‘Can contract law be moral?’

For symposium on D Campbell, *Contractual Relations*,
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What I want to do in this talk is to try to *locate* David’s book in modern private law theory, to relate what he’s saying to other points of view. The obvious way to go about this is by way of comparison. This is largely possible, I should point out immediately, precisely because David has been so very clear about where he stands. If he also feels it makes him much too convenient a target, well, *c’est la vie*.

1 Atiyah, ‘Rise and Fall’

An obvious starting point is to compare David’s *Contractual Relations* with Patrick Atiyah’s *Rise and Fall of Freedom of Contract*, a book with which David is clearly very familiar, and seems to have a high opinion of.

In terms of method, there are strong similarities. Both books have clear historical vision, tracing contract regulation both through formal legal doctrine *and* wider social and political thought. From the high point of *laissez-faire* in the mid-Victorian period, they follow the gradual falling-away of that doctrine, throughout the late Victorian period and on to the present. Both describe the problems that were increasingly seen with *laissez-faire*, and how they were addressed. Neither of them is writing a year-by-year account of this falling-away, but rather with giving a broad-brush account of the underlying ideas.

And they paint broadly similar pictures: *laissez-faire* as a tolerably coherent idea, but nonetheless with a fatal flaw that increasingly made itself apparent. Of course, their accounts differ as to what exactly that flaw was. To Patrick, the flaw was to put too much weight on the idea of *promise or agreement*, on the obligation to do what you said you would do – it was inevitable that other principles would assert themselves over time[1]. Whereas David’s focus is rather on *exchange*. *Laissez-faire* was right to prioritise exchanges, wrong not to go further in treating this as embodying a principle of mutual respect[2]. So what Patrick describes as an increasing appreciation of market failure, David regards as a failure to understand what markets really do. Neither of them felt that we could move on properly from *laissez-faire* without an alternative vision being spelled out[3], though Patrick never managed to complete that task; David now has, and here we are.

The difference between them is vital, but let’s consider the similarities first. While their common method – writing a history of contract doctrine in parallel with a history of social thought – is perhaps a natural

[1] *Rise and Fall* (1979) 4.
[2] *Contractual Relations* 408.
[3] *Contractual Relations* 62.

one for contract lawyers who also know their history, it's going to look slightly odd to those outside the small world of contract theory. For both Patrick and David, the two histories march together in lock-step – we're constantly shifting attention, rather vertiginously, from contract doctrine, to social and economic theory, and back again. What judges say is being linked to what social theorists say, yet without much evidence that either was reading what the other was writing. So the leading lawyers are treated as having their fingers on the pulse of the nation, responding to new social problems as seems best to them. They have one foot in the law library and the other in the public square. The idea that there's a distinct legal culture, an 'internal point of view', by which the legal community to see issues from a different perspective from the community generally, is either missing or not considered important.

Whether that's entirely legitimate is an interesting issue. As Ben Zipursky has said[4], it's ironic that the basic private law subjects, the ones that make our students 'think like lawyers', are also often seen as based on wider social and political thought. Is it really true that the way lawyers think is pretty much the same as how economists, political scientists and historians think? Some of the most insistent criticism of Patrick Atiyah's *Rise and Fall* has been on precisely this point, that he *assumed* a linkage between how contract law developed and how economic and political thought developed, rather demonstrating an actual intellectual connection. Of course, a serious investigation of this would be a major historical project in itself – not something that can be done within the confines of this book.

With David's book, much as with Patrick's, the precise series of events in contract doctrine is not explicitly spelled out. But it's not hard to construct a chronology.

In David's telling, the closest contract law had to a golden age would be the mid-Victorian period, with the after-glow lasting perhaps until the end of the century[5]. High points include George Jessel's famous statement of the rationale of contract law in *Printing and Numerical Registering v Sampson* (1875) ('still the cornerstone of the law'[6]), the 'exemplary' *Dimmock v Hallett* (1866)[7], and the Sale of Goods Act 1893 (an 'extraordinary regulatory success'[8]).

David tends to be respectful of the leading judges in this period – even when he thinks they were making serious mistakes – as with Colin Blackburn's early thoughts on what became the doctrine of frustration[9], of which David merely comments that it demonstrates 'unwisdom'[10]. And David struggles manfully to say

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[4] 'The standard 1L curriculum remains heavy on Torts, Contracts, and Property, presumably on the theory that these subjects will help students learn "to think like lawyers". Ironically, however, these are the subjects in which leading scholars are most attracted to the opposite approach: they want to think like economists, philosophers, political scientists, and historians …': B Zipursky, '*Palsgraf*, Punitive Damages, and Preemption' (2012) 125 *Harvard Law Review* 1757, opening words (online).

[5] Note the praise for Scrutton LJ's judgment in *Reigate v Union Manufacturing* (1918), *Contractual Relations* 128.

