An 'All of the Above' Theory of Legal Development (Revised)

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UNEDITED DRAFT

AN ‘ALL OF THE ABOVE’ THEORY OF LEGAL DEVELOPMENT

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THEORY OF LEGAL DEVELOPMENT

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I. INTRODUCTION
II. LEGAL THEORIES OF DEVELOPMENT
   A. Maine’s Progression
   B. Isaacs’ Cycle Theory
   C. Evolutionary Efficiency
III. NON-LEGAL THEORIES OF EVOLUTION
   A. Evolutionary Biology
   B. Paradigm Shifts: Kuhnian Theory
IV. JEWISH AND COMMON LAW EVOLUTION
   A. The Premise and Its Explanatory Power
   B. Jewish Law Innovations
   C. Jewish Common Law
   D. Jewish Law of Contracts
V. STATUS AND CONTRACT LAW
   A. Status-based Relationships
   B. Standard Form Contracting
   C. Problem of Anachronistic Rules
VI. AN ‘ALL OF THE ABOVE’ THEORY OF LEGAL DEVELOPMENT
   A. Dynamic Nature of Law
   B. Complexity of Contract Law
   C. False Dichotomies
      1. Formalism-Realism
      2. Textualism-Contextualism
      3. Standards-Rules Debate
      4. Facilitation-Regulation
      5. Summary
VII. CYCLE THEORY REVISITED
   A. Principles-Based Evolution
   B. Progressive-Cyclical Continuum
   C. Concluding Remarks
I. INTRODUCTION

This paper reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. My interest in legal development is in its infantile stage. The intellectual starting point for this project is Nathan Isaacs’ cycle theory of legal development. His view of legal development takes issue with Maine’s thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, this progression is linear in nature.

The legal evolution that Maine describes in *Ancient Law* is not directly challenged in this paper. Whether legal development is generally progressive begs the question because Maine consigned his legal theory to legal development in “progressive societies.” The nature of that progression as a movement from status to contract is what cycle theory rejects. Maine thesis is that progressive societies eventually strip away status-based relationships and replace status with a generic freedom of contract where the characteristics of the contracting parties become irrelevant. Isaacs argues that taken from a broader historical context legal development is best characterized as cyclical in nature. In sum, legal development is in a perpetual motion moving between status and contract-based relationships.

This paper will focus mostly on the legal development of contract law. Roger Cotterrell notes that “at the most basic level contract is the legal concept which most directly links law and economy because of the significance of the numerous forms of exchange transactions for economic development.” Based upon this assessment, the development of contract law in the nineteenth to the twenty-first centuries will act as surrogate to legal development in general.

Parts II and III will review theories of development inside and outside of the legal academy. This review is premised on two core issues. First, is legal development best characterized by a linear progression (status to contract) or by a cyclical progress (status to contract to status)? Second, is this progression gradual due to the nature of the common law or is it subject to periods of rapid change or “jumps.” Part IV provides the framework for Isaacs’ cycle theory through the review and recognition of similar evolutionary patterns in Jewish law. Isaacs’ knowledge of Jewish law influenced his view of secular law. The similarities between English

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common law and Jewish common law (*responsa*) are breathtaking. Part V explores the relationship between status and contract law. Part VI sketches the rudiments of an ‘all of the above theory’ of legal development. This approach is based upon three core tenets: (1) contract law is dynamic in nature, (2) contract law’s complexity provides ample space for different theories, models, and norms, and (3) because of the first two tenets the dichotomies debated in legal scholarship are false. Finally, Part VII revisits cycle theory. It focuses on Isaacs’ belief that dynamic law is and should be rooted in basic principles. Law’s dynamism is not a pure creation of induction, but takes inductive input and uses historical principles to guide legal change. It concludes with the proposition that legal development can best be understood as a progressive-cyclical continuum.

II. **Legal Theories of Development**

Roger Cotterrell sees legal development as a battle between different ideologies. This is so because law both legitimates and channels power structures in society: “Analysis of the historical patterns of the development of legal doctrine is thus part of the field of study of the formation, modification and disintegration of ideologies.” ³ An example is the perceived paradigm shifts from classical to neoclassical to modern (neoclassical plus relational) eras of contracts. It can be seen in methods of legal reasoning—from legal formalism to realism-contextualism, and potentially in a return to formalism (neo-formalism). This Part will review three approaches to legal development—Henry Sumner Maine’s progression thesis, Nathan Isaacs’ cycle theory, and law and economics’ evolutionary efficiency model.

**A. Maine’s Progression**

In relationship to the evolution of the common law, two, seemingly dyadic, views can be presented. The Mainesian view sees law as a progressive development. This development results from a gradual evolution of the common law. An alternative view of legal development focuses on the contingent nature of the law. The gradual evolution of the common law is premised on its ability to develop in an internally logical manner. The alternative view sees not gradual evolution by “legal jumps” in response to seismic events, such as the industrial revolution, the Great Depression, and the creation of the Internet. The idea of legal jumps will be discussed in Part III. For now, the mainstream common law model is that of gradualism—law changing in response to societal change, but only at an incremental rate.

One cannot find in legal systems an internal consistency, because legal systems are determined by externalities, namely historical, social, and political conflicts. [This realization results in the rejection of] the Hartian notion, that “to the extent that lawyers think historically about the law, they tend to think in terms of the slow evolution of legal forms from the crude to the sophisticated, and not in terms of the particular connections between different legal forms and different kinds of society.” ⁴

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³ Cotterrell at 169-70.

Whether by gradual means, jumps, or a combination of both, the core part of Maine’s thesis remains that legal development is a linear progression.

The importance of contract in creating a modern marketplace was a common theme in the works of Max Weber. Weber is in agreement with Maine that freedom of contract is a recent development. In fact, Weber refers to earlier relations as “status contracts” and those that relate to a market economy as “purposive contract.” Additionally, Weber recognized the facilitative and regulatory nature of contract law. With the expansion of types of contractual transactions came a need for more and more rules. The facilitative rules—the rules of *ius dispositivum* are what in modern nomenclature are called default rules. The primary function of contract law is to provide known rules that automatically applied unless the contracting parties agreed otherwise. However, certain issues could not be left to contractual freedom. Therefore, a body of mandatory rules, *ius cogens*, was needed to prevent harm produced by unlimited freedom of contract.

Emile Durkheim asserted that the expansion of the realm of contracts was a necessary consequence of the specialization of labor as a society moves from agrarian-based to industrial-based. But, Durkheim also saw the potential for abuse in an unregulated contract regime. The expansion of the reach and importance of free contracts necessitated an increase in “regulative action.” He argues that the more economically advanced a society becomes the greater the importance of contracts and the greater the need for regulation: “[T]he division of labor produces solidarity . . . not only because it makes each individual an exchanging; it is because it creates among men an entire system of rights and duties which link them together in a durable way.” In sum, Durkheim does not see contracts and status as adversarial, but as the necessary products of the specialization of labor. Maybe, the popular notion that Maine’s status to contract adage was a zero sum game—that as contract increased, status decreased—is a wrong interpretation of Maine’s statement. Maine’s adage could simply be a recognition that the importance of contracts relative to status increased with the creation of a market economy. There were just many more types of transactions that didn’t exist in earlier times.

In defense of Maine, his status to contract adage was likely meant to be a generality and not advocacy for the extinguishment of all status-based relationships, such as the special protections provided to a minor in the common law. Frederick Pollock in “notes” to the 1963 Beacon edition of *Ancient Law* surmises “[s]tatus may yield ground to Contract, but it cannot be reduced

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6 Weber states “that extensive contractual freedom which generally obtains today has not always existed.” Weber at 100.
7 Weber at 105.
8 Weber at 126 & 126 n.67.
10 *Id.* at 101.
11 *Id.* at 143.
12 Weber at 100 (“with every extension of the market . . . legal transactions became more numerous and complex”).
to Contract." Pollock gives as an example of the evolution of the personality of the corporation. Corporation as a legal person is a status-based entity created by the State through incorporation statutes and regulated in many ways including the status-based concept of fiduciary duties. Pollock also wrote at a time evidencing the rise of the administrative state.

**B. Isaacs' Cycle Theory**

Before proceeding, a brief introduction to Nathan Isaacs and his scholarship is needed. Isaacs was a prolific writer from 1914 to 1940. He held a doctorate in economics and received his S.J.D. at Harvard Law School under the tutelage of Dean Roscoe Pound. Isaacs was a scholar of powerful intellect with broad-based knowledge of the Jewish, civil, and common law traditions. His intellect produced a deep opus both in secular common law and in Jewish literature. For contract law aficionados, he is remembered as the person who introduced the nomenclature of standard form contracting in his 1917 article The Standardizing of Contracts in the Yale Law Journal. For tort buffs, he advocated early, in the twentieth century, the need to recognize strict liability in certain areas of an industrialized economy. Those that work in arbitration law, will be familiar with Isaacs description of alternative models of the role of the arbitrator—the agency model and the judicial model. He argued for the agency model believing the model of arbitrator as judge would make arbitration litigation-like. He also argued for limited judicial review of arbitration awards. The agency model would become the standard interpretation of the 1926 American Federal Arbitration Act. In constitutional law he argued for a principles-based interpretive methodology and against literal interpretation. He asserted that after one-hundred fifty years of existence, constitutional interpretation involved “trying to get at the spirit of the thing, rather frankly confessing that the letter is not the whole thing.”

As the above paragraph noted, Isaacs wrote on numerous areas of law. In at least four of those areas his works are still standard citations in American law review articles. However, few people make the connection to his total body of work because of the specialization of legal research. Why is Isaacs so unknown? Why isn’t he recognized in the legal history canon for the breadth and insightfulness of his work? Why isn’t he recognized as an important legal realist as is clearly shown in his writings? These are hard questions to answer. Maybe the answer was that he was a professor at the Harvard Business School and not at a law school. Maybe it was

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14 Id. at 423-24.
19 Nathan Isaacs, Lecture on Legal History, 3 (Jan. 8, 1922) (on file with Baker Library Historical Collections, Harvard Business School, Box 1, File). See also, Nathan Isaacs, The Securities Act and the Constitution, 43 YALE L.J. 218 (1933) (criticized the Supreme Court for using fictions and stretching the words of the Constitution beyond their normal meanings).
because his articles were not very theoretical in nature. But, here is where I venture a supposition that rests upon the difference between theory and insight. Even though Isaacs’ writings were filled with insights, many prophetic in nature, on the surface they were relatively atheoretical in nature. This may be the reason that he was not recognized, as he should have been, by his contemporaries, while his insights remain important today and is evident in the historical record. An explanation for this is that his insights were based upon deep historical knowledge and not concocted theory.

This paper focuses on one of his insights—the cycle theory of legal development. This theory evolved through his in-depth study of Jewish and secular legal systems. This paper will focus on two implications of Isaacs work on cycle theory. First, it will examine the descriptive power of the theory. Second, it will suggest the commonality of Jewish law or legal tradition and the common law. The Jewish “common law” or responsa and other sources of Jewish law often dealt with issues of commercial and contract law that predated the common law. Isaacs explained the commonality of legal systems, especially in areas of commercial law, as the product of the commonality of basic, universal principles that underlie most developed legal systems. His contributions to Jewish law were also contributions to common law; his Jewish scholarship clearly informed his legal scholarship. He believed that cycle theory could be applied to most legal systems. However, the primary focus of his analysis was the cyclical nature of the Jewish and common law traditions.

The seeds of cycle theory are seen in Max Weber’s insight that the greater the contractual freedom the greater the level of coercion. In order to prevent freedom of contract from being the singular domain of the powerful, mandatory rules were needed: “A legal order which contains ever so few mandatory and prohibitory norms and ever so many ‘freedoms’ and ‘empowerments’ can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion.”

A status relationship is a bundle of mandatory norms or rules, at least in modern times, needed to protect the weaker parties to contracts. Another rationale for cycle theory is the importance of authoritative sources in legal decisions. The law or at least those who apply it are in a constant search for authority. This search is required by the internal component of law. The conceptual nature of law requires any change in the law to be supported by and within that conceptual system. Because of this, “law is typically backward-looking.” In essence, what is old is made knew. This assures that the law if not substantively, then at least superficially looks cyclical in nature.

Professor Weisbrod succinctly summarizes cycle theory as the view that “one should get away from an idea of legal history progress as movement . . . in one direction or another, and see ‘a kind of pendulum movement back and forth between periods of standardization and periods of individualization.’” Cycle theory of legal development seeks to discover universal principles

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20 Responsa translates into “answers.” Jewish scholars provided these answers when an answer was not readily apparent in the text of the Talmud. Isaacs “had what was probably the greatest existing collection of Rabbinic responsa.” Nathan Isaacs Papers,” Nathan Isaacs in Cambridge, Harvard Law School, Special Collections, Collected Papers, Vol. I at 5.

