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**WHAT WE KNOW ABOUT CONTRACT LAW AND
TRANSACTIONING IN THE MARKETPLACE — A REVIEW
ESSAY OF CATHERINE MITCHELL, *CONTRACT LAW
AND CONTRACT LAW PRACTICE: BRIDGING THE GAP
BETWEEN LEGAL REASONING AND COMMERCIAL
EXPECTATION* AND JONATHAN MORGAN, *CONTRACT
LAW MINIMALISM: A FORMALIST RESTATEMENT
OF COMMERCIAL CONTRACT LAW*.**

ABSTRACT

Since Stewart Macaulay's pioneering work on the use and non-use of contract law in the market two competing schools of thought have emerged to explain the appropriate way to judge contract disputes before the courts. The first, contextualism, argues that judges, in deciding contract disputes and developing the law, should give effect to the expectations, practices and desires of the business community. The alternative, formalism, argues that since business uses law selectively it would be counterproductive if the law were anything other than predictable. The books reviewed synthesise the scholarship surrounding this debate and, in so doing, each proposes the form of judging thought to be the most suitable. In this review I will argue that when viewed against the arguments of two giants in this field, Macaulay himself and Hugh Collins, it becomes apparent that Mitchell's careful, well-explained and balanced contextualism is ultimately unpersuasive and that Morgan's formalist defence makes much more sense. I will also argue, however, that the differences between Mitchell and Morgan are ultimately tactical because both see contract law in instrumental terms. Both understand the role of contract law as being to aid and enhance market exchange but differ over how this is best achieved. I will argue that both are wrong on this point and that there are historical, constitutional and institutional reasons for not seeing contract law in instrumentalist terms.

I INTRODUCTION

Students of contract law have an advantage over those working in other areas of law. More than 40 years of empirical and theoretical work have given us a good idea, at least for commercial contracts, of how important contract law is,

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what role it plays in the market and how judges should decide cases and develop the law.¹

We owe this knowledge to the avalanche of empirical and theoretical studies carried out in response to Stewart Macaulay's 1963 seminal article 'Non-Contractual Relations in Business: A Preliminary Study'.² Macaulay had investigated the role of contract law in business transacting and found that contracts and contract law had very limited roles to play in commerce. The businesspeople that Macaulay studied preferred not to use contracts and avoided the courts as much as possible.³

This raised an important question for contracts scholars. How should contract law respond to Macaulay's demonstration that contract law does not seem to be used all that often in commerce? Jonathan Morgan, whose recent book *Contract Law Minimalism* is the subject of this review, thinks this question is 'arguably the most difficult of all questions facing contract scholars today'.⁴

Two schools of thought have developed to answer this question. The first, contextualism, argues that judges, in deciding contract disputes and developing the law, should give effect to the expectations, practices and desires of the business community. A contextualist law of contract would give primacy to standards such as good faith and unconscionability and look to business norms and practices to interpret contracts and to fill gaps where necessary. Such a law would be dynamic because it would be continually refined to give effect to changing business norms, expectations and behaviour.⁵ Catherine Mitchell's *Contract Law and Contract Practice*⁶ (the other book examined in this review) reflects this understanding of the relationship between contract law and transacting and builds on the earlier influential work, *Regulating Contracts* by Hugh Collins.⁷

¹ For developments in other areas of law and for the field of empirical legal studies more generally, see Symposium, 'The Empirical Revolution in Law' (2013) 65 *Stanford Law Review* 1195.

² Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55 ('Non-Contractual Relations').

³ For further reading see the bibliographies in the following recent works — the latter two are the subjects of this review essay: Jean Braucher et al (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart, 2013); Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart, 2013) ('*Contract Law and Contract Practice*'); Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013) ('*Contract Law Minimalism*').

⁴ Morgan, above n 3, 72.

⁵ R Brownsword, 'Static and Dynamic Market Individualism' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth, 1996) 46–67.

⁶ Mitchell, above n 3.

⁷ Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999).

The alternative response, formalism, argues that since business uses law selectively, that is when the law suits its purposes, it would be counterproductive if the law were anything other than predictable. In other words, if the law is continually changing to match perceived notions of business needs or expectations (perceptions that at best can only be rough and ready approximations of these needs and expectations) the law would be unpredictable and not a useful tool for these businesspeople. Formalism eschews open-ended concepts such as good faith and relies on bright-line rules and strict limits on judicial discretion.⁸ Morgan's *Contract Law Minimalism* falls within this school of thought.

What do Mitchell and Morgan add to these debates? Both attempt to synthesise the scholarship in this area and, in so doing, each propose the form of judging they think would be most appropriate. In this review I will argue that the best way to answer this question about the appropriate form of judging is to go back one step and reconsider what Macaulay and Collins had to say about contract and the market and to argue that, despite their own beliefs, both Macaulay and Collins can be best understood from a formalist perspective. When this is done it then becomes apparent that their lessons help us see why Mitchell's careful, well-explained and balanced contextualism is ultimately unpersuasive and that Morgan's formalist defence makes much more sense.

However, that is not the end of the matter because, as I will argue, the differences between Mitchell and Morgan are merely tactical because both see contract law in instrumental terms. Both understand the role of contract law as being to aid and enhance market exchange but differ over how this is best achieved. In other words, at the tactical level of deciding whether contextualism or formalism best suits the market, Mitchell and Morgan differ, but at the strategic level of determining what the role of contract law is, both agree that contract law has an instrumentalist purpose of aiding market exchange.⁹ I will argue that both are wrong on this point and that there are historical, constitutional and institutional reasons for not seeing contract law in instrumentalist terms.

