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An All of the Above Theory of Legal Development

Larry A DiMatteo, *University of Florida*



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An 'All of the Above' Theory of Legal Development

Professor Larry A. DiMatteo
Huber Hurst Professor of Contract Law
Warrington School of Business

U N I V E R S I T Y O F W A R R I N G T O N

FIRST DRAFT

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AN 'ALL OF THE ABOVE' THEORY OF LEGAL DEVELOPMENT

Larry A. DiMatteo*

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AN ‘ALL OF THE ABOVE’ THEORY OF LEGAL DEVELOPMENT

Larry A. DiMatteo*

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. The intellectual starting point for this project is Nathan Isaacs’ unfinished work on a cycle theory of legal development.¹ His view of legal development takes issue with Henry Sumner Maine’s thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs’ review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.²

The legal evolution that Maine describes in *Ancient Law* is not directly challenged in this paper.³ Whether legal development is generally progressive begs the question. The nature of that progression as a movement from status to contract is what cycle theory rejects. Maine’s 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 better characterized as cyclical in nature. In sum, legal development is in 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.”⁴ Based upon this assessment, the development of contract law in the nineteenth to the twenty-first centuries will act as surrogate or example of legal development in general. The paper further argues that cycle theory collapses the dichotomies of contract law—formalism/realism, literalism/contextualism, facilitation/regulation, standards/rules—into an oscillating continuum between these opposite views of legal reasoning and views of contract law.

*Huber Hurst Professor of Contract Law, University of Florida, J.D. Cornell University, LL.M. Harvard University, PhD Monash University (Australia).

¹ See Larry A. DiMatteo & Samuel Flaks, *Beyond Rules*, 47 HOUSTON L. REV. 297, 305-311 (2010) (introduction to the works of Nathan Isaacs and cycle theory). For the unfinished nature of Isaacs theory see, Samuel Flaks, “Jewish Law at Harvard: Rediscovering Nathan Isaacs,” (unpublished manuscript) (on file with author) (hereinafter, Flaks, “Rediscovering Isaacs”). Flaks notes that after a barrage of articles in 1917 and 1918 testing cycle theory on different legal subjects (Jewish law, contracts, torts, and jurisprudence), Isaacs failed to further develop the theory. *Id.* at 29.

² Flaks states that “unlike Hegel or Maine, Isaacs did not believe that the historical development of law and society would reach an endpoint.” Flaks, “Rediscovering Isaacs” at 31.

³ HENRY SUMNER MAINE, *ANCIENT LAW* 126, 128, 168-9 (Beacon Edition 1963).

⁴ ROGER COTTERRELL, *LIVING LAW: STUDIES IN LEGAL AND SOCIAL THEORY* 171 (2008).

The idea of false dichotomies and non-monists views⁵ of contract theory may not be novel in nature but, their exploration through the prism of cycle theory presents a new perspective.

At a time that most legal scholars in America believed in the unique worth of the common law, 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) the importance of bargaining power in the development of contract law, (3) the positive-negative nature of freedom of contract, and (4) the view that legal development cycles between status-based and contract-based relationships.

Part II 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 process (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 III provides the framework for Isaacs’ cycle theory through the review and recognition of evolutionary patterns in Jewish law. Isaacs’ knowledge of Jewish law influenced his view of secular law. The similarities between English common law and Jewish common law (*responsa*) are breathtaking. This Part also explores the role of status in contract law. Part IV 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 V 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.

In the end, cycle theory provides a perspective in assessing other theories and debates in the contract law literature. Isaacs saw his theory equally applicable to the common, civil, and Jewish legal traditions. As such, this allows for the assessment of underlying commonalities. The Jewish Legal Tradition and the evolution of Jewish contract law show a familiar tension between the gradualism of Jewish legal thought and its responsive or dynamic nature. Isaacs saw the same tension at work in the common law. The references to Kuhnian paradigm shifts and evolutionary biology are used to explain that gradualism, whether in Jewish or common law, is at times interrupted by external shocks that result in legal jumps. This legal jumps or shifts, at any given time, may favor contract over status, formalism over realism, literalism over contextualism, facilitation over regulation, and rules over standards followed by a subsequent shift in the other direction. Any such shift is only a partial movement. Contract law will always remain a mixture of rules and standards, status and contract, and so forth. These shifts may occur gradually as the traditional view of the case-based system depicts or quickly in response to external shocks, such as the industrial revolution, Great Depression, and the Internet revolution.

It is from Isaacs’ historical knowledge of Jewish legal development that he saw the idea of a linear progression from status to contract as an illusion. The shift from equitable contract law of

⁵ See RICHARD A. HILLMAN, *THE RICHNESS OF CONTRACT LAW*.

the early nineteenth century to the rise of individualism at the end of the century was clearly a shift from status to contract. But, viewed historically it is but one of many such shifts. In broad strokes, in the last few centuries, status was represented by the fact that consideration in the early nineteenth century needed to be of relative equality in order to be legally sufficient. By the end of laissez faire, the individual's valuation of consideration expunged the need for fairness of exchange as a legal requirement for enforceability. However, this evolution to freedom of contract was never truly free as courts continued to intervene to remedy injustices. The twentieth century has seen a partial return to status with the consumer replacing the farmer or serf as a focus of paternalism. This shift is seen in Llewellyn's merchant-consumer distinction, the doctrine of unconscionability, consumer protection laws, and the principle of good faith.

In contract law, without attempting to attribute an idea to one tradition over the other, or to provide evidence of transplantation or borrowing, the *responsa* literature shows a great deal of commonality with the common law, and also, offers insight into how the common law developed. The fact that much of the *responsa* predated the development of similar rules, doctrines, or concepts in the common law can be explained in two ways: (1) The common law adopted or borrowed from Jewish law or (2) The case-based process of Jewish and common law inherently evolve in an efficient or, in the alternative, a fairness-centered way. The connection between the Jewish *responsa* and English common law is only relevant here for purposes of explaining Isaacs' notion of legal cycles.

This paper is intended to be broad in scope since its subject is a theory of legal evolution in which nuance is dissolved in the sweep of Jewish and common law history, the battle between status and contract, and the seemingly endless thrusts to and parries from the different sides of competing contract law theories and debates. A look at the contract law literature from the beginning of the twentieth century to the present reflect the legal cycles that Isaacs saw unfolding over the course of millennia. In the end, this paper abandons all tethering to theory, as such, in favor of an all of the above model of legal development characterized by cyclical and hopefully, progressive developments in law. The only support to be offered here is that legal development that reflects real world change is necessarily progressive in nature.

The broad scope of the paper's coverage warrants a brief preview of its six suppositions. First, any legal system that responds to developments in society is progressive by nature. Hence, Isaacs' steadfast view that Jewish law was a dynamic, living law provided the foundation for his formulation of cycle theory. Second, legal systems characterized by incremental or gradual change—common and Jewish law—are subject to legal jumps or radical change. The legal system can be jolted out of its incrementalism through external shocks—such as the Great Depression. Third, the commonality and parallelism of common and Jewish legal development supports the above two suppositions. Even though Isaacs used the study of Jewish as the means to develop cycle theory, he believed that all legal systems developed in similar ways. Fourth, Isaacs' cycle theory recognizes and explains the perpetual swings between status and contract-based relationships. In short, freedom of contract leads to abuse which is then corrected through status-based recognitions—either through judicial or legislative interventions. Fifth, cycle theory—premised upon the dynamic nature of law and, for the present paper, the complexity of contracts—renders the great contract law debates, such as formalism versus realism, mere replications of underlying pseudo-dichotomies. Sixth, the cornerstones of a revised cycle theory

emphasizes Isaacs' principles-based model of legal evolution, as well the recognition that any point in a cycle represents a place on a continuum in which various degrees of different types of legal reasoning are utilized.

