*John Gava**

CONTRACTUAL RELATIONS: A CONTRIBUTION TO THE CRITIQUE OF THE CLASSICAL LAW OF CONTRACT

BY DAVID CAMPBELL
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David Campbell's book[1] is an audacious work, both in the vision of political economy that animates it and in his forthright analysis of the law of contract, a law which, for Campbell, is too often at odds with that vision of political economy.

Let's look at the political economy first. As a thought experiment one can imagine Campbell inviting Friedrich Hayek and John Stuart Mill and George Orwell and EP Thompson (but probably not Karl Marx or Friedrich Engels) to a talk aimed at convincing them that his, Campbell's, understanding of what he calls 'liberal socialism' underlies each of their individual conceptions of the proper constitution and operation of the market in a modern society. An intellectual project with a goal to claim an underlying unity of purpose and understanding among four such thinkers traditionally understood to be poles apart is, clearly, audacious. So, what does he mean by 'liberal socialism'? In his words:

> The answers one gives to all questions of personal and political morality ultimately rest on the concept one has formed of the nature of human being, or one's 'philosophical anthropology'. This book is written by a 'liberal socialist' who believes, firstly, that the most attractive yet plausible such philosophical anthropology is that of classical liberalism, which focuses on 'unsocial sociability' as a specific characteristic of humankind, and, secondly, that, considering such natural human beings as economic actors, the market economy, when institutionalised in, *inter alia*, an adequate law of contract, is the best possible general system for the production and

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1 David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford University Press, 2022).

> consumption of economic goods. This seems a very strange thing for a socialist of any stripe to say.[2]

This strangeness not only arises because of the close association between Marxist antipathy to the market and socialism but also because non-Marxist socialism has, in Campbell's view, become inextricably linked to welfarism in political economy and law, especially contract law: 'In the liberal-democracies, the *laissez faire* market economy legally institutionalised in the classical law of contract has been developed into the "maximalist" welfare state, the policy of which towards the law of contract is "welfarism".'[3]

For Campbell, welfarism in contract law embodies the pursuit of 'ideals of social justice [embodying] the communitarian values comprising assistance to the weak and handicapped, fairness in the distribution of wealth, and altruistic concern for the interest of others which gave birth to the welfare state'.[4]

This is in marked contrast to the 'core moral value of *laissez faire* and the classical law [which] is the autonomy of the parties entering into a voluntary exchange'.[5] For Campbell, welfarism in contract law subordinates the autonomy of the parties to the pursuit of social goals geared to the paternalistic goals outlined above.

The autonomy that Campbell values accords with Hayek's understanding in that

> the socialism [Campbell] ha[s] in mind [is] very significantly akin to Hayek's liberal political morality, … [and] the account of exchange and contract in this book will draw heavily on the understanding of the co-ordination of economic information by competition to which Hayek gave perhaps the twentieth century's leading expression. If contracting is to give optimal effect to freedom to choose and therefore to welfare-enhancing competition, it must be made self-conscious of its moral basis in a relationship of mutual recognition. Consciousness of this necessity is, for reasons which will emerge over the course of this book, best called socialism.[6]

And,

> [t]he core of liberal socialism is the preservation and indeed expansion of the individual's freedom to act, which, in regard of the allocation of economic goods, should

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2 Ibid 4 (citations omitted). The reference to 'unsocial sociability' comes from Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Aim', tr Allen W Wood in Robert B Louden and Günter Zöller (eds), *Anthropology, History, and Education* (Cambridge University Press, 2007) 107, 113.

3 Campbell (n 1) 4 (citations omitted).

4 Ibid 4–5, quoting Hugh Collins, *The Law of Contract* (Weidenfeld and Nicolson, 1986) 1.

5 Campbell (n 1) 5.

6 Ibid 9.

> take the form of the economic actor's freedom to choose, legally institutionalised as freedom of contract.[7]

A self-conscious attempt to equate socialism with the political economy of Hayek merits being called audacious. It might also merit other descriptors but let's leave that for a moment.

One way of understanding Campbell's position is to recognise that Campbell is distinguishing the allocation of wealth in a society from the process of transacting in that society via contract law. As far as I can tell his position is not one arguing that, for example, a welfarist contract law which actively aims at overcoming inequality and disadvantage is not a plausible or effective way of achieving these goals and that there are far more effective and appropriate means of dealing with these issues.[8] Whilst I guess that Campbell would agree with these sentiments, his is a straightforward position, viz, contract law should be a neutral mechanism to allow for full autonomy for adults of sound mind and is to be welcomed and praised on those grounds alone, irrespective of whether such a law is or is not capable of achieving paternalistic welfare goals.

So, what does this mean for the law of contract?

