scholarship in Contract Law: Possibilities and Pitfalls' (2003)4 *University of Illinois Law Review* 1033, 1054-1059.

<sup>669</sup> Beale, Dugdale (n660) 46.



created in the search for the non-use of legal enforcement. Samuels only corresponded with 20 of the US's largest industrial bodies, and even then only with their legal department, thus limiting the scope away from SME firms in the same sector and even from merchants.<sup>670</sup> White only interviewed 10 chemical and pharmaceutical companies, and did not give a definitive answer of how many people he had interviewed.<sup>671</sup> Blegvad only gave a case study of three firms in Denmark,<sup>672</sup> though admittedly one of which was part of a cartel and so would most likely have similar business practices with its other eight firms.<sup>673</sup> The limited methodology of such studies must act as a warning against generalising contract practice and business behaviour based on questionable data.

Yet, limited methodologies do not entail useless results, as all the previous studies have shown a general trend towards businesses seeking flexibility and a more relaxed view towards legal obligations. What this creates is a mosaic of small studies identifying a general trend rather than a definitive answer on how transactions are governed. To the credit of those who have provided evidence that the law is not as important as once thought, it has been noted that businesses have a wide variety of commercial practices.<sup>674</sup> Contract, and contract law, can still be used but there is a higher prevalence of non-legal methods and increasing ambivalence of law by the business community.<sup>675</sup> For example, one can look at Keating's findings with boilerplate contracts to see that merchants are not particularly concerned with the fact that they are legally bound by their sellers forms in a battle of forms, nor were they concerned with the state of the law at the time.<sup>676</sup> In doing so one will see that there is a non-use of contract law in business but still avoid the trap of believing Keating's conclusion is necessarily the only logical deduction from the data he had gathered.

Furthermore, not all studies have been plagued by small sample sizes. Weintraub's methodology far exceeds that of the original foundations laid down by Macaulay, with

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<sup>670</sup> John H Samuels, 'Business Practices and the Flexibility of Long Term Contracts' (1950) 36(5) Virginia Law Review 627.

<sup>671</sup> James White, 'Contract Law in Modern Commercial Transactions, an Artifact of Twentieth Century Business Life?' (1982) 22(1) Washburn Law Journal 1, 2.

<sup>672</sup> Britt-Mari Blegvad, 'Commercial Relations, Contract, and Litigation in Denmark: A discussion of Macaulay's Theories' (1990) 24(2) Law and Society Review 397.

<sup>673</sup> *ibid* 405.

<sup>674</sup> *ibid* 407.

<sup>675</sup> Mitchell, *Contract Law and Contract Practice* (n647) 71.

<sup>676</sup> Keating, 'Exploring the Battle of Forms' (n649) 2696-2700.

182 corporations being contacted with anonymity given as to prevent a conflict of interest for present or future litigation<sup>677</sup> The main vindication of Macaulay comes in the form of the question on if a firm would insist on compliance with the written contract in the event of the other party needing change, of which 95.1% said they would not.<sup>678</sup> Additionally, 80% of respondents had asked for relief from a contract, with 87.9% of those asking for relief having been met with an amicable working out of the problem via modification of duties.<sup>679</sup> Interestingly, in the 48.5% of firms that had once asked for relief were denied it but performed anyway, and only 25.8% of firms had occasions that led to litigation in court.<sup>680</sup> One respondent went as far to say 'business objectives are far more important than business sanctions'.<sup>681</sup> This evidence would then indicate that Macaulay's findings, despite the methodological weakness of the surveys that followed, does have a strong point in its centre: The business world sidelines contract law even where applicable. Such a trend is likely to invoke sympathy towards Macaulay's claim that contract law is 'a flawed product that would seem to breach the warranty of merchantability'.<sup>682</sup>

A potential reason for the divergence of legal obligation and legal enforcement that is not the fault of law but rather inherent in every judicial system: legal cost. Business people do not wish to play expensive games with legal rules.<sup>683</sup> They are not interested in having a theoretical argument in court which eats into their balance sheet. This can be a world away from the realm of lawyers who, under an adversarial system, can see the legal battles as intellectual games where prestige of subject matter becomes highly important.<sup>684</sup> The playing of legal games, of which costs the business financially and logistically, generates a disincentive to engage in litigation ab initio. Simultaneously the cost of litigation, Attiyah comments, can mean that it is economically irrational to litigate as the level of damages may not be sufficient to cover the costs of legal

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<sup>677</sup> Russell Weintraub, 'A Survey of Contract Practice and Policy' (1992) 1 *Wisconsin Law Review* 1.

<sup>678</sup> *ibid* 18.

<sup>679</sup> *ibid* 22-23.

<sup>680</sup> *ibid*.

<sup>681</sup> *ibid* 24.

<sup>682</sup> Stewart Macaulay 'Almost Everything That I Did Not Want To Know About Contract Litigation: A comment on Galanter' (2001) 2001(3) *Wisconsin Law Review* 629, 629.

<sup>683</sup> Douglas Baird Robert Weisberg, 'Rules Standards and the Battle of Forms: A Reassessment of s 2-207' (1982) 68 *Virginia Law Review* 1217, 1252.

<sup>684</sup> Stewart Macaulay, 'Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar' (1982) 32(4) *Journal of Legal Education* 506, 509-525.

counsel.<sup>685</sup> This means that a party can safely breach its legal obligation without providing any compensation, or consideration for a new contract to buy the legal writ, because they know that it is not worth the effort of the other party to engage the claim.<sup>686</sup> This potentially means that a portion of the non-use of the legal mechanism is due to the procedural costs, creating a net loss for parties.

However, deterrence is not confined to the financial sense. The Contract in Action school of thought has highlighted other factors including information asymmetry and psychic costs. Jean Braucher, described as a 'zealot in promoting the study of the law in action',<sup>687</sup> has made numerous contributions to this analysis for both Business to Business (B2B) transactions and Business to Consumer (B2C) transactions. The latter contains some of the more visible issues that lead to the non-use of law. For example, Braucher posits that even where a party is legally right in theory, the result is still uncertain as it is dependent upon what the party will be able to prove in court.<sup>688</sup> This will undoubtedly deter lay-people from legal systems due comparatively minimal resources and lack of legal knowledge compared to a sophisticated commercial entity. When contract law textbooks give stereotyped examples of the individual to individual legal action, these create the false impression that such cases are typical when most individuals cannot bear the cost or risk of litigation<sup>689</sup> This only serves to amplify Braucher's argument that the increased risk due to evidential constraints will promote the infeasibility of litigation, causing consumers to either press for informal compensation, or even to accept the loss.<sup>690</sup>

This is potentially a point that law might not be able to aid. While an ideal world contains consumers who both know and act on their rights, the evidence suggests this is not the case.<sup>691</sup> Schmitz notes that individuals are usually inert and unreactive, usually suffering from confirmation biases regarding choices such as purchasing a product.<sup>692</sup> Emotional constraints and psychic costs can be highly important, with shame,

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<sup>685</sup> Patrick Atiyah, *Essays On Contract* (Oxford University Press 1986) 164.

<sup>686</sup> *ibid.*

<sup>687</sup> William Whitford, 'Jean Braucher's Contracts World View' (2016) 58(1) *Arizona Law Review* 14, 14.

<sup>688</sup> Jean Braucher, 'The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action' (2012) 45(3) *Suffolk University Law Review* 667, 674.

<sup>689</sup> *ibid* 675.

<sup>690</sup> *ibid* 686.

<sup>691</sup> Amy Schmitz, 'Remedy Realities in Business-To-Consumer Contracting' (2016) 58(1) *Arizona Law Review* 213, 214.

<sup>692</sup> *ibid* 230.

resignation, fear or even gratitude being hurdles that consumers might have to pass to even consider pressing a legal claim.<sup>693</sup> Part of this pre-breach optimism of a contract is, ironically, rational behaviour. Consumers would not have the time or emotional capacity to be distrustful of every purchase that they make, and expecting them to have a sceptical opinion of all purchases would make ordinary consumption difficult.<sup>694</sup> As consumers do not have the resources, or psychological profile, to enforce legal obligations it then stands to reason that a reliance on more informal norms would be to provide even minuscule protection.

A third problem that arises is the lack of knowledge about legal relations in the first place. In B2C contracts this is more pertinent due to the existence of the click-wrap contract. Most consumers are not aware of legal rights within contracts they are unaware they even are in.<sup>695</sup> Even where the consumer is aware of the existence of the contract, it is highly questionable if they truly understand it and are able to retain the information regarding the contractual duties of the other parties.<sup>696</sup> It would be unfair to claim consumers who do not put effort into comprehension are acting irrationally when this is a prime example of loss-aversion. In contracts of adhesion, reading the contract provides little to no benefit as there is no option for negotiation even where the consumer actually understands the contract.<sup>697</sup> It is then a sunk transaction cost of time with no benefit, thus making such an enterprise irrational.<sup>698</sup> To use a modern example: If a consumer wishes to search for the consideration within Facebook's terms of service. Facebook gives a brief overview of the contractual consideration, the consumers data, in a subsection half-way down the page.<sup>699</sup> While this is user-friendly, to an extent, it still contains legal-speak that is unlikely to be understood by the consumer:

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<sup>693</sup> *ibid* 231.

<sup>694</sup> Jean Braucher, 'Deception, Economic Loss and Mass Market Consumers: Consumer Protection Statutes as Persuasive Authority in the Common Law Of Fraud' (2006) 48 *Arizona Law Review* 829, 833.

<sup>695</sup> Christopher McMahon 'iPromise: How Contract Theory Can Inform Regulation of Online Consumer Contracts' (2018) 21 *Trinity College Law Review* 174, 176.

<sup>696</sup> *ibid* 176.

<sup>697</sup> *ibid* 175.

<sup>698</sup> Omri Ben-Shahar, 'The Myth of the Opportunity to Read in Contract Law' (2009) 5(1) *ERCL* 1.

<sup>699</sup> <https://www.facebook.com/terms.php> (Accessed 30/08/2021).

'you grant us a non-exclusive, transferable, sub-licensable, royalty-free and worldwide licence to host, use, distribute, modify, run, copy, publicly perform or display, translate and create derivative works of your content.'<sup>700</sup>

Additionally, a consumer may just stop at the three points of note that have been made within the first page. This would leave them unaware that two further pages, effectively acting as annexes to the contract, clarify the legal rights with regard to advertisements<sup>701</sup> and data gathering/management.<sup>702</sup> In doing so, they would be completely unaware that Facebook obtains the cookies, internet history, phone apps, and even mouse movement which is then sold off to any business with a relevant business goal.<sup>703</sup> Consumers who are blatantly unaware of these terms would not be aware if they have been breached via their data being managed inappropriately. Even if they knew what would constitute a breach, they would then need to monitor the business organisation to detect breach. Both of these create a near-impossible situation for most individual consumers, and thus similar situations with contracts of adhesion will be de-facto immune from ordinary litigation. This would provide explanation for a lessened use of contract law as more and more consumers become bound into contracts where legal sanctions are not a possibility.

While the author has focused on B2C contracts due to the disproportionate effect of information asymmetry and legal cost, that does not mean that B2B contracts are immune. Even large multinationals do not have the resources to investigate for every possible deception in a contract nor does it have the inclination to pursue for contractual remedies.<sup>704</sup> It must be remembered that legal risk, and minor losses from breach, are balanced against other considerations for businessmen.<sup>705</sup> These other considerations post serious issues for lawyers, who are inclined to focus on legal risk and therefore become irrelevant advisors to the merchants of the world.<sup>706</sup> This leaves two outcomes; either lawyers are successfully adapting and providing advice on relationship structuring to keep their relevance, or they are focusing on legal risk and being ignored. Both outcomes leads to less reliance on legal obligations and less cases. Even if not the

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<sup>700</sup> *ibid.*

<sup>701</sup> <https://www.facebook.com/about/ads> (Accessed 30/08/2021).

<sup>702</sup> <https://www.facebook.com/about/privacy/update> (Accessed 30/08/2021).

<sup>703</sup> *ibid.*

<sup>704</sup> Braucher 'Deception, Economic Loss...' (n694) 831.

<sup>705</sup> Jean Braucher, 'Afterlife of Contract' (1995-1996) 90(1) *Northwestern University Law Review* 49, 85.

<sup>706</sup> *ibid.*

sole reason for the apathy towards law, the structural hurdles of the system as a whole certainly contribute to the non-use of contract law.

### 4.3 Trust and relational sanctions

One of the major reasons for the non-use of contract law can be attributed to the fact humans are, as Macneil insisted, social animals.<sup>707</sup> We have a natural pre-disposition towards trust in relationships and therefore avoid antagonistic behaviour detrimental to relationship building. The reason for the abandonment of law in this trust relationship is that the classical law was not designed for trusting individuals who make informal commitments. The classical law borrowed its model of the man from classical economics: a self-interested and rational individual with no cultural, social, or emotive influences.<sup>708</sup> The business world has never truly fallen under this influence and management scholars do often teach that trusting co-operation can be highly beneficial when done properly.<sup>709</sup> It is the author's contention that trust plays a pivotal role in supplying values that law does not, essentially acting as an ad hoc gap filler.

There are two common misconceptions that should be addressed. The first is that the law provides an underlying level of trust, without which contract would not be able to foster the trust needed for good relations.<sup>710</sup> The reasoning behind this form of argument is that law indirectly effects the behaviour of managers who tacitly rely on it to fill gaps, provide the threat of sanction, and to symbolically crystallise the duty to perform a contract.<sup>711</sup> This argument is primarily used as a response to the implication of law and trust being seen as mutually exclusive.<sup>712</sup> Of course, the fact that trust exists in a relationship does not mutually exclude the use of law, and the substitution theory of trust has highly impeded the debate both on law and on relational sanctions.<sup>713</sup> Some contractual relations may be beneficially effected by the underlying existence of a

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<sup>707</sup> Ian R Macneil, 'Values in Contract: Internal and External' (1984) 78 *Northwestern University Law Review* 340, 348.

<sup>708</sup> Menachem Mautner, 'Contract, Culture, Compulsion or: What is so problematic in the application of Objective Standards in Contract Law' (2002) 3(2) *Theoretical Inquiries in Law* 545, 546.

<sup>709</sup> Jon Hawes, Keeneth Mast, John Swan, 'Trust Earning Perceptions of Sellers and Buyers' (1989) 9(1) *The Journal Of Personal Selling and Sales Management* 1.

<sup>710</sup> Simon Deakin, Christel Lane, Frank Wilkinson, 'Trust or Law- Towards an Integrated Theory of Contractual Relations between Firms' (1994) 21(3) *Journal of Law and Society* 329, 340.

<sup>711</sup> Stewart Macaulay, 'Elegant Models, Empirical Pictures, and the Complexities of Contract' (1977) 11(3) *Law & Society Review* 507, 519-520.

<sup>712</sup> Deakin, Lane, Wilkinson (n710) 339.

<sup>713</sup> Catherine Mitchell, *Contract Law and Contract Practice* (n647) 90-91.

legally binding document at the start of the relationship, as law can both facilitate trust and mimic it.<sup>714</sup> For contracts on the discrete end of the spectrum, law can mimic the effects of trust without the level of interpersonal investment required to build the equivalent framework.<sup>715</sup> There is little reason to believe that law and trust are inherently diametric opposites without chance of interconnectivity.

This is a point that Macaulay is willing to concede with a caveat: the tacit assumptions of business people in transactions need not come from law.<sup>716</sup> There is little evidence that the trust-related norms which are necessary in the more relational contracts are necessarily dependent on the initial establishment of a contract.<sup>717</sup> This is pertinent as there is little evidence to suggest that business people know of, or are even remotely interested in, the decisions and reasonings of appellate courts.<sup>718</sup> If the business world is not knowledgeable about the law of contract, or its recent developments, then it cannot be said that they tacitly rely upon it. Tacit acceptance requires, at a basic level, basic knowledge and comprehension of what is being tacitly accepted to. Apathy is not adherence.

Furthermore, while it is accepted that certain contractual relations are benefited by the underlying existence of a legal document, business history does not support the proposition that law is essential for complex contracts. The existence of highly complicated contracts between landlord and tenant lemon producers in nineteenth century Italy are an exemplification of this.<sup>719</sup> These contracts could last for up to 8 years and still prosper, all while the central courts were so incompetent and corrupt that contracts were practically unenforceable.<sup>720</sup> The business environment eventually became so prosperous that parties could afford private protection from third party crimes and even contractual breach in the form of the mafia.<sup>721</sup> Even where legal

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<sup>714</sup> *ibid* 92.

<sup>715</sup> *ibid* 92-93.

<sup>716</sup> Stewart Macaulay, 'Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building' (1996) 1996(1) *Wisconsin Law Review* 75, 77.

<sup>717</sup> *ibid*.

<sup>718</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge of Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 75-77.

<sup>719</sup> Arcangelo Bimico, Alema Isopi, Ola Olsson 'Origins of the Scilian Mafia: The Market for Lemons' (2017) 77 *Journal of Economic History* 1083, 1091-1092.

<sup>720</sup> *ibid*.

<sup>721</sup> Paul MacMahon, 'Conflict and Contract Law' (2018) 38(2) *Oxford Journal of Legal Studies* 270, 277-278.

enforcement was unfeasible, long term complex contracts were still able to exist and prosper. Law cannot claim itself an irreplaceable necessity where historically it was absent in complex commercial relationships.

Anthropological evidence also serves to dispel the second misconception that trust is altruistic and incompatible with business behaviour. Blois comments that a business relationship requires thought processes that are antithetical to trusting relationships, such as monitoring for opportunism, questioning a partner's honesty, and active evaluation of the net-benefit of the relationship.<sup>722</sup> This falls in line with the reasoning of classical economics: self interested individuals and institutions will be calculative and economically rational in their dealings, thus displacing the need for trust.<sup>723</sup> Unfortunately for the classical doctrine, it does not appear that humans have typically followed this model. Perillo undertook an extensive analysis of stone-age societies that were still in existence in the 20<sup>th</sup> Century with reference to three separate societies all of which had little to no contact with one another.<sup>724</sup> Quite a number of recurrent patterns of behaviour were seen and attributed to limitation on the human inventiveness of substantive law.<sup>725</sup> However, an interesting note is that all display high levels of trust. An example is the reciprocal gift, in which the Adamanese Islanders would allow any and all objects to be taken without pay but would expect a gift at a later date.<sup>726</sup> This naturally needs a high level of trust to allow this trade to happen without negotiation without suspicion of a ruse for theft. A more interesting pattern of trade was the silent trade, which goes as follows:

'They [The Carthaginians] no sooner arrive but forthwith they unlade their wares, and, having disposed them after an orderly fashion along the beach leave them, and, returning aboard their ships, raise a great smoke. The Native, when they see the smoke, come down to the shore and, laying out to view so much gold as they think the worth of the wares, withdraw to a distance. The Carthaginians upon this come ashore and look. If they think the gold enough they take it...but if it

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<sup>722</sup> Keith Blois, 'Is It Commercially Irresponsible to Trust' (2003) 45(3) *Journal of Business Ethics* 183, 190-191.

<sup>723</sup> Oliver Williamson, 'Calculativeness, Trust, and Economic Organisation' (1993) 36(1) *Journal of Law and Economics* 453, 481-484.

<sup>724</sup> Joseph Perillo, 'Exchange, Contract and Law in the Stone Age' (1989) 31(1) *Arizona Law Review* 17, 18-20.

<sup>725</sup> *ibid* 24.

<sup>726</sup> *ibid* 25.



does not seem to them sufficient, they go aboard ship once more and wait Patiently. Then the others approach and add to their gold... The natives [never] carry off the goods till the gold is taken away.<sup>727</sup>

This form of trade relies heavily upon trust, despite the fact that the first occasion of this occurring would be the closest thing to a truly discrete transaction. There is no security upon the goods or the gold and one party could easily have behaved opportunistically via theft, fraud, or trickery. It is not easy to explain this form of trade away as an exceptional circumstance as it was a recorded pattern on at least six separate societies, all of which were spread out across the world.<sup>728</sup> There is the potential argument that these behaviours were done at a time where technology was highly limited, thus such behaviours were necessary if undesirable. This argument has two pitfalls. Firstly, this behaviour was recorded in Maine in 1542, long after the rise of the professional merchant.<sup>729</sup> By the renaissance era, more invasive legal enforcement had developed, yet such trading relations flourished. It is hard to explain the existence of such relations where legal enforcement existed without recognising that the inherent trust embedded in exchange relations is tangible for the parties.

The second is that situations where enough trust is present to nullify concern for security or negotiation continue to exist with a modern twist. Social commerce is a new form of digital e-commerce which exemplifies this form of behaviour. Social commerce is 'a form of electronic commerce that utilises user-generated content'.<sup>730</sup> This encompasses social media, as well as peer-to-peer e-commerce sites.<sup>731</sup> Like the silent transaction, the framework is one of anonymity, impersonality, and heterogeneity; three things which one would assume would be non-conductive to trust.<sup>732</sup> This framework may well be the ideal breeding ground for discrete transactions, but the market players transactional relations spite Macneil's technical man. While anonymity tends to breed distrust, voluntary disclosure massively increases it. Accordingly, market actors in social commerce will disclose much of their personal information not related to the transaction as to increase their trustworthiness.<sup>733</sup> What this shows is that a framework

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<sup>727</sup> *ibid* 32-33, citing Herodotus, *History Book IV* (G Rawlinson (trans), 1862) ch 196.

<sup>728</sup> *ibid* 33.

<sup>729</sup> *ibid*.

<sup>730</sup> Julia Y Lee, 'Trust and Social Commerce' (2015) 77(2) *University of Pittsburgh Law Review* 137, 141.

<sup>731</sup> *ibid* 141-144.

<sup>732</sup> *ibid* 153.

<sup>733</sup> *ibid* 154.

which parallels, near perfectly, the discrete transaction will be tempered by human nature. Those that voluntarily increase their reliability via harmonisation with the social matrix, seen here as familiarity, safety and security that direct communication provides,<sup>734</sup> are more likely to flourish in the market.

Trust is thus an inherent trait of the human condition, and so utilising it is instrumental in fulfilling the norms of harmonisation with the social matrix and satisfying performance expectations. Law cannot attempt to claim that contractual trust only arises due to law's presence. Trust, by its nature, is indispensable to human relations, and this would include exchange relations.<sup>735</sup> Putting aside a singular definition of trust for a moment, one can see that humans display trust in three potential ways: cognitive, emotional, and behavioural.<sup>736</sup> To summarise these three types of trust; cognitive is a willing choice to trust when there is no longer a desire to find a rational explanation.<sup>737</sup> Emotional exists where there are emotional bonds between participants and behavioural exists when a party treats an uncertain future as certain.<sup>738</sup> For the purposes of this thesis, there is little need to further engage with the definitional debate of trust as all social relationships will display a mix of the above.<sup>739</sup> Needlessly continuing the debate of the different senses of trust in a business relationship, for example nuanced separation of trust as altruistic or social,<sup>740</sup> risks ignoring trust's psychological nature. It is highly difficult for humans to introspectively differentiate the different types of trust into when they rationally trust a person or when it is affectionate. An internal separation might even be considered impossible due to psychological pitfalls such as confirmation bias.

To take an example, let us use the affective v cognitive trust distinction by Cross.<sup>741</sup> Affective trust is positive emotions towards another's good will, in essence the moral form of trust.<sup>742</sup> Cognitive is the economic and strategic version of trust, including behaviours such as a cost-benefit analysis, monitoring, and risk management.<sup>743</sup> It

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<sup>734</sup> *ibid* 156.

<sup>735</sup> David Lewis, Andrew Weigert, 'Trust as Social Reality' (1985) 63(4) *Social Forces* 967, 968.

<sup>736</sup> *ibid* 969.

<sup>737</sup> *ibid* 970.

<sup>738</sup> *ibid* 971-972.

<sup>739</sup> *ibid*.

<sup>740</sup> Campbell, 'Non-Use of Contract' (n651) 164.

<sup>741</sup> Frank Cross, 'Law and Trust' (2005) 93(5) *Georgetown Law Journal* 1457.

<sup>742</sup> *ibid* 1464.

<sup>743</sup> *ibid* 1465-1467.

would be simple to call one altruistic and, therefore, having no place in contractual relations, however even Cross accepts that distinguishing the two forms of trust on a practical level is not nearly as simple.<sup>744</sup> Empirical analysis affirms the difficulty as Hawes, Mast, and Swan found that a business partner's likability was an important characteristic for establishing trust.<sup>745</sup> To trust someone merely because they have likable characteristics would fit into affective trust, yet it influences the economic decisions of parties even when placed alongside other factors as competence and dependability.<sup>746</sup> This can be explained simply with Macneil's analysis, in particular his truism that humans are entirely selfish and entirely social.<sup>747</sup> Humans are both self-interested and altruistic, meaning that psychological trust will be a collusion of both affective and cognitive. Where betrayal of trust harms a party's self-interest, it is doubtful that honest behaviour is truly altruistic. Where self-preservation requires fidelity, then the trust developed is both selfish and selfless.

As trust becomes integral to contract, a moral dimension arises. Wilkinson-Ryan and Baron have pointed out that contractual parties are usually sensitive to moral dimensions at the point of breach.<sup>748</sup> In a study of a panel of US residents, three experiments were created, with different conditions. Recurrently, opportunistic behaviour, such as the breach to gain scenarios, was penalised by the panel with higher amounts of damages and higher amounts of guilt.<sup>749</sup> The difference between the avoid loss scenarios and the gain scenarios was particularly apparent in experiment 1; with a t value of 2.592 for damages and 3.663 for guilt.<sup>750</sup> This insight is aided by Weintraub's study, aforementioned, where over 68% of the participants were in favour of being able to sue for expectation damages in a promise that was promptly repudiated and where there was no reliance.<sup>751</sup> With no financial loss, the reason for an insistence on expectation damages is, as a respondent put it 'a deal is a deal'.<sup>752</sup> What this shows is that there is a moral dimension placed on contract independent of financial gains and losses. To breach is to betray trust, but such morality is fluid. Where there is legitimate

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<sup>744</sup> *ibid* 1468.

<sup>745</sup> Hawes, Mast, Swan, 'Trust Earning Perceptions' (n709) 5.

<sup>746</sup> *ibid*.

<sup>747</sup> Macneil, 'Values in Contract' (n707).

<sup>748</sup> Tess Wilkinson-Ryan, Jonathan Baron, 'Moral Judgement and Moral Heuristics in Breach of Contract' (2009) 6(2) *Journal of Empirical Legal Studies* 405.

<sup>749</sup> *ibid* 413-422.

<sup>750</sup> *ibid* 414.

<sup>751</sup> Weintraub (n677) 30.

<sup>752</sup> *ibid*.

reason as to betray trust, more people would be inclined to minimise the obligations.<sup>753</sup> Such discrepancies in treatment can only be accounted for through accepting the role of trust, and its moral trappings, in human relations.

This moral dimension links trust with the non-use of contract law. The sanctity of promising is resonant as a moral principle, to the point of being a universal norm.<sup>754</sup> This moral principle is therefore integrated into the social matrix, a common norm of contract regardless of legal enforceability. Recourse to legality is an unnecessary complication while trust aids in reducing the complexity for relations.<sup>755</sup> As complete presentation is neither possible or desirable, trust begins to gap-fill as people use their informal ethical principles to gloss over uncertainty.<sup>756</sup> In essence, 'trust begins where prediction ends'.<sup>757</sup> An extreme form of this would mean that where there is enough trust there is no need for either a legally enforceable contract or plan contractual measures to ensure performance.<sup>758</sup> This is the substitute view of trust, where it can take the place of the contract itself.<sup>759</sup> While historical examples give this view merit, one should not accept the extreme as normality. The original empirical data still found that the written contract was still used, often as the tipping point to get the contractual relation underway.<sup>760</sup> While trust is a powerful force, it is neither omnipresent or omnipotent and written contracts may sometimes be a necessary step for trust to foster.

With the misconceptions addressed, there is room for discussion on further reluctance to engage contract-law, even outside of the desire to be trusted. While the written contract might not be completely substituted for, relational sanctions have the possibility of occasionally substituting legal sanctions. Trust in another contractual party breeds mutual constraints. These can be internal constraints due honour and personal guilt, or they can be from third party behaviour in the form of social sanctions such as gossip, shaming and ostracism.<sup>761</sup> Third party sanctions are social sanctions that can be put onto a party who is shown to abuse trust. Recurring abusive behaviours may begin to harm the reputation of the contractual party and even affect their personal life outside of the

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<sup>753</sup> Wilkinson-Ryan, Baron, (n748).

<sup>754</sup> *ibid* 409.

<sup>755</sup> Lewis, Weigest, (n735) 986.

<sup>756</sup> Wilkinson-Ryan, Baron, (n748) 409.

<sup>757</sup> Lewis, Weigest, (n735) 976.

<sup>758</sup> Mitchell, *Contract Law and Contract Practice* (n647) 89.

<sup>759</sup> *ibid*.

<sup>760</sup> Campbell 'Non-Use of contract' (n651) 169-170.

<sup>761</sup> Carol Rose 'Trust in the Mirror of Betrayal' (1995) 75(3) Boston University Law Review 531, 535-536.

contractual arrangement.<sup>762</sup> Such sanctions can deter breach within contractual relations regardless of the legal enforceability of obligations. To avoid such sanctions parties may behave more flexibly than required to maintain trust and avoid accumulating toxic reputational capital.

However, social sanctions are not merely psychic as lost opportunity costs provide an economic imperative. While trust may reduce the need to monitor and check, achieving that position of trust in the first place may require a considerable amount of monitoring, checking, and reassurance.<sup>763</sup> As humans exist in a world of information asymmetry, it is impossible for them to be sure of the full character another, so they must rely on that party's reputation for reliability and trustworthiness.<sup>764</sup> If reputation is lacking, or contrary to, trustworthiness, toxic reputational capital may be generated. Toxic reputational capital breeds distrust, which mimics trust's role by reducing relational complexity albeit through avoidance rather than facilitation.<sup>765</sup> Critically, trust is rarely given as a gift, and in most circumstances trust is present where mutual trust provides mutual gain.<sup>766</sup> Where reputation signals that a certain actor is harmful to other's self-interests, and such trust would be parasitic as opposed to mutual, a disincentive to entering into business relations emerges.

Allowing for toxic reputational capital to amass may do more than poison current relationships. Where there is a vacuum for reliability, or a serious information problem, this very quickly can be exploited by business.<sup>767</sup> Even in the most extreme of circumstances where a market faces collapse due to adverse selection promoted by information asymmetry, there is a potential for business to fill the gap by virtue-signalling.<sup>768</sup> In fact, where a particular market is known for distrust or for opportunism, there is a higher chance of business investing in public image and good will initiatives.<sup>769</sup> This then creates a competition for trust and goodwill, where parties need

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<sup>762</sup> Weintraub (n677) 7.

<sup>763</sup> Rose (n761) 537-539.

<sup>764</sup> Carl Shapiro, 'Premiums for High-Quality Products as Returns to Reputations' (1983) 98(4) *The Quarterly Journal of Economics* 659.

<sup>765</sup> Lewis, Weigest (n735) 969.

<sup>766</sup> Cross (n741) 1465.

<sup>767</sup> Adam Thierer, Christopher Koopman, Anne Hobson, Chris Kuiper, 'How the Internet, the Sharing Economy and Reputational Feedback Mechanisms Solve the Lemons Problems' (2016) 70 *University of Miami Law Review* 830, 833.

<sup>768</sup> *ibid* 849.

<sup>769</sup> Douglas Baird, 'Commercial Norms and the Fine Art of the Small Con' (1999) 98 *Michigan Law Review* 2716, 2718.

to demonstrate why they are as trustworthy, if not more, than their competitors.<sup>770</sup> Even the economically-rational classical model of the man must pay heed as a prudent market player will avoid transactions with those suspected of unreliability.<sup>771</sup> The logical conclusion is that any merchant who allows toxic reputational capital to corrupt their image places themselves in a serious disadvantage for obtaining further contractual relations.

Due to the existence of these social sanctions, there is less of a need for legal sanctions to be considered by parties and thus would, at least partly, explain the lack of legal enforcement that occurs. Informal sanctions will work where the prospect of losing the gains of repeat exchanges and the relationship as a whole outweighs immediate short-term gains.<sup>772</sup> Disputes that do arise are often decided informally, partly because the business pressures are often more powerful and apparent than legal entitlement.<sup>773</sup> Like basal trust, such behaviour is noted historically, such as in the 11<sup>th</sup> century Maghribi traders using reputation networks as to exclude those whose reputations made them untrustworthy.<sup>774</sup> Trust has not displaced because of modernisation, as actors still go out of their way to signal their credibility in new e-commerce markets.<sup>775</sup> Additionally, reputation is not merely a passive defence as it is possible to weaponise good reputation to avoid the social sanctions that breed opportunity losses.<sup>776</sup> The value of such a weapon has led to situations where businesses have even threatened lawsuits against consumers who write bad reviews online.<sup>777</sup> While a breaching party might feel comfortable with the initial financial loss via damages, it is easier to buy off a legal writ than to stop commercial gossip. Where such sanctions are powerful enough, they can deter breach or even nullify the need for a legal sanction.

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<sup>770</sup> Friedrich Hayek, *Individualism and Economic Order* (Routledge 1948) 97.

<sup>771</sup> Lester Tesler 'A Theory of Self-Enforcing Agreement' (1980) 53(1) *The Journal of Business* 27, 28.

<sup>772</sup> Henning Hilman, 'Economic Institutions and the State: Insights from Economic History' (2013) 39, *Annual Review of Sociology* 251, 255.

<sup>773</sup> Jean Braucher, 'Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transaction Fairness' (2008) 50(1) *Arizona Law Review* 191, 223.

<sup>774</sup> Avner Grief, 'Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders (1989) 49 *Journal of Economic History* 857, 865-888.

<sup>775</sup> Lee (n730) 154-156.

<sup>776</sup> Gordon Tulloch, 'Adam Smith and the Prisoner's Dilemma' (1985) 100 *Quarterly Journal of Economics* 1073, 1078.

<sup>777</sup> Amy Schmitz, 'Remedy Realities in Business-To-Consumer Contracting' (2016) *Arizona Law Review* 213, 235-237.

The analysis of lost opportunity cost also explains why law is secondary in the relationship. Recourse to legality, including close monitoring of performance, has a tendency to poison the relationship.<sup>778</sup> Even detailed negotiations, as opposed to informal customs or agreements, were found to be a sign of distrust among business people.<sup>779</sup> The reason for this is simple; If one accepts that the essence of trust is 'reliance upon the representation that a reasonable expectation will be fulfilled',<sup>780</sup> then concentrating on breach scenarios gives the indication that the other party is already contemplating failure. Since complete trust requires no legal protection, then overzealous attention to legality undermines established trust; similar to how a pre-nuptial arrangement undermines party's trust that a marriage will be long-lived.<sup>781</sup> This severely limits the potential of co-operation in the long term of a contractual relationship and can increase conflict past healthy levels and into uncontrolled hostility. This disincentive arises even at the point of conditional breach. As classical law would deem the contract voidable, recourse to legality will only encourage relationship breakdown, leading to lost opportunity costs.

While these sanctions are more relational and informal, it does not follow that they entail better consequences than legal sanctions or an ideal world. As seen with the Maghribi traders, reputation and social norms are significantly more potent in tight-knit communities.<sup>782</sup> This creates a situation in which those not already part of the community will find it hard to break into the marketplace.<sup>783</sup> It is arduous for outsiders to dislodge members from a social group who have in-group trust, making it difficult a vacuum of reliability to be fully exploited by new, more trustworthy players. This means that it is difficult for reputations to affect those who are outside of the local marketplace.<sup>784</sup> This seems to be a natural pattern within human relations, and commercial history is no exception. In medieval Germany, special commercial courts had to be created due to the high levels of distrust that was placed upon merchants who

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<sup>778</sup> Rose (n761) 540.

<sup>779</sup> Linda Mulcahy, *Contract Law in Perspective* (5th edn, Routledge-Cavendish 2008) 39.

<sup>780</sup> Mautner, (n708) 554.

<sup>781</sup> Cross (n741) 1482.

<sup>782</sup> Claire Hill, Erin Ann O'Hara, 'A Cognitive Theory of Trust' 2008 84(7) *Washington University Law Review* 1717, 1720.

<sup>783</sup> *ibid.*

<sup>784</sup> Hillmann (n772) 264.

were not citizens of the Holy Roman Empire.<sup>785</sup> Even citizens of the Empire who came from separate towns were treated with levels of distrust.<sup>786</sup> While highly unlikely that commercial feuds in the modern era would devolve into pillage and plunder, the human proclivity for network closure based on in-group trust has not evolved much through time. The outsider still faces distrust and network closure due to the simple fact that other players already have accrued and weaponised reputational capital.

This form of network closure can also influence the lacklustre use of law that is present in business relations. A serious long-term contractual relationship will amplify Macneil's norm of power. Where there is a significantly distorted power imbalance, then that can mean a party becomes trapped in the relationship. Social sanctions might end up creating a situation in which there is significant exploitation due to the economic dependence one party has on the other.<sup>787</sup> Even where social sanctions can be used against the breaching party, it might be completely irrational to do so as it could poison the relationship, leading not only to the loss of the necessary trade, but also the sunk costs that were put into the relationship.<sup>788</sup> Legal claims are just as useless in the face of inflexible market shares. Braucher makes the point that:

'Prudential must use Microsoft products and is subject to take-it-or-leave-it terms from Microsoft as an individual consumer. Furthermore, the cost of suing Microsoft for breach of warranty or the like is a daunting prospect: there is no hope of obtaining the benefit of the bargain.'<sup>789</sup>

There is little that can be done about such situations where economic necessity overcomes the moral outrage of the party. The main incentive of contractual parties to be honest, according to the economist, is when it is more advantageous for them to be honest and reliable.<sup>790</sup> What social analysis shows is not that this premise is untrue, but rather that blackboard economics does not show the full reality. Humans, as social animals, have social needs and wants, but it does not necessarily follow that these will take precedence where economic gain is great enough. Systems of trust might weed out

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<sup>785</sup> Oliver Volckart, 'The Economics of Feuding in Late Medieval Germany' (2014) 41 *Explorations in Economic History* 282, 286.

<sup>786</sup> *ibid* 286-294.

<sup>787</sup> Stewart Macaulay, 'An Empirical View of Contract' (1985) 1985(3) *Wisconsin Law Review* 465, 469.

<sup>788</sup> *ibid*.

<sup>789</sup> Braucher 'The Sacred and Profane' (n688) 676.

<sup>790</sup> Tesler, (n771) 28-30.



those who have reputations for abuse, but it is not a catch-all. Trust occurs where there is imperfect information and so it can easily be placed in the wrong person.<sup>791</sup> Business miscalculations still happen, and it can result in high losses.<sup>792</sup> From this, it should be determined that trust is not a panacea to any and all contractual issues. Relational sanctions might be useful and natural to humans, but that does not mean that they create the ideal situations. Long term relationships can go sour and become toxic, and the longer the relationship, the messier and more painful the breakup for the parties.

#### 4.4 Good Faith

The trust that is integral to commercial dealings is in clear dissonance with classical thought. For those looking to harmonise commercial law and commercial practice, one concept does have a natural alignment to ideas of trust. Good Faith, and more importantly the English hostility to it, may be used as an insight to the utility of harmonisation. After all, basic trust in the business world leads to commercial flexibility, thus causing relational scholars to advocate standards of good faith to recognise these facts of life.<sup>793</sup> Despite this, English law highly rejects a general rule of good faith outright. Since the advent of judicial liberalism in the 1870s, the concept of good faith was treated with increasing hostility. This hostility is understandable when good faith, *prima facie*, seems contrary to the classical model of a man as a self-interested utility maximiser. With a 'Hobbesian'<sup>794</sup> view on human nature, it is of little surprise that contract law would reject any form of obligation towards another's self interest for the sake of altruism.

##### 4.4.a English Law on Good Faith

Good faith has existed in western civilisation for thousands of years.<sup>795</sup> Unsurprisingly, its existence predates the classical liberal revolution in the nineteenth century. It is equally unsurprising that good faith found support with Lord Mansfield, who previously attempted to harmonise contract law with commercial practice. In *Carter v Boehm*<sup>796</sup>

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<sup>791</sup> Macaulay, 'An Empirical View...' (n787) 471.

<sup>792</sup> *ibid.*

<sup>793</sup> Hutchinson, 'Relational Theory...' (n650) 302.

<sup>794</sup> Anthony Gray, 'Development of Good Faith in Canada, Australia and Great Britain' (2015) 57(1) Canadian Business Law Journal 84, 98.

<sup>795</sup> Edward Imwinkelreid, 'The Implied Obligation of Good Faith in Contract Law: Is it Time to Write Its Obituary' (2009) 42(1) Texas Tech Law Review 1, 1.

<sup>796</sup> (1766) 3 Burr 1905, 97 ER 1162 (KB).

Lord Mansfield made reference to good faith as 'the governing principle is applicable to all contracts and dealings'.<sup>797</sup> While this was an insurance contract, and therefore comes with policy considerations for terms implied at law, further case law acknowledged that Lord Mansfield was attempting to create a general doctrine of good faith.<sup>798</sup> This would not be the last time that a general doctrine of good faith was seen favourably by the judiciary, as Lord Kenyon in *Mellish v Motteux*<sup>799</sup> claimed that encouraging good faith is of the highest priority.<sup>800</sup> It is clear that in the reformation of common law to be less antagonistic to the needs of the business classes there was recognition of a general norm of good faith among merchants. It would be fair to conclude that early common law was receptive to the principle of good faith.

This receptiveness would not last. In the 1870s, common law dynamically shifted against good faith as liberal economics began to become more pronounced in the legal system.<sup>801</sup> Economic liberalism, in its stance against encompassing government intervention would set itself against a general doctrine of good faith which appeared paternalistic.<sup>802</sup> The ideological shift culminated with the rationale of *Walford v Miles*.<sup>803</sup> In the context of good faith, *Walford v Miles*'s main question of law concerned the enforceability of a lock-out agreement between the claimants and the respondents, the latter of which were hoping to sell their photographic processing business.<sup>804</sup> On the 17<sup>th</sup> March, the parties had agreed that the respondents would terminate all third party negotiations, subject to the claimants being able to obtain a letter of comfort from their bankers detailing that they would be prepared to finance the endeavour.<sup>805</sup> However by the 30<sup>th</sup> March, the respondents decided to sell the company to Statusguard Ltd for £2 million, a company which had previously attempted acquisition in 1985.<sup>806</sup> This was done via a telephone conversation on the 27<sup>th</sup> March, post the lock out agreement.<sup>807</sup>

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<sup>797</sup> *ibid* 1910.

<sup>798</sup> *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1; [2001] 1 All ER 743, para 42 (HL).

<sup>799</sup> (1792) 170 ER 113; Peake 156 (KB).

<sup>800</sup> *ibid* 157.

<sup>801</sup> Woo Pei Yee, 'Protecting Parties' Reasonable Expectations: A General Principle of Good Faith' (2001) 1(2) Oxford University Commonwealth Law Journal 195, 195.

<sup>802</sup> Patrick Atiyah, *The Rise and Fall Of Freedom Of Contract* (Oxford University Press 1979) 168.

<sup>803</sup> [1992] 2 AC 128; [1992] 2 WLR 174.

<sup>804</sup> *ibid* 132.

<sup>805</sup> *ibid* 133.

<sup>806</sup> *ibid* 134.

<sup>807</sup> *ibid*.

Lord Ackner found that the lock-out agreement made no positive obligation to continue negotiations, and the lack of specified time would make the agreement futile.<sup>808</sup> In response, the appellants amended the statement of claim, adding in that it would be necessary for business efficacy that a term be added in for continuation of negotiations of good faith.<sup>809</sup> The good faith addendum led to the famous dictum:

'How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.'<sup>810</sup>

This brings up two of the main criticisms of the good faith doctrine that common law lawyers often make. The first is the question of uncertainty and the second is that good faith is necessarily antagonistic to the ideas of adversarialism and liberalism.<sup>811</sup> These will be explored in more detail further on, but for now it is pertinent to wonder how these arguments could have been made when English law initially appeared to be receptive to the idea of a general duty to good faith. Part of this is, undoubtedly, due to the context of *Walford v Miles* being an agreement to negotiate. Perry points out that there are generally four separate situations for good faith to be raised:<sup>812</sup>

1. Agreements to negotiation where a requirement to good faith is an express term

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<sup>808</sup> *ibid* 139.

<sup>809</sup> *ibid* 135.

<sup>810</sup> *ibid* 138.

<sup>811</sup> Alistair Mills, Rebecca Loveridge, 'The Uncertain Future of *Walford v Miles*' (2011) 4 *Lloyds Maritime and Commercial Law Quarterly* 528, 530-537.

<sup>812</sup> Christiana Perry, 'Good Faith in English and US Contract Law: Divergent Theories, Practical Similarities' (2016) 17(1) *Business Law International* 27, 28.

2. Agreements to negotiation where a requirement to good faith is not an express term
3. Contractual performance where good faith performance is an express term
4. Contractual performance where good faith performance is not an express term.