II. LEGAL AND NON-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."⁶ An example is the perceived paradigm shifts from classical to neoclassical to modern (neoclassical plus relational) eras of contracts.⁷ 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 Henry Sumner Maine's progression thesis and Nathan Isaacs' cycle theory, as well as non-legal theories of evolution that focuses on the nature of change—gradualism versus radical change.

A. *Legal Theories of Legal Development*

Two theories of legal development are reviewed in this section. First, Henry Sumner Maine's famous progressive model of legal development involving the movement from status to contract-based relationships will be analyzed. Status is viewed here as a surrogate for paternalism and partiality, while contract is seen as advancing freedom, individualism, and equality. Maine's model also encompasses the gradualism most often associated with the common law's case-based system of change. Second, Isaacs' cycle theory, which sees unfettered freedom of contract leading back to status-based protections, will be reviewed.

1. 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. The gradual evolution of the common law is premised on its ability to develop in an internally logical manner. An alternative view of legal development focuses on the contingent nature of the law and sees not only gradual evolution, but also acknowledges "legal jumps" in response to seismic events, such as the industrial revolution, the Great Depression, the creation of the Internet, and the current financial crisis. The idea of legal jumps will be discussed in later in this Part. For now, the mainstream common law model is that of gradualism—law changing in response to societal change, but only at an incremental rate: "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

⁶ Cotterrell at 169-70.

⁷ Macneil, Gilmore, Kennedy.

of society.”⁸ 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.⁹ Weber is in agreement with Maine that freedom of contract is a recent development.¹⁰ In fact, Weber refers to earlier relations as “status contracts” and those that relate to a market economy as “purposive contracts.”¹¹ 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.¹² This view of society sees the necessity of free contracting to facilitate market transactions, but also recognitions an important regulatory role that cannot be left to the free market. 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.¹³ A status relationship is a bundle of mandatory norms or rules, at least in modern times, needed to protect the weaker parties to contracts.

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.¹⁴ 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.”¹⁵ He argues that the more economically advanced a society becomes the greater the importance of contracts and the greater the need for regulation.¹⁶ In sum, Durkheim does not see contracts and status as adversarial, but as the necessary products of the specialization of labor.

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

⁸ Steven R. Morrison, *Toward a History of American Criminal Law Theory*, 32 U. LA VERNE L. REV. 47, 83 (2010), citing and quoting, ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 8, 13 (Butterworth’s 2d ed. 2001).

⁹ See MAX WEBER ON LAW IN ECONOMY AND SOCIETY (trans. Edward Shils & Max Rheinstein, Harvard University Press: Cambridge 1966).

¹⁰ Weber states “that extensive contractual freedom which generally obtains today has not always existed.” Weber at 100.

¹¹ Weber at 105.

¹² Weber at 126 & 126 n.67.

¹³ Weber asserts that 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.” Weber at 191.

¹⁴ Durkheim states that “the division of labor produces solidarity . . . not only because it makes each individual an exchanger; it is because it creates among men an entire system of rights and duties which link them together in a durable way.” EMILE DURKHEIM, *ON MORALITY AND SOCIETY* 92 (University of Chicago Press: Chicago 1973).

¹⁵ *Id.* at 101.

¹⁶ *Id.* at 143.

provided to a minor in the common law. 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 be interpreted as a recognition that the importance of contracts relative to status increased with the creation of a market economy. This was due to the creation of many more types of transactions that didn't exist in earlier times.¹⁷

Frederick Pollock in his "notes" to the 1963 Beacon edition of *Ancient Law* surmises that "[s]tatus may yield ground to Contract, but it cannot be reduced to Contract."¹⁸ Isaacs begins his 1917 article on legal change with a quote from Maine's Ancient law in which he gives credit to Maine's recognition that law is brought into alignment with societal change through the use of legal fictions, equitable principles, and ultimately by new legislation.¹⁹ However, following Maine's quotation, Isaacs' asserts that the essence of his mission was to show that law cycles among different stages and that Jewish law provided a unique means for understanding these cycles: "It is submitted that the history of Jewish law furnishes another example that could have been used, one with a longer continuous development than even that of the Roman law—so much longer that by its study we are enabled to assign to Maine's three agencies their proper positions as mere arcs in a cycle, a constantly recurring cycle-of which Maine says nothing."²⁰ The next section begins the exploration of Isaacs' cycle theory.

2. Isaacs' Cycle Theory

Before proceeding, a brief introduction to Nathan Isaacs and his scholarship is needed. Isaacs was a prolific writer from 1914 to 1940.²¹ 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.²² 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*.²³ For tort buffs, he advocated early, in the twentieth century, the need to recognize strict

¹⁷ Weber at 100 ("with every extension of the market . . . legal transactions became more numerous and complex").

¹⁸ HENRY SUMNER MAINE, *ANCIENT LAW* 423 (Beacon Press: Boston 1963). Pollock gives as an example of the evolution of the personality of the corporation. Corporations as legal persons are status-based entities created by the State through incorporation statutes and regulated in many ways including the status-based concept of fiduciary duties. *Id.* at 423-24.

¹⁹ Isaacs' quotes Maine: "A general proposition of some value . . . may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, legal fictions, equity and legislation." Nathan Isaacs, *'The Law' and the Law of Change*, 65 U. PA. L. REV. 665, 665 (1917).

²⁰ *Id.* In Isaacs two-part essay on legal change he traces the cycles found in Jewish legal history: Biblical, Mishnah, Gerama, Post-Talmudic, and Present cycles. *Id.* & Nathan Isaacs, *'The Law' and the Law of Change (Continued)*, 65 U. PA. L. REV. 737 (1917).

²¹ For a fuller biography on Nathan Isaacs see Samuel Flaks, *Nathan Isaacs's Ideia: Legal Evolution and Parental Pro Se Representation of Students with Disabilities*, 46 HARV. J. LEGIS. 275 (2009) (provides biographical information and analyzes his cycle theory in relation to the Individuals with Disabilities Education Improvement Act of 2004 or IDEIA). See also, Larry A. DiMatteo & Samuel Flaks, *Beyond Rules*, 47 HOUSTON L. REV. 297, 305-311 (2010) (brief biological sketch).

²² For a fuller biographical review and a review of his work in Jewish literature see Flaks, "Rediscovering Isaacs," *supra* note 1.

²³ Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).

liability in certain areas of an industrialized economy.²⁴ 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. This agency model would become the standard interpretation of the 1926 American *Federal Arbitration Act*.²⁵ 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.”²⁶

As the above paragraph notes, 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 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.

A number of his articles, in these different areas of law, analyzed those subjects through his cycle theory of legal development.²⁷ This theory evolved through his in-depth study of Jewish and secular legal systems. One of the implications of Isaacs' work on cycle theory is its descriptive power to explain legal evolution in general. In his Jewish and secular literature, the commonality of Jewish law or legal tradition and the common law is pronounced.²⁸ The Jewish

²⁴ Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954 (1927); Nathan Isaacs, *Quasi-Delict in Anglo-American Law*, 31 YALE L.J. 571 (1922).

²⁵ Federal Arbitration Act, 9 U.S.C. §§ 1-15 (1926).

²⁶ 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).

²⁷ See e.g., Isaacs, *Standardizing Contracts*, supra note (status and contract) ; Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954 (1918)(fault-based and strict liability tort regimes).