[6] *Contractual Relations* 16.

[7] *Contractual Relations* 89 n 63.

[8] *Contractual Relations* 257; and see 110 and 345 n 138.

[9] *Taylor v Caldwell* (1863), considered *Contractual Relations* 324-329.

[10] *Contractual Relations* 329. Similarly with Robert Lush's much-quoted attempt to define consideration ('not a distinguished one', *Contractual Relations* 153).

something nice about the Carbolic Smoke Ball case, eventually concluding that it is 'far more sensible than is usually allowed' and that any legislation to address the same problem would have been even worse[11].

But the occasional blemish in the law is admitted to. Most seriously, the mis-handling of hire-purchase transactions. David is indignant about the unfairness there, which to his mind consisted in documentation which deliberately misrepresented the bargains involved[12], though he is curiously respectful of the judges who went along with this[13] – I say curiously, in the light of what he says about later judges, when this error later metastasised, and attacked the whole of consumer law.

It is only when we are well into the 20th century that David goes in with all guns blazing, so to speak. A string of decisions from the 1930s provide ready targets.

> *Bell v Lever Bros* (1931) which is 'literally incomprehensible'[14], despite an 'impeccable' opinion from Richard Atkin[15].
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> *Arcos v Ronaasen* (1933), which is 'notorious'[16], 'pathological'[17]; Atkin's literal interpretation of the contract was 'preposterous'[18] and 'strains credulity'[19]; and the case's 'malign influence' is 'scarcely possible to overstate'[20].
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> *L'Estrange v Graucob* (1934) - 'preposterous'[21] and 'a disaster for the law of contract'[22].
>
> And last but not least:
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> The Hire Purchase Act 1938, which responded to the problems in that law. While David doesn't deny that this legislation improved overall welfare (though he can't *quite* bring himself to say so in words of one syllable[23]), he is adamant that its *method* was entirely wrong-headed, treating the issue as one of market failure, rather than as a failure of *the law of contract* 'to institutionalise the values of exchange and agreement'[24].

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[11] *Contractual Relations* 90.
[12] *Contractual Relations* 214-229 on *Helby v Matthews* (1895) and the legislative response.
[13] There is little comment on the judges themselves, though see *Contractual Relations* 227.
[14] *Contractual Relations* 325 n 28.
[15] *Contractual Relations* 328.
[16] *Contractual Relations* 124.
[17] *Contractual Relations* 138.
[18] *Contractual Relations* 127.
[19] *Contractual Relations* 126.
[20] *Contractual Relations* 125.
[21] *Contractual Relations* 237.
[22] *Contractual Relations* 234. Scrutton LJ's judgment is all the more puzzling for David because of his exemplary views in *Reigate v Union Manufacturing* (1918), 'on which this chapter is substantially based' (128).
[23] '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 the legislation was necessary to correct market failure': *Contractual Relations* 215.
[24] *Contractual Relations* 215.

So these 1930s rulings for David represent The Fall, where the legal establishment was confronted with the flaw in the Victorian approach, but botched their chance to correct it. They doubled-down on their mistaken view of what respect for agreement required, and responded to the obvious injustices flowing from this with a combination of stoic indifference, passing the buck to Parliament, and 'ingenious'[25] but ultimately inconsequential dexterity in favour of particularly deserving litigants.

There's an important point here, which indicates the unique approach to legal history David is forging. David is not alone in deprecating the English private law of the first half of the 20th century, but those who do this usually blame a failure to *abandon* the ideals of the Victorian law. Earlier generations of judges paid at least minimal attention to the social thought of their day, but in this period the judges gave up on it entirely and simply followed precedent. This overall phenomenon is usually labelled as 'formalism', a rigid adherence to the form of legal argument, and an abandonment of attempts to achieve substantively fair results[26]. It is not until rather later that the duty to 'do right to all manner of people' (as the judicial oath has it) begins to resurface.

It's fascinating that David agrees with the charge of unfairness, but for almost the opposite reason – he doesn't think the judges *should* have paid attention to contemporary economic thought, but on the contrary should have perfected the ideals implicit in the Victorian law. They should have used immanent critique to institutionalise genuine mutual respect between contractual parties. Focussed in this way, David thinks, contract doctrine could have become a principled embodiment of market values, rather than a series of *ad hoc* attempts to mitigate injustices for which the judges themselves were responsible.

As to the post-1945 picture, David's view of the law's development is not much more approving. He has an intense love-hate relationship with Tom Denning throughout; agreeing that Denning did much good though also some significantly bad things[27]; admiring his cleverness and inventiveness[28] but deploring the goals he applied them to, which were either wrongheaded or simply incoherent[29]; and commenting that 'the audacity of his statements' was 'notorious'[30], but also that his 'bark was generally worse than his bite'[31].