21 Weber at 191.

22 Watson at 119. See FN 50

23 Weisbrod, Way We Live, supra note 10 (quoting Isaacs, Standardizing Contracts, supra note 51, at 40).
of law while allowing for constant change in the content of the law. Isaacs asserted that those changes are accomplished through a predictable set of means that correlate to the different but recurring stages of how lawyers approach their legal system. He asserts that the framing of legal change through the prism of progressive evolution biases the interpreter toward a revisionist view of history in order to confirm the legal-ethical progression. Since the progressive theory of legal development has been accepted as canonical, legal scholars’ views of legal history are structured by this foundational premise. In sum, the progressive theory of legal development biases the historical record to support such a view.

Instead of Maine’s progression of status to contract, Isaacs’ historical research in Jewish and common law led him to believe that law developed in cycles from status to contract and contract to status. He believed that the history of the common, civil, and Jewish law is one of many such cycles. Isaacs’ referred to status-based legal regimes as ones that encompass standardized relationships and those that were primarily based on free contract as characterized by individualized relationships.

Wilson Huhn’s scheme in which legal reasoning progresses through three stages provides an example of cycle theory in microcosm. He uses the Dworkinian notion of “hard cases” as the impetus for change: “[E]xamination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law.” However, Huhn’s progression is ahistorical in that judges’ progress through the three types of legal reasoning in in singular cases.

From a historical vantage point all three types of reasoning play a role in the evolution of law. Formalism recognizes the internal component of law as a conceptual system based upon deductive reasoning. The major premise being the law, the facts of the case being the minor premise, and the rule application is the conclusion. The judicial decision is the application of an existing rule of law by its terms to a set of facts. This approach views the text—contract law rules and private contracts—as providing an internal means of interpretation. The next step in the process is the use of analogical reasoning. Pure formalism is the direct application of rule to case in which the reasoning is a purely conceptual and deductive. The civil law system with its direct appeal to a civil code, as the singular source of law, is an example of such rule to case reasoning. Analogical reasoning, allows for a broader view of the law and the case facts. On the conceptual side, the judge may look to different rules and apply them analogically to a novel case. But, it is on the factual side where analogical reasoning is most used in the common law. The judge searches previous case law to determine the proper precedent to apply to the case at hand.

26 Id.
28 Id. at 312, citing, Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. CHI. L. REV. 1179, 1179 (1999).
The final stage of legal reasoning is based upon the need for the court to look into the consequences of its rule applications. The need to apply a policy analysis to weigh the benefits and costs of a ruling “emerged from the British school of utilitarianism and the American philosophy of pragmatism.” However, Huhn’s analysis of legal reasoning is not diachronic in nature. His is a synchronic analysis of the judicial reasoning process in particular cases and not by implication a testament to the legal evolution from formalism to realism. His judicial reasoning is referencing the types of reasoning employed in hard cases:

When faced with new fact situations, the reasoning of the courts frequently follows a typical sequence. First, courts attempt to formalistically apply existing rules of law according to their terms to new facts. If the courts are unable to define the terms of existing rules so that they apply to the new case, then the courts draw analogies between the new situations and familiar ones, applying the existing rules by analogy. If these analogies break down, courts fashion new rules by means of a realistic balancing of policies and interests.

This summation of Huhn’s three stages of legal reasoning makes a number of things clear. First, even though it is not a theory of legal development it implicitly supports cycle theory. In different eras of legal development these three types of reasoning change in importance or in the degree in which they are “formally” utilized.

Grant Gilmore’s 1979 tome *Ages of American Law* and other scholarship dividing legal evolution into different eras provide moderate support for cycle theory. Gilmore traces the shifting of American legal reasoning from the late nineteenth century. Under a generally recognized schematic, the early and mid-19th century was an era of status-based contract relations that were regulated by fairness-in-the-exchange norms. The later part of the nineteenth century saw a shift to greater freedom of contract and less judicial interventionism into private contracts. This legal regime was characterized by the formalistic application of the rules of contract law. The general schema is that contract law shifts between ages of formalism and realism, law and equity, and status and contract. Beginning with the proto-Realists in the early twentieth century, and the advent of standard form contracting, the reality of bargaining disparities was recognized. The history of the twentieth century shows a continuous movement away from pure laissez faire-formalism to greater protections of weaker parties. The history at the turn of the twenty-first century has seen increased scholarship advocating for a greater amount of formalism in contract law application.

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29 Id. at 316.
30 Id. at 379
33 See Robert Hale, Coercion and Distribution in a Supposedly Noncoercive State, 38 POL. SCI. Q. 470 (1923) (courts enforcement of contract rights is inherently coercive; over interpreting freedom of contract masks the coercive power of the state)
34 The advocacy of a less contextual, more formal interpretation of contracts has been labeled “neo-formalism.” See Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988).
C. Evolutionary Efficiency

Judge Posner, among others, has argued that the common law is generally made up of efficient rules: “[T]he common law method allocates responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities.” 35 The argument is that common law judges, in applying rules, intuitively use an economic analysis. Thus, theoretically, the common law should become more efficient over time. One argument is that through a process of natural selection inefficient rules are adjusted or replaced by more efficient rules. 36 Professors Priest and Rubin have argued in favor of this evolutionary efficiency theory of legal development. 37 Rubin asserts that efficiency gains are mainly due to the types of cases that parties decide to litigate. Cases where both contesting parties seek to establish a precedent result in inefficient rules being worked out of the common law. In short, “efficient rules will be maintained, and inefficient rules litigated until overturned.” 38 Priest argues that even when parties decide not to seek or change a precedent, the common law still evolves toward efficiency.

Professor Rubin conditions his thesis by acknowledging that evolutionary efficiency is not uniform throughout the common law because it is party-dependent. 39 A further assertion that this implies is that evolutionary efficiency is not necessarily congruent with a gradual, steady evolution of the common law. Archaic or inefficient rules that are not worked out of the law in a timely fashion invite legislative or regulatory action. America’s best private law example is the enactment of its Uniform Commercial Code as a reaction to the worn out Sales Act of 1906.

Viewed through a comparativist perspective, the similarities in commercial and contract law across legal traditions, specifically the common and civil law, support the view that legal systems evolve in efficient ways. 40 High degrees of similarity likely reflect the fact that the ways of doing business are similar in most legal systems so the variation in rules should be relatively minor if law in general evolves efficiently to reflect real world transactions. Professor Baird has offered an excellent description of the explanatory power of an evolutionary efficiency theory of legal development:

35 Richard Posner, Economic Analysis of Law 98 (7th ed. 2007)
39 Id. at 51.
In addition, if evolutionary economics is correct, the law would operate best by allowing experimentation with respect to means, even if the law sets the ends desired and imposes certain constraints. But the law also requires a modesty to acknowledge its own limitations and a realization that the law is an imperfect expression that requires careful and constant reconsideration.\textsuperscript{41}

However, divergences in rules across advanced legal traditions weigh against the evolutionary efficiency theory. If contract rules found in the common and civil laws are opposed, then they cannot both be equally efficient. The emergence of different rules or divergences in the application of similar rules may still be efficient within the context of their given legal systems, although, efficiency theory would warrant otherwise.

From a contextual approach, it may be that different rules are efficient in different contexts. An example would be the diametrically opposed rules, found in the American Uniform Commercial Code (Code) and the United Nations Convention on Contract for the International Sale of Goods (CISG), on the right of buyers to reject defective goods. Section 2-601 of the Code states that the buyer has a right to reject goods if they “fail in any respect to conform to the contract.” This almost absolute right of a buyer to reject, even for minor defects, is appropriately called the perfect tender rule. In contrast, the CISG incorporates a pro-seller rule in which the buyer may only reject delivery of goods that meet the threshold of fundamental breach.\textsuperscript{42}

Diametrically opposed rules are subject to a comparative efficiency analysis. However, when placed in the context of domestic and international sales both rules can be seen as efficient. The perfect tender rule, on the surface, provides the buyer a weapon to reject goods that closely conform to contract requirements. This presents a moral hazard problem. Assuming the market price for the goods declines from the time of contract execution to the time of delivery, a buyer could use the rule as a “loophole” to get out of the contract in order to buy lower priced goods on the market. This epitomizes the notion of legal inefficiency. But, in the domestic context, such a rule is more efficient than the fundamental breach rule. First, the duty of good faith can be used to police such bad faith acts. Second, the disincentive of negative reputational effects dissuades merchants from such opportunistic behavior. Third, the efficiency of domestic shipment capabilities and the existence of secondary markets make rejection more of an inconvenience for the seller than a major financial setback.

In contrast, the fundamental breach rule is the more efficient rule for international sales transactions. The sending of goods to a stranger in a distant country greatly increases the risks to the seller if the buyer fails to take delivery. The risks of theft, the inability to find a secondary buyer, the costs of trans-shipping the goods, as well as the lack of marketability of customized or goods that are subject to deterioration make the pro-seller rule of fundamental breach the efficient choice. The buyer is in the best position to maximize the value of the defective goods and to prevent waste.

\textsuperscript{42} CISG Articles 25, 46(2), 49(1)(a), 51(2), 64(1)(a), \& 72(1).
The next section explores non-legal theories of development to address the nature of legal change. A model of gradual change interspersed with radical change—legal jumps or paradigm shifts—challenges the gradualism of change most often associated with common law development. This modified model recognizes that gradual change is inherent in the case method approach, while also recognizing that external shocks can result in rapid changes in the law.

III. NON-LEGAL THEORIES OF EVOLUTION

Evolutionary biology’s theory of “jumps” and Thomas Kuhn’s concept of paradigm shifts offer an alternative view of common law development. Common law development has often been characterized as gradual in nature. The rationale for the gradualism of common law change is that such change provides a level of continuity, certainty, and predictability needed for commercial transactions. Jay Gould’s evolutionary jumps and Kuhn’s paradigm shifts assert that the gradualism of evolutionary change and the incremental development of scientific theory—is not a true depiction of change. In reality, gradualism is interrupted at times by dramatic change. Gradual evolution, whether it is biological, scientific, or legal, is intermittently shocked by profound extrinsic change. In legal development, the impetus for radical change is an external shock to the relevancy of existing law. The Industrial Revolution provided such a shock. New types of contractual relations—distance selling, mass production, standard contracting—required dramatic changes in the law. In the United States, the evolutionary jump or paradigm shift is best represented by the enactment of the Uniform Commercial Code. The paradigm shift resulted in new theories and frameworks of contract law, such as neo-classicism and relational contract theory.

A. Evolutionary Biology

The traditional history of common law development is one marked by gradual change. This may have been true during the middle ages and through to the eighteenth century, but has not been true of the modern era of legal development. Alternatively stated, in a relatively static period of social change the change in law is also relatively static. However, dynamic or epochal change in society requires major changes in the law. The debate of whether the law is always in the lag position or whether law can initiate dramatic social-economic change is a sociological-legal question not a part of the current undertaking. The issue being explored here is the rate of legal change. The most rationale model would combine the case-by-case gradualism of common with intermittent paradigm shifts or legal “jumps.” The evolutionary theory associated with Stephen Jay Gould provides an appropriate analogy. Under the concept of “punctuated equilibrium,” evolution is characterized by long periods of little change, where a species is gradually transformed into another, with relatively short periods punctuated by rapid, cladogenesis or species splitting change.43 Richard Dawkins labeled Gould’s work with Niles Eldredge as “discrete variable speedism” in which gradual change is interspersed with evolutionary jumps.44

The application of punctuated equilibrium to legal development has recently been provided in the area of administrative law development. Professor Niles references Eldredge-Gould in stating that “evolution is much more often the product of dramatic quantum shifts over relatively short periods of time, than the kind of gradualism envisioned by Darwin.” 45 Niles asserts that the evolution of regulations follows a similar path. Examples include: the Sarbanes-Oxley Act in response to a series of corporate scandals and the Dodd-Frank Act following the 2008 financial crisis. These dramatic regulatory responses were premised by the view that the existing legal structures were incapable of preventing a reoccurrence. 46 These regulatory jumps are rare in a political process where political interest groups are generally successful in preventing rapid regulatory changes. Thus, a dramatic social-economic event is the means by which agency capture by interest groups are evaded to effectuate a substantial change in law. While, economic crises and business cycles have long focused regulatory jumps, Niles notes that this view of change is even more relevant in the information age where even less dramatic events can have a powerful societal impact and resulting regulatory shifts. 47 In this environment, the occurrences of rapid regulatory change become much less rare.

The legal formalist believes in an internally logical, enclosed body of law that can be directly applied in each case. This conceptual utopia is founded on another belief that every issue presented in real world cases has a pre-existing, ready-made solution in the law. This may be true in “easy cases,” but it is not true in novel or “hard cases.” The idea that courts should refrain from using extrinsic evidence in the interpretation of a contract or in the application of contract law is at best, in American common law, superficially acknowledged. In fact, some form of contextual evidence is used even in the so-called easy cases. Karl Llewellyn was a strong believer in the dynamic nature of commercial law. This dynamism is due to the grassroots-nature of commercial and contract law creation. In this way, the conceptual edifice of commercial law could be constantly refreshed by real world developments. The template of for a law that is in a constant state of re-creating itself was the courts willingness to consider contextual evidence. Thus, the law of practice—trade usage, commercial practice, and business custom—would enter and change the law through cases decisions. This constant renewal of law prevents the anachronism of non-changing or slowly changing law that characterized the abstract conceptualism associated with the legal formalism that existed in the early twentieth century.