II MACAULAY AND COLLINS ON CONTRACT LAW

Macaulay explained non-use of contract law by showing that reputation was the most important security for contractual performance and that the fear of losing a good reputation was, usually, far superior to costly, time-consuming recourse to law.

⁸ In this paper, as will become clear, formalism is not being used as an alternative expression for what might be called traditional legalism. However, for many writers the classical law of contract is a proxy for formalism. For the author's understanding of traditional legalism see, for example, John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Harbour Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519.

⁹ For further discussion of this point see John Gava, 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25(2) *University of Queensland Law Journal* 253, 262; John Gava, 'How Should Judges Decide Commercial Contract Cases?' (2013) *Journal of Contract Law* 133, 147–8.

He pointed to the institutional pressure to perform and the pride of those involved in business as strong forces operating to ensure that performance. He also noted that the companies he investigated often used contracts as bureaucratic devices to control the inner workings of complex organisations rather than primarily as tools designed to ensure performance. Macaulay emphasised not only that contract law was infrequently used; he also highlighted the negative impact that its use could have for business dealings and business relationships.¹⁰ Macaulay's analysis sparked a flood of empirical and theoretical works on the use and non-use of contract law in the market place. Macaulay's explanation for the minor, indeed, often non-existent, role played by contract law in daily commerce has been confirmed and augmented through detailed empirical and analytical studies from a variety of jurisdictions.¹¹

These findings and his analysis rest most comfortably with a formalist understanding of contract law. Macaulay shows that contract law is not that important in market transacting but that it will be used where and when it is useful or if there are no other alternatives. For Macaulay, law is normally a tool of last resort. In such circumstances it would be unwise and unnecessary to have anything other than a predictable and strictly enforced law. Attempts to make law more commercially appropriate would seem to miss the mark as such attempts would misread the needs of commerce. 'Non-Contractual Relations' is best understood as supporting a formalist view of contract law — even though Macaulay was later to advocate a contextualist role for judges.¹²

Collins added two powerful lessons, one positive and one negative, about contract law and transacting in the market. The *positive lesson* was in his explanation of the relationship between contracting and transacting in the market. Collins explained that transacting had three dimensions. The first was the business relationship between the parties: normally the most important because businesses usually rely on more than one exchange and their reputation depends, in the main, on their business relationships. The second dimension was the deal or transaction itself. Normally this is less important than the business relationship but, of course, in special circumstances the deal could take primacy where, for example, it was extraordinarily large or one of the parties was in a parlous financial state. The third and final dimension was the contract. This would normally lie dormant, as Macaulay showed, but, again, in particular circumstances the parties could and would rely on a contract and use litigation as a means of settling disputes. Collins emphasised that all three dimensions were potentially in play at all times and that there was an interrelationship between them. For example, parties to a transaction might formulate a rigid contract with firm obligations but not expect their actual business relationship to exhibit this rigidity. The contract's tough terms would be a form of insurance to guarantee against opportunism.

¹⁰ Macaulay, Non-Contractual Relations, above n 2.

¹¹ See works listed at above n 3.

¹² Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract*, (Hart, 2003), 51–102.

Collins' schema rests very comfortably with Macaulay's analysis of contracting and transacting in 'Non-Contractual Relations'. Indeed, it would be fair to describe Collins' tripartite analysis as embodying and filling in the skeletal framework provided by Macaulay. It, too, is best understood as underpinning a formalist position because it makes clear the way in which contracts and contract law are used tactically by businesspeople when and if they suit.

Collins' other lesson is equally important, if *negative* in effect. In *Regulating Contracts*, Collins made a concerted and exhaustive argument in favour of a contextualist law of contract. He argued that the courts should take into account the learning provided by economics and sociology on market transacting in order to apply and develop a commercially apt law of contract. Mindful of his tripartite schema for understanding market transacting and the interrelationship between the business relationship, the imperatives of a business deal and the contract (if one existed), he also explained how it was important for judges to understand not only commercial expectations generally but also in any business transaction the relationship between the parties, the importance of the deal to them and what role, if any, a contract played. Elsewhere I have argued that his contextualist project failed because it demanded of judges capacities that they did not have; that it required information that often did not exist, was costly to obtain or was confidential; that it ran counter to the best evidence suggesting that parties used law tactically; and that it ignored the inequality of power in business dealing; all of which, instead, supported a formalist law of contract. Collins' explanation of what is needed for a true contextualism is persuasive because anything less will essentially amount to guesswork and the imposition on the parties of what a judge imagines the context between them to be. At the same time this careful explanation also explains why contextualism is impossible. It asks too much of judges and requires information that is costly, often not available and frequently confidential.¹³ In a nice irony, by pinpointing the contradictions, or more accurately, the impossibility of contextualism, Collins undermines his own thesis about the role of judges in commercial contract cases.

It is in the context of Macaulay's and Collins' comprehensive analyses of market transacting and the place of contract within the market that we can best understand the contributions of Mitchell and Morgan.