*Walford v Miles* would be considered in the second criteria, which is considered the least attractive proposition for good faith in Anglo-American legal systems.<sup>813</sup> Supposing that the amended statement of claim was the original agreement, thus making it an express term, then English law appears murky. On one hand, cases such as *Petromec Inc v Petroleo Brasileiro SA Petrobras*<sup>814</sup> and *Knatchbull Hugessen v SISU Capital Ltd*<sup>815</sup> give the indication that parties may put express obligations on the other to negotiate in good faith. However, *Ebden v News International*<sup>816</sup> upheld that agreements to negotiate cannot be enforceable in English law. Nevertheless there is significant trend that courts will allow for enforceability for express terms of good faith in negotiation if linked to a standard for determining the conduct.<sup>817</sup> Though in law this can be circumvented if further endeavours or conduct would have no significant chance of achieving the desired result.<sup>818</sup> If the term is simply to negotiate in good faith with no definable standard then it is possible that courts will not enforce this as being too uncertain as was stated in *Cable & Wireless plc v IBM United Kingdom Ltd.*<sup>819</sup> When wishing good faith in negotiation, obtaining legal enforceability is a technical minefield that requires clear and unequivocal contractual language in the hopes of binding the court to its own standards of respecting party autonomy.

Should a party be part of scenario three, then the courts seem to be more receptive to the idea of good faith. In *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust*<sup>820</sup> clause 3.5 of the written contract expressly provided for good faith in performance to enable the trust to derive the full benefit of the contract.<sup>821</sup> Lord Jackson, however, did not read this as a general obligation but rather confined it to the

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<sup>813</sup> *ibid* 36.

<sup>814</sup> [2005] EWCA Civ 891 (CA).

<sup>815</sup> [2014] EWHC 1194 (QB).

<sup>816</sup> [2011] EWHC 4082 (Ch).

<sup>817</sup> *Little v Courage Ltd* (1995) 70 P & CR 469 (CA); *P & O Property Holdings v Norwich Union Life Insurance* (1994) 68 P & CR 261.

<sup>818</sup> *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 (CA) at [32].

<sup>819</sup> [2002] EWHC 2059 (Comm).

<sup>820</sup> [2012] EWCA Civ 200.

<sup>821</sup> *ibid* at [14].

two purposes that were found in the same clause.<sup>822</sup> The standard for conduct regarding these purposes was set to honesty, mimicking previous case on the interpretation of good faith in implied-in-law contracts.<sup>823</sup> However, other cases in which express terms have been recognised have seen the standard to be 'commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose'.<sup>824</sup> If law developed along these lines, it would avoid the narrow reading of *Compass* that Mitchell claims empties the substantive content of good faith by essentially making it performance (albeit honest performance) with the terms of the contract.<sup>825</sup> It would seem that *Compass* maintains some credence as further case law has been inspired by its narrow reading.<sup>826</sup> Nevertheless, a narrow reading is still an acceptance of an obligation of good faith where the parties have expressly required it and therefore not completely alien to the courts.

With regards to scenario four, English Law has seemingly tangled itself. Implied at law duties are the most common, for example for consumer protection in the Consumer Rights Act.<sup>827</sup> Additionally, English law has special categories of contracts that require good faith such as insurance contracts<sup>828</sup> and employment contracts.<sup>829</sup> Yet controversy surrounds cases in which good faith can be implied in fact. The most obvious case in this category would be *Yam Seng Pte Ltd v International Trade Corp Ltd*.<sup>830</sup> This case involved the rights to manufacture and sell branded fragrances, the contract of which was written with minimal legal advice.<sup>831</sup> However, multiple failings occurred within the contract, including multiple delays in supply, misrepresentations regarding the registration of the product in China, and the undercutting of the price of the product in Singapore.<sup>832</sup> Leggatt J used this opportunity to claim that good faith is not an alien

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<sup>822</sup> *ibid* at [106].

<sup>823</sup> *ibid* 112; *Street v Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 984 (CA); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1 (HL).

<sup>824</sup> *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch) at 97; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [246].

<sup>825</sup> Mitchell, *Contract Law and Contract Practice* (n647) 133.

<sup>826</sup> *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).

<sup>827</sup> Consumer Rights Act 2015, s62(4).

<sup>828</sup> *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Ltd* [1994] 2 Lloyd's Rep 427; [1995] 1 AC 501 (CA).

<sup>829</sup> *Attorney General v Blake* [1998] 2 WLR 805.

<sup>830</sup> [2013] EWHC 111 (QB); [2013] 1 CLC 662.

<sup>831</sup> *ibid* 671-672.

<sup>832</sup> *ibid* 672-694.

subject in English law and its hostility to the concept of good faith was misplaced.<sup>833</sup> Additionally, he found that there was no difficulty in implying a good faith duty into any ordinary commercial contract based on the presumed intention of the parties.<sup>834</sup>

Leggatt J has not stopped with this case. In *Al Nehayan v Kent*<sup>835</sup> Leggatt J reflected on the duty of good faith once more. Here, two personal friends had started a hotel business together, only for the business to face collapse and a demerger agreement be considered.<sup>836</sup> The defendant alleged that their consent to the agreement to pay £4.2 million was obtained unfairly.<sup>837</sup> Leggatt J seems to put a significant amount of emphasis on the fact that cases which have applied *Yam Seng* have been relational contracts,<sup>838</sup> while those that have rejected have been contracts not deemed relational.<sup>839</sup> However, a point must be made clear. This is not to be interpreted as an automatic duty of good faith where contracts are deemed relational. As implied terms in fact, the duty of good faith can only be implied on the test of business efficacy.<sup>840</sup> The usage of such terms by the court is often scarce and restrictive, undoubtedly due to its development during the era of liberalism.<sup>841</sup> Leggatt J makes no attempt to change the criteria, and does in fact utilise this fairly high standard for implication of terms in discussing terms of good faith.<sup>842</sup> With implied in fact terms necessarily being case-specific and contextual in nature, this methodology would be the anti-thesis of any general doctrine of good faith that has a substantive behavioural content.

Thus, the case of *Al Nehayan* demonstrates that English law has not adopted, nor does it intend to adopt, a general duty of good faith via implied terms towards all contracts. Rather, the future of *Yam Seng* is that courts are open to implying a good faith or fair dealing term of the contract when necessary for business efficacy. This seems nothing more than an explanatory gloss of the previous status quo, and if this construction

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<sup>833</sup> *ibid* 700-701.

<sup>834</sup> *ibid* 697.

<sup>835</sup> [2018] EWHC 333 (Comm).

<sup>836</sup> *ibid* 1-5.

<sup>837</sup> *ibid*.

<sup>838</sup> *ibid* 169; *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226(QB).

<sup>839</sup> *ibid* 170; *National Private Air Transport Services Co v Windrose Aviation Co* [2016] EWHC 2144 (Comm); *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396.

<sup>840</sup> *Marks and Spencers v BNP Paribas Securities* [2015] UKSC 72, [2015] 3 WLR 1843.

<sup>841</sup> Andrew Phang, 'Implied Terms, Business Efficacy and the Officious Bystander- A Modern History' (1998) *Journal of Business Law* 1, 2.

<sup>842</sup> *Al Nehayan* (n835) 174.

continues then *Yam Seng* is fundamentally uncontroversial.<sup>843</sup> Whittaker makes the point that this form of good faith would seem alien to even civil lawyers, because an implied term in fact can be excluded by express terms.<sup>844</sup> This has led to some academic rebuke of the case, including Zhou claiming that it did not take the full opportunity that it had to develop a general duty of good faith.<sup>845</sup> He has also claimed that a lack of an obligatory duty would allow for misleading behaviour to gradually become the commercial norm as parties would be free to conceal material information.<sup>846</sup> There is a significant problem with this argument in that the legal duty of good faith has not existed in English law for 200 years, yet this gradual movement has not occurred. As has been shown, the evidence points to the opposite trend, where commercial parties have been building relational networks and trust as to fully maximise their self-interest via co-operation.

To avoid potential confusion, a final care warning is needed. It should be noted here that the concept of relational contracts implying good faith in law has been raised by *Alan Bates and Others v Post Office Ltd.*<sup>847</sup> and later affirmed in *Essex County Council v UBB Waste (Essex) Limited.*<sup>848</sup> Both cases relied on *Yam Sang* and *Al Nehayan* in order to establish an implied duty of good faith in law for all relational contracts. These cases will be discussed in much further detail in chapter seven, as the author has severe qualms about the usage of the term relational contract. However, important for this chapter is that good faith has not entered into law via the backdoor. Rather, *Bates* referred to relational contracts as a separate species of contract.<sup>849</sup> Therefore, the categorisation of good faith analysis in relational contracts is similar in approach to other specialised contracts, such as employment contracts. Criticism will be drawn towards the qualifications of what makes a relational contract, and therefore what invokes good faith, within chapter seven.

#### **4.4.b Relevant Comparatives**

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<sup>843</sup> Simon Whittaker, 'Good Faith, Implied Terms and Commercial Contracts' (2013) 129 *Law Quarterly Review* 463, 469.

<sup>844</sup> *ibid* 468.

<sup>845</sup> Qi Zhou, 'The *Yam Seng* Case: A new Development of Good Faith in English Contract Law' (2014) 17(1) *International Trade and Business Law Review* 358, 360.

<sup>846</sup> *ibid* 368.

<sup>847</sup> [2019] EWHC 606 (QB).

<sup>848</sup> [2020] EWHC 1581 (TCC).

<sup>849</sup> *Bates* (n847) [711].

While England and Wales does not have a general duty of good faith, the 'ought' question must then be asked. In doing so, it is useful to compare a relevant jurisdiction to aid in predictive analysis. Yet, there is a pitfall in comparative work on good faith. Many academics seek to do comparative work via looking at civil law systems, most notably Germany.<sup>850</sup> Doing so would be a mistake. Civil law systems have significantly different legal cultures and traditions to the common law world, and full transplantation can result in a legal irritant.<sup>851</sup> The cultural divergence is extremely apparent within the German legal system as the commercial law is geared towards 'Rhineland Capitalism' and the practical application of good faith has been influenced by this commercial culture.<sup>852</sup> This is significantly different from liberal market economies where business has less of an influence in changing the institutional framework.<sup>853</sup> This divergence is amplified in good faith as good faith is attuned to societal/community conceptions, needs, and concerns.<sup>854</sup> This leads to culture-specific understandings of concepts like 'fair dealing' or 'reasonable commercial standards'. Therefore, comparisons with civil systems may be disingenuous as the culture of such systems will heavily affect the procedural operation of such a value-laden concept.

The most obvious system that would relate to England and Wales would be Canada. Canada maintained the same hostility towards good faith until 2014 with the case of *Bhasin v Hrynew*.<sup>855</sup> This case involved a quasi-franchise agreement in which Bhasin would sell education selling plans on behalf of Cam-Am.<sup>856</sup> This agreement soon broke down when Cam-Am put Hrynew as auditor over Bhasin's district despite the fact that Hrynew had previously attempted mergers with Bhasin and would now have access to confidential financial information.<sup>857</sup> This created an obvious conflict of interest. This power was found to be abused due to Hrynew utilising his position to pressure Bhasin into merging and eventually using the confidential data to solicit Mr Bhasin's

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<sup>850</sup> Camilla Baasch Andersen, 'Good Faith; God Grief' (2014) 17(1) *International Trade and Business Law Review* 310, 312; Joseph Beautridge, 'Understanding Good Faith in the Context of Contractual Performance: Lessons To Learn from the German System' (2016) 2 *Anglo-German Law Journal* 39; Vanessa Sims, 'Good Faith in Contract Law: Of Triggers and Concentric Circles' (2005) 16(2) *King's College Law Journal* 293, 296.

<sup>851</sup> Gunther Teubner, 'Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up In New Divergences' (1998) 61(1) *Modern Law Review* 11, 11.

<sup>852</sup> *ibid* 25.

<sup>853</sup> *ibid* 26.

<sup>854</sup> Alan D Miller, Ronen Perry, 'Good Faith Performance' (2013) 98(2) *Iowa Law Review* 689, 704.

<sup>855</sup> 2014 SCC 71; [2014] 3 SCR 494.

<sup>856</sup> *ibid* [5].

<sup>857</sup> *ibid* [9-12].



workforce.<sup>858</sup> Cam-Am continued his appointment and eventually terminated its contract with Bhasin after his continued resistance to merging. Cromwell J. took the opportunity to elucidate how the court would treat good faith:

'The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily'<sup>859</sup>

This rationale gave Cromwell J the basis to claim that a term of honest performance could be implied.<sup>860</sup> While this gives credence to a general duty of good faith, Cromwell refuses to engage if good faith itself is implied in fact or law.<sup>861</sup> The lack of a concrete term outside honest performance continued in *Moulton Contracting Ltd v British Columbia*<sup>862</sup> which refused to put good faith as an implied term, relying on *High Tower Homes Corporation v. Stevens*<sup>863</sup> which had emphasised that good faith was not an implied term but rather a general doctrine that can manifest specifically.<sup>864</sup> Additionally *Styles v Alberta Investment Management Corp*<sup>865</sup> refused to extend the duty of honesty to a duty of reasonable performance.<sup>866</sup> Further case law adds emphasis that good faith does not allow obligations wholly different from the terms of the contract.<sup>867</sup> One should not mistake this for a clear doctrine of honesty as Tapia points out that the lack of a positive duty creates legal ambiguity that causes significant issues for legal advice.<sup>868</sup> While Tapia has argued that a duty to disclose would contribute to business

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<sup>858</sup> *ibid* [13].

<sup>859</sup> *ibid* [63].

<sup>860</sup> *ibid* [73].

<sup>861</sup> *ibid* [73-76].

<sup>862</sup> 2015 BCCA 89; 249 ACWS (3<sup>rd</sup>) 736.

<sup>863</sup> 2014 ONCA 911.

<sup>864</sup> *ibid* [35-37].

<sup>865</sup> 2017 ABCA 1.

<sup>866</sup> *ibid* [49-50].

<sup>867</sup> *Addison Chevrolet Buick GMC Limited v General Motors of Canada Limited* 2015 ONSC 3404; 45 BLR (5<sup>th</sup>) 135, [119].

<sup>868</sup> Matthew Tapia, 'The Good Faith Doctrine: A Positive Duty To Disclose Would Protect the Reasonable Expectations of the Parties During Contract Performance' (2019) 96 University of Detroit Mercy Law Review 291, 316-317.

efficacy,<sup>869</sup> and thus potentially pass the test in *Yam Seng* for the particular facts in *Bhasin*, this has so far not been accepted by the Canadian courts.

This uncertainty is by no means a buried issue, as it has been raised again in 2021. *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*<sup>870</sup> extended the reach of good faith to include the restriction of discretionary in absence of a contractual term while simultaneously neutering the term by confining it the use discretionary power for non-contractual purposes. Interestingly, Kasirer J felt the need to clarify that the doctrine of good faith does not require the subordination of self interest.<sup>871</sup> There was an explicit rejection of an encompassing standard of unreasonableness,<sup>872</sup> and even went as far to say that to eviscerate another party of their benefit under the contract is not itself a breach of good faith.<sup>873</sup> This stance merely enforces the status quo of an omnipresent doctrine that is applied very narrowly. Therefore, this has not substantially changed the landscape post-*Bhasin*, which left numerous unanswered questions on how to apply dishonesty, resulting in speculation on what considerations a court will use.<sup>874</sup> The continual hesitancy to make bright line limits on the doctrine is likely due to good faith being necessarily vague, uncertain, and potentially impossible to define.<sup>875</sup> While the supreme court has traditionally maintained an overtly cautious approach, the main result in practice is that claims of good faith are now a boilerplate addition to pleadings.<sup>876</sup> With recent cases stating that all contracts will have good faith, while concurrently ripping out substantive good faith, the doctrine is simply a catalyst for confusion.

A refutation of Canadian comparatives could claim that uncertainty is unavoidable in early development. Zhou claims that over a long period of continuous precedent, the uncertainty surrounding a good faith duty will decrease naturally.<sup>877</sup> While intuitive, this argument is fundamentally flawed. The fragility of this argument is demonstrated

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<sup>869</sup> *ibid* 324.

<sup>870</sup> 2021 SCC 7.

<sup>871</sup> *ibid* [6]

<sup>872</sup> *ibid* [61-68]

<sup>873</sup> *ibid* [82-84]

<sup>874</sup> Conrad Flaczyk, Nicolas Glaudemans, 'Moving Beyond Uberrima Fides- The General Duty of Honesty in Contractual Performance and Punitive Damage Award in Anglo-Canadian Contract Law' (2018) 85 *Defense Counsel Journal* 1, 19-21.

<sup>875</sup> Jacob Young, 'Justice Beneath the Palms: *Bhasin v Hrynew* and The Role of Good Faith in Canadian Contract Law' (2016) 79(1) *Saskatchewan Law Review* 79,101-102.

<sup>876</sup> *ibid* 108.

<sup>877</sup> Zhou, 'The *Yam Seng* Case' (n845) 368.

through the legal history of the United States. Good Faith has been in the United States for 50 years, originally in the second restatement of contracts,<sup>878</sup> then the Uniform Commercial Code. While there is a slight difference in definitions of good faith between the two, the latter provides the most widely accepted version in Article 2 of:

'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade<sup>879</sup>

Prior to discussing the vagueness and generality of the definition, a problem already arises; the UCC definition has not been accepted by all US States. Maryland employs solely the second restatement's definition of subjective honesty, completely stripping away the objective standard of reasonable commercial practices.<sup>880</sup> Maryland is not alone in this regard, as a small number of other states have not adopted the UCC standard such as Missouri and Florida.<sup>881</sup> Achilihu has theorised the reason is that Maryland has a particularly challenging banking sector.<sup>882</sup> It is a state with multiple community-based banks that struggled with the demands after the financial crash, thus Maryland found it expedient to not enforce changes via UCC compliance during recovery.<sup>883</sup> Regardless of its contextual expedience, dissidence between states undermines the certainty provided by federal uniform laws.<sup>884</sup> Without touching upon the main criticism of good faith in USA law, cracks are already seen in the edifice. Though the domestic lawyer should not put much weight on this, as procedural issues of federalism are non-transferable to the unitary England and Wales system.

The problem that is transferable is the inadequate definition of a general duty of good faith. Two major schools of thought exist on this area. The first is the excluder approach of Robert Summers. This entails that good faith does not have a definition at all, but rather is used by the courts as to exclude bad faith conduct.<sup>885</sup> The certainty for the practical lawyer is to consider what form of conduct the judge intends to exclude.<sup>886</sup>

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<sup>878</sup> Restatement (Second) Of Contracts (205).

<sup>879</sup> UCC § 2-103.

<sup>880</sup> Lisa Sparks, 'The Regression of Good Faith in Maryland Commercial Law' (2016) 47(1) 17, 17-22.

<sup>881</sup> *ibid* 24.

<sup>882</sup> Kara Achilihu, 'Dishonesty in Fact: The Future Uncertainty of Maryland's Statutory Interpretation of Good Faith & Encouraging Lax Lender Liability' (2018) 77(4) Maryland Law Review 1206, 1227.

<sup>883</sup> *ibid*.

<sup>884</sup> Sparks, (n880) 24.

<sup>885</sup> Robert Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 58(2) Virginia Law Review 195, 201.

<sup>886</sup> *ibid* 200.

Immediate red flags should become visible at this junction, as entails courts deal with good faith claims on an ad-hoc, intuitive basis.<sup>887</sup> This allows for the potential of judicial discretion being used as to input personal moral standards, especially as good faith is often considered linked with morality.<sup>888</sup> Summers responds by claiming that no existent case law shows this trend, legal good faith is not the same as moral good faith in US Contract law, and that US contract law is generally free of moralism.<sup>889</sup> Relying on the express reasoning of judges, the excluder approach maintains that it is not the gateway to unregulated judicial moralism.

This is not particularly plausible. While it is true that courts have not expressed overt moral reasoning in its considerations of good faith, that does not mean its nonexistence. Public policy, moral upbringing, and community values can be unconscious deciders for judges in determining law.<sup>890</sup> This is amplified where there is room for interpretative choices within the law, for example the ambiguous legal language of good faith. If one needs evidence that extra-judicial concerns can effect a judge's output, one need not look further than Dansiger, Levav, and Avinaim-Pesso who found that the proportion of favourable judicial decisions massively decreased close to the judge's lunch break, only to spike immediately after.<sup>891</sup> Judges are, after all, human. They are fallible to the psychological connections between moral good faith and legal good faith, even unconsciously. Summer's approach essentially allows for a breach of good faith when a judge claims that it is breached.<sup>892</sup> With little guidance on precedent, the excluder approach may well encourage the linkage between the 'moral overtones of the Restatement'<sup>893</sup> and the decision making process of the judiciary.

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<sup>887</sup> Thomas Diamond, Howard Foss, 'Proposed Standard for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery' (1996) 47(3) *Hastings Law Journal* 585, 591.

<sup>888</sup> Martijn W. Hesselink, 'The Concept of Good Faith' in AS Hartkam, EH Hondius, MW Hesselink, CE du Perron & M Veldman (eds) *Towards a European Civil Code* (Kluwer Law International 2004) (Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1098856](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1098856)) last accessed 24/09/2018.

<sup>889</sup> Robert Summers, 'The General Duty of Good Faith- Its Recognition and Conceptualization' (1982) 67(4) *Cornell Law Review* 810, 834.

<sup>890</sup> Max Lerner (ed) *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (New York: Random House 1943) 51.

<sup>891</sup> Shai Dansiger, Jonathan Levav, Liara Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *PNAS* 6889, 6890.

<sup>892</sup> Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith' (1984) 9(4) *The Canadian Business Law Journal* 385, 398.

<sup>893</sup> Alan D Miller, Ronen Perry, 'Good Faith Performance' (2013) 98(2) *Iowa Law Review* 689, 705.

Nevertheless, Summer's approach has still been well received by the US judiciary.<sup>894</sup> Though, ironically, there is no certainty in the uncertain definition as even this has proven divisive. Burton has created a second school of thought: good faith is the prevention of parties recapturing forgone opportunities. The basis is that when a party contracts, they take on opportunity costs. Bad faith is the attempt of circumventing this by shifting opportunity costs onto the other party. This law and economics approach has seen itself brought up by the US courts.<sup>895</sup> Yet, courts do not seem to make much progress in coming up with results from this theory.<sup>896</sup> While intrinsic economic analysis might sound desirable, it is questionable if courts are competent in doing so. This is even less likely when courts have imperfect facts given to them by parties, who themselves have imperfect information. This cascading information asymmetry makes the Burton definition slightly unworkable in practice, and the lack of courts following the definition in its spirit is demonstrable of this.

Moreover, the Burton analysis used in practice destroys the very concept of good faith. Bridge comments that good faith under this analysis reduces it to become nothing but a breach of a contractual term.<sup>897</sup> Houh argues further that Summer's definition is used to achieve the same result by the courts; the protection of parties' reasonable expectations.<sup>898</sup> This underlies the main purpose of good faith, which is the safeguarding of parties mutual expectations.<sup>899</sup> Though, with this metric, it is difficult to see how this is not covered by the existent law of breach of contractual terms. Thus, Houh sees good faith as being able to subsume breach and to go further in increasing equality.<sup>900</sup> Academics have also seen it as a potential model for social engineering in destroying societal injustices such as racial discrimination.<sup>901</sup> If anything, these calls for

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<sup>894</sup> *Occusafe, Inc v EG&G Rocky Flats, Inc.*, 54 F.3d 618, 624 (10<sup>th</sup> Cir. 1995).

<sup>895</sup> *Carma Developers (Cal), Inc. v Marathon Dev. Cal. Inc.*, 826 P.2d 710, 727 (Cal. 1992); *Hubbard Chevrolet Co. v General Motors Corp.*, 873 F.2d 873 (5th Circuit 1989); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 417 (8th Cir. 1986)

<sup>896</sup> Richard Writz, 'Good Faith and The Morals of the Market Place' (2018) 36(2) *Quinnipac Law Review* 231, 233-245.

<sup>897</sup> Bridge, 'Does Anglo-Canadian Contract Law' (n892) 402.

<sup>898</sup> Emily MS Houh, 'The Doctrine of Good Faith In Contract Law: A (Nearly) Empty Vessel?' [2005] *Utah Law Review* 1, 51.

<sup>899</sup> Jay Feinman, 'Good Faith and Reasonable Expectations' (2014) 67(3) *Arkansas Law Review* 525, 525-529.

<sup>900</sup> Emily MS Houh 'Critical Interventions: Toward an Expansive Equality Approach to the Implied Doctrine of Good Faith in Contract Law' (2003) 88(4) *Cornell Law Review* 1025, 1088.

<sup>901</sup> Neil G Williams 'Offer, Acceptance, and Improper Considerations: A Common-Law Model For The Prohibition of Racial Discrimination in the Contracting Process' (1994) 62 *George Washington Law Review* 183, 214.

a more expansive view of legal moral faith confirm the psychological link between concepts of morality and good faith. Regardless, courts have at least not made any move towards moralism explicit and have phrased their judgements around the protection of reasonable expectations.<sup>902</sup>

This has left the United States common law in a rather confused place. Courts seem to want to protect the reasonable expectations of the parties, and so while they seldom apply *Burton* to reach a result, his language is employed so frequently that we are past the point of ignoring it.<sup>903</sup> Courts actively ignore the conflicts between the theories when searching for a definition that aligns with reasonable expectations.<sup>904</sup> This is in spite of the fact that neither *Summers* or *Burton* agrees on what the reasonable expectations of the parties actually are.<sup>905</sup> Essentially, the actual definition and substantive content of the duty of good faith are open ended.<sup>906</sup> This leaves the legal process in a position of extreme flexibility, but this comes at the sacrifice of certainty. This is antithetical to the classical doctrine, which maintains certainty as a cardinal virtue.<sup>907</sup> The uncertainty is for the US legal system, whose lawyers and judges must play the 'silly legal games' that merchants do not wish to be embroiled in. Since merchants already have trust in existing relationships, the only result of legal uncertainty on good faith are costly legal battles purely on the definition of the term which, after 50 years, is still debateable.

#### **4.4.c The Net English Approach**

Accordingly, the claim that good faith will evolve into a position of certainty seems implausible. Despite this, a general duty of good faith may still protect reasonable expectations. It allows for courts to pursue behaviour that is indecent or unfair, frustrating a party's intentions.<sup>908</sup> After all, few would intentionally contract to be treated unfairly or capriciously. At which point, the mythical meeting of the minds and

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<sup>902</sup> *Hubbard Chevrolet Co v General Motors Corp.*, 873 F.2d 873 (5<sup>th</sup> Circuit 1989); *Big Horn Coal Co. v Commonwealth Edison Co.*, 852 F.2d 1259 (10<sup>th</sup> Circuit 1988).

<sup>903</sup> Writz (n896) 245.

<sup>904</sup> E Allan Farnsworth, 'Good Faith in Contract Performance' in Jack Beatson, Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 161.

<sup>905</sup> Houh, 'The Doctrine of Good Faith...' (n898) 51.

<sup>906</sup> *ibid* 5.

<sup>907</sup> Melvin Eisenburg, 'The Emergence of Dynamic Contract Law' (2001) 2 *Theoretical Inquiry of Law* 1, 3-4.

<sup>908</sup> Mark Snyderman, 'What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 *University of Chicago Law Review* 1335, 1370.

the concept of a general doctrine of good faith are not diametrically opposed. Contract is both adversarial and a co-operative channelling of self-interest. A relational analysis might then add that English law is mistaken in its refusal to adopt any form of a general good faith standard. In such a light, one may see good faith as a potential relational bandage on the classical law, not fully making it a relational law of contract but providing courts the opportunity to employ relational analysis in deciding the conduct of the parties.

However, the question of 'does the English law of contract require good faith' comes to an anti-climatic end as the true answer is that it already has good faith. English law has never truly accepted the complete untrammelled self-interest of commercial actors.<sup>909</sup> Maintaining its distaste for any and all general principles,<sup>910</sup> the law of contract developed doctrines that allowed it to indirectly circumvent bad faith. Piers has classed the categories of doctrines that have dealt with this as: Duress, Mistake, Misrepresentation, Undue influence, Frustration, and Implied Terms.<sup>911</sup> The combined effect of these doctrines are that English Law comes to nearly identical results as good faith cases on the continent.<sup>912</sup> If good faith is to be seen as a measure to ensure the reasonable expectations of the parties,<sup>913</sup> it is hard to imagine that English contract law would completely disregard it. That good faith is present in some form is considered so obvious that it is not even considered a debatable topic to Campbell.<sup>914</sup> The debate, regardless of the dicta in *Walford*, is not about the desirability of good faith, but rather the desirability of a general doctrine.

The earlier comparative with the United States has already shown that the legal uncertainty of good faith is not cured by time. However, Brownsword argues the current law is still uncertain as it contorts itself to create fair results without a legal good faith obligation.<sup>915</sup> While uncertain and vague, good faith is not incapable of being given

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<sup>909</sup> David Campbell, 'Adam Smith and the Social Foundation of Agreement' (2017) 21 *Edinburgh Law Review* 376, 399-401.

<sup>910</sup> Maud Piers, 'Good Faith in English Law- Could a Rule become a principle' (2011) 26 *Tulane European and Civil Law Forum* 123, 132.

<sup>911</sup> *ibid* 154-160.

<sup>912</sup> Johan Steyn, 'The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy' [1991] *Denning Law Journal* 131, 138.

<sup>913</sup> Johan Steyn, 'Contract Law, Fulfilling the Reasonable Expectations of Honest Men' (1997) *Law Quarterly Review* 433.

<sup>914</sup> David Campbell, 'Good Faith and The Ubiquity of the Relational Contract' (2014) 77(3) *Modern Law Review* 460, 486.

<sup>915</sup> Roger Brownsword, 'Good Faith In Contracts Revisited' (1996) 49(1) *Current Legal Problems* 111, 132.

legal content,<sup>916</sup> thus potentially meaning that the certainty of a general obligation would surpass the status-quo of tacit good faith. The counter-argument lies in the fact that the doctrines used to create good faith are of themselves very strict and certain. Economic duress is still reasonably limited and restricted by a narrow outlook on illegitimacy of threats,<sup>917</sup> and by maintenance that hard bargaining by a stronger party will not qualify as duress.<sup>918</sup> Similarly, misrepresentation is equally clear by being a false statement of facts, not opinions,<sup>919</sup> and the burden of proof for negligent misrepresentation is difficult to discharge.<sup>920</sup> The doctrines are not vague as they had been developed through classical law's value of legal certainty intermingling with the simultaneous values of commercial utility and procedural fairness. They are the result of the synthesis of multiple converging values, and the presence of legal certainty allows for more predictability.

What benefits would there be that could outweigh the cost of uncertainty? One is that it would reflect the trusting and relational nature of contracting. The *Walford* idea that good faith is naturally contrary to the self-interested capitalist system is simply untrue. Sims comments that good faith does not counter the commercial effects on the relevant market when implying a term as such effects are central to courts balancing conflicting interests.<sup>921</sup> By the same stretch, the adoption of a good faith requirement does not entail the abandonment of liberal values like party autonomy and freedom of contract.<sup>922</sup> Rather, it simply applies these ideals to the reality of contracting and commercial parties which does not fall within the liberal ideal of the wholly selfish individual.<sup>923</sup> One could look to the aforementioned rationale of *Wastech* as an example of western liberal courts will be quick to emphasise that good faith is not opposed to commercial self interest.<sup>924</sup> It would then be a mistake to presume a good faith doctrine to be a victory of welfarism when it is a reflection of how humans contract within a self-interested capitalist system.

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<sup>916</sup> Leon Trakman, Kunal Sharma, 'The Binding Force of Agreements to Negotiate in Good Faith' (2014) 73(3) Cambridge Law Journal 598, 599.

<sup>917</sup> *CTN Cash and Carry Ltd v Gallaher* [1994] 4 All ER 714.

<sup>918</sup> *National Westminster Bank plc v Morgan* [1985] AC 686.

<sup>919</sup> *Bisset v Wilkinson* [1927] AC 177.

<sup>920</sup> *Howard Marine v Ogden* [1978] QB 574.

<sup>921</sup> Sims, 'Good Faith in Contract Law...' (n850) 299.

<sup>922</sup> Brownsword 'Good Faith in Contracts...' (n915) 128.

<sup>923</sup> *ibid.*

<sup>924</sup> *Wastech* (n870) [6].



Since good faith is not mutually exclusive from western liberal capitalism, the basic premise of *Yam Seng* is correct; The hostility to good faith in English law is misplaced. However, this does not necessitate a general duty of good faith to fit commercial reality so long as parties reasonable expectations are respected.<sup>925</sup> Contract law can be left to develop according to its own pragmatic traditions without adding an extra level of uncertainty.<sup>926</sup> Common law's systems still work tolerably, even if they offer no greater certainty than the civil law tradition of good faith.<sup>927</sup> Even *Yam Seng* accepted this proposition, and maintained that no general duty is needed where English law has the legal heritage of examining cases on a case by case basis.<sup>928</sup> Fundamentally, English contract law represents a compromise between its classical ideology and its acceptance of dissonance with reality. English contract law is filled with other-regarding duties, regulations, and standards as to not allow un-trampled self-interest.<sup>929</sup> If law was so blind as to simply self-refer consistently under application, such other-regarding duties would never have developed. Law's piecemeal compromise might be a counter-intuitive response to dissimilarity between the ideal and the real, but it is workable one.

This lack of a need for change also makes the commercial benefit questionable. If one accepts that good faith is a commercial norm then logically it will be in contractual performance regardless of law.<sup>930</sup> While Chen argues that a duty to good faith will help foster co-operative contractual relations,<sup>931</sup> parties seem to be co-operating of their own accord without such a duty being imposed. Special relationships, such as partnerships and franchises, may benefit from good faith but such relationships may already have good faith implied via fact or law.<sup>932</sup> The fact that this category of contract might benefit from good faith relations does not entail that all would. Merely agreeing a contract does not necessitate wanting to be in a long term contractual relationship that would appear in the complex end of the relational spectrum.<sup>933</sup> Parties in negotiations almost certainly do not immediately enter into a relationship of trust and confidence,

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<sup>925</sup> Steyn, 'Fulfilling the Reasonable Expectations...' (n913) 439.

<sup>926</sup> *ibid.*

<sup>927</sup> Steyn, 'The Role of Good Faith...' (n912)140.

<sup>928</sup> *Yam Seng* at [147].

<sup>929</sup> Campbell, 'Adam Smith...' (n909) 401.

<sup>930</sup> Teri Dobbim, 'Losing Faith, Extracting the Implied Covenant of Good Faith from (Some) Contracts' (2005) 84(1) Oregon Law Review 227, 251.

<sup>931</sup> Jason Chen, 'Should English Contract Law Adopt a General Duty To Negotiate In Good Faith' (2017) 2017 Bristol Law Review 18, 22.

<sup>932</sup> Dobbim (n930) 238-240.

<sup>933</sup> *ibid* 254.

and it is impractical to suggest that merchants should accept to be their brother's keeper before even deciding to enter contractual relations.<sup>934</sup> If a good faith doctrine were to go past the narrow Canadian 'honest dealing' remit, a remit Mitchell considers to be devoid of substance,<sup>935</sup> then it quickly becomes a 'one size fits all' category. While this might not cause active harm, it will not benefit contracts that are more discrete who do not need, nor require, good faith outside express terms.

Finally, the increased quantity of good faith terms will expand the role of good faith along already-set paths, rendering the need of a new doctrine moot. More parties are including express terms of good faith in their contracts.<sup>936</sup> While part of the reason might be simply a rhetorical overture to aid trust development, courts are required to construct such terms at relationship breakdown, thus increasing doctrinal substance. As express good faith terms of performance are uncontroversial, this allows for a body of work that allows for courts to apply substance to implied terms in fact on an ad-hoc basis without the need for a general doctrine. This useful starting place allows for certainty when courts deal with future problems,<sup>937</sup> thus allowing the classical law to keep its crown jewel. Thus, the piecemeal fashion of English law can act collaboratively, with judges routinely looking towards the analysis of express terms as a way to construct terms implied in fact. Therefore there is no real necessity to create a new doctrine to apply to all contracts when the current system, left to its own machinations, is able to develop its own certainty while respecting the reasonable expectations of the parties.

#### **4.5 Existence of a Real Issue?**

Consequently, English law does not require a general doctrine of good faith for commercial expectations to be met and the commercial benefit of a substantial doctrine is questionable. However, classical contract law still has a significant bias in favour of the Discrete transaction.<sup>938</sup> It is still disjointed from the reality of contracting, to the

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<sup>934</sup> Reshma Korde, 'Good Faith and Freedom of Contract' 2000 UCL Jurisprudence Review 142, 160.

<sup>935</sup> Mitchell, *Contract Law and Contract Practice* (n647) 133

<sup>936</sup> Neol McGrath, 'Good Faith: A Puzzle for the Commercial Lawyer' (2014) UCD Working Papers in Law, Ciminology & Socio-Legal Studies Research Paper No.11  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500105](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500105)> (Last accessed 29/08/2021) 12.

<sup>937</sup> Angela Swan 'The Obligation to Perform in Good Faith: Comment on *Basin v Hrynew*' (2015) 56(3) Canadian Business Quarterly 395, 403.

<sup>938</sup> Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72(6) Northwestern University Law Review 854.

point of irrelevancy.<sup>939</sup> While courts might accept the fact that contracts are not made in a vacuum from society, this view is tainted by the guise that such considerations are not salient for the court.<sup>940</sup> One might immediately point out in response that if parties do not care about the legal system and rules, in favour of trust and reputation, then there is no reason for the court to expand its ambit. The counter to this is that by the time that parties have entered the court, the relationship has already broken down.<sup>941</sup> Relational sanctions, at this point, have proven ineffective, and the 'preservation of the relation' norm be defunct. At which point, one must consider if the law protects the reasonable commercial interests within relational contracts even outside the good faith implied in law per *Bates*.

The most obvious example of the law not providing this is in the case of *Baird Textile Holdings v Marks and Spencer plc*.<sup>942</sup> Baird, a clothing supplier, had a close relationship with M&S which lasted a period of 30 years without need of a legally enforceable relationship.<sup>943</sup> Despite this, the parties had created multiple interconnected links with one another including: regular logistics consultations, appointment of mutually approved managers, and the implementation of a unique umbrella agreement.<sup>944</sup> This agreement took a rather sharp decline when M&S cut off all its ties with Baird due to decrease in sales (around 50%) and management overhaul.<sup>945</sup> Blois categorised this sharp turn in attitude as a corporate nervous breakdown.<sup>946</sup> While having previously embraced a reputation of 'once a supplier, always a supplier'<sup>947</sup> economic circumstances forced it to act in its extreme self interest and cut the relationship off. This was a clear breach of the trust that commercial parties often put on each other and therefore could count as an externality to the classical law of contract.

The Court of Appeal took a different stance. It found no case to answer, as the courts had found no certain evidence that the parties had intended to make a contract.<sup>948</sup> While counsel had given submissions regarding the applicability of relational contract theory

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<sup>939</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) Buffalo Law Review 763, 766-771.

<sup>940</sup> Catherine Mitchell, *Contract Law and Contract Practice* (n647) 102.

<sup>941</sup> Hutchinson (n650) 326.

<sup>942</sup> [2001] EWCA Civ 274; [2001] CLC 999.

<sup>943</sup> *ibid* 1001-1003.

<sup>944</sup> *ibid*.

<sup>945</sup> Keith Blois, 'B2B Relationships- A Social Construction of Reality?' (2003) 3 Marketing Theory 79, 87.

<sup>946</sup> *ibid* 88.

<sup>947</sup> *ibid* 89.

<sup>948</sup> *Baird Textiles* (n942) 1007.

in academia, these were largely ignored by the court as having no influence on the classical legal doctrine.<sup>949</sup> If parties' conduct would not change regardless of a contract's existence, then contract will not be implied.<sup>950</sup> This would undoubtedly be the case, as Baird's niche market would make it highly unlikely that they could go to any other supplier.<sup>951</sup> Additionally, they wished for increased flexibility due to the nature of the goods, and Baird had good reason to trust M&S due to both their reputation and the negotiation processes.<sup>952</sup> In a rather perverse fashion, the classical law did actually follow a line that was in the reasonable expectations of the parties. Neither had wished or wanted for the legal enforceability of the relationship, but had wished for exchange relations.

Even the subject of good faith would not have provided a welfarist outcome here. M&S had not behaved deceitfully, but rather Baird became complacent in their roles and future due to their psychological security on the relationship.<sup>953</sup> There was no bad faith to exclude, nor was there a salvageable relationship. It had simply broken down. Mitchell counters that an absence of formalities does not entail that parties proactively decided that no legal status was to be applicable.<sup>954</sup> After all, the socio-legal work of the past four decades shows an ambivalence to the law, so the absence of formalities is merely an extension of this.<sup>955</sup> This analysis falls on its own sword. If parties did not seek to evade legal relations due to apathy, such apathy intrinsically means they also did not wish to create them. At which point, the intervention of classical law would not protect the reasonable expectations of the actual commercial parties, but rather usurp them for the expectations developed from an academic model.

Yet, other relational contracts have similarly failed due to the strict and rather hard stance of law. In *Travel World Vacations ltd v Monarch Airlines*<sup>956</sup> a 12 year relationship was scuppered due to the court's refusal to recognise an overarching agreement to continue business subject to reasonable notice of termination. *Carlton*

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<sup>949</sup> *ibid* 1004.

<sup>950</sup> *ibid* 1014.

<sup>951</sup> Stefanos Mouzas, Micheal Furmston, 'From Contract to Umbrella Agreement' (2008) 67(1) Cambridge Law Journal 37, 47.

<sup>952</sup> *ibid*.

<sup>953</sup> Blois (n945) 89.

<sup>954</sup> Mitchell, Contract Law and Contract Practice (n647) 111.

<sup>955</sup> *ibid*.

<sup>956</sup> [2013] EWHC 2561 (Comm).

*Communications plc and Granada Media plc v The Football League*<sup>957</sup> equally failed due to lack of a written legal guarantee being in place. Mitchell has made the point that cases such as the above form a stark reminder to academics that the law of contract has not succumbed to socio-legal analysis yet and legal requirements are still necessary.<sup>958</sup> Though, Mitchell admits that the legal position remains straightforward, with the caveat that it is still dissonant from commercial practice.<sup>959</sup> Does dissonance mean commercial law is failing its objective? The author posits no. The common law of contract was not created from a conscious drive to suit the needs and whims of commercial actors.<sup>960</sup> The assumption that the primary drive of contract law is to suit merchants is unproven, and might well be undesirable.<sup>961</sup> When such an assumption is no longer present, the initial knee-jerk response to the commercial injustice of the above might well be irrational.

If law is not created to follow the merchant, Macaulay's claim that contract law would breach the warranty of merchantability is not as salient as imagined.<sup>962</sup> The judiciary are not insulated from mercantile concerns, even in the early days of contract,<sup>963</sup> but these were never given hegemonic value. Not only must certainty and procedural fairness be considered, but so must the reality of the court system including internal logistics, a reality Mitchell and other contextualists are accused of avoiding by Gava.<sup>964</sup> Even in the early days of commercial law, a quasi-Hippocratic oath was in play by the judiciary of to first do no harm to the commercial sector.<sup>965</sup> As courts have considered legal uncertainty a grievous harm for merchants,<sup>966</sup> it is unsurprising they would avoid it as to satisfy this quasi-Hippocratic oath. One may believe this is challenged by the apathy towards the law by merchants, but it is hard to imagine that the business world would remain apathetic over the law if it were not reasonably certain. While salience is put on more performative aspects of the contract, the legal position is often in the background

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<sup>957</sup> [2002] EWHC 1650 (Comm).

<sup>958</sup> Catherine Mitchell, 'Contract: There's still Life in the Classical Law' [2003] Cambridge Law Journal 26.

<sup>959</sup> *ibid* 28.

<sup>960</sup> John Gava, 'What We Know About Contract Law and Contract Practice' (2014 35(2) Adelaide Law Review 409, 416.

<sup>961</sup> *ibid* 416.

<sup>962</sup> Stewart Macaulay, 'Almost Everything That I Did Want To Know About Contract Litigation: A Comment on Galanter' (2001) 2001(3) Wisconsin Law Review 629, 630.

<sup>963</sup> Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 46.

<sup>964</sup> Gava (n960) 416.

<sup>965</sup> *Stone v Rawlinson* (1745) Wiles 559, 561.

<sup>966</sup> *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 ; *Buller v Harrison* (1777) 2 Cowp 565, 567; *Medcalf v Hall* (1782) 3 Doug 113, 115.

as a general guise that parties are aware of.<sup>967</sup> It is rather inconceivable that they would be able to do this should law become a wildcard with gross variations in its outcomes. The less confident merchants are about the legal outcomes, the more they must focus on them at the expense of business-related needs.

This reasoning would explain why commercial parties still view the law as indispensable even where they are apathetic about it. In Weintraub's study, 65.8% of business respondents believed that commerce would be effected both substantially and negatively by the removal of legal sanctions.<sup>968</sup> Respondents claimed that law sets rules for every action and that start-up companies would be highly disadvantaged due to their lack of a reputation.<sup>969</sup> The first response seems asymmetrical with the business practice of merchants ignoring legal enforceability. Yet, this can be harmonised with an understanding of Macneil's basic point: the most fundamental root of contract is society.<sup>970</sup> Regardless of the ideological pontiffs of either welfarism or of liberal economics, business has slowly and organically changed based on what society has demanded of it and contract law is a part of society. Contracts do not have a long life-span where they conflict with societal norms<sup>971</sup> and thus where parties wish to have a long contractual relation they will ensure that conflict with society is kept to a minimum. This means that society has a slow and incremental influence on contracting behaviour as the parties do not wish to have their relationship put in jeopardy by external forces, including new bouts of legal uncertainty.