Llewellyn, in writing Articles 1 and 2 of the Uniform Commercial Code, rejected the status quo contextualism that sociologist William Graham Sumner and attorney James Coolidge Carter advanced in the early part of the twentieth century. 48 The Sumner-Carter model of legal change

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46 Niles at 421.
47 Id.
48 WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906); JAMES COOLIDGE CARTER, LAW: ITS ORIGIN,
was simply the recognition and continuation of ancient customs. Under this model of change, context-driven change is slowed by the need to tie all legal change to evolving, but historically ancient customs. Sumner-Carter’s theory of change was not the dynamic change that Llewellyn attempted to incorporate into the UCC through his repeated use of the reasonableness standard. Reasonableness determinations are inherently contextual endeavors. In contrast, Sumner-Carter contextualism was diachronic in nature in that a rule adjustment had to fit within a historical context of customary common law. It is an evolutionary gradualism more akin to Darwinian-Spencerian theory of evolutionary change.49

For Llewellyn, Isaacs, and the other Realists legal development or change, especially in commercial law, was an inductive process with a forward-looking perspective.50 Where Sumner-Carter looked backward to ancient customs anchored by relatively static societal norms; the realist looked to existing commercial practice to constantly adjust rules to fit the present and looked to the consequences of such rule adjustments for future cases. While Sumner-Carter’s view of change was reconcilable to the deductive reasoning of legal formalism; the realists argued that the deductive process had to be complimented with inductive reasoning from facts and practice to prevent rules from becoming anachronistic.

B. Paradigm Shifts: Kuhnian Theory

American legal historian Alan Watson recognized the notion of a paradigm shift in his concept of “legal revolution.”51 Unlike a social revolution, the legal tradition remains, but the basis of the law changes. The idea of paradigm shifts is most popularly associated with the work of Thomas Kuhn. Kuhn, in his influential book The Structure of Scientific Revolutions, argues that a paradigm shift is when the basic assumptions within mainstream scientific theory are replaced.52

Just as Patrick Glenn notes the incommensurability in comparing legal traditions, Kuhn argues that competing scientific paradigms are incommensurable. As a result, the competing views of contract law cannot be reconciled and our view of contract can never be a purely objective one. In fact, the incommensurability issues of law are much greater than those in scientific evolution. Science is a pure fact-based undertaking. Once a new theory is scientifically proven there is no avenue to go back and argue for the truth of the older, disproved theory. Law as a value-laden creation is able to re-cycle theories of law, legal development, and legal reasoning. It is this distinction between science and law that lends credence to a cycle theory of legal development.

In Kuhnian terms, divergences between reality and law or legal theory lead to the development of a new paradigm. In contract, rules are changed and new standards asserted to close the gap. The paradox is that the revolution is not based on a sudden dramatic insight or event, but is based upon a steady build-up of changes in reality and law’s response or lack of response to those

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50 Id. at 435-39.
changes. As Llewellyn and Isaacs recognized in the 1920s, piecemeal changes in the commercial law of the time was no longer a rational course of action. The gap between business reality and existing rules necessitated a more sweeping change in commercial law. This recognition lead to a change in Llewellyn’s mandate from revising the Uniform Sales Act of 1906 to the drafting of a broad commercial code.

IV. JEWISH AND COMMON LAW EVOLUTION

Isaacs in studying the tension between tradition and innovation in Jewish Law saw legal change anchored in basic principles. The cyclical nature of legal development is anchored in this tension. At the same time, Isaacs was both “fascinated by universal legal ideals” and his belief that Jewish law was a living, growing law.53 The cyclical nature of legal development was not a chaotic one because it was guided by the application of basic principles to novel developments in society. Furthermore, Isaacs did not see the Jewish people or their law as sui generis.54 Another scholar notes that Jewish law was practiced within different societies, cultures, and religious or secular legal systems.

The extent that Jewish law was influenced by Roman, Greek, or Near Eastern legal systems and social norms are much debated.” For example, there is no biblical precedent for certain concepts, such as guardianship. “In general, Talmudic halakhah in matters of civil and criminal law must be read in the context of other legal systems of late antiquity. It has its distinctive features, deriving mainly from the attempt to harmonize the biblical text with actual practice, but at the same time shares much with the surrounding societies.”55

Isaacs ‘knowledge of the Jewish and civil law legal systems enabled him to place Anglo-American law in a broader context.56 Isaacs believed that the indexing of the responsa and the legal experience in the Jewish settlement in Palestine could add “a new chapter...to the influence of Judaism on Western Law.”57 Isaacs accepted that there were rigid periods in Jewish law, but he asserted that these periods were followed by flexible periods of equity.58 Crucially, he argued that these cycles occurred in all legal systems.59

54 Nathan Isaacs, Jewish Law in the Modern World, VI MENORAH JOURNAL 258, 262 (1920) [hereinafter Isaacs, Jewish Law in the Modern World].
56 See Weisbrod, Way We Live, supra note 10, at 786 nn.40-44 (analysis of the general character of Nathan Isaacs’ writings and career).
57 Isaacs, The Influence of Judaism on Western Law, supra note 1, at 236.
H. Patrick Glenn has noted that the impact of sources outside of the common law are often forgotten or ignored: “More distant traditions have also contributed greatly to one another, as with the talmudic and Islamic contributions to the common law . . .”60 The responsa tradition is the counterpart of the common law’s precedent and case-based system of reasoning. Largely analogical, a new case is processed through a search for applicable law. This search involves the analysis of previously decided, similarly situated cases. Analogical reasoning may be both deductive and inductive in nature. The search for similarly situated cases or fact patterns is inductive in nature (search for similar fact scenarios; search for legal “data”) while the recognition and application of the relevant law or rule is deductive (application of law’s conceptualization—principles, standards, rules) in nature. The reasoning process can entail the extension of existing case law or the analysis when applied to the case at hand may suggest a rule adjustment or the creation of a new rule, such as an exception. As in the common law, Jewish responsa exhibits both dimensions of analogical reasoning: “Case-based reasoning and explicit, principle-based conceptualization are closely, even inextricably, intertwined in rabbinc literature.”61

A. The Premise and Its Explanatory Power

Isaacs’ cycle theory as applied to Jewish law was premised on the idea of the existence of cycles between tradition and innovation. An alternative way of viewing cycle theory in Jewish law is his believe in universal principles while also recognizing the changing content of law. The cycle approach may be seen as the way the bet din restores harmony between contesting parties which at times involve novel fact situations not expressly dealt with by the Talmud.62 The degree of influence of Jewish law on the development of the common law can be debated.63 But, thousands of years of the Jewish Legal Tradition predates the common law and likely had some influence on common law development.64 Some argue that Jewish law remains a source of common law development: “American courts and legal scholars have increasingly turned to Jewish legal tradition for insights into various issues confronting the American legal system.”65 This should not come as a surprise since Jewish law is not only a spiritual conduit to the Jewish faith, it touches upon all aspects of life “as the Hebrew term implies, halacha offers a way of

61 LEIB MOSCOVITZ, TALMUDIC REASONING: FROM CASUISTICS TO CONCEPTUALIZATION 272 (Mohr Siebeck: Tübingen 2002)
62 The Talmud is an enormous compilation of teachings consisting of sixty-three tractates totally 523 chapters. It was compiled over a period of about eight hundred years. Talmud means study and refers to the massive collection of law produced by rabbinic Judaism from the oral traditions.
64 See Daniel G. Ashburn, Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions, 71 U. DET. MERCY L. REV. 295 (1994) (reviews American case law for express citations to Jewish law).
life—a path for all of life’s endeavors and activities.” Alternatively stated, there are a surprising amount of similarities between Talmudic law and modern law.  

B. Jewish Law Innovations

This analysis does not significantly take into account the pluralism of the Jewish legal tradition. Like the history of all legal traditions, the historical record is never monochromatic. “Today there is a growing recognition of the variety in Jewish belief and practice, together with a deeper appreciation of the contributions that the different schools have made to the content of Jewish life and thought.”

Isaacs saw Jewish law as dynamic in nature and not ending with the passing of the law to Moses at Mount Sinai. Alternatively stated, he did not believe the literal revelation of the five books of the Torah was in complete form at Mount Sinai. While applying cycle theory to secular legal systems, Isaacs also used it as a response to the Jewish Reform movement at the turn of the twentieth century. He believed in the importance of authority and fixed basic principles espoused in Orthodoxy. But, also saw Jewish law as dynamic in responding to real world developments and in the application of basic principles. Even though he was strict in the practice of the rituals of the Jewish faith, he did not approve of the unbending, static nature of some views of Orthodoxy. At the same time, despite his view of the flexibility of Jewish law, he rejected the Reform style’s complete rejection of the authority of the rabbinic tradition.

“God’s revelation of the Torah was an incomprehensible event that might be and was interpreted literally, philosophically, or mystically; but henceforth its growth and development were entrusted to human beings, for ‘the Torah was not given to angels.’” Thus the development of Jewish law, like any other legal system, was heavily influenced by customs external to the literal text of the Torah. “The power of the popular will, as distinct from the official Halakhah, is exemplified in the famous dictum ‘Custom sets aside the law.’” Custom was resorted to when there were competing interpretations among scholars of the meaning of the law and “when a set of exceptional circumstances prevailed” The binary relationship between a given society and law is made obvious from the variations of Jewish law after the Diaspora resulted in the exodus of Jews throughout Europe and Northern Africa:

The many differences in local background and experiences, coupled with the beliefs and desires of the common people produced the phenomenon of minhag, ‘custom,’ as distinct from din, ‘law.’ These minhagim reflected every conceivable

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66 Id. at 258.
67 See, e.g. Jed W. Junxowri, Talmudic and American Tort Liability: A Comparative Analysis, 10 Ariz. L. Rev. 483 (1968) (analyzes the similarities between Talmudic law and common law in the areas of negligence, strict liability, and the measurement of damages for personal injuries.)
68 Gords at 30.
69 Conversation with Samuel Flaks (July 12, 2011).
70 ROBERT GORDIS, THE DYNAMICS OF JUDAISM: A STUDY IN JEWISH LAW (Indiana Press: Bloomington 1990), citing B. Yoma 30a; B. Kiddushin 54a.
71 Gords at 105, citing P. Yebamot 12:1; B. Baba Mezia 7,1; B. Sopherim 14.
72 Gords at 105.
Even though much of the minhagim disappeared, mainly because they were out of touch with the times, between the Medieval and Modern Age, the importance of evolving custom and its influence on Jewish law has persisted. “The emergence of new practices and institutions embodying the operation of ethical principles under changing conditions was not an unbroken linear process. However,] the general direction was unmistakable. A new position once achieved was rarely abandoned; on the contrary, it proved the point of departure for another step forward toward the realization of the ideal.”

Another example of the dynamic nature of Jewish law is seen in the recognition of prenuptial contracts. In this recognition, we see the dynamic nature of the halakhic. Because of the rarity of divorce in ancient times the issue of providing for an ex-wife was not one of urgency. In the case of divorce, tradition required the divorcing husband to provide a sum of money or a “get.” As the incidents of divorce increased and the injustice of divorcing husbands not providing a get, the prenuptial agreement providing for the wife in case of divorce became to be recognized as an enforceable obligation. “New agreements developed such as the Agreement for Mutual Respect based on work of the rabbis of Morocco in the 1950s.” Such agreements have been “recognized by a number of rabbinical authorities including the Supreme Rabbinical Court of Jerusalem.”

C. Jewish Common Law

Isaacs did not see the Jewish people or their law as sui generis. Isaacs’s major insight was to recognize that Jewish law is a dynamic, living law responsive to moral and ethical concerns, much as he stressed the same attributes in American law. He argued that Jewish life “was developing the Halakah by applying it.” An example was the development of the practice known as hazakah in response to the scarcity of housing due to anti-Semitism and, at times, the segregation of the Jewish population. In order to prohibit Jews from competing for the same rental units Rabbis, sometimes, but not always, with reference to the Talmud, recognized the tenant-right or hazakah. This tenant-right prohibited one Jew from attempting to rent a unit currently occupied by another Jew. The result was an early form of rent control. Isaacs’s research on rent control in Jewish law was cited as precedent for the constitutionality of rent control in oral arguments before Judge Cardozo’s New York Court of Appeals and the U.S. Supreme Court where both courts upheld New York’s groundbreaking rent control law.