III CATHERINE MITCHELL – CONTRACT LAW AND CONTRACT PRACTICE

Mitchell makes clear her contextualist goal in her ambition to show

that serving commercial expectations, purposes and so on is an end point in the analysis of what contract law is for and how its success is to be judged. Here, the attempt is made to understand better what this claim might mean, whether and how it should be pursued and what reforms to contract law might be necessary to render these claims more than merely rhetorical.¹⁴

¹³ I have dealt with this issue in greater detail in John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63(3) *Cambridge Law Journal* 605.

¹⁴ Mitchell, above n 3, 26.

Mitchell's strategy to achieve her goal is to examine the notion of 'commercial expectations' and explain why she thinks that notion is capable of being applied to commercial relationships. She does this by explaining what 'commercial expectations' could mean and examines the various ways in which the parties' own beliefs and wider sectoral norms can supply meaning to this term. Her analysis is comprehensive and she carefully explains and analyses what she calls new forms of contracting, such as network and umbrella agreements.¹⁵ She very carefully considers the debates about the sources of norms and customs that would be the basis of 'commercial expectations'. She also considers the discussion surrounding Lisa Bernstein's rigidity thesis as well as claims that legalisation of norms will crowd out the creation of such norms.¹⁶

She then explains how the current law is poor at giving effect to such expectations and, in particular, the tension that exists between the judiciary's concentration on the documents (ie, the written contract) rather than on the context surrounding the transaction associated with those very documents. She provides examples of recent significant decisions that illustrate this tension and the problems that flow, in her opinion, when the judges do not accurately appreciate the relationship between the contractual documents and the context. Her discussion of *National Westminster Bank plc v Rabobank Nederland*¹⁷ and *Baird Textile Holdings v Marks and Spencer plc*¹⁸ is illuminating but also allows Mitchell to explain the relationship between documents and context with flair and insight.¹⁹

Mitchell then explores rights-based and economic efficiency theories about contract law to see if and how her hopes for the operation of commercial expectations in law match these theories. This is done to see if there are normative, as well as practical, reasons for supporting the inclusion of commercial expectations in contract law. She finds that both could be understood as supporting her stance.²⁰ However, she suggests that since commercial expectations give effect to the social rather than the philosophical aspects of contracts, Ian Macneil's relational understanding of contract gives the best fit for incorporating commercial expectations into contracts and contract law.²¹ Finally she examines debates surrounding the capacity of the law and the courts to give effect to commercial expectations and while recognising that these institutions cannot seamlessly incorporate commercial expectations into contract, she argues that the costs of not incorporating commercial expectations is greater than the costs generated by doing so.²²

¹⁵ Ibid 27–61.

¹⁶ Ibid 63–98. For Bernstein's thesis see Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765.

¹⁷ [2007] EWHC 1056 QBD.

¹⁸ [2002] 1 All ER (Comm) 737.

¹⁹ Mitchell, above n 3, 100–36.

²⁰ Ibid 138–71.

²¹ Ibid 200–36.

²² Ibid 1–21.

Mitchell's coverage and analysis are exemplary; her choices are clearly justified and fully explained; and her conclusions are carefully considered and reasoned. While I am not persuaded by her conclusions, it is not because of any failings in her exploration of relevant materials or because of hasty or ill-conceived judgments. Reasonable people could come to different conclusions on many of the points that she considers and still accept that the different conclusions reached could be both plausible and defensible. Nevertheless, for all the strengths of her analysis, I think that Mitchell's argument is flawed in the way that all contextualist accounts are flawed.

Mitchell is quite clear in arguing for a contextualist position:

The main benefit of a relational and commercial-expectations approach to contract law is that it seeks to draw out and apply the internally generated norms of the business relationship to questions concerning the scope of contractual obligations or dispute resolution ... What relational theory demands is sensitivity to a range of contracting circumstances and a denial of the traditional binary lines along which debates are often drawn. Pragmatism, context and flexibility are the hallmarks of a relational approach to contractual agreements. There will be costs involved in developing a relational contracts law, but the institutional costs in not developing it, particularly in terms of our confidence in contract law's capacity to facilitate commercial dealing and commercial expectations in all their forms, are likely to be greater.²³

Mitchell's strategy is, in essence, the same as that proposed by Collins. This means that similar criticisms to those made of Collins' approach can be made of Mitchell's strategy. As noted above, it is important to remember that Collins has spelt out in some detail what is required of a judge who wants to pursue the contextualist path in a serious and committed, and not a half-hearted way, and, as also argued above, that what is required to do so goes far beyond the capacity of any judge.²⁴

Mitchell is not blind to such concerns but it is not clear that her careful responses adequately acknowledge what Collins has shown to be required by contextualism. For example, she notes that commercial relationships

will generally display a multidimensional governance strategy, relying simultaneously on norms of contract *and* trust. Whether these two are conflicting or mutually reinforcing, substitutes or complements, is not an issue that can be decided in the abstract, but only upon close examination of each individual commercial relationship.²⁵

²³ Ibid 265–6.

²⁴ See discussion associated with above n 13.

²⁵ Mitchell, above n 3, 96–7 (emphasis in original) (citations omitted). For further examples where Mitchell recognises the complexity of the context of contracts and, thus, the enormous difficulties facing judges, see 145–6, 155, 175–6, 182, 194–7, 213, 240, 245–6.