In western society, this has amalgamated with the ideals of liberty. Freedom of contract is seen as a moral principle and is highly integrated in societal thought.<sup>972</sup> While it would be foolish to claim that society saw this as an unqualified or unrestricted principle, it is a central tenet nonetheless. A true reading of relational contract theory shows that party behaviour will not be immune from such considerations, and thus they will have reasonable expectations that such principles will be applied and respected by the courts subject to reasonable limits. At the point at which law is reasonably certain as

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<sup>967</sup> Beale, Dugdale (n660).

<sup>968</sup> Weintraub (n677) 24-25.

<sup>969</sup> *ibid.*

<sup>970</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1.

<sup>971</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 226.

<sup>972</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 214.

to not unnecessarily trample on this principle, it is argued that merchants are able to become complacent of the legal protection that they either have or do not have. In such complacency norms that require less positive effort and expense on their behalf, in the form of engaging with the legal system, can be seen as more attractive.. After all, the work of both Macneil and Macaulay point towards the fact that despite the fact that many contracts are not legally enforceable, relational contracts seem to be flourishing.<sup>973</sup> At which point, the classical law of contract, even with its unrealistic premise and absurd assumptions of parties, seems to be providing a suitable baseline for parties to enact their commercial expectations.

#### **4.6 Conclusion**

The purpose of this chapter was to show that the non-use of contract law is not inherently a problem. A whole host of reasons can be identified, such as the trust and relational sanctions that are amplified in relational contracting, and the simple reality that the process of the legal system is not a free one. Trust does not replace contract or the uses of legal instruments, but influences the performance and the dispute resolution behaviour of commercial actors. It is these two areas that classical law is most detailed, and thus a divergence from law and commercial practice is to be expected. This does not mean that law is irrelevant, but rather that it is not the primary metric of the parties.

The purpose of the discussion on good faith was a rather simple one; default harmonisation with the reality of contracting does not necessarily mean that commercial expectations will be more protected. The law may protect commercial expectations through multiple means, and a recourse to a default principle might not be the best methodology. The crown jewel of the classical has always been that of certainty, a subject that it shall defend even when faced against commercial practice, intention, or even that of ideological consistency. Multiple values exist in contract law, however the previous three chapters have highly stressed the point that classical contract doctrine will rarely sacrifice certainty. With this taken into consideration, one must question the ability of classical doctrine in the field of relational contractual governance. Externalities to the classical doctrine of contract law can exist, but whether or not it is worth dealing with these externalities is the primary subject of the forthcoming chapter.

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<sup>973</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 124.

## 5. Chapter Five: Fixing Contract Law's Externalities With A Relationally Constituted Contract Law?

### 5.1 Introduction

Relational contract theory swept the field of academia. The 95 works of Macneil have been cited (as of 2014) 7,347 times, with an average of 128 times per paper.<sup>974</sup> Yet despite its apparent academic success, the theory's direct impact on the law of England is much less pronounced.<sup>975</sup> Multiple reasons can be cited including the tendency of English law to prefer abstraction rather than detailed fact-finding.<sup>976</sup> This is combined with the fact classical concept of law was never really a theoretical framework.<sup>977</sup> A hybrid system of differing, often competing, values is difficult to manage ex-ante, so it is not surprising that courts wished to ease the complexity by abstracting the values from reality. It is without doubt that eliminating context and evidence makes the law easier to apply and predict, removing uncertainty that can lead to continuous litigation on application of law to particular factual matrixes.<sup>978</sup> This top-down approach would initially appear to be antithetical to relational contract theory's emphasis on the contextual understanding of contractual relations. Consequently, relational contract theory is considered a rival system, with neither side permitting the other to exist in the same system.<sup>979</sup> Such an adversarial dichotomy would lead to the contention that relational contract theory should become the dominant basis of legal contractual governance.

This chapter will explore this adversarial relationship with regards to the practicality of turning relational contract theory into workable law. Short of radical change encompassing all of contract law in statute, the author will presume a gradual change of the law through courts applying relational analysis in its interpretation of a contract. It is impossible to discuss such a change without placing the issue of contractual interpretation at the forefront. This is an issue whose contentiousness is most obvious in

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<sup>974</sup> Josetta McLaughlin, Jacqueline McLaughlin, Raed Elaydi, 'Ian Macneil and Relational Contract Theory: Evidence of Impact' (2014) 20(1) *Journal of Management History* 44, 47.

<sup>975</sup> Hugh Beale, 'Relational Values in English Contract Law' in David Campbell, Linda Mulcahy, Sally Wheeler (eds) *Changing Concepts Of Contract* (Palgrave Macmillan 2013) 116.

<sup>976</sup> *ibid* 118-119.

<sup>977</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 216.

<sup>978</sup> Beale, 'Relational Values in English Contract Law' (n978) 119-122.

<sup>979</sup> David Campbell, 'The Relational Constitution of the Discrete Contract' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 42.



the United States who have highly divisive schools of thought; a situation not aided by the courts fickle loyalty to either doctrine.<sup>980</sup> The binary that seems to have evolved has been between formalism and contextualism.<sup>981</sup> Modern contextualists have assumed that the divide is a fallacy, with both methods being useful tools.<sup>982</sup> This is not a view shared by hard-line formalists who would prefer exclusive formalism, come what may.<sup>983</sup>

However, much of the debate on a relational constituted law ignores a fundamental rule of regulation: the cure must be better than the cost. Even should we accept that the divergence between classical law and the reality of transactions are a harm, the cost of curing this harm cannot be relatively higher than the cost of the harm. If we are to change legal analysis, this will be regulatory change, and thus the cost-benefit analysis must be done. Using comparative work with the theory of social costs and externalities, it can be determined that the cost very simply is not worth the alleged benefits. What will be shown is that the alleged harm of classical law diverging from reality must be tolerated if it even is a harm. While a hard a pill to swallow, the co-existence of relational contract theory and the classical reasoning for the classical law might be inevitable.

## 5.2 Formalism

Formalism, while considered the historic legal methodology, is not so simple as to be self-explanatory. The term formalism is vague, and is often used for multiple different meanings.<sup>984</sup> Perhaps the easiest definition of formalism is provided by Schauer: ‘the concept of decision making according to rule’.<sup>985</sup> While this definition is certainly easy, it says nothing about the academic theory of formalism, nor does the mechanical operation of rule-based outcomes provide inherent justification for the rules.<sup>986</sup> Yet, this mechanical application has been the basis of English classical contract, which is

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<sup>980</sup> Lawrence Cunningham, ‘Contract Interpretation 2.0: Not Winner Take All But Best Tool for the Job’ (2017) 85(6) *George Washington Law Review* 1625, 1627.

<sup>981</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 240

<sup>982</sup> *ibid.*

<sup>983</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013).

<sup>984</sup> Johan Steyn, ‘Does Formalism Hold Sway In England’ (1996) 49(1) *Current Legal Problems* 43, 44.

<sup>985</sup> Frederick Schauer, ‘Formalism’ (1988) 97(4) *Yale Law Journal* 509, 510.

<sup>986</sup> Melvin A Eisenburg, ‘Why There Is No Law of Relational Contract’ (2000) 94(3) *Northwestern Law Review* 805, 805-808.

axiomatic by nature.<sup>987</sup> As a care warning, there is a divergence between the two major meanings of formalism. The author will refer to these as ‘English Formalism’ and ‘American Formalism’. The difference between the two strands can only be explained, ironically, by looking at their historical context.

‘English formalism’ is the black-letter jurisprudence that has been discussed in chapter two. For the purposes of this chapter, a few characteristics are to be kept in mind. Eisenburg has summarised the features of the classical law of contract into three broad groups: 1) axiomatic and deductive, objective and standardised, and static.<sup>988</sup> The first criteria is rather important and is one of the main reasons for the divergence between meanings of English formalism and American formalism. One of the chief internal values of classical law is its doctrinal certainty.<sup>989</sup> This includes a rigid application of *stare decisis*, in which courts will be restricted by merely one authoritative case in a higher court.<sup>990</sup> The result of these factors is extreme conservatism, aided by the nature of institutions which inherently prefer repeated patterns.<sup>991</sup> Deductive origins means that English formalism did not rise from academia, but rather through legal analysis. English formalism is thus the law-driven, academically sparse doctrine that has survived from the classical era without truly radical changes.

This directly contrasts with American formalism, which is a slight misnomer. American formalism is better labelled as ‘anti-anti-formalism.’<sup>992</sup> Rather than being a unified doctrine, it is an attack on the contextualist movement and its failings. This contrarianism is a result of legal history; the USA was heavily influenced by the legal realist school in the 1920s-30s. Formalism was under pressure for its disjointed approach to both reality and court proceedings. This led to the fall of formalism from the US zeitgeist, only to have a emergence by the mid 1980s, with the new-formalism and ‘neoclassical’ thought that strongly dispised anti-formalism.<sup>993</sup> However, this is naturally a reactionary stance, and mere complaints about anti-formalism are not a

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<sup>987</sup> *ibid.*

<sup>988</sup> *ibid* 805.

<sup>989</sup> Melvin Eisenburg, ‘The Emergence of Dynamic Contract Law’ (2001) 2 *Theoretical Inquiry of Law* 1, 3-4.

<sup>990</sup> AL Goodhart, *English Law and the Moral Law* (Stevenson & Sons 1959) 77.

<sup>991</sup> Francis Fukuyama, *Political Order and Political Decay* (Profile Books 2014) 6-19.

<sup>992</sup> David Charny, ‘The New Formalism In Contract’ (1999) 66 *University of Chicago Law Review* 842, 842-843.

<sup>993</sup> *ibid.*

convincing argument for a return to classical formalism.<sup>994</sup> Miller argues few seek to return to a full classical stance as neo-formalists have not forgotten the lessons of legal realism.<sup>995</sup> This all entails that American formalism is the opposite of English formalism in terms of its source material as its origins are those of reformist academics with a reactionary tone, although they seem equally hesitant to return to tradition.

The Anglo/American separation is a care warning. While the majority of scholarship regarding the benefits of formalism is American, one must be careful to not conflate their justifications with the rationale of English formalism. With this in mind, it is worth pointing out that the two systems are still similar enough that the analysis of one may transpose to the mechanism of the other. The main difference is primarily in the theorisation of formalism, with significantly less difference between classists and neo-formalists than the latter would admit.<sup>996</sup> The general desired outcome is similar: a rule-based system with limited discretion given to judges to give consequentialist reasoning's or weight to norms of morality or custom.<sup>997</sup> For contractual interpretation, both schools support textual primacy over the factual matrix that surrounds the contractual relation.<sup>998</sup> American scholarship is still useful in elucidating the benefits of formalism, albeit its utility must always come with a disclaimer.

A prevailing argument for formalism is the promotion of legal methods that businesses wish for contract law to deploy.<sup>999</sup> The first argument raised in favour of this is, unsurprisingly, legal certainty and predictability for commercial parties. This argument is best encapsulated by Morgan:

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<sup>994</sup> Curtis Bridgeman, 'Why Contract Scholars Should Read Legal Philosophy' (2008) 29 *Cardozo Law Review* 1443, 1446.

<sup>995</sup> Meredith R. Miller, 'Contract Law, Party Sophistication and The New Formalism' (2010) 75(2) *Missouri Law Review* 493, 495.

<sup>996</sup> Mark Moveseon, 'Formalism In American Contract Law: Classical and Contemporary' (2006) 11 *Ius Gentium* 115, 117.

<sup>997</sup> Gregory Klaus 'Contract Exposition and Formalism' (2017) *Georgetown University Law Review*, Available at < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2913620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913620)> (Last Accessed 25/01/2019), 3.

<sup>998</sup> Zhong Xing Tan, 'Beyond The Real and The Paper Deal: The Quest For Contextual Coherence In Contract Interpretation' (2016) 79(4) *Modern Law Review* 623, 626.

<sup>999</sup> Morgan, *Contract Law Minimalism* (n983) 1.

‘Commercial parties simply desire a functional framework for their deals. They have no interest in providing a laboratory for the testing of academic theories.’<sup>1000</sup>

In essence, the argument deduces that contract parties do not wish for complex or broad rules that expand liability as this will raise the cost of contracting.<sup>1001</sup> The avoidance of transaction costs would imply a form of ex-ante efficiency for the parties. However, one should not mistake this for the argument of ex-ante efficiency from the law and economics school in their quest for default rules.<sup>1002</sup> Formalism argues that the principle of law should not be to create efficiency, but rather the literal enforcement of express terms so parties may make their own efficiencies.<sup>1003</sup> This is distinct from the argument that the state should incorporate economically efficient default rules, as Scott warns this leads to the misinterpretation of express terms.<sup>1004</sup> The formalist's desired predictability is that of commercial parties able to predict a court's interpretation of their agreement, thus allowing for standardisation of clauses based off a plethora of legally decided terms.<sup>1005</sup> This sets formalism as an ideology of textual literalism, in which reliance on the express terms is considered more beneficial than applying external criteria or contextual fact.

A logical result of enhanced certainty over contractual interpretation is the standardisation of terms within contracts of the same sector. Forgoing vague and uncertain interpretation allows for courts to produce judgements that allow parties to signal their intentions using tested and safe standardised terms.<sup>1006</sup> This allows for ex-ante efficiency as the usage of standardised terms cuts the transaction costs of negotiation, reading, and drafting.<sup>1007</sup> Yet, this is a rather questionable benefit as full standardisation might defeat the integrity of the express term, and thus undermine the first cited benefit of formalism.<sup>1008</sup> Even literalist approaches whose predictability helps

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<sup>1000</sup> *ibid* 87.

<sup>1001</sup> *ibid* 91-92.

<sup>1002</sup> Ian Ayres, Robert Gertner, 'Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules' (1992) 101 *Yale Law Journal* 729.

<sup>1003</sup> Robert E Scott, 'The Case for Formalism in Relational Contract' (2000) 94(3) *Northwestern University Law Review* 847, 851-852; Morgan, *Contract Law Minimalism* (n983) 43-61.

<sup>1004</sup> Scott, 'The Case For Formalism' (n1003) 854.

<sup>1005</sup> *ibid* 866.

<sup>1006</sup> Robert E Scott, 'The Death Of Contract Law' (2004) 54(4) *University of Toronto Law Journal* 369, 379.

<sup>1007</sup> George G Triantis, 'Improving Contract Quality: Modularity, Technology, And Innovation in Contract Design' (2013) 18(2) *Stanford Journal of Law, Business & Finance* 177, 186.

<sup>1008</sup> Scott, 'The Case For Formalism' (n1003) 857.

to standardise express terms may create similar problems. Scott, Gulati, and Choi have recognised the existence of ‘black hole’ clauses in contracts.<sup>1009</sup> These are clauses which have undergone so much rote usage that they have lost all shared meaning along with a phenomenon of encrustation, in which the intelligibility of the clause deteriorates as more legal formality is added.<sup>1010</sup> This situation becomes extremely problematic as legal formalities are designed to circumvent interpretation.<sup>1011</sup> Their very function is to be a cheap and effective tool with little to no ascribed meaning other than the precedent of past judicial construction.<sup>1012</sup> This is a vicious and counter-productive cycle where the pursuit of formalism and formalities by both the judiciary and the parties can lead to the deterioration of an express term’s meaning.

Scott’s counter-argument is that courts should be open to arguments that the black hole clause is empty of all meaning.<sup>1013</sup> This stance is puzzling given Scott’s previous formalist argumentation. It seems highly unlikely, if not impossible, that any party could prove that a term is a black hole without significant contextual evidence for that effect. Scott gives an example of a question a court may ask itself:

‘Is a historic or original meaning of the term accessible in a fashion that makes sense in the contemporary context and are contemporary commercial actors aware of that meaning?’<sup>1014</sup>

This is, by definition, a contextualist question. It is asking courts to abandon the formalist position of taking the literal interpretation of the text and apply commercial context in the hope of avoiding absurdity in commercial boilerplate.<sup>1015</sup> This concession might be a large one, but it is a sensible one. In commercial boilerplate, parties may not intend anything by what is written. The original boilerplate can go through multiple legalistic processes which create ad-hoc cosmetic edits which are then mindlessly transferred into standardised templates.<sup>1016</sup> The clients of lawyers may not have even read the boilerplate from the outset, since the deal is focus on concerns such as price,

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<sup>1009</sup> Robert E Scott, Mitu Gulati, Stephen J Choi, ‘The Black Hole Problem in Commercial Boilerplate’ (2017) 67(1) *Duke Law Journal* 1.

<sup>1010</sup> *ibid* 5.

<sup>1011</sup> Klaus, ‘Contract Exposition...’ (n997) 18.

<sup>1012</sup> *ibid* 13.

<sup>1013</sup> Scott, Gulati, Choi ‘The Black Hole Problem’ (n1009) 68

<sup>1014</sup> *Ibid*.

<sup>1015</sup> *ibid* 67.

<sup>1016</sup> John F Coyle, Mark C Weidemaier, ‘Interpreting Contracts Without Context’ (2018) 67(6) *American University Law Review* 1673, 1679.

performance, and profit rather than ancillary terms.<sup>1017</sup> After all, the deal would go ahead even if the standard form, or the black hole clause, had never existed.<sup>1018</sup> Even reading the contract and the parties objectively, it cannot be said that interpreting the clause is about the parties' ex-ante intentions.<sup>1019</sup> Though, such a scenario lends little weight to contextualist approaches, as even a contextualist methodology will fail to turn up any party expectation if a term had no intended meaning.<sup>1020</sup> The concession by Scott that plain meaning might not be the best outcome in all circumstances can be said to be wholly sensible.

However, Scott's alternative that parties should submit that a clause has an empty meaning is inadequate. Any party who has been accused of a breach is not going to seek an argument that no one knows what the clause means, as doing so would give full control to the other party for a presented interpretation.<sup>1021</sup> Formalism would put parties in a catch 22 situation: they cannot argue the truth as that would damage their end-game motives, and they cannot argue outside the plain meaning of the text. This scenario defeats the certainty gained from standardisation, as well as overtly sidelining party intention. This anomaly might be devastating for formalism's validity as empirical formalism relies on the argument that parties choose or prefer a formalistic system.<sup>1022</sup> Even more damaging is the type of contract in which the anomaly is occurring. These contracts are high-end boilerplate, in which both parties are sophisticated and can manage their needs and risk via negotiation.<sup>1023</sup> Such a contract is close to the template bespoke contract of formalistic theory and contemporary analysis.<sup>1024</sup> Both parties in boilerplate disputes are sophisticated entities, who had full ability to adapt to the law, thus making them the ideal relationship for formalism. If the ideal relationship is creating unintentional entrapment via unread legalese, formalism's claim of commercial preference is suspect.

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<sup>1017</sup> Charles Sukurs, 'Harmonising the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods' (2001) 34(5) *Vanderbit Journal of Transnational Law* 1481, 1484.

<sup>1018</sup> Douglas Baird, Robert Weisberg, 'Rules Standards and the Battle of Forms: A Reassessment of s 2-207' (1982) 68 *Virginia Law Review* 1217, 1252.

<sup>1019</sup> Coyle, Weidemaier, 'Interpreting Contracts...' (n1016) 1680.

<sup>1020</sup> *ibid.*

<sup>1021</sup> *ibid* 1703.

<sup>1022</sup> Catherine Mitchell, *Interpretation of Contracts* (Routledge-Cavendish 2007) 101-108.

<sup>1023</sup> Margaret Jane Radin, 'The Deformation of Contract in the Information Society' (2017) 37(3) *Oxford Journal of Legal Studies* 505, 511-513.

<sup>1024</sup> *ibid.*

A potential way out for the parties would be an activist judge who identifies the above scenario, or any other similar absurdity, and makes judgements accordingly. Yet it is here that formalism makes its strongest and potentially most powerful argument; Judicial incompetency.<sup>1025</sup> This incompetency is not a general attack on the quality of the judiciary, but rather scepticism on their ability to determine both the underlying context of a contractual relationship and the social norms therein.<sup>1026</sup> Very simply, judges do not have access to all the information that the parties had been privy to throughout the relationship.<sup>1027</sup> The argumentation here is similar to that which is discussed for objectivism in chapter two, so it needs no repeating here. For the purposes of formalism, the choice that is presented is whether it is parties who choose to add context or social norms, such as good faith, into their contract or if it should be the court actively searching for such norms.<sup>1028</sup> Formalists side with the parties, who can include context into a written contract as they see fit rather than have judicial attempts to access the same context with limited resources.

The pragmatic arguments of costs must also be considered. There are obvious administrative costs to increasing the ambit of what a court is supposed to consider for construction. However the costs to the parties are equally important as there might be cause for concern that abandoning a formal approach would seriously increase costs at litigation. Parties must submit evidence to the court for any argument to be considered. Even the most activist of judges is bound by the submissions that parties present to them.<sup>1029</sup> If the court is clearly using contextual analysis to side with one party, the other tactically must respond by information gathering, using its own litigation funds. One of the defences of formalism is that it avoids the surprise litigation cost by allowing parties to only include what they want to be brought into court into the express contract.<sup>1030</sup> By avoiding having to respond to new evidence that a judge might appear to be engrossed with, the costs of litigation are minimalised, thus allowing for more ready access to the court structure.

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<sup>1025</sup> Scott, 'The Case For Formalism' (n1003) 859.

<sup>1026</sup> John Gava, Jayne Greene, 'Do We Need a Hybrid Law Of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63 *The Cambridge Law Journal* 605, 617.

<sup>1027</sup> *ibid.*

<sup>1028</sup> Robert Scott, Charles Sabel, Ronald Gibson, 'Text and Context: Contract Interpretation as Contract Design' (2004) 100(1) *Cornell Law Review* 23, 28.

<sup>1029</sup> Morgan, *Contract Law Minimalism* (n983) 160-163.

<sup>1030</sup> Scott, Sabel, Gibson, 'Text and Context' (n1028) 40.

Abandoning the strict restraints of formalism also comes with the drawback of crowding out other evidence. Bernstein has written much on the types of evidence in contract, marking a distinction between ‘Observable’ and ‘Verifiable’.<sup>1031</sup> Observable information is information that is both possible and worthwhile for transactors to obtain while verifiable is information worth the cost to prove to either a court or arbitrator.<sup>1032</sup> Many of the norms that are present within relational contract theory are observable, but they are not verifiable.<sup>1033</sup> What has been ignored by academia is what the expansion of the categories would actually mean for the evidence that is already in its place. Contextualism may naturally want for evidence that is observable but not verifiable to become verifiable. The problem is its potential to crowd out information that is already observable and verifiable. Parties have limited resources available for litigation, and this inherently means that there is only a finite amount of evidence that a party can actually afford to bring to a court, regardless of its worth.

This has two potential outcomes. The first is that a more contextualist outlook will have little effect on what evidence is adduced. Evidence that was once observable and verifiable will be preferred over new forms of evidence due to its historic predictability. This is essentially a form of path dependency. The other is significantly more concerning in which once favoured evidence begins to get crowded out by counsels who switch emphasis in the hopes of testing the limits of the court’s newfound leniency. With little precedence on the utility of a certain evidence, adducing it serves to increase the cost of litigation. Furthermore, as the remit of what is contextual increases, more party-unique evidence may come into play, potentially preventing such costs from ever decreasing from new precedence. If we were to apply Macneil’s norm of power into the equation, things begin to look dark as larger, economically sophisticated, parties can threaten a bombardment of contextual evidence to price them out of a dispute as a form of legal bullying. This could mean smaller merchants would be discouraged from accessing a system that is open to experimentation, and therefore open to abuse via saturation. Even should neither party wish to enter this attrition of cost, then the first scenario occurs and contextualism merely becomes a more expensive status-quo

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<sup>1031</sup> Lisa Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Codes Search for Immanent Business Norms’ (1996) 144 *University of Pennsylvania Law Review* 1865, 1791.

<sup>1032</sup> *ibid.*

<sup>1033</sup> Morgan, *Contract Law Minimalism* (n983) 105.



Even if contextualism was taken at its best where parties could produce evidence at non-onerous costs, there is no evidence to suggest that courts would be able to accurately determine the extra-legal norms of the relationship. The judiciary are not economists or sociologists, they are lawyers.<sup>1034</sup> While they are certainly still considerate to business need, they are not the experts in business relationships but rather experts in law.<sup>1035</sup> It must be remembered that the relationship norms during a contractual relationship are not the same as the norms in place when the parties are in court.<sup>1036</sup> At litigation, the relationship has been destroyed and the norms in effect are known as end game norms which are usually embodied in written contracts.<sup>1037</sup> Relationship preserving norms are designed to maintain relationships,<sup>1038</sup> and thus diverge from end-game norms which concentrate on breakdown economics. As courts do not have the same information of the parties, then courts are being asked to see party submissions of contextual conduct. This provides an incentive for parties to opportunistically tailor behaviour based on relationship preserving norms into completing the goals of end game norms. A court being able to resist this misleading behaviour is an optimistic view at best and a complete impossibility at worst.

Yet it is separation from social norms that raises the ire of relationalist. Murray argues that formalist claims to be relationalist are not persuasive due to their preference on written contracts and explicit meanings.<sup>1039</sup> Murray then claims that if the formalistic argument was correct, then parties would be writing clauses excluding all extra-legal material such as negotiations.<sup>1040</sup> The serious flaw in Murray's argument is that it ignores that the root of all contract is society. The reason for trust's current operation is the underlying social matrix that allows parties to believe that such signals to one another are trust signalling.<sup>1041</sup> To legalise certain norms, and thus making parties aware that certain parts of the relationship will now be open to judicial scrutiny, can be a dangerous braiding of end game self-interested opportunism and relationship preserving norms. Of course, this does not imply a complete usurpation, but rather that the norms,

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<sup>1034</sup> Morgan, *Contract Law Minimalism* (n983) 166.

<sup>1035</sup> *ibid.*

<sup>1036</sup> Bernstein, 'Merchant Law in a Merchant Court' (n1031) 1796

<sup>1037</sup> *ibid* 1797.

<sup>1038</sup> *ibid.*

<sup>1039</sup> John E Murray, 'Contract Theories and the Rise of Neoformalism' (2002) 71(3) *Fordham Law Review* 869, 892.

<sup>1040</sup> *ibid* 900.

<sup>1041</sup> Jonathan Morgan, 'In Defence of Baird Textiles' in David Campbell, Linda Mulcahy, Sally Wheeler (eds) *Changing Concepts Of Contract* (Palgrave Macmillan 2013) 174.

when judicialised, will adapt to the new social matrix. This can change their meaning, their characteristics, and their value.

Contextualist naivety does not mean that formalism is without sin. One of the biggest concerns is regarding plain meaning. It might be simple to claim that the plain meaning of words are apparent, but in practice language is far more complex. The English language has multiple dialects and colloquialisms that vary significantly on multiple different facts, including race, culture, religion, and locality.<sup>1042</sup> What the plain meaning rule ends up creating is a situation of “majority talk” prevailing.<sup>1043</sup> Furthermore, judges are not necessarily all in alignment with regards to what the 'plain' meaning of a word is, with significant division occurring and judges overestimating the force of their interpretation.<sup>1044</sup>

Without context, what the court can adduce from a contract might be significantly distorted from the deal to the point of absurdity. To take an example relating to the authors home dialect, suppose an English court is considering a hospitality contract in which a holiday-maker is booking a room with a Northern Irish hostel service. One of the terms of the contract is that a payment of £100 is to cover “the designated room and the crack provided by the landlords”. A judge, looking at context, would immediately be able to see that the meaning of crack is an Irish dialect for a pleasurable activity and thus apply *Jarvis v Swan Tours*.<sup>1045</sup> However, a fully formalist and acontextual meaning would, at best, interpret the sum to be for repairs of the room or, at worst, be handed over to drug enforcement.

This scenario is not as far-fetched as one might suspect due to the rise of precatory fine print.<sup>1046</sup> Precatory fine print are boilerplate terms designed to influence customer behaviour; including to motivate readership of the terms.<sup>1047</sup> One of the more common methods of doing this is to make the contract less legalistic and more colloquial, such as

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<sup>1042</sup> Steven Burton, 'Lessons On Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation' (2013) 88(1) 339, 351.

<sup>1043</sup> *ibid* 350.

<sup>1044</sup> William Baude Ryan D Doerfler, 'The (Not So) Plain Meaning Rule' (2017) 84(2) *The University Of Chicago Law Review* 539, 559-560.

<sup>1045</sup> [1972] EWCA Civ 8.

<sup>1046</sup> David Hoffman, 'Relational Contracts of Adhesion' (2018) 85(6) *University of Chigago Law Review* 1395, 1398.

<sup>1047</sup> *ibid* 1403.

the example of the dating app Bumble that Hoffman illustrates.<sup>1048</sup> This sort of contracting is prevalent in the digital consumer economy. The social media site Tumblr's terms and conditions is an amalgamation of formal and informal, with inclusions of phrases such as 'We're just letting you know'<sup>1049</sup> to make the terms more personable. The website Wikipedia has taken a more conservative approach with producing a 'human readable summary'<sup>1050</sup> above its terms and conditions. However, even its terms are still in an informal and consumer-friendly tone, including the final clause of the contract being a thank you for reading the contract.<sup>1051</sup> One of the reasons for this divergence from formality is that these are consumer contracts, with the sophisticated party attempting to innovate for consumer benefit.<sup>1052</sup> Unadulterated formalism has never fit in well with consumer contracts, and this divergence from a category of contracts is problematic when trying to merge with relational theory, which describes all contractual relations.

There is, however, a far graver threat to the use of formalism in relational contract law, and that is its justificatory base. Morgan makes the stance of new formalists clear: 'commercial contract law must serve the needs of the business community'.<sup>1053</sup> From the very start of his work, he maintains that the core task of the law of contract is to support commercial transactions and therefore advocates the instrumental viewing of contract law.<sup>1054</sup> The author rejects this starting position, though this refutation is not solely at formalists as contextualists such as Mitchell share the same premise.<sup>1055</sup> Historically, there is little reason to suggest that the English legal system primarily based itself around what the business community wanted.<sup>1056</sup> This is a problem when Morgan himself admits that the English legal system is 'winning the game' of contractual governance in terms of parties choosing to be governed by English law.<sup>1057</sup> This means that English contract law is already considered adequate by businesses

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<sup>1048</sup> *ibid* 1421-1441.

<sup>1049</sup> Tumblr, 'Terms of Service' Accessed at <<https://www.tumblr.com/policy/en/terms-of-service>> (last accessed 05/06/2020).

<sup>1050</sup> [https://foundation.wikimedia.org/wiki/Terms\\_of\\_Use/en](https://foundation.wikimedia.org/wiki/Terms_of_Use/en) (last accessed 02/01/2019).

<sup>1051</sup> *Ibid*.

<sup>1052</sup> Hoffman, 'Relational Contracts of Adhesion' (n1052) 1441-1444.

<sup>1053</sup> Morgan *Contract Law Minimalism* (n983) 91.

<sup>1054</sup> *ibid* 1-41.

<sup>1055</sup> John Gava, 'What We Know About Contract Law and Transacting in the Marketplace- A Review Essay' (2014) 35(2) *Adelaide Law Review* 409, 416.

<sup>1056</sup> *ibid*.

<sup>1057</sup> Morgan, *Contract Law Minimalism* (n983) 176.

without adopting the 'striving to meet business demand' attitude of Morgan.<sup>1058</sup> The 'customer is always right' attitude that is implied with putting business demand first is a very narrow ambit for contract law to take given its need to balance a plethora of demands.

It is most likely for the above reason that Morgan makes significant concessions, such as limiting his work to purely commercial contracts and avoiding consumer contracts.<sup>1059</sup> This is a significant hurdle to any attempt at harmonising formalism and relational contract theory when the latter encompasses all contracts. A more defensible basis would be to link the formalist status-quo with relational analysis. After all, law is a facet of society and so exists in the social matrix. This matrix influences all contracts, regardless of their position on the spectrum. Where a previously formalist system becomes more contextualist, this changes how contracts themselves function as the factual matrix changes around it. This leads to two questions: 1. Would the contextualist matrix be a net-detriment? and 2. Is the current matrix providing the benefits formalist theory claims? A positive answer to both questions would allow the ardent formalist to claim relational justification.

### 5.3 Contextualism

The formalistic stance to contract law has come under heavy criticism from the movement in contract law known as contextualism. This movement has a prima facie affinity with relational contract theory.<sup>1060</sup> As relational contract theory looks at the whole of the party's relationship, Feinman has called it 'contextual with a vengeance'.<sup>1061</sup> Mitchell has also pointed out that a basic demand of relational contract law would be for a more contextual approach to interpretation.<sup>1062</sup> It should be noted that there are, like formalism, two forms of contextualism. The first is that primarily seen within English courts, with a narrow approach focused on understanding the

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<sup>1058</sup> *ibid.*

<sup>1059</sup> *ibid* 108.

<sup>1060</sup> Tan Zhong Xing, 'Beyond The Real Deal and The Paper Deal: The Quest For Contextual Coherence In Contractual Interpretation' (2016) 79(4) *Modern Law Review* 623, 626.

<sup>1061</sup> Jay M Feinman, 'Relational Contract Theory In Context' (Spring 2000) 94(3) *Northwestern University Law Review* 737, 742.

<sup>1062</sup> Mitchell, *Contract Law and Contract Practice* (n981) 185.

express terms of the contract.<sup>1063</sup> The second is the movement in the USA which calls for a re-evaluation of the priorities of contractual interpretation, including the social matrix overcoming certain express terms.<sup>1064</sup> The first form will be dealt with in the subsequent section of English contract law, while this section shall look at the more extreme version which presents itself to be more in line with relational contract theory's demands.

First, it must be explored why contextualism sees the traditional formalistic style of contractual governance as inadequate. Collins has made the point that the formalist stance ignores the co-operative nature of contracting, and in doing so limits the ability for parties to maximise their joint wealth.<sup>1065</sup> He acknowledges that the business relation between the parties precedes the transaction, with surrounding social relations that are ancillary to the transaction itself.<sup>1066</sup> He maintains that the most appropriate form of legal regulation would have some form of reference to these facts which are instrumental in governing the business relation.<sup>1067</sup> The cited problem is that while formalism was good for the developing market economy of the nineteenth century, it has failed to adapt to the long-term supply contracts that have become the staple of the twentieth.<sup>1068</sup> Collins answer to this is for courts to look past the express terms of the agreement and to look at the surrounding circumstances.<sup>1069</sup> This is a rather useful shorthand for the contextualist movement. Less priority should be placed on express terms and more on the underlying context.

This is an obvious link with relational contract theory. Relational contract theory holds that accurate analysis must start with the surrounding circumstances due to the societal root. Equally, contextualists understand contracts to be a reflection of the context in which they have been formed.<sup>1070</sup> Attempting to interpret even the express terms without context is a disingenuous task at best,<sup>1071</sup> as language itself is a product of

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<sup>1063</sup> Catherine Mitchell, 'Interpreting Commercial Contracts: The Policing Role Of Context In English Law' in Larry DiMatteo, Martin Hogg (eds), *Comparative Contract Law: British And American Perspectives* (Oxford University Press 2016) 233.

<sup>1064</sup> *ibid* 234.

<sup>1065</sup> Hugh Collins, *Regulating Contracts* (Oxford University Press 1999) 198.

<sup>1066</sup> *ibid* 129.

<sup>1067</sup> *ibid* 181.

<sup>1068</sup> *ibid* 199.

<sup>1069</sup> *ibid* 181.

<sup>1070</sup> Larry Di Matteo, Blake Moirant, 'Contracts In Context as Context' (2010) 45(3) *Wake Forest Law Review* 549, 550.

<sup>1071</sup> *ibid* 551.

society. Even taking the plain meaning ideal, it is hard to see how any form of plain meaning could possibly be invoked without looking at the contextual meaning that makes it plain to begin with.<sup>1072</sup> Attempting to say otherwise harkens back to the neo-liberals who once made the argument that there is no such thing as a society. At the point at which the root of all contract is society, then the ‘plain meaning’ of a term is naturally society's plain meaning.

While this seems a tautology it is necessary to distinguish between necessary contextualism, that no serious formalist will dispute, and the contextualist movement. It should be noted the movement does not come with a pre-determined outcome. Contextualism can be used to allow for parties to plan greater wealth maximisation as Collins argues.<sup>1073</sup> It can be used to allow parties to achieve their reasonable commercial expectations from the contractual relation.<sup>1074</sup> It can be used from a welfarist standpoint such as to fix racial inequalities.<sup>1075</sup> It can be used to give more consideration to parties that may have structural disadvantages in the contractual system due to attributes such as gender.<sup>1076</sup> Similar to relational contract theory, it is not necessary that one must go into the analysis with a particular goal in line in order to justify using the tool. The contextualist movement does not necessitate welfarism or liberal economics. The objectives of both are ideologically compatible with the tool of contextualist analysis.

Paradoxically, contextualism does not necessitate a complete withdrawal from formalism. Gerhart and Kostritsky have pointed out that there is a false binary between the textualist and the contextualist standpoint.<sup>1077</sup> This is not an uncommon feature, as Bayren points out that contextualists will be formalistic under the right circumstances.<sup>1078</sup> This would explain American courts radically changing between which doctrine they approach the law from, using both as a tool as to obtain the best

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<sup>1072</sup> Mitchell, *Interpretation of Contracts* (n1022) 4-12.

<sup>1073</sup> Collins, *Regulating Contracts* (n1065).

<sup>1074</sup> Mitchell, *Contract Law and Contract Practice* (n981) 265-266.

<sup>1075</sup> Blake D Morant, ‘The Relevance of Race and Disparity In Discussions of Contract Law’ (1997) 31 *New England Law Review* 889.

<sup>1076</sup> Debora L Threedy, ‘Dancing Around Gender: Lessons From Arthur Murray On Gender and Contracts’ (2010) 45 *Wake Forest Law Review* 749.

<sup>1077</sup> Peter Gerhart, Juliet Kostritsky, ‘Efficient Contextualism’ (2015) 76 *University of Pittsburg Law Review* 509.

<sup>1078</sup> Shawn Bayern, ‘Contract Meta-Interpretation’ (2016) 49(3) *UC Davis Law Review* 1097, 1100.

result.<sup>1079</sup> It could then be seen as a mistake to go down the ‘all or nothing’ line than Cunningham warns has overtaken American scholarship.<sup>1080</sup> Mitchell has made clear that, while being a contextualist, there is room for formalism within a contextualist analysis.<sup>1081</sup> The divide between formalism and contextualism may be superfluous in the eyes of the contextual movement, though these feelings of amicability do seem rather one-sided as demonstrated through Morgan’s *Contract Minimalism*.

It would seem rather sensible for contextualism to concede that there should be room for formalistic analysis, primarily because there will be occasions in which it is far more appropriate in the makeup of the relation. An example is where parties are both highly sophisticated and therefore able to have negotiated the express terms and ordered risk sensibly.<sup>1082</sup> The opposite is also true, and where one party is seriously disadvantaged in terms of sophistication contextualism might be more appropriate.<sup>1083</sup> Though, given that contextualism is supposed to be a neutral tool, what context could make a difference in analysis yet still be able to be used regardless of ideology? Relational contract theory provides insight here with the point of party identity. Classical contract theory holds the identity of parties to be irrelevant.<sup>1084</sup> It is completely irrelevant to the discrete transaction the actors who are involved in it. A basic contextualist point is that the actors involved, and their level of sophistication, might be of use when making basic examinations about the nature of the transaction.

This is potentially one of the most profound arguments that hit English law, as party identification came with the recognition that consumer contracts should be separated. With the rise of the consumer society, consumer protection and welfarism began to rise with it.<sup>1085</sup> The history of consumer protection is probably the best example of contextual analysis being used by a welfarist ideology.<sup>1086</sup> In terms of current law, party identity is best described by the Consumer Rights Act 2015 in which it gives the following definitions:

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<sup>1079</sup> Nancy S Kim, ‘Evolving Business and Social Norm and Interpretation Rules: The Need For a Dynamic Approach to Contract Disputes’ (2005) 84 *Nebraska Law Review* 506.

<sup>1080</sup> Cunningham (n980) 1627-1630.

<sup>1081</sup> Mitchell, *Contract Law and Contract Practice* (n981) 240-242.

<sup>1082</sup> Miller, ‘Contract Law, Party Sophistication...’ (n ABOVE) 495.

<sup>1083</sup> *Ibid.*

<sup>1084</sup> Ian R Macneil, ‘Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law’ (1977-1978) 72(6) *Northwestern University Law Review* 854, 863.

<sup>1085</sup> Patrick Atiyah, *The Rise and Fall of Freedom Of Contract* (Oxford University Press 1979) 544-562.

<sup>1086</sup> *Ibid.*

'Trader' means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.'

'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession"<sup>1087</sup>

These are naturally vague definitions, used to catch as the largest possible amount of consumers. The protection offered by the statute affirms the welfarist streak, as the party identity of consumers is limited to natural persons in the explanatory notes, preventing small business claiming protection.<sup>1088</sup> This seems to point towards a distinction of sophistication and power balances of the parties, regardless of nuanced party roles. Even the law and economics school may be used to justify such a distinction, as modern behavioural economics shows that less sophisticated parties are more likely to be irrational and thus unable to make the self-interested decisions.<sup>1089</sup> Though this might be a flawed viewpoint. Austen-Baker has pointed out that when one properly applies relational contract theory, the consumer-supplier dichotomy begins to fall apart.<sup>1090</sup> This is not unexpected. Macneil's theory is vast and comprehensive, and making it legally operable to fix a pre-conceived problem will involve simplification for the sake of legal clarity. However, Austen-Baker's point that such regulation actually ignores relational contract theory's ideas that even consumers will be under the norms of contract causes concern.<sup>1091</sup>

The hyper-generalisation of law is not concerning merely because it is a failure to grasp an academic concept. It is concerning due to the basic premise of contextualism, to demonstrate the realities of the contract, seemingly failed at the hurdle applying the relational norm it used to prescribe protection. As Austen-Baker notes, the fact that both reciprocity and solidarity need to be present for any form of contract to function can mean that suppliers are not in the strong position that might be initially imagined.<sup>1092</sup> Of course, one must concede that consumer protection is not supposed to be a neutral

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<sup>1087</sup> Consumer Rights Act 2015, s2.

<sup>1088</sup> <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1/2>.

<sup>1089</sup> Chris Willett, 'Re-Theorising Consumer Law' (2018) 77(1) Cambridge Law Journal 179, 189.

<sup>1090</sup> Richard Austen-Baker, 'Consumer-Supplier Relations, Regulations, And Essential Contract Theory' (2008) Journal of Contract Law 60, 63-66.

<sup>1091</sup> *ibid* 66-73.

<sup>1092</sup> *ibid* 69-71.



analytic tool. It is created to correct power inequalities in contractual relations.<sup>1093</sup> Its divergence from normal contractual analysis may mean that it is no longer part of contract, but instead a separate regulatory system.<sup>1094</sup> The CRA envisioned making the law on B2C contracts clearer for the purposes of practice.<sup>1095</sup> Yet they seem to fail justifying their method with the object. This instrumental approach to contract law is a distortion of the relational analysis, but it is a distortion as to achieve a certain end.

The superficial analysis regarding consumer law elucidates one major theme; that law may fail at being the neutral tool that contextualism desires. This might be one of the reasons why it is better that court be 'rationally ignorant'.<sup>1096</sup> Rational ignorance is the decision by courts to limit their supply of information, and rational closed-mindedness is the pre-emptive decision to cut avenues of information off.<sup>1097</sup> Formalism naturally argues that the removal of contextual information is rational due to procedural cost and legal uncertainty.<sup>1098</sup> While formalism focuses on procedural costs, the author submits that biased distortion is just as dangerous. As Macneil points out, there is no system of analysis that is ever completely free from bias.<sup>1099</sup> Contextualism may be used for any object from any ideology, but going in with pre-emptive conceptions runs the same failings as classical law in creating a closed intellectual structure.<sup>1100</sup> Consumer law, the crown of contextualism, has done this by replacing express terms with party identity as the analytic priority. Usurping one aspect of the contract as the defining feature with another, instead of holistic analysis, is opposed to the ideals of relational contract theory. For contextualism to continue claiming harmony with relationalism, it will need to explain its fetishisation of consumer contracts.

This then causes problems for the claim that relationalism requires contextualism as a methodology. Collins argues for open-ended standards along the lines of good faith and reasonable expectations.<sup>1101</sup> Yet this gives no ability to prevent the activist judge from

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<sup>1093</sup> Alec Samuels, 'The Consumer Rights Act 2015' (2016) 3 *Journal of Business Law* 159.

<sup>1094</sup> Rodger Brownsword, 'Regulating Transactions: Good Faith and Fair Dealing' in G Howells, R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich 2009) 89-113.

<sup>1095</sup> Willett, 'Re-Theorising' (n1089) 182.

<sup>1096</sup> Shawn Bayern, 'Rational Ignorance, Rational Closed-Mindedness, And Modern Economic Formalism in Contract Law' (2009) 97(3) *California Law Review* 943.

<sup>1097</sup> *ibid* 944.

<sup>1098</sup> *ibid* 950.

<sup>1099</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 212.

<sup>1100</sup> *ibid* 210.