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73 Gordis at 106.
74 Gordis at 121.
75 Halakhah refers to the entire corpus of Jewish law.
76 Rachel Levmore, Rabbinical Responses in Favor of Prenuptial Agreements, 42 TRADITION 29, 44 (2009)
77 Id. at 42
80 See Edgar A. Levy Leasing Co. Inc. v. Siegal, 230 N.Y. 634 (1921); 810 West End Avenue v. Stern,
D. Jewish Law of Contracts

On scholar asserts “that many of our common law principles and many of the legal forms and customs which we find difficult to explain, trace their origin more or less directly to sources in the Written and Oral Law of the Jewish people.”\(^{81}\) One example is found in the law of contracts. The evolution of form and the doctrine of consideration are found in Jewish law. The “Jewish counterpart of the fixed form in Anglo-American law is Kinyan.”\(^{82}\) “The delivery by A to B of the article of use creates an obligation (Mahaeb) in B to deliver the money to A. This is the identical concept of contracts which prevailed in England in Glanville’s time.”\(^{83}\)

The creation of an executor obligation or current promise for a future transfer or payment is an example of the creativity and innovation of Jewish law. Multiple types of obligations (debt, barter, obtaining ownership by form) were combined to create the modern day contract “in the creation of the concept of Hiyub. This was accomplished by combining parts of the applicable and functional principles of the doctrines of Areb (surety), Uditha (debt), Kinyan (form) and Deikni (lien).”\(^{84}\) Jewish law also requires consideration to bind most contracts. However, unlike modern common law, Jewish law concerned itself with the adequacy of the consideration. Thus, if something was sold or bought for an amount higher or lower than one-sixths of its market value, then the agreement was void. Jewish law is similar to the common law on the rule that a detriment can be consideration and that past consideration could not bind a contract. The common law rule against penalties was predated by the Jewish principle of Asmakhta. “[It] is a rule which declares to be invalid an assurance made by one that he will pay or forfeit something in the event of his non-fulfillment of a certain condition, which, however, he is confident that he will carry out.”\(^{85}\)

The conceptualistic nature of rabbinic legal opinions in the area of contract\(^ {86}\) allows for a comparative analysis with the common law of contracts. This comparison, not surprisingly, shows a great amount of similarity. In early Jewish law, as in the early common law, formality was of great importance. However, the key roles of intent or consent, alongside the required formalities, are fully actualized from the early stages of Jewish legal development:

No matter how perfectly formalized a transaction may be, it will not be valid unless that form is supported by knowledge, intention, and consent—by Da’at. Conversely, Da’at without form cannot have any legal effect.\(^ {87}\)

The act of a person who does not know what he is doing has no legal validity.\(^ {88}\)

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\(^{82}\) Auerbach at
\(^{83}\) Auerbach at
\(^{84}\) Auerbach at
\(^{85}\) Auerbach at
\(^{86}\) Moscovitz at 27.
\(^{87}\) ARNOLD COHEN, JEWISH CIVIL LAW 228 (Feldheim Publishers: Jerusalem 1991)
In mercantile law, the rule is that ‘[a]ll formal acts of acquisition require the intention of the acquirer to acquire and the disposer to dispose . . . An act without intention is worthless . . . ‘\(^{89}\)

The second major element of common law contracts is the requirement of consideration. The same concept is found in Jewish law as a requirement for a binding contract. However, today, consideration in the common law is viewed primarily as a formality.\(^{90}\) In contrast, the relative equality of the consideration is required in Talmudic law. Despite these seemingly different approaches to consideration, a broader view allows for an understanding of the difference. First, Ona’ah was an early regulatory device in Jewish law to police fraud and overreaching. Profiting from a transaction is assumed under Jewish law, but something that rises to the level of unconscionability would be invalidated. Viewed as such, the Ona’ah can be seen as an early version of unconscionability that was first found in equity and later adopted in American law through Section 2-302 of the Uniform Commercial Code and by analogy to the general law of contracts. Historically, the focus on the fairness of the exchange was a core concept in the common law as late as the nineteenth century.\(^{91}\)

V. STATUS AND CONTRACT

P.S. Atiyah made the primordial case for the need for status-based protections in contract law. He lays the rationale on the tenuous nature of free choice. Those that are the beneficiaries of good fortune, such as intellect, wealth, and the best education available, are better equipped to take advantage of free contracting: “[T]he greater is the scope for the exercise of free choice, the stronger the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities.”\(^{92}\) The Coase Theorem’s argument that such inequities do not prevent entitlements arriving in the hands of those who can maximize its value rings hollow in the face of reality. In reality, the disparity between the wealthy and the poor continues to grow at an alarming rate. The assumption of no or low transaction costs that allow entitlements to flow to the most efficient user bears little relationship to reality. In fact, the inequality of transactional costs also continues to grow between the haves and have not’s. Often times contracting parties do not play on a level playing field. Transactional costs asymmetries flow from the baseline inequities alluded to by Atiyah. Status-based protections will grow in importance as the protector of last resort against these growing inequities. This Part will examine in more detail the relationship between status and contract.

\(^{88}\) Id. at 229. Examples of this is the Jewish laws adoption of the three major areas of incapacity which are also found in the common law: (1) intoxication, but only extreme intoxication (a contract with “someone who is drunk would be valid unless he had reached the stage of Lot’s drunkenness,” (2) mental incapacity, and (3) infancy law doctrine (“Neither a madman nor a minor is deemed to know what he is doing and is therefore deprived of legal capacity.”). Id.

\(^{89}\) Id. at 233, quoting, Aruch Hashulchan, Chosen Mishpat 189:2.

\(^{90}\) Schaefer at 84.


A. Status-based Relationships

A good example of the oscillation between status and contract is the employment contract. A look back at the last 500 years in Anglo-American law shows that the employment relationship has largely been recycling between the status and contract poles of Maine’s dichotomy. The 1562 English Statute of Laborers created a status-based relationship that provided protections to apprentices. It required advanced notice and a reasonable cause for a legal termination. A further protection provided by the Statute is the presumption that a hiring with no fixed term was an employment contract of one-year. In nineteenth century America, there was a paradigm shift that resulted in the recognition of the employment-at-will doctrine. The watershed event was the publication of Horace Wood’s 1887 treatise on the Law of Master and Servant in which Wood states:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate for whatever times the party may serve.

The importance of Wood’s *Treatise* is reflected in the fact that there were only a handful of cases that recognized employment-at-will. The real source of Wood’s declaration was not found in the law, but was a response to the Industrial Revolution and its need for a flexible, fungible workforce. The rejection of the special status of employees was evident in the United States Supreme Court decisions in the early twentieth century holding that even minimal employee protections were unconstitutional under the Constitutions’ Contract Clause. The court, in the 1915 case of *Coppage v. Kansas*, declared that “the employer and employee have equality of right, and any legislation that disturbs this equality is an arbitrary interference with the liberty of contract which no government can legally justify.” Even though, the Supreme Court position changed in the mid-1930s to allow workplace protections, such as maximum hour and child labor laws, the employment-at-will doctrine remained as the default rule for the employment relationship.

Toward the end of the twentieth century, the pendulum began to swing back toward status-based protections. First, all of the American states adopted a public policy exception to at-will termination. This exception holds that an employer may not discharge an employee, without liability, if the discharge was due to an employee act that was in furtherance of a public policy. Thus, discharging an employee who is absent from work in order to serve on a jury would be illegal under the public policy exception. Broader exceptions—implied-in-fact contract and

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93 Statute of Labourers, 1562 5 Eliz. 1, c.4 (Eng.).
94 IRA MICHAEL SHEPARD, PAUL HEYLMAN & ROBERT L. DUSTON, WITHOUT JUST CAUSE: AN EMPLOYER’S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE 16 (1989).
95 HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).
97 Coppage v. Kansas, 236 U.S. 1, 10-11 (1915)
breach of the duty of good faith—began to be recognized in some states.\textsuperscript{98} Even though at the present these exceptions have not been uniformly adopted, there existence in some states potentially changes the at-will default to a just cause legal regime.

The implied-in-fact exception liberally construes employment-related materials (company policies, employee handbooks) and employer representations, even when the employer expressly states it is an at-will relationship, as an implied-in-fact contract for just cause termination. The good faith exception is potentially the most expansive of the exceptions since it applies to all employment relationships. The basis of this exception is Section 205 of the Restatement (Second) of Contracts states that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”\textsuperscript{99} Under this exception, the motivation for discharging the employee becomes tantamount in determining the legality of the discharge. Thus, in an otherwise at-will relationship, if an employer discharges an employee to prevent full vesting of the employee’s pension funds, then that would be an illegal act of bad faith termination.

\textit{B. Standard Form Contracting}

It was in Isaacs’ \textit{Standardizing of Contracts} article that the term “standard” was first applied to contracts.\textsuperscript{100} He saw the rise of standard form contracting as challenging classical contract law’s unitary consent-based view of contract law.\textsuperscript{101} Professor Weisbrod more recently argued that \textit{Standardizing of Contracts} demonstrated the malleability of the consent principle: “All relationships can also be seen through the law of contracts—some more comfortably than others. By bending and twisting the idea of choice, most relationships can be understood as chosen, even if the choice is the refusal of an association.”\textsuperscript{102} Instead of simply creating fictitious models of consent to justify standard contracting as within the unitary theory, Isaacs saw the need for the development of specialized rules to regulate such contracts. Will theory’s view of contract, as a pure exercise of freedom, did no fit the imposition of standard terms by the stronger contracting part.

Isaacs charged that because of a lack of true consent by the form receiving party, especially when that party was a consumer, required a new categorization of those types of contracts with


\textsuperscript{99} It should be noted that the Restatement drew from the duty of good faith and fair dealing found in the Uniform Commercial Code’s Section 1-202.

\textsuperscript{100} Professor Snell traces scholarly concern for adhesion contracts to the work of Isaacs: “[Isaacs argued] that contract law should promote ‘freedom in the positive sense of presence of opportunity’ and that the law should strive toward ‘standardizing . . . the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining.’” G. Richard Shell, \textit{Federal versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on Mastrobuono}, 65 U. Cin. L. Rev. 43, n.109 (1996) (citing \textit{Standardizing Contracts}, supra note 51, at 47).

\textsuperscript{101} See FISHER, ET AL., supra note 1, at 77-79 (excerpting \textit{Standardizing Contracts} as an example of a realist analysis that highlighted the conflict between the will theory of contract and early twentieth century legal developments).

\textsuperscript{102} Weisbrod, \textit{Way We Live}, supra note 10, at 49.
their own status-oriented set of contract rules. He believed, like any principle or right, the exercise of such principles and rights could not be unfettered. There would always be a need for limitations, regulations, and exceptions. For Isaacs, standard form contracts were that line in the sand in need of a separate categorization, restrictions, and regulatory limits on enforceability. Standard form contract terms represented a “practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract.”

Despite the obvious diminishment of the quality of consent in standard form contracts, judges and scholars largely folded these types of contracts into the classical framework. Contract theory has failed to properly adjust by continuing to rationalize the enforcement of such contracts through the rubric of unitary contract principles. Nonetheless, Isaacs’ prophecy that status would make a major comeback in order to regulate such contracts was realized. Instead of adjusting contract law internally, except for the expansion of the doctrine of unconscionability in American law, the protections came from external sources through the enactment of consumer protection laws. It should be noted that Llewellyn was able to create status-oriented rules through the use of the merchant-consumer distinction and the adoption of the doctrine of unconscionability in the Uniform Commercial Code.

Isaacs recognized that the concept of freedom was a multi-dimensional concept that included positive and negative freedom. Superior bargaining power can lead to a form of negative freedom where the weaker party’s manifestation of consent is really an exercise of negative freedom. The negative nature of the consent is a creature of the weaker party’s belief that there is a lack of an alternative. The one-sidedness created by the use of superior bargaining power dictated the intervention of the law to reorder relationships initially created by contract in order to protect the weaker party against overreaching. Again cycle theory can be brought to bear to expunge the concept that contract law is purely private law. Instead, cycle theory shows that contract law cycles between its private autonomy (private) and regulatory (public) functions.

C. Problem of Anachronistic Rules

The cyclical progression of legal development is implied in Cotterrell’s “battle of ideologies.”

The competing ideologies seek to determine the rules and doctrines that reflect the given ideology. But, this is a perpetual battle in which winners and losers constantly change positions. Cotterrell notes that “legal history shows the discovery, loss and rediscovery of specific ideas and techniques over time . . .” This implies circularity of legal techniques and styles of legal reasoning. Part of this is due to societal developments that at times suggest the utility of a given type of legal thought and doctrine. A simple notion of progression is simply that law changes in

103 Isaacs, Standardizing Contracts, supra note 51, at 39.
104 Standardizing of Contracts, supra note 51, at 40.
107 Cotterrell at 170.
108 Cotterrell at 170.
response to changes in economic and social change. Cotterrell again notes that the interrelationship between society and law is not perfectly correlated. Cotterrell states that “it is extremely difficult to pick out clear linear patterns of development of legal techniques so as to able to relate them confidently and exactly to the existence or non-existence of particular forms of economic or social relationships . . . and kinds of transactions at specific moments in time.”