But she does not explain how a busy court will do this. As I have argued elsewhere, Collins recognised what would be necessary to make such a ‘close examination’ and, as I have also argued, there is very little plausibility in claims that a common law judge (or anyone else, including the parties, for that matter) will be able to do this.²⁶

Two aspects of Mitchell’s argument deserve further attention. The first is her strong insistence that it is the underlying role or purpose of contract law to meet the needs and expectations of commercial contracting parties.²⁷ In particular, Mitchell refers to new forms of contracts and their increasing complexity as demanding recognition through the development of doctrine and interpretation to reflect these new contractual realities.²⁸ The initial attractiveness of this claim, however, rests on a number of unproven assumptions. It is not clear, for example, that the best reading of contract law’s historical development is to see that development as a conscious response to the needs of commerce over the past several hundred years. What we can say for certain is that the development of contract law has consistently been the result of the settlement of those commercial disputes that came before the courts. It is, at best, a controversial claim to read the doctrinal development of the common law of contract as reflecting the conscious desire of judges to make the law fit or suit the varying needs, expectations and behaviours of commercial actors.²⁹ Contract law might reflect the hue of the mainly commercial litigants who appeared before the courts, but this is not the same as saying that the courts have actively developed contract law to suit these litigants’ expectations.

Secondly, Mitchell’s claims surrounding supposedly new forms of contracting are unconvincing. It is not entirely clear to me, for example, that ‘network’ or ‘umbrella’ contracts are new forms of contracting and transacting. The same can be said about more general claims about the increasing complexity of contracting in today’s market. When one considers the long history of market exchange in the common law world, it is as plausible to suggest that the difficulties surrounding exchange in times without instantaneous communication, where transport was difficult and risky and where law enforcement was less comprehensive than today, made transacting in, say, the 18th century, *more* complex than it is today. For all we know, even more complex transacting arrangements were created in the past to compensate for the more difficult trading environment of that time. As trade in the past survived with a doctrinally narrow law of contract, it is reasonable to ask whether claims of increasing contractual complexity are true and, if so, require a contextually reformulated law of contract. This is an area that calls out for more research and study.

The second aspect of Mitchell’s argument that calls for further attention arises from her acknowledgment that contextualism will not be cost free but that the costs of

²⁶ Gava and Greene, above n 13.

²⁷ See, for example, Mitchell, above n 3, 4–6.

²⁸ Ibid 53–62, 204–8.

²⁹ Mitchell acknowledges both scholarly and judicial criticisms of her claim. See *ibid* 204.

not following this path are potentially greater. On the face of it, this is a perfectly plausible argument. This assumes that even being an imperfect contextualist is better than not being a contextualist at all. But is this true? It is just as likely that being an imperfect contextualist is worse than not being a contextualist at all. If we go back to the argument between the contextualists and the formalists, it soon becomes apparent that one of the foundational arguments of the latter is that contextualism of any sort is likely to run counter to business desires. Would it not be the case that an imperfect contextualism will result in a decision that reflects the beliefs of neither party to a transaction? In other words, an incomplete (or inaccurate) contextualism would not and could not reflect the practices, expectations and behaviours of the contracting parties. I think that it is the case that one needs to be a totally accurate contextualist to be an effective contextualist.

Despite Mitchell's considerable efforts, her reconfigured contextualism fails to convince for the same reasons that bedevil Collins' own attempts and her thoughtful analysis only shows more strongly why contextualism cannot work.

IV JONATHAN MORGAN — CONTRACT LAW MINIMALISM

Morgan's argument is neatly and succinctly described in the preface of his recent book:

The basic theses defended here are three in number; first, that commercial contract law has a central *purpose*, namely, to provide a suitable legal framework for trade; secondly, that the nature of commercial contract law is radically *optional*, that is, it exists only as a body of default rules; and, thirdly, that when contract law is as simple, clear and strict – *formalist* – as it can be made, commercial preferences are best satisfied and its rules flourish because opting out from them is infrequent.³⁰

I do not agree with his first thesis — that contract law has as its central purpose (and justification) the role of aiding and enhancing market exchange. Morgan's second thesis might be seen as overstating the optional nature of contract law, but that is an argument about the actual architecture of contract rules and, whilst interesting, this will not be covered in this review essay. I agree with Morgan's third thesis but with the caveat that it is incomplete in its description of contract law.

Morgan commences his analysis by examining current English law to see if it can be best understood either from instrumentalist or non-instrumentalist approaches and then asks whether an instrumental approach to contract law provides a better justification for it than popular moral and promise-based theories of contract. He argues that an instrumentalist view of contract law provides the best fit with the current law and that instrumentalism provides a good justification for that law.³¹ Morgan then analyses contract law from economic, social and other non-doctrinal

³⁰ Morgan, above n 3, xiii (emphasis in original).