<sup>1101</sup> Collins, *Regulating Contracts* (n1065) 146-148

generating a pre-determined conclusion based on whim masqueraded as policy or context. Even should we accept open standards dedicated towards discovering contextual information, how might contextualism do this? Ben-Shahar and Strahilevitz have proposed that courts should make use of surveys in adding context to terms of the contracts.<sup>1102</sup> However, this is wholly unacceptable as it puts the burden on the parties to design surveys for the court. Regardless of cost increases, surveys can be made with leading questions as to get the desired result and most courts lack the capacity to assess the quality of data. Additionally, even finding the right interpretive community is a serious challenge that requires normative questions over what the categorical variable would be.<sup>1103</sup> Mitchell asks the court look at narratives of the parties.<sup>1104</sup> However, this is equally unacceptable as allowing parties to give subjective accounts of their interpretation of the contract, during the breakdown in which end-game norms are at play, encourages opportunism and outright perjury. There are few methods of instituting a fully contextualist system which do not come with increased risk of injustice or severely increased cost.

A combination of increased risk, increased cost, and recurrent failures means that the contextualist movement must be rejected. Merely decrying the issues of the formalistic parole evidence rules is not enough to create justification for a change in the law. The change must show itself to have a net-positive effect. It is true that contextualism offers more flexibility for parties.<sup>1105</sup> Though under formalism parties are still able to add as much context as they want to the contract.<sup>1106</sup> The non-use of contract law might still be at play, but the discussion seems to now be with whom the power to raise context comes from. When dealing with express terms, formalism has many failings that the English system has not fallen for. However, usurping the express terms for the factual matrix comes with a significant amount of court power. As contextualists have not adequately shown that their methods have practical value, they cannot be the preferred method for a relationally constituted law.

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<sup>1102</sup> Omri Ben-Shahar, Lior Jacob Strahilevitz, 'Interpreting Contracts Via Surveys And Experiments' (2017) 92 New York University Law Review 1753.

<sup>1103</sup> John Coyle, Mark Weidemaier, 'Interpreting Contracts Without Context' (2018) American University Law Review 1673, 1713 fn217.

<sup>1104</sup> Catherine Mitchell, 'Narrativising Contract Law' (2009) 29(1) Legal studies 19.

<sup>1105</sup> Jeremiaj A Ho, 'Why Flexibility Matters: Inequality and Contract Pluralism' (2017-2018) 18(1) UC Davis Business Law Journal 35, 103.

<sup>1106</sup> Jonathan Morgan, *Contract Law: Great Debates* (Macmillan, 2012) 74.

## 5.4 The English Law of Contract Interpretation

English contractual interpretation is historically regarded as formalist. Morgan uses this formalistic reputation as a defence for minimalism, claiming that England is winning the market for contractual governance as a result.<sup>1107</sup> He cites its objectivity and predictability as reasons for the dominance of English contractual governance in the market.<sup>1108</sup> However, we should not be under the illusion that English contract law is Morgan's prescribed normative system. While contextualists note there has been an upward trend in contextual analysis of contract<sup>1109</sup> this is not the same as saying traditional English contract law had previously embraced academic formalism. In fact, the rise of English contextualism is fairly narrow and is concentrated on the interpretation of the contractual document, not the wide ambit that US formalism prefers.<sup>1110</sup> This constrained remit is a result of a gradual development within traditional common law which always rejected hard formalism. In doing so, it has created a regime that still departs from relational contract theory, yet seems to not interfere with the needs of business.

Thus, the English legal system is under attack from both schools. Contextualists often criticise its dependency on the classical legacy and wish for a wider ambit of courts to determine wider business relationships.<sup>1111</sup> Morgan, however, claims there to be fear from his formalist standpoint that 'there is good reason to fear that English law has inclined unduly towards context'.<sup>1112</sup> The latter has been fuelled by Lord Hoffmann in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* (hereafter *ICS*).<sup>1113</sup> This case certainly left its mark upon the commercial-lawyer psyche, with Lord Steyn remarking that this case raised questions about 'the two sacred cows of English law' regarding the exclusion of negotiation evidence and subsequent contextual factors that elucidate party intention.<sup>1114</sup> Yet Lord Hoffmann does not seem to be setting

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<sup>1107</sup> Morgan, *Contract Law Minimalism* (n999) 176, 186.

<sup>1108</sup> *ibid.*

<sup>1109</sup> Catherine Mitchell, 'Interpreting Commercial Contracts: The Policing Role Of Context In English Law' in Larry DiMatteo, Martin Hogg (eds), *Comparative Contract Law: British And American Perspectives* (Oxford University Press 2016) 231.

<sup>1110</sup> *ibid.* 233-234.

<sup>1111</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 248-249.

<sup>1112</sup> Morgan, *Contract Law Minimalism* (n983) 231.

<sup>1113</sup> [1998] 1 WLR 896.

<sup>1114</sup> Johan Steyn, 'The Intractable Problem Of The Interpretation Of Legal Texts' (2003) 25(1) *Sydney Law Review* 5, 10.

himself as a trailblazer, but rather summarising the evolution of English law that had occurred decades prior since *Prenn v Simmonds*.<sup>1115</sup> Lord Hoffmann gave a restatement on the principles of contractual interpretation which can be summed as follows:<sup>1116</sup>

1. Interpretation is to ascertain the meaning of the document which would be conveyed to a reasonable person who had the background knowledge available to parties.
2. The background knowledge, also known as the matrix of fact, includes everything that can affect the meaning of the document's language
3. The law excludes previous negotiations and declarations of subjective intent for reasons of practical policy.
4. The meaning of the document is not the same thing as the meaning of the words. The former is determined by background, the latter by dictionaries.
5. The natural and ordinary meaning rule reflects the judicial attitude that linguistic mistakes are rare in contractual documents, though where there is evidence of the contrary the court will not enforce a meaning the parties clearly did not have.

These principles were later affirmed in *BCCI v Ali*.<sup>1117</sup> They have also been expanded to cover construction of trusts within equity.<sup>1118</sup> These principles have a simple rationale; it is only through contextual information that the interpreter can deduce the purpose of the communicators.<sup>1119</sup> As Mitchell notes, the purpose of interpretation here is on giving effect to the written document, and thus the plain meaning cannot be ignored.<sup>1120</sup> The dependency on the written text combined with a need for contextual analysis has led for Havelock to call *ICS* an 'unsatisfactory halfway house between two rival approaches in interpretation'.<sup>1121</sup> Regardless it is a highly influential case, with 1184 reported cases in the United Kingdom citing, 397 in New Zealand and 213 in Hong Kong as of 2016.<sup>1122</sup> Even appellate courts in Canada began adopting the rationale despite discrepancies with

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<sup>1115</sup> [1971] 1 WLR 1381.

<sup>1116</sup> *Investors* (n1113) 912-913.

<sup>1117</sup> [2001] 2 WLR 735.

<sup>1118</sup> *Catherine Armstrong v Catherine Armstrong* [2019] EWHC 2259 (Ch)

<sup>1119</sup> Adam Kramer, 'Commonsense Principles Of Contractual Interpretation (And How We've Been Using Them All Along)' (2003) 23 Oxford Journal Of Legal Studies 173, 177.

<sup>1120</sup> Mitchell, *Interpretation Of Contracts* (n1022) 43-45.

<sup>1121</sup> Rohan Havelock, 'Return To Tradition in Contractual Interpretation' (2016) 27 Kings Law Journal 188.

<sup>1122</sup> *ibid* 198.

precedent from Supreme Court.<sup>1123</sup> This flirtation has been tempered by the Supreme court, who confirmed that while the contractual interpretations should include surrounding circumstances, the plain and ordinary meaning of the documents must maintain primacy.<sup>1124</sup> Regardless of academic hostility towards *Investors*, this does not seem to have transferred over to common-law courts.

Havelock counters this, citing a retreat from *ICS* through a gradual series of cases.<sup>1125</sup> He claims *Re Sigma Finance Corporation*,<sup>1126</sup> *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council*,<sup>1127</sup> and *Marley v Rawlings*<sup>1128</sup> do not cite *ICS* in their discussions of contractual interpretation.<sup>1129</sup> This culminated in *Arnold v Britton*<sup>1130</sup> which Havelock calls the ‘coup de grâce’.<sup>1131</sup> *Arnold v Britton* involved a series of leases throughout 1978-1991, all of which contained a clause stipulating for an annual service charge. The interpretative issue regarded the fixed sum which would be subject to a compound increase of 10% every three years. In his judgement, Lord Neuberger goes through seven factors, three of which may, prima facie, contravene *ICS*. The first is that reliance within commercial common sense and the matrix of facts should not be used to undermine the importance of the textual language.<sup>1132</sup> The second, that natural meanings take preference unless there is ambiguity or lack of clarity which may justify departure.<sup>1133</sup> The third is that commercial common sense, regardless of interpretative importance, must not be used as a quick method of usurping the natural meaning of the words.<sup>1134</sup> This reaffirms the primacy of express terms which could be inferred to depart from the contextualist principles laid out in *ICS*.

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<sup>1123</sup> M H Ogilvie, ‘Reconsidering The Interpretation and Implication Rules in the Law Of Contract: An English-Canadian Comparison and a Proposal for a New Unified Rule’ (2013) 28(2) Banking & Finance Law Review 187, 189.

<sup>1124</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *Sabeen v. Portage LaPrairie Mutual Insurance Company*, 2017 SCC 7.

<sup>1125</sup> Havelock, ‘Return To Tradition’ (n1121) 198-200.

<sup>1126</sup> [2009] UKSC 2.

<sup>1127</sup> [2010] UKSC 47.

<sup>1128</sup> [2014] UKSC 2.

<sup>1129</sup> Havelock, ‘Return To Tradition’ (n1121) 198-200.

<sup>1130</sup> [2015] UKSC 36.

<sup>1131</sup> Havelock, ‘Return To Tradition’ (n1121) 198-200.

<sup>1132</sup> *Arnold* (n1130) [17].

<sup>1133</sup> *ibid* [18].

<sup>1134</sup> *ibid* [20].

These departures might then be an indication of court dissatisfaction with *ICS* principles in key areas.<sup>1135</sup> Departures from Hoffmann's restatement can be seen as restating the 'traditional law' approach.<sup>1136</sup> This puts some of the developed case law into doubt, most notably *Rainy Sky SA v Kookmin Bank*.<sup>1137</sup> In *Rainy Sky SA*, Lord Clarke of Stone-Cum-Ebony made clear that where language is capable of more than one construction, commercial common sense can be used regardless if a particular construction would lead to an absurd result.<sup>1138</sup> *Rainy Sky SA* also confirmed that the process of interpretation is a unitary process in which the court will construct the document with regards to the contextual information and in doing so will have preference for construction that aligns with business common sense.<sup>1139</sup> Lord Sumption claims that while Lord Clarke emphasised that the purpose is to understand, not override, the language of the parties, Lord Clarke's judgement does the opposite.<sup>1140</sup> While Sumption admits that the case may have been decided similarly based on a fully traditional approach,<sup>1141</sup> the point still remains that there exists a superficial tension between the principles of *ICS*, as carried on through *Rainy Sky SA*, and that in *Arnold v Britton*, which gives primacy to the plain and ordinary meaning.

This tension has been highlighted by academia, with a significant amount of praise for *Arnold v Britton*. Connal has claimed that lawyers advising on the meanings of documents can now 'breathe a sigh of relief'.<sup>1142</sup> Havelock has pointed that the retreat allows for more certainty and predictability for commercial actors to rely on express terms.<sup>1143</sup> Accordingly, parties can allocate terms and obligations at breach with more accuracy.<sup>1144</sup> Yet, it should be noted that this retreat is not a particularly explicit one, and has been referred to as 'muffled' by Lord Sumption.<sup>1145</sup> The Supreme Court itself

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<sup>1135</sup> David McLauchlan, 'The Lingering Confusion and Uncertainty in the Law of Contractual Interpretation' [2015] *Lloyd's Maritime and Commercial Law Quarterly* 406, 411.

<sup>1136</sup> David McLauchlan, 'The ICS Principles: A Failed Revolution in Contract Interpretation' (2016) *New Zealand Universities Law Review* 263, 274.

<sup>1137</sup> [2011] UKSC 50; [2011] 1 *WLR* 2900.

<sup>1138</sup> *ibid* [43].

<sup>1139</sup> *ibid* [21].

<sup>1140</sup> Lord Sumption, 'A Question Of Taste: The Supreme Court and the Interpretation Of Contracts' (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 308.

<sup>1141</sup> *ibid*.

<sup>1142</sup> Craig Connal, 'Has the Rainy Sky Dried Up? *Arnold v Britton* and Commercial Interpretation' (2016) 20(1) *Edinburgh Law Review* 71, 76.

<sup>1143</sup> Havelock, 'Return To Tradition' (n1121) 203-207.

<sup>1144</sup> *ibid*.

<sup>1145</sup> Sumption, 'A Question Of Taste...' (n1140) 313.

has actually rejected the idea that tension even exists per *Wood v Capita Insurance Services Limited*.<sup>1146</sup> Lord Hodge made his opinion very explicit:

“I do not accept the proposition that *Arnold* involved a recalibration of the approach summarised in *Rainy Sky*”<sup>1147</sup>

One of the chief reasons for this viewpoint is laid out unequivocally by Lord Hodge:

“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.”<sup>1148</sup>

This led to the conclusion that *Rainy Sky SA* and *Arnold v Britton* were the same principle.<sup>1149</sup> This judgement is critical by making clear that no one factor has universal primacy.<sup>1150</sup> It is a fact-specific analysis to aid objective interpretation of party intention. This does not prevent legal certainty arriving as certain contracts, such as pension schemes, will have distinct characteristics which entail the preference of certain interpretative tools.<sup>1151</sup> The case facts must be determinant to a judge considering to add context for interpretative purpose, though this does not permit overriding the bargain of the parties.<sup>1152</sup> This approach seems to have been accepted with a plethora of recent cases in agreement that there has been no reformulation to the principles of interpretation.<sup>1153</sup> McLaughlan argues that this continues the confusion of a major tension point: that ambiguity does not need to be present for the contextualist analysis,

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<sup>1146</sup> [2017] UKSC 24.

<sup>1147</sup> *ibid* [9].

<sup>1148</sup> *ibid* [13].

<sup>1149</sup> *ibid* [14].

<sup>1150</sup> Andrew Bowen, ‘Textualism and Contextualism In The Interpretation Of Avoidable Opaque Contract Terms’ (2018) 152 *Business Law Bulletin* 1, 3.

<sup>1151</sup> *Barnardo’s v Buckinghamshire* [2018] UKSC 55.

<sup>1152</sup> *NHS Commissioning Board v Silovsky* [2017] EWCA Civ 1389.

<sup>1153</sup> *Gorst v Knight* [2018] EWHC 613 (Ch); *ARB V IVF Hammersmith* [2018] EWCA Civ 2803; *Car Park Services Ltd v Bywater Capital (Winetavern) Ltd* [2018] NICA 22; *Botleigh Grange Hotel Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 1032; *Perkins Englines Co Ltd v Ghaddar* [2018] EWHC 1500; *Grimes v Essex Farmers and Union Hunt Trustees* [2017] EWCA Civ 361; *Barings (UK) Ltd v Deutsche Trustee Co Ltd* [2020] EWCA 521; *Gilbert v Duchess Wellesley* [2020] EWHC 777 (Ch).

which can be adopted even when not aligned to the plain meaning.<sup>1154</sup> From the standpoint of the formalist-contextualist debate, this puts English law in an awkward position. It has either returned to hard formalism with some soft contextualism, or the more contextualist analysis of Lord Hoffmann is still predominant.

With respect, this debate has been fuelled by mischaracterisation and oversimplification of the nature of English law. Fundamentally, English law has always been concerned about context.<sup>1155</sup> Although *ICS* has been characterised as a break from the traditional formalism Lord Hoffmann obtained all his principles via the use of precedent, not ideological musing. *Prenn v Simmons*<sup>1156</sup> and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*<sup>1157</sup> were both concerned about the matrix of facts surrounding the documents, and thus utilising contextualist information, long before *ICS*. Even without looking at pure interpretation of express terms one can see that the clear line rules of contract cannot possibly work without a view to context. Duress, Mistake, Frustration, and Misrepresentation are devoid of any power without appreciation of surrounding circumstances. English law has implicitly rejected the idea of the purely discrete contract, despite the classical legacy emphasis on presentation .

Perhaps the easiest example of this in contractual interpretation is that of the commercial common sense rule. This rule is naturally anti-literalist, demanding a view towards the merchant and away from semantic analysis.<sup>1158</sup> This concept long predates the contextualist movement with *Weardale Coal and Iron Co v Hodson*<sup>1159</sup> making reference to it in the ninetieth century. In *Glynn v Margetson & Co*<sup>1160</sup> Lord Halsbury explicitly said that whole provisions of the contract should be rejected if they run counter to the main purpose of the contract.<sup>1161</sup> Later case law would replace the term ‘object of the contract’ with ‘give effect to the intention of the parties’ when defending commercial common sense,<sup>1162</sup> yet the principle is identical. Previously, commercial

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<sup>1154</sup> David McLauchlan, ‘Continuity, Not Change, in Contract Interpretation’ (2017) 133 Law Quarterly Review 546, 549.

<sup>1155</sup> Natalie Byrne, ‘Contracting For Contextualism- How Can Parties Influence the Interpretation Method Applied to Their Agreement’ (2013) 13 1 QUT Law Review 52.

<sup>1156</sup> [1971] 1 WLR 1381.

<sup>1157</sup> [1976] 1 WLR 989.

<sup>1158</sup> Neil Andrews, ‘Interpretation of Contracts and Commercial Common Sense: Do Not Overplay This Useful Criterion’ (2017) 76(1) Cambridge Law Journal 36, 37-41.

<sup>1159</sup> [1894] 1 QB 598 (CA).

<sup>1160</sup> [1893] AC 351 (CA).

<sup>1161</sup> *ibid* 358.

<sup>1162</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771.



common sense was invoked at absurdity and irrationality, and this trend is also seen within case law post-*ICS*.<sup>1163</sup> Where there was ambiguity, it was used in deciding between competing constructions.<sup>1164</sup> The rationale here is to give effect to the reasonable expectations of the merchant as the only way of doing so is to avoid overly literal methods of interpretation which can lead to absurdity.<sup>1165</sup>

Emphasis must be placed on the word reasonable as opposed to actual, as subjective intentions are excluded from interpretation. This policy decision, but it is the main bulwark against full contextualism and even relational interpretation.<sup>1166</sup> The policy reason has been reference by the courts as a warning of judicial inexperience and incompetency against judges using the tool too freely.<sup>1167</sup> Similar to formalist argumentation, the appellate courts have recognised that they are not in the same position to know the facts as the parties, and so are in an inferior position to know what the parties have meant.<sup>1168</sup> Other common law courts have even made reference that commercial common sense is a vague and ambiguous term which courts need to be wary of.<sup>1169</sup> This wariness is easily understood when it is acknowledged that courts have routinely enforced the line that they will not make a contract for the parties regardless of unfairness or nonsensicality.<sup>1170</sup> This shows that courts are both wary of frustrating a contract through excessive literalism and wary of unchecked interpretive power of judges masking their intent via the guise of common sense.

Consequently, English law has always been a half-way house between formalism and contextualism. *ICS* simply made it more transparent that contextual factors were already within court remits. *Wood v Capita Insurance* was correct in saying that there is no real difference between the evolved *ICS* principles in *Rainy Sky SA*, and those in *Arnold*. Also, *Arnold* tacitly rejected the idea that absurdity is required for a departure from the plain meaning.<sup>1171</sup> A court being slow to replace the natural meaning of the words is not the same as a court being forbidden to do so. Case law shows that the ‘traditional’

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<sup>1163</sup> *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* [2011] EWHC 2111 (Ch).

<sup>1164</sup> *Co-Operative Wholesale Society v National Westminster Bank Plc* [1995] 1 EGLR 97 (CA).

<sup>1165</sup> Lord Hodge, ‘Can Judges Use Business Common Sense in Interpreting Contracts?’ in Larry DiMatteo, Martin Hogg (eds), *Comparative Contract Law: British And American Perspectives* (Oxford University Press 2016) 272.

<sup>1166</sup> Mitchell, *Contract Law and Contract Practice* (n1111) 208-211.

<sup>1167</sup> *Skanska Rasleigh Weatherfoil Ltd v Somerfiel Stores Ltd* [2006] EWCA Civ 1732, [32] (Longmore LJ)

<sup>1168</sup> *Royal and Sun Alliance Insurance Plc v Dornouch Plc* [2005] 1 All ER (Comm) 590.

<sup>1169</sup> *North Sydney Leagues Club Ltd v Synergy Protection Agency Pty Ltd* [2008] NSWSC 413.

<sup>1170</sup> *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL), 609.

<sup>1171</sup> *Arnold v Britton* (n1130) [20].

approach maintains elements of context. It simply has to do to the fact that no common law judge would be confident enough to completely dismiss an argument from counsel regarding a different interpretation of a clause.<sup>1172</sup> To do so would create a situation in which judges are accused of pre-judging the issue.<sup>1173</sup> When presented with competing interpretations, neither of which necessarily has to align with the plain interpretation, context becomes highly important as a guide for the courts.

English law therefore rejects the academic dichotomy between contextualism and formalism. Academia seems to have a fixation on ‘all or nothing’ rather than recognising that both tools are useful depending on the situation.<sup>1174</sup> While formalism can claim that the majority of parties would prefer their method, they cannot claim that every party and every contract wishes for it.<sup>1175</sup> As *Wood v Capita Insurance* points out, the court will decide how much emphasis to put on the contextual interpretation based on the factual matrix.<sup>1176</sup> This can easily be squared with relational contract theory under the norm of party autonomy, though courts are less concerned with the actual autonomy of the parties. They are concerned with the identity of the parties and their level of sophistication. This is a mechanism already seen within the US.<sup>1177</sup> When parties are sophisticated, formalism is intuitive due to the presumption that teams of lawyers will have worked on the express terms with the intention of them being followed.<sup>1178</sup> When the party is not, there is more of a judicial approach towards leniency and a more contextual analysis.<sup>1179</sup>

While this approach has problems for Morgan’s claim that the formalism is the reason why parties choose England, it equally has problems for the ardent contextualist. English law has created a system that identifies parties’ external norms in reference to the express terms of the contract. It does not look at the whole of the relationship, yet it has still created a successful half-way house. It has shown that it is unnecessary to seek for all external and contextual information in order to give effect to the expectations of

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<sup>1172</sup> Robin Havelock 'Some Fallacies Concerning the Law Of Contract Interpretation' (2018) 1 Lloyds Maritime And Commerical Law Quarterly 40, 49.

<sup>1173</sup> *ibid.*

<sup>1174</sup> Lawrence Cunningham, ‘Contract Interpretation 2.0: Not Winner Take All But Best Tool for the Job’ (2017) 85(6) *George Washington Law Review* 1625, 1627.

<sup>1175</sup> *ibid* 1641.

<sup>1176</sup> *Wood v Capita Insurance Services Limited* (n1146) [13].

<sup>1177</sup> Miller ‘Contract Law, Party Sophistication...’ (n995).

<sup>1178</sup> *Wood v Capita Insurance Services Limited* (n1146) [13].

<sup>1179</sup> Miller ‘Contract Law, Party Sophistication’ (n1177) 502-505.

the parties. The system where express terms come as the starting part of the agreement, with the plain meaning of these to be displaced only if a party is able to present a sound enough reason, seems to be working for the majority of parties. Equally, the flirtation with context has not created a slippery slope of judicial tyranny. As Andrews comments, express terms will never, through context, be tortured into a rival meaning with no support from the text.<sup>1180</sup> Very simply, context is a useful tool for courts where the express terms are insufficient. To deny the ability of parties to raise this, or to inflict context upon parties without their consent, could be considered a usurpation of will theory with its emphasis on a meeting of the minds.

### **5.5 Fixing Externalities: State Intervention To Market Failures**

The previous chapter made the case that the current legal system seems to still be adequate for the purposes of business despite its non-use. Yet, there is still a significant divergence between what the law claims contractual governance is and the reality of contracting. Markets will develop their own norms as they are a moral free space.<sup>1181</sup> These norms, as chapter three has shown, clearly conflict with classical contract's ideological premise. If we take Morgan's view that contract law is a market then this divergence can be classed as a quasi-externality. This categorisation is due to the definition of the externality as being the costs of an actor's methods being incurred by a third party.<sup>1182</sup> The reason for the author's distinction is due to the fact that we are no longer talking about a horizontal relationship, but rather a vertical one. The state may create contract law that is optional but any wishing to access legal rights must obey the law's prototype. This means that commercial actors are neither a true third party, nor are they a contractual partner.

Despite the technical definitional difference between vertical and horizontal relationships, the comparator of the externality is apt. The state refusing to recognise informal exchange relations, as well as behaviour-altering norms, can be viewed as an external cost. In harmonising law with the reality of contracting, we are then discussing externality regulation as any change taken by courts is a regulatory change. This is

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<sup>1180</sup> Andrews, 'Interpretation of Contracts' (n1158) 51.

<sup>1181</sup> Thomas Donaldson, Thomas Dunfee, *Ties that bind: A Social Contracts Approach to Business Ethics* (Harvard Business School Press 1999) 222.

<sup>1182</sup> Lisa Grow Sun, Brigham Daniels, 'Mirrored Externalities' (2014) 90(1) Notre Dame Law Review 135, 137.

because a shift to emphasising relational norms may move non-legal behaviour into the legal sphere and thus what is governed by law. This is a noticeably wide definition of regulation, termed by Campbell as social regulation, in which economic activity is controlled via establishing a pattern of behaviour.<sup>1183</sup> Additionally, legal change is not free,<sup>1184</sup> and this seems widely sidelined in the relational debate. The externality problem will demonstrate by allegory that the question to ask is not 'should a divergence between law and practice be fixed', but rather 'it is worth fixing'. Even if we assume the divergence is a harm, which often is the imperative behind calls for regulatory change,<sup>1185</sup> we must then ask what level of harm should we allow. Harmless/costless regulatory change does not exist, and all changes must derive a net-benefit.

Pigou, in his work *The Economics of Welfare*, elucidated that divergences between private net product and social net product can emerge due to the free-play of self interest.<sup>1186</sup> These divergences have potential uncompensated harms that operate on an extra-contractual level, thus creating a sub-optimal environment.<sup>1187</sup> In response to the divergence between social net product and private net product, Pigou thought it the role of the state to intervene in a balancing act.<sup>1188</sup> Pigou's initial plan was a form of Pigouvian tax that would be used as a knife edge tool to balance, rather than to achieve social outcomes.<sup>1189</sup> Campbell notes that Pigou saw intervention as an exceptional tool, and not something that is to be used carelessly.<sup>1190</sup> However, this does not detract from Pigou's optimism of the ability of the state to intervene.<sup>1191</sup> This optimism is what sparks the most contention with regards to the theory of social harms and would prove to be a sticking point in the debate of regulation of externalities.

Of course, the idea of regulating for externalities is not confined to Coase and Pigou, nor is it something that died out in the post-welfarist era. For example, Rahim has put

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<sup>1183</sup> David Campbell, 'The Market In The Theory Of Regulation' (2018) 27(5) *Social and Legal Studies* 545, 549-553.

<sup>1184</sup> Micheal P. Van Alstine, 'The Costs of Legal Change' (2002) 49(3) *UCLA Law Review* 789.

<sup>1185</sup> Debra Satz, *Why Some Things Should Not Be For Sale: The Moral Limits of Markets* (Oxford University Press 2010) 37.

<sup>1186</sup> Arthur Pigou, *The Economics of Welfare* (4th ed Macmillan 1932) 134.

<sup>1187</sup> *ibid.*

<sup>1188</sup> Arthur Pigou, 'State action and Laissez-Faire' in Arthur Pigou(ed), *Economics in Practice: Six Lectures on Current Issues* (MacMillan 1935) 107.

<sup>1189</sup> *ibid.*

<sup>1190</sup> Campbell, 'The Market In...' (n1183) 550.

<sup>1191</sup> David Campbell, 'Of Coase and Corn: A (Sort of) Defence of Private Nuisance' (2000) 63(2) *Modern Law Review* 197, 200.

forward the case that in new and emerging economies legislation is needed due to the chronic lapses in self enforcement.<sup>1192</sup> Additionally, the environmental law polluter pays principle is often justified on the lines of Pigouvian social cost.<sup>1193</sup> Part of the reason for the linkage to regulation can come down to the fact that externality is a normative concept.<sup>1194</sup> Implicit in Pigou's explanation of the externality is the assumption that government alternatives can decrease the costs incurred by third parties.<sup>1195</sup> This is because of inherent value judgements when discussing externalities, as if one believes the market will internalise everything then there are no externalities in the first place.<sup>1196</sup> Following this argument would lead to the first question at the notice of a negative externality to be akin to the current first question of relationalist: how does one narrow the divergence?

The major attack that Coase made on this assumption was over the optimism that regulation will leave the scenario in a more optimal position. The criticism focused on blackboard policies that look welfare-enhancing on theory alone reinforced by the presumption of state competence.<sup>1197</sup> Yet, the basis of this attack is often misunderstood. The 'Coase Theorem' gets a significant amount of academic attention, but what academics often reference is often irrelevant to Coase's point. The misconception is the claim that when transaction costs are zero then externalities will be neutralised via voluntary bargaining.<sup>1198</sup> It is highly unfortunate that this line of thought persisted, especially as Coase was opposed to the idea that zero transaction costs was even possible.<sup>1199</sup> It is more useful to focus on Coase's attack on the regulation of externality via state intervention. This has obvious parallels with formalism as both question the competency and effectiveness of state institutions.

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<sup>1192</sup> Mia Rahim, 'Legal Regulation of Corporate Social Responsibility: Evidence from Bangladesh' (2012) 41(2) *Common Law World Review* 97, 132.

<sup>1193</sup> Anisia-Teodora Doniga, 'The Polluter Pays Principle' (2016) 2016 *Law Annals From Titu Maiorescu University* 79.

<sup>1194</sup> Carl J Dahlman, 'The Problem of Externality' (1979) 22(1) *The Journal of Law and Economics* 141, 155.

<sup>1195</sup> *ibid.*

<sup>1196</sup> *ibid* 156.

<sup>1197</sup> Ernest Williams, Ronald Coase, 'The Regulated Industries: Discussion' (1964) 54 *American Economic Review (Papers and Proceedings)* 192, 195.

<sup>1198</sup> Ronald Coase, 'The Problem of Social Cost' (2013) 56 *Journal of Law and Economics* 837, 843-850.

<sup>1199</sup> David Campbell, 'The Sense in Coase's Criticism of the Ceteris Paribus Case for Intervention' (2017) 13 *The Journal of Law and Policy* 39, 40; Coase, 'The Problem of Social...' (n1198) 850

Although it would be unfair to mischaracterise Pigou the way how Coase has done. The depiction of an extreme interventionist was not aided by scholars who were sympathetic to Pigou using his work to further goals towards state reallocation of resources.<sup>1200</sup> When compared with his successors, Pigou does not seem much of a Pigouvian.<sup>1201</sup> His most interventionist claim was that there was a prima facie case for intervention at the existence of an externality, with an implicit understanding that other factors were required to justify intervention.<sup>1202</sup> Though one should not accept the apologism of Aslanbeigui and Oakes who attempt to frame Pigou as a pragmatic advocate for ad hoc analysis of government capacities.<sup>1203</sup> Pigou still had an unwarranted, slightly naive, impression of what the state could accomplish using ad-hoc boards in the face of failure.<sup>1204</sup> This naivety justifies the Coasian attack of inadequate levels of institutional analysis.<sup>1205</sup> While unfair to accept all of Coase's attacks on Pigou, it is still true that the criticism of naivety of state competency is not a misconception.<sup>1206</sup> Pigou still made critical failings of research and argument in his attempts to justify intervention for externalities even if not to the level his critics ascribed to him.

One can see the parallel between the Pigouvian reaction to fix the externality and the relationalist stance of seeing divergences between law and practice and wishing for harmonisation. This reaction is not completely novel and has been argued by Charley<sup>1207</sup> and Devlin.<sup>1208</sup> Indeed, the latter argued that the merchant expects the law to conform to the mercantile understanding of the law.<sup>1209</sup> Relationalists do seem to follow this line, though not dogmatically, by the admission that a demand of relationalism is that contract regulation should be according to the internal norms of the parties and not by an external standard.<sup>1210</sup> With classical law's emphasis on discreteness and

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<sup>1200</sup> Donald Stabile, 'Pigou's Influence on Clarke: Work and Welfare' (1995) *Journal of Economic Issues* 1133, 1133.

<sup>1201</sup> Bruce Yandle, 'Much Ado About Pigou' (2010) 33(1) *Regulation* 2, 4.

<sup>1202</sup> Pigou, *The Economics of Welfare* (n1186) 332.

<sup>1203</sup> Nahid Aslanbeigui, Guy Oakes, *Arthur Cecil Pigou* (Macmillan 2015) 168-171.

<sup>1204</sup> Pigou, *The Economics of Welfare* (n1186) 334.

<sup>1205</sup> Campbell, 'The Sense in...' (n1199) 45.

<sup>1206</sup> Roger Backhouse, Steven Medema, 'Economics and the Analysis of Government Failure: Fallacies in the Chicago and Virginia Interpretations of Cambridge Welfare Economics' (2012) 36 *Cambridge Journal of Economics* 981, 992.

<sup>1207</sup> RST Chorley, 'The Conflict of Law and Commerce' (1932) 48 *Law Quarterly Review* 51.

<sup>1208</sup> Patrick Devlin, 'The Relation Between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249,

<sup>1209</sup> *ibid.*

<sup>1210</sup> Mitchell, *Contract Law and Contract Practice* (n981) 185

presentation,<sup>1211</sup> it has created a false view of what contracting is and how the relationship is governed.<sup>1212</sup> One can go as far to say that its perspective on reality is disjointed to the point of irrelevancy.<sup>1213</sup> Using the idea of the externality, we can consider this discrepancy to be an externality that, through the courts' power of precedent, affects third parties who are outside of the case that has enacted the rule.

If we accept that the divergence between law's ideology and commercial practice is an externality, then what is the cost of the externality? It can be argued that the divergence alone is inherently harmful, that law should strive to always be relevant to commercial practice, in what is called the Mansfield approach.<sup>1214</sup> After all, the workings of lawyers, despite the non-use of law, have still affected parts of commercial practice as legal rules become part of the commercial matrix.<sup>1215</sup> Yet, harm of such a gap comes into question when one recognises that relational contracts seem to still be commonplace in current system.<sup>1216</sup> As discussed in chapter four, the non-use of contract law is not inherently a problem, and does not seem to have any real world problems for the majority of contract parties during their relationship. This causes immense problems for any serious argument that would claim that the law's discrete standpoint undermines the norms and values of the parties. The only observable harm seems to be in the form of an academic headache over the divergence of law and reality.

With little evidence of widespread practical harm, the net-benefit criteria for regulatory change already looks suspect. Relational contract law might, however, find justification in benefits from implementation. By having an individualised, less formalistic, and more relational law, contract law would fulfil the purpose of fulfilling the parties' true objectives.<sup>1217</sup> Perhaps an acknowledgement of the intrinsic co-operative nature of the

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<sup>1211</sup> Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72(6) *Northwestern University Law Review* 854.

<sup>1212</sup> Jay M Feinman, 'Relational Contract Theory In Context' (Spring 2000) 94(3) *Northwestern University Law Review* 737, 738.

<sup>1213</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) *Buffalo Law Review* 763, 778

<sup>1214</sup> Morgan, *Contract Law Minimalism* (n999) 87.

<sup>1215</sup> Tan Yock Lin, 'Construction of Commercial Contracts and Parol Evidence' (2009) *Singapore Journal Of Legal Studies* 301, 302.

<sup>1216</sup> Morgan, *Contract Law Minimalism* (n999) 124.

<sup>1217</sup> Melvin Eisenburg, 'The Emergence of Dynamic Contract Law' (2001) *Theoretical Inquiries of Law* 1, 2-4.

relationship would help guide judges in determining liabilities.<sup>1218</sup> This could break down the distinction between the ‘real deal’ and the ‘paper deal’ that courts seem to struggle to understand.<sup>1219</sup> Parties may benefit as they no longer need to deal with the ‘genuine struggle’ to assimilate two normative frameworks within their agreement.<sup>1220</sup> It is also true that in a choice between a relationalist analysis and an imposed analysis, the former will be more accurate at discovering the parties’ reasonable expectations.<sup>1221</sup> For example, Mulcahy and Andrews have shown that the case of *Baird Textile Holdings v Marks & Spencer plc* can be construed far differently should the court have taken into account the relational norms of trust and the need of flexibility.<sup>1222</sup> Perhaps the benefits of integration might be a reason for a relationally constructed law.

Yet, these benefits are rather dubious. Even ignoring the doomed process of promoting trust and relational norms via law,<sup>1223</sup> the alleged benefits ignore a key part of Macneil’s analysis. If we accept that the root of all contract is society,<sup>1224</sup> then the legal background will be part of that root. This means that all essential contract norms are necessarily influenced by the current legal makeup. It is a fallacy to assume that integrating norms into relational analysis will not have an effect on the norms in question.<sup>1225</sup> This can happen both consciously and subconsciously, as there is always the danger that commercial actors will choose not to know the law and those that do choose to know it will actively avoid it.<sup>1226</sup> Of course, successful enforcement may gather more support for prevailing law.<sup>1227</sup> However, the opposite is also true and government failure delegitimizes regulation.<sup>1228</sup> That is to say, that an upsurge of judicial error caused by a change to relationally constituted law might have the opposite

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<sup>1218</sup> Jay Feinman, ‘Relational Contract Theory In Context’ (2000) 94 North Western University Law Review 737, 748.

<sup>1219</sup> Catherine Mitchell, ‘Contracts and Contract Law: Challenging the Distinction Between the Real Deal and the Paper Deal’ (2009) 29(4) Oxford Journal Of Legal Studies 675.

<sup>1220</sup> *ibid* 698-703.

<sup>1221</sup> Collins, *Regulating Contracts* (n1065) 140-148.

<sup>1222</sup> Linda Mulcahy, Cathy Andrews ‘Baird Textile Holds v Marks & Spencer plc’ in Rosemary Hunter, Clare McGlynn, Erika Rackley, Brenda Hale (eds), *Feminist Judgements: From Theory To Practice* (Hart Publishing 2010).

<sup>1223</sup> Jonathan Morgan, ‘In Defence of Baird Textiles’ in David Campbell, Linda Mulcahy, Sally Wheeler (eds) *Changing Concepts Of Contract* (Palgrave Macmillan 2013) 170-174.

<sup>1224</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1-4.

<sup>1225</sup> Morgan, *Contract Law Minimalism* (n983) 105.

<sup>1226</sup> Thomas McInerney, ‘Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility’ (2007) 40(1) Cornell International Law Journal 171, 185.

<sup>1227</sup> *ibid* 191.

<sup>1228</sup> Campbell, ‘The Sense In...’ (n1199) 54.



effect to enhancing party's trust in the law to achieve their reasonable expectations. Should the impression that a move to a relationally constituted approach hampered judicial accuracy take root, the imperative to avoid law increases.

How likely is this delegitimizing error? It is significantly more likely that relationalist would like to admit. Even using Austen-Baker's four-norm essential contract theory,<sup>1229</sup> the norms are vague at best. They still suffer from terminological issues, though their clarity is still far superior to Macneil's, whose norms were confusing and impenetrable.<sup>1230</sup> It is unlikely that a court will be able to interpret these norms, and apply them to a real life case, with any more comprehension than the decades of academic work that often seem to miss the point. This is especially true regarding the spectrum analogy, which may be useful for sociology but is simply not legally operational.<sup>1231</sup> Attempting to apply the demands of Collins to each case using relational analysis might prove to be a superhuman feat, one that no judge can reasonably do.<sup>1232</sup> Since government institutions lack detailed knowledge about the parties in question they are more likely to give inappropriate answers.<sup>1233</sup> Thus there is a high chance that a court will get to the ostensibly wrong outcome due to the confusion of handling new yardsticks that are ostensibly different from its current operations.

This matters due to the ostensible hidden costs. The argument goes that there are significant legal transition costs involved when the law is made more complex, including learning costs as firms and individuals scramble to figure out the new legal remits.<sup>1234</sup> There are also increased uncertainty costs both in the form of loss of accumulated experience with the law as well as the cost of legal advice rising as less professionals can claim expertise.<sup>1235</sup> Additionally there are error costs for when courts and law makers commit mistakes of human error and mistakenly apply the law.<sup>1236</sup> Though logically these costs should dissipate naturally when there is a large amount of

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<sup>1229</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 221-222.

<sup>1230</sup> Jay Feinman, 'The Reception of Ian Macneil's Work in the USA' in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001) 63.

<sup>1231</sup> Melvin Eisenburg, 'Why There Is No Law Of Relational Contracts' (2000) 94(3) *Northwestern Law Review* 805, 814.

<sup>1232</sup> Gava, Green, 'Hybrid Law of Contract' (n1026) 620.

<sup>1233</sup> Larry Ledebur, 'The Problem of Social Cost' (1967) 26(4) *American Journal of Economic and Sociology* 399, 409-411.

<sup>1234</sup> Van Alstine, 'The Costs of Legal Change' (n1184) 817.

<sup>1235</sup> *ibid* 823-833.

<sup>1236</sup> *ibid* 845.

precedent. This logic runs into problems when one applies information heuristics. When erroneous judgements occur, externality entrepreneurs can distort future outcomes after the externality has taken place. These groups, according to Sun and Daniels;

“Strategically identifies, selects, frames, and publicizes externalities to create opportunities to influence political and legal outcomes.”<sup>1237</sup>

This changes the way how future transactors deal with the law. While a laboured point, normal business people generally do not know the law or keep themselves updated.<sup>1238</sup> This confines knowledge about current law to lawyers and corporations whose sophistication is enough to allow in-house counsel. This creates ‘availability cascades’.<sup>1239</sup> It would be a serious transaction cost to merchants, and even other commercial lawyers, to have to research new law, and therefore they are likely to free-ride on the research of others.<sup>1240</sup> This puts the routine players in courts in a disproportionately powerful position. A characteristic of the externality entrepreneurs is that they are able to abuse externalities for their own strategic goals and self interest.<sup>1241</sup> While this analysis traditionally has focused on a bottom-top vertical pressure,<sup>1242</sup> the same analysis can be used for horizontal relationships. Where one party has significantly more resources at its disposal, it can use its power to extract more benefits from the changed system.

Due to this, repeat players in the legal market can distort the game via their ability to saturate a court case with significantly more contextual evidence they know will be approved. They can also threaten a high cost legal battle it knows it will lose, but the other party cannot afford to fight and lacks the capability to know they are sure to win on a relational analysis. Since lay-persons free-ride on available information, corporate narratives go unchallenged due to the lack of opposing information.<sup>1243</sup> Smaller merchants are even more likely to succumb to this trap via the bandwagon effect, in

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<sup>1237</sup> Lisa Sun, Brigham Daniels, 'Externality Entrepreneurism' (2016) 50(1) University of California Davis Law Review 321, 327.

<sup>1238</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge of Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 77.

<sup>1239</sup> Timure Kuran, Cass Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51 Stanford Law Review 683.

<sup>1240</sup> *ibid* 717.

<sup>1241</sup> Sun, Daniels, (n1237) 332.

<sup>1242</sup> *ibid* 357-366.

<sup>1243</sup> Kuran, Sunstein (n1239) 721.

which expressing approval of the larger party's narrative may incur social benefits that enhance the relationship of the parties.<sup>1244</sup> The end result of this is that outside of legal enforcement, a change to relational law might be a massive boon for those with the ability and resources to comprehend it. For those who are not so able, the analysis might end up creating an even more severe power imbalance.

Additionally, this has largely ignored the costs of regulation itself. The entire point of the Coase argument is that regulatory change must leave net welfare in a better off position than previously to the externality.<sup>1245</sup> The above arguments are purely analytical, and without a change to relationally constituted law will, hopefully, remain purely theoretical. But it must be remembered that changing the analysis of courts, and uprooting the entire theory of contract, will come with its own institutional cost. The operation of the state and its organs can drive up a bigger cost, both economically and socially, than the cost imposed by the externality.<sup>1246</sup> If the biggest cost to the current regime is that the theory of contract is currently ideologically indefensible, this is a comparatively low cost as compared to the logistical costs of changing the foundations of legal education of contract law. It is a fallacy to consider state action to be costless simply because there is not a direct price tag attached.<sup>1247</sup> This would also include the costs of law spinning on its wheels attempting to provide substance to what are incredibly vague norms of relational contract theory. The state has its own transaction costs,<sup>1248</sup> and the longer courts must spend on a case the higher these costs will be raised. The costs of changing the system of legal education, as well as retraining a whole generation of contract practitioners, to embrace a radically different paradigm needs to be considered in the cost-benefit analysis

What has been demonstrated is that the demands for a relational contract law are seriously misguided. This is not to defend the classical law doctrine. Classical law is undead.<sup>1249</sup> It is completely indefensible as a progressive theory of law.<sup>1250</sup> Yet not only

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<sup>1244</sup> *ibid* 724.

<sup>1245</sup> David Campbell, 'Ronald Coase's the Problem of Social Cost' (2016) 35 *University of Queensland Law Review* 75, 92.