VI. AN ‘ALL OF THE ABOVE’ THEORY OF LEGAL DEVELOPMENT

The voluminous literature espousing different unitary theories of contract law has only proven the nonsensical nature of such a quest. An ‘all of the above theory’ of legal development recognizes that law has always and will always oscillate between different poles of a multi-dimensional matrix. This oscillation in contract law is due to the dynamic and complex nature of real world transactions. Contract law is dynamic and complex because of “the rich complexity of actual situations that involve full-dimensional people.” Thus, contract law’s theories and dichotomies possess explanatory power when taken as a whole. In the end, unitary theories fall to fully explain the is or ought of contract law. Dichotomies are inherently false due to the dynamic-complex range of contract transactions. The explanatory power of dichotomies, however, can be harnessed through the recognition that they form a continuum in which the law gravitates, over time, toward one pole or the either. This recognition is the essence of cycle theory.

A. Dynamic Nature of Law

The richness of the laws and oral traditions of Jewish law can be attributed to the nature of the Torah: “Because the laws of the Torah were enunciatory in nature and required a great deal of interpretation by the rabbis, a large body of oral interpretive teachings developed.” J. David Bleich rejects the abstract conceptualism of legal formalism and the idea of an absolute and static Jewish law: “Law is not metaphysics; nor is the Halakah.” The Jewish responsa or common law supports the premise that Jewish law is a dynamic, living law. The comparison of Jewish law and the common law is not a novel idea. Furthermore, the idea that both laws are dynamic in nature is commonsensical. Steven Nadel states that the “[c]omparison of the talmudic law’s regulation of the market place with that of Anglo-American legal system can enhance our understanding of law as a dynamic system of thought.” One commentator, in reviewing Palsgraf v. Long Island R.R. Co., traces the foreseeability standard to prove proximate cause in tort to Jewish law. He notes that throughout the commentary on the Talmud a person could

109 Cotterrell at 170.
111 Junxowri, supra note 483.
115 Steven B. Nadel, Palsgraf Revisited: A Comparative Analysis of the Unforeseeable Damages Exception to
not be held liable in negligence for an unforeseeable occurrence. The Talmud recognizes Gerama that holds that a tortfeasor is not liable for remote, unforeseeable damages. Nadel states that this use of Gerama is an example of Jewish judicial courts “expanding the application of Torah-based principles” to novel cases.

Sociology of law and legal history have demonstrated that the dynamism of societal development requires a dynamic, albeit lagging, development in law. But, the changes in the law are not always knee-jerk responses to socio-economic change. Contract law is ever changing to meet the needs of changes in society, but it is also guiding real world transactions. The law not only responds to new categories of novel fact-situations it also helps anchor transactions with certainty and predictability. Roger Cotterrell notes “if we are to treat seriously the hypothesis that law has an independent effectivity, the coercive power of the law must be treated primarily as the power of a political authority guaranteeing the law and, at the same time, directing and channeling its power through legal doctrine.” Thus, there is a binary quality between contract law and society. It is clear to see in legal history, especially in the past two centuries, contract law responding and changing to real world developments, such as distance selling, form contracting, inequality of bargaining power, evolution of the leasing and licensing of products and intellectual property, Internet contracting, creation of franchising, and the liberalization of international trade.

B. Complexity of Contract Law

The reason for the oscillation between status and contract and between the dominance of certain types of legal during different eras of legal development is that contract law is responsive to different values. The list of contract values includes private autonomy, certainty, fairness, and justice, among many others. A more static, less dynamic contract law would need to evaluate and reconcile these competing values into a normative composite. This is impossible due to the incommensurability of values. Patrick Glenn in comparing legal traditions notes that “[m]onistic theories are those which presuppose a single, ultimate value in the world against which all must be measured.” No single value, whether autonomy or fairness, can fully captures contract law. This insures that even in so-called freedom of contract and legal formalist eras there will remain a good measure of contract law that’s primary normative base is fairness concerns and some level of contextualism within the legal-formalistic infrastructure. Glenn notes, however, that within a given legal tradition the incommensurability of values is contained within a socio-political framework. This framework allows the legal system to function despite the incommensurability problem. The possible outcomes of the competing values “would all nest within the range of permissible choices which western life offers to us.”

The complexity of contract law can be simplified by viewing the norms that underlie its principles and rules as a tree with a number of sturdy branches. Or, in the alternative, the

116 Id. at 151.
117 Id. at 145.
118 ROGER COTTERRELL, LIVING LAW: STUDIES IN LEGAL AND SOCIAL THEORY 169 (2008).
120 Id. at 138.
American notion of the spoke and wheel approach to commercial law in which common law contracts make up the core or center and the spokes represent different sets of specialized body of rules for specific transaction types, such as sales of goods, leasing of goods, licensing of goods, and so forth. This approach to revision Article 2 of the CISG was rejected, but its general theme remains—that the complexity of contract law requires categorization and attendant specialized rules. The tree analogy would have the trunk of contract law being the core norms of freedom of contract, certainty, and predictability. These norms attach to all forms of contract.

A close look at different areas of contract law shows different ancillary principles at work besides the core norms. In sales law, an expediency principle underlies most of the law. The focus is not so much on performance or breach; the focus is the quick contracting and delivery of goods. The rules focus not so much on the parties, but on the goods. More specifically, sales law ancillary goal, beyond facilitating private autonomy, is the prevention of waste and the quick acquisition of substituted goods if needed. This is why we see the perfect tender rule in the American Uniform Commercial code and the fundamental breach rule in the CISG. Perfect tender allows for an expedient rejection of goods by the buyer. Due to market “fungibility” and an efficient domestic transport system, the buyer can quickly cover and the seller can quickly find a secondary buyer to transship the goods. In this way, buyer’s harm is partially mitigated, the cost to the seller is diminished, and the value of the defective goods is not lost. The CISG, with its pro-seller rule, accomplishes the same objective due to the different context of the international sale of goods transaction. Market fungibility and the low costs of transshipment are greatly diminished. The party that is best positioned to minimize the waste and harm caused by the delivery of defective goods is the buyer. Thus, the fundamental breach rule places the onus on the buyer to use or re-sell the defective goods. Both sales laws also minimize waste by places duties on the buyer to protect and preserve the defective goods.

In the area of government contracts, the ancillary principles of transparency and opportunity of access is what makes this body of law different than the general common law of contracts. With the common law of contracts as a backdrop, government bid regulations aim to provide access to government procurement contracts to a broader range of private contractors. The principle of transparency allows for greater access to procurement information for interested parties. Secondly, at the same time, government contract law’s intended goal is to increase the opportunity of access to smaller and medium-sized firms. This goal is rationalized under the principle of equality. Sometimes this goal is made explicit with policies that give minority group companies preferential treatment. Other times, the goal of equality is implicit in the bidding process, such as larger procurements are broken into numerous, smaller invitations to bid to allow smaller (minority-owned) firms the opportunity to bid.

In the area of letters of credit, bank guarantees, suretyship, and performance bonds the core certainty principle is the dominant contract norm. There is no ancillary principle per se, but there is the presence of ancillary parties. The assurance of payment or performance is external to the primary contract. In a sense, the uncertainty of payment or performance by a contracting party is resolved through the enlistment of a trusted third party. Because of this external source of certainty, a principle of integrity underlies the transaction. This principle relates to the integrity of the guaranteeing institution in honoring its obligations and the integrity of the contracting party that is signaled by its ability to obtain such a guarantee.
In the area of employment law and the limited liability company, the core principle of freedom of contract is almost uncontested. However, agency, fiduciary, and good faith principles place a check on that freedom. The American employment-at-will model holds that outside of a written employment contract or a collective bargaining agreement an employer may discharge an employee without notice for any or nor reason. Even in this bastion of American liberalism, the ancillary principles have begun to impact the law. Some states have carved out exceptions to the at-will rule. The implied-in-fact exception holds that even though an employment relationship begins at-will the employee may obtain just cause termination rights. The case of a loyal, long-term worker with firm specific skills is one where the principles of loyalty and heightened duties seem more pronounced. A second exception—implied-in-law or good faith exception—protects at-will employees from bad faith termination. The rationale here is quite simple—the duty of good faith is or should be implied in all contracts. This is an example where the Uniform Commercial Code as transformed the general law of contracts by analogical applications. The duty of good faith and fair dealing found in the Code has now implied in non-Code cases including: termination of franchises, employment, mortgage loan and foreclosures, landlord-tenant contracts, and so forth.

Long-term or relational contracts primary norm is the preservation of contract. Given the sunk costs and specialization of goods or services linked to such contracts the need for flexibility becomes paramount in obtaining a return on investment and the harm caused by the premature ending of a contract by a technical breach enforced by the terminating party. Additionally, in most such contracts, due to their long-term and often personal nature, the formal contract will fade or get lost in the context of the relationship. Within this relational-preserving context the ancillary principles of good faith, trust, and loyalty play important secondary influences on how the law is applied.

It is the complexity of contracts that lay the basis of a number of widely discussed dichotomies that will be discussed in the next section. It would seem that such complexity would argue for a contextual interpretive methodology. Due to the variation of transaction-types there is no general, overarching structure of meaning. Therefore, contextual evidence is needed to appropriate meaning from the matrix of particular parties, particular industries, and particular transactions types. Others have offered a diametrically opposed proposition that due to contract law’s complexity legal formalism is the means to bring order to chaos of processing such complexity through a unitary premise that contract is consent-based. Under such an approach, the parties have the responsibility to negotiate out of formalism, which involves the recognition of standardized terms and the formal application of contract rules. The same type of dialectic is explored in the next section’s review of some of contract laws theoretical dichotomies—formalism-realism, textualism-contextualism, and standards-rules.

C. False Dichotomies

Numerous dichotomies have been used to characterize law and legal reasoning. These dichotomies include the appropriateness of rules versus standards or the relative qualities of legal formalism versus contextualism. In the end, cycle theory shows that these are pseudo-

121 Charnay at 849.
dichotomies. It provides an explanation that scholars have always known that the eras of legal
development all incorporated relative amounts of both ends of the dichotomies. During the high-
water mark of laissez-faire economics of the nineteenth century America, there, in fact, was an
extraordinary amount of government regulation of private transactions. The move from legal
formalism, beginning in the 1920s to the present, to a more realistic, contextual jurisprudence
was far from a total success. Formality remains, and should remain, a part of our contact law
system. On the other hand, contract law is not a formalistic machine whose formal rules provide
single right answers. But, it does provide formal rules that provide a certain level of certainty
and predictability.

I. Formalism-Realism

The debate between formalism and realism is actually two debates. At the risk of confusion, the
paper deals with these separately. The first debate is whether it is possible to have a closed,
internally logical system that provides answers to all cases through deduction from law to case
(formalism). Realism represents a number of tenets in legal thought: (1) Rule skepticism that
rules really doesn’t decide cases; other factors decide cases, such as a judge’s predisposition and
the operative facts of the case. (2) Because rules cannot resolve hard cases, contract law is
largely indeterminate. This skeptical view argues that a judge usually reaches a decision first
and then looks to the law to rationale the decision. In sum, the meaning of formalism here is the
formalistic application of rules, and realism, its radical tenets aside, is the recognition that other
elements influence the judicial decision whether economic, policy considerations, or the creative
nature of a given judge in crafting new law.

The second debate, reviewed in the next section, involves the methods of interpreting contracts
and contract law. The question here is what sources of evidence are permitted in the
interpretation of a contract and the application of contract rules to that contract? Formalists hold
to the common law’s premise that places the written form intended as a final integration of the
parties’ agreement, as the primary source, if not the only of relevant evidence. The exceptions
are cases of contractual incompleteness and contractual ambiguity. If there is a gap in the
contract, then the court may apply a default rule. In the case, of ambiguity, extrinsic evidence is
used to determining the most plausible meaning—party intent or trade usage. If truly
ambiguous, then the contract can be viewed as a “gap” case. Contextualists argue that meaning
can never be completely found within the four-corners of the written contract. The key premise
here is that words may mean different things in different contexts. Therefore, the written
contract is just one piece of probative evidence, along with evidence extrinsic to the formal
contract. In the next section I refer to the second aspect of formalism as textualism.

