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Contract Law as a System of Values Book Review

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BOOK REVIEWS

CONTRACT LAW AS A SYSTEM OF VALUES†

THE LAW OF CONTRACT. By Hugh Collins.* Wiedenfeld & Nicolson, London. 1986. Pp. xi, 236. £7.50.

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Contract law has changed dramatically since the heyday of free contract ideology. The false conflict in the cases and literature between facilitation of market transactions and regulation to achieve social aims has been transcended, largely due to the realization that social aims are behind all of contract law. In place of this false conflict, new questions about the values advanced through contract law have been posed. Contract theory needs an account of the values underlying doctrines that were previously justified (wrongly) as means to effectuate the intent of the parties. Hugh Collins has given us such an account in his new book, *The Law of Contract*.[1]

The skeptical reader might protest that contract doctrine does not look all that different today than it did in the late nineteenth century. Judicial opinions abound in contemporary reports that appear to rest exclusively on freedom of contract ideology. It is difficult, in fact, to find cases that explicitly discuss the values that Collins says provide the foundation for modern contract law.[2] Collins admits throughout the book that free contract ideology still plays an important role in contract law and that many contem-

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[1] H. COLLINS, THE LAW OF CONTRACT (1986).

[2] *See infra* notes 7-8 and accompanying text. The book contains excellent descriptions of how judges achieve various moral goals but use classical contract concepts in a terribly distorted fashion. Thus, the inability to locate decisions that explicitly discuss the values Collins has in mind does not indicate that the values are not there. Collins attributes the unwillingness to break out of the old way of writing contract law opinions to the nature of the judicial process and the fear of criticism. *See* H. COLLINS, *supra* note 1, at 121.

porary decisions are explainable only as resting on adherence to notions of free contract. Collins does not claim, then, that the values he identifies explain all of contract law. Rather, he claims that the values he identifies have, to some extent, supplanted free contract thinking, and that even in cases influenced by free contract ideals, these values temper free contract ideals. And Collins makes a good case that current law has strayed from the classical, uninhibited market model.

Collins's book is important as an attempt to reconstruct the common law around a group of values. Lately, critiques of common law, and of law generally, have threatened lawyers' confidence in law's ability to effectuate social policy. Critical Legal Studies has attacked contract law for its indeterminacy and for its unwillingness to adapt to the ground rules of the modern social welfare state.[3] Collins's project of connecting legal doctrines with values is difficult because both the doctrines and the values are indeterminate. Any argument that a doctrine advances a specific value can be met with a counter-argument that rests on a different meaning of the doctrine or value. Those of us who still believe in law, but also accept the realist attack, must learn how to talk about law and make normative arguments without being paralyzed by indeterminacy theory.

Collins's book successfully provides a framework both for analyzing contemporary contract law and for normative criticism of that doctrine. The doctrinal reforms that have moved contract law away from strict freedom of contract norms are not supported by a well-developed theoretical framework. This may lead to preference for free contract because free contract, with all its faults, rests on a rather firmly established set of principles. The book offers a competing set of values that could provide an alternate framework for contract law. This would legitimize doctrinal deviations from free contract ideology and open a path to further reform. Collins's greatest success in this book is in his explication of this competing set of values for the modern law of contract.

This review is divided into two parts. Part I is largely a description of the book's contents, with comments on its major theoretical propositions. This part includes a critique of Collins's discussion of corporatism in contract law. The focus here is on whether corporatism in contract law is connected to the substantive transformation that Collins describes in the remainder of the book. Part II is a discussion of the relationship between Collins's description of the law of contract and the law as it appears in the reporters. This second part also discusses the general relationship between theory and doctrine.

I. METHODOLOGY, DOCTRINE, AND THEORY

One of the first things law students learn is that contract law is not concerned only with facilitation of voluntary transactions. Contract law

[3] *See generally* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (showing the indeterminacy of contract law).

comprises complex principles and rules that regulate the market system so that transactions are enforced only if the law's substantive requirements are satisfied.[4] The theoretical problem has been to break out of the conceptualization of contract law as a core of facilitation of voluntary agreements with a periphery of regulation. This project requires an explanation of the normative judgments that inform the concept of voluntariness and an understanding of the values that determine when and how contracts are enforced. In more traditional discussions of contract law, individual deviations from enforcement of voluntary transactions are explained in a micro-context with a focus on particular problems involving the transaction. Only rarely do the traditional discussions rely on the type of transaction in explaining why the agreement is not enforced.[5]

Contract law structures a set of institutions that compose the market system of allocating goods and services in the economy. Collins therefore attempts to analyze contract law in the context of market transactions and the market system generally. This methodology, Collins argues, will enable him to find in contract law inherent principles other than the principle of enforcing the will of the parties.[6]

Collins's thesis is that modern contract law advances, through regulation of market transactions, "the communitarian values comprising assistance to the weak and handicapped, fairness in the distribution of wealth, and altruistic concern for the interests of others."[7] These values, which Collins sometimes refers to more abstractly as fairness, paternalism, trust, and cooperation,[8] are the ideals of social justice underlying the welfare state, and they have been incorporated into the law of contract.[9] Collins attempts to illus-

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[4] Collins characterizes the freedom to negotiate terms of a contract as "a privilege granted on stringent conditions." H. COLLINS, *supra* note 1, at 2.