> [T]his book will put forward an explanation and evaluation of the positive law of contract and, behind this, the understanding of economic action expressed in neo-classical economics. The result of this critique will be adequate consciousness of a relationship of mutual recognition. This relationship is always present in economic action and contract, for without it neither are possible, but the classical law of contract and neo-classical economics express this only very inadequately. Conscious mutual recognition by economic actors and contracting parties is what I mean by socialism, actualised in the social market.[9]

In concrete terms, this requires a contract law that eschews entirely self-centred conduct and, instead, is based on notions of good faith.

> [T]he reproduction of autonomy in the social relationship of exchange is a question of an actor's conduct towards other actors, with the law of contract turning on the recognition that a party's freedom to choose is crucially influenced by the conduct of the other parties involved in negotiations and contracts. When the question is one of legally enforceable duties to others, this is a question of 'justice'. … The key to this is not to treat others as mere means to the realisation of one's own ends, but to recognise that others also have the status of ends-in-themselves. This is the necessary condition of realising Pareto optimality as a social system of *mutual* advantage, and it will be

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7 Ibid 8 (citations omitted).

8 I, for example, have made that very argument: see John Gava, 'Contract Law and Inequality: A Response to Frank Carrigan' (2013) 13(1) *Oxford University Commonwealth Law Journal* 9.

9 Campbell (n 1) 11 (citations omitted).

> argued throughout this book that the positive law of contract has been, and is being, formed by the development of consciousness of this necessity in a concept of good faith which expresses the duties to each other of both parties to a contract. Coherently understanding these duties has long involved and now involves rejection of a classical law that cannot free itself from a commitment to solipsistic self-interest.[10]

Wow, one might say. Not only is Campbell embarking on a path-breaking reanalysis of much of classical political economy, he is also, in effect, advocating the remaking of the law of contract to give effect to his vision of liberal socialism. Campbell is continuing a conversation that stretches back over nearly 300 years about the nature of government, society and economy started by Adam Ferguson[11] and Adam Smith[12] in Scotland and Montesquieu[13] in France, amongst others, and which has continued to this day.[14]

Other than noting the audacity of Campbell's notion of liberal socialism, I will leave to others, more expert in political economy than I am, the task of evaluating Campbell's theoretical underpinning of a reformed law of contract. My instincts give me pause but …

I do feel more able to comment about his call for a thoroughly re-evaluated and reformulated law of contract. In the spirit of Campbell's welcome blunt and clear opinions I will be similarly blunt and clear. First, Campbell's understanding of the relationship between transacting in the market and contract law is just plain wrong. Second, he shows a fundamental misunderstanding about the nature of the common law and common law reasoning and of the institutional capacity of the common law and its judges to reform, and then maintain and apply, a law of contract crafted to suit his understanding of personal autonomy and exchange in a market economy.

But, before explaining these criticisms I want to emphasise that Campbell's reading of the law of contract is as audacious as his treatment of political economy, and that even if one were to disagree with all of his analysis (which I am far from doing) no one could read this book's treatment of the law of contract and not come away with a better understanding of this classic form in the common law. His treatment of the hire purchase contract is a wonderful example of this. While, as I have indicated, I am not convinced that the law of contract could be reconceived and applied in the manner desired by Campbell, it is wonderful to see such a straightforward criticism of a whole area of law which was of such importance to so many over many, many years. Campbell's analysis is best put in his own words:

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10 Ibid 27 (emphasis in original) (citations omitted).