Hanoch Dagan provides an succinct description of the formalist-realist divide: ‘Formalists
describe ‘the standard judicial function as the impartial application of determinate existing rules
of law in the settlement of disputes,’ while realists reject the idea that law is or can be ‘a self-

\[122\] William J. Novak, The People’s Welfare: Law and Regulation in Nineteenth-Century America
(1996) argues that the characterization of nineteenth-century America is a myth; shows the existence of the
pervasive use of government regulation)

\[123\] Hanoch Dagan, Rationality: Between Rationality and Benevolence: The Happy Ambivalence of Law
regulating system of concepts and rules, a machine that, in run-of-the-mill cases, simply runs itself.”\(^{124}\) The realists reject the thesis that law can be made determinate by simply equating law with doctrine. Instead they see law “as ‘a going institution,’\(^{125}\) and thus focus their attention on the dynamics of legal evolution, notably adjudication.”\(^{126}\)

A more interesting question is whether parties can contract into formalism by setting the rules of interpretation? Professors Schwartz and Scott have answered the question in the affirmative, at least, when it comes to business-to-business transactions.\(^{127}\) They argue that businesspersons primarily want certainty and that certainty requires the use of formalism in the interpretation of such contracts. They posit that firm-to-firm contracting is “conditioned on few states of the world, and maximizes joint gains in a wide variety of contexts.”\(^{128}\) The power of contextual evidence to uncover meaning is unnecessary in business contracts since the bargaining parties are willing to trade off a rare misinterpretation for the certainty of formalistic interpretation. There is no evidence that suggests that business contracts should be treated as a separate species in needed of different rules of interpretation. First, not all businesspersons are as sophisticated or possess equality of bargaining power that the Schwartz-Scott thesis assumes. Second, their model assumes, wrongfully I suggest, that business contracts and their meaning are immune from contextual influences. Another commentator rightfully suggests even if business parties intend to adopt formalistic interpretation that it would still “take a contextual . . . approach to determin[e] whether formalist principles apply”\(^{129}\) The better theory to explain the relationships between businesspersons is relational contract theory, which is contextual in nature.\(^{130}\) Its more plausible premises are that many such transactions are not one-shot affairs, but are part of an ongoing relationship. In addition, relational contract theory rejects the unitary model of business contracts that underlies the Schwartz-Scott thesis.

2. Textualism-Contextualism

The first dimension of formalism discussed above relates to the formalistic (purely deductive) application of existing law under the premise that existing doctrine provides the answers to all issues brought before the courts. Furthermore, the application process is a mechanical one that leaves little room for judicial discretion. In contrast legal realism asserts that material external to the law—novel fact patterns, public policy considerations, distributive justice concerns—also have a strong impact on judicial decision-making. These materials are used in the application of

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\(^{125}\) K. N. Llewellyn, My Philosophy of Law, in MY PHILOSOPHY OF LAW 183 (1941).

\(^{126}\) Dagan, Rationality, supra note at 196.


\(^{128}\) Id. at 618.


legal rules through the process of induction. This section analyzes the impact of these views on the process of interpretation of contracts and contract rules.

At the core of the debate between the textual (literalism) and contextual interpretive methodologies, is the recognition of evidentiary rules. Formalism’s mechanical-deductive model suggests that the interpretation process should be limited to the written contract if it was intended as a final integration. The parol evidence rule bars the introduction of extrinsic evidence that contradicts the written form, but allows extrinsic evidence in cases of gaps and ambiguity. Contextualism recognizes that words have numerous meanings in different contexts and that only through the admission of extrinsic evidence can the true intentions of the contracting parties be uncovered. The legal formalism said to rule the late nineteenth and early twentieth centuries is not a unique phenomenon. “Rabbinic explanations of legal rulings . . . are frequently formalistic and conceptualistic in nature. Such explanations often focus on the formal legal status of particular actions or objects . . . rather than on the assumed goals of the law (e.g., promoting equity).”131

But, it is in the cases—the fact patterns of the real world—whether in Jewish responsa or in the common law in which the limits of formalism are exposed. “There is reason to pause before concluding that collaborators' avoidance of contextualist doctrines means they prefer formalist interpretation. This is because the usual arguments for formalist interpretation struggle to explain why formalism complements parties’ choice to use escalation and arbitration. In their traditional formulations, the standard arguments for formalism—that formalism creates incentives for parties to draft clearer agreements (standardization theory) and that formalism allows informal governance to flourish (self-enforcement theory)—appear insufficient. Standardization theory fails because the endemic uncertainty that attends innovative activity precludes parties from creating standardized contractual terms that a court can readily recognize. Traditional self-enforcement theory fails because . . . interfirm collaborations are often neither lengthy nor repeated.”132

“Contextualism and formalism are inappropriate for enforcing generative contracts because of their similar assumptions regarding the role of intention in contract adjudication. Intention is the touchstone of contract enforcement. Over the years, the approach to interpreting intention has changed, from the 19th century's subjective approach, which parsed the parties' ‘meeting of the minds,’ to the twentieth century's objective approach. If contextualism at times strays from the traditional concern over original intent in order to promote contractual flexibility, discerning the parties' intentions still plays a central role. Thus, under either formalist or contextualist contract law, the court's ex post analysis is explicitly framed by its view of the parties' intent at the ex ante bargaining stage.”133

Differences between legal reasoning—formalism versus contextualism—exist at same time. Still, cycle theory can be used to measure trends in the pendulum between status-based and contract-based relationships recognized in the law during different legal eras. That said, these

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131 LEIB MOSCOVITZ, TALMUDIC REASONING 27 (Mohr Siebeck: Tübingen 2002).
132 Jennejohn, Collaborative Economy, supra note at 210.
133 Jennejohn, Collaborative Economy, at 224-25.
general doctrinal trends are partially created not only by societal forces, but also in the competing styles of legal reasoning or techniques of legal interpretation.

According to contextualists, the court itself, using informal business norms as a guide, should proactively fill the agreement's gap on behalf of the parties. On the other hand, modern formalists argue that a court asked to enforce an incomplete contract should follow a minimalist understanding of its role and refuse to extrapolate the contract's indefinite language to reach the unforeseen situation. Such an approach addresses incompleteness by creating incentives for parties to draft clearer agreements and/or because informal governance will compensate for the courts' minimized role.134

There are different shades of contextualism, just as they are less strict forms of formalism. In order to flesh out what contextualism means in the actual interpretation of cases, I will review three iconic cases—two American cases and an English case—that demonstrate the implications of contextualism. The cases are in chronological order Pacific Gas v. G.W. Thomas Drayage Co. (Pacific Gas),135 Nanakuli Paving & Rock Co. v. Shell Oil Co (Nanakuli),136 and Investors Compensation Scheme Ltd. v. West Bromwich Building Society (ICS v. Bromwich).137 All three cases showed the trend towards contextual interpretation of contracts.

In Pacific Gas, California Supreme Chief Justice Richard Traynor rejected a plain meaning approach dictated by legal formalism. The relevant clause in the case was an indemnity clause in which one party agreed to indemnify the other for “all” damages to property “arising out or in any way connected” to the performance of the contract. The indemnifying party argued that the words “all” and “any way” related only to damages to property of third-parties. A plain meaning approach would hold that “any” meant “any” and that “any way” meant damages caused to anyone’s property. The lower court held that since the indemnity clause had a plain meaning it could not admit any extrinsic evidence that would contradict its interpretation.

Traynor famously rejected the lower court’s argument by asserting that such a rule “would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.”138 Traynor’s assertion pretends the plain meaning rule was a novel creation by the lower court judge instead of a longstanding common law rule. Knowing this, Traynor acknowledges the parol evidence rule, which prohibits the use of extrinsic evidence to contradict a written, integrated contract. He then empties the rule of its prohibitory authority by stating: “Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose.”139 In essence, there is rarely the case were a word or phrase has a plain meaning. Therefore, even when the language is

134 Jennejohn, Collaborative Economy, at 176-77.
135 442 P. 2d 641 (Cal 1968).
136 664 F.2d 772 (9th Cir. 1981).
137 [1998] 1 WLR 896.
138 Id. at 644.
139 Id. at 645.
seemingly clear extrinsic evidence should be considered to determine whether the language is susceptible to an alternative interpretation to the plain meaning interpretation.

The *Nanakuli* case demonstrates how far contextualism can reach. The court states that “courts should not stand in the way of new commercial practices and usages by insisting on maintaining the narrow and inflexible rules of interpretation.” Unlike *Pacific Gas*, where there was at least a plausible argument for ambiguity, the issue in *Nanakuli* is a step into the abyss of linguistic nihilism. The case involved a long-term supply contract for the supply of asphalt paving materials. The contract expressly provided the supplier could unilaterally change the price without notice. The clause stated that the price shall be the “supplier’s posted price at the time of delivery.” Despite the clarity of the meaning, admitted to by the court, the court allowed the jury to consider extrinsic evidence. However, instead of overtly doing away with the ordering of evidence as Justice Traynor did the court when on a quixotic journey to work with in the formal rules of contract interpretation. The extrinsic evidence of note in the case was industry customs to price protect buyers in such long-term supply contracts. Price protection would require some advance notice or maintaining the price for jobs already contracted by the buyer using the price at the time of contracting. However, the court did not instruct the jury that the custom could trump the clear language of the contract, but was allowed to construe the custom or trade usage as being consistent with contradictory plain meaning of the express term!

Finally, the House of Lords, more recently, made the case for contextualism in *ICS v. Bromwich*. The comparison of the majority and dissenting opinions provide a stark example of formalistic and contextual methods of interpretation. The dissent provides the case for a legal formalistic interpretation. The interpretive issue in the case was the meaning of a reservation of rights phrase in an assignment clause. The reservation stated that assigning party reserved “any claim (either sounding in rescission for undue influence or otherwise).” Lord Lloyd makes the distinction between language that is “tolerably clear” and language that is a product of poor drafting. In the event that the language is tolerably clear the problem of poor drafting is not the subject for which a court is to use extrinsic evidence to uncover the parties’ true intent. He rejects the importance of the oddity of specifying undue influence and not the other common grounds for rescission. Lord Lloyd acknowledges the use of purposive interpretation methodology, but rejects its use here since the plan meaning of the clause can be ascertained. He disregards the phrase “or otherwise,” and asserts that the placing the phrase in question in parentheses can only be construed as a narrowing of the external phrase “any claim.”

Lord Hoffman works within the same rules of interpretation advanced by Lord Lloyd and, at the same time, breaks out of the structure of those formal rules of interpretation. First, he argues that Lord Lloyd’s interpretation of the parentheses is a misreading. The key phrase is “any claim” while the parenthetical phrase serves only an illustrative purpose and is not a limitation of the types of claims permitted under the reservation of rights. Second, assuming that Lord Lloyd’s interpretation is a reasonable one does not mean that there are no other reasonable interpretations that would be uncovered through a closer contextual analysis. Lord Hoffman provocatively states that: “The meaning which a document would convey to a reasonable man is not the same as the meaning of its words.” This is a clear rejection of legal formalism and classical contracts interpretive rules—four-corner analysis, plain meaning rule, and a hard parol evidence rule.

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140 *Nanakuli* at 790.
Lord Hoffman’s conviction that reasonable meaning is or should not be the determinate of actual meaning, taken to its extreme, is a rejection of the objective theory of contract. In fact, it is a partial rejection in that the reasonable person standard acts as a default rule where more than one reasonable meaning is available after a review of the contextual evidence. However, the first order meaning is an inter-subjective enterprise. This model can be seen in Article 8 of the Convention on Contracts for the International Sale of Goods (CISG) that states that the first order rule is that the prevailing meaning is the meaning “where the other party knew or could not have been unaware” of what the opposing party’s “intent was.”\textsuperscript{141} This assessment cannot be determined without an analysis of all relevant contextual evidence.\textsuperscript{142} The second order rule is the reasonable person or objective theory of interpretation. If the search of the evidence fails to uncover the inter-subjective meaning, then the meaning attributed by the reasonable person shall prevail.\textsuperscript{143}

Lord Hoffman’s rejection of plain meaning interpretation and embrace of inter-subjectivism is made clear when he quotes Lord Diplock in \textit{Antaios Compania Naviera SA v. Salen Rederierna AB}\textsuperscript{144} that “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”\textsuperscript{145} In essence, even in cases of ambiguity the meaning given by a reasonable person ought not to automatically prevail. This does not seem at all controversial since formalism allows for the use of extrinsic evidence in cases of ambiguity. However, Lord Hoffman goes on to say that a reasonable person determination (plain meaning plus extrinsic evidence) should not necessarily prevail when the extrinsic evidence fails to remove the ambiguity. In fact, the court is required to choose “between competing unnatural meanings” when the evidence shows that the parties did not intend to use the words in an ordinary manner.

Justice Traynor and Lord Hoffman’s rejection of literalism were not some Cardozo-like leap of faith. Instead, they were openly recognizing what had previously been a covert operation. The ambiguity determination is a decision of law and, as was saw in \textit{Nanakuli}, even the clearest of language can be dubbed an ambiguity when the true meaning is likely to be found in the arena of contextual evidence. In the end, contextualism in some degree has been a part of contract interpretation from the very beginning. Without it, laws dynamic nature would be greatly diminished and the divergence of law and commercial practice would soon render contract rules obsolete. It is the recognition of context—from large socio-economic change to the creation of new transaction types—that law progresses.