<sup>1246</sup> Gordon Tulloch, 'Externalities and All That' in Charles Rowley (ed), *The Selected Works of Gordon Tulloch* (4th ed, Liberty Fund 1970) 107

<sup>1247</sup> Roy Cordato, 'Knowledge Problems and the Problem of Social Cost' (1992) 14(2) *Journal of the History of Economic Thought* 209, 209

<sup>1248</sup> Campbell, 'Ronald Coase's the Problem of Social Cost' (n1245)

<sup>1249</sup> David Campbell, 'The Undeath of Contract: A Study In The Degeneration of a Research Programme' (1992) 22(1) *Hong Kong Law Journal* 20.

has it persisted, but the author makes the claim that it needs to persist because the alternative is much worse. The costs of change are certain, and the benefits created are uncertain. Using the Coasian analysis and accepting the classical law's disjunctive and inconsistent style as being a harm, the cost of cure might be far too onerous to bear. This is a harm that needs to be tolerated within the legal world.

## 5.6 Conclusion

Relational Contract Theory and Classical Law are rival programmes.<sup>1251</sup> Rightly, any progressive programme of law cannot permit exceptions.<sup>1252</sup> Yet, it seems both might just have to tolerate each other's existence. Formalism's claims, taken to their logical conclusion, demand of classical contract something it should be doing if it valued logical consistency. Yet consistency is not the primary goal of contract. Certainty takes priority, and that certainty can quickly be undermined where literalist dogmatism causes commercially absurd constructions. On the other hand, contextualism, and the realities of the merchant world, have been influential in the creation of positive law, yet again, not dogmatically. The balancing act of English law is to balance both formalism and contextualism, but not by preference of one method of another per case. Rather all cases are seen in a unitary exercise, in which both the constraints of formalism and the elucidations of contextualism play a part. English law has maintained its position as a half way house of pragmatic concerns.

Regardless of either formalism's or contextualism's ability to proclaim superiority, neither provide a good basis for a relationally constituted law of contract. This is not due to some inherent flaw in either school, but rather the fact that the dissonance between commercial law and commercial practice does not have a tangible harm that needs to be addressed. Without a tangible harm, then the cost-benefit analysis of regulatory change must solely look at the potential benefits versus the potential costs. The benefits of such a change are questionable. Relational contracts are flourishing in the current system, and therefore clearly do not need legal interference to survive. This is compared to the potential costs, both logistically and commercially. As has been said throughout the thesis, one cannot put enough emphasis on the fact that relational norms are not soft and cuddly. Power on the relational scale can quickly evolve into

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<sup>1250</sup> *ibid* 33.

<sup>1251</sup> Campbell, 'The Relational Constitution' (n979).

<sup>1252</sup> Campbell. 'The Undeath of Contract' (n1249) 33.

imprisonment via golden handcuffs. A change to relational law, even ignoring the logistical costs, allows for powerful players in the legal world to be externality entrepreneurs and opportunistically exploit the confusion in the system, trapping smaller parties who are struggling to cope with a new legal paradigm. Again, this is a bitter pill to swallow for many relationalists, but movement towards a relationally constituted law, when analysed under relational contract theory, might be commercially unwise.

## 6. Chapter Six: Autopoietic Systems Theory

### 6.1 Introduction

The previous chapters have explored the practical prospect of a relationally constituted law contract. However, one cannot attack the application of a theory based on practice alone. Doing so invites responses ranging from reform aimed at ersatz optimality to radical overhaul to achieve the ideal state. For there to be complete engagement with the debate, the application of relational contract theory must be challenged in the theoretical sense. The author will do this by applying the sociological theory of autopoietic systems theory. Attempts have been made to apply autopoiesis to family law,<sup>1253</sup> corporate law,<sup>1254</sup> racial discrimination in law,<sup>1255</sup> constitutional law,<sup>1256</sup> and even contract law.<sup>1257</sup> However, application is not sublimation, so the relationalist need not defensively react. As a 'grand theory', or a 'theory of theories', autopoiesis is a meta-paradigm where multiple theories can exist.<sup>1258</sup> By utilising this paradigm, we may discover insights on the possibility of a relationally constituted contract law.

Even at this premise, problems emerge. Luhmann's Theory is notoriously complicated, convoluted and complex. Luhmann accepted that there are high entry costs into his theory.<sup>1259</sup> These high entry costs have led to a rather comical situation where many that criticise autopoietic social systems have done so with little reading of any of Luhmann's substantive works.<sup>1260</sup> Indeed, in the Anglo-American world, there is little impact from Luhmann in legal scholarship.<sup>1261</sup> This is largely because of the highly abstract nature of

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<sup>1253</sup> Micheal King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57(3) *Modern Law Review* 385; Carole Smith, 'Autopoietic Law and the Epistemic Trap: A Case Study of Adoption and Contact' (2004) 31(3) *Journal of Law and Society* 318.

<sup>1254</sup> Spencer Thompson, Vladislav Valentinov, 'The Neglect of Society in the Theory of the Firm: A Systems-Theory Perspective' (2017) 41 *Cambridge Journal of Economics* 1061.

<sup>1255</sup> Rachel Herron, 'A Social Systems Approach to Understanding the Racial Effect of Section 44 Counter-Terror Stop and Search Powers' (2015) 11 *International Journal of Law and Context* 383; Sarah Sargent, 'Transracial Adoption In England: A Critical Race And Systems Theory Analysis' (2015) 11 *International Journal of Law in Context* 412.

<sup>1256</sup> Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution' (2003) 25 *Dublin University Law Journal* 56.

<sup>1257</sup> Ana Lourenco, 'Autopoietic Social Systems Theory: The Co-Evolution of Law and the Economy' (2010) 35 *Australian Journal of Legal Philosophy* 35.

<sup>1258</sup> Micheal King, 'The Construction and Demolition of the Luhmann Heresy' (2001) 12 *Law and Critique* 1, 4-5.

<sup>1259</sup> Lyana Francot-Timmermans, Emiliios Christodoulidis, 'The Normative Turn in Teubner's systems Theory of Law' (2011) 40 *Rechtsphilosophie & Rechtstheorie* 187, 187.

<sup>1260</sup> King, 'Construction and Demolition of the Luhmann Heresy' (n1258) 2-4.

<sup>1261</sup> Stephen Diamond, 'Autopoiesis in America' (1991) 13 *Cardozo Law Review* 1763, 1763.

the theory.<sup>1262</sup> Is such an abstract theory useful in the application of relational contract theory? The author posits yes, however doing so will need to be done very particularly. The analysis will be split over two chapters, with this chapter being expository in nature, similar to the expository platform for relational contract theory in chapter three. Many misapprehensions, summary dismissals, and often absurd conceptions plague Luhmann's works, and these will need to be worked through before any useful work can begin.

A summary dismissal is usually immediate when academics learn that autopoietic systems theory's has origins in biological theory. With respect to the many academics who have laboured to apply the biological origins of autopoiesis, the author must disappoint them by saying that this close to irrelevancy. Rather than literal transposition, Luhmann asserted that his German concept of science allowed the use of concepts to be used very broadly and liberally.<sup>1263</sup> To him, 'concepts in one science became metaphors for another'.<sup>1264</sup> The hostility that surrounded importing biological concepts into sociological work is highly misguided when its utility is purely analogical similar to Macneil's spectrum analogy. The metaphorical character of the biological connotations should have been obvious to readers who had seen Luhmann making a departure from the biological theory via insistence on communication as opposed to chemical reaction.<sup>1265</sup> Trying to apply biological rules further than the basic principles that Luhmann utilised as an explanatory analogy results in distortion of Luhmann's message. It is thus confusing when Ladeur claims that Luhmann takes the biological context too far when he barely relies on it.<sup>1266</sup> The only useful purpose of considering the origins is in easing confusion resulting from Luhmann's work through a reminder that some terminological transplantation had taken place.

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<sup>1262</sup> Francot-Timmermans, Christodoulidis, 'The Normative Turn' (n1259).

<sup>1263</sup> Niklas Luhmann, 'Insistence on System Theory: Perspectives from Germany' (1983) 61(4) *Social Forces* 987, 991.

<sup>1264</sup> *ibid.*

<sup>1265</sup> John Mingers, *Self Producing Systems: Implications and Applications of Autopoiesis* (Plenum Press 1995) 120, 139-144.

<sup>1266</sup> Karl-Heinz Ladeur, 'Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, "The Unity of the System"' in Gunther Teubner (eds) *Autopoietic Law: A New Approach to Law and Society* (Walter De Gruyter 1988) 261.

As a quick summary of the background context: Autopoiesis stems from Humberto Maturana and Francisco Varela in the 1970s.<sup>1267</sup> They defined autopoietic biological systems as a dynamic unity of components which could 'recursively regenerate the network of productions that produced them' and could identify and distinguish their environment.<sup>1268</sup> The biologists developed a six-point key to determine if there is an autopoietic system:<sup>1269</sup>

1. Does the unity have determinable boundaries?
2. Are there describable components of the unity?
3. Is the unity a mechanistic system?
4. Do the components that constitute the boundaries do so via 'preferential neighbourhood'?
5. Are the components of the boundary produced by interactions of components within the unity?
6. Are all other components of the unity produced the same way as those in 5 other than permanent constitutive components?

Should the answer to all of these be in the affirmative, it is then an autopoietic living system.<sup>1270</sup> It is from this that Luhmann's theory received inspiration and much of his terms and concepts were borrowed from biological analysis.<sup>1271</sup> Historically, such comparisons to biological science was not new or even controversial.<sup>1272</sup> Of course, there has always been some distrust over such comparisons.<sup>1273</sup> However Luhmann's comparison should not cause the same level of suspicion as he differs greatly from the biological model.<sup>1274</sup> The biochemical interactions of the cell are practically absent as Luhmann saw no reason to include literal transpositions of biochemical components important in biological autopoiesis, such as nucleic acids or organelles. Luhmann's

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<sup>1267</sup> Humberto Maturana, Francisco Varela, Ricardo Uribe, 'Autopoiesis: The Organisation of Living Systems, Its Characterisation and a Model' (1974) *Bio Systems* 187.

<sup>1268</sup> Humberto Maturana, 'Man and Society' in F Bensele, P Hejl, W Kock (eds) *Autopoietic Systems in the Social Sciences* (Campus Verlag 1980) 29.

<sup>1269</sup> Maturana, Varela, Uribe (n1267) 192-193.

<sup>1270</sup> *ibid.*

<sup>1271</sup> Hubert Rottleunthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989) 23(5) *Law and Society Review* 779, 782.

<sup>1272</sup> Hubert Rottleunthner 'Biological Metaphors in Legal Thought' in Gunther Teubner (eds) *Autopoietic Law: A New Approach to Law and Society* (Walter De Gruyter 1988) 100-102.

<sup>1273</sup> Jean-Pierre Dupy, 'On the Supposed Closure of the Normative System' in Gunther Teubner (eds) *Autopoietic Law: A New Approach to Law and Society* (Walter De Gruyter 1988) 51.

<sup>1274</sup> Marcelo Neves, 'From the Autopoiesis to the Allopoiesis of Law' (2001) 28(2) *Journal of Law and Society* 242, 245.



inspirations and liberal metaphors are not constrained to the biological sciences but also the cybernetics world.<sup>1275</sup> There is little need to expand on the biological theory further as Luhmann simply wished for an understandable analogy to aid in comprehension. It is regrettably ironic that such a comparison has led to widespread summary dismissal.

## 6.2 Back To Basics

Before internal analysis can begin, there are multiple housekeeping matters which require urgent attention. The responses to Luhmann's work have been lacklustre if one is generous. There is recurrent misunderstanding of Luhmann's work to the point where beginning with the internal intricacies runs the risk of repetitive misunderstanding where rebuttal feels prefabricated. Luhmann is no innocent party here as he, like Macneil, cannot seem to make his point without incessant terminological confusion. Luhmann regularly uses normal language counter-intuitively, often deviating significantly from the normal usage.<sup>1276</sup> Additionally, he looks at law through sociology, primarily constructivism,<sup>1277</sup> which contains its own implicit premises and logic that is alien to the lawyer. Thus it is unsurprising when King comments that reading more of Luhmann's work might not necessarily help understanding.<sup>1278</sup> It is Luhmann's own writing that provides the active deterrent, so it is predictable that much dismissal is from those who 'put their critical fingers to the keyboard on the basis of very little reading of or engagement with the Luhmann enterprise'.<sup>1279</sup> This academic nescience has led to very few commentators being error-free in the most banal aspects of the theory.

However, it would be too harsh to solely blame Luhmann's skills as a wordsmith. Luhmann went into great levels of detail within his work because reductionism was adverse to his project.<sup>1280</sup> In describing society, Luhmann had to make a complex theory primarily due to the fact that society is, by nature, extremely complex.<sup>1281</sup> It is this complexity and his divergence from ordinary language that perhaps led the way to the

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<sup>1275</sup> Jean-Sebastian Guy, 'Niklas Luhmann Before Relational Sociology: The Cybernetics Roots of Systems Theory' (2018) 35(6) *System Research And Behavioural Science* 856, 858.

<sup>1276</sup> Rottleuthner, 'A Purified Sociology of Law' (n1271) 779.

<sup>1277</sup> Gunther Teubner. 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23(5) *Law and Society Review* 727.

<sup>1278</sup> King, 'The Construction and Demolition' (n1258) 2.

<sup>1279</sup> *ibid.*

<sup>1280</sup> Micheal King, Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan 2003) 1.

<sup>1281</sup> *ibid.*

claim that his work was impenetrable and filled with prolixness.<sup>1282</sup> The author has noticed in the majority of academic misrepresentations a common set of misconstrued Luhmann's premises, leading to absurd conclusions of the theory and its supposed prescriptions. Often, this can be summarised as failing to see the forest for the trees as scholars focus on conceptual details without view to the overarching premises and foundations. In order to aid in clarification, the author shall lay out a number of premises here that are intertwined with later analysis, however it is crucial that these premises are kept in mind to avoid confusion.

While not the most operative parts of autopoietic system theory, the following premises are the most overlooked and in forgetting these points many commentators have created skewed interpretations of the theory:

1. Society, and all its subsystems, are systems of meaning.<sup>1283</sup>
2. Society is built on communications, not actions.<sup>1284</sup>
3. Not all communications are actions, and therefore are not confined to the actions of verbal/written linguistics or physical acts.<sup>1285</sup>
4. Subsystems are made solely of these communications,<sup>1286</sup> they do not have a corporal existence outside of this meaning-generating structure.
5. Causality is an independent concept to autopoietic systems theory due to its subjective character.<sup>1287</sup>

With these underlying premises in mind, we may now look at the substantive content of the theory with less scope for misconstruction. A reductive summation of autopoietic systems theory would be as follows: *society exists as autopoietic normatively closed yet cognitively open social subsystems*.<sup>1288</sup> However, such reductionism carries little explanatory power and already creates definitional ambiguity. While a seemingly banal point, an important question is raised: What is a system? Luhmann characterises

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<sup>1282</sup> David Campbell, 'Luhmann Without Tears: Complex Economic Regulation and the Erosion of the Market Sphere' (2011) 33(1) *Legal Studies* 162, 178

<sup>1283</sup> Niklas Luhmann, *Social Systems* (Translated by J Bednarz and D Beacker, Stanford University Press 1995) 59-60.

<sup>1284</sup> *ibid.*

<sup>1285</sup> Niklas Luhmann, *Essays on Self Reference* (Columbia University Press 1990) .

<sup>1286</sup> Niklas Luhmann, *Law as a Social System* (Translated by Klaus Ziegert, Oxford University Press 2004) 89.

<sup>1287</sup> *ibid.* 106.

<sup>1288</sup> David Nelken, Jiří Přibáň, 'Introduction', in David Nelken, Jiří Přibáň, *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Dartmouth Publishing 2001) 6.

potential systems: Living, Psychic, and Social.<sup>1289</sup> Living systems, such as cells, are systems of chemistry and thus reproduce via chemical reaction.<sup>1290</sup> Psychic systems, such as those in the human brain, are conscious systems who reproduce via consciousness.<sup>1291</sup> Social systems, such as law, are systems of meaning that use communication for their autopoietic reproduction.<sup>1292</sup> While both psychic and social systems are meaning systems, they are separate and distinct from one another.<sup>1293</sup> While psychic systems distinguish themselves based on their internal consciousness, social systems must distinguish themselves based on the meaning they ascribe to the world via their communications.<sup>1294</sup> This means society is a system of meaning, in which various social systems create their own outputs to add to a holistic whole.

Here we come across the first counter-intuitive definition used: Communication. To Luhmann, a communication is a synthesis of information, utterance, and understanding.<sup>1295</sup> Mingers has characterised these as fact, form, and meaning.<sup>1296</sup> Luhmann's own concept of communication was that utterance is self reference while information is external reference.<sup>1297</sup> The systems' observation was in distinguishing between utterance and information.<sup>1298</sup> The understanding of communication is in the understanding of the distinction between the system's reference (utterance) and its reference to the environment (information).<sup>1299</sup> Information is then a difference which changes the state of the system and thus requires the system to distinguish the difference from itself as to generate understanding and thus produce new communication.<sup>1300</sup> This allowed systems to form understanding allowing for further communication while

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<sup>1289</sup> Luhmann, *Essays on Self Reference* (n1285) 2.

<sup>1290</sup> *ibid.*

<sup>1291</sup> *ibid.*

<sup>1292</sup> *ibid* 3-4.

<sup>1293</sup> Michael King, 'The Truth About Autopoiesis' (1993) 20(2) *Journal Of Law and Society* 218, 220.

<sup>1294</sup> *ibid.*

<sup>1295</sup> Luhmann, *Essays on Self Reference* (n1285) 3.

<sup>1296</sup> John Mingers, *Self-Producing Systems: Implications and Applications of Autopoiesis* (Plenum Press 1995) 142.

<sup>1297</sup> Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13(5) *Cardozo Law review* 1419, 1424.

<sup>1298</sup> Niklas Luhmann, *Theory of Society Volume 1* (Translated By Rhodes Barrett, Stanford University Press 2012) 36-37.

<sup>1299</sup> *ibid* 53.

<sup>1300</sup> *ibid* 113-116.

simultaneously and recursively using previous communication.<sup>1301</sup> This distinction is highly artificial but allows for a construction of reality based on communication.<sup>1302</sup>

Luhmann's and Minger's definitions are not necessarily opposed, as should a system be autopoietic, in that it reproduces its own communications, then form will necessarily be self-referential. Let us take Luhmann's example of a legal communication being a question of legal rights arising.<sup>1303</sup> Should a question of contractual damages exist then anything, such as the contract itself, a judgement on the case or even a law student studying on the case, which directly or indirectly asks the question of legal rights is the utterance. The action leading to the utterance is irrelevant so long as the system considers it to be within its own remit, and thus internal to the systems operations. Information would be the external facts that might have led to damages which the system is observing. Understanding comes from the system recognising the distinction between itself (legal rights and norms) and its environment (a relevant situation). Communication is an improbable synthesis of the above and gives rise to meaning based on the peculiarities of both the information and the utterance.<sup>1304</sup>

However, communication is not synonymous with a communicative act.<sup>1305</sup> An act may well include communication, but this is only if part of the act informs, is observable, and generates meaning to an observer. This distinction arises as acts are not inherently social whereas communication is.<sup>1306</sup> Acts can occur without understanding or observation, allowing them to be completely solitary, whereas communication cannot exist without observation.<sup>1307</sup> Consequently social subsystems would not be able to survive if their basic elements were acts as acts are unable to continually reproduce further elements to sustain a system.<sup>1308</sup> Furthermore, acts can spawn multiple different meanings, thus making them unsuitable for existence within only one subsystem. An act such as a court judgement may include legal communication however not all things said by the judge will be legal communication.<sup>1309</sup> For example, if it were medical law or intellectual property law, then the science subsystem may generate communications

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<sup>1301</sup> Luhmann, 'Operational Closure and Structural Coupling' (n1297) 1424.

<sup>1302</sup> *ibid.*

<sup>1303</sup> Luhmann, *Law as a Social System* (n1286) 99.

<sup>1304</sup> Mingers, *Self-Producing Systems* (n1296) 143.

<sup>1305</sup> *ibid.* 144.

<sup>1306</sup> Niklas Luhmann, *Introduction to Systems Theory* (Translated by Peter Gilgen, Policy Press 2013) 54.

<sup>1307</sup> *ibid.*

<sup>1308</sup> *ibid.*

<sup>1309</sup> Micheal King, 'The Truth About Autopoiesis' (1993) 20(2) *Journal of Law and Society* 218, 224.

based on the judgement. Where society exists to generate meanings for humans to comprehend, then it is best to view the basic element of society as something that requires meaning as a result of observation.

The operation of self-referencing communication leads to the concept of an 'autopoietic system' which presents a further definitional hurdle. The concept of autopoietic systems is that societal subsystems exist as self-referring and self-replicating spaces.<sup>1310</sup> This self-reproduction is necessary in order for systems to continue to exist.<sup>1311</sup> They continuously produce and reproduce their own elements in a dynamic fashion.<sup>1312</sup> As meaning systems, they continuously produce elements as to make sense of their environmental observations. Such elements are not permanent structures and must be continuously destroyed in the system as to prevent a build-up of unnecessary and unwieldy data.<sup>1313</sup> As opposed to the idea open systems with their input-output model, autopoiesis claims that elements are solely produced by the system, thus meaning no system may generate the elements of another.<sup>1314</sup> It is the constant self-reference that distinguishes autopoietic systems theory from other systems theories such as open-system theory.<sup>1315</sup> Therefore autopoietic subsystems in society are categorised as figuratively closed spaces which are constituted by communications generated solely by the system they constitute.

It is here that we find a definitional hurdle within a definitional hurdle: What are 'autopoietic subsystems'? Subsystems are autopoietic spaces within society which differentiate themselves from other subsystems in their environment. This is due to the complexity of society.<sup>1316</sup> As society becomes complex, the need for reduction of data increases as to give meaning to the world.<sup>1317</sup> Luhmann categorises differentiation's function as the enhancement of selectivity, as reduction of superfluous complexity

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<sup>1310</sup> Luhmann, *Introduction to Systems Theory* (n1306) 70-77.

<sup>1311</sup> Tor Hernes, Tore Bakken, 'Introduction: Niklas Luhmann's Autopoietic Theory and Organisation Studies- A space of connections' in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 10.

<sup>1312</sup> Katarzyna Gracz, Primavera De Filippi, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic System Theory' (2014) 22(4) *International Journal Of Law and Information Technology* 334, 337.

<sup>1313</sup> Luhmann, *Essays on Self reference* (n1285) 9-10.

<sup>1314</sup> Niklas Luhmann, 'The Unity of the System' in Gunther Teubner (ed) *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988).

<sup>1315</sup> Gunter Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) *Law and Society Review* 291, 292.

<sup>1316</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 1.

<sup>1317</sup> Luhmann, *Introduction to Systems Theory* (n1306).

allows for greater freedom of variation and choice of meaning.<sup>1318</sup> As humans have limited cognitive capacities environmental data needs to be reduced for reality to be manageable.<sup>1319</sup> Additionally, complexity reduction is a prerequisite for system differentiation.<sup>1320</sup> Ergo, the environment will be infinity more complex than the systems reducing it to manageable proportions.<sup>1321</sup> Yet, differentiation does not entail that the whole of society becomes isolated subsystems.<sup>1322</sup> Instead, each subsystem will observe its environment to reconstruct it through its own internal processes.<sup>1323</sup> Through doing this, it is among the environment of other subsystems, essentially multiplying itself as other subsystems who distinguish themselves from the original system.<sup>1324</sup> The differentiation of the system is then a prelude for reducing information in the environment into manageable portions that, when organised, can spawn infinite internal complexity and meaning generation.

Luhmann goes on to give the different forms of differentiation that have historically occurred (segmentation, stratification, functional differentiation).<sup>1325</sup> Segmentation denotes a system in which all subsystems are equal, while stratification denotes a hierarchy of subsystems.<sup>1326</sup> Segmentation was the dominate form of differentiation during the Neolithic revolution.<sup>1327</sup> Stratification peaked during the feudal era, lasting until the onset of the industrial revolution.<sup>1328</sup> The evolution away from stratification was not due to predetermination, but rather a chance encounter. Functional differentiation became more suited to changing socialisation while the nobility's attempt to enforce a stratified system with outdated methods gave functional differentiation an evolutionary advantage over stratification.<sup>1329</sup>

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<sup>1318</sup> Niklas Luhmann, *Differentiation of Society* (Columbia University Press 1982) 231-232.

<sup>1319</sup> Vladislav Valentinov, 'From Complexity Reduction To Moral Character: A Deweyian Reading of Luhmann's Social Systems Theory' (2017) 35(6) *Systems Research and Behavioural Science* 632.

<sup>1320</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 18.

<sup>1321</sup> Luhmann, *Social Systems* (n1283) 182.

<sup>1322</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated By Rhodes Barrett, Stanford University Press 2012) 3.

<sup>1323</sup> *ibid.*

<sup>1324</sup> *ibid* 2-8.

<sup>1325</sup> Niklas Luhmann, *Differentiation of Society* (Columbia University Press 1982) 231-236.

<sup>1326</sup> *ibid.*

<sup>1327</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated By Rhodes Barrett, Stanford University Press 2012) 27-40.

<sup>1328</sup> *ibid* 52-65.

<sup>1329</sup> *ibid* 83-86.

Such changes, and the whole of society within Luhmann's theory, is ultimately the product of evolution.<sup>1330</sup> This evolution is the result of multiple improbabilities becoming reality, from the improbability of individual survival to the improbability of structural co-ordination.<sup>1331</sup> This evolution encompasses causal links, but not casual laws.<sup>1332</sup> Similarly, functional differentiation is not inherently permanent as Luhmann admits it is not possible to exclude new potential forms of differentiation evolving.<sup>1333</sup> After all, with the increase of complexity of individuals, there is an increase in demand for differentiation of society to accommodate this new categorisation.<sup>1334</sup> Society continues to become more and more internally differentiated; a result of the ever-greater demand to reduce complexity in the environment.

Accordingly, Luhmann considers society to be comprised of subsystems which are differentiated based on their function, which presents another counter-intuitive definition. Function does not equate to utility or of cognitive expectations.<sup>1335</sup> Even the self-description of the system or observer-ascribed attributes do not impact the function of the system.<sup>1336</sup> The basal function of all social systems is to give meaning to the world and in doing so subsystems specialise their societal function. System functionality, generally, is the ability to disseminate and organise communications into meaning so that other systems (including the individual's psychic systems) can make use of them.<sup>1337</sup> By reducing external complexity, the system enhances the ability to build complexity internally.<sup>1338</sup> Thompson and Valentinov point out increased dependence on external complexity is required for an increase in internal complexity.<sup>1339</sup> The only true threat to functionality is dedifferentiation.<sup>1340</sup> This is where one system begins to dominate the communications and processes of another,

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<sup>1330</sup> Niklas Luhmann, *Theory of Society Volume 1* (Translated By Rhodes Barrett, Stanford University Press 2012) 251.

<sup>1331</sup> *ibid.*

<sup>1332</sup> *ibid.* 253.

<sup>1333</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated By Rhodes Barrett, Stanford University Press 2012) 12-14.

<sup>1334</sup> *ibid.* 15.

<sup>1335</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 9-10

<sup>1336</sup> *ibid.*

<sup>1337</sup> *ibid.*

<sup>1338</sup> Hans-Georg Moeller, *Luhman Explained: From Souls to Systems* (Carus Publishing Company 2006) 17-18.

<sup>1339</sup> Thompson, Valentinov, 'The Neglect of Society' (n1254) 1067.

<sup>1340</sup> *ibid.* 40.

thereby distorting its function.<sup>1341</sup> This occurring would not be the end of society, but would severely impact the capacity for a modern complex society.<sup>1342</sup> This cannibalisation process is not something that is common, or indeed particularly likely due to the non-transferability of communications.

These specialised differentiated functions are considered necessary for the preservation of complex society, and therefore no specific function maintains primacy.<sup>1343</sup> Additionally, due to function specialisation, no system can substitute the other's function.<sup>1344</sup> Examples given of specific functions include the collective binding of decisions (political system), and the religious function of interpreting the incomprehensible.<sup>1345</sup> Importantly, this differentiation is not considered to be inevitable by Luhmann, who views these as simply a product of functional necessity.<sup>1346</sup> For functional differentiation to occur, subsystems must have sufficient capacity to differentiate function. performance, and self reflection.<sup>1347</sup> After all, functional differentiation increases the availability of selection and choice of data and facts.<sup>1348</sup> This differentiation is a necessary precursor for autopoietic systems the need to provide meaning from a complex environment saturated with data. Accordingly, there will never be an exhaustive list of subsystems as where a functional need for meaning emerges a new system of meaning be develop.

The second definitional criteria is that of the binary code. Systems ascribe meanings to information and communications based on if it fits into a positive-negative code.<sup>1349</sup> The nature of recursive communication means that information is not found in wider reality but rather in the systems themselves.<sup>1350</sup> This touches on the concept of cognitive openness which will be explored later, but a basic prelude is that information within communication only occurs as a product of observation by the system, and thus the information is not external. For the legal subsystem, any communication that does not

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<sup>1341</sup> *ibid* 41.

<sup>1342</sup> *ibid*.

<sup>1343</sup> Luhmann, *The Differentiation of Society* (n1325) 236.

<sup>1344</sup> Rottleuthner, 'A Purified Sociology of Law' (n1276) 781.

<sup>1345</sup> Luhmann, *The Differentiation of Society* (n1325) 236.

<sup>1346</sup> Roger Cotterrell, 'The Representation of Law's Autonomy in Autopoiesis Theory' in David Nelken, Jiří Přibáň, *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Dartmouth Publishing 2001) 87.

<sup>1347</sup> Luhmann, *The Differentiation of Society* (n1325) 239.

<sup>1348</sup> *ibid* 231.

<sup>1349</sup> Luhmann, *Law as a Social System* (n1286) 93.

<sup>1350</sup> Niklas Luhmann, *Essays on Self Reference* (Columbia University Press 1990) 4



fall within its code is not recognised.<sup>1351</sup> As such, all legal communication is already within the legal subsystem by virtue of it being legal communication. Therefore, no external source can supply legal communication into the legal subsystem.<sup>1352</sup> While this can seem perplexing, one must recall that social systems are systems of meaning. If a communication has legal meaning then it is part of a system whose composition is all legal meanings.

This invites the question: what decides if a communication is legal/political/economic? The answer is the system itself. Each system follows its own code and has full sovereignty on how that code is applied and made; for the legal subsystem 'only law can say what law is'.<sup>1353</sup> In seeing this, one would be forgiven for making the common mistake that Luhmann is a positivist.<sup>1354</sup> Autopoiesis does not allow any elements of a system to come from a higher power as claimed in natural law. However, conflating Luhmann with positivism is overly simplistic and ignores his ambitious enterprise.<sup>1355</sup> It is also confusing to claim that Luhmann's theory is the 'daughter of Kelsen'<sup>1356</sup> given the rather significant epistemological difference between the two. While, on a purely definitional basis, one could claim autopoietic systems theory to be positivistic, this would be misleading should Luhmann not be placed in a separate and distinct subcategory.<sup>1357</sup> Luhmann's work extends far beyond the positivist school of thought, and it would invite misrepresentation to apply the presumptions of positivism.

Importantly, coding is not a norm, and what is law is not a normative question. Rather, it is a structural device used for recognition and attribution of meaning by the system.<sup>1358</sup> Meaning is described as the ordering of human experience as opposed to the particular meaning of facts or the world.<sup>1359</sup> This makes the concept of meaning a selective relationship between the system and the world.<sup>1360</sup> Subsequently, it is a selection rule that presupposes autopoietic systems as the medium of meaning is

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<sup>1351</sup> Luhmann, *Law as a Social System* (n1349) 98.

<sup>1352</sup> *ibid* 100.

<sup>1353</sup> *ibid* 85.

<sup>1354</sup> John Mingers, 'Can Social Systems be Autopoietic? Assessing Luhmann's Social Theory' (2002) 50(2) *Sociological Review* 278.

<sup>1355</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280).

<sup>1356</sup> François Ewald, 'The Law of Law' in Gunther Teubner (ed) *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988) 39.

<sup>1357</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 38.

<sup>1358</sup> *ibid* 101.

<sup>1359</sup> Luhmann, *Essays on Self Reference* (n1285) 25.

<sup>1360</sup> *ibid* 26-30.

communication.<sup>1361</sup> This would suggest that systems of meaning are really systems of decisions as Luhmann points out:

‘Organised social systems can be understood as systems made up of decisions, and capable of completing the decisions that make them up through decisions that make them up’<sup>1362</sup>

Thus when Luhmann expresses a system of meaning he is talking about a system that has been built up via the making of decisions which allow for further options for decisions.<sup>1363</sup> The decision of what to give meaning to is based around communication as each communication operates as a selection.<sup>1364</sup> An important reminder that these communications are not actions, objects, people or even linguistic.<sup>1365</sup> They are a synthesis of the three elements discussed earlier and it is meaningful communication that makes up the system.<sup>1366</sup> It is such communications that make up the autopoietic reproduction of the system as they are the recursively produced elements of the system that are produced and reproduced by a network of communications that is wholly within the system.<sup>1367</sup>

It is worth explaining how law is itself a social subsystem. The binary code for law, according to Luhmann, is formulated as legal/illegal.<sup>1368</sup> Not all things which reference legal sanctions or norms are necessarily relevant to the code, for example press reporting on law cases is not necessarily legal communication.<sup>1369</sup> Conversely, they are also not precluded from being considered legal communication by the legal subsystem. Subsequently, the legal system cannot merely be seen as a unity of legal texts.<sup>1370</sup> Michalilakis makes the claim that the legal/illegal code means that the theory of autopoietic systems theory views law for its facility and not about its moral value.<sup>1371</sup>

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<sup>1361</sup> *ibid* 83.

<sup>1362</sup> Niklas Luhmann, ‘Organisation’ in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 32.

<sup>1363</sup> *ibid* 39.

<sup>1364</sup> Gorm Harste, ‘The Emergence of Autopoietic Organisation’ in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 80.

<sup>1365</sup> King, Thornhill, *Niklas Luhmann’s Theory* (n1280) 14.

<sup>1366</sup> *ibid* 11-12.

<sup>1367</sup> Niklas Luhmann, ‘The Autopoiesis Of Social Systems’ In F. Geyer, J Van Der Zouwen, *Sociocybernetic Paradoxes* (SAGE publications 1986).

<sup>1368</sup> Luhmann, *Law as a Social System* (n1349) 94.

<sup>1369</sup> *ibid* 103.

<sup>1370</sup> *ibid* 89.

<sup>1371</sup> Dimitris Michailakis, ‘Law as an Autopoietic Sytem, (1995) 38 Acta Sociologia, 327.

Therefore moral questions are not inherent legal communications, and as such fall outside the remit.<sup>1372</sup> The terms legal/illegal are simply the positive-negative legal value.<sup>1373</sup> It is a simple attribution mechanism of if something is relevant to the system or not as a factual matter, rather than a normative demand of sanctions.<sup>1374</sup> Thus, the coding of the legal system is a morally neutral tool of legal/illegal in order to set system boundaries.

With the legal code defined, the second half of the definition of the system must be satisfied: the specialised societal function. The function of the legal system is to stabilise normative expectations in the face of countervailing actions.<sup>1375</sup> The term expectations does not mean subjective or psychic values. Rather, expectations are merely the future tense of meaning.<sup>1376</sup> This is to say that expectations are indications of what a meaning foresees in its future.<sup>1377</sup> By this virtue, they are constraints on the range of possibilities for future meaning within the system, thus lowering potential complexity.<sup>1378</sup> This removes the subjective component of expectations.<sup>1379</sup> Law's function is to then stabilise normative expectations created by the norms that form the basis of society.<sup>1380</sup> As such, law's product is the following according to King and Thornhill:

'Law allows at least for the possibility of expectations being based on established norms so that it is possible to anticipate whether conduct will be legal or illegal, subject to the law or not subject to the law. This avoids the need for expectations to be reliant upon experience.'<sup>1381</sup>

What this means is that decisions can be taken with normative certainty.<sup>1382</sup> Normative expectations must be distinguished from cognitive ones, which retain a subjective

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<sup>1372</sup> *ibid.*

<sup>1373</sup> Niklas Luhmann, 'The Coding Of The Legal System' in a Febbrajo, Gunter Teubner (eds) *State, Law, Economy as Autopoietic Systems* (Milano 1992) 147

<sup>1374</sup> Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) *Cardozo Law Review* 13(5) 1419, 1428.

<sup>1375</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 11

<sup>1376</sup> Luhmann, *Introduction to Systems Theory* (n1306) 72-73

<sup>1377</sup> Luhmann, *Social Systems* (n1283) 96.

<sup>1378</sup> *ibid* 292-293.

<sup>1379</sup> Luhmann, *Introduction to Systems Theory* (n1306) 72-73

<sup>1380</sup> King, Thornhill, , *Niklas Luhmann's Theory* (n1365) 53

<sup>1381</sup> *ibid.*

<sup>1382</sup> *ibid* 214.

element. Normative expectations do not change even if they are disappointed.<sup>1383</sup> The law's function is to then maintain these expectations regardless of if they are met by the outside world.<sup>1384</sup> Of course, there is always the risk of disappointment of these expectations, however the uncertainty of expectation is a significantly more difficult burden for the legal subsystem than disappointed expectations.<sup>1385</sup> Due to expectations being seen in the light of social systems, they are directed at society and not at individuals.<sup>1386</sup> Law is constrained by this function and its own code, thus meaning it will not take over other subsystems meaning-functions. While positivistic accounts may allow for legal hegemony in society, autopoietic systems theory precludes such systemic imperialism.

### 6.3 Operative Closure

A fundamental aspect of autopoietic systems theory, and potentially its most misunderstood aspect, is operative closure. Put simply, a system cannot directly communicate with its environment.<sup>1387</sup> It follows from this that subsystems cannot communicate with one another as they are in each other's environment.<sup>1388</sup> In the matter of communications, social systems are recursively closed.<sup>1389</sup> That is to say, all communications that make up the operations of the system must be internally sourced from the system and cannot be imported from the environment.<sup>1390</sup> In essence, the autopoietic system will generate its own network of operations in order to generate future operations.<sup>1391</sup> This is a rejection of the input-output model of open systems theory which relies on systems collecting environmental facts as resources for output production.<sup>1392</sup> Given that all communication occurs with utterance within the system, it then becomes logically impossible for communication to exist outside the system.

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<sup>1383</sup> David Van Zandt, 'The Breath Of Life In The Law' (1992) 13(5) *Cardozo Law Review* 1745, 1758.

<sup>1384</sup> Katarzyna Gracz, Primavera De Filippi, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic System Theory' (2014) 22(4) *International Journal Of Law and Information Technology* 334, 339.

<sup>1385</sup> Luhmann, *Law as a Social System* (n1349) 163.

<sup>1386</sup> *ibid* 142.

<sup>1387</sup> Luhmann, *Introduction To Systems Theory* (n1306) 64.

<sup>1388</sup> King, 'Children's Rights as Communication' (n1253) 390.

<sup>1389</sup> Luhmann, *Essays On Self Reference* (n1289) 5.

<sup>1390</sup> Luhmann, *Introduction to Systems Theory* (n1306) 77.

<sup>1391</sup> *ibid*.

<sup>1392</sup> King, *The Truth About Autopoiesis* (n1293) 219.

The reason for this autonomy is due to the self-reference of the system's communications.<sup>1393</sup> Due to the binary code, all communication must fit into positive/negative. The system does not have the capability to understand communication that does not fit into this code.<sup>1394</sup> Not merely can the system not understand such communication, but such communication cannot enter the system.<sup>1395</sup> All legal communication is within the legal subsystem and that which is outside the code is not within the subsystem.<sup>1396</sup> We must reinforce here that law is nothing but these communications.<sup>1397</sup> It is not a system of rules as is normally seen within positivism or a group of individuals acting within the law.<sup>1398</sup> In fact, without maintaining law solely as communication, the idea of self-reproduction would not be intelligible.<sup>1399</sup> As communication is both the self reference and the external reference of meaning, it will only exist within the system that it is self-referencing.

This tautology, that all that is legal is within law, defines the systems boundaries.<sup>1400</sup> These code-set boundaries are only visible to the system as it distinguishes its own communication from others.<sup>1401</sup> Clam makes the point that boundaries are solely operative; they are not spatial, material or formal.<sup>1402</sup> By referencing back to itself and its code, the system is able to distinguish that which is inside the system from its environment.<sup>1403</sup> Thus the legal subsystem, when it senses external stimuli, will apply its code. If the stimuli does not fit the code, it will not undergo internal operations to be transposed as meaning. This code allows the system to maintain distinctiveness and independence from its environment.<sup>1404</sup> As a system comprised of all legal communication, the legal system can never operate outside of its own boundaries.<sup>1405</sup>

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<sup>1393</sup> Luhmann, *Law as a Social System* (n1286) 93.

<sup>1394</sup> *ibid.*

<sup>1395</sup> *ibid.*

<sup>1396</sup> *ibid* 99-101.

<sup>1397</sup> Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23(5) *Law and Society Review* 727, 739.

<sup>1398</sup> *ibid.*

<sup>1399</sup> *ibid.*

<sup>1400</sup> Lourenco (n1257) 39.

<sup>1401</sup> Gracz, De Filippi, 'Regulatory Failure' (n1312) 337.

<sup>1402</sup> Jean Clam, 'The Specific Autopoiesis of Law: Between Derivative Autonomy and Generalise Paradox' in David Nelken, Jiří Přibáň, *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Dartmouth Publishing Company 2001) 64.

<sup>1403</sup> Niklas Luhmann, 'Insistence On System's Theory: Perspectives from Germany' (1983) 61(4) *Social Forces* 987, 992.

<sup>1404</sup> Gracz, De Filippi (n1384) 340.

<sup>1405</sup> Luhmann, 'Operational Closure...' (n1374) 1423.

Normative closure does not extend past this, it simply entails that all legal communication is within the legal system. All legal operations are composed of legal communications as they are the basic elements of the system. By logical deduction, no operation of the legal system may operate outside of, or be imported from, the code-set boundary.

Thus, all operations of law come from the legal subsystem which reproduces its operations in a self-referential process. However, the legal system is not merely a code with a function. Rather, all social subsystems have programmes in addition to the codes.<sup>1406</sup> Programmes are facilitative inventions essentially designed to make substance for the codes.<sup>1407</sup> In doing so, they develop the scope, applicability, and procedure that the system follows, essentially putting flesh on the bone of the code.<sup>1408</sup> These programmes are solely developed by the system itself, and therefore are part of the system.<sup>1409</sup> However, despite this one should be aware that programmes are designed to be malleable creations which can respond to whatever pressure that the operations have created it to respond to.<sup>1410</sup> For example, if we were to take the concept of medical law as an example of a legal programme, the programme will undoubtedly have operations to aid observations of relevant stimuli, such as the science subsystem. This ability does not threaten normative closure as programming does not extend past the system boundary in its operation.

Programmes are the added internal complexity that subsystems need to adequately observe their environment. Without programmes, codes would not be effective.<sup>1411</sup> However, this does not mean that programmes generate codes. As codes are the basic orientation and identity of the system, it is the code that generates the programme.<sup>1412</sup> Consequently, programmes do not determine the nature of coding, which maintains its binary distinction.<sup>1413</sup> Programmes are generally free to orientate themselves on the

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<sup>1406</sup> Luhmann, *Social Systems* (n1283) 213-215, 317-319.

<sup>1407</sup> Ramona Mayer, *The Theory of Social Functional System by Niklas Luhmann* (GRIN Verlag GmbH 2014) 9.

<sup>1408</sup> Moeller, *Luhman Explained* (n1338) 25

<sup>1409</sup> Luhmann, *Social Systems* (n1283).

<sup>1410</sup> François Ost, 'Between Order and Disorder: The Game of Law' in Gunther Teubner (ed) *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988) 75.

<sup>1411</sup> Luhmann, *Law as a Social System* (n1286) 193

<sup>1412</sup> *ibid.*

<sup>1413</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1365) 25-26

binary,<sup>1414</sup> albeit as creations of recursive communication they are themselves recursive. Though there is one limitation on programmes: they must be conditional, not purposive.<sup>1415</sup> A purposive programme has an end, and given that programmes themselves are made of communications which must lead to further communications, then basing a systems on these would be the death of the system.<sup>1416</sup> Conditional programmes work on the simple basis of 'if X then Y'.<sup>1417</sup>

This contrasts with moral/ethical viewpoints of law which desire set outcomes. Autopoiesis does not mean that programmes must be uncorrupted from moral or economic goals. While it is possible for performance objectives to be set, these are nested within the conditional programme.<sup>1418</sup> Conditional programmes are not designed to fulfil goals directly as its only direction is to create decisions for more meaningful outputs. Future facts, for instance a contract's consideration having no economic efficiency, mean nothing to a conditional programme but could be the *raison d'être* of a purposive programme.<sup>1419</sup> Should programmes be purposive it would follow that future facts would influence the legal/illegal binary, making absurd outcomes.<sup>1420</sup> Programmes may be as responsive to these goals as much as the subsystem wants them to be. However, they must promote such goals as a by-product of conditional operation. To orientate themselves purposively will have the outcome either of: 1. They naturally dissolve when they are satisfied the goal is concluded or 2. The programme observes itself as non-conductive to its goal and thus self-destructs.