²⁸ For examples of the commonality of Jewish and common law principles, as well as the use of Jewish law as a source of the common law and legal reform see Samuel J. Levine, *Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation*, 33 J. LEGAL PROF. 1 (2008) (Jewish law had achieved a degree of respect and legitimacy within American legal discourse); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U.L. REV. 165 (2000) (Jewish law and ethics might prove helpful in formulating, interpreting, and applying more well-considered and effective ethics codes for the practice of law); Samuel J. Levine Teshuva: *A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000) (path to teshuva may indeed

“common law” or *responsa*²⁹ 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.

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.’”³⁰ Cycle theory of legal development seeks to discover universal principles 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.

b. Eras of Legal Development

The mainstream scheme of eras of legal development has been mapped by numerous scholars, such as Grant Gilmore,³¹ Karl Llewellyn,³² Duncan Kennedy,³³ Morton Horwitz,³⁴ and Ian Macneil.³⁵ Beginning in the mid to late-1800s different modes of legal thinking—equitable, Grand Style, formalism, realism, and more recently, neo-formalism³⁶—have been associated with different time periods. Under a generally recognized schematic, the early and mid-nineteenth century was

provide insight in formulating a new perspective on the notions of punishment underlying American law); Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY’S L. J. 1037 (1998) (a student of the law who studies the Jewish legal system and the American legal system will observe many parallels in both substance and methodology; some legal scholars look to Jewish law to help resolve complex issues in American law).

²⁹ *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.

³⁰ Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777 (quoting Isaacs, *Standardizing Contracts*, *supra* note 51, at 40).

³¹ GRANT GILMORE, *AGES OF AMERICAN LAW* (1977).

³² KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

³³ Duncan Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH L. & SOCIO. 3 (1980).

³⁴ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992).

³⁵ Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW U. L. REV. 854 (1978).

³⁶ See Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–48 (2003); Scott and Kraus

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. Cycle theory sees contract law constantly shifting between ages of formalism and realism, law and equity, and status and contract. Beginning with the proto-Realists³⁷ in the early twentieth century, and the advent of standard form contracting, the reality of bargaining disparities was recognized.³⁸ 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.³⁹

b. Stages of Legal Reasoning

Cycle theory as continuum, explored in Part V, asserts that above forms of reasoning are present in various degrees in all eras of common law contracts. Roger Cotterrell again notes that the interrelationship between society and law is not perfectly correlated. He states that “it is extremely difficult to pick out clear linear patterns of development of legal techniques so as to be able to relate them confidently and exactly to the existence or non-existence of particular forms of economic or social relationships . . . at specific moments in time.”⁴⁰ Thus, at a fix point in time cycle theory is ahistorical in nature. Individual cases can be analyzed for traces of legal reasoning associated with different eras of legal development.⁴¹

From a historical vantage point, all of the historically recognized methods of legal 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.

³⁷ Robert Hale, Morris and Felix Cohen, Wesley Hohfeld, Nathan Isaacs, Roscoe Pound.

³⁸ 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)

³⁹ See supra note 33.

⁴⁰ Cotterrell at 170.

⁴¹ See Wilson Huhn, *Three Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILLANOVA L. REV. 305 (2003).

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.”⁴² However, the different stages of legal analysis are both diachronic and synchronic in nature. The different forms of legal reasoning are products of evolution and are used in various degrees in the case law disassociated from the historical record. Professor Huhn notes that modern day courts in novel cases often follow a standard typology of legal reasoning: [C]ourts attempt to formalistically apply existing rules of law according to their terms to new facts [;] then the courts draw analogies between the new situations and familiar ones, [and finally, if necessary, they] fashion new rules by means of a realistic balancing of policies and interests.”⁴³ The use of different modes of legal reasoning, associated to certain eras of legal development, support the idea of cycle theory. Cycle theory applied to legal reasoning recognizes that in different eras of legal development these types of reasoning change in importance or in the degree in which they are “formally” utilized, but any single type of reasoning is never fully extinguished.

A simple explanation for the cycles of legal reasoning 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.”⁴⁴ In essence, what is old is made new. This assures that the law if not substantively, then at least superficially looks cyclical in nature. 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.

B. Non-Legal Theories of Development: The Nature of Change

Evolutionary biology’s theory of “jumps” and Thomas Kuhn’s concept of paradigm shifts offer an alternative model of common law development. Common law development is 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 changes. 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

⁴² *Id.* at 316.

⁴³ *Id.* at 379.

⁴⁴ Watson at 119. See FN 50

resulted in new theories and frameworks of contract law, such as neo-classicism and relational contract theory.

1. Evolutionary Biology

The model of common law development as one marked by gradual change 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 law 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.⁴⁵ Richard Dawkins labeled Gould’s work with Niles Eldredge as “discrete variable speedism” in which gradual change is interspersed with evolutionary jumps.⁴⁶

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.”⁴⁷ Niles asserts that the evolution of regulations follows a similar path. Examples include the enactments of 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 of such events.⁴⁸ 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 is evaded to effectuate a substantial change in law. 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 cause

⁴⁵ Niles Eldredge & S. J. Gould (1972). "Punctuated equilibria: an alternative to phyletic gradualism" in *MODELS IN PALEOBIOLOGY* (T.J.M. Schopf ed. San Francisco: Freeman Cooper) pp. 82-115, reprinted in N. ELDREDGE *TIME FRAMES* 193-223 (Princeton: Princeton Univ. Press, 1985); STEPHEN JAY GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY* 775 (Cambridge, Massachusetts: Belknap Press 2002); STEPHEN JAY GOULD, *PUNCTUATED EQUILIBRIUM* 26 (Cambridge MA: Harvard University Press 2007) ("sudden jumps") Mayr, Ernst, "Change of genetic environment and evolution" in J. HUXLEY, A. C. HARDY & E. B. FORD, *EVOLUTION AS A PROCESS* 157-180 (London: Allen & Unwin 1954).

⁴⁶ RICHARD DAWKINS, *THE BLIND WATCHMAKER* 245 (Norton & Company 1996).

Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 *J. MARSHALL L. REV.* 353, 353 (2011).

⁴⁸ Niles at 421.

regulatory shifts.⁴⁹ In this environment, the occurrences of rapid regulatory change become much less rare.

2. Paradigm Shifts: Kuhnian Theory

American legal historian Alan Watson recognized the notion of a paradigm shift in his concept of “legal revolution.”⁵⁰ Unlike a social revolution, in a legal 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 occurs when the basic assumptions within mainstream scientific theory are replaced.⁵¹ Just as Patrick Glenn notes the incommensurability in comparing legal traditions, Kuhn argues that competing scientific paradigms are incommensurable. As a result, 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 legal-societal 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 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 led to a change in Llewellyn’s mandate from revising the Uniform Sales Act of 1906 to the drafting of a broad commercial code.

III. JEWISH-COMMON LAW EVOLUTION AND THE STATUS-CONTRACT DUALITY

Isaacs in studying the tension between tradition and innovation in Jewish Law saw legal change anchored in basic principles. In addition, the cyclical nature of legal development is a product of this tension. Isaacs was both “fascinated by universal legal ideals” and his belief that Jewish law was a living, growing law.⁵² 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*.⁵³ Another scholar notes that Jewish law was practiced within different societies, cultures, and religious or secular

⁴⁹ *Id.*

⁵⁰ ALAN WATSON, *THE EVOLUTION OF LAW* 118 (John Hopkins University Press: Baltimore 1985).

⁵¹ T.S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

⁵² Adolph S. Oko, *Nathan Isaacs*, pg. 1, *supra* note 12. See Adolph S. Oko and Nathan Isaacs, *Correspondence Between A Jurist and a Bookman*, IV *MENORAH JOURNAL* 73, 73-85 (1918) (calling for the writing of a history of Jewish Law).