³¹ Ibid 1–40.

sources. These chapters are principally designed to introduce readers to the vast literature that arose following Macaulay's seminal work. They are comprehensive and are worthwhile reading even for those steeped in the literature.³² But, as Morgan indicates, the really important question is what to make of this literature, or, in other words, whether judges should adopt a formalist or contextualist approach to contract law in light of the findings of these empirical and theoretical works on the use and non-use of contract law in market exchange.³³

Morgan defines his minimalism as the contract law that commercial parties want, arguing that any other form of law will lead to widespread contracting out of unsuitable or unwanted rules.³⁴ Because of this, he rejects any role for contract law that puts moral purposes or social values in the place of its core role of aiding market exchange.³⁵ Neither, according to Morgan, should contract law absorb the variety of non-legal sanctions and processes through which commercial players have settled their disputes and arranged their transactions. Apart from being an ill-advised exercise, the limited capacity of judges and the institutional constraints on litigation render both inappropriate vehicles for importing business norms and non-legal sanctions into contract law.³⁶ Morgan also shows that the evidence that we have, whilst not conclusive, does support the view that people in business prefer a formalist, predictable contract law. Finally, Morgan compares his formalist desiderata against modern English contract law, arguing that that law's formalist characteristics have been increasingly diluted since the middle of the 20th century through what he describes as the 'creep of contextualism, discretion and regulation'.³⁷

Is his argument persuasive? Morgan has read widely in the literature and his arguments are thoughtful and well-considered. As a relative newcomer to the field, he seems to have felt the need to go back to first principles, unlike Mitchell, who was willing to enter the debate as it stood. Because of this, anyone wishing to enter this field of studies would do well to read Morgan's book. But if his first thesis is considered in detail, some problems arise.

Morgan's first thesis, that commercial contract law has a central *purpose*, namely, to provide a suitable legal framework for trade, puts him in the same company as otherwise disparate scholars, for example, Collins, Mitchell, David Campbell and Robert Scott.³⁸ As I have argued above, the differences on this point between

³² Ibid 41–86.

³³ Ibid 41.

³⁴ Ibid 89–113.

³⁵ Ibid 114–57.

³⁶ Ibid 158–72.

³⁷ Ibid 219.

³⁸ See Collins, above n 7; Mitchell, above n 3; D Campbell, 'What Do We Mean by the Non-Use of Contract' in Braucher, above n 3, 159–90; R Scott, 'The Promise and the Peril of Relational Contract Theory' in Braucher, above n 3, 105–39. I am not sure that Stewart Macaulay should be added to this list as his writings seem more welfarist than directly concerned with business needs.

authors of such varying views on contract law and its place on the market depend on a strategic congruence on the ultimate goal — aiding market exchange — and only display tactical divergence — on whether formalism or contextualism is the best way of achieving that strategic goal.³⁹

Because Morgan thinks that opting out of the formalist law that was the English law of contract has been infrequent, it is clear that he believes that that contract law has had a central role in aiding market exchange. He also believes that instrumental reasoning to that end is ‘thoroughly characteristic of English contract law.’⁴⁰ He is quite emphatic on this point:

It is not that judges ‘sometimes’ explicitly consider the effects of their rulings ... but that they *consistently* do so. This claim will not be defended in detail, since it is submitted that any English contract lawyer would recognize the truth in it.⁴¹

Morgan’s insistence on the centrality of contract law for market transacting defies Macaulay’s illustration of the peripheral role of contract law in market exchange. Indeed, it runs counter to what Morgan himself calls ‘the lawyer’s perennial fallacy of “legal centrism”.’⁴² In fact, Morgan himself provides many arguments against his own view, evidence that his otherwise common sense analysis of commercial contract law runs counter to his misguided view that the central role of contract law is to provide a suitable framework for market exchange. Instead, as will be argued below, contract law’s usefulness for commerce is accidental and not fundamental to its existence.

Morgan’s arguments that challenge his ‘legal centrism’ can be grouped under five headings. The first concerns doubts about the *capacity of judges* to create a contract law, minimal or otherwise, designed to aid market transacting. For example, Morgan notes the propensity of English judges to ascribe to contracting parties ‘a virtual caricature of atomistic/selfish/Hobbesian behaviour’, mainly because they only see parties in dispute and thus do not appreciate the norms under which most parties transact.⁴³ Judges who misunderstand the way in which commerce operates are hardly likely to produce an efficient contract law. Morgan also accepts that judges will make poor decisions when faced with socio-economic data⁴⁴ and that any attempt to give effect to ‘commercial expectations’ will founder on the problem that such expectations are ‘an uncertain guide’.⁴⁵ These difficulties are magnified by the lack of empirical data dealing with transacting and contracting in the market⁴⁶

³⁹ See above n 9.

⁴⁰ Morgan, above n 3, 5.

⁴¹ *Ibid* 6 (emphasis in original) (citations omitted).

⁴² *Ibid* 142.

⁴³ *Ibid* 67.

⁴⁴ *Ibid* 117–8, 121–2.

⁴⁵ *Ibid* 235.

⁴⁶ *Ibid* 160.

(and the procedural difficulties that would arise if litigation was changed to try to allow more data in, assuming it existed).⁴⁷ Morgan also accepts that judges are appointed because of their legal knowledge and not for any command of economics, sociology, business or day-to-day experience in the market.⁴⁸ It would be surprising if the limits on judicial capacity that Morgan acknowledges would allow judges to design a contract law whose purpose is to aid market transacting and to do so in an efficient manner.

Morgan's second argument that challenges his views about the role of contract law deals with the *complexity of the common law of contract*. As we have seen, Morgan argues that common law judges have been consciously instrumentalist and have crafted a commercial law of contract that is simple, clear and strict and whose main purpose is to aid market transacting. Yet when he criticises what he calls 'doctrinal scholars' for their excessive purity about rules, he is also willing to accept that legal reasoning in contract (and the common law more generally) is not neat and tidy but is messy and that 'life, and therefore living law, is just too complex to be reduced to classical simplicity'.⁴⁹ Of course, much the same criticism can be made of a claim that common law judges have consciously crafted a commercial law of contract that gives effect to the minimalism that Morgan espouses.