David also briefly plays the game – started I understand by Duncan Kennedy – of specifying *how many* Dennings would have been optimal for the development of English law. Duncan himself opted for 'a few'[32],

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[25] *Contractual Relations* 237.
[26] P Atiyah, *Rise and Fall* (1979) ch 20; and R Stevens, *Law and Politics* (1978) esp chs 10-11. David doesn't care for talk of 'formalism' in this sense, *Contractual Relations* 118.
[27] *Contractual Relations* 328.
[28] *Contractual Relations* 184.
[29] *Contractual Relations* 184.
[30] *Contractual Relations* 231.
[31] *Contractual Relations* 231.
[32] See P Atiyah and R Summers, *Form and Substance in Anglo-American Law* (1987) 133. I have not located any similar statement in print, though this seems entirely compatible with his published views on Denning: see e.g. D Kennedy, 'The Political Significance of the Structure of the Law School Curriculum' (1983) 14 *Seton Hall Law Review* 1, 14-15.

but Patrick Atiyah opined that 'one' was just enough[33]. David, after due consideration, seems tempted to suggest a slightly lower number, but never actually does so[34].

David's judgment on the post-1945 law is actually quite mixed. Going briefly through the standard syllabus:

> *Offer and acceptance* law is doctrinally incoherent, and 'there must be a question whether [it] now serves its basic purpose'[35].
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> *Intent to contract* is a 'device' that was 'always fundamentally ill-conceived'[36].
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> *Consideration* is essentially a sound notion, but the modern cases are confused: *Chappell v Nestlé* is barely comprehensible[37], and while *Williams v Roffey* shows 'commendable motivation'[38] and gets to the right result, 'the judgment is at root logical nonsense'[39] and 'depressingly calls to mind more than a century of scholasticism'[40].
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> *Promissory estoppel* doctrine is also 'logical nonsense'[41], and the idea that it could *ever* affect the result of a contract case is 'completely unsatisfactory'[42].
>
> *Unilateral mistake* doctrine is simply wrong, 'cannot possibly be the law'[43]; *common mistake*, along with *frustration*, 'fundamentally contradict[s] the basic function of contract'[44] and should be abolished[45].
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> On *express terms* the picture is mixed. Denning's innovations on fundamental breach are condemned as 'irredeemable error'[46], but his 'red hand' test in *Spurling v Bradshaw* (1956) is considered strongly beneficial[47]. David doesn't care much for the Unfair Contract Terms Act – the theory's all wrong[48], the title's misleading[49], it misleadingly focuses on the fairness of the terms rather than the adequacy of the negotiations[50] – but his bottom line is really only that it wasn't

[33] P Atiyah, 'Lord Denning's contribution to contract law' (1999) 14 *Denning Law Journal* 1, 11.
[34] *Contractual Relations* 133.
[35] *Contractual Relations* 80 n 5.
[36] *Contractual Relations* 180.
[37] *Contractual Relations* 204.
[38] *Contractual Relations* 342.
[39] *Contractual Relations* 340.
[40] *Contractual Relations* 341.
[41] *Contractual Relations* 341.
[42] *Contractual Relations* 358.
[43] *Contractual Relations* 46.
[44] *Contractual Relations* 328.
[45] *Contractual Relations* 331. He makes an exception for unanticipated changes in regulatory frameworks (329 n 58).
[46] *Contractual Relations* 231.
[47] *Contractual Relations* 238-239.
[48] *Contractual Relations* 231.
[49] *Contractual Relations* 229.
[50] *Contractual Relations* 192-193.

necessary, that *Spurling v Bradshaw*-type reasoning should have led to the same results at common law[51].

On *implied terms*, again a mixed bag. *Liverpool v Irwin* was incoherent and left later courts in an impossible position[52]; but there are good points too: the technical legal issues in *Bernstein v Pamson Motors* 'could not be better analysed than they were by Rougier J'[53] though the result he reached, David thinks, was still wrong[54]. On the key issue of an implied good faith term, the lords in *Walford v Miles* were of course wrong, if in some respects understandably so[55]; but David brings out his very highest compliments for George Leggatt's judgement in *Yam Seng*, which he calls 'remarkable'[56] and 'a *tour de force*'[57].

On *misrepresentation*, David has eviscerated the 1967 Act elsewhere[58], and makes no comment here.

On *unconscionability and inequality of bargaining power*, he makes his loathing of the core concepts clear[59], but doesn't seem to have any problem with the *use* the judiciary have made of them, which is in truth rather limited; for example, he is happy with the result of *Atlas v Kafco,* though noting that the judge was 'perhaps, with respect, not entirely comprehending'[60].

On *equitable remedies*, David thinks the standard approach is wrong – commercial parties are only really interested in their lost profit, so damages will nearly always be an adequate remedy – and unless the claimant is a consumer, it's only in very rare circumstances that anything else is required. But this doesn't much matter, David thinks, because making specific performance available to commercial parties doesn't mean the contract will be performed, it simply gives the claimant a somewhat stronger position from which to negotiate damages[61].