As noted earlier, both sides of contract law’s dichotomies, as discussed in the scholarly literature, appear throughout the recent history of the common law in some degree. Such balancing or blending that a continuum approach represents is demonstrated by the notion of “relational formalism.” Relational, as in relational contract theory, sees many business contracts as

\textsuperscript{141} CISG at Article 8 (1).
\textsuperscript{142} Contextualism is fully embraced in Article 8 (3): “due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties established between themselves, usage and any subsequent conduct of the parties.” This rejection of interpretive formalism is re-enforced in Article 11’s provision that a contract “may be proved by any means, including witnesses.”
\textsuperscript{143} CISG at Article 8 (2).
\textsuperscript{144} [1985] AC 191
\textsuperscript{145} Id. at 201.
embedded in a relational framework. This structure is contextual in nature and provides extrinsic evidence needed to attach the intended meanings to such contracts. Formalism suggests that parties, especially business parties, should have the onus to craft contracts that can be applied strictly under legal formalism. Relational formalism suggests that even in highly formalized contracts, such as financial instruments, context still plays an important role. It holds that strict formalism may have a pragmatic use in some types of contracts, but it can never be completely detached from the context of relationships.146

3. Standards-Rules Debate

Cycle theory lends insight to the rules-standards debate. The debate discusses the differences between rules and standards, as well as what each is best suited. Should standards remain the key competent of tort law? Are rules best utilized in areas such as contract law and government regulation? Cycle theory suggests that areas of law cycle between rules-based and standards-based legal regimes. Of course, most areas of law possess both standards and rules. However, over time standards through application to various categories of cases are re-casted into rules-based regimes. At times, a chaotic rules-based jurisprudence leads to a more simplified regime with the adoption of standards to compliment the codification of new rules. One commentator provides an example relating to statutes of limitation.147 At the turn of the twentieth century the standard of laches provided an equity-based approach that granted courts discretion in determining whether a cause of action had become stale. Laches was marginalized as states adopted fixed periods to bring timely claims under limitation statutes. As in all fixed rule systems, the bright line periods caused injustices in certain categories of cases. The courts and legislatures responded by extending limitation periods through the principle of tolling. However, tolling has resulted in the extension of limitation periods well past a reasonable time. This resulted in the passage of statutes of repose to fix the length of time that tolling can extend the right to sue.

In order to prevent injustice in certain categories of cases exceptions are crafted on to standards. As the number of exceptions increase, the greater the original standard will be contorted into a series of precise rules. Russell Korobkin notes that a hard and fast rule can lead to a standard by its purity diluted through the recognition of exceptions.148 In time, this leads to the development of factors analyses often used in the application of standards. The defining characteristic of a rule is that it can be applied by making a simple factual determination. However, as Korobkin notes, rules become more standard-like through the creation of exceptions. Cycle theory argues that rules and standards cycle between each other.149 When standards become too obtuse, courts

149 See also, Three Stages, supra note at 378-80:
see the need for more formalism and break the standard into fixed rules. When rules lag behind societal developments and become anachronistic, courts look to the development of a flexible standard in order to better cohere the law with real world practice.

4. Facilitation-Regulation

Contract law serves two functions—the facilitation of private ordering and the regulation of the abuses of private ordering. The long-standing debates (freedom-fairness, formalism-realism, textualism-contextualism, standards-rules) are a result of contract theories that favor one or the other of contract law’s functions. It is imperative to keep in mind that both functions are present in all eras of contract law development. An example is the characterization of the late nineteenth century as an era of pure freedom of contract, legal formalism, and laissez faire economics. In fact, private transaction where heavily regulated and government intervention in the marketplace were widespread.\textsuperscript{150}

In different eras, at least on the surface, calls for less or more regulation of private ordering take hold. This premise supports cycle theory as promulgated by Isaacs. The facilitation function focuses on freedom of contract’s role in fostering private initiate; the regulatory function focuses on the need to provide status-based restrictions on the abuse of freedom of contract. This is almost always the case following financial and economic crises. But, this variation in degrees of regulation is both external and internal contract law. Government regulation aims at correcting market failures. Internally, contract law though equitable principles and policing doctrines intercede at the case level to correct abuse—at least when found in categories of similarly-situated cases or fact patterns.

The pseudo-duel between pro-freedom and pro-regulation advocates is replicated in legal scholarship. The pseudo debate references the fact that contract law—whether in a perceived formalistic or realistic phase—is always a blend of its two functions. Contract law scholarship, whether at the doctrinal level to the heights of theoretical modeling for which American academe is infamous, is as cyclical in nature as the law itself. The old debates seem to be renewed through the creation of new labeling. Isaac Newton’s famous adage that all advances in knowledge are incremental for they are built on the “shoulders of giants” is shunted aside by much of today’s legal scholarship. Law scholarship is no different in that current contract scholarship is built upon work of the “lords of contract”—Lord Mansfield, Fredrick Pollock, Samuel Williston, Karl Llewellyn, Benjamin Cardozo, E Allan Farnsworth, Richard Posner, Ian

As rules evolve into standards, and as standards evolve into rules, a critical stage in the process is judicial experience in applying the law. For standards to become rules, the courts must draw formalist analogies between cases interpreting the standards, and for rules to become standards, the courts must draw realist analogies among the cases interpreting the rules. This pattern in the evolution of rules and standards supports the concept that formalism, analogy and realism are the stages of legal reasoning, and that analogy serve as the bridge between formalism and realism.

\textsuperscript{152} See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (argues that nineteenth century was characterized by ordinances, statutes, and common law restrictions that regulated every aspect of the marketplace) (1996).
Macneil, Patrick Atiyah, among many others. At times, however, especially at the level of high theory and abstraction, legal scholarship has become more like a spinning top on time of the heads of these giants. Recent comments by the Justices of the United States Supreme Court was critical of the modern law reviews’ penchant for high theory. Chief Justice Roberts states that “[w]hat the academy is doing, as far as I can tell is largely of no use or interest to people who actually practice law.”\textsuperscript{151}

A brief example is supplied by the return of formalism or neo-formalism to American scholarship. The absurdity of this deepening scholarship includes that lack of anything new, its irrelevancy to legal practice, and its elitism. We begin with realism and contextualism as the initial straw man followed by a predictable series of academic banter between the formalists (classical formalism), anti-formalist (realism), and more recently, the anti-antiformalists (neo-formalism. Indeed, there have been other variations, such as “relational formalism.”\textsuperscript{152} The anti-antiformalist seeks to discredit the Llewellynian-Mansfieldian view that a contract between merchants includes the background of business custom, trade usage, and prior dealings. Therefore, in interpreting the contract post hoc, these areas of contextual evidence need to be resourced for the true meaning of the contract. One strain of anti-antiformalist thought is that custom and usage are no longer determinant in a national-international marketplace. At best, there are sets of formalized structures provided by trade associations. Assuming this to be correct one commentator asks: “Does anti-antiformalism lead us back to formalism?”\textsuperscript{153} Not necessarily, the fact that some industries have formalized standards, practice, and contracts does not mean that the context of the particular parties, inside or outside of that industry, should all of a sudden become irrelevant.

D. Summary

Isaacs observed that John Dewey’s definition of logic included “any of the methods actually used to reach conclusions, whether they have been careless or extremely careful, whether they involve demonstration or only approximation of the truth sought.”\textsuperscript{154} The task for Isaacs was to reconcile the universality of natural law principles and the incoherency of legal conceptualism—the application of general principles to rapidly changing content. Despite the seemingly incoherency of melding natural law principles with changing legal rules, Isaacs believed that a successful mediation between the conflicting elements of general principles and changing content was possible. Isaacs looked to the pragmatic philosophy of Dewey to support the compatibility of fixed principles and changing rules.\textsuperscript{155} Put simply, different tasks require different types of logic. Depending on the immediate task, one kind of logic may depend heavily on intuition,

\textsuperscript{151} Adam Liptak, Keep the Briefs Brief, Literary Justices Advise, N.Y. TIMES (May 21, 2011).
\textsuperscript{153} Yovel, Relational Formalism, supra note . See also, Richard H. Pildes, Forms of Formalism, 66 U. Chi. L. Rev. 529 (1999).
while others may require a more mathematical rigor. There was no one ideal form of logic. Isaacs believed that this type of pragmatic reasoning had deep roots in the common law. His theory required flexibility in judicial reasoning.

Another discernible characterization of the cyclical nature of the common law is the role of equity within contract law. Judicial discretion is expanded during eras of equitable contract law. Isaacs asserted that “during periods of growth by equity, there is a great deal of discretion by judges.” From his perspective, this was a good thing. In the end, Isaacs was a true believer in judge-made common law and in the common law process.

VII. CYCLE THEORY REVISITED

The danger of a simplistic view of legal development is that it never provides the nuances of real understanding. The opinion that law, or at least the common law, is purely a progressive movement becomes a self-fulfilling prophecy. Isaacs firmly believed that the prism of progressive evolution biases the interpreter toward a revisionist view of history in order to confirm the legal progression. The next section examines the relationship between legal change and guiding principles.

A. Principles-Based Evolution

The common law is different among the common law countries. The differences and commonality of these different divisions may be explained by cycle theory. At a given time the differences in the systems are at different places in the cycle. Cycle theory as progressive evolution was possible, under Isaacs’ scheme, by the discovery of universal principles. These principles, some in tension with each other, guided the constant change in the content of the law. Thus, principles of historical dimensions provided the means to understand and predict legal change. Through a careful combination of fidelity to the past and, when necessary,

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156 Isaacs, Logics-And Logic, supra note 304, at pg. 2.
157 Isaacs, How Lawyers Think, supra note 4, at 556.
158 Id. at 557. See Isaacs, Logics-And Logic, supra note 304, at pg. 2, (citing Prohibitions del Roy 12 CO. REP. 63, 65 (1616) (Lord Coke’s classical defense of common law reasoning against the learned King James’s assertion that he could reason as well as the lawyers and therefore he could decide cases for himself).
159 Nathan A. DiMatteo, The Equitable Reformation of Contract Law
160 Another scholar summarized the overall philosophy of legal development that Isaacs saw in Jewish law: “[Judaism] contains a body of ethical teaching that reckons realistically with the limitations of human nature without losing faith in its potential.” ROBERT GORDIS, THE DYNAMICS OF JUDAISM: A STUDY IN JEWISH LAW 6 (Indiana University Press: Bloomington 1990)
161 See Isaacs, Common Law of the Bible, supra note 153 (claiming that a knowledge of the development of unwritten law takes the sting out of turn of the 20th century Higher Biblical Criticism).
162 For an example of analyzing the comparative efficiency of rules found in the common versus the civil legal systems see: Larry A. DiMatteo & Daniel T. Ostas, Comparative Efficiency in International Sales Law, 26 AM. U. INT’L L. REV. 371 (2011)
163 Nathan Isaacs, Preface [of planned book collection of his articles C.E. 1923], pp. 1-4 (NI Papers,
innovation and creativity, legal authorities have responded to these challenges by applying settled and known legal principles to resolve the questions accompanying new and unanticipated circumstances.166

Principles-based evolution is found in the analogical reasoning found in common law reasoning can be seen as recognition of the belief in underlying principles that cut across areas of contract law, and more fundamentally across disparate areas of law. The key to the dynamic nature of law is that principles can be found by deductive and inductive reasoning. On the conceptual side, underlying principles are used as a guide in applying existing law to novel cases. On the factual side, the recognition in a series of cases a novelty that is common in all leads to the categorization of those cases as of a specific “type” in which new rules or exception are needed. These needed new rules or exceptions are best created by the use of underlying principles in the common law as a guide. In Dworkinian terms, the new rules or exceptions need to fit within the overall framework of the given body of law.

Under Isaacs’ theory of legal development the court’s duty is to uncover underlying historical principles to guide them in rendering a decision in “hard” or novel cases. Isaacs’ student notes (from Dean Pound’s class) reveal that he was attracted to the work of German Philosopher Rudolph Stammler and his concept of "a natural law with a variable content."167 While Isaacs believed that law constantly changed to better serve the needs of society, he also accepted as a tenet of his legal faith that there is such a thing as justice as an ideal—an unchanging goal that is independent of the changing historical context, and that there are just different ways of approximating that goal in different historical contexts.168

Isaacs sought to use cycle theory to uncover underlying principles that provide the tension needed to make changes in the law. The use of underlying principles would guide the changes in law to make it more relevant and consistent.169 The tension between competing principles would have to be properly balanced in order legal reform to make law functional and just. In contract law, this tension is seen between the principles of private economy (freedom) and fairness or as the balancing contract law’s facilitative and regulatory functions. A blend of these seemingly intractable adversaries is found in all eras of the law. Isaacs’s cycle theory recognizes that changes in law are simply movements towards one of the competing core principles. In contract law, changes in society lead to greater protections of weaker contracting parties (status-regulation or towards free contracting.