The common law is indeed messy but, as Morgan emphasises, there is an 'institutional bias towards the fairness or efficiency of their own rules'⁵⁰ when judges decide cases, especially given the fact that '[c]ontract law should stick to doing what it does best: resolving disputes.'⁵¹ The reality is that common law judges have decided contract cases with a number of forces operating on them but that the primary source for the development of common law contract rules has been a commitment to a system of rules that gives effect to the historically developed sense of institutional fairness that lies at the heart of the common law of contract. Rather than seeing judges consciously aiming to create this or that form of contract law, it is more plausible to believe that contract law has developed through judges applying a traditional conception of fairness within an overarching architecture of rules and with a hue taken from its primarily commercial litigants.⁵²

The third argument deals with the *limitations of litigation as a source for the regulation of market exchange*. If judges have consciously aimed at creating a minimalist law of contract, we must remember that they can only have done so in the context of litigation. But is litigation a good source of information for the crafting of such rules? Morgan thinks not. For example, he acknowledges that lawyers are prone to ignore what Arthur Leff has called the 'vital' questions that an

⁴⁷ Ibid 161.

⁴⁸ Ibid 166.

⁴⁹ Ibid 31 (citations omitted).

⁵⁰ Ibid 93.

⁵¹ Ibid 148.

⁵² See Gava, above n 9, for an elaboration of this argument.

economist would ask about the design or analysis of any legal rule; namely, what will it cost, who pays and who decides on the above two questions?⁵³ If, as Morgan accepts, lawyers (and judges) regularly ignore such questions, one has to be doubtful about any project that aims to create an economically efficient system of rules, minimalist or otherwise. But it is not only that lawyers are not good at asking the right questions. Litigation itself, by concentrating on particular disputes, will give a distorted picture of transacting in the market place. This, in turn, renders litigation a poor vehicle for the creation of a commercially savvy and attractive contract law. In Morgan's words:

Very rarely is contract litigation embarked upon in the course of an ongoing commercial relationship. Its sheer cost, if nothing else, is enough to sour any lingering hopes for future trading between the parties. Therefore, almost by definition, litigated contract cases are *never disputes between partners in an ongoing commercial relationship*.⁵⁴

In other words, the ingredients for the courts to have developed a commercially appropriate minimalist law of contract, in accordance with Morgan's ideas, have been a minority of unrepresentative cases. And, again, in Morgan's words:

Regulatory limitations are intrinsic in the very nature of adjudication. In summary form, they are: the submission put to the court (limited to arguments favouring one of the parties); limited socio-economic data; the court's limited capacity to comprehend any such information; the limitation of the court's 'regulatory opportunity' to the cases that are brought before it. ... Individual parties decide whether to bring an action in the first place (and whether to settle, litigate or ultimately appeal). At all stages, the parties decide what arguments and evidence to present to the court (with the aim of winning their case, not of developing the law, and certainly not of elaborating corrective justice, regulating the economy or supporting the capitalist system).⁵⁵

If we add 'the creation of a commercially appropriate minimalist contract law' to the final list of things litigation is not designed to do, we can see that Morgan's own arguments run against his thesis that the role of contract law is to aid commercial contracting through a judicially crafted and carefully constructed, commercially appropriate contract law. Litigation is a mechanism that just will not work for this task. As Morgan reminds us:

The courts are entirely at the mercy of potential litigants. They alone control which disputes (if any) reach the courtroom, and how the issue will be framed.⁵⁶

⁵³ Morgan, above n 3, 52–3, citing Arthur Leff, 'Some Realism About Nominalism' (1974) 60 *Virginia Law Review* 451.

⁵⁴ *Ibid* 84 (emphasis in original).

⁵⁵ *Ibid* 160.

⁵⁶ *Ibid* 162.

The control exerted by litigants challenges Morgan’s confident suggestion that it

seems inconceivable that judges ... [and] lawyers ... would be ignorant about the preferences of contract law’s commercial customers — or uncharacteristically mute and passive were the law seriously out of line with commercial expectations.⁵⁷

Given the unrepresentative nature of litigation driven by litigants interested in winning their own cases, it seems unlikely that litigation would be a useful mechanism for creating an appropriate form of contract law. This reservation is only reinforced when we consider Morgan’s fourth argument: the *lack of empirical data* for the judges.

For judges to craft a minimalist law of contract that fits the needs of commerce, judges will need to know what those needs are. Yet Morgan acknowledges that such empirical data are lacking and that ‘the suspicion persists that little empirical research has been done because the data are virtually impossible to collect.’⁵⁸ And, as he adds, ‘Of course, the judicial impulsion to satisfy “commercial expectations” is strong and longstanding. But reasonable expectations are an uncertain guide.’⁵⁹ In fact, Morgan accepts that ‘the likelihood is that there is no single correct answer to “what business wants”. Commercial life and requirements are too diverse.’⁶⁰

The final argument to be considered is the acknowledgment by Morgan that *unwanted rules are avoided by contracting out of them*. In his words:

The combined effect of Macneil’s and Macaulay’s research is that relational contracts flourish in spite of the discrete, formal nature of contract law. Indeed, Galanter suggests that this is the most important lesson of Macaulay’s seminal article.⁶¹

The example of privity law reform is one that makes this point clearly and it is one that Morgan clearly recognises. He notes that the moves to reform privity, which culminated in the *English Contracts (Rights of Third Parties) Act 1999* (UK), were not driven by commerce and that ‘any competent lawyer could have given rights to a third party where desired before 1999 by using a suitable device.’⁶² Indeed, it is apparent that for most of the 20th century English judges were at pains to distort fundamental rules surrounding privity to suit what they saw as the needs of business but without providing any evidence about what business really wanted or needed.⁶³

⁵⁷ Ibid xv.