And last but very much not least,

Damages. Here the Victorian judges got it absolutely right, and this essential rightness is to David one of the main reasons why markets continue to generate wealth[62]. Various mid-Victorian cases,

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[51] *Contractual Relations* 238-239.
[52] *Contractual Relations* 110 n 166.
[53] *Contractual Relations* 106.
[54] *Contractual Relations* 107 n 150.
[55] *Contractual Relations* 69-75.
[56] *Contractual Relations* 47.
[57] *Contractual Relations* 147.
[58] D Campbell, 'The Consequences of Defying the System of Natural Liberty: The Absurdity of the Misrepresentation Act 1967' in T Arvind and J Steele (eds), *Contract Law and the Legislature* (2020) 127. In his opening words, David holds back from denouncing it as 'the Act which, purporting to effect desirable reform of the general principles of the law of contract, has, in proportion to its length, caused the most mischief for the understanding and operation of that law', though only because he accords that distinction to the Law Reform (Frustrated Contracts) Act 1943.
[59] e.g. *Contractual Relations* 192-202 and 328 ('desperate recourse to equity or unconscionability').
[60] *Contractual Relations* 344 n 133.
[61] *Contractual Relations* 302.
[62] *Contractual Relations* 282.

the earliest of which is *Hadley v Baxendale,* accurately set out the law[63], and this bedrock of principle is still pretty much in force.

That said, just about every leading modern case has messed with this legacy. A recurrent error is of inappropriate borrowing of concepts from tort law, though there are other errors as well.

- *The Heron II* (1969) simply failed to identify the real issues[64].

- The 'eccentric'[65] *Ruxley v Forsyth* (1996) managed to get to the right result[66], but the discretionary approach in the case 'obviously runs counter to the fundamental values of contract'[67].

- *Attorney-General v Blake* (2001) represents 'a gross misinterpretation of the positive law'[68], though fortunately it has proved to be 'the dampest of squibs'[69].

- *The Achilleas* (2008) was 'one of the unhappiest recent instances' of failure to distinguish contract and tort[70]; it is 'incomprehensible' and 'wholly inimical to the values of the law'[71]. David actually apologises for saying that the decision also shows 'perversity', but excuses himself because 'I ... can think of [no word] more fit'[72] ('sorry not sorry', as they say).

- *ParkingEye* (2015) is an 'abandonment of the common law of contract'[73], can be defended 'only at the cost of absurdity'[74], and has led to 'squalid' results[75].

  and

- *One Step v Morris-Garner* (2018) embodies a fallacious view, which can only be held by someone who 'thinks the whole of the law of remedies for breach of contract is fundamentally wrong'[76].

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[63] *Hadley v Baxendale* (1854) (264-271); *BC Sawmill v Nettleship* (1867) (266); *Wigsell v School for the Indigent Blind* (1882) (301).
[64] *Contractual Relations* 266.
[65] *Contractual Relations* 302.
[66] *Contractual Relations* 297. He adds that '[t]here are worse cases than *Ruxley*' (300).
[67] *Contractual Relations* 297.
[68] *Contractual Relations* 280.
[69] *Contractual Relations* 279.
[70] *Contractual Relations* 268.
[71] *Contractual Relations* 269.
[72] *Contractual Relations* 268.
[73] *Contractual Relations* 314.
[74] *Contractual Relations* 316.
[75] *Contractual Relations* 318.
[76] *Contractual Relations* 282.

In summary, while David excoriates the development of the law of contract over the past century, and thinks that much nonsense has been talked along the way, the *results* have to his mind been not so bad. Just about every judicial innovation seems to be flawed at some level; however, the judges have not yet strayed so far from Victorian principle as to weaken it fatally. So while David is fierce on the theoretical stances taken – 'authoritarian' and 'inchoately communist' as he calls them throughout[77] – we can say of David too that his bark is a lot worse than his bite. David's judgement on the judiciary's development of contract law is reminiscent of Churchill's famous judgment on Americans: that they *can* be trusted to do the right thing, though only once they've tried everything else first[78].

So that's *Rise and Fall*.

2 Kantians

The second comparison to make, when locating David's book in modern private law theory, is with Kantian writers, most famously Ernest Weinrib but also Arthur Ripstein, Allan Beever, Peter Benson and (arguably) Charles Fried. Yet David makes *little* reference to these other writers, and they are working within a very different intellectual tradition.

Nonetheless, in four respects we can see a close similarity with David's approach.