B. Progressive-Cyclical Evolution

BLHC, HBS, supra note 9, Box 4, File: “Chapters in books possibly published, undated”).
166 Levine, supra note at 262.
167 Cf. CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 248 (1930) (quoting STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 124 (1911); STAMMLER DIE LEHRE VON DEM RICHTIGEN RECHTE 93, 196 (1902-07)).
168 Compare, Moscovitz at 339-42 (“the impact of explicit legal principles seems rather limited” in Talmudic reasoning).
169 Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form’, 100 COLUM. L. REV. at 120 (citing Isaacs, Standardizing Contracts, supra note, at 40-41 (emphasis added)).
Cycle theory should not be construed as a series of advancements and regressions in the development of the law. Dynamic law responds to societal changes and is inherently progressive in nature, but it is not a linear progression as enunciated by Maine. Instead, it is better described as a cyclical progression. Stated more philosophically, unregulated, freedom of contract is its own worst enemy. The 2008 world financial is a testament to freedom of contract’s abuses in the creation of new financial instruments that masked underlying risks. Inevitably, such abuse results in greater regulation of the free markets. This last crisis resulted in the creation of a number of status-based concepts from “too be to fail” bailouts of financial and insurance companies to the establishment of a new consumer protection agency to provide greater protections in consumer lending, such as fuller disclosures of the nature of financial instruments, the meaning of ratings, and prohibitions against predatory lending.

A simpler way of re-stating the cyclical nature of freedom and regulation of contract is to look at the grassroots of deal making. The engines that drive the free market include innovation and creativity. Entrepreneurs often gravitate away from heavily regulated transaction-types through the creation of new transaction types. A classic example is the evolution of the franchise contract. This new form of doing business allowed for the rapid expansion of business through the creation of independently owned franchise operations. The franchise paradigm was a creature of business-legal innovation and became a dominant form of doing business. The innovation of franchising was made possible by freedom of contract.

Initially, franchise contracts were lightly regulated—both internally by contract law and externally by government regulation. But, the nemesis of the forever search for additional profits, also known as greed, began to raise its ugly head. This was inevitable given the moral hazard problems that most franchise agreements present. In the early stages of a franchise, the interests of the franchisor and the franchisee are aligned. Their self-interests are one in the same—the launch of a profitable franchise operation. However, the more profitable the franchise the greater possibility that one of the parties will try to capture more profits or value. The franchisee may feel they no longer need the franchisor and see franchise costs and fees as a result of overreaching by the franchisor. The franchisee may take steps to avoid full payment of fees or elect to terminate the franchise agreement and go it alone. The more likely scenario is that of franchisor opportunism. This could include franchise encroachment (locating company operations in proximity to the franchised operation) and franchise termination (franchisor takes over franchised operation) often within the terms of its franchise agreement, such as termination with cause or non-renewal.

The above scenario of the abusive exercise of freedom of contract resulted in the law converting the relationship to a partially status-based one. Courts have used the doctrine of unconscionability to void overly one-sided franchise terms. More importantly, many states passed anti-termination statutes to protect franchisees from opportunistic terminations. If the amount of regulation, internally (contract law) or externally (government regulation) becomes pervasive, then entrepreneurs will seek ways around such laws by the use or creation of alternative transaction types. For example, the franchisor may shift to a limited liability company business model for each of its franchised locations. The freedom of contract rationale is the core concept underlying limited liability company law in the United States. The former
franchisor could draft an operating agreement in which it retains all powers as a member-manager. In the future, the abuse of such powers is likely to persuade courts to protect the minority investor by viewing the member-manager and minority investor as a status-based relationship. This process continues ad infinitum with freedom of contract providing the means for the creation of novel types of relationships and the law infusing them with status-based qualities.\(^{170}\) Isaacs, and subsequently Llewellyn, saw the status-based elements of the law as a grassroots creation in which community norms and practices become incorporated into the status-based relationship and subsequently recognized into law.

Ultimately, a theory of all of the above recognizes the complexity of contract law. The idea that law evolves progressively is supportable by the common sense thesis that law is dynamic and changes to meet the needs of changing societal conditions. In this way it can be said to be progressive. The cyclical nature recognizes that there are relatively stable dichotomies whose opposing poles fluctuate over time. Some of the dichotomies discussed here include formalism-contextualism (realism), status-contract, freedom-fairness, rules-standards, and deductive-inductive reasoning. What is also clear is that even when given ends of the poles become dominant in a given era of legal development its dominance is never absolute. Every era possesses both sides of the dichotomies.

The complexity of contract law also makes any monist theory of the subject incomplete. Different areas of contract law can be explained, at least in a partial way, by a single monist theory of contract law, but the whole body of contract can only be explained by a matrix of values.\(^{171}\) A theory of all of the above recognizes this diversity and draws insight from the different theories of contract law. An all of the above theory of contract law accepts most theories of contract law as viable and helpful as part of a composite.\(^{172}\) The many values of contract law underlie to some extent all of contract law. Only as a composite of different theories or principles can contract law be fully explained. However, individual areas or rules of contract reflect different “blends” of the competing values.

Cycle theory can be reduced to the idea that there is a re-mixing of contract law’s competing values from time to time. For contract law, the status-contract dichotomy possesses descriptive power in explaining the different eras of contracts, the sway of the underlying poles of contact law—freedom versus regulation—and the persistence of formalistic and contextual modes of interpretation. The dichotomy is a powerful tool to analyze the surface crust of contract law—its principles, standards, and rules. The scholar needs to dig below the crust to better understand the great dichotomies of contract law: rules versus standards; formalism versus realism, and, of course, autonomy enabling versus the regulatory role of contract law. The next few paragraphs provide some additional thoughts on these dichotomies and how they can be reconciled.

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\(^{171}\) Professor Glenn describes proponents of monist theories as “those which presuppose a single, ultimate value in the world against which all must be measured.” H. Patrick Glenn, Are Legal Traditions Incommensurable?, 49 AM. J. COMP. L. 133, 137 (2001).

For the idea of a normative composite approach see LARRY A. DI MATTEO, EQUITABLE CONTRACT LAW: STANDARDS AND PRINCIPLES (2000).
Contract law is a blend of competing values. It is those values that underlie the great debates of contract law. Contract law remains a blend of rules, standards and principles; of formalistic and realistic ways of legal thought; of literal and contextual interpretive methodologies; and of positive freedom to contract and negative freedom from contract.

Cycle theory remains a useful descriptive tool of the cyclical results of contract law’s debates and dichotomies. Legal sociologists provide insight of how legal cycles influences the internal working out of the obsolete-ism in the law and the impact of external or societal developments on the law. In the end, despite the explanatory power of cycle theory and status versus contract-based relationships model, any description or theory of contract cannot escape the curse of reductionism.

Comparativist scholar and historian H. Patrick Glenn work on incommensurability can be applied by analogy to the role of dichotomies in the common law. He states that “the nature of the western, philosophical enquiry relating to incommensurability, which is that of seeking incommensurable values ‘within a conceptual scheme, way of life, or culture.’ There would thus be incommensurabilities within western life, but they would all nest within the range of permissible choices which western life offers to us.\(^{173}\)

The cyclical and progressive nature of legal development is seen in Isaacs’ analysis of statutory evolution. The cyclical nature of statutory evolution is inherent in statutory and contract law rule writing. Just as a contract cannot foresee and predict all possible future developments, changes, and risks, statutory law and contract law only remains useful when they are updated to remain relevant to changes in society. If this revision of law is not properly maintained then the rules and principles that embody the law become anachronistic. The divergence of law and real world practice widens to a degree where the law no longer reflects contemporary business and life. The rules and principles no longer become predictive of decisions in cases. The rules or principles are ignored, subject to creative interpretation or fictions, subject to equitable modification, or get covertly replaced by operative rules.\(^{174}\) The concept of operative rules is essentially recognition of the divergence between the law as written and the law as applied.

Isaacs described the 1908 Uniform Sales Act as a standardized contract for both sales and purchases; which had the unfortunate draw back “that the contract made for us by the Sales Act might not under a given set of conditions be the contract that we would have been made for ourselves if the various points had been called to our attention.”\(^{175}\) We see here the notion of what is now called the hypothetical bargain.\(^{176}\) One can also argue that it is at this point we see

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\(^{173}\) Id. at 138, quoting, INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON 2 (R. Chang ed. 1997).


the beginning of a paradigm shift between classical to neo-classical contract law. Llewellyn’s subsequent incorporation of a contextual interpretive methodology was an attempt to continually refresh default rules. In this way, contract law’s default rules would continue to mimic the hypothetical bargain. Llewellyn and Isaacs believed that classical interpretive methodology, such as the plain meaning and four-corners of contract interpretive techniques, often failed to get to the true intent-true meaning of the contract.

This constant need to update law is captured nicely in Isaac’s cycle theory. The anachronistic nature of an area of law is confronted in a number of ways. The two most obvious include the use of judicial discretion or the enactment or revision of a statute. The recognition by legislatures of law’s obsoleteness motivates them to enact a statute to change and update the law. Once enacted, the courts strive to set initial precedents that accurately represent the meaning of the statutory text. However, over time novel (hard) cases challenge the ability of a court to apply statutory text to resolve such cases. Ultimately, the ill fit of rule to case is resolved by the creation of a rule adjustment either through the creation of an exception or through the creation of a judicial fiction. The recognition of and application of appropriate core principles can be used to guide a rule adjustment. At some point, however, basic principles can no longer be plausibly stretched resulting in anachronistic rules becoming so attenuated that the divergence between text and application becomes irreparable. At this point of obsolescence, either courts will have to dramatically disregard legal precedent or the legislature intervenes to re-state or reform what has become a chaotic jurisprudence of fictions and exceptions. The cycle then begins anew.

This is the story of the evolution of the Uniform Commercial Code. The law of sales had been mostly unified under the Sales Act of 1908. By the 1920s, with rapid industrialization and the spread of distant selling, it became obvious to Karl Llewellyn, Nathan Isaacs, and many others that the Sales Act had become anachronistic and was in need of a wholesale replacement. As the process toward reform advanced, it became obvious that a more expansive commercial code was needed to modernize and unify commercial law. But, it wasn’t until the early 1960s that the Uniform Commercial Code could be celebrated as the uniform law of the United States. The acceleration of more complex market transactions and even a greater acceleration of the technological means to carry out transactions has resulted in the enactment of new parts and revisions of old parts of the Code.

Isaacs’ paradigm calls on judges to continuously strive to uncover underlying objective principles and to understand their historical evolution. He sought to blend an evolving, but cyclical, organic theory of legal development with the pragmatism needed to make rules workable. To do this, the contingent nature of law must be contained within a framework of moral, political, and cultural values. Isaacs’ analysis of contract law and other areas of law reflected both a critical and positive theory of the legal order. This fusion of an organic natural law with the inherent indeterminacy of legal conceptualism moves beyond rules to a principle-based contextualism.
C. Concluding Remarks

At a time that most legal scholars in America believed in the unique worth of the common law, or at most also were interested in Continental legal systems, Isaacs was opening the way to viewing all legal systems in a radically egalitarian manner. Some of the important insights found in the scholarship of Nathan Isaacs includes: (1) The challenge presented by standard form contracting to classical contract law. (2) Importance of bargaining power in the development of contract law and the enforcement of contracts. (3) Positive-negative distinction with freedom of contract; freedom to contract vs. freedom from contract. (4) Cycle theory of legal development: from status (standardized relationships) to contract (individualized relationships), and back to status.

Isaacs’ cycle theory contests Maine’s linear progression of status to contract; better explains legal evolution; and explains the dynamic nature of law. From a law and society perspective the dynamism of law can be explained as a reaction to developments in society. These developments are conceptualized in the law; that conceptualization eventually lags behind further developments, and requires a re-conceptualization. In the area of legal reasoning, legal evolution oscillates between formalism and realism. The cycle is moved through grassroots changes in practice and subsequently, the law responds by adopting a custom or practice as law or intervening to regulate abuses due to inequality of bargaining power.

Cycle theory, if correct, has major implications on how we view legal development, most notably, on how we apply law. Plausible implications include: (1) The development of law is best undertaken through a contextual methodology of interpretation. (2) Although there is a powerful argument for the contingent nature of law, that contingency does and must work within a framework of moral, political, and cultural values. (3) Recognition of the dynamic and cyclical nature of law allows for negative critique along with a positive theory of development. This is largely done by grounding rules and adjustments to those rules in historically evolved principles. Thus, ‘hard cases’ are not decided by pure deduction, but by reference to underlying principles and equities. Isaacs’ belief in underlying principles could be described as a neo-Kantian, natural law approach. Cycle theory seeks to reconcile the universality of principles with the indeterminacy of legal conceptualism.

The beauty of Isaacs is that he is a bit of an anarchist in that he was anti-labeling of different schools of legal thought, whether Jewish or secular. Maybe, in the end, he was an embodiment of all schools of thought. Ultimately, the structure of cycle theory is overly simplistic, but it does support the dynamic nature of Jewish and the common laws. All legal regimes are never fixed, but are dynamic in applying basic principles to novel developments in society. But, legal dynamism, according to Isaacs is constrained or constructed though basic principles. Isaacs’s was a believer of interpretation based upon the spirit, not the letter of sacred texts; this applied to the Torah, Talmud, and the Constitution, as well as contracts.