⁵⁸ Ibid 52.

⁵⁹ Ibid 235.

⁶⁰ Ibid 88.

⁶¹ Ibid 124 (citations omitted), citing Marc Galanter, ‘Vision and Revision’ [1985] *Wisconsin Law Review* 647, 652.

⁶² Morgan, above n 3, 178–9 (emphasis added) (citations omitted).

⁶³ See Gava, above n 8.

One only needs to mention the complicated rules surrounding offer and acceptance or consideration, for example, to see that commerce has lived with complicated contract law rules for centuries and has done so by avoiding their impact through contracting, more or less successfully, around them.

Morgan's claim that English judges have consciously created a minimalist law of contract that satisfies the formalist desiderata is, on his arguments, implausible. It is one thing to argue, in general terms, that a formalist contract law suits business. It is an entirely different thing to believe that English (or any other) contract law consciously embodies a judicial determination to create a pure formalist law. To argue this is to ignore the lessons provided by Macaulay and Collins. To accept that formalism works best for commerce is not the same as arguing that contract law has been purposely designed by formalist judges or that it should be. Contract law has other reasons for being and its utility for the market is accidental and not designed.

V CONCLUSION

The literature generated by Macaulay's seminal article has taught us a lot about the use of contracts in the wider sphere of transacting in the market. Of course, much work remains to be done. For example, the numerous studies that have been carried out looking at the contracting practices in a variety of industries have really only touched the surface of what could and should be done. More studies across the whole gamut of market exchange in a range of countries would help solidify our knowledge of market transacting as well as provide more specific information about how particular industries operate and to what extent, if any, contract law plays a role. There is a temporal element as well. Transacting practices in industries might change over time as the industry matures or changes or if trading conditions become easier or more difficult. This means that there is a need to continually update these studies.

This information will be useful even in those parts of the market where contract law is not important, as governments can use such information in promulgating and administering industry policy.⁶⁴ For example, a recent study of contracts in the Australian wine industry showed that contracts were entered into to provide banks with security for lending money.⁶⁵ This information would help both industry and governments in the regulation and support of the wine industry. One can imagine that there is much idiosyncratic use of contracts across industries but we will never know unless the studies are undertaken. However, given their costs and the difficulty of undertaking them, it might be optimistic to believe that more than a trickle of such studies will be undertaken.

Where contract law is an option for the market players, there is much other work that needs to be done. For example, we need to find out whether, in practice, the legalisation of commercial norms by their incorporation into contract law 'crowds

⁶⁴ I have discussed the demarcation of market transacting in Gava, above n 9.

⁶⁵ Iain Fraser, 'The Role of Contracts in Wine Grape Supply Coordination: An Overview' (2003) 11 *Agribusiness Review* Paper 5, 7.

out' their spontaneous generation amongst traders.⁶⁶ There would be little point in trying to incorporate business customs, norms and expectations if in doing so the law would adversely affect the capacity of market players to generate these in their day to day transacting. Or, to take another example, studies which tried to see whether Bernstein's 'rigidity thesis' is true would add greatly to our knowledge and inform us about the desirability of contextualist judging. Bernstein has argued that transactors value the possibility of waiving contractual rights at particular times in a business relationship while still wishing to reserve the right to enforce these rights in the case of future breaches (where breaches are opportunistic, for example). If this possibility is denied them, they will more rigidly enforce their contractual rights in order not to lose them.⁶⁷ Or, finally, we need studies about how and to what extent litigation is used tactically as part of dispute resolution in the market. If, for example, it was often used for this reason, this would tell us that judges would need to be careful about using commercial norms and expectations as the parties themselves are not looking for judicial endorsement of their behaviour but, rather, as a means to strengthen their hands in a dispute. Indeed, if it were found that contract litigation were used in this way, formalist judging, with its more predictable flavour, would seem to be the sensible approach to adopt.

Mitchell and Morgan, however, are interested in looking at how judges should, in general terms, decide contract cases and develop contract law in light of the work done since Macaulay's 1963 article and it is against this general question that their books should be evaluated.

Despite their very different approaches — Mitchell espouses a contextualist approach and Morgan a formalist one — the two authors share more than might be apparent at first sight. Both view contract law instrumentally. In their eyes, as we have seen, contract law has a clear purpose: aiding market exchange. This is their shared strategic goal over whose attainment they differ tactically, with Mitchell favouring a contextualist contract law and Morgan arguing that a formalist law of contract would best help transacting in the market place. Now, as I have argued above, on the matter of tactics I think that Morgan's approach is the better one, as it promises to better reflect the way in which commerce operates. But the strategic congruence that the authors share on the purpose of contract law is another matter.