⁵³ Nathan Isaacs, *Jewish Law in the Modern World*, VI *MENORAH JOURNAL* 258, 262 (1920) [hereinafter Isaacs, *Jewish Law in the Modern World*].

legal systems: “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.”⁵⁴ Isaacs’ knowledge of the Jewish and civil law legal systems enabled him to place Anglo-American law in this broader context.⁵⁵ 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.”⁵⁶ Isaacs accepted that there were rigid periods in Jewish law, but he asserted that these periods were followed by flexible periods of equity.⁵⁷ Crucially, he argued that such cycles occurred in all legal systems.⁵⁸

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 . . .”⁵⁹ 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 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.⁶⁰

A. *The Premise and Its Explanatory Power*

Isaacs’ cycle theory is premised on his belief that the changing content of law occurs within the framework of universal principles. 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.⁶¹ The degree of influence of Jewish law on the development

⁵⁴ Norman Soloman, “Making Talmud Intelligible,” Report of the Oxford Centre for Hebrew & Jewish Studies 82-83 (2008-09), Book Review of *The Talmud: A Selection*

⁵⁵ See Weisbrod, *Way We Live*, *supra* note 10, at 786 nn.40-44 (analysis of the general character of Nathan Isaacs’ writings and career).

⁵⁶ Isaacs, *The Influence of Judaism on Western Law*, *supra* note , at 236.

⁵⁷ Isaacs explained his theory of legal development in Jewish law and secular law in a two-part article: ‘*The Law and the Law of Change I and II*. Isaacs, *Law of Change I & 2* at 58 & 59.

⁵⁸ Nathan Isaacs, *Is Judaism Legalistic?* 7 THE MENORAH JOURNAL 259, 266 (1921), quoted in Elcanan Isaacs, *supra* note 8, at 587-588 (Isaacs’s description of cycles in Jewish Law).

⁵⁹ H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. COMP. L. 133, 140 (2001).

⁶⁰ Leib Moscovitz states: “Case-based reasoning and explicit, principle-based conceptualization are closely, even inextricably, intertwined in rabbinic literature.” LEIB MOSCOVITZ, TALMUDIC REASONING: FROM CASUISTICS TO CONCEPTUALIZATION 272 (Mohr Siebeck: Tübingen 2002)

⁶¹ 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.

of the common law can be debated.⁶² But, thousands of years of the Jewish Legal Tradition predate the common law and likely had some influence on common law development.⁶³ 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.”⁶⁴ 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, *halakhah* offers a way of life—a path for all of life's endeavors and activities.”⁶⁵ In the end, it is hard to ignore the surprising amount of similarities between Talmudic law and modern secular law.⁶⁶

B. Jewish Law Innovations

This current 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.”⁶⁷ 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.⁶⁸ 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 strictly adhered to ritual practice, 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.’”⁶⁹ Thus, the development of Jewish law, like any other legal system, was heavily influenced by customs external to the literal

⁶² See Rabinowitz, "The Influence of Jewish Law on the Development of the Common Law," in L. FINKELSTEIN, *THE JEWS: THEIR HISTORY, CULTURE AND RELIGION* 823 (3rd. ed., vol. I 1960).

⁶³ 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).

⁶⁴ 28 Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, With Application to the American Legal System: A Psychological and Philosophical Analysis*, LOY. L.A. INT'L & COMP. L. REV. 257, 257 (2006). See also, Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. LAW REV. 813 (1993); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997).

⁶⁵ *Id.* at 258.

⁶⁶ 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.)

⁶⁷ ROBERT GORDIS, *THE DYNAMICS OF JUDAISM: A STUDY IN JEWISH LAW* 30 (Indiana Press: Bloomington 1990) (hereinafter GORDIS, *DYNAMICS OF JUDAISM*).

⁶⁸ Conversation with Samuel Flaks (July 12, 2011).

⁶⁹ GORDIS, *DYNAMICS OF JUDAISM*, citing B. Yoma 30a; B. Kiddushin 54a.

text of the Torah.⁷⁰ “The power of the popular will, as distinct from the official Halakhah, is exemplified in the famous dictum ‘Custom sets aside the law.’”⁷¹ 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.”⁷² The binary relationship between a given society and law is made obvious from the variations of Jewish law after the Diaspora: “The many differences in local background and experiences . . . produced the phenomenon of *minhag*, ‘custom,’ as distinct from *din*, ‘law.’”⁷³ Even though much of the *minhagim* disappeared, as they mainly became obsolete, 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*.”⁷⁴

The dynamic nature of Jewish law is seen in the recognition of prenuptial contracts.⁷⁵ 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.”⁷⁶ Such agreements have been recognized by the Supreme Rabbinical Court of Jerusalem.⁷⁷

Isaacs’s insight was to recognize that Jewish law as 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.”⁷⁸ An example was the development of the practice known as *hazakah* in response to the scarcity of housing due to anti-Semitism and in the past segregation of Jewish populations. 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.⁷⁹ 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

⁷⁰ See Chad G. Marzen, *The Role of Custom in Canon, Jewish, and Islamic Law: Supplemented, Superseded, or Supplanted by Written Law?*, 35 OHIO NO. U. L. REV. 813 (2009).

⁷¹ GORDIS, DYNAMICS OF JUDAISM at 105, citing P. Yebamot 12:1; B. Baba Mezia 7,1; B. Sopherim 14.

⁷² *Id.* at 105.

⁷³ *Id.* at 106.

⁷⁴ *Id.* 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

⁷⁸ Samuel Flaks, Harvard Law School Legal History Colloquium (April 25, 2008), *quoting*, Letter from Henry Hurwitz to Adolph S. Oko, enclosed copy of Isaacs’s introduction of Louis Ginzburg’s Zunz Lecture in Chicago, pg. 4, (January 12, 1921), ASO Papers, MS 14, AJA, File 2, Box 8. See also, Nathan Isaacs, *Jewish Law in the Modern World*, 6 THE MENORAH JOURNAL 258, 262 (October, 1920).

⁷⁹ *Id.*, citing, Nathan Isaacs, *The Influence of Judaism on Western Law*, in THE LEGACY OF ISRAEL 377, 402 (Bevan, Edwyn Robert, 1870-1943, ed., 1927).

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.⁸⁰

C. *Jewish Law of Contracts*

Professor Auerbach 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 *Kinyan* is the delivery of an item from one party to the other creating an obligation or *Mahaeb* to pay the purchase price. "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 The common law rule against penalties was predated by the Jewish principle of *Asmakhta*.⁸⁵

The conceptualistic nature of rabbinic legal opinions in the area of contract⁸⁶ 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. The importance of consent to the formation of an enforceable contract is made clear by the following principles: (1) *Da'at* or the requirement of knowledge, intent or consent to be bound even when the required formalities are present,⁸⁷ (2) a person without legal capacity—the inability to

⁸⁰See *Edgar A. Levy Leasing Co. Inc. v. Siegal*, 230 N.Y. 634 (1921); *810 West End Avenue v. Stern*, 230 N.Y. 652 (1920), *Edgar Levy Leasing Co. v. Segal*, 258 U.S. 242 (1922).

⁸¹ Charles Auerbach, *The Talmud: A Gateway to the Common Law*, 3 CASE W. RES. L. REV. 5 (1951).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Asmakhta* 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." *Id.*

⁸⁶ Moscovitz at 27.