Firstly, they all ground the law in *relationships of mutual respect for each others' autonomy*. This is the classic Kantian approach. Indeed, David is happy to regard himself as part of this relational Kantian tradition[79]. We should not treat others *merely* as means to our own ends, but should recognise that they too are entitled to define their own ends[80]. There are terminological issues here; David at some points distinguishes between relational contracts and discrete contracts[81], at others says that all contracts are relational[82]. But there's no inconsistency. All contracts are relational, but in some cases that relationship requires ongoing mutual collaboration and adjustment to a high degree, and naturally the relationship gets even more emphasis. So it is perfectly meaningful to say that while all contracts are relational, some are more relational than others[83].

Secondly, David agrees with the Kantian tenet that *because* the law is based on the relationship between the parties, it *shouldn't* be based on, or pay much attention to, the world *outside* their relationship. We should leave the parties free to define their own mutual entitlements. David perhaps isn't quite as dogmatic on as the other Kantians are, but the overall result is the same. David doesn't deny the presence of externalities, but is unimpressed with those economists who rely on them to any great degree. It is

[77] e.g. *Contractual Relations* 410.
[78] The target and authorship of this famous observation are much disputed. See Quote Investigator.
[79] *Contractual Relations* 258, 407.
[80] *Contractual Relations* 27.
[81] e.g. *Contractual Relations* 347.
[82] e.g. *Contractual Relations* 410.
[83] For discussion see *Contractual Relations* ch 2.

because externalities are everywhere, but quantifying them is so hard, that they often become an excuse for poorly-justified government intervention[84].

Thirdly, David adopts the same *unitary* attitude to law as the other Kantians. Respect for the autonomy of others isn't *one goal* of the law, he thinks, or even *its most important* goal – it's the whole damn thing. So respect for others isn't just a *nice idea*; rather, anything else is a fundamental *betrayal* of what law should be about. If you don't allow the parties to determine their own interests, then whatever you do, however well-intentioned, amounts to substituting external standards instead[85]. Much like Ernest Weinrib[86], David is adamant that applying external standards is objectionable in principle, even if it works out well in practice: it's authoritarian, it's paternalistic, and (because it lacks any principled justification) it has no logical stopping point. David condemns writers who rely heavily on the concept of market failure – if the market has really failed to discern the parties' preferences, he thinks, the default answer is to re-double our attempts to discern them, not to paternalistically substitute our own[87].

And fourth, much like other Kantians, David does his best to push appeals to inequality to one side. He is however rather awkward about it. With Marx, he declares that achieving complete equality is not a meaningful goal, that inequality is inevitable[88]. Yet he also agrees that negotiations between unequal parties are 'bound to continually yield undesirable outcomes'[89]. Exploitation of unequal bargaining strength *should* be addressed, he says, but this is inherently difficult[90]. *Truly* unacceptable market outcomes must be corrected, but the market itself must be accepted as a basically just institution. David lays it down dogmatically that the cases calling for intervention will be exceptional, 'in [a] very demanding sense'[91].

His most general point is that many of the issues blamed on inequality are really issues of agreement. Standard forms which outrageously favour one side should not be seen as impositions on weaker parties, but as attempts to mislead the legal system as to what the parties' agreement truly was[92]. Or again, where weaker parties lack relevant information, the solution is not to guess what would be best for them, but to give them an appropriate amount of information so that their choice is a genuine one[93].

Left unclear is whether David would go further. Perhaps the real argument is not that inequality does not need to be addressed, but that it is not for *contract law* to do so, but other heads of law. Which other heads, though? I have struggled to find references either to discrimination law or to human rights law. David does mention the welfare state quite a bit, stating that the market is only accepted as legitimate

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[84] *Contractual Relations* 393.
[85] *Contractual Relations* 6.
[86] E Weinrib, *The Idea of Private Law* (1995) 3-14.
[87] *Contractual Relations* 86.
[88] *Contractual Relations* 63, 207.
[89] *Contractual Relations* 238 n 133.
[90] *Contractual Relations* 238 n 133.
[91] *Contractual Relations* 193-194.
[92] *Contractual Relations* 217.
[93] *Contractual Relations* 92-99. Much of this is an argument over specifying the *right amount* of information, arguing against O Bar-Gill, *Seduction by Contract* (2012) and M Radin, *Boilerplate* (2013).

because of basic social provision[94], but also it has now expanded too far to be acceptable. More generally, redistribution is mooted as a possible response to *some* problems. At one point, David suggests that it's essential to separate out distribution of initial endowments from the market process itself – 'this separation is essential to the operation of contractual justice' he says – but he immediately acknowledges that this can't happen in any literal sense, would at best only be a matter of degree[95]. He also notes the failure of attempts to address inequality effectively, particularly in relation to education[96].