If we view contract from a historical perspective or a constitutional perspective or an institutional perspective, it becomes clear that the instrumentalist vision shared

⁶⁶ For a discussion of this notion see, eg, Mitchell, above n 3, 84–6 and Morgan, above n 3, 125–31.

⁶⁷ Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765 and, for a discussion of the 'rigidity thesis', see Jason Johnston, 'Should the Law Ignore Commercial Norms? A Comment on the Bernstein Conjecture and its Relevance for Contract Law Theory and Reform' (2011) 99 *Michigan Law Review* 1791; Jody Kraus and Steven Walt, 'In Defence of the Incorporation Strategy' in Jody Kraus and Steven Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000).

by Mitchell and Morgan, far from being obvious, is in fact deeply controversial and, indeed, unpersuasive.

The history of contract law is one of a development of modern contract as a species of tort to a fully free standing area of law with some hundreds of years of application and development. However, it would be controversial to see it as developing in direct response to commercial needs, or any other need, for that matter. Rather, the best reading of its history is that a restricted corps of judges, trained in the common law, developed the law in relative isolation and with a heavy doctrinal influence. As argued above, it is likely that contract law has a commercial hue but this is because most of its 'customers' were involved in commerce and the disputes before the court were commercial disputes. The lessons that Macaulay and Collins have taught us — that contract law is not used much in the market and that contract law is a component of transacting with the emphasis on the business relationship and the imperatives of a deal — are as likely to have been the case three or four hundred years ago as they are today. People in the past used contract much as they use it today: sparingly, when it was useful, and always with one eye on their business reputation with existing and potential business partners, and with their other eye on the imperatives behind any particular business transaction. Macaulay and Collins show us that it would not make sense for judges to try to develop contract law to suit the practices, expectations and behaviour of those trading in the market and this, in turn, explains why the judges did not do this in the past.

However, it is not just Mitchell's contextualism that would challenge this concept of contract. While formalism is not dynamic because a formalist law is by nature static and predictable, the reality is that the common law of contract is at best a proxy for a formalist law. The law of contract is just too messy, too full of contradictions and contains too many competing lines of authority to be an ideal formalist law. There would need to be a severe makeover of contract law before it could be described as an ideal formalist law. Morgan,⁶⁸ and Alan Schwartz and Robert Scott⁶⁹ recognise this and spell out in great detail what a truly formalist law would look like. Formalism is no friend of the common law of contract as traditionally understood.

It must also be remembered that contract law is an integral part of the common law and is therefore part of the constitutional heritage of any common law country. This does not mean that it cannot or should not change. But it does mean that any change should be in conformity with our constitutional traditions. The common law has developed through that professional corps of judges and is now increasingly interwoven with the growth of the legislative state. But to, in effect, make judges become the servants of commerce through a process of applying and changing contract law to give effect to commercial expectations raises profound constitutional questions. Judges owe their fidelity to the law and the constitution (written or not in various common law countries), yet contextualism requires them to transfer

⁶⁸ Morgan, above n 3, 218–53.

⁶⁹ Alan Schwartz and Robert Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 *Yale Law Journal* 541.

that fidelity to commercial practice and morality. Contract law is more than a tool for the market: it is, instead, our historically created and constitutionally validated means of settling disputes.

Mitchell's contextualism is clearly at odds with this understanding of contract law, but, as we have seen, the reconfiguration of contract law needed to meet formalist requirements means that Morgan's vision of contract is equally a threat.

Finally, there is an institutional perspective that should not be overlooked. If contextualism is to become the guiding philosophy for judges, we have to ask how this would affect the judges in the generalist courts that feature in the common law world. Would they be expected to be contextualist judges for contract cases only and carry on normally in other areas? Or would contextualism spread to other areas of law? If so, real questions have to be asked about the capacity of our judges to decide in fashions similar to contextualism in areas such as torts, crime, equity, corporations law and the like, as well as in their role of interpreting and applying statute. Would this mean that judges have different training to enable them to judge more competently according to a new standard? Would it mean that lay people be appointed to give advice or that the rules of evidence and procedure be changed to allow contextualist judging to operate fairly and openly? The training and experience of common law judges is not, I would argue, appropriate for contextualist judging and we would have to look seriously at training, staffing and perhaps even the creation of many more specialist courts if we were to take contextualism seriously. Now, while a truly formalist law of contract need not lead to such challenges to the institutional integrity of the courts, it would nevertheless make it clear to the world that the law which is being applied is no longer the creature of the common law judges but is, instead, an artificial law created to suit business needs; in this case a completely formalist law.

Both contextualism and formalism, in their different ways, challenge our accepted historical and constitutional understandings of contract law. Neither Mitchell nor Morgan have considered these challenges and, as a consequence, have not explained why their preferred conceptions of contract law deserve to replace traditional contract law.

Catherine Mitchell and Jonathan Morgan have written impressive books. Both can be read with profit and both introduce and explain exceedingly well the debates surrounding the relationship between contract law and the phenomenon of its relative non-use in the market. Perhaps surprisingly, given that I share Morgan's position on the tactical question about which form of law would best suit business (formalism), I feel that Mitchell's position is better argued even though I think it wrong. Morgan undermines his thesis with his frankly unpersuasive argument that contract law has been designed for the use of market players and that this is as it ought to be.