11 See, eg, Adam Ferguson, *An Essay on the History of Civil Society* (1767).

12 See, eg, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

13 See, eg, de Secondat, Baron de Montesquieu, *Spirit of Laws* (1800) [trans of: *De L'Esprit des Loix* (1748)].

14 David Graeber, *Debt: The First 5,000 Years* (Melville House Publishing, 2011) is a fine recent example of such work.

> Though still used to finance sales to consumers, especially of cars, the far greater availability to consumers of other forms of credit, and, as we shall see, the extensive legislative steps taken to eliminate the objectionable legal characteristics of the hire purchase contract mean that hire purchase does not now have nearly the importance that it previously had. But between, say, 1877, the year of the formation of the first company with the specific object of financing credit sales of furniture, and 1974, the year of the passage of [t]he *Consumer Credit Act*, hire purchase was the principal means of financing sales of relatively high value, 'durable' goods to consumers — sewing machines and pianos featured prominently in the late Victorian era but cars were the most important twentieth-century example — so that hire purchase came to stand a similar relationship to such sales as the mortgage to house purchases.
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> The hire purchase contract was the result of innovation in the appellate courts in the second half of the nineteenth century which radically altered the objective intentions regarding a sale which were codified in the *Sale of Goods Act 1893*. The aim of this innovation was to give the seller of consumer durables on credit an all but absolute legal security in the goods. But the specific contract which was devised contained great potential for unfairness and the infliction of hardship, and the realisation of this potential is a most instructive example of the shortcomings of the classical law of contract, specifically of its failure adequately to institutionalise contract's relational character of mutual recognition. This unfairness and hardship gave rise to great public concern, and eventually led to extensive legislative intervention beginning with the *Hire Purchase Act 1938*, and this legislation specifically for hire purchase set a pattern for consumer credit regulation …
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> Though it would be the merest affectation to argue that the legislative regulation of hire purchase as a form of consumer credit was unnecessary or has not markedly increased welfare, *it is wrong to say that legislation was necessary to correct market failure. What failed was a law of contract which … specifically did not attempt to institutionalise the values of exchange and agreement. A market properly regulated by the private law of contract would not have given rise to hire purchase in the specific form which caused such concern*.[15]

Say what you will about such a claim, but it does make one *think*. There can be no higher praise for academic writing. Of course, one could argue that this was a matter best left for Parliament which has processes for garnering information and opinions from those expert and experienced in the field. But Parliaments do not always act promptly, or at all, and courts do have to resolve the disputes before them. So, we are back to asking serious questions about the received wisdom in an important area of law.

Now, to Campbell's understanding of the relationship between law and transacting in the marketplace. Since Stewart Macaulay's pioneering 1963 essay, 'Non-Contractual

15 Campbell (n 1) 214–15 (emphasis added) (citations omitted) .

Relations in Business: A Preliminary Study',[16] a large body of empirical and theoretical work on the use and non-use of contract law in transacting has been carried out and two broad schools of thought now dominate the field. Both accept that law plays a relatively minor role in day-to-day transacting but differ in their response to this finding. One group, which we can call contextualists, argues that contract law should be changed (continually) to reflect business needs, behaviours and expectations. Catherine Mitchell has provided a wonderfully encyclopaedic treatment of this school of thought[17] and her book on that topic should be a first step for anyone interested in these questions. The other group, which we can call formalists, argues that business prefers formal, clear and relatively unchanging rules so that it can transact knowing that if recourse to law is desired the law will be predictable. Jonathan Morgan has provided a similarly wonderful examination of this body of thought[18] which, too, should be read by anyone investigating this area of law and commercial practice.

It is clear from the description given above that Campbell has a strong and well-argued belief about the nature of contract law and what needs to be done so that its doctrines give effect to the principles that he believes should underpin the common law of contract. With this significant proviso in mind, it is clear that Campbell believes that contract law underpins transacting in the marketplace. In his words, '[t]he law of contract can coherently be conceived only as, not a set of limitations upon potential illegitimate action, but as the facilitative conditions of all legitimate economic action'.[19]

In another section of his book Campbell describes transacting parties as acting within the 'shadow of th[e] law'.[20] So for Campbell, the non-use of contract law is not evidence of its irrelevance, but rather of its effectiveness, with recourse to law a relatively exceptional undertaking because of the law's very clear and close identification with the act of transacting.

As I have argued elsewhere, this gets the lessons to be learned from Macaulay and all subsequent empirical work exactly the wrong way around. Contract law and transacting in the marketplace are discrete concepts or entities. What Campbell and most other writers in this field, including Mitchell and Morgan, can't seem to accept is that contract law does not underpin transacting and that it does not matter if this

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

17 Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013).

18 Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013). Of course, much work has been published after Mitchell's and Morgan's books were published but they are essential starting points for anyone interested in this field.

19 Campbell (n 1) 39.

20 Ibid 257.

is the case.[21] Writers such as Campbell and Morgan accept that contract law is not, overtly, used much by business but they think that business transacts in the shadow of the law. Mitchell and other contextualists recognise this non-use of contract law but see it as a problem to be overcome by making contract law mirror business needs, behaviour and expectations.

It is as if these authors just cannot accept the evidence before their eyes.[22] Macaulay had shown that contract law was not used much by businesspeople, and that reputation, trust and other non-legal mechanisms were the primary means for securing transactions, and that contracts often were drawn up for internal bureaucratic and other non-legal reasons by businesses.[23] Macaulay's analysis sparked an explosion of empirical and theoretical work on the use and non-use of contract law by business and his explanation for the minor, indeed often non-existent, role played by contract law has been confirmed and augmented through detailed empirical and analytical studies from a variety of jurisdictions.[24] Sometimes contract law is used, sometimes business does transact in the shadow of the law, but these are conscious decisions to use law when it suits. To see this opportunistic use of law as the equivalent of most or all of transacting operating in the shadow of the law just runs counter to the evidence before our eyes.