There's clearly an issue here – namely, if we agree that inequality needs to be addressed, should private law should be part of the process of addressing it – an issue addressed elsewhere by Orit Gan[97], Hanoch Dagan and Avihay Dorfman[98] amongst others, and clearly vulnerability theory ought to have something to contribute here too. Clearly David can't dogmatically insist that these issues have to be kept separate from issues of contractual justice, because he himself explains why that can't be done. But equally, he can't be blamed for failing to unravel these particular conundrums, because no-one else has been able to either. His bottom line, here at least, is that mutual recognition of interests 'is necessary for a *desirable, general, practical* reform' of contract law[99]. Whatever else may be required – including, possibly, redistribution through taxation or other means – would be a different topic, certainly a big one[100]. One thing at a time.

So, the links between David's theory and Kantian legal thought generally are clear enough. But it shouldn't be forgotten quite how broad a church legal Kantianism is. What David says is largely compatible with the views of Ernest Weinrib[101] and Arthur Ripstein[102], though both of them tend to talk of contract doctrine in rather general terms[103]. David can also agree with some observations of Charles Fried[104] and Peter Benson[105] – but ultimately they are simply not engaged in the same sort of project as David is. They are focused on defending traditional textbook orthodoxies, which leads them to construct elaborate theories to justify textbook treatments. To David, this means that most of what they discuss lacks practical import[106]. Most Kantians are simply trying, in their various ways, to understand contract law; whereas for David, the point is to change it. Can David's theories ultimately be fused with those advocated by Ernest Weinrib and his collaborators? It's difficult, particularly as for most legal Kantians 'economics' means Chicagoan welfare economics, a very different beast from David's more Hayekian economics[107].

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[94] *Contractual Relations* 211.
[95] *Contractual Relations* 206-208.
[96] *Contractual Relations* 211 n 113.
[97] O Gan, 'Contract Law, Equality and the State' (2024) 72 *Cleveland State Law Review* (forthcoming) (online).
[98] H Dagan and A Dorfman, 'Poverty and Private Law: Beyond Distributive Justice' (2022) (online).
[99] *Contractual Relations* 398, emphasis in original.
[100] *Contractual Relations* 11, 206.
[101] E Weinrib, *The Idea of Private law* (1995) 50-53, 136-140.
[102] These too tend to be rather general. See particularly A Ripstein, *Private Wrongs* (2016) esp chs 3 and 4; A Ripstein, 'The Contracting Theory of Choices' (2021) 40 *Law and Philosophy* 185.
[103] Allan Beever's recent work shows some sympathy with David's approach (e.g. *Freedom under the Private Law* (2023) 5 n 6), but is too little focused on contract law to be useful here.
[104] *Contractual Relations* 17.
[105] *Contractual Relations* 80 n 5.
[106] *Contractual Relations* 191 n 8; see also 55 n 61. See also his similar comment on Steve Smith's work on remedies as '[u]nconstrained by contact with the real issues' (291 n 36).
[107] As David himself hints, *Contractual Relations* 55-56 n 61.

With Hugh Collins[108], I have my doubts whether Kantian thought can be merged with economics in the way David attempts[109] – but weighing up that issue rigorously is far above my current pay grade.

To conclude the discussion of Kantianism, however, we must note one respect in which David's view stands out – though it in no way invalidates his status as a card-carrying Kantian. This is in relation to the law of negligence, which Ernest Weinrib and Allan Beever have explained as entirely based on Kantian principles of mural respect. David's views are scattered throughout the book, perhaps because he has written extensively on this elsewhere[110], but he is nonetheless crystal clear: this is complete garbage. Channelling the dissenting law lords in *Donoghue*, David argues that the current law is unjust, undermines contractual allocation of risk, is unprincipled state intervention and – precisely because it *is* unprincipled – has no internal logic or stopping point[111]. It is not simply that the law is incoherent, he says; incoherence is its 'defining feature'[112].

As to the scale of this, it's important not to be distracted by David's discussion of *Junior Books* – a soft target if ever there was one[113]. His objection is not to any one case, but to the entire development of the tort since 1932. *Donoghue* itself he thinks a terrible decision, whether viewed narrowly as a case about product liability – 'no rational policy or just legal grounding has ever been provided'[114] – or as the basis for a broad negligence liability[115]. The *Hedley Byrne* case (1964) exemplifies 'fatuity' and is 'even more absurd than the law of proximity in personal injury'[116], and the cases from *Dorset Yacht* (1970) to *Murphy v Brentwood* (1991) are even worse[117]. David is particularly enraged when the language used in the cases is very contractual, as with talk of 'relationships equivalent to contract' or 'assumptions of responsibility'[118]. To David, either there is a contract or there is not; fudging the issue is 'a sort of abuse of language', an excuse to substitute exogenous standards for the parties' own[119].

The difference between David and other Kantians on this point is actually quite subtle, though it illustrates just how diverse a crowd subscribe to 'relational' theories. Ernest Weinrib likes talk of the duty of care, because it seems to say that we have a duty to care for one another. David hates it, because it actually means a different thing, namely that a failure to care can lead to a money payment from an insurer – a payment which is funded, ultimately, by consumers themselves. The question of whether the system is fair therefore reduces to whether consumers would continue to fund the system if they had a choice in the matter, and David doesn't think they would[120].