A final point on autonomy: Operational closure is solely about operations and communications.<sup>1421</sup> Autonomy is nothing more than the decision making operations within the system being based on the standards of the system itself.<sup>1422</sup> Autopoietic systems theory gives no credence to the idea that internal causes are necessarily more

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<sup>1414</sup> *ibid* 56.

<sup>1415</sup> Luhmann, *Law as a Social System* (n1286) 196

<sup>1416</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1365) 61-62

<sup>1417</sup> Niklas Luhmann, *A Sociology of Law* (Routledge 1985) 174-175

<sup>1418</sup> Luhmann, *Law as a Social System* (n1286) 196-198

<sup>1419</sup> *ibid*

<sup>1420</sup> *ibid* 200-202

<sup>1421</sup> King, 'Luhmann Heresy' (n1258) 20.

<sup>1422</sup> Niklas Luhmann, 'Eingie Probleme Mit Reflexivem Recht' (1985) 6 *Zeitschrift firr Rechtssoziologie* 1, 6 (Translated by Marcelo Neves in 'From the Autopoiesis to the Allopoiesis of Law' (2001) 28(2) *Journal of Law and Society* 242).

potent or important than external causes.<sup>1423</sup> Causality is up to the observer of the system and not the system itself.<sup>1424</sup> All subsystems are naturally dependant on one and other's performances, but this is not the same as an input-output relationship in terms of norms or subsystems requiring each other to fulfil their operations.<sup>1425</sup> Systems must constantly self-reproduce their own operations and this is naturally recursive and self-referential.<sup>1426</sup> If the legal system is nothing but legal communication, and all legal communication must always be within the system, then all future legal communication must link back to the system. This does create a problem however. The legal system is an observing system, so how does it observe and what does it observe when operationally closed? The answer comes in the form of cognitive openness.

#### 6.4 Cognitive Openness

The second aspect of the social subsystem is cognitive openness. It should be noted that this is traditionally distinguished from operative closure for reasons of clarity.<sup>1427</sup> In reality, these two ideas are interconnected as the closure, counter-intuitively, makes systems open.<sup>1428</sup> The system defines itself based on reflection by distinguishing everything else.<sup>1429</sup> As Luhmann comments, pure self-reference is impossible as it would fail the moment something acts outside of the reference.<sup>1430</sup> It is a mistaken view that cognitive openness is merely a device to avoid hard questions or to save the theory from 'fatal conservatism' as Sinclair suggests.<sup>1431</sup> Rather, the concept of a social system requires the system to have a cognitive concept of its environment to fulfil its social function. This element is not as a separate paradigm or convenient escape for the theory, but as a necessary component in understanding the interactions of subsystems. In essence, 'all openness is based on closure'.<sup>1432</sup>

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<sup>1423</sup> Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in Gunther Teubner (ed) *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988) 336.

<sup>1424</sup> *ibid.*

<sup>1425</sup> Micheal King, Anton Schutz, 'The Ambitious Modesty of Niklas Luhmann' (1994) 21(3) *Journal of Law and Society* 261, 270.

<sup>1426</sup> Luhmann, *Social Systems* (n1283) 81-86.

<sup>1427</sup> Dupy, 'On the Supposed Closure' (n1273).

<sup>1428</sup> Gunther Teubner 'Introduction to Autopoietic Law' in Gunther Teubner (ed) *Autopoietic law : A New Approach to Law and Society* (Walter De Gruyter 1988) 2.

<sup>1429</sup> Niklas Luhmann, *Social Systems* (Stanford University Press 1995) 184.

<sup>1430</sup> *ibid* 446.

<sup>1431</sup> MBW Sinclair, 'Autopoiesis, Who Needs it?' (1992) 15(1) *Legal Studies Forum* 81, 87.

<sup>1432</sup> Luhmann, *Social Systems* (n1429) 447.



Under cognitive openness the system is able to observe its environment, and within its environment lies other systems, be they psychic, biological, material, or social. This is key to operative closure as for systems to self-reference, they distinguish between themselves and an 'other'.<sup>1433</sup> This other is beyond the systems boundaries, and thus it follows that the system needs to be cognitively aware and able to observe past its boundaries.<sup>1434</sup> In terms of operations, the basis of cognitive openness stems from the system's programming,<sup>1435</sup> as in its role it must have information to subject to the code. Without this programming being cognitively open, the system would not be able to self-reproduce as it would be uncertain if the conditions for such reproduction have been satisfied.<sup>1436</sup> Thus the cognitive quality of systems acts as coordination for the systems normative processes.<sup>1437</sup> This demonstrates the dualist nature to systems. They must be closed as to produce elements that fulfil their function, but be equally open otherwise their function becomes meaningless.

It is reasoned that while systems are geared towards their own autopoiesis, they are also sensitive to changing environmental conditions via cognitive openness.<sup>1438</sup> No system possesses immunity from other subsystems and each system is highly dependent on the functions of another.<sup>1439</sup> This means that systems can be influenced by one another and by environmental factors although this will never be a direct input-output process.<sup>1440</sup> Rather the construction of the environment, and the recognition of other subsystems noises, is a highly internalised process. Systems do not receive information directly from the outside world, merely communicate about it.<sup>1441</sup> The system then constructs its meaning of what these systems are internally within itself.<sup>1442</sup> Due to this, no demand

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<sup>1433</sup> Hugh Baxter, 'Autopoiesis and the Relative Autonomy of Law' (1988) 19(6) *Cardozo Law Review* 1987, 2009.

<sup>1434</sup> *ibid.*

<sup>1435</sup> *ibid* 2011.

<sup>1436</sup> Luhmann, 'The Unity of the System' (n1314) 20.

<sup>1437</sup> Niklas Luhmann, 'Die Einheit Des Rechtssystems' (1983) 14 *Rechtstheorie* 129, 139. (Translated by Marcelo Neves in 'From the Autopoiesis to the Allopoiesis of Law' (2001) 28(2) *Journal of Law and Society* 242).

<sup>1438</sup> Raf Vanderstraeten, 'System and Enviroment: Notes on the Autopoiesis of Modern Society' (2005) 22(6) *Systems Research And Behavioural Science* 471, 473.

<sup>1439</sup> Micheal King, Anton Schutz, 'The Ambitious Modesty of Nikals Luhmann' (1994) 21(3) *Journal of Law and Society* 261, 270.

<sup>1440</sup> Marcelo Neves, 'From the Autopoiesis to the Allopoiesis of Law' (2001) 28(2) *Journal of Law and Society* 242, 250.

<sup>1441</sup> Gunther Teubner, 'How The Law Thinks: Towards a Constructivist Epistemology of law' (1989) 23(5) *Law and Society Review* 727, 740.

<sup>1442</sup> Niklas Luhmann, *Law as a Social System* (Translated by Klaus Ziegert, Oxford University Press 2004) 112.

from the environment can be effective in changing a programme of law unless such demand is translated into legal communication, given meaning, and then selected.<sup>1443</sup> Cognitive openness therefore does not usurp operative closure as all that exists in the system is its self-reproduced communications stemming from observations.

Without direct communications, systemic influence occurs via the concept of noise and perturbations. The environment of the system provides constant irritation and disturbances to the system.<sup>1444</sup> This will only become meaningful when the system incorporates it into its selection process.<sup>1445</sup> As all communication is a form of selection, with one meaningful understanding chosen above others,<sup>1446</sup> then this provides a wide remit for noise to be recognised. Yet, if all noise were incorporated within the system, the system would be overwhelmed, ergo the need for code-set boundaries. Systems cannot refuse to produce information merely because they do not wish to.<sup>1447</sup> Doing so would be a contradiction of their base foundation is to provide meaning. Conversely, if systems were not constantly irritated with noise then they would soon cease their functions and autopoiesis.<sup>1448</sup> This obligation to create meaning then creates 'chains of communication'<sup>1449</sup> in which the communicative events in one system are observed and reinterpreted in other systems. Thus systems are continuously and relentlessly bombarded with noise from its environment to continue their autopoiesis while simultaneously limiting the noise they recognise.

How do subsystems treat this noise? Firstly, their programmes can be designed as to be responsive to noise identified as coming from a certain source.<sup>1450</sup> Programmes take noise from the environment and guide the allocation of the code values by determining relevancy.<sup>1451</sup> However, not all noise will be treated equally. Noise will be treated by

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<sup>1443</sup> Dimitris Michailakis, 'Law as an Autopoietic System' (1995) 38 *Acta Sociologica* 323, 329.

<sup>1444</sup> Niklas Luhmann, 'Organisation' in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 40-41.

<sup>1445</sup> *ibid.*

<sup>1446</sup> John Mingers, 'Observing Organisations: An Evaluation of Luhmann's Organisation Theory' in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 107-108.

<sup>1447</sup> Luhmann, 'Organisation' (n1444) 41.

<sup>1448</sup> Luhmann, 'Closure and Openness' (n1423) 335.

<sup>1449</sup> Kristof Van Assche, Gert Verschraegen, 'The Limits of Planning: Niklas Luhmann's System's Theory and the Analysis of Planning and Planning Ambitions' (2008) 7(3) *Planning theory* 263, 271.

<sup>1450</sup> Luhmann, *Differentiation of Society* (n1325) 111.

<sup>1451</sup> Ana Lourenco, 'Autopoietic Social System Theory: The Co-Evolution of Law and the Economy' (2010) 35 *Australian Journal of Legal Philosophy* 35, 39.

the system as either information as a redundancy.<sup>1452</sup> Information will come as a surprise to the system, which then creates internal change.<sup>1453</sup> Redundancy is when noise in the system is deemed to be not new and therefore not something that can develop further communication.<sup>1454</sup> No system can survive turning all outside factors into redundancies.<sup>1455</sup> This responsiveness is not a contradiction to operative closure, despite terminological trepidation. Operative closure does not mean informational, casual, or environmental closure.<sup>1456</sup> Merely that the system must be self-steering and observers may put causal weight on external information if they so wish.<sup>1457</sup> Without a constant stream of irritations as new information then communication cannot occur. No communication means no system.

There is a further related element referred to as structural coupling. Structural coupling is where the system presupposes the existence of another system or fact about its environment.<sup>1458</sup> This provides a constant mutual stream of irritations and perturbations between systems.<sup>1459</sup> The mutuality is unavoidable as it is impossible for one system to provide perturbations without also receiving perturbations.<sup>1460</sup> This would imply that systems can shape the other's environment, if indirectly.<sup>1461</sup> The constant irritations provide the possibility of resonance between systems where systems are forced to react to each other. However this is not the same as steering.<sup>1462</sup> Steering would involve a system having the capacity to dominate society, which is something that is an anti-thesis to autopoietic system theory.<sup>1463</sup>

To take an example here, when Parliament passes a statute, the legal system is automatically receptive to this event as it had presupposed the political system changing legislation, and this is a structural coupling.<sup>1464</sup> The legal system then begins a radical deconstruction of both the statute and any relevant data. In doing so, the legal system

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<sup>1452</sup> Baxter, 'Autopoiesis and the Relative Autonomy (n1433) 2026

<sup>1453</sup> *ibid.*

<sup>1454</sup> *ibid.*

<sup>1455</sup> *ibid.*

<sup>1456</sup> Assche, Verschraegen, 'The Limits of Planning' (n1449) 272.

<sup>1457</sup> *ibid* 273.

<sup>1458</sup> Luhmann, *Law as a Social System* (n1286) 382.

<sup>1459</sup> Moeller *Luhmann Explained* (n1338) 37-39.

<sup>1460</sup> *ibid.*

<sup>1461</sup> *ibid* 19.

<sup>1462</sup> *ibid* 38-39.

<sup>1463</sup> *ibid.*

<sup>1464</sup> Luhmann, *Law as a Social System* (n1286) 4010-412

produces bounds of new communications and meanings. In our common law experience, we could think of precedents, interpretations, obiters, legal guidance and predictions which fulfil this role. All of these communications are then observed by the political system who then do the exact same dynamic deconstruction and reconstruction of the new information which has been made available.

The above demonstrates that through structural coupling, a series of communications can arise via the introduction of an irritation. This might give the impression that structural couples are a tool for introducing dynamic chaos into a system. This would be misleading as structural couples have a dual role of both facilitating noise and reducing it.<sup>1465</sup> Luhmann gives an analogy with the coupling between the eye and the brain: the eyes give a highly limited field of vision to the brain to allow the brain to resonate with its environment without being overwhelmed with sensory input.<sup>1466</sup> In terms of social systems, this is achieved by the fact that noise is not correlated with the environment.<sup>1467</sup> Irritations are a perception of the system in that the system must decide how it is irritated and how it reacts to such irritations.<sup>1468</sup> This might seem counter-intuitive, however a useful analogy is the pain reaction. The psychic system develops a concept of pain as an irritation, and if it had no way of understanding pain then pain would never irritate the psychic system. Pain can only exist within the structure that has been created to understand it as such. For social systems, the same is true for irritable information.

This opens up the problem of double contingency. Double contingency is the phenomenon where two systems are observing each other but only through their own selective observations.<sup>1469</sup> Simply put, systems cannot get inside another's head.<sup>1470</sup> Of course, systems require a minimum amount of reciprocal observation for double contingency to come into effect.<sup>1471</sup> However, due to their mutual deep internal complexity, their understanding will be limited.<sup>1472</sup> This does not preclude similar or indistinguishable understandings but rather that the same process that can produce these

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<sup>1465</sup> Luhmann, *Law as a Social System* (n1442) 382.

<sup>1466</sup> *ibid.*

<sup>1467</sup> *ibid* 383.

<sup>1468</sup> *ibid.*

<sup>1469</sup> Rachel Herron, 'A social Systems Approach To Understanding the Racial Effect of the Section 44 Counter-Terror Stop and Search Powers' (2015) 11 *International Journal of Law in Context* 383, 384.

<sup>1470</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 30

<sup>1471</sup> Luhmann, *Social Systems* (n1283) 108

<sup>1472</sup> *ibid.*

can also create irrelevant, or divergent understandings. This is because operative closure does not change simply due to reciprocity, so their observations will always be self-referential.<sup>1473</sup> Their learning and evolution is a wholly internalised process of observing the feedback to their observations.<sup>1474</sup> Again, this does not entail natural conservatism as double contingency both effects a systems behaviour and leaves it open to chance.<sup>1475</sup> This chance and uncertainty reinforces the need for self-reference of system to reduce both the complexity of another systems operations and the uncertainty of their outputs.<sup>1476</sup> The double contingency it is a simple logical deduction of the effects of cognitively open but operationally closed systems.

This should be treated with some caution, as misinterpretation of double contingency has occurred. Mayer has attempted to claim that 'the listener instead of the speaker decides on the meaning of a message'.<sup>1477</sup> This ignores the functions of meaning systems, and would imply that meaning systems do not produce meaning until another meaning system observes their output and creates meaning. A more accurate representation is that the meaning provided for by the initial system is non-transferable, with identical meanings being coincidental rather than procedurally causative. Though this can also create confusion as it lead to Herron asserting 'no single system can declare its view as representing a fundamental truth and binding on all other systems'.<sup>1478</sup> It is fundamentally true that no system's interpretation of reality will ever be universally true as it has no direct access to reality.<sup>1479</sup> This aspect is uncontested. However, the major flaw is assuming no system can declare itself as such. The author posits that each subsystem, by necessity, must implicitly consider itself to be the ultimate decider of reality, though it is rare that this will manifest as an explicit claim. There are multiple reasons for saying this. The functional reason is that the very process of observation and communication involves making selections.<sup>1480</sup> These selections construct the systems entire reality.<sup>1481</sup> It is highly doubtful that any system could survive making this selection process if it were in constant self doubt regarding its own construction of

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<sup>1473</sup> *ibid* 110.

<sup>1474</sup> *ibid*.

<sup>1475</sup> *ibid* 119-120.

<sup>1476</sup> King, Thornhill, *Niklas Luhmann's Theory* (N ABOVE) 30-31

<sup>1477</sup> Ramona Mayer, *The Theory of Social Functional System by Niklas Luhmann* (GRIN Verlag GmbH 2014) 8.

<sup>1478</sup> Herron 'A Social Systems Approach' (n1255) 384.

<sup>1479</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 20.

<sup>1480</sup> Luhmann, *Social Systems* (n1283) 140-141.

<sup>1481</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 18-21.

reality by recognising the constructions of others to be equal. Doing so would expose the Luhmann paradox and could begin a process of rapid internal cannibalisation of a functioning system in which it desperately tries to search for a justification for its own code.

A second reason similar to the first is that systems have a basic function to provide meaning. This is true for both social systems and psychic systems,<sup>1482</sup> so it is possible to draw an analogy between the two with the preliminary concession that they operate with very different elements and operations. A psychic system relies on its own construction on reality, and more important the truth of that construction, in order for its operations to continue. If we use Luhmann's example of the eye having a limited field of vision, when a psychic system sees a yellow leaf, then leaf is yellow and its yellowness is a universal truth. It does not enter the operations of the psychic system that another psychic system would perceive it differently. Even where the system has information regarding different light vectors that humans cannot detect, that does not detract from their observations of yellowness. Due to internal operations they cannot even have a concept of the yellow leaf being a imperceptible colour. As such colours are nonexistent and they not real to the system. Social systems, also operationally closed, perceive such new information in a similar manner. The existence of other systems does not preclude the current systems implied hegemony on reality. Even if they internally know that other systems will not accept their meaning, they must treat their own meaning as true

The 'elaborate charade'<sup>1483</sup> of seeing the outside world as an internalised construction brings about a unique concept on how legal chance occurs. Structural couplings create irritations and disorder which is a requirement for any system to build up regularities.<sup>1484</sup> Command and control, the old Austinian principle<sup>1485</sup> cannot work. King and Schutz make the point that while cognitive openness allows for systems to see the environment, each system observes other systems via their own unique coding.<sup>1486</sup> As such, no system will see the world in the exact same way.<sup>1487</sup> If the political system cannot create communication that will have identical meaning as the legal system, the

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<sup>1482</sup> Luhmann, *Essays on Self Reference* (n1285) 2.

<sup>1483</sup> Thomas E Webb, 'Explaining Systems Boundaries' (2013) 24 *Law and Critique* 131, 134.

<sup>1484</sup> Luhmann, 'Operational Closure and Structural Coupling' (n1297) 1433.

<sup>1485</sup> John Austin, *The Province of Jurisprudence Determined* (First Published 1832, Nabu Press 2014).

<sup>1486</sup> Micheal King, Anton Schutz, 'The Ambitious Modesty of Niklas Luhmann' (1994) 21(3) *Journal of Law and Society* 261, 269.

<sup>1487</sup> *ibid.*

political system cannot command the legal system. It may believe itself to command the legal system and that its communications ought to command. It may even have enough power to force responsiveness out of the legal system in forcing it to structurally couple and create responsive programmes.<sup>1488</sup> However it can never truly force a set outcome on the legal system, as these selections are wholly internal.

It is here that we see the utility within the Luhmann's theory towards legal scholarship. While autopoiesis by itself can never explain anything,<sup>1489</sup> it does teach that change is more nuanced and variable than previously imagined. There is a divergence between Luhmann and Teubner regarding change. Luhmann is pessimistic about the possibilities of cooperative systemic change. Teubner with his writings on reflexive law, believes that it is possible to instigate structures, referred to as reflexive law, in order to accommodate the operational closure of systems.<sup>1490</sup> This divergence has been commented on by academics with Gillespie claiming that Teubner is more pragmatic<sup>1491</sup> while Campbell claiming he is merely 'Luhmann without tears.'<sup>1492</sup>

The author considers this framing to be rather unfair to Teubner, although there is a certain optimism to his work. Teubner and Luhmann both agree on the concepts of cognitive openness and operative closure, and really the only thing that they disagree on is if a system can be partly autopoietic.<sup>1493</sup> The author would posit that it is this divergence that creates the rather different utility outcome. For Luhmann, the system is either autopoietic or it is not,<sup>1494</sup> at which point the operations of one system can never have determine effects on the operations of another. As such, the moral, political, or economic communications can never be guaranteed similar meanings post legal reconstruction. If we were to conceive autopoietic systems as potentially having being partially autopoietic, the analysis changes. Suddenly, systems now have the ability to have concepts that emerged prior to their full closure and they can recursively rely on to create responsive and reflexive programmes.

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<sup>1488</sup> Ost, 'Between Order and Disorder' (n1410) 75.

<sup>1489</sup> Luhmann, *Introduction to System Theory* (n1306) 80.

<sup>1490</sup> Gunther Teubner, 'The Two faces of Janus: Rethinking Legal Pluralism' (1992) 13(5) *Cardozo Law Review* 1443, 1447.

<sup>1491</sup> John Gillespie, 'New Transnational Governance And the Changing Composition of Regulatory Pluralism in Southeast Asia' (2014) 9 *ASJCL* 65, 73 fn39.

<sup>1492</sup> Campbell, 'Luhmann Without Tears' (n1282).

<sup>1493</sup> Gunther Tubner, 'Evolution of Autopoietic Law' in Gunther Teubner (eds) *Autopoietic Law: A New Approach to Law and Society* (Walter De Gruyter 1988) 222.

<sup>1494</sup> Luhmann, *Introduction to System Theory* (n1306) 82

The author confirms that he prefers the concept of fully closed autopoietic systems as a system which has elements of another cannot be called an autopoietic system but would need a wholly new categorisation. It cannot be that a system is partly autopoietic, it either is solely recursive and self-referential or it is not.<sup>1495</sup> As such, the author then accepts the rather self-styled pessimistic outlook of Luhmann:<sup>1496</sup> intersystem command and control will lead to failure. Luhmann gives an example of the former Soviet union: the breakdown of socialist economies was due to the breakdown in communication that emerged from the political system taking control of the economic system.<sup>1497</sup> The soviet planning centres, functioning on political communications, were never properly informed about the economic situation as they were unable to understand economic communication.<sup>1498</sup> Thus, the economic system could not perform its function and the political system operations could not substitute. This is no commendation for free market economies, whom Luhmann has criticised for creating economic communication purely for political purposes that cannot be understood by the political system, and even might be meaningless in the economic system.<sup>1499</sup> The purpose of mentioning this is simple: attempting to govern another social subsystem using the language, communications, or values of another is highly susceptible to failure if the goal is to translate one meaning to another. Diamond put it best: 'Don't Mess with another system's world.'<sup>1500</sup>

## **6.5 Academic Misconceptions: Causality and the Individual**

### **6.5.a Causality**

One of the major stumbling blocks in understanding operational closure is the idea that law's normative autonomy equates to isolation from social forces and other subsystems.<sup>1501</sup> This is partly the reason why many academics instinctively reject autopoietic system theory. Yet, Luhmann never claims that there is a form of legal autarky meaning systems cannot influence each other.<sup>1502</sup> Rather, his account explicitly

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<sup>1495</sup> *ibid.*

<sup>1496</sup> David Sciulli ' An Interview With Niklas Luhmann' (1994) 11 *Theory, Culture & Society* 37, 44.

<sup>1497</sup> Niklas Luhmann, *Einführung in die systemtheorie* (Heidelberg 2002) 130 (translated by Hans-Georg Moeller, *Luhman Explained: From Souls to Systems* (Carus Publishing Company 2006) 34).

<sup>1498</sup> *ibid.*

<sup>1499</sup> *ibid* 131.

<sup>1500</sup> Diamond ' Autopoiesis in America' (n1261) 1766.

<sup>1501</sup> Luhmann, 'Operational Closure and Structural Coupling' (n1297) 1431

<sup>1502</sup> Lourenco (n1257)



claims that law is dependent on other subsystems.<sup>1503</sup> Law would not be able to fulfil its functions without the other systems of the economy, politics, morality, family et al also fulfilling their functions.<sup>1504</sup> Law, when attempting to provide meaning, cannot do so outside of its code and therefore cannot possibly take over the functions of other subsystems whose functions and codes are exclusive to themselves. Due to the dualism of operational closure and cognitive openness, Law can perceive of other subsystems through its internal mechanisms. The fact there is some form of symbolic creation in the legal subsystem and within legal meaning representing its environment, means that environment's existence is part of the legal subsystems operations, albeit in an abstract fashion.

Furthermore, such representations ignore Luhmann's key distinction between operations and causality. Causality is a highly subjective concept to Luhmann and it is not included in the description of how communications are objectively reproduced in society.<sup>1505</sup> Causality is a judgement call of an observer looking at cause and effect.<sup>1506</sup> In autopoietic systems theory there is a highly complex causal relationship between systems.<sup>1507</sup> It is probably alien for lawyers to see causality as subjective so an analogy might be useful. Should a person be stabbed, pain will occur. However, what caused the pain is up to the observer and what part of the sequence they put weight on. Biological systems such as sensory receptors have no concept of a knife or even pain, yet they sense pressure and so transmit electrical signals. In their observation, the pressure is the cause. The brain also has no concept of pain, but the thalamus has a concept of nerve signals, and so sorts them into the frontal cortex for the psychic system. To the brain, the cause is electrical signals from neurotransmitters in the dorsal horn. The psychic system observes the signals in its environment, and comes to the conclusion that the knife is the cause. The legal subsystem might observe this and place causal connection within mens rea. All conclusions of causality within the sequence are equally valid and therefore causality in this context is subjective.

This misunderstanding of subjective causality causes significant mischaracterisations of the autonomy of social systems, creating rather perplexing conclusions. The author must

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<sup>1503</sup> Luhmann, *Introduction to Systems* (n1306) 82.

<sup>1504</sup> Luhmann, *Law as a Social System* (n1286) 92

<sup>1505</sup> Luhmann, *Introduction to Systems* (n1306) 65

<sup>1506</sup> *ibid.*

<sup>1507</sup> Lourenco (n1257) 47

devote some time to the article 'Autopoiesis who needs it' by Sinclair.<sup>1508</sup> From the outset we can see that Sinclair has trouble with the concept of a social subsystem as he is unsure if communication is the content and subject matter of a system.<sup>1509</sup> In case the author has not emphasised this enough, it very much is. Furthermore Sinclair does not quite grasp what Luhmann's conception of causality is, especially in his discussion of extra legal norms and the system deciding to act 'according to such extra legal normative phenomena'.<sup>1510</sup> However, even if we forgive some of these errors of comprehension, Sinclair's main piece is with regards to the application of the theory to the practising lawyer:<sup>1511</sup>

'Suppose we decide that Luhmann is correct. The Lawyer would search among the acknowledged parts of the legal system - the statutes, precedents, regulations and suchlike - for the kind of law that may pertain to the facts in question having found the candid statute, she would quite typically look to legislative history, policy, or purpose to resolve or create uncertainties as to its meaning. The first part of this search is of the autopoietic legal system - of that complicated function that will tell whether these facts fall under a norm of pronouncing them legal or not legal.'

There is a lot of errors in this one passage to deconstruct. Firstly, with the lawyer searching 'among the acknowledged parts of the legal system', it is implied that this will only be what the lawyer looks at as opposed to things such as legislative history as this is in the realm of politics.<sup>1512</sup> This is a completely false picture of actors within the system. Lawyers are still psychic systems and thus have access to the meaning outputs of all social systems (though crucially not their communication). Thus they can create meaning from the environment via the outputs of all social systems, not merely the legal system. This has led to the very erroneous conclusion that it is the lawyer, an observer, to decide what is legal/illegal when only the legal subsystem may do this. The psychic system may observe the legal subsystem and come to their own meanings, but their meanings are theirs alone.

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<sup>1508</sup> MBW Sinclair, 'Autopoiesis, Who Needs it?' (1992) 15(1) Legal Studies Forum 81.

<sup>1509</sup> *ibid* 82.

<sup>1510</sup> *ibid* 86.

<sup>1511</sup> *ibid* 88

<sup>1512</sup> *ibid*

Sinclair goes on to say:<sup>1513</sup>

‘Many of the common law judge’s sources of decisional bases are from beyond the legal system. Were this not so there could be no landmark decisions’

His explanation for this is structural coupling, however he then claims that this could not be the case as common law judges are not authoritative in the legal power of norms they adopt.<sup>1514</sup> Again we run into the serious problem that in an autopoietic concept of law, it is not the judge who decides legal operations and norms but rather the system itself.<sup>1515</sup> Structure and programming may allow for the constructed symbolic artefact of the judge to have operative power in this, but it makes no prescription that this be the case.

Sinclair’s inability to engage with the concepts of cognitive openness and programming are emphasised more in his discussion of notice.<sup>1516</sup> Sinclair makes the claim that people do not base their behaviour on law, and so must get standards of behaviour based on the what is considered law through ordinary socialisation.<sup>1517</sup> Due to socialisation, people have notice of law and thus common law judges refer to the rules of the community for governing norms.<sup>1518</sup> He then claims that this is incompatible with autopoietic systems because structural coupling cannot reverse the flow of time.<sup>1519</sup> All of this is in complete contrast with the basics of autopoietic systems theory. It is true that positive law requires people to have notice. However, law constructs its own internal image of what the defendant is. The environmental reality is only applicable to law in the manner, form, and context that the system allows. Put simply, a defendant has notice for the purposes of law if law’s operations say as much. An observer to the system of law can happily say that the reason notice was found was because of there being a norm within the economic or political system in which leads to the landmark judgement. However, this is subjective solely on the observer for putting weight on that particular casual effect. Even so, what the psychic system’s internal understanding of what the norm is might be highly different from the origin systems and very different

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<sup>1513</sup> Sinclair, ‘Autopoiesis, Who Needs it?’ (n1508) 91

<sup>1514</sup> *ibid* 92

<sup>1515</sup> Luhmann, *Law as a Social System* (n1286) 85, 90.

<sup>1516</sup> Sinclair, ‘Autopoiesis, Who Needs it?’ (n1508) 92

<sup>1517</sup> *ibid*.

<sup>1518</sup> *ibid*.

<sup>1519</sup> *ibid*.

from the legal systems conception of it. The operations of law are the only determinate factor on what further communications, including the concept of notice, are selected within the system.

### 6.5.b The Individual

Luhmann's theory is called anti-humanistic as one of its major criticisms.<sup>1520</sup> This criticism, while definitionally true, has less gravity than first imagined. First, the reason for this stance is that Luhmann considered humanism to be too simplistic a standpoint for a complex reality.<sup>1521</sup> He commented that the main reason for the current sociological pursuit of humanistic tendency was due to the strong orientation towards man within European tradition post-enlightenment.<sup>1522</sup> Due to the paradox of sociology both wishing to be attached to humans yet understanding it cannot be related to everything that a human does, action theory became the solution.<sup>1523</sup> However, communicative actions, as aforementioned, cannot be the basis of any encompassing theory as actions may be solitary and without an observer to generate meaning. Autopoietic system theory allows for a radical conception of individualism because it places humans outside of the system and into the environment as a fact.<sup>1524</sup> Luhmann's conceptions of individuals then is not negligent of their status in reality but rather gives it special meaning as an independent fact in its own right.

Luhmann's conception then gives rise to a special status of humans on the whole. In fact, Luhmann says himself that one could rename Autopoietic systems theory to 'taking individuals seriously' due to its understanding of the complex nature of both reality and of the individual.<sup>1525</sup> Part of this complexity is the make-up of humans. Humans under Autopoietic systems theory have three existences: Biological, Psychic, and Social.<sup>1526</sup> Biological systems in the human body, the Psychic in the mind, and the social in the multiple abstractions and constructions of that person by the multitude of social systems at any given time.<sup>1527</sup> Humans may present themselves as a unity either

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<sup>1520</sup> Peter Gilgen, 'System- Autopoiesis- Form: An Introduction to Luhmann's Introduction to system theory' in Niklas Luhmann, *Introduction to System Theory* (Polity Press 2013) xiv.

<sup>1521</sup> Moeller, *Luhman Explained*' (n1338) 79-80.

<sup>1522</sup> Niklas Luhmann, *Introduction to System Theory* (Polity Press 2013) 180-184.

<sup>1523</sup> *ibid* 183-184.

<sup>1524</sup> *ibid* 187-188.

<sup>1525</sup> Luhmann, 'Operational Closure' (n1297) 1422.

<sup>1526</sup> Moeller, *Luhman Explained*' (n1338) 10.

<sup>1527</sup> *ibid* 10-12.

in their own self reflection or to an observer, however no human truly is.<sup>1528</sup> As demonstrated in the pain analogy above, the psychic system cannot even directly communicate with the biological system, merely observe its outputs and attempt to produce meaning from them.<sup>1529</sup> Humans are highly complicated and exist with a multitude of different meanings where trying to formulate them as a single unit is often far too simplistic.

Nevertheless, some rather strange responses human orientation have emerged. These range from the plainly untrue ('People themselves do not matter according to Luhmann's Theory'<sup>1530</sup>) to the downright bizarre ('It follows then that if human beings did not exist a social system would still have meaning'<sup>1531</sup>). The latter, from Bankowski, is rather puzzling and demonstrates the need for the author to have created the list of misconceptions. Social systems might be meaning systems, but they are also function systems.<sup>1532</sup> They serve a functional role in society in fulfilling normative expectations, the normative expectations still stemming from humans. The only way Bankowski's claim would make any sense is if another conscious system emerges which requires similar normative needs. Luhmann pointed out that it is absurd to consider society without humans.<sup>1533</sup> Yes, human minds are psychic systems and therefore distinct from social systems. But to say there is no dependency would be similar to saying that the psychic system would continue to create meaning without the millions of collective biological systems, such as the brain, that maintain its existence. This would be an absurd proposition and Bankowski's claim is equally as absurd.

However, an argument has emerged in a recent paper by Webb and Phipopoulos-Mihalopoulos claiming that the removal of the individual, as well as operative closure, causes hyper-exclusion from society.<sup>1534</sup> While this paper has clearly been written by those who have engaged with the Luhmann enterprise, the author would argue that

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<sup>1528</sup> Niklas Luhmann, *Social Systems* (Stanford University Press 1995) 40.

<sup>1529</sup> *ibid.*

<sup>1530</sup> Alan Wolfe, 'Sociological Theory in the Absence of People: The Limits of Luhmann's Systems Theory' (1992) 13(5) *Cardozo Law Review* 1729, 1736.

<sup>1531</sup> Zenon Bankowski, 'How Does it Feel To Be On Your Own? The Person in the Sight of Autopoiesis' (1994) 7(2) *Ratio Juris* 254, 259.

<sup>1532</sup> Luhmann, *Differentiation of Society* (n1325) 238.

<sup>1533</sup> Luhmann, *Law as a Social System* (n1286) 105

<sup>1534</sup> Andreas Philippopoulos-Mihalopoulos, Thomas E Webb, 'Vulnerable Bodies, Vulnerable Systems' (2015) 11(4) *International Journal of Law in Context* 444

some of the conclusions are a distortion of autopoietic analysis. The first issue has already been dealt with but will be highlighted here to emphasise the point.<sup>1535</sup>

‘First, Although humans form part of the process of production of communication, they are not the casual origin of such communication. Humans are not agents of actions within society, but conduits conveying meaning between and within systems as part of the communicative activity of society’

Firstly, and as we have already discussed causality the author will be brief, humans are only not the casual origin of communication only so far that the observer does not put causal weight on them. There is nothing fundamentally opposed to Autopoietic systems to say that the causal origin of all possible communication is the human being. It only becomes opposed at the point that one puts the causal origin as above or as important as the recursive selectivity of systems. Though, it is appreciated that Webb and Phippopoulos-Mihalopoulos have identified that Psychic systems do act as conduits of meaning within and between systems. Though, an important addendum, they only do so as semantic artefacts. Psychic systems are their own systems of meaning who will create meaning themselves based on the meaningful outputs of social subsystems.

Secondly, we get to the main point of hyperexclusion framed as thus:<sup>1536</sup>

The question, however, is whether autopoietic anti-humanism leads to dehumanisation with potentially catastrophic social consequences such as disengagement, disassociation and finally exclusion from every aspect of society’

The argument of the above stems from the concern that due to the removal of humans, values that humanists consider integral to modern legal systems are removed from their predominate positions.<sup>1537</sup> Concepts such as human rights, argued as integral to accessing systems, become up to the system to apply.<sup>1538</sup> Risks emerge due to the ‘inequality of communicative opportunities’ in the western centric framework.<sup>1539</sup> When the risk of disengagement emerge, then dedifferentiation occurs due to a ‘sub-dermal pressure to dedifferentiate as those excluded from social processes look to other

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<sup>1535</sup> *ibid* 446

<sup>1536</sup> Philippopoulos-Mihalopoulos, Webb, ‘Vulnerable Bodies’ (n1534) 447

<sup>1537</sup> *ibid.*

<sup>1538</sup> *ibid* 448.

<sup>1539</sup> *ibid* 451.

avenues for answers'.<sup>1540</sup> Their argument centres of the concept of hyperexclusion being separate from ordinary exclusion.<sup>1541</sup> The latter is what they consider Luhmann's premise; free individuals outside society while the former is the lack of ability to move towards society.<sup>1542</sup> Put simply, the denial of access to systems endangers said systems.

There are multiple issues with this argument. The first is semantic, but highly important for understanding Luhmann. It is genuinely impossible to be fully excluded from any social system. Merely making the question of legal rights becomes a legal communication, any economic transaction is an economic communication, any collectively binding decision becomes a political communication.<sup>1543</sup> Even teaching law in a law school is a legal communication.<sup>1544</sup> This thesis contains legal communications. Of course, not every legal communication will turn into a legal operation.<sup>1545</sup> Yet, there is no contradiction to say that should individuals find alternative means, those means would, in of themselves, be part of social systems and potentially act as programmes within the system. As Luhmann says, access to all systems is equal.<sup>1546</sup> What may not be equal is the conditional programmes which may require additional criteria before they function. This distinction is important as one cannot be excluded from the system but they can be prevented from continuing with further communications of a specific kind due to a conditional programme.

This is important due to programming flexibility. Should systems come under pressure due to their programming causing irritations in the environment, programming can be changed to accommodate such pressures.<sup>1547</sup> It is questionable how total exclusion of society could come about on a significant scale without it becoming a multi-system perturbation. At the very least, the psychic systems who observe total exclusion can produce noise that irritate multiple subsystems, for example the political and legal, who must then apply their codes and programmes. Of course, their operations are highly unpredictable with no clear outcome. However, it is not an existential threat to the system that exclusion from accessing specific operations is inevitable. Exclusion must

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<sup>1540</sup> *ibid.*

<sup>1541</sup> *ibid* 449.

<sup>1542</sup> *ibid.*

<sup>1543</sup> Luhmann, *Differentiation of Society* (n1325) 122

<sup>1544</sup> King, *The Truth About Autopoiesis* (n1293) 224.

<sup>1545</sup> Luhmann, *Law as a Social System* (n1286) 103

<sup>1546</sup> Luhmann, *Differentiation of Society* (n1325) 236

<sup>1547</sup> King, Thornhill, *Niklas Luhmann's Theory* (n1280) 59-61.

be possible, otherwise inclusion would not be.<sup>1548</sup> Ordinary exclusion has been commented on by Luhmann who, while unhelpfully omitting the word programmes, gave examples of programmes which had the potential of excluding individuals from further communications.<sup>1549</sup> However, onerous exclusion is not the fault of autopoiesis, but rather the fault of over-zealous programmes that can be changed in the system as a result from substantial pressure.

The human rights element is also drawn up by critics of the system. However here we can draw out some conclusions which have rather concerning consequences. Yes, it is fundamentally true that the third values of human rights in a moral context can only be understood via the system they operate in.<sup>1550</sup> Human rights are a specialised programme of law that law currently recognises as legal.<sup>1551</sup> The key point is that it is only valid because law says it is valid, and not because of some devotion to a higher power.<sup>1552</sup> We should distinguish this heavily from positivists like Bentham who proclaimed human rights as ‘nonsense on stilts’.<sup>1553</sup> Human rights in autopoietic systems are not nonsense but in fact are highly important communications that will influence all future communications even should a movement away occur. Moreover, realising human rights are merely programmes within the system adds more to the importance of keeping them. Weisberg has applied Autopoiesis to the development in Vichy France.<sup>1554</sup> What was found was that the Autopoietic process that occurred after Nazi racial policies were applied into the system caused the system to ‘go bezerk’.<sup>1555</sup> The system went far further than the German legal code did against the Jewish population, and this was attributed to the French legal programmes that had existed before.<sup>1556</sup> The recursive method of the system combined with new policies caused a completely dynamic and unintended consequence.<sup>1557</sup> This is the lesson that should be

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<sup>1548</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated by Rhodes Barrett, Standofrd University Press 2013) 18

<sup>1549</sup> Niklas Luhmann, 'Beyond Barbarism' in Hans-Georg Moeller, *Luhman Explained: From Souls to Systems* (Carus Publishing Company 2006) 269-270.

<sup>1550</sup> Philippopoulos-Mihalopoulos, Webb, 'Vulnerable Bodies' (n1534) 447

<sup>1551</sup> Niklas Luhmann, 'Are There Still Indispensable Norms In Our Oociety' (2008) 14(1) *Soziale Systeme* 18, 33

<sup>1552</sup> *ibid* 27-30.

<sup>1553</sup> Jeremy Bentham, 'Anarchical Fallacies: Being an Examination of the Declaration of Rights issues During the French Revolution' in *The Works of Jeremy Bentham* (Simpkin, Marshall & Co, 1843)

<sup>1554</sup> Richard Weisberg, 'Autopoiesis and Postivism' (1992) 13(5) *Cardozo Law Review* 1721

<sup>1555</sup> *ibid* 1726.

<sup>1556</sup> *ibid*.

<sup>1557</sup> *ibid*.



gleamed from the application of Human Rights to Autopoiesis: Their protection is paramount because we have no capability of knowing what might come after.

## 6.6 Conclusion

The purpose of this chapter has been an expositive premise to Luhmann's Grand Theory. Of course, no single work could ever hope to encompass all of Luhmann's ideas, writings, and philosophy.<sup>1558</sup> However, given the relative small space provided for within this work the author hopes that there is now enough clarity of the paradigm to begin to apply the theory to contract law. As a concluding summary: Society is formed of numerous subsystems which are normatively closed but cognitively open. They reproduce their own elements which are termed 'communication'. Communication, which requires information, utterance, and understanding, cannot exist outside its home system.

This creates a new conception of legal change, one that is independent of human willpower or of political revolutions. Morality can apply itself as much as it wants to the systems, but the systems are under no obligation to take notice unless their own operations deem otherwise. Even should their programmes demand responsiveness, the system cannot perceive outside of its observation structures. This creates the potential, and the likelihood, of misunderstandings and disappointments. It does not matter if we consider Teubner's responsive or reflexive law, there is no method of guaranteeing successful change. Change happens at the pace, direction, and behest of the social subsystem that is changing. While one certainly can irritate a system in a 'kick it until it moves' approach, there is never any certainty of how this will conclude .

This is then the pessimistic turn of Luhmann. It is not that change or evolution cannot happen, but rather that it is dynamic and unpredictable. The overall reality that is constructed by systems will generally be left to the system and humans, as psychic systems, merely get to influence and interpret the outputs of these functional meaning systems. Social and legal change needs to be perceived in a more nuanced way. The concept of regulatory failure goes far beyond enlightened blackboard economics into a more existential threat: the system you are attempting to influence simply will not understand, or worse, misunderstand what you expect from it.

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<sup>1558</sup> Moeller, *Luhman Explained'* (n1338) xi

## 7. Chapter Seven: Grand Theory and Relational Contract

### 7.1 Introduction

We may now begin the assimilation process of Luhmann's Theory to see what insights may be extracted. It might seem counter-intuitive to apply one theory to another but one must remember the scope of Luhmann's work. Autopoietic systems theory is a theory of theories.<sup>1559</sup> It is a grand theory which is better described as a theoretical paradigm.<sup>1560</sup> Within this grand theory, contract is a social event on the peripheral between the legal and the economic subsystems of society.<sup>1561</sup> When contracts are made on this peripheral, they are seen at the same time by both the economic and the legal system,<sup>1562</sup> who generate the relevant communications about the event in response to their observations<sup>1563</sup> Thus a contract is a form of communicative act which can have multiple meanings within different systems simultaneously.<sup>1564</sup> Due to its inherent nature, a contract would be considered a structural coupling between the legal and the economic subsystems due to the law observing economic rights and the economic system observing justifiable transactions.<sup>1565</sup> Contract offers little conceptual challenge to the operationally closed but cognitively open system.

Many lessons extracted from the exposition of autopoiesis are relevant to discussion of a relationally constituted contract law. Perhaps the most pertinent is that direct communication may never happen between two subsystems.<sup>1566</sup> Systems are operationally closed but cognitively open, and so they may observe one another to generate communication but they will never communicate.<sup>1567</sup> Thus a theory that has been generated outside the legal subsystems may never be fully understood by the legal subsystem. Rather, a distorted reflection may arise as the legal subsystem utilises its

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<sup>1559</sup> Micheal King, Anton Schutz, 'The Ambitious Modesty of Nikals Luhmann' (1994) 21(3) Journal of Law and Society 261, 284.

<sup>1560</sup> Michael King, 'The Truth About Autopoiesis' (1993) 20(2) Journal Of Law and Society 218, 218.

<sup>1561</sup> Hugh Baxter, 'Autopoiesis and the Relative Autonomy of Law' (1988) 19(6) Cardozo Law Review 1987, 2022.

<sup>1562</sup> *ibid.*

<sup>1563</sup> Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13(5) Cardozo Law review 1419, 1424.