⁸⁷ ARNOLD COHEN, *JEWISH CIVIL LAW* 228 (Feldheim Publishers: Jerusalem 1991)

understand the nature of a contractual obligation—cannot not enter into a valid contract,⁸⁸ and (3) mere action without intent does not bind a party to a contract.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. Unlike modern common law, Jewish law concerned itself with the adequacy of the consideration. 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. 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. Viewed historically, the common law was more attuned to Jewish law as late as the nineteenth century when equality of consideration or fairness of the exchange was a core concept in the common law.⁹¹

D. Status-based Relationships

Patrick 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 contracting⁹² 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 modern day transactions. Transaction costs asymmetries flow from the baseline inequities alluded to by Atiyah. Status-based protections represent the protectors of last resort against these growing inequities

A good example of the oscillation between status and contract is the employment contract. The employment relationship has largely been recycled between the status and contract poles of

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 [I]n mercantile law, the rule is that “[a]ll formal acts of acquisition require the intention of the acquirer to acquire and the disponent to dispose An act without intention is worthless *Id.* at 233, quoting, Aruch Hashulchan, Chosen Mishpat 189:2.

⁹⁰ Schaefer at 84.

⁹¹ See James Gordley, *Equality in the Exchange*, 69 CAL. L. REV. 1587 (1981). See also, LARRY A. DiMATTEO, THE EQUITABLE LAW OF CONTRACTS (Transnational Publishers: Ardsley, NY 2000) (traces the equitable side of contract law from the twelfth century forward).

⁹² P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Atiyah asserts that “the 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.” *Id.* at 6.

Maine's dichotomy. The 1562 English Statute of Laborers⁹³ created a status-based relationship that provided protections to apprentices. It required advanced notice and a reasonable cause for a legal termination.⁹⁴ A further protection provided by the Statute was 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*. Wood stated that "a general or indefinite hiring is *prima facie* a hiring at will."⁹⁵

The importance of Wood's *Treatise* is reflected in the fact that at the time there were only a handful of cases that recognized employment-at-will.⁹⁶ 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 Constitution's 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."⁹⁷ Even though, the Supreme Court's 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's 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 breach of the duty of good faith—began to be recognized in some states.⁹⁸ Even though at the present these exceptions have not been uniformly adopted, their 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 that the employment is at-will) as an implied-in-fact contract for just cause termination. The good faith exception is 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* which states that "every contract imposes upon each party a duty of good

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).

⁹⁶See J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1973).

⁹⁷*Coppage v. Kansas*, 236 U.S. 1, 10-11 (1915)

⁹⁸ See Philip H. Dorff, Jr. & Hugh J. Cain, *The Evolution of the Implied Contract Exception to the Employment-At-Will Doctrine in Iowa: From Young to French and Beyond*, 43 DRAKE L. REV. 359 (1994).

faith and fair dealing in its performance and enforcement.”⁹⁹ Under this exception, the motivation for discharging the employee becomes tantamount in determining the legality of the discharge. For example, an employer that discharges an employee to prevent full vesting of the employee’s pension funds commits an illegal act of bad faith termination.

E. Standard Form Contracting

It was in Isaacs’ *Standardizing of Contracts* article that the term “standard” was first applied to contracts.¹⁰⁰ He saw the rise of standard form contracting as challenging classical contract law’s unitary consent-based view of contract law.¹⁰¹ Professor Weisbrod has argued that *Standardizing of Contracts* demonstrated the malleability of the consent principle: “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.”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 not 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 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 separate regulatory limits on enforceability. He argued that standard form contract terms represented a “practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract.”¹⁰³ 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 comeback¹⁰⁴ 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

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.

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, *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 *Standardizing Contracts*, *supra* note 51, at 47).

¹⁰¹ See FISHER, ET AL., *supra* note 1, at 77-79 (excerpting *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).

¹⁰² Weisbrod, *Way We Live*, *supra* note 10, at 49.

¹⁰³ Isaacs, *Standardizing Contracts*, *supra* note 51, at 39.

¹⁰⁴ *Standardizing of Contracts*, *supra* note 51, at 40.

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.¹⁰⁵ 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 any reasonable 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.¹⁰⁶ 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 and regulatory (public) functions.

IV. 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."¹⁰⁷ In the end, unitary theories fail to fully explain the "is" or "ought" of contract law. Dichotomies are inherently false due to the dynamic-complex range of contract transactions. Contract law's theories and dichotomies, however, possess explanatory power when taken as a whole. The explanatory power of dichotomies can be harnessed through the recognition that they form a continuum in which the law gravitates, over time, toward one pole or the other. 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."¹⁰⁸ 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 *Halakhah*,"¹⁰⁹ The Jewish *responsa* supports the premise that Jewish law is a dynamic, living law. The same can be said about the common law.

¹⁰⁵ Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 90 U. CHI. L. REV. 1513, 1519, n.30 (citing Isaacs, *Standardizing Contracts*, *supra* note 51, at 47).

¹⁰⁶ Isaacs gave the example of the insurance contract in which overreaching by the insurance industry led to government intervention. NATHAN ISAACS, *THE LAW IN BUSINESS PROBLEMS* 217 (The Macmillan Company, rev. ed. 1934). See Carol Weisbrod, *War, Insurance and Some Problems of Community*, 10 CONN. INS. L.J. 103, 111-13 (2004).

¹⁰⁷ WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATIONS FOR THE PROFESSION OF LAW* 6 (2007) (Carnegie Report).

¹⁰⁸ Junxowri, *supra* note at 483.

¹⁰⁹ J. David Bleich, *The Metaphysics of Property Interests in Jewish Law*, 43 TRADITION 49, 67 (2010).

The idea that both laws are dynamic in nature is commonsensical. The Talmudic law's and Anglo-American legal system's regulation of the market place demonstrate the dynamic nature of both traditions.¹¹⁰ One commentator, in reviewing *Palsgraf v. Long Island R.R. Co.*,¹¹¹ traces the foreseeability standard to prove proximate cause in tort to Jewish law.¹¹² He notes that throughout the commentary on the Talmud a person could 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.¹¹³ Nadel states that this use of *Gerama* is an example of Jewish judicial courts "expanding the application of Torah-based principles" to novel cases.¹¹⁴

Sociology of law and legal history have demonstrated that the dynamism of societal development requires a dynamic, albeit lagging, development in law. It is clear to see in legal history, especially in the past two centuries, contract law responding to real world developments, such as distance selling, form contracting, inequality of bargaining power, the evolution of the leasing and licensing of products and intellectual property, Internet contracting, creation of franchising, and the liberalization of international trade. 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's dynamism not only responds to new categories of novel fact-situations it also helps anchor transactions with certainty and predictability, and guide real world practice. Roger Cotterrell notes that law's "independent effectively" allows government authority not only to *guarantee* the law, but also as a means to channel "its power *through* legal doctrine."¹¹⁵

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. The recognition of business custom and trade usage allows for the conceptual edifice of commercial law to be constantly refreshed by real world developments. The courts willingness to consider contextual evidence is the basis for a model of legal development in which law is in a constant state of re-creating itself. 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.¹¹⁶ The Sumner-Carter model of legal change was simply the recognition and continuation of ancient customs. Under their model, context-driven change is slowed by the need to tie all legal change to evolving, but historically ancient

¹¹⁰ Arthur Gross Schaefer, *Differing Concepts of Adequate Consideration from Common Law and Talmudic Law: De Minimis versus Equity*, 2 NATIONAL JEWISH L. REV. 79, 80 (1987).

¹¹¹ 248 N.Y. 339, 162 N.E. 99 (1928).

¹¹² Steven B. Nadel, *Palsgraf Revisited: A Comparative Analysis of the Unforeseeable Damages Exception to Liability under American and Jewish Law*, 5 NATIONAL JEWISH L. REV. 145 (1990).

¹¹³ *Id.* at 151.

¹¹⁴ *Id.* at 145.

¹¹⁵ ROGER COTTERRELL, *LIVING LAW: STUDIES IN LEGAL AND SOCIAL THEORY* 169 (2008).