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[108] H Collins, Review of *Contractual Relations* (2023) 19 *European Review of Contract Law* 265, 268-269 (online).
[109] See *Contractual Relations* 16, 196-197.
[110] See writings referred to in *Contractual Relations* 172 n 118.
[111] *Contractual Relations* 183.
[112] *Contractual Relations* 174 n 124.
[113] *Contractual Relations* 175-177.
[114] *Contractual Relations* 184, footnote omitted.
[115] *Contractual Relations* 185.
[116] *Contractual Relations* 173.
[117] *Contractual Relations* 327.
[118] *Contractual Relations* 173.
[119] *Contractual Relations* 268.
[120] *Contractual Relations* 172, 185. See also D Campbell, 'Interpersonal justice and actual choice as ways of determining personal injury law and policy' (2015) 35 *Legal Studies* 430 (online).

How far would David push this? It's hard to believe that David is Kantian *only* in relation to contract, that he thinks mutual respect should only operate between contracting parties and not between people more generally. David is clear that the current system is much too generous – 'a pointless and lawless costly levy on UK citizens'[121] – and will have no truck with tort's principle of full compensation, which he thinks goes beyond the mere prevention of want[122]. But he is also clear that there has to be some floor of basic rights which community members may invoke; and he doesn't deny that there *may* be a way of defending something rather like product liability, though he's yet to see a proper justification[123]. What a justifiable set of basic rights looks like, and how much of the current law of tort would remain part of it, is not explained here.

3 Collins, 'Regulating Contacts'

Last, I want to compare David's book with Hugh Collins's *Regulating Contracts*[124]. The *contrast* is obvious enough. Hugh sees the defects of the classical Victorian law as having led to the emergence of another set of laws, the regulations which manage the modern economy. While the two fields of law have very different aims and methods, Hugh wants to merge them into a new regime to regulate the market. David thinks Hugh is wrong at every turn: the Victorian law wasn't as bad as all that; where it was misguided, it is because it didn't take its own core ideas seriously enough; and we should be seeking to 'regulate' the market only in a very limited sense. Echoing Walter Lippmann, he says that the law's point is 'not [to] administer the affairs of men [but to] administer[..] justice among men who conduct their own affairs'[125].

So the difference between David and Hugh is apparently stark. It mustn't be exaggerated, however. David wants contract law to play a narrow role, but he nonetheless wants it to play a role *of some sort*, embodying a conception of justice which some might think undemanding, but is nonetheless a conception of justice. He might even agree with Catherine Mitchell that existing contract doctrine has in some respects abandoned its proper role in regulating market behaviour, though he's unlikely to agree with her on *how* precisely it should be regulating[126]. All of this might be too much for some. That role seems more extensive than (say) the 'minimalist' role urged by Jonathan Morgan in relation to commercial (though not consumer) contracts[127]. I'll leave it to Jonathan to say how much of David's theory he can go along with. The point is, that David does not want markets to be lawless or amoral, though he insists that there can be too much law, and the wrong sort of morality.

It's worth noting that David takes an entirely orthodox view of the *scope* of general contract law – he does not do what a more neo-liberally-minded thinker might do, which is to seek to extend contract into areas

[121] *Contractual Relations* 187.
[122] *Contractual Relations* 173.
[123] *Contractual Relations* 187-188.
[124] (1999).
[125] *Contractual Relations* 34, quoting W Lippmann, *The Good Society* (1944) 267 (online).
[126] C Mitchell, *Vanishing Contract Law* (2022).
[127] See J Morgan, *Contract Law Minimalism* (2013), particularly ch 6.

currently dominated by regulation. It's perfectly true that David wants to assimilate much of consumer law into general contract law[128], saying it's a fallacy that the two are distinct[129]. But while he has a point in relation to the parts of consumer law he considers in detail, that's a hard case to make for consumer law as a whole. And most areas affecting ordinary, non-business parties – housing law, employment law, family law[130] – are usually considered quite distinct from general contract law. Does David think *their* principles, too, should be replaced by contractual principles? Perhaps – we can ask him. Or does he think, as do Hanoch Dagan and Michael Heller, that we should focus more attention on specific types of contract, rather than a very general theory[131]? Again, we can ask him. Does he make a case to either effect in this book? Absolutely not.

More generally, while the differences between Hugh Collins and David are real enough[132], many of them are terminological only, and perhaps merely differences of emphasis. One is insisting that the glass is half full, the other that it is half empty. They have different emotional registers, to be sure. David expresses himself through anger and resentment at governmental overreach, while Hugh expresses shock and incredulity if the social problems he sees are not addressed. Hugh takes it for granted that it is government's job to govern, and enthusiastically discusses the best ways of doing so; whereas David is suspicious of that very project.