<sup>1564</sup> King, The Truth About Autopoiesis (n1560) 219, 224.

<sup>1565</sup> Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of The Legal System' (1992) Cardozo Law Review 13(5) 1419, 1435.

<sup>1566</sup> Niklas Luhmann, *Introduction to Systems Theory* ( Translated by Peter Gilgen, Policy Press 2013) 64.

<sup>1567</sup> Raf Vanderstraeten, 'System and Enviroment: Notes on the Autopoiesis of Modern Society' (2005) 22(6) Systems Research And Behavioural Science 471, 473; Gunther Teubner, 'How The Law Thinks: Towards a Constructivist Epistemology of law' (1989) 23(5) Law and Society Review 727, 740.

available information and self-references them back to prior legal communications.<sup>1568</sup> While information is an external reference, it is not picked up outside of the system in its environment.<sup>1569</sup> Information is merely part of a synthesis of utterance and meaning as to create communication, and so it exists solely within the system.<sup>1570</sup> This means that the only external reference that the system has in developing meaning is found only within the system itself. With no direct output line, there is no guarantee of direct meaning symmetry.

It is here where relationally constituted law finds a theoretical hurdle that it simply cannot ignore. There is no guarantee that the insights of Macneil will translate into the legal system with any meaning that remotely resembles its origin. Not only is there no guarantee, but the legal communications that are coming out with reference to relational contract would indicate that the system is already divergent. The meaning has already changed. The legal subsystem could not insulate itself from relational contract theory as no system can insulate itself from noise.<sup>1571</sup> What will be shown is that relational contract, when first observed by the courts and thus becoming an irritant noticed by a legal programme, opened a Pandora's box and set a chain of unpredictable changes.

Autopoiesis has little to no normative power over outcomes. Just as causality is a subjective concept,<sup>1572</sup> so too are the individual results that are arrived at via the programmes within a system. It would be disingenuous to outright claim that relational contract theory will always be misrepresented in the legal subsystem. However that does not mean that no predictions can be made using historical precedent of noise in the subsystem using a relevant comparator. The comparator chosen is the doctrine of consideration; common law's great survivor.<sup>1573</sup> It has survived multiple noises and influences from the economic system and the political system at different points in its life. While it has survived, it has not maintained purity. The programme outright rejected outside noise translated into communication, only to eventually be morphed

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<sup>1568</sup> Niklas Luhmann, *Social Systems* (Translated by J Bednarz and D Beacker, Stanford University Press 1995) 108-120.

<sup>1569</sup> Niklas Luhmann, *Essays on Self Reference* (Columbia University Press 1990) 4.

<sup>1570</sup> *ibid* 3.

<sup>1571</sup> Kristof Van Assche, Gert Verschraegen, 'The Limits of Planning: Niklas Luhmann's System's Theory and The Analysis of Planning and Planning Ambitions' (2008) 7(3) *Planning theory* 263, 272.

<sup>1572</sup> Luhmann, *Introduction to Systems Theory* (n1566) 65.

<sup>1573</sup> Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 186.

into something that medieval assumpsit, classical contract, or the economic sub-system would not deem coherent or understandable.

Relational contract has a real danger of going down the same beaten track that consideration has done, albeit with its own programmes of good faith contracts. The misunderstandings are evident, and the divergences are too obvious to ignore. It is clear that the programmes of the legal system are attempting to incorporate noise but failing miserably at grasping even the most basic concepts of relational contracting. The author comes to the conclusion that due to this erroneous uptake of information that it is better for relational contractarians to double down on their theory but via a different method. The legal system and its operations have already been influenced by communications built on the classical law of contract. Speaking without practical concerns and solely from the theory side, it would be better to abandon the hope of a relationally constituted law but instead use the rich analytical apparatus of Macneil to discover flaws within the classical law and provide specific remedies that the classical law itself can understand. In short; use the theory as a means, and not an end.

## **7.2 Compatibility**

Autopoietic systems theory is a grand theory that does not claim to be an exhaustive comprehension of all of society.<sup>1574</sup> Given that it is a theoretical framework, there is no inherent problem with submitting another theory within its paradigm so long as it does not attempt to distort the framework. Relational contract theory can be understood within autopoietic systems theory, though to do so we must determine its proper place within an autopoietic society. As a descriptive theory,<sup>1575</sup> relational contract can elucidate part of society and thus provide more substance on the theoretical framework as determined by Luhmann. This would make relational contract theory an addition to the grand theory, allowing for mutual appreciation between Luhmann's insights on meaning generated in a complex society and the insights of Macneil on contracting in a complex society.

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<sup>1574</sup> King, Schutz, 'Ambitious Modesty' (n1559) 261.

<sup>1575</sup> Ian R Macneil, 'Relational Contract Theory: Challenges and Queries'(2000) 94(3) Northwestern University Law Review 877, 899.

Unfortunately, numerous scholars have distorted autopoietic analysis via attempting to assimilate autopoietic systems theory into their own frameworks.<sup>1576</sup> King cites a number of examples including Cornell including it with critical legal studies and the attempts by Jacobson to combine it with his views on legal autonomy.<sup>1577</sup> A further example could be found with Valentinov, whose admirable knowledge of corporate governance has lead him to an assimilation attempt where systems have arbitrary priorities that seemingly match what corporations are required to do to function.<sup>1578</sup> The obstacle of all these attempts seem seems to be that of scale. Autopoietic systems theory cannot be subsumed into another framework as it is a framework of society. As a framework of everything, it cannot fit into a limited scope without severe distortion. On the other hand, where a theory has a direct line of inquiry, for example how are contracts governed, they can be added into the framework of everything as a sub-theory. In fact, they may do so with little internal modification, as if a descriptive framework of society exists, then a descriptive framework of an activity in that society can also exist.

This is not merely a luxury which can be ignored. As Campbell has pointed out, no serious theory can permit an exception.<sup>1579</sup> For analysis of relational contract under a systems-view approach to have any validity, the base principles of the both theories must be compatible and not represent exceptions. This is rather complicated due to the fact that relational contract theory is highly complex.<sup>1580</sup> This should be expected given that a basic premise of functionally differentiated systems is seemingly endless complexity via internal differentiation.<sup>1581</sup> There are two aspects of relational contract theory that might help us determine its scope within an autopoietic society; the spectrum and the ten common contractual norms . One will note that unlike previous chapters dealing with the practicalities of a relationally constituted law, this is not going to utilise

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<sup>1576</sup> Micheal King, 'The Construction and Demolition of the Luhmann Heresy' (2001) 12 *Law and Critique* 1, 10.

<sup>1577</sup> *ibid* 10-20.

<sup>1578</sup> Spencer Thompson, Vladislav Valentinov, 'The Neglect of Society in the Theory of the Firm: A Systems-Theory Perspective' (2017) 41 *Cambridge Journal of Economics* 1061; Vladislav Valentinov 'Veblen and Instrumental Value: a Systems Theory Perspective' (2013) 47(3) *Journal of Economic Issues* 673; Vladislav Valentinov 'The Complexity-Austainability Trade-off in Niklas Luhmann's Social Systems Theory' (2014) 31(1) *Systems Research and Behavioural Science* 14.

<sup>1579</sup> David Campbell, 'The Undeath of Contract: A Study in the Degeneration of a Research Programme' (1992) 22(1) *Hong Kong Law Journal* 20, 33.

<sup>1580</sup> William Whitford, 'Ian Macneil's Contribution to Contracts Scholarship' (1985) 1985(3) *Wisconsin Law Review* 545, 556.

<sup>1581</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated By Rhodes Barrett, Stanford University Press 2012) 12-15.

the streamline four contractual norms that Austen-Baker generated.<sup>1582</sup> The rationale behind this decision is due to Macneil's work being vastly comprehensive. In discussing substance to grand theory this comprehensiveness significantly benefits elucidation of the scope within the grand theory.

Chapter three has already worked through the comprehensive substance with regards to relational contract theory, but pinpoints will be used to help with clarity. Firstly are the twelve different axes on which a contract may sit on the spectrum. These include concepts such as overall relationship type between the parties and the sources of socio-economic support within the relationship.<sup>1583</sup> These axes were determined via Macneil investigating the four roots of contractual behaviour; society, specialisation of labour, conceptual choice, and awareness of the future.<sup>1584</sup> As these roots could never create a set outcome, it led to complexity of outcomes which Macneil categorised via analogy as the spectrum of contractual relations.<sup>1585</sup> Already we get an idea of where this would stand within autopoietic systems theory. While Macneil's analysis stems into pre-functionally differentiated society territory, including discussing segmented and stratified societies,<sup>1586</sup> his work primarily focuses on the consensual relationships of human beings within these societies. Simply put, his work is focused on the interplay between psychic systems who are interactive with society's subsystems.

Seeing relational contract theory through this prism is unique compared to the traditional approach. It is not necessarily dealing with legal, economic, political or ethical analysis but rather the interplay of human beings who are interacting with systems of meaning. As humans are an external fact to systems,<sup>1587</sup> their behaviour is given different meaning by those systems. By the same remit, Humans are psychic systems who have society, and thus its subsystems, as external to themselves.<sup>1588</sup> This means that they will interact with these subsystems as to generate their own internal meaning of the world. The spectrum of contractual relations seems to be a descriptive

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<sup>1582</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 221-222.

<sup>1583</sup> Richard Austen-Baker, Qi Zhou, *Contracts in Context* (Routledge 2013) 80.

<sup>1584</sup> Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 1-4.

<sup>1585</sup> Ian R Macneil, 'The Many Futures of Contract' (1974) 47(3) *Southern California Law Review* 691, 720.

<sup>1586</sup> Macneil, *The New Social Contract* (n1584).

<sup>1587</sup> Niklas Luhmann, *Introduction to System Theory* (Polity Press 2013) 187.

<sup>1588</sup> Niklas Luhmann, *Law as a Social System* (Translated by Klaus Ziegert, Oxford University Press 2004) 106; Hans-Georg Moeller, *Luhman Explained: From Souls to Systems* (Carus Publishing Company 2006) 10-12.

effort towards how individuals interact with one another while using the meanings produced by the plethora of subsystems in their environment. Unlike classical doctrine, which is a product of a legal programme and thus can only see the world in the form of legal communication, relational contract theory can be used to explore the human relation with a multitude of different systems in a functionally differentiated society.

This can be seen when looking at the ten common norms.<sup>1589</sup> Of course, harmonisation with the social matrix is a catch all for autopoietic systems theory. It is an indefinable norm that changes with particular contexts dependant on the contractual relation itself.<sup>1590</sup> Be the contract discrete or relational, it must obey basic rules set by society and social expectation.<sup>1591</sup> This could be deemed interaction with any number of societal subsystems. Contracts deemed illegal by the legal system, immoral by the moral system, irrational by the economic system, or weak by the political system can all fall under this remit and cause a deterioration in contractual relations. But the differences in how this is done is interesting. In discrete transactions, the primary social matrix concerns are of the legal subsystem as it determines what society will be willing to accept and will not be willing to accept.<sup>1592</sup>

For example, prohibition in contract law is one of the first contact points a person in a discrete contract will have with the social matrix.<sup>1593</sup> This is compared with the relational end of the spectrum in which this norm seems to become more attuned with the moral subsystem and the political subsystem as party roles have the potential to conflict with moral demands to a larger extent.<sup>1594</sup> The complexity introduced here shows that where humans wish to engage in different contractual relations they will begin to be receptive to more or less noise from select subsystems. Macneil's work can be harmonised with autopoietic systems theory on the account that it gives an insight of when psychic systems might be more receptive to different meanings at different points in time with the contractual relation being the catalyst for the reception.

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<sup>1589</sup> Ian R Macneil, 'Contracting Worlds and Essential Contract Theory' (2000) 9(3) *Social and Legal Studies* 431, 432.

<sup>1590</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 214.

<sup>1591</sup> Ian R Macneil, 'Values in Contract: Internal and External' (1984) 78 *Northwestern University Law Review* 340, 361.

<sup>1592</sup> *ibid.*

<sup>1593</sup> Austen-Baker, 'Comprehensive Contract Theory' (n1582) 228.

<sup>1594</sup> Macneil, 'Values in Contract...' (n1591) 364.

Other norms would support this hypothesis. In Macneil's definition of power, discrete contracts are more attached to the meanings produced by the legal subsystem.<sup>1595</sup> This is different from the form of power that is demonstrable within relational contracts: a form of 'golden handcuff'.<sup>1596</sup> Here, parties are more receptive from noise from the economic subsystem which becomes more prevalent to the relation at the expense of the legal subsystem. Macneil's contractual solidarity, defined as the ability to depend on the other party within the contractual relation,<sup>1597</sup> follows the same formula. In a discrete transaction, parties are relying on the legal subsystem's programs regarding expectation or reliance damages at breach. These legal programmes allows for the parties to trust one another enough to perform the contract.<sup>1598</sup> For a relational contract, the moral and economic subsystems begin to produce more relevant meanings for the parties due to prolonged co-operative behaviour (duties of loyalty and long-term assets respectively).<sup>1599</sup> Accordingly, Macneil's norms provide useful substantive content on psychic system's behaviour in Luhmann's autopoietic world.

The author's initial submission is that there is no tension between Luhmann's work and Macneil's work if framed correctly. They are even complimentary. Macneil's work is focused on the norms that arise when an individual is interacting with societies subsystems in a contractual relation. It could be further defined as a work on the structural couplings between individuals and their environments and under what circumstances do they become more receptive to the communications or noises of a particular social subsystem. For the sake of clarity, the mere fact that they are complimentary does not entail that every analysis of relational contract must therefore mean that autopoietic systems must be invoked. While autopoietic systems is a theory of everything in society, that does not mean it must be invoked at everything in society and it is noteworthy that it has not been invoked in this thesis during the discussions on the practicalities of a relationally constituted law.

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<sup>1595</sup> Ian R Macneil, 'Power of Contract and Agreed Remedies' (1961) 47(4) Cornell Law Review 495; Robert Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) Wisconsin Law Review 565, 570.

<sup>1596</sup> Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 75

<sup>1597</sup> Macneil, 'Values in Contract...' (n1591) 349.

<sup>1598</sup> *ibid* 360.

<sup>1599</sup> Macneil, *The New Social Contract* (n1584) 14



The reason for the non-invocation until this point is obvious: autopoiesis is not a practicable theory. It is a grand theory with overarching ideas. It cannot be used to explain the root cause of anything.<sup>1600</sup> As such it is absolutely pointless to raise it when talking about the costs or benefits of legal change as autopoiesis does not, and cannot, give set outcomes. What it can be used for is discussing the processes of legal change, particularly within noise in the system. Relational contract theory is a noise in the legal subsystem, and it is becoming ever louder as more scholars transmit its writings into legal communication. Importantly, what autopoiesis teaches is that importing meaning into a system does not work as an in-input out-output model.<sup>1601</sup> The lessons of relational contract do not necessarily translate into identical legal communication. This generates the possibility of misunderstanding of the creation of new meanings for the same facts.

### 7.3 The Legal System's Interpretation of Relational Contract

We may now look at how relational contract has been received so that we may properly orientate ourselves on the legal system's stance. Of course, it is recognised that the impact of relational contract theory has been limited,<sup>1602</sup> yet it was not ignored. Relational contract has a messy history with a recent upsurge of cases. In 1998 Lord Steyn made references to a form of contract known as a relational contract.<sup>1603</sup> In this early phase, there was little gleaned into how the legal system viewed relational contracting other than it was a long-term contract with no special rules in their interpretation.<sup>1604</sup> Even at this outset, a fundamental mistake regarding Macneil's work is already apparent. Macneil's work was not confined to long-term contracts as all contracts are relational.<sup>1605</sup> It was a common academic blunder to imagine that relational contract theory was confined to long term contracts due to Macneil's terminological choice of axis of his spectrum.<sup>1606</sup> This blunder seems to have been passed onto the legal system which created meaning from this noise, although its programmes swiftly rejected creating further legal communication. Yet, this misinterpretation is still

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<sup>1600</sup> Luhmann, *Introduction to Systems Theory* (n1566) 80.

<sup>1601</sup> King, *The Truth About Autopoiesis* (n1560) 219.

<sup>1602</sup> Hugh Beale, 'Relational Values in English Contract Law' in David Campbell, Linda Mulcahy, Sally Wheeler (eds) *Changing Concepts Of Contract* (Palgrave Macmillan 2013) 116.

<sup>1603</sup> *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209, 218

<sup>1604</sup> *ibid.*

<sup>1605</sup> Richard Austen-Baker, Qi Zhou, *Contracts in Context* (Routledge 2013) 76-77; Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 71.

<sup>1606</sup> David Campbell, 'Good Faith and the Ubiquity of the Relational Contract' (2004) 77(3) *Modern Law Review* 460, 484.

important as it should have been an early warning to relational contract scholars that something was about to go wrong.

Some light relief might have occurred three years later with *Baird Textile Holdings v Marks and Spencer plc.*<sup>1607</sup> although for rather ironic reasons. The facts of this case were discussed in chapter four and thus do not need mention here, however what is required for this analysis of autopoietic systems is the judgement given by Lord Mance. Lord Mance had directly referenced relational contract theory, saying that Baird's Counsel:<sup>1608</sup>

'referred to academic discussion with regard to "relational contracts" and the legal implications to which they may give rise. But the articles which he produced did not suggest that the normal rules as to the implication and formation of contracts or the usual requirements of certainty did not apply to "relational contracts".'

Two main points should come out of this. Firstly, the legal analysis in response to relational contract seems surprisingly accurate here. Macneil himself confirmed on multiple occasions that the theory does not demand a change in the classical rules of contract.<sup>1609</sup> Looking at law via relational contract is a question of application and this can be made with any bias in order to achieve whatever purposive result the applier desires.<sup>1610</sup> We have thus seen an observation of the legal system whose ascribed meaning actually matches Macneil's intentions. However, the irony here is that the noise that the theory generated was treated as a redundancy by the legal system. While redundancy is necessary information for a system to determine its boundary, it will not become legal communication as it does not provide information that requires new meaning.<sup>1611</sup> Therefore, law has observed relational contract theory and has declined to give it meaning further than the mere observation of its existence. It was this application of redundancy which would become a hurdle to further legal communication being generated.

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<sup>1607</sup> [2001] EWCA Civ 274; [2001] CLC 999.

<sup>1608</sup> *ibid* at 16.

<sup>1609</sup> Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 899.

<sup>1610</sup> Ian R Macneil, 'Reflection on Relational Contract after a Neo-Classical Seminar' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 212-215.

<sup>1611</sup> Hugh Baxter, 'Autopoiesis and the Relative Autonomy of Law' (1988) 19(6) *Cardozo Law Review* 1987.

Even with redundancies, surprises are still possible.<sup>1612</sup> The surprise that arose came from the question of good faith in *Yam Seng Pte Ltd v International Trade Corp Ltd*.<sup>1613</sup> Here, Leggatt J raised the issue of relational contracts again as to describe contractual relations:<sup>1614</sup>

'English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements.'

He then cites examples of relational contracts as being relationships such as joint venture agreements and long term distributorship agreements.<sup>1615</sup> This communication seems to be a rehash of the Lord Steyn misinterpretation that relational contracts are confined to the axis of long-term agreements. Even then, it is not clear if the system has fully understood what this axis entails. The 'high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty' is eerily similar to Teubner's mischaracterisation.<sup>1616</sup> In the context of good faith, an observer could go so far as to use Leggatt's phrasing as evidence for the Barnett misinterpretation of the theory as a communitarian

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<sup>1612</sup> Micheal King, Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan 2003) 49.

<sup>1613</sup> [2013] EWHC 111 (QB); [2013] 1 CLC 662

<sup>1614</sup> *ibid* at 142

<sup>1615</sup> *ibid*.

<sup>1616</sup> Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) *Social and Legal Studies* 399, 405.

ideology.<sup>1617</sup> While trust can be an aspect of contractual relations, Macneil never shied away from admitting that humans were still self-interested creatures whose cooperative efforts were in place partially for their own gain.<sup>1618</sup> The use of phrasing creates suspicions that the legal system has diverged from the meaning that Macneil had generated and instead created its own understanding.

From an autopoietic standpoint, this generates major red flags. Systems cannot ignore information merely because they do not wish to use it.<sup>1619</sup> *Yam Seng* was the first warning that the system had begun to recursively apply the meaning generated by Lord Steyn to generate further communication. The legal subsystem, as of 1998, had generated a meaning to relational contract and the only potential change to that meaning would be up to the system itself. It had passed this meaning through its code and determined it to be relevant. Anything else with regard to Macneil's theory was now outside the system and in its environment. As outside communication, it could not merely enter the system by virtue of it being related.<sup>1620</sup> From this point onwards, it was the legal subsystem and the legal subsystem alone which would decide what further communications and meanings would be developed from the first insurrection of relational contracting.<sup>1621</sup>

Further cases have demonstrated that the legal system has begun diverging rapidly from relational contract theory. The simplification in *Yam* was expressly applied in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors*.<sup>1622</sup> In *D&G Cars Ltd v Essex Police Authority*, Dove J referred to the contract in question as a 'relational contract par excellence' because it 'created a relatively lengthy period of contractual relationship between the parties, during which there were going to be a very large number of individual transactions undertaken under the auspices of the contract.'<sup>1623</sup> In *National Private Air Transport Services Company (National Air Services) v Creditrade Llp & Anor* a relational contract was found not to exist because of the lack of an express

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<sup>1617</sup> Randy Barnett, 'Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract' (1992) 78(5) Virginia Law Review 1175

<sup>1618</sup> Ian R Macneil, 'Values in Contract: Internal and External' (1984) 78 Northwestern University Law Review 340, 348-350.

<sup>1619</sup> Niklas Luhman, 'Organisation' in Tom Bakken, Tor Hernes (eds) *Autopoietic Organisation Theory* (Copenhagen Business School Press 2002) 41.

<sup>1620</sup> Niklas Luhmann, *Law as a Social System* (Translated by Klaus Ziegert, Oxford University Press 2004) 93.

<sup>1621</sup> *ibid* 85.

<sup>1622</sup> [2014] EWHC 2145 (Ch), [196]

<sup>1623</sup> [2015] EWHC 226 (QB), [176]

obligation of cooperation in the sub-lease.<sup>1624</sup> This is similar to *Hamsard 3147 Ltd & Anor v Boots UK Ltd* which did not hold a relational contract due to the lack of express provision to a long-term arrangement.<sup>1625</sup> In 2016, The Court of Appeal did at least attempt to label these developments outside of relational contracting as a specific category of long-term commercial contracts.<sup>1626</sup> While this seems to be a far more accurate portrayal of what the courts were in fact doing, the communication linking it to relational contract was already executed. The concept of a relational contract being synonymous with a long-term contract was now within the legal subsystem despite the misunderstanding on which it was based.

The effect this misunderstanding has had can be demonstrated in *Alan Bates and Others v Post Office Ltd*.<sup>1627</sup> This case was a highly complex litigation that required two procedural cases before it merely on procedural issues.<sup>1628</sup> The case regarded 550 claimants who were sub-postmasters and crown employees alleging numerous breaches of contract including implied terms of good faith. The Post Office was accused of maliciously prosecuting the employees as they were liable to pay for accounting shortfalls regarding the new Horizon system unless they could individually prove they were not responsible. Part of the contested issues was regarding if there was such a species of contract known as a relational contract.<sup>1629</sup> It was here that Fraser J claimed that relational contract was an established part of English law.<sup>1630</sup> He identified it as a species of contract of which there is an implied obligation of good faith.<sup>1631</sup> The obvious problem that relational contract theory does not entail an obligation of good faith for complex contracts is not the only misrepresentation. Possibly one of the most glaring deviations is as follows:<sup>1632</sup>

*'It follows that I therefore do not consider that what the Claimants refer to as "the imbalance of power" has any effect upon whether the contracts are relational ones. This appears to me to be equivalent to saying "the contract*

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<sup>1624</sup> [2016] EWHC 2144 (Comm), [134] - [136].

<sup>1625</sup> [2013] EWHC 3251 (Pat), [84]

<sup>1626</sup> *Globe Motors, Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor* [2016] EWCA Civ 396, [67].

<sup>1627</sup> [2019] EWHC 606 (QB).

<sup>1628</sup> *Bates & Ors v Post Office Ltd* [2017] EWHC 2844 (QB); *Bates & Ors v Post Office Ltd (No 2)* [2018] EWHC 2698 (QB).

<sup>1629</sup> *Bates (n1627)* [703].

<sup>1630</sup> *ibid* at [704].

<sup>1631</sup> *ibid* at [711].

<sup>1632</sup> *ibid* at [722]

terms are unfair; please rebalance them by finding they are relational contracts”.  
That is the wrong approach.’ (emphasis added)

It is clear Fraser J is invoking the policy decision to not have courts rewrite contracts for the parties by stopping the doctrine of relational contracts implying good faith into all transactions that have power imbalances. However, saying that power is irrelevant is completely opposed to Macneil's theory which expressly put the creation and restraint of power as one of the common norms.<sup>1633</sup> Parties in relational contracts are just as prone to abuses of power while trapped in economic dependency.<sup>1634</sup> This is in comparison to the strong role identity in discrete contracts, whose abuse focuses on legal enforcement.<sup>1635</sup> The aspect of power is a useful tool in determining between a discrete transaction and a relational through what aspect of the relation can turn abusive. The legal system has declined to include this in its understanding of relational contract with a communication that can be linked to the sanctity of contract. The causal reason seems to be one of policy, however it is simply more evidence that the system's observations of relational contract has diverged from the origin source.

The divergence is made conclusive by Fraser J deciding to list the nine 'characteristics' of a relational contract:<sup>1636</sup>

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

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<sup>1633</sup> Ian R Macneil, 'Contracting Worlds and Essential Contract Theory' (2000) 9(3) *Social and Legal Studies* 431, 432; Ian R Macneil, *The New Social Contract* (Yale University Press 1980) 56-57.

<sup>1634</sup> Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 75

<sup>1635</sup> Robert Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) *Wisconsin Law Review* 565, 570.

<sup>1636</sup> Bates (n1627) at [725]

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
9. Exclusivity of the relationship may also be present.

It is hard to imagine how one could diverge further from the relational theory of contract. The first characteristic, the only conclusive one,<sup>1637</sup> almost definitively states that the system's view on relational contract has little to do with analytic categorisation but rather defining acceptable circumstances to imply good faith. While it might be hard to imagine complex contract surviving without some form cooperation, there is no reason as to why a complex contractual relationship cannot be formed under a boilerplate umbrella document which clearly excludes a legal duty of good faith. The accepting party may not even care about this as they are more concerned about actual performance than boilerplate terms.<sup>1638</sup> There is no reason why the express terms of a relationship excluding good faith obligations has anything to do with determining where on the spectrum a relation falls. If anything, this categorisation is the spawn of classical law's fetish on the sanctity of express terms.

The second criteria might sound compatible, however it has overtures of the mischaracterisations of relational contracting being light and fluffy. The third and fourth criteria seem farcical primarily because fidelity to the bargain is more within the discrete transaction. Relational contracts move away from the initial transaction; becoming more concerned with their relationship and its preservation as it gets more complex.<sup>1639</sup> In fact, having loyalty to the original bargain would imply a strong element of planning and presentation based off the first transaction rather than the ongoing

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<sup>1637</sup> *ibid.*

<sup>1638</sup> Stewart Macaulay, 'Non-Contractual Relations in Business' (1963) 28(1) *American Sociological Review* 55; Hugh Beale, Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45; Daniel Keating, *Exploring the Battle of Forms in Action*, (2000) 98 *Michigan Law Review* 2678, 2696-2700

<sup>1639</sup> Macneil, *The New Social Contract* (n1633) 66; Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216.

planning of strategic goals present in relational contracts.<sup>1640</sup> On the topic of confusing categorisation, the ninth characteristic genuinely seems irrelevant for analysis. If a characteristic may be present or may not be present then it is completely unnecessary in categorisation, especially when exclusivity may be found in non-relational contracts. Either way, there is no corresponding contractual norm for this as excluding other parties is a behaviour that can cut across multiple norms, on any part of the spectrum, in multiple different ways.

The fourth criteria is completely redundant, as is its tautology; criteria seven. Even the most discrete of contracts require a basic form of co-operation.<sup>1641</sup> It would be hard to imagine the discrete contract of buying gasoline at a petrol station without the basic collaboration of handing over the money into the cashiers waiting hand. Cooperation is so essential to any form of contract it was defined by Havighurst as one of the four uses of contract.<sup>1642</sup> Although it goes without saying that the level of cooperation or collaboration will vary greatly between complex contracts and discrete ones, the level of cooperation or collaboration may vary greatly between two fully relational contracts. While unorthodox, relational contracts may have very little collaboration as with a high degree of trust and there may be little need for active collaboration. This criteria then is nothing but a vacuous platitude as it applies to all contracts in a basic sense but has no useful application in an extreme sense.

The final three categories (5, 6, and 8) show some promise, but are let down by fundamental misunderstandings about relational contracting as well as general phrasing. 'Spirits and objectives not capable of being expressed exhaustively in a written contract' sounds like a vacuous platitude. The author finds it difficult to see how any contract, discrete or relational, will have an exhaustive list of all the objectives and mentality of all parties involved. Even in discrete contracts complete presentation is impossible. 'To repose trust and confidence in one another' is misleading as all contracts require a basic level of trust. Relational contract requiring a different level of trust gives an indication that the legal system the classical view of contract parties, that of homo-economis,<sup>1643</sup> for non-relational contracts. The eight criteria seems almost irrelevant to relational

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<sup>1640</sup> John Adam, 'Franchising, the Draftmans Contract' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996).

<sup>1641</sup> Collins, 'Competing norms...' (n1634) 70-71.

<sup>1642</sup> Harold Havighurst, *The Nature of the Private Contract* (Northwestern University Press 1961) 21.

<sup>1643</sup> Menachem Mautner, 'Contract, Culture, Compulsion or: What is so Problematic in the Application of Objective Standards in Contract Law' (2002) 3(2) *Theoretical Inquiries in Law* 545, 546



contracting. Extreme financial investment does in no way indicate the presence of a relational contract. It may be a causal reason as to why relational behaviours begin to emerge in the contractual relationship, but this is not guaranteed nor is it necessarily likely.

Yet, this is accepted by the legal system as its understanding of relational contract. *New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd* accepted the reasoning of *Bates* with regards to the obligation of good faith.<sup>1644</sup> The explicit categories were accepted by Fancourt J in *UTB LLC v Sheffield United Ltd*.<sup>1645</sup> Here, Fancourt J approved of the usage of Fraser J's categories but with a proviso: the criteria were not to apply to all relational contracts but only those which came under the original sense of *Yam*.<sup>1646</sup> This leads to Fancourt J claiming that under law relational contracts will have a duty of good faith.<sup>1647</sup>

However, this seems to go against the judgement in *Yam*, which an implied term in fact, not law.<sup>1648</sup> Legatt J reinforced this in *Al Nehayan v Kent* in which he had clearly linked the question of good faith in relational contracts to the business efficacy test.<sup>1649</sup> The legal movement to imply a term in law regarding good faith suggests that the legal communication within the system has moved past its original meaning. The cases invoking relational contract are doing so simply as to justify legal imposition of a good faith obligation. It comes to no surprise that where a concept is only used with regards to an element, then the element is soon considered essential to the concept itself. The legal system has begun to see an obligation of good faith as being essential to relational contracts, and the changing of language would suggest that were a relational contract is found the court will almost certainly imply the term. In essence, it has become an implied term in law clandestinely.

Though this move is by no means certain as the law on this area is still developing. In *SPI North Ltd v Swiss Post International (UK) Ltd & Anor (Rev 1)* Hochhauser suggested that the duty of good faith may be implied in relational contracts but gave no

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<sup>1644</sup> [2019] EWHC 2837 (Comm) [43-44]

<sup>1645</sup> [2019] EWHC 2322(Ch)

<sup>1646</sup> *ibid* 202.

<sup>1647</sup> *ibid* 200.

<sup>1648</sup> *Yam* (n1613) [131-132]

<sup>1649</sup> [2018] EWHC 333 (Comm) [174]

indication that it was automatic.<sup>1650</sup> This case develops 4 'principles' of relational contract as derived from previous case law, the first of which contains some of Fraser's criteria of when it may be appropriate to imply a term of good faith.<sup>1651</sup> The second principle explicitly states that cooperation does not require one party to submit to the interests of another.<sup>1652</sup> This would suggest alignment to Macneil's reasoning that humans are both entirely selfish but entirely social, and thus cooperation and self interest go hand in hand.<sup>1653</sup> The third and fourth principles deal with the content of the good faith obligation whose scope and content is wholly determined on the facts of the contractual relationship.<sup>1654</sup> While relational analysis is not being distorted further, it is equally not harmonising with Macneil's theory.

Interestingly, the claimants had argued there was no relational contract because 'the express terms of the contract made detailed provision for the operation of the parties' contractual relationship'.<sup>1655</sup> Hochhauser did not see this as inherently preclusive to the existence of a relational contract.<sup>1656</sup> Thus the legal system has not set up an arbitrary divide between the planned against the relational. Some recognition has occurred that relational contracts can still have a very high degree of planning in express terms if this suits the parties relationship. This is somewhat encouraging due to the noticeable trend of prior courts to discuss relational contracts with an eye on terms that were not expressed in the contract; again a development caused by the focus on implying terms of good faith.

A slightly more interesting turn comes in the 2020 decision of *Essex County Council v UBB Waste (Essex) Limited*.<sup>1657</sup> This case explicitly states that good faith is now implied at law in all relational contracts.<sup>1658</sup> This is a clear indication that the legal system has now set aside the implied in fact criteria; no longer caring to treat relational contracts on an ad hoc basis but rather a new distinct category of contracts. While this is certainly a development, there is a point of contention within the judgement to be

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<sup>1650</sup> [2019] EWHC 2004 (Ch) [62].

<sup>1651</sup> *ibid.*

<sup>1652</sup> *ibid.*

<sup>1653</sup> Macneil, 'Values in Contract' (n1618).

<sup>1654</sup> *SPI North* (n1650).

<sup>1655</sup> *ibid* [63-64].

<sup>1656</sup> *ibid* [78].

<sup>1657</sup> [2020] EWHC 1581 (TCC).

<sup>1658</sup> *ibid* 113.

highlighted. Pepperall J outright dismisses Fraser's first characteristic.<sup>1659</sup> He claimed that Fraser's criteria were a 'helpful indicta' that should not be treated as statute.<sup>1660</sup> This is worth mentioning as the legal system, while now being clear on the implied duty of good faith, has created more confusion for the categorisation of relational contracts. Since *Bates*, there has been little actual agreement on what constitutes a relational contract practically. While this would be fine for abstract analysis, the courts are forming a new category of contract with no clear boundaries.

Applying this to autopoietic systems theory creates a rather bleak outcome. The system, in *Baird*, outright rejected a full transplantation of relational contract theory. However systems cannot ignore noise or new information, so the 'other' that was generated from this rejection persisted in the environment. By the time of *Yam Seng* the information entered into a different legal programme, mainly that of implied terms. Again, the concept was not transplanted, but undergoing a reconstruction within the legal system attempting to generate new meaning. This meaning has clear divergences from the relational contract theory and this should be a major red flag. The legal system is clearly not understanding relational contract in the same manner as it was composed. The legal programmes that are being invoked to handle the communication are distorting the meaning to create further communication. Unfortunately, it is too late to reverse this. When information has been transformed into communication, that communication will continue to reproduce. It is unlikely a full transplantation will ever come to fruition. This prediction comes from observing a prior occasion where noise began irritating the legal system and demanding transplantation: Consideration.

#### **7.4 Consideration**

Consideration is said to be central to contract law.<sup>1661</sup> It is 'common law's great survivor'<sup>1662</sup> that has survived over three centuries, although this was never guaranteed in its history. It is not a doctrine that fits in well with the ideological context of contract. In fact, it seems opposed to the dominant will theory.<sup>1663</sup> Under any conception of the

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<sup>1659</sup> *ibid* 106.

<sup>1660</sup> *ibid*.

<sup>1661</sup> Michael Lobban, 'Contract' in William Cornish, J Stuart Anderson, Ray Cocks, Micheal Lobban, Partrick Polden, *The Oxford History of The Laws Of England: Volume XII: 1820-1914 Private Law* (Oxford University Press 2010) 359-360

<sup>1662</sup> Swain, *The Law of Contract* (n1573).

<sup>1663</sup> Lobban, 'Contract' (n1661)

meeting of the minds, there is little reason why there should be any qualification on 'sufficient consideration' or rules regarding 'past consideration' should the individual truly be the pinnacle of the contract. Despite this, consideration survived the numerous assaults on its foundation that was levied at it from other systems, be the origin political, moral, or economic, during multiple different periods of its history. It is due to the doctrines tenacity that we shall pursue a case study of its history here in the light of autopoietic system theory.

A care warning that applies to any autopoietic analysis must be restated. Autopoietic system theory cannot be used to explain anything.<sup>1664</sup> That is to say, by no reference of the theory can one determine what an outcome will be. The life history of consideration can be examined in so far that we can apply the framework given to us by Luhmann as to explore the development of the doctrine, and thus potential patterns. However what cannot be done is say any particular outcome was casually related to autopoiesis. Many different interpretations have been given to the development and entrenchment of consideration including economic efficiency,<sup>1665</sup> procedural history,<sup>1666</sup> evidential utility,<sup>1667</sup> and even its ability to moderate party behaviour.<sup>1668</sup> These are irrelevant for the current case discussion as determining the reason why consideration was considered by courts as too important is outside the scope of autopoietic systems theory. Rather, the application is concerned with analysing the procedural events and evolution of the doctrine within the legal system when presented with environmental stimuli which convinced the system that, regardless of reason, certain outcomes must happen.

Consideration predates the notion of a unified contract doctrine. It has origins within equity,<sup>1669</sup> and its first usage in a contractual context was in 1561.<sup>1670</sup> This means that its existence predates the functional subsystems that autopoiesis uses as a base foundation.<sup>1671</sup> Rather, it would have been considered during the era which Luhmann

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<sup>1664</sup> Luhmann, *Introduction to Systems Theory* (n1566) 80.

<sup>1665</sup> Richard Posner, *Economic Analysis of Law* (7th ed, Little, Brown & Co. 2007).

<sup>1666</sup> Michael J Schler, 'Supply Versus Demand For Efficient Legal Rules: Evidence From Early English Contract Law and the Rise of Assumpsit' (2011) 73 *University of Pittsburgh Law Review* 161.

<sup>1667</sup> Kevin Teeven, 'Mansfield's Reform of Consideration in Light of the Origins of the Doctrine' (1991) 21 *Memphis State University Law Review* 669.

<sup>1668</sup> Lon L Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799, 800-801.

<sup>1669</sup> William Holdsworth, 'The Modern History Of the Doctrine of Consideration' (1923) 57 *American Law Review* 706.

<sup>1670</sup> JH Baker, *An Introduction To English Legal History* (2nd Ed Oxford University Press 1979) 468.

<sup>1671</sup> Niklas Luhmann, *Theory of Society Volume 2* (Translated By Rhodes Barrett, Stanford University Press 2012) 12-13.

refers to as the stratified society.<sup>1672</sup> This different societal setup is the reason for the vastly different litigation procedure for contractual arrangements. At this point in time, no general remedy existed for contractual enforcement. Plaintiffs would need to rely on a range of different methods: If the contract were formal, written, and under seal then the doctrine of covenants could be used.<sup>1673</sup> If the contract were based on the borrowing of money and agreement to repay, the action of debt could be invoked.<sup>1674</sup> It is worth nothing that these two doctrines did not overlap, an action was in one or the other.<sup>1675</sup> However, the most influential form of enforcement came in the form of informal contracts: *assumpsit*. *Assumpsit* was a species of tort, namely that of trespass.<sup>1676</sup> Here, the doctrine of consideration was given meaning within the legal system when looking at contractual relations.

While both covenant and the action for debt existed, these were mired in technical and procedural problems. These problems encouraged litigants to try for other remedies.<sup>1677</sup> This led to courts beginning to allow trespass in informal contracts where there was misfeasance.<sup>1678</sup> Due to the fact misfeasance was bad behaviour during a contract, executory contracts not made under seal were not enforceable in the fifteenth century.<sup>1679</sup> *Assumpsit* was eventually expanded to cover cases in which there was a non-performance of the contract.<sup>1680</sup> In doing this, the *remit*s of *Assumpsit* were greatly expanded, however it was not until *Slade's Case*<sup>1681</sup> in which the floodgates were truly opened. *Slade's Case* concerned a grain merchant having contracted with the defendant to sell grain at the price of £16. The defendant then decided to not complete the contract, which would be a standard action of debt at the time.<sup>1682</sup> However, the case

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<sup>1672</sup> *ibid* 50-65.

<sup>1673</sup> Kevin J Fandl, 'Cross Border Commercial Contracts and Consideration' (2016) 34 *Berkley International Law* 1, 7.

<sup>1674</sup> *ibid*.

<sup>1675</sup> James C Oldham, 'Reinterpretations of 18th Century English Contract Theory: The View From Lord Mansfield's Trial Notes' (1989) 76 *Georgetown Law Journal* 1949, 1952.

<sup>1676</sup> *ibid* 150.

<sup>1677</sup> Micheal J Sechler, 'Supply Versus Demand For Efficient Legal Rules: Evidence From Early English Contract Law and the Rise of *Assumpsit*' (2011) 73 *University of Pittsburgh Law Review* 161, 172.

<sup>1678</sup> *ibid* 173

<sup>1679</sup> Kevin J Fandl, 'Cross Border Commercial Contracts and Consideration' (2016) 34 *Berkley International Law* 1, 7.

<sup>1680</sup> William Holdsworth, 'Debt, *Assumpsit*, And Consideration' (1913) 11(5) *Michigan Law Review* 347, 349-350.

<sup>1681</sup> (1602) 4 *Coke Report* 91a

<sup>1682</sup> Oldham, 'Reinterpretations of 18th Century...' (n1675) 1957.

itself was heard under *assumpsit*, and in a rather serious extension of power Popham CJ ruled:<sup>1683</sup>

"It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he promises to pay, or deliver it; and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof promises to pay so much money to the other, in this case both parties may have an action of debt, or an action upon the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal action upon the case, as well as action of debt."

When *assumpsit* had been expanded as to include all executory exchanges, the demand for the doctrine to be given substance increased dramatically. Thus doctrine of consideration coming under the spotlight. There is no agreement on the origins of consideration, and the author agrees with De Cruz who claims that it is too simplistic to attempt to find one origin source.<sup>1684</sup> Consideration was influenced by many different sources including the equitable doctrine of consideration,<sup>1685</sup> Roman Law's *Causa*,<sup>1686</sup> and the *quid-pro-quo* doctrine in debt.<sup>1687</sup> The multi-casual development of the doctrine through the sixteenth and seventeenth century meant that the development was very piecemeal and not particularly unified.<sup>1688</sup> This is undoubtedly due to the fact that lawyers and judges are not a homogenous group, and coming from a society that was radically transitioning, its natural many held very different views regarding the expectations of contract law.<sup>1689</sup> Despite the piecemeal and inconsistent development, a number of principles can be said to exist by the start of the eighteenth century.

These principles contrasted greatly with the later developed will theory, and can be said to run contrary to both the needs of the business world and philosophical thought at the time. These principles included: consideration must move from the promisee to the

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<sup>1683</sup> *Slade* (n1681)

<sup>1684</sup> S P De Cruz, 'Assumpsit, Consideration, And Third Party Rights' (1986) 7 *Journal of Legal History* 53, 61.

<sup>1685</sup> Holdsworth, 'The Modern History' (n1669).

<sup>1686</sup> Ernest G Lorenzen, 'Causa and Consideration in the Law of Contracts' (1919) 28 *Yale Law Journal* 621.

<sup>1687</sup> Holdsworth, 'The Modern History' (n1669) 712-713.

<sup>1688</sup> Teeven, 'Mansfield's Reform of Consideration' (n1667) 671.

<sup>1689</sup> Warren Swain, 'Codification of Contract Law: Some Lessons From History' (2012) 31 *University of Queensland Law Journal* 39, 43.

promisor.<sup>1690</sup> Included in this was that Consideration must require a detriment to the promisee and a benefit to the promisor, a requirement that survived into the nineteenth century when will theory was at its peak.<sup>1691</sup> Consideration could be executed, but it could not be past consideration for a previous obligation.<sup>1692</sup> Though the adequacy of consideration was not to be assessed by the court,<sup>1693</sup> which would raise at least some hint of liberalism, the sufficiency of consideration would be assessed.<sup>1694</sup> These are natural constraints on the ability to have a 'meeting of the minds' that will theory would demand. The reason behind these seems to be more of one of policy, in which legal certainty was regarded as too important to discard.

The purpose of these principles was to embody the idea of reciprocity in the bargain.<sup>1695</sup> Hamson goes as far as to state that it is a fundamental aspect of the bargain, being an indivisible trinity with offer and acceptance.<sup>1696</sup> Consideration's main premise was to be a way to separate enforceable claims from non-enforceable claims.<sup>1697</sup> The concept of reciprocity was the main sticking point of how the law would recognise an enforceable promise. There was an insistence that there be something within the agreement that can be objectively tested and is practical for court procedures.<sup>1698</sup> Atiyah categorises this early stage of consideration as the dominant aspect of the contract, where ideas such as promise played a subordinate role.<sup>1699</sup> Promise was evidentiary to finding the consideration's sufficiency and freshness due to the great value it has in clarifying quantification and independent duties.<sup>1700</sup>

This already runs into an issue that this foundation of enforceability runs entirely contrary to Will Theory.<sup>1701</sup> While it is true that will theory did not develop as an organised thought until the late eighteenth to early nineteenth century, liberal thought

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<sup>1690</sup> Brian Coot, 'Consideration and the Joint Promisee' (1978) 37 Cambridge Law Review 301, 301.