¹¹⁶ WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* (1906); JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* (G.P. Putnam's Sons 1907).

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.¹¹⁷

For Llewellyn, Isaacs, and the other Realists legal development or change, especially in commercial law, was an inductive process with a forward-looking perspective.¹¹⁸ 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. Complexity of Contract Law

The reason for the oscillation between status and contract and between the dominance of certain types of legal reasoning during different eras of legal development is that contract law is responsive to different values.¹¹⁹ 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.¹²⁰ No single value, whether autonomy or fairness, 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 and some level of contextualism within the legal-formalistic infrastructure.

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 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 containing the core norms of freedom of contract, certainty, and predictability. These norms attach to all types of contracts.

49 See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 436 (2004).

¹¹⁸ *Id.* at 435-39.

¹¹⁹ See Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the Law of Satisfaction'—A Nonunified Theory*, 24 HOFSTRA L. REV. 348 (1995) (contract law as normative composite).

¹²⁰ Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. COMP. L. 133, 137 (2001).

A close look at the different branches or 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 on the quick contracting and delivery of goods. The rules focus not so much on the parties, but on the goods. More specifically, sales law's 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 case of rejection. In this way, the harm to the seller is partially mitigated 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.

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, government contract law's also aims at increasing 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 case of a loyal, long-term worker with firm specific skills is one where the

principles of loyalty and heightened duties are more pronounced. The duty of good faith and fair dealing found in the Code has now been 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 the contractual relationship. 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 averting the harm caused by the premature ending of a contract by a technical breach. 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 relation-preserving context the ancillary principles of good faith, trust, and loyalty play important secondary influences on how the law is applied.

C. False Dichotomies

It is in the complexity of contracts, discussed above, that lays the basis for a number of widely debated dichotomies that will be discussed in this section. For example, due to the variety of transaction-types there is no general, overarching structure of meaning for contracts as a whole. Therefore, contextual evidence is needed to attribute meaning from the particular parties, particular industries, and particular types of transactions. However, others have offered a diametrically opposed proposition that due to contract law's complexity legal formalism is the means to bring order to chaos.¹²¹ Such an approach requires the full recognition of standardized terms and the formal application of contract rules. The parties have the responsibility to negotiate out of formalism.

Numerous dichotomies have been used to characterize contract law and legal reasoning including, formalism-realism, textualism or literalism-contextualism, facilitation-regulation, and standards-rules. Cycle theory shows that these are pseudo-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 nineteenth century America, there, in fact, was an extraordinary amount of government regulation of private transactions.¹²² 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 contract law system. It does provide formal rules that provide a certain level of certainty and predictability. On the other hand contract law is not a formalistic machine whose formal rules provide single right answers.

1. Formalism-Realism

The debate between formalism and realism is actually two debates. At the risk of confusion, the paper deals with these separately: formalism-realism in this section and literalism-contextualism in the next section. The first debate is whether it is possible to have a closed, internally logical

¹²¹ Charny at 849.

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)

system that provides answers to all cases through deduction from law to case (formalism). Realism incorporates a number of tenets in legal thought: (1) A rule skepticism that asserts that rules really don't decide cases; other factors decide cases, such as a judge's predisposition and the operative facts of the case and (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.

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, or the creative nature of a given judge in crafting new law—also have a strong impact on judicial decision-making. These materials are used in the application of legal rules through the process of induction

Hanoch Dagan provides a 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,’¹²³ while realists reject the idea that law is or can be ‘a self-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 certain types of contracting parties prefer formalism and whether they should be able to opt into a formalistic legal regime by incorporating formal, non-contextual rules of interpretation into their contracts? Professors Schwartz and Scott have answered these questions 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 their 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.

¹²³ Hanoch Dagan, *Rationality: Between Rationality and Benevolence: The Happy Ambivalence of Law and Legal Theory* 62 ALA. L. REV. 191, 196 (2010), citing, H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977). See also, Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611-17 (2007). H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

¹²⁴ ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 99, 110-12 (2d ed. 1989).

¹²⁵ K. N. Llewellyn, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 183 (1941).

¹²⁶ Dagan, *Rationality*, *supra* note at 196.

¹²⁷ See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544-48 (2003).

¹²⁸ *Id.* at 618.

However, there is no empirical evidence that suggests that businesspersons prefer formalism or that their contracts should be treated as a separate species of contract in need 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, 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 It is a more plausible premise that many business-to-business transactions are not one-shot affairs, but are part of an ongoing relationship. Relational contract theory rejects the unitary model of business contracts that underlies the Schwartz-Scott thesis.

2. Textualism-Contextualism

This section analyzes the impact of formalist versus realist views on the process of contract interpretation. 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 which places the written form, intended as a final integration of the parties’ agreement, as the primary source, if not the only source of relevant evidence. The exceptions are cases of contractual incompleteness and contractual ambiguity. 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. If there is a gap in the contract, then the court may apply a default rule. 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.

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.

At the core of the debate between the textual (literal) and contextual interpretive methodologies, is the recognition of evidentiary rules. Formalism’s mechanical-deductive model with the written contract at the center of the interpretive process advocates a hard parol evidence rule barring the introduction of extrinsic evidence. Contextualism recognizes that only through the admission of extrinsic evidence can the true intentions of the contracting parties be uncovered.

¹²⁹ Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 535–36 (2009).

¹³⁰ See Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881 (2000) (outlining the “core propositions” of relational contract theory).

The legal formalism said to rule the late nineteenth and early twentieth centuries is not a unique phenomenon. By analogy, Jewish law rulings “are frequently formalistic and conceptualistic in nature.”¹³¹ But, the impact of real world fact patterns in common law cases and in Jewish *responsa* have exposed the limits of formal-textual interpretations. This is because the usual arguments for formalist interpretation struggle to explain how formalism leads to uncovering the true meaning intended by the parties. One of the core law and economics arguments for formal interpretation of contracts is that such an approach creates incentives for parties to draft clearer agreements.” This incentive to write, clearer, more standardized contracts fails “because the endemic uncertainty that attends innovative activity precludes parties from creating standardized contractual terms that a court can readily recognize.”¹³² As noted earlier, the complexity and dynamic nature of contracting prevent the realization of formalism quest to incentivize more complete contracts, as well as highly efficient default rules.

The methods of legal reasoning represented by textualism versus contextualism are present to some degree in most judicial decisions. Courts often refer to trade usage and informal business norms in filling in the gaps of a contract. On the other hand, formalism is advanced when courts fail to enforce incomplete contracts. Such an approach is likely to increase the quality of contracts as parties learn from the failure of their contracts. In addition, informal remedies such as reputational effects may, in certain cases, be a more effective than a legal remedy.

a. Shades of Contextualism

There are different shades of contextualism, just as there are less strict forms of formalism. In order to flesh out what contextualism means in the actual interpretation of cases, a review of three iconic cases—two American cases and an English case—will be undertaken. The cases are in chronological order *Pacific Gas v. G.W. Thomas Drayage Co. (Pacific Gas)*,¹³³ *Nanakuli Paving & Rock Co. v. Shell Oil Co (Nanakuli)*,¹³⁴ and *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (ICS v. Bromwich)*.¹³⁵ All three cases show the trend towards the contextual interpretation of contracts.

In *Pacific Gas*, California Supreme Chief Justice Richard Traynor rejected a plain meaning approach dictated by legal formalism. The relevant contract provision 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 “all” means “all” and “any” means “any.” Therefore, the indemnifying party was liable for all 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

¹³¹ LEIB MOSCOVITZ, *TALMUDIC REASONING* 27 (Mohr Siebeck: Tübingen 2002).

¹³² Jennejohn, *Collaborative Economy*, *supra* note at 210.