So each can be read as cautioning the other. But neither can land a knock-out blow.

- On the legitimacy of *government* intervention, the starting point for *both* is the superior efficiency of the market[133]. But equally, both agree that there are significant problems which can only be addressed by intervention of some sort[134]. David concedes the possibility of market failure, though he thinks it often overstated; no doubt Hugh would concede David's point that there can be governmental failure too[135]. I'm not suggesting that the two of them are likely to agree when this would be, but then both of them are fairly vague on that point – they are arguing about the general attitude to be taken to such interventions, not laying down precise rules. But Hugh is quite right to comment that views very similar to David's are already well represented in the EU case law[136].

- On *judicial* legislation specifically, it's notable that David does not repeat the polemics he has made elsewhere, suggesting that judges are forgetting their constitutional place[137]. That's

[128] *Contractual Relations* 120 n 17.
[129] *Contractual Relations* 210-211, 243-244.
[130] On which see especially *Contractual Relations* 180 n 161.
[131] H Dagan and M Heller, *The Choice Theory of Contracts* (2017) 7-9.
[132] For David on Hugh see *Contractual Relations* 32-34, 406; for Hugh on David see H Collins, Review of *Contractual Relations* (2023) 19 *European Review of Contract Law* 265, 268-269 (online).
[133] *Contractual Relations* 32.
[134] *Contractual Relations* 396.
[135] *Contractual Relations* 186.
[136] H Collins, Review of *Contractual Relations* (2023) 19 *European Review of Contract Law* 265, 272-273 (online).
[137] D Campbell, 'The *Heil v Rankin* approach to law-making: Who needs a legislature?' (2016) 45 *Common Law World Review* 340 (online); D Campbell and J Allan, 'Procedural Innovation and the Surreptitious Creation of Judicial

perhaps no big surprise. Here, David is urging that judges should adopt a major change of attitude on a matter of fundamental social importance, with little demonstrated popular support, and so he's in a poor position to complain about *other* people advocating judicial legislation. Both Hugh and David are urging that the judiciary should do the best they can, bearing in mind that they are part of a wider system – and none the less so because David grumbles occasionally about the 'hazardous vistas of judicial creativity'[138].

- David complains that Hugh's welfarist approach is arbitrary: the supposed welfare gains from it can't be quantified[139], and that there is no obvious limit to public interventionism[140]. I'm sure we can all agree there's *something* in this – though I doubt that we'd agree quite how much – but *David's* approach is subject to much the same criticism[141], forcing him to point out that we can't settle every issue in advance, and that the goal should not be specify precise rules, but rather should seek to inculcate the right values[142].

- A final complaint is that Hugh, and welfarists generally, are too ready to take a *dim view* of market actors. Consumers are taken to be ignorant or feeble-minded, when in fact they simply have different preferences from those that legislators prefer[143]; business entities are taken to be selfish bullies or worse, rather than simply trying to earn an honest penny. The law should not presume that *everyone* it deals with are knaves or fools[144]. But to what extent the law is dealing with knaves and to what extent with honest people, is not really something that can be judged from the law library. It is striking that David is happy to insist that most market actors behave properly, yet when it comes to the market sector he knows most about – personal injury advocacy – he has a quite different view, saying that the lawyers have 'received much but not nearly sufficient criticism' for their behaviour, 'which undermines the welfare state'[145]. As for the charge that some legislators have a snobbish disrespect for the free choice of those to whom the law applies, I doubt that Collins would disagree; as to whether those who framed the current law on alcohol and other intoxicants are in that category[146], perhaps further argument is required.

Supremacy in the United Kingdom' (2019) 46 *Journal of Law and Society* 347 (online); J Allan and D Campbell, 'Supremacy and hegemony: a reply to Palmer and Martin' (2021) 48 *Journal of Law and Society* 120 (online).

[138] *Contractual Relations* 135.

[139] *Contractual Relations* 186-188.

[140] *Contractual Relations* 395.

[141] For similar points see reviews by Catherine Mitchell (2023) 50 *Journal of Law and Society* 152, 155-156 (online) and Christopher Hose [2023] *Cambridge Law Journal* 365, 368-369 (online).

[142] *Contractual Relations* 122.

[143] *Contractual Relations* 392 n 62.

[144] *Contractual Relations* 40.

[145] *Contractual Relations* 173.

[146] *Contractual Relations* 396.

Conclusion

In conclusion I can only say what a very great pleasure it has been to review this excellent book, and to see how it engages with other points of view. If I've seemed a little harsh at times, I would repeat that it's only because David has been so very clear in what he says that it's possible to make such targeted points. As it is, David has staked out a serious position in contract theory, which should provide a focal point for discussion for decades to come.

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