[5] The preexisting duty rule, which bars enforcement of one-sided modifications of a contract, provides a good example. The operation of the rule is ascribed to the rules requiring consideration. If any attempt is made to explain why the agreement should not be enforced, the potential for duress employed through threats of withholding performance is cited as the ground for the rule. Yet these explanations are made only in passing, almost as an afterthought. *See, e.g.*, E. FARNSWORTH, CONTRACTS 277-78 (1982). One of the reasons that contract law itself has not made distinctions between different types of contracts might be that once such distinctions are made, law regulating specific arrangements is broken off from the main body of contract law and reconstituted as an independent body of doctrine. *See generally* G. GILMORE, THE DEATH OF CONTRACT (1974) (discussing the dissolution of an independent contract law).

[6] *See* H. COLLINS, *supra* note 1, at 2.

[7] *Id.* at 1.

[8] *Id.* at ix.

[9] *Id.* at 1. The substantive transformation of contract law, according to Collins, has been accompanied by a procedural complement in which power has devolved to participatory, private groups. *See id.* at 208. For my discussion and criticism of this part of Collins's argument, see *infra* notes 39-48 and accompanying text.

trate how specific doctrines and interpretive techniques in the cases reflect these values.

This methodology has obvious consequences for the organization of the book. Instead of focusing on discrete doctrinal categories alone,[10] Collins focuses on (1) the context of the social relations in the market, (2) the values upon which contract law is based,[11] and (3) the doctrinal divisions of contract law.

A. *Philosophical and Social Groundwork*

1. The Role of Contract Law

Collins takes an overtly instrumentalist view of contract law, stating that it channels and regulates market transactions according to ideals of social justice.[12] He rejects the view that contract law serves only to facilitate market transactions, arguing that the rules of contract law promote many, and ofttimes conflicting, social values.[13]

One of the most significant changes in contract law that Collins identifies is the breakdown of the classical model. The classical model analyzed rules abstractly, without considering the social context in which they operated. Contract rules were thought to serve only one purpose, and the way to learn about contract law was to look only at the rules. The rise of instrumentalism requires that rules be evaluated in their social contexts. This means that contract rules must be evaluated and understood, not as instances of the general principle of free will, but in terms of their consequences. Contract law creates and distributes power in the marketplace and provides incentives and disincentives designed to channel the use of that power. Thus, the way to learn about contract law today is to examine the institutions that it

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[10] *See, e.g.*, E. FARNSWORTH, *supra* note 5, at ix-xvii; J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS xxiii-xlv (2d ed. 1977).

[11] *See* H. COLLINS, *supra* note 1, at v-vii.

[12] *Id.* at 1.

[13] Collins's presentation is a bit unclear because he is reluctant to admit that the libertarian principles that motivated free contract theory are still important to contract law. As noted above, Collins states that the social values promoted by contract law are "assistance to the weak and handicapped, fairness in the distribution of wealth, and altruistic concern for the interests of others." *Id.* at 1. Collins explains differences in tests for enforceability of contracts, including consideration and reliance theory, as depending on conflicting views regarding efficiency, liberty, and privacy. *See id.* at 22-47. Collins neglects the possibility, which I discuss *infra*, that there are conflicting views about what these values are. In any event, contract law has not abandoned the values underlying nineteenth-century free contract doctrine; rather, as Collins more accurately states in his preface, the newer values *infuse* contemporary contract doctrine. *Id.* at ix. The new and old values coexist, creating a confusing and incoherent body of doctrine.

regulates and to observe ways in which contract law furthers the operation of those institutions. Furthering the operation of institutions is not neutral: the law will advance certain institutional arrangements at the expense of others.

Collins identifies the breakdown of free market theory and the movement toward understanding contract law in its social context as a double transformation in the law of contract.[14] By looking at the operation of contract law in society, one can discern a movement toward promoting values of fairness, trust and cooperation. Legal discourse has also changed. Collins argues that contract law is less particularistic than it once was; when it designs or advances institutional arrangements, it operates at a higher level of generality, revealing, to a greater extent, the values underlying the doctrine.[15] In other words, the technical rules that make up contract law are less important than the general principles or standards that guide the development of the rules.[16] The process of reasoning is thus both inductive and deductive. It is inductive insofar as examples lead to conclusions about the social vision from which contract law arises. But the reasoning is deductive in cases where conflicting questions center on how doctrine can best advance moral aims.