¹³³ 442 P. 2d 641 (Cal 1968).

¹³⁴ 664 F.2d 772 (9th Cir. 1981).

¹³⁵ [1998] 1 WLR 896.

seemed to the court to be clear and unambiguous. He rationalized that this would deny the court access to evidence of the true intentions of the parties. Furthermore, it “presupposes a degree of verbal precision and stability our language has not attained.”¹³⁶ Traynor ignores the fact that the plain meaning rule was a longstanding common law rule. Traynor acknowledges the parol evidence rule, which prohibits the use of extrinsic evidence to contradict a written, integrated contract. But, he then empties the rule of its prohibitory authority by stating that “[a]lthough 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.”¹³⁷ In essence, there is rarely a case where a word or phrase has a plain meaning. Therefore, even when the contract language is seemingly clear, extrinsic evidence should be considered to determine whether the language is susceptible to an alternative (reasonable) interpretation to the plain meaning interpretation.

The *Nanakuli* case demonstrates how far contextualism can reach. Unlike *Pacific Gas*, where there was at least a plausible argument for ambiguity, the issue in *Nanakuli* is a step further 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 following Traynor in overtly ordering the use of extrinsic evidence, the court quixotically tried to work within 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. The court asserted 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*.”¹³⁸ However, the court did not instruct the jury that the custom could trump the clear language of the contract, but it was allowed to construe the custom or trade usage as being consistent with the 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 the 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 plain meaning of the clause can be ascertained.

¹³⁶ *Id.* at 644.

¹³⁷ *Id.* at 645.

¹³⁸ *Nanakuli* at 790.

He disregards the phrase “or otherwise,” and asserts that the placing of 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 parole evidence rule.

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 contracts. 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 one. 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.”¹³⁹ This assessment cannot be determined without an analysis of all relevant contextual evidence.¹⁴⁰ 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.¹⁴¹

Lord Hoffman’s rejection of plain meaning interpretation and embrace of inter-subjectivism is made clear when he quotes Lord Diplock in *Antaios Compania Naviera SA v. Salen Rederierna AB*¹⁴² for the proposition 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.”¹⁴³ 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.

¹³⁹ CISG at Article 8 (1).

¹⁴⁰ 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.”

¹⁴¹ CISG at Article 8 (2).

¹⁴² [1985] AC 191

¹⁴³ *Id.* at 201.

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 seen in *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, law’s 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 is captured by a continuum approach to be discussed in Part V. For now, an example of such blend is captured by the phrase “relational formalism.” Relational, as in relational contract theory, sees many business contracts as 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.¹⁴⁴

3. 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 transactions were heavily regulated and government intervention in the marketplace was widespread.¹⁴⁵

Different eras, at least on the surface, have been characterized as more or less regulative of private ordering. This premise supports cycle theory as promulgated by Isaacs. The facilitation function focuses on freedom of contract’s role in fostering private initiative; the regulatory function focuses on the need to provide status-based restrictions on 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 to contract law. External government regulation aims at correcting market failures. Internally, contract law though equitable principles

¹⁴⁴ See Jonathan Yovel, *Relational Formalism and the Construction of Financial Instruments*, 48 AM. BUS. L.J. 371 (2011).

¹⁵¹ 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).

and policing doctrines intercede at the case level to correct abuse—at least when found in categories of similarly-situated cases or fact patterns.¹⁴⁶

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, from doctrinal analysis to the heights of theoretical modeling is as cyclical in nature as the law itself. The old debates are 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. At times, however, especially at the level of high theory and abstraction, legal scholarship has become more like a spinning top on the heads of our legal giants. 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.”¹⁴⁷

A brief example is supplied by the return of formalism or neo-formalism to American scholarship. The absurdity of this scholarship includes that it lacks anything new, its irrelevancy to legal practice, and its elitism. We begin with realism and contextualism as the initial straw men followed by a predictable series of academic banter between the formalists (classical formalism), anti-formalist (realism), and more recently, the anti-antiformalists (neo-formalism).¹⁴⁸ The anti-antiformalist seeks to discredit the Mansfieldian-Llewellynian view that a contract between merchants includes the background of business custom, trade usage, and prior dealings. Under the Mansfieldian-Llewellynian model, in interpreting a contract ex post, these areas of contextual evidence need to be resourced to determine the true meaning of the contract. One strain of anti-antiformalist thought asserts 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?”¹⁴⁹ Not necessarily, the fact that some industries have formalized standards, practices, 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.

4. Standards-Rules Debate

Cycle theory lends insight into the rules-standards debate.¹⁵⁰ The debate discusses the differences between rules and standards, as well as what each is best suited to perform. 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 recasted into rules-based regimes. At other times, a chaotic rules-based jurisprudence leads to a more simplified regime with the adoption of standards to compliment the codification of new

¹⁴⁶ See W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* (1996); Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 *NEW ENG. L. REV.* 265 (1999).

¹⁴⁷ Adam Liptak, *Keep the Briefs Brief*, *Literary Justices Advise*, *N.Y. TIMES* (May 21, 2011).

¹⁴⁸ See generally, Richard H. Pildes, *Forms of Formalism*, 66 *U. CHI. L. REV.* 529 (1999).

¹⁴⁹ David Charny, *The New Formalism in Contract*, 66 *U. CHI. L. REV.* 842, 846 (1999).

¹⁵⁰ See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 24 (1992).

rules. One commentator provides an example relating to statutes of limitation.¹⁵¹ 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 the issue of the timeliness of 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.

The recognition of “exceptions” paradoxically precedes the changing a standard into rules and rules into a standard. The greater the recognition of exceptions to standards, generally to prevent injustice in certain categories of cases, exceptions are crafted on to standards, the more likely the original standard will be contorted into a series of precise rules. Alternatively, Russell Korobkin notes that a hard and fast rule can lead to a standard by its purity diluted through the recognition of exceptions.¹⁵² 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.¹⁵³ When standards become too obtuse, courts 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 flexible standards to better cohere the law with real world practice.

5. Summary: Cycle Theory and Legal Reasoning

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.”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

¹⁵¹ Wilson Huhn, *Three Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 376-77 (2003).

¹⁵² Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) (“Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.”); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“Rules aim to confine the decision-maker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.”).

¹⁵³ See also, *Three Stages*, *supra* note at 378-80:

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.

¹⁵⁴ Nathan Isaacs, Book Review, 34 HARV. L. REV. 222, 223 (1920) (Review of JOHN WILLIAM SALMOND, JURISPRUDENCE, Sixth Edition (1920)). See also Isaacs, *Influence of Judaism on Western Law*, *supra* note, at 385.

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.¹⁵⁵ Put simply, different tasks require different types of logic. Depending on the immediate task facing a decision-maker, the decision-maker may depend heavily on intuition while at other times she may utilize a more rigorous deductive approach.¹⁵⁶ There is no one ideal form of logic.¹⁵⁷ Isaacs believed that this type of pragmatic reasoning had deep roots in the common law.¹⁵⁸ Cycle theory recognizes and supports the development and use of different methods of legal reasoning. The dynamic and complex nature of contracts requires flexibility in judicial reasoning. Another discernible characterization of the cyclical nature of the common law is the role of equity within contract law.¹⁵⁹ Isaacs asserted that “during periods of growth by equity, there is a great deal of discretion by judges.”¹⁶⁰ 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.¹⁶¹

V. 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.¹⁶² That said, Isaacs’ rejection of linear progression was not a rejection on the need for law to develop in a generally, but as importantly, in an orderly manner. He believed that historical principles were the means by which legal evolution could be guided to reflect core values and, at the same time, maintain its relevancy. The role and application of long standing principles in legal evolution is the unfinished part of cycle theory. The final sections examine the relationship between legal change and guiding principles.