Why do such outstanding scholars fail to see this? I think that they do this because of a shared and deep belief that contract law can only be understood in instrumental terms. They seem unable to accept the evidence that contract law plays a limited role in the market. Instead, whether writing from a contextualist or formalist position, they are determined to argue that contract law is central to market exchange. This means that they do not see that, to the extent that contract law does aid commerce, this use is accidental rather than purposive.

This misplaced belief about the centrality of contract law to the market comes at a cost. It has blinded these scholars to the real lessons to be learned from the sociolegal analysis of transacting and contracting in the marketplace. These lessons are that judges should *not* adapt the law of contract to suit perceived needs, behaviours and expectations of those in commerce *when contract law is relevant* to the parties. *Where contract law is not relevant*, transacting in the market can be rendered more efficient by concentrating on governmental and business policies that make

21 See generally John Gava, 'Taking Stewart Macaulay and Hugh Collins Seriously' (2016) 33(2) *Journal of Contract Law* 108.

22 It is a surprise that even Macaulay seemed unable or unwilling to accept his own evidence and analysis showing the relative unimportance of contract law for transacting in the marketplace: see ibid 108, 111.

23 See Macaulay (n 16) 62–5.

24 For a good introduction to the work in this field see the bibliographies in Campbell (n 1), Mitchell (n 17), Morgan (n 18) and Jean Braucher, John Kidwell and William C Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart Publishing, 2013).

transactions within corporations and governmental entities more efficient or by creating structures which aid and improve the working of trust and reputation in the market.[25]

Finally, on Campbell's fundamental misunderstanding of the nature of the common law and common law reasoning and of the institutional capacity of the common law and its judges to reform, and then maintain and apply, a law of contract crafted to suit his understanding of personal autonomy and exchange in a market economy.

As we have seen above, Campbell is not shy in demanding of the judges the complete reformulation of contract law to reflect his notion of liberal socialism.[26] Can this happen?

To achieve his goal Campbell would need, at the very least, a majority of judges in the higher, appellate courts to be proficient in political economy (and, of course, to adhere to his conception of political economy — one which is idiosyncratic, to put it mildly). It is hard enough in this world to be a master of one skill or one discipline. To ask the best of our judges to display a similar mastery in political economy is asking the impossible. This means that if contract is to be reformulated along Campbell's lines, it will be done by judges outsourcing the work to political economists (assuming that they will agree on implementing Campbell's vision). I can't see this outsourcing happening either.

Further, would the judges accept an intellectually bifurcated common law, with one part, the law of contract, the creation and reflection of a sophisticated notion of political economy, and the remainder, created according to common law methods? The judges who are ostensibly, and to a great extent actually, the guardians of the common law would not, I believe, countenance such a development. The history of the common law has shown that the judges, while often deferential to executive power, are powerfully jealous of their institution and of its methods and results.[27] To believe that they would accept a reformulation of contract law to reflect an outsider's vision of political economy, either through their own efforts or through outsourcing to experts, is to misread our judges.[28]

Putting these concerns aside for the moment, one has to ask how the change that Campbell wants is to be implemented. We can imagine the doctrinal confusion arising if the law of contract were to be reconfigured one case at a time. How

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25 For a fully developed argument elaborating on these themes, see Gava, 'Taking Stewart Macaulay and Hugh Collins Seriously' (n 21).

26 See above nn 9–10 and accompanying text.

27 See, eg, the High Court's treatment of judicial power in the *Australian Constitution* since, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

28 For those interested I have dealt with these issues in greater detail in John Gava, 'The Audience for Rick Bigwood's *Exploitative Contracts*' (2007) 32(1) *Australian Journal of Legal Philosophy* 140.

long would this take? Many, many years I would guess, and we must remember Marc Galanter's suggestion that law cases are essentially unrepresentative, with repeat players using their hard-won knowledge and experience to win more than they 'should'.[29] This bodes ill for Campbell's proposed reformulation of contract law. Of course, we can imagine a grand law reform committee established to carry out Campbell's wishes but in real life this is just not likely to happen.

To sum up, common law judges do not have the time, inclination or skills to do what Campbell wants and they would not meekly pass on to others their role of guardians of the common law.

Of course, Campbell is perfectly entitled to put his views forward, irrespective of the chances of them being accepted, now, in the near or the distant future. But if he thinks that the common law judges will happily, or otherwise, carry out the changes that he has outlined, he will be disappointed.

David Campbell has produced a humdinger of a book. In chapter after chapter my reactions went from, 'What the …', to, 'He can't really mean that', to, 'Maybe', and finally to, 'I'm going to have to read that again'. It's not often that a book about contract law does that and for me that is reason enough to recommend this book as strongly as I can. I think that he is wrong on many grounds but … so what?

29 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95, 103.