<sup>1691</sup> *Currie v Misa* (1875) LR 10 Ex 153, 162.

<sup>1692</sup> *Andrew v Boughey* (1553) 73 ER 160.

<sup>1693</sup> *Sturlyn v Albany* (1587) 78 ER 327.

<sup>1694</sup> *Stone v Wythipol* (1588) 78 ER 383 .

<sup>1695</sup> Peter Benson, 'The Idea of Consideration' (2011) University of Toronto Law Journal 241, 242.

<sup>1696</sup> C J Hamson, 'The Reform Of Consideration' (1938) 54 Law Quarterly Review 233, 234.

<sup>1697</sup> Benson, 'The Idea of Consideration' (n1695) 257.

<sup>1698</sup> Wright, 'Ought the Doctrine of Consideration to be Abolished From The Common Law' (1936) 49 Harvard Law Review 1225, 1226.

<sup>1699</sup> Patrick Atiyah, *The Rise and Fall Of Freedom Of Contract* (Oxford University Press 1979) 140

<sup>1700</sup> *ibid* 143.

<sup>1701</sup> *ibid* 143-144.

had been emerging at the start of the eighteenth century.<sup>1702</sup> Advances in business practice, as well as the advent of liberal writers, began to influence the political, economic, legal, and moral systems.<sup>1703</sup> This environmental noise began to stimulate observations and reactions in the law. A significant source of this stimuli during this early period was Lord Mansfield, who acted as a semantic artefact, acting as a conduit of meaning between the legal, moral, and economic subsystems.

Mansfield's first attack on the doctrine was a highly ambitious one: to effectively remove its biting force. In *Pillans & Rose v Van Mierop & Hopkins*,<sup>1704</sup> Pillans & Rose accepted bills of credit from White, which were guaranteed by Van Mierop & Hopkins. White became insolvent, yet Van Mierop & Hopkins refused payment, citing that the consideration was past due to the month gap between Pillans & Rose giving the money to White and Van Mierop & Hopkins accepting their status as guarantors. Without fresh consideration, they argued that it was a nudum pactum citing *Hunt v Bate*.<sup>1705</sup> In what is a clear indication of Lord Mansfield importing the communications of the economic system into law, he claims:

'If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same : a witness cannot be admitted, to prove the law of merchant. We must consider it as a point of law. A nudum pactum does not exist, in the usage and law of merchants'<sup>1706</sup>

What can be seen here is that the judgement is already straying away from sole legal communication. Through Mansfield acting as symbolic agent, the legal subsystem is observing economic meaning as information and is generating its own communications based upon its own operations. Further observations occurred in the form of Mansfield's comments that want of consideration is not an objection among merchants.<sup>1707</sup> In economic terms, this would be the case as no merchant would enter a contract without some form of reciprocity.<sup>1708</sup> As such, there seemed little need for the law to demand

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<sup>1702</sup> Swain, *The Law of Contract* (n1573) 20-39.

<sup>1703</sup> Janet McLean, 'Ideologies in Law Time: The Oxford History of the Laws of England' (2013) 38(3) *Law and Social Inquiry* 746, 752-759; David H Parry, *The Sanctity Of Contracts In English Law* (Stevens 1959) 13; Samuel Williston, 'Freedom of Contract' (1920-1921) 6(4) *The Cornell Law Quarterly* 365, 366-367.

<sup>1704</sup> (1765) 97 ER 1035; (1765) 3 Burr 1663

<sup>1705</sup> (1567) 73 E.R. 605; 3 Dyer 272a.

<sup>1706</sup> Pillans (n1704) 1038.

<sup>1707</sup> *ibid.*

<sup>1708</sup> Kevin Teeven, 'Mansfield's Reform of Consideration in Light of the Origins of the Doctrine' (1991) 21 *Memphis State University Law Review* 669, 683.



this in technical formalities from merchants who would intrinsically have expectations from their transactions. However, the legal system merely observing the state of another system would not be of particular interest if not for the perturbation leading to the following legal communication:

'I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds... there was no objection to the want of consideration.'<sup>1709</sup>

The first phase of Mansfield's undermining of the doctrine was to allow for writing to be used to substitute it entirely.<sup>1710</sup> This greatly expanded the evidentiary model of consideration, which was at least logically coherent with liberal individualism. Liberal scholars such as Colebrooke explicitly framed consideration as an 'evidence of the will'.<sup>1711</sup> After all, if the objective theory could be integrated via citing the need for procedural fairness, then evidentiary rules for the meeting of the minds could also be defended. However, this was a serious overemphasis of the evidentiary function by Mansfield.<sup>1712</sup> Teeven goes as far as to suggest that this attempt was 'judicially unsubstantiated'.<sup>1713</sup> This suggests that Oldham was misdirected in his criticism of Atiyah's observation that consideration was prominent over promise.<sup>1714</sup> Oldham used *Pillans* to suggest that promise was the fundamental premise of contract as seen by Mansfield.<sup>1715</sup> However, prior courts did not support this notion, which aids the claim that this was more of a interjection by Mansfield than a restatement. As McCauliff has argued, Mansfield wished to get rid of consideration in favour of enforcing agreements, however the dominant contract theory at the time had the opposite purpose of pruning agreements that were enforceable.<sup>1716</sup>

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<sup>1709</sup> *ibid.*

<sup>1710</sup> Warren Swain, 'The Changing Nature of the Doctrine of Consideration 1750-1850' (2005) 26(1) *The Journal Of Legal History* 47, 48.

<sup>1711</sup> Henry Colebrooke, *Treatise on Obligations and Contracts*, (1818) 38.

<sup>1712</sup> Teeven (n1708) 691.

<sup>1713</sup> *ibid* 693.

<sup>1714</sup> James C Oldham, 'Reinterpretations of 18th Century English Contract Theory: The View From Lord Mansfield's Trial Notes' (1989) 76 *Georgetown Law Journal* 1949, 1961.

<sup>1715</sup> *ibid.*

<sup>1716</sup> C M A McCauliff, 'A Historical Approach to the Contractual Ties that Bind Parties Together' (2002) *Fordham Law Review* 841, 81.

There is merit in this argument as Mansfield was quickly rebuked by the House of Lords in *Rann v Hughes*<sup>1717</sup> It claimed there were only two classes of contracts: specialities and parole.<sup>1718</sup> Written contracts are not a third category; if they are not specialities then they are parole and must be proven by consideration.<sup>1719</sup> This effectively overruled the doctrine within *Pillans*. The attempt to corner consideration into a purely evidential function had failed and further cases reinforced this proposition. *Randall v Morgan*<sup>1720</sup> concerned a claim by Mr Godfrey regarding a bond of £2000 with an interest of £4 per annum against the estate of his wife's father. It was clearly stated that even should there have been a promise in the letter between Mr Godfrey and his father in law, it would have been nudem pactum for lack of consideration.<sup>1721</sup> This was a direct attack at *Pillans* as both *Pillans* and *Rann* were cited as authority for this statement.<sup>1722</sup> *Barrent v Trussell*<sup>1723</sup> put the final say on the matter in 1811:<sup>1724</sup>

'The Court observed, that in all cases, to make any promise valid, whether to pay the debt of another, or to do anything else, there must be a consideration for it, whether it be in writing or not in writing; to make a promise to pay the debt of another binding, it must be in writing, as well as made upon good consideration'

Therefore, the subsystem rejected the first transplantation of economic communication. It treated the information as a redundancy. While mercantile pressures were strong, the repeal in *Rann* did not even consider the economic subsystem in its put-down of Mansfield.<sup>1725</sup> Yet, Mansfield was undeterred by this setback and so began to formulate a new approach as to make consideration fit into his ideals more smoothly.<sup>1726</sup> He retreated to an admission that consideration was required, but the sufficiency of the consideration should be liberalised to moral obligations.<sup>1727</sup> This could be considered noise from the moral and political systems which deemed individualism to be morally just.<sup>1728</sup> The first attempt was in *Atkins v Hill*.<sup>1729</sup> Mansfield found that there was good

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<sup>1717</sup> (1778) 4 Bro PC 27; (1778) 7 Term Rep. 350.

<sup>1718</sup> *ibid.*

<sup>1719</sup> *ibid.*

<sup>1720</sup> (1806) 12 Ves Jun 67; 33 ER 26

<sup>1721</sup> *ibid* 73.

<sup>1722</sup> *ibid.*

<sup>1723</sup> (1811) 4 Taunt 117, 128 ER 273.

<sup>1724</sup> *ibid* 121.

<sup>1725</sup> Teeven (n1708) 692.

<sup>1726</sup> Wright (n1698) 1242.

<sup>1727</sup> Teeven (n1708) 692.

<sup>1728</sup> Atiyah, *The Rise and Fall* (n1699) 261.

and valuable consideration because the executor was bound 'in law and conscious' to pay.<sup>1730</sup> This was further elaborated in *Hawkes v Sanders*.<sup>1731</sup> Here, Mansfield rejected the claim that the only ground for consideration in assumpsit is where there is a benefit to the promisor or a detriment to the promisee.<sup>1732</sup>

He then defines the sort of consideration he believes to be sufficient:<sup>1733</sup>

'Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.'

and

'yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration.'

While Swain has made the claim that in context it is more likely that Mansfield was trying to bring legacies into common law and his desire to reform was a coincidence,<sup>1734</sup> this is unsatisfactory. In *Hawkes*, Mansfield clearly lays out that regardless of moral obligation a legal or equitable obligation will be sufficient consideration.<sup>1735</sup> However, Swain is correct in saying these cases were not decided on the grounds of moral consideration.<sup>1736</sup> McCauliff has claimed that this attack survived longer as it had some substance within previous law, mainly equity.<sup>1737</sup> Parry went as far to say that moral obligation was the primary factor in making promises enforceable due to how it favours the idea of freedom of contract.<sup>1738</sup> We then see a slightly mediated form legal communication that has been developed from the political and moral noise of liberalism at the time. While outright scrapping of the doctrine was unpalatable, harmonisation of the doctrine to be logically consistent with the environmental noise was now being tested. If Mansfield could not rigorously enforce his ideals of a contractual system then curtailing the most obvious discrepancies would be a compromise.

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<sup>1729</sup> (1775) 1 Cowp 284, 98 ER 1088.

<sup>1730</sup> *ibid* 288.

<sup>1731</sup> (1775) 1 Cowp 289, 98 ER 1091.

<sup>1732</sup> *ibid*.

<sup>1733</sup> *ibid* 290.

<sup>1734</sup> Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 112.

<sup>1735</sup> *Hawkes* (n1731) 290.

<sup>1736</sup> Swain, 'The Changing Nature' (n1710) 55.

<sup>1737</sup> C M A McCauliff, 'A theme of Fairness Revisited: Lord Mansfield's Legacy for a Holistic Theory of Contract Today' (2001) 15 *Denning Law Journal* 67, 72.

<sup>1738</sup> David H Parry, *The Santity Of Contracts In English Law* (Stevens 1959) 51.

However, this was not given the honeymoon period that seems to be suggested and the legal system began to enforce its own unity rather quickly. As early as 1802, *Wennall v Adney* held that Mansfield's contribution did not extend past the past authorities on consideration as in all occasions the promisor had received some benefit from the promisee.<sup>1739</sup> Lord Tenterden CJ added in *Littlefield v Shee* that the proposition that moral obligation is sufficient consideration must be invoked with caution.<sup>1740</sup> The legal system eventually repudiated this idea in 1840 with *Eastwood v Kenyon*.<sup>1741</sup> Here, the executor became guardian of an infant girl, whom promised to pay him back the money he borrowed to care for her when she came of age. The plaintiff's counsel had argued moral obligation, claiming that the plaintiff had been the faithful guardian of the girl for many years and her now husband's refusal to pay was in breach of that obligation.<sup>1742</sup> Lord Denman CJ did not find this convincing:<sup>1743</sup>

'Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it... The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society;'

Thus, Mansfield's main attempts at reforming consideration into something more akin to his moral vision on the world came to nothing. Simply, Mansfield had arrived too late into consideration's doctrinal history to change fundamental aspects of it unilaterally, and certainly not abolish it completely.<sup>1744</sup> Applying autopoiesis, the situation can be observed as the legal system recurrently receiving perturbations from its environment. However, the input-output model clearly was not occurring. The results of the noise, which seems to be channelled primarily through Mansfield in this period, was not a system that reflected the outside world. Rather the legal system wholesale rejected the new communications that were being produced in response to the noise and in its attempts at unity confined them to non-law similar to *Baird Textiles*. The lesson from this is that regardless of the political or moral tastes at the time, the legal system is not

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<sup>1739</sup> (1802) 127 ER 137, 139.

<sup>1740</sup> (1831) 2 Barnewall and Adolphus 811, 813

<sup>1741</sup> (1840) 11 Ad & E 438, 11 Eng Rep 482.

<sup>1742</sup> *ibid* 483.

<sup>1743</sup> *ibid* 486-487

<sup>1744</sup> Francis Bennion, 'Want of Consideration' (1953) 16(4) *The Modern Law Review* 441, 441.

bound to achieve one single output, but can in fact redouble on itself even where there is ample opportunity for dynamic change.

However consideration was not unfazed from the attacks on its technical nature and dissonance from other society subsystems. *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>1745</sup> made incredible challenges to the doctrine of consideration from the economic subsystem. As Steyn has pointed out, one of the major influences of the case was with regards commercial practice and how this was a necessitous decision.<sup>1746</sup> The rule on past consideration predates the oft-cited *Stilk v Myrick*.<sup>1747</sup> *Hunt v Bate*<sup>1748</sup> had established the rule in assumpsit that a past benefit could not be consideration if done without the request of the promisor in 1568. This was reaffirmed in the seventeenth century by *Hodge v Vavisour*<sup>1749</sup> and *Lampleigh v Brathwait*.<sup>1750</sup> Even before the *Stilk v Myrick* decision, the principle that consideration could not be past was already a legal programme that had been firmly entrenched.

*Williams v Roffey Bros* was the clear deviation as practical benefit could now be used to induce compliance of providing further benefit for a pre-existing duty.<sup>1751</sup> Yet, it was not a clean break from the legal programme. It had cloaked itself in the language of fresh consideration arising via practical benefit.<sup>1752</sup> Therefore this is more of a legal evolution than a revolution. The legal system had generated communications in response to its stimuli, but had not simply transplanted the economic communication. Consideration remained, but the legal programme has decided to change an aspect of itself in order to be receptive of the observed noise. One could go as far as to suggest that this is the system attempting to reinforce its unity. After all, the doctrine of promissory estoppel had been growing and threatened to devour the whole doctrine of consideration'.<sup>1753</sup> The system, in its attempt to ensure that it presented itself with unity, either had to dispense of the legal programme altogether or reform part of it to deal with the ever present noise stemming from the economic system. The result was a hybrid of

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<sup>1745</sup> [1989] EWCA Civ 5; [1991] 1 QB 1.

<sup>1746</sup> Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 Law Quarterly Review 433, 438.

<sup>1747</sup> (1809) 2 Camp 317.

<sup>1748</sup> 3 Dyer 272, 73 ER 605 (CP 1568).

<sup>1749</sup> 3 Bulstr 222, 81 ER 188 (KB 1617).

<sup>1750</sup> Hobart 106, 80 ER 255 (KB 1616).

<sup>1751</sup> Williams (n1745)

<sup>1752</sup> Hugh Collins, 'Competing Norms of Contractual Behaviour' in David Campbell, Peter Vincent Jones (eds), *Contract and Economic Organisation* (Dartmouth Publishing Company 1996) 68.

<sup>1753</sup> David Campbell, 'The Undeath of Contract...' (n403) 28.

the noise and the doctrine, a hybrid which courts have cast doubt on if it really enforces the unity of the system in its adherence to the classical doctrine.<sup>1754</sup>

However, in *Rock Advertising Ltd. v MWB Business Exchange Centres Ltd*<sup>1755</sup> the supreme court begun to recognise the inconsistency of *Williams v Roffey* compared to *Foakes v Beer*.<sup>1756</sup> Here, Lord Sumption decline to answer the question on consideration because it would be undesirable as:<sup>1757</sup>

'In *Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1* , the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer (1884) 9 App Cas 605* : see in particular p 622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced... The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*'

The legal system has then detected the irritation that exists due to the de-facto curtailment of past consideration. This was not a completely new realisation as *Re Selectmove Ltd.* was hesitant to expand the realm of practical benefit to part payments<sup>1758</sup> Roberts has called *Rock Advertising Ltd* a missed opportunity as it did not delve into the inconsistency in the law that has occurred the past 30 years.<sup>1759</sup> He claims that the court might have condemned *Foakes v Beer* and leading it to die of neglect.<sup>1760</sup> However, no view in line with autopoietic systems theory should be surprised by this outcome. The legal system had already taken on the economic perturbations in 1990. It did not make a direct translation of the noise from the business system but instead understood it in relation to its own programmes. Fresh consideration could arise from a pre-existing duty where more benefit is conferred to the promissor. However the system, in needing to display its own unity, has refused to explicitly contradict its

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<sup>1754</sup> *South Caribbean Trading Ltd v Trafigura Beheer* [2005] 1 Lloyd's Rep 128, para 108 (Colman J).

<sup>1755</sup> [2018] UKSC 24.

<sup>1756</sup> (1884) 9 App Cas 605.

<sup>1757</sup> *Rock Advertising* (n1755) at [18]

<sup>1758</sup> [1993] EWCA Civ 8.

<sup>1759</sup> Marcus Roberts 'Foakes v Beer: Bloodied, Bowed, but Still Binding Authority?' (2018) 29(3) Kings Law Journal 344, 348.

<sup>1760</sup> *ibid* 352.

previous programmes it had created, regardless of how much logical tension there is to an outside observer.

Consideration thus managed to survive three separate eras in one shape or another, despite the many varied complaints that it has received from different philosophical bends.<sup>1761</sup> Havighurst commented in 1942 that it was 'shocking to the moral sense' that deliberate made promises were not enforced because of a lack of reciprocity.<sup>1762</sup> From an autopoietic point of view, this explains why so many perturbations and environmental noise came from the moral subsystem via Mansfield. Laws internal communications regarding what a contract was did not match its environment, and multiple psychic systems could observe the contrasting meanings and tried to fix the tension on the legal side. As has been shown, the legal system did not merely perform in an input-output fashion. Legal communications developed themselves based on their own internal procedures in a way that was undoubtedly unpredictable. The hybrid version of consideration that is currently in law is the result of numerous communications attempting to apply competing meanings. Thirty years later and these meanings are still unclear as the legal system is close to self-cannibalism in its attempt to display a non-existent unity built on a paradox.

### **7.5 The Future of Relational Contract Theory**

As has been seen, relational contract theory has not been received by the legal subsystem in an input-output basis. Like consideration, the attempts at reform are understood by the legal subsystem only by its own terms. As systems recursively relay communication back to themselves, the meaning produced will be affected by the past communications of the system. Put another way, past meanings will influence the meaning of the present. It is true that some extent of path dependency exists within the law, as courts hear arguments shaped by courts prior decisions.<sup>1763</sup> However autopoietic systems theory goes much further than mere path dependency. Rather than dictate outcomes, autopoietic systems theory states that all outcomes of a functionally differentiated subsystem must have passed through the recursive operations of the system. To observe, a system must distinguish itself from its environment so it knows

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<sup>1761</sup> Harold C Havighurst 'Consideration, Ethics, and Administration' (1942) 42(1) Columbia Law Review 1,10.

<sup>1762</sup> *ibid.*

<sup>1763</sup> OA Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) (86) Iowa Law Review 601, 629.

what it is observing. A system composed entirely of meaningful communication will then observe its past meanings as part of itself when it references the state around it. This is true of both logical deductions and of surprises in the system. However, while the path relational contract theory is going will be a surprise to the system, it should not be a surprise to the observer.

By looking at consideration, we have seen that no matter how clear a noise is, the system may not develop a symmetrical meaning to the origin. More concerning is that there are increasingly large parallels between the development of relational contract in the courts and the failed attempts at reform of consideration into something that would suit the liberal pallet. Both had their initial transplants be rejected by the system. Consideration refused to accept the liberal noises that the doctrine was just for evidentiary purposes in *Rann v Hughes*. Relational contract theory, similarly, had been just as quickly dispelled in *Baird Textile Holdings*. The legal sub-system had rejected wholesale transplantation of noises as being non-legal communication. It deemed such noise redundant and continued to make meaning out of other information. Internally, the legal subsystem was invoking its plural values of clarity and certainty to act as a redundancy limit. It was rejecting the notion of a surprise internally and framing the perturbation as merely an extension of its already constituted elements whose meaning produced the classical doctrine.

Both doctrines also experienced the Pandora's Box Effect. When the noise became present in the legal subsystem, it became almost impossible to remove. Judges, as symbolic actors, produce multiple communications. We have seen judges produce communications that have meaning both in the economic subsystem and the moral subsystem in both consideration and in reference to relational contract. In doing so they followed the structural coupling between these subsystems and the legal subsystem. Their judgements providing even more irritation into the subsystem. The meanings that are attached to the concepts stay, even if the original noises were made redundant. For this reason the subsystem was open to be influenced by different but connecting noises. In consideration this was through practical benefit. The economic noises regarding the utility of further benefit found their place in a system that a century prior would have been openly hostile to such an idea. They had successfully come as a surprise to a system by a receptive legal programme designed to receive stimuli. Likewise, relational contract found footing within the particular doctrine of good faith. However, the initial



rejection of both these noises combined with the now selective intake of communications has led to absurdity and severe misunderstanding of the original communications and meanings. The relational contract that the courts are currently using is not relational contract theory. They are defining a species of contract as to impose a good faith obligation via implied terms at law and have applied the relational label to due to the information having already been in the system.

Classical contract, being recursively used within an autopoietic system, is acting as a contaminant to the legal subsystem's understanding of relational contract. But we cannot do as Morgan suggests and just revert back to the old rules of classical contract or even to rely purely on formalism alone.<sup>1764</sup> It is far too late for that. Now that the system has encountered an observation, it will continue to make communications on such an observation. This is not merely from a grand theory standpoint. Observers of the legal system's outputs will continue to associate good-faith implied terms with relational contract, and thus the meanings produced by the recent line of cases provide presumptions that influence further meaning. The formalist cannot merely dismiss this by denying the implication of terms as express terms of good faith must, by reason of their formalistic inclusion, be developed in a meaningful way that the system understands. With the existence of the current meaning being information for courts to use even the most formalist reading of a contract cannot escape the meaning of relational contract that the system has already affixed to the good faith concept.

This does not just discourage formalists, but also is a dire note for relational contract scholars. *Bates* has permanently distorted the meaning of relational contract within the legal system. Even the most relationalist scholars cannot deny that the entry-costs to understanding *Bates* are significantly lower than those of understanding the intricacies of Macneil, even with the Austen-Baker reduction. The distorted view on reality will continue to influence the interpretation of all forms of relational contract noise that enter the system. Any expansion of a relationally constituted law will be altered and changed due to this legal communication. This potentially means that there is no hope of relational contract being understood by the legal system in any form that relationalists would have initially conceived, or even approve of.

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<sup>1764</sup> Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013).

Of course, changing the law is still possible under autopoietic systems theory, but change occurs in a radically different paradigm that normally envisioned.<sup>1765</sup> Law is not the great regulator it is promised to be.<sup>1766</sup> There is no telling how exactly relational contract will develop within law via autopoietic systems theory alone. As King explains, asking autopoiesis to explain individual decisions is like asking evolutionary theory to explain the death of a pet dog.<sup>1767</sup> But what can be extrapolated is the general trend of evolution within the law, and by utilising the lessons within autopoiesis one can reverse-engineer the trend to identify the factors that have lead to the current evolution. What can be said is that the current communications being produced via the influx of relational noise does not match its point of origin. Using consideration as a comparator, one can begin to draw parallels between the development of law where noise has been treated similarly. Such parallels do not inspire confidence in the current development, and the uncertainty can be felt within the relational field. Relationalists have accepted that the classical law is still highly influential, and regardless of how much clout Macneil's work has developed the old law is still in the system.<sup>1768</sup> No matter how inadequate classical law is as a system. It is still legal communication until the legal system decides otherwise.

This changes the analysis that was expanded in chapter four and five. We can discuss Coase and Pigou as much as we wish when it comes to the practicalities of change, however both have a standing assumption: that the state will actually understand what it is observing. Pigou's was highly optimistic about the state to intervene,<sup>1769</sup> and with any form of optimism of success comes the basic assumption that the state can determine the externality. Pigou's only real guidance regarding the uptake of externality information was his belief that all externalities could be determined on an ad-hoc basis by state boards.<sup>1770</sup> Coase was similar, thought significantly more pessimistic. While decrying the use of 'blackboard economics'<sup>1771</sup> he does not put considerable emphasis on if the state can actually identify externalities in the first place. His work focused on the

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<sup>1765</sup> John Paterson, 'Reflecting on Reflexive Law' in Martin King, Chris Thornhill, *Luhmann on Law and Politics, Critical Appraisals and Applications* (Hart Publishing 2006) 15.

<sup>1766</sup> King, 'The Truth..' (n1560) 229-230.

<sup>1767</sup> *ibid.*

<sup>1768</sup> Catherine Mitchell, 'Contract: There's still Life in the Classical Law' [2003] *Cambridge Law Journal* 26.

<sup>1769</sup> David Campbell, 'Of Coase and Corn: A (Sort of) Defence of Private Nuisance' (2000) 63(2) *Modern Law Review* 197, 200.

<sup>1770</sup> Arthur Pigou, *The Economics of Welfare* (4th ed Macmillan 1932) 334.

<sup>1771</sup> Ronald Coase, *The Firm, The Market and the Law* (University of Chicago Press 1986) 22.

aspect of should an externality be found, can the state realistically intervene with a net benefit.<sup>1772</sup> Of course, included in this criticism was that the state would often just have a marked or complete lack of inquiry into the problem,<sup>1773</sup> yet the point still stands that even with the most prudent of inquiries with complete due-diligence that the state can still misconstrue even the most basic information presented before it. With autopoietic systems theory, and the analysis throughout the thesis, we can see that the implied assumption of omniscience cannot be justified. The actual view of both the externality and the solution might be distorted by the legal system. This means that even if the legal system observed Gudel's claim that classical contract law is so distinct from the reality of contracting that it is practically irrelevant,<sup>1774</sup> there is no guarantee it will attribute the meaning to that observation that Gudel meant. Furthermore, even if it did generate the same meaning, it may not develop the same conclusion to the problem as the observation passes through the relevant legal programmes.

These problems are not confined to the legal system. Should we expand relational contract into law multiple other systems will need to observe the changes and apply. Both the economic system and the political system are functionally differentiated systems that obey the same rules of noise intake and recursive communications.<sup>1775</sup> Contracts, by nature, are a structural coupling between the economic system and the legal system,<sup>1776</sup> and thus any change in the constitution of contract law will act as noise within the economic system. Just as there is no certainty on how the legal system will deal with further noise from relational contract theory, there is no certainty how the economic system will react to a change in the perturbations that the legal system currently provides on a constant basis. Moreover, if we were to go down the route of statute, then the political system would be required to add its influence into the communication of the social event prior to legal communication being produced, which only increases the opportunities of miscommunication and misunderstanding.

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<sup>1772</sup> Ernest Williams, Ronald Coase, 'The Regulated Industries: Discussion' (1964) 54 *American Economic Review* (Papers and Proceedings) 192; Ronald Coase, 'The Problem of Social Cost' (1937) 56 *Journal of Law and Economics* 837.

<sup>1773</sup> David Campbell, 'The Sense in Coase's Criticism of the Ceteris Paribus Case for Intervention' (2017) 13 *The Journal of Law and Policy* 39, 53.

<sup>1774</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) *Buffalo Law Review* 763, 778

<sup>1775</sup> Niklas Luhmann, *Differentiation of Society* (Columbia University Press 1982) 122.

<sup>1776</sup> Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) *Cardozo Law Review* 13(5) 1419, 1435.

There is also the constant risk that, even should the unlikely happen and both the legal system and the economic system manage to come to symmetrical meanings and communications regarding relational contract, the individual psychic system will react in a counter-productive way to the new environmental stimuli. Currently, merchants generally ignore the vast majority of legal communication that is relevant to their craft.<sup>1777</sup> They effectively are making the legal communication redundant, and by increasing redundancy they are able to increase the complexity of other choices.<sup>1778</sup> If there is a significant change in law, such as adding a more contextual approach that Mitchell believes is the basic reform law must do to be more relationally constituted,<sup>1779</sup> then there will be a change in how individual psychic systems react to the legal communication. It will be a literal surprise to their system, a change in the state of the environment, that will provide new information for them to process. The fallacy of relationally constituted law is that it expects the legal system to understand individuals and their bargains who then in turn will need to understand the changing law which is becoming ever-more complex and impenetrable the more varied it becomes.

Humans, as psychic systems, are just as likely to misunderstand the communications that the legal subsystem produces as any social system. The relationalist, when claiming that the law will provide practical benefit to the individual contractor, must assume that the contractor actually understands the law in question in order to raise it and engage with the (positive) legal system. A brief recollection on consumer law mentioned in this thesis should be enough to dispel this. Those who do not understand the law will not play costly games to show it as a pantomime in court, and those who do many not even provide the legal argumentation that a relationalist would expect for the court to mediate, thus diverging even further in outcomes. Even if we were to gloss over this assumption and treat humans as infallible in their ability to understand communication, there is a risk that through their own processes the psychic systems will choose not to know the law and those that do choose to know it will actively avoid it.<sup>1780</sup> This is the argument of rational ignorance that was mentioned in chapter five. This means that the

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<sup>1777</sup> Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge of Transparent Simple Rules' in David Campbell, Hugh Collins, and John Wightman, *Implicit Dimensions of Contract* (Hart Publishing 2003) 77.

<sup>1778</sup> Luhmann, 'Organisation' (n1619) 41-45.

<sup>1779</sup> Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 185.

<sup>1780</sup> Thomas McInerney, 'Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40(1) *Cornell International Law Journal* 171, 185.

relationalists goal of a relationally constituted law matching commercial expectations is only one of multiple outcomes from the outset, even disregarding practical concerns.

This should not be used as a conclusive argument against any form of legal change or legal reform. Merely it is making the case that the existence of an alternative theory does not mean the theory would survive a transposition into a different legal system. It is fully possible that the meaning of a communication can be replicated symmetrically in a different system. However this is not a guaranteed process, and from the signals that are currently being shown in relational contract it is highly doubtful this will be the case. The red flags are too obvious to ignore any longer, and continuation down the beaten path can result in outcomes that no one presently in the debate would find satisfactory. So what can relational contract scholars do? Austen-Baker has provided us with an answer of the use of relational contract theory:<sup>1781</sup>

1. Permit the social sciences to understand exchange relations
2. Enable businesses to better understand likely consequences of alternative approaches
3. Identification of contractual stress points
4. Assist judges in ascertaining the 'real deal'
5. Ensure the law reformer does not go against contractual relations with reform

Relational scholars will still be producing legal communication, and while scholars have no say in how such noise is understood within the system they are fully in control of the perturbations that they are irritating the system with. At which point, relational critique of contract law is still possible, but if relationalists wish to increase the chances of a positive influence of the law as opposed to misunderstanding then they must be aware of how their critique will sound inside the system. King has said that autopoiesis has a basic point of forcing researchers to look not only at how systems interact with one another, but also at the internal operations of the system and the different worlds each system seemingly creates around itself.<sup>1782</sup> After seeing what attempting to have a grand reformation to a doctrine can do with consideration, and now with good faith, relationalists should take this to heart.

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<sup>1781</sup> Austen-Baker, 'Comprehensive Contract Theory' (n1582) 218.

<sup>1782</sup> King, 'The Truth..' (n1560) 230.

So what perturbations can one do? This can mean various methods, from criticising the effects of law per its own stated goals to trying to harmonise relational elements within contract law. The discussion of relational contracts and good faith may have been radically altered should relational scholars have had a more knife-point analysis while being aware of the current legal communications that will be recursively relied on. Actively targeting programmes the relationalist knows will be receptive is also a possible way forward, essentially mimicking the evolution of the postal rule in offer and acceptance and as the classical doctrine had done while spinning its own wheels on the subject of duress. All concerns having been followed, importantly, by the system applying its own meanings to itself in surprising fashions. The lesson here for relationalists is about framing. There may be no set outcome, but the outlook does not look as bleak.

Thus, the 'grand theory' approach to relational contract theory is a pessimistic one, but not a hopeless one. Relational contract noise can still act as a surprise to the law, and such surprises create legal change.<sup>1783</sup> Yet it is impossible to coordinate such change from the outside. Legal programmes change to accommodate pressure from the outside but do so only in their own way as determined by the programmes made from past communication.<sup>1784</sup> This past communication has been, for the past two centuries, the classical theory of law. It is inescapable and attempts to eradicate it will more often than not be met with disappointment. Relational nuances into law are not just possible but in fact incredibly likely. It must be recalled in chapter two that the classical law programming consistently changed as to accommodate pressures, but these changes were erratic and often justified themselves via unity even where the basis was logically absurd. With a more nuanced approach to relational contract theory, it might be possible to influence law, or at least attempt to plug deficiencies in the law. To do this will require a strong change in narrative. Transplantation will not happen, but becoming a powerful environmental stimuli may be the best course ahead.

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<sup>1783</sup> Hugh Baxter, 'Autopoiesis and the Relative Autonomy of Law' (1988) 19(6) *Cardozo Law Review* 1987, 2026.

<sup>1784</sup> King, Thornhill, (n1612) 60.

## 8. Chapter Eight: Conclusion

Alonso Quijano is a literary figure from the Spanish work *Don Quixote*. A hidalgo, he reads so many chivalric romances that he succumbs to madness and becomes a knight-errant. Deluded in his idealised and romanticised world, he sets out to perform great acts of chivalry, such as the slaying of giants. In the real world, these giants are but windmills, and a hidalgo has no place in the world of war. This led to the term quixotism to describe a pursuit of ideals without regard to practicality, often as a result of romantic ideas. The author has chosen this term as the basis for his thesis because relational harmonisationists are soon becoming the new quixotes. The ideal of a world of highly contextualised, exceedingly accurate case analysis has coloured many academics, just as it had done during the liberal revolution of the meeting of the minds. These academics rally to face their giant: the classical doctrine.

Yet the law survives. It 'still has bite' no matter the complaints of the relationalist.<sup>1785</sup> Campbell even goes as far as to call it undead.<sup>1786</sup> No matter the complaint, the criticism, or the outcry, classical law merely adapts, changes, or ignores its way through its own course. Even when faced with the undeniable proof that relational contracts exist, and such contracts cannot be seen under the classical paradigm, the classical doctrine did not cannibalise itself. It did what it has done to nearly every noise and perturbation that has come near it throughout its history; it assimilated and pretended that its development was always the only logical deduction. For relational contract, it did this with implied terms of good faith, first by fact, then generating an entirely new species of contract to imply terms at law. Anything deemed a relational contract will now have a good faith criteria implied within it, unless there is an express term to the contrary, to protect the parties from breach of trust.

Yet, the presence of relational contracts within the law should not be cause of celebration to the relationalist. *Alan Bates and Others v Post Office Ltd.*<sup>1787</sup> and *Essex County Council v UBB Waste (Essex) Limited*.<sup>1788</sup> have both explained the criteria used to determine the categorisation of what constitutes a relational contract. Yet *Bates* manages to not produce a single unproblematic characterisation of relational contracts.

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<sup>1785</sup> Catherine Mitchell, 'Contract: There's Still Life in the Classical Law' [2003] Cambridge Law Journal 26

<sup>1786</sup> David Campbell, 'The Undeath of Contract: A Study In The Degeneration of a Research Programme' (1992) 22(1) Hong Kong Law Journal 20

<sup>1787</sup> [2019] EWHC 606 (QB).

<sup>1788</sup> [2020] EWHC 1581 (TCC).

*Essex County Council*, while at least disposing of the arbitrary characterisation that relational contracts cannot contain an express clause excluding good faith performance, has managed to make the situation even more confusing. Following *Essex* we now know for certain that relational contracts are given a distinct legal meaning, but we have no concept of what that meaning is since not a single characteristic is definitive and the only list we have is a 'helpful indicta' of non-exhaustive disposable, and substitutable qualities.<sup>1789</sup>

So, relational contract theory's inroads into the law of contract have been limited. The only doctrine it has managed to influence enough to get linguistical sway over has misrepresented and distorted its findings so much that it is difficult to see any similarity between the theory and the application. Now that Pandora's box has been opened, it is unlikely to subside now. Even should the entire category of relational contracts be repealed by the Supreme Court, the communication is within the system. *Yam Seng Pte Ltd v International Trade Corp Ltd.*,<sup>1790</sup> is still good law, and even without the categorisation of relational contracts, any long term contract is liable to find itself with the implied term of good faith in fact. Repeal at this stage would be eerily similar to Mansfield's consideration reforms, having been expanded, rescinded and then minorly expanded. For better or worse, the legal system has decided to pursue a path of divergence from actual relationally constituted law, and we must now consider damage mitigation as opposed to outright avoidance.

Of course, from a theory standpoint, there was no way to know that this would happen. Autopoiesis is not a black box for outcome results. Yet, insights from Luhmann's theory do tell us that this always had a possibility of happening. Furthermore, not only is the current meaning dynamic, but attempts to course correct can result in even more divergent and sometimes puzzling consequences. This was seen within consideration; how many attempts of other subsystems to command and control the law often lead with failure because there is no true input-output model for meaning in society. As such, change in society does not work in the way old jurisprudential models envisioned. Without the ability to trust that meaning will transpose from one system to another without translation errors, a new aspect of regulatory failure is unlocked: the failure to understand. While there can never be a formula for this based on autopoiesis, it does

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<sup>1789</sup> *ibid* 106

<sup>1790</sup> [2013] EWHC 111 (QB); [2013] 1 CLC 662



allow us to spot pattern signs of similar distortions emerging. There were multiple warning signs within contract law that the legal system was misinterpreting the demands relational contract theory had. These were ignored, and now contracts with 'spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract'<sup>1791</sup> are considered relational.

Regardless of high theory, desirability of a relationally constituted contract law is still suspect. The entire engagement with the Luhmann enterprise was to explore a more nuanced approach to regulatory failure from the angle of systems theory. Even if one has trepidation of Luhmann's framework, or simply does not value abstract analysis to allow for argument via metaphor, there are still multiple tangible and practical problems with application. For any regulatory change to be justified, the benefit must outweigh the cost. The benefit itself does not need to be positive, and the simple elimination of a harm is quantifiable. A relationally constituted contract law has not been able to demonstrate this. As a prime example of quixotism, very few relationalists have included the costs of regulatory change in their analysis. We are not talking here of cost to change documents, but costs to the system itself encouraged by the multiplier effect. Lawyers will need to be retrained, erroneous judgements become more likely, businesses now need to spend money on legal counsel for areas that they happily ignored prior. Just because legal change does not come with a price tag does not make it free.<sup>1792</sup>

Even then, here we have only talked about direct cost. The problem of 'availability cascades'<sup>1793</sup> creates potential problems the relationalist cannot ignore. There are transaction costs involved in researching new law, and therefore there is an incentive to free-ride on the research of others.<sup>1794</sup> This puts the routine players in courts in a disproportionately powerful position. This is often seen in consumer contracts as corporate narratives often go unchallenged due to lay people requiring to free-ride on information.<sup>1795</sup> Yet there is no reason to presume this stops with the consumer. SMEs are just as likely to free-ride as few could afford not only in-house counsel, but counsel

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<sup>1791</sup> Bates (n1787) at [725] (Fraser J)

<sup>1792</sup> Roy Cordato, 'Knowledge Problems and the Problem of Social Cost' (1992) 14(2) *Journal of the History of Economic Thought* 209.

<sup>1793</sup> Timure Kuran, Cass Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51 *Stanford Law Review* 683.

<sup>1794</sup> *ibid* 717.

<sup>1795</sup> *ibid* 721.

who are equipped in the area of law being changed. Fundamentally, legal uncertainty will benefit the party who has the resources to play silly legal games. Strategic legal bullying exists, and threatening to bankrupt a party via litigation can occur even when the abuser has no hope of winning. The more open context the system allows, the greater the danger for hyper-saturation by economically powerful parties bullying weaker parties they know cannot afford to litigate.

However, all this cost could be justified if relationalists could point to significant harm that the divergence between commercial law and commercial practice causes. Unfortunately, this has not materialised. Yes, the non-use of contract law is a fact of commercial life. This is undisputed. What is disputed is this ever being a problem. While the rhetoric of Macaulay's that classical contract is 'a flawed product that would seem to breach the warranty of merchantability'<sup>1796</sup> resonates deeply with commercial lawyers, it fails to show any harm. Commerce is not stagnating due to the divergence between law and practice and relational contracts in particular seem to be flourishing in spite of cases like *Baird Textile Holdings Ltd v Marks and Spencer plc.*<sup>1797</sup> Relational contract is even able to explain this in its own terms through its self observation. As Macneil insisted, humans are social animals.<sup>1798</sup> We have a natural pre-disposition towards signalling trust towards those we wish to be in relationships in, regardless of if it is for selfish or selfless reasons.

Our disposition towards trust means that social sanctions begin to come into play, to the point where they can crowd out legal sanctions. After all, the sanctity of promising is practically a universal norm, with it being a moral outrage to breach.<sup>1799</sup> To breach trust would then be discordant with the social matrix, and the greater the severity of the breach the more punitive the social sanctions. This crowds out legal sanctions as punishing a party too much for the same sin would be equally abusive in a relationship. Additionally, parties wishing to promote trust are likely to avoid recourses to law as such recourses can taint the overall relationship.<sup>1800</sup> Even detailed negotiations can be a

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<sup>1796</sup> Stewart Macaulay 'Almost Everything That I Did Not Want To Know About Contract Litigation: A comment on Galanter' (2001) 2001(3) Wisconsin Law Review 629, 629.

<sup>1797</sup> [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737.

<sup>1798</sup> Ian R Macneil, 'Values in Contract: Internal and External' (1984) 78 Northwestern University Law Review 340, 348.

<sup>1799</sup> Tess Wilkinson-Ryan, Jonathan Baron, 'Moral Judgement and Moral Heuristics in Breach of Contract' (2009) 6(2) Journal of Empirical Legal Studies 405, 409.

<sup>1800</sup> Carol Rose 'Trust in the Mirror of Betrayal' (1995) 75(3) Boston University Law Review 531, 540.

sign of distrust.<sup>1801</sup> Humans whose performance expectations are then dependant on a trusting relationship are not going to engage the legal system until the relationship breakdown. At which point we should not be surprised to see a lack of engagement with legal systems.

While Gudel argues contract law's bias to discreteness is intuitively unfair when applied to relational contracts,<sup>1802</sup> where is the practical harm? We cannot have regulatory change within the field of contract law based off moral outrage alone. This is especially true when default harmonisation with the reality does not necessarily mean better protection of commercial expectations. The classical system seems to be doing just fine at protecting the reasonable protections of the parties, despite its existence as a hybrid spawn that no ideological platform would be satisfied with. While relationists may dismay at the discordance between contract law and reality, the will theory purist would despair at the plethora of contract law doctrines that just ignore the classical theory. Classical law is not classical theory. The law certainly has a limerence towards the language of the will, but any detailed look into duress, objectivity, or offer and acceptance would quickly dispel any illusion that this extends past compartmentalisation. Multiple values exist within the classical law, including procedural fairness, legal certainty, and even commercial sensitivity. However, these values have always been in a balancing act with no one value ever being supreme.

This thesis has not demanded for the return to classical contract nor has it claimed that all regulation will lead to failure. Rather it has been clear that the movement towards a relationally constituted law of contract has been misguided by regulatory optimism that is comparable with Pigou. The author is himself a relationist, however is a firm believer that the neutral analytic tool is best kept out of the legal system and within legal academia. As Austen-Baker has pointed out, there are multiple ways how relational contract theory can be utilised without it becoming positive law.<sup>1803</sup> Should relationists wish for legal change, then it would be better for them to work with the system, and not against it. Contract law has shown itself to be incredibly adaptable, but equally as stubborn and recursive. One can argue for specialised remedies for problems

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<sup>1801</sup> Linda Mulcahy, *Contract Law in Perspective*, (5th edn, Routledge-Cavendish 2008) 39.

<sup>1802</sup> Paul Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46(3) *Buffalo Law Review* 763, 766.

<sup>1803</sup> Richard Austen-Baker, 'Comprehensive Contract Theory: A Four Norm Model of Contractual Relations' (2009) 25 *Journal of Contract Law* 216, 218.

one has identified using Macneil's analysis. One simply needs to be careful of the system understanding the demand that is irritating it. It stands to reason, the more the irritation uses meaning the system already knows, and often produced itself, the less chance there is for divergence. Yet, the current landscape is not that of surgeons using specialised tools and receptive patient care as to treat specific conditions. The march of ideological purity means that the landscape is populated by hidalgos who are tilting at windmills.

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