A. Principles-Based Evolution

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

¹⁵⁵ See John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924). See JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 410 n.101 (1947).

¹⁵⁶ Isaacs, *Logics-And Logic*, *supra* note 304, at pg. 2.

¹⁵⁷ Isaacs, *How Lawyers Think*, *supra* note 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 DiMatteo, *Equitable Reformation*, *supra* note.

¹⁶⁰ Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339, 345 (1923).

¹⁶¹ 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)

¹⁶² 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).

understand and predict legal change.¹⁶³ “Through a careful combination of fidelity to the past and, when necessary, 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.”¹⁶⁴ Principles-based evolution is found in the analogical reasoning used in common law decision-making. Such reasoning recognizes underlying principles that cut across areas of contract law, and more fundamentally across disparate areas of law.¹⁶⁵ 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 as novel 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 use of the 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.¹⁶⁶

H. Patrick Glenn’s work on incommensurability provides an analogy to the tension between cyclical change and guiding principles. 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.”¹⁶⁷ Glenn recognizes the role of an overarching framework despite the problem of the incommensurability of values. In the current undertaking incommensurability is represented by dichotomies and the overarching framework is represented by guiding principles.

Under Isaacs’ theory of legal development the court’s duty is to uncover underlying historical principles to guide them in rendering decisions in 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.”¹⁶⁸ 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 different ways of approximating that goal in different historical contexts.¹⁶⁹

¹⁶³ Nathan Isaacs, *Preface* [of planned book collection of his articles C.E. 1923], pp. 1-4 (NI Papers, BLHC, HBS, *supra* note 9, Box 4, File: “Chapters in books possibly published, undated”).

¹⁶⁴ Levine, *supra* note at 262.

¹⁶⁵ The common law has evolved differently among the different common law countries. These different versions of the common law may be explained by cycle theory. The differences in the systems are due to the fact that they are at different places in the evolutionary cycle. 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)

¹⁶⁶ See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

¹⁶⁷ *Id.* at 138, quoting, INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON 2 (R. Chang ed. 1997).

¹⁶⁸ *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)).

¹⁶⁹ Compare, Moscovitz at 339-42 (“the impact of explicit legal principles seems rather limited” in Talmudic reasoning).

Isaacs sought to use cycle theory to uncover underlying principles. The use of underlying principles would guide changes in law to make it more relevant and consistent.¹⁷⁰ The tension between competing principles would have to be properly balanced 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 of contract law's facilitative and regulatory functions. Isaacs's cycle theory recognizes that changes in law are simply movements toward 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

Cycle theory should not be construed as a series of advancements and digressions 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 crisis 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.¹⁷¹ This last crisis resulted in the creation of a number of status-based concepts from "too big 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 the 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 businesses 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 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

¹⁷⁰ 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)).

¹⁷¹ The federal government responded to the crisis by enacting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat 1376 (July 21, 2010).

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.¹⁷²

The franchise scenario involving 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 or a series LLC.¹⁷³ 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.¹⁷⁴ Isaacs, and subsequently Llewellyn, saw the status-based elements of the law as a grassroots creation in which community norms and practices are molded to create status-based relationships which are subsequently reflected in legal change.

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. What is also clear is that even when given ends of the poles become dominant in a particular 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. However, even in those areas, the rules and standards reflect different “blends” of competing values. The whole body of contract law can only be explained by a matrix of values.¹⁷⁵ 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

¹⁷² See Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191 (2010).

¹⁷³ See Thomas E. Rutledge, *Again, For the Want of a Theory: The Challenge of the ‘Series’ to Business Organization Law*, 46 AM. BUS. L.J. 311 (2009).

¹⁷⁴ Morris Cohen would adopt this insight of the quasi-status, quasi-contract track of legal development in his often-cited *The Basis of Contract*. Morris R. Cohen, *The Basis of Contract Law*, 46 HARV. L. REV. 553, 558, 560-64 & 587 (1933).

¹⁷⁵ 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).

theories of contract law as viable and helpful as parts of a composite.¹⁷⁶ Only through a composite of different theories or principles is contract law explainable.

Cycle theory is reducible to the idea that there is a periodic re-mixing of contract law's competing values. For contract law, the status-contract dichotomy possesses descriptive power in explaining the different eras of contracts, the sway of the underlying poles of contract 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. However, the scholar needs to dig below the crust to better understand the great dichotomies of contract law. The next few paragraphs provide some additional thoughts on these dichotomies and how they can be reconciled.

The cyclical and progressive nature of legal development is seen in Isaacs' analysis of statutory and contract rules. These rules only remain useful when they are updated to reflect 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 can widen 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 and are ignored through the use of creative interpretation, legal fictions, equitable modification, or are covertly replaced by operative rules.¹⁷⁷

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.”¹⁷⁸ We see here the notion of what is now called the hypothetical bargain.¹⁷⁹ It is at this point we see the beginning of a paradigm shift between classical to neo-classical contract law. Karl Llewellyn's subsequent incorporation of a contextual interpretive methodology into the Uniform Commercial Code was an attempt to provide a means 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 failed capture the true intent or meaning of the contract.

This constant need to update law is captured nicely in Isaacs' 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

¹⁷⁶ For the idea of a normative composite approach see LARRY A. DiMATTEO, *EQUITABLE CONTRACT LAW: STANDARDS AND PRINCIPLES* (2000).

¹⁷⁷ The concept of operative rules is essentially the recognition of the divergence between the law as written and the law as applied. See Elizabeth Warren, *Formal and Operative Rules Under Common Law and Code*, 30 *UCLA L. REV.* 898 (1983). Professors Calamari and Perillo have also noted that courts “ritualistically” state the formal rules of contract law and then proceed to disregard some of aspects of the stated rule almost entirely. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 367 (1970).

¹⁷⁸ Speech, Nathan Isaacs, “Some Legal Aspects of Purchasing”, Address before Rochester Association of Purchasing Agents, Rochester, New York, November 16, 1932, pg. 3 NI Papers, BLHC, HBS, *supra* note 9, Box 3, File: “Speeches, 1934.” See also, Nathan Isaacs, *The Dealer-Purchaser*, 1 *CINC. L. REV.* 373 (1927).

¹⁷⁹ See David Charny, *Hypothetical Bargains The Normative Structure of Contract Interpretation*, 89 *MICH. L. REV.* 1815 (1991) (hypothetical bargain formulation conceals a complex set of issues).

legislatures of law's obsolescence 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 have resulted in the enactment of new parts and revisions of old parts of the Code.

C. Concluding Remarks

Isaacs' cycle theory of legal development sees law progressing through cycles between different poles of various dichotomies. It 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, he sought to contain the contingent nature of law 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.

Cycle theory, if correct, has major implications on how we view legal development, most notably, 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 a negative critique along with a positive theory of development. This is largely done by grounding rules and adjustment in historically evolved principles. Thus, "hard cases" are not decided by pure deduction, but by reference to underlying principles and equities.

Cycle theory seeks to reconcile the universality of principles with the indeterminacy of legal conceptualism.¹⁸⁰

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. 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 most legal systems. Isaacs became less rigid in his view of cycles later in his career in favor of functional or realist approaches to law. The simple model of cycle theory can best be viewed as a heuristic concept. Legal development is replete with nuance, variances, and contradiction. Cycle theory may merely reflect the fact that all legal systems advance through different stages. The general schema that contract law shifts between ages of formalism and realism, ages of law and equity, and ages of status and contract is a modest recognition of the cyclical nature of legal development.

¹⁸⁰ Flaks, "Rediscovering Isaacs," *supra* note 1.