Collins's functional theory of the law of contract assigns to contract law a key role in important social operations. He states that the market creates, to a great extent, the "order of wealth and power" in "modern Western societies."[17] Contract law sets the ground rules for the working of the market and is thus vital to the established social order. Collins acknowledges that some theorists believe that the market functions independently of law or that law is merely reflective of the extra-legal order, but Collins insists that law in modern society creates the norms or standards of conduct that exist by tradition or custom in other societies. My instincts lead me to agree with Collins that law is important in establishing many of the norms of conduct in various aspects of economic life, but I remain critical of claims that elevate law to a primary role. There is still room for uncertainty about the importance of law to the function of the market.[18]

A key function of the market, as constituted by law, is to establish the

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[14] *See id.* at ix.

[15] *See id.* at ix.

[16] *Id.* at 15-16.

[17] *Id.* at 3.

[18] *See* Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). Ellickson's study of relations between farmers and ranchers indicates that law was important to his subjects in that they thought they were regulating their conduct according to it. However, the farmers and ranchers had their own ideas about what the law required, ideas which often did not correspond to reality. Law, as an ideal, might influence conduct, but the particulars of the actual law may not be all that important. *Id.* at 685.

distribution of wealth for society. Collins argues that under the market economy wealth is distributed according to the results of trading in the marketplace, a distributional system that rewards superior information and expertise.[19] He views inheritance and other non-market transfers as alterations of this basic pattern. But the presence of non-market transfers of wealth, and the importance of bargaining power to the distribution of wealth that the market creates, undermine Collins's presentation of the market as a meritocracy that generally respects personal dignity. The terms of contracts are affected by the relative power of the parties, and that relative power is determined by the legal rules.[20] Collins bypasses some of the more devastating criticisms of the market because he plays down the importance of raw power to the distribution of wealth under the market.

2. The Transformation of Contract Law

The "justice of exchange,"[21] as Collins calls the ideal underlying the distribution of wealth under the market, was defended as respecting personal autonomy and dignity, and providing a set of incentives for economic activity. The emergence of the welfare state illustrates that society no longer accepts the "justice of exchange."[22] Under the social welfare regime, a "legislative framework supplants the market order with compulsory obligations of social insurance. . . ."[23] Today the market is supplemented by social welfare legislation that wrests control over aspects of the distribution from the marketplace.

Free market exchange is supplemented not only by social welfare wealth transfers, but also by many reforms of contract law itself. Collins says that the liberal response to the injustice of the distribution of wealth under the

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[19] H. COLLINS, *supra* note 1, at 3. Collins points out that the justice of the market distribution is supported by the market's refusal to recognize claims of privilege; ability to succeed in the market economy is not explicitly distributed according to social class. *Id.* at 4. This, for Collins, is progressive when compared to the feudal structure that capitalism replaced. *Id.* at 9. I think Collins unduly discounts the importance of privilege in modern society. Wealth is heavily concentrated in many Western countries, and laws allowing inheritance and allowing parents to pay for private education (and allowing state governments to finance public schools from local property taxes, *see* San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 46 (1973)) have enormous effects on the opportunities for success of people not born into wealth. The equality of opportunity so vital for the justice of the market distribution is largely mythical.

[20] *See* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 29 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

[21] H. COLLINS, *supra* note 1, at 32, 204.

[22] *Id.* at 9.

[23] *Id.*

exchange model has been to advocate individual responsibility in the form of generalized duties of care (such as the reliance model) in place of the simple identification of voluntary consent.[24] The liberal response is viewed by Collins as inadequate because it fails to account for many of the changes in contract law and because it is inadequate to prevent the injustices that the market can create even with expanded duties of care.[25]

Collins details three major problems with the market system that he argues precipitated many of the modern reforms of contract law. First, contract law oppressed the weak by adopting a very broad definition of voluntary agreement, enforcing all such agreements and ignoring questions concerning the origins of ownership and the power ownership entails.[26] To prevent such domination, modern law has responded with increased regulation of both the uses of bargaining power and the content of contracts.[27] The second problem with the "justice of exchange" was that it legitimated a distribution of wealth that made it impossible for many individuals to enjoy the liberties that purport to justify the unregulated market in the first instance.[28] Contract law is now much more likely to regulate the fairness of contracts, and the welfare state also intervenes to ameliorate the harshness of the market's distribution of wealth.[29] The third problem with earlier contract law is its insistence on an image of the world of economic relations as competition between antagonistic individuals. Collins argues that the world is now more accurately described as a set of interdependent relationships in which the legal system protects and encourages cooperation and accommodation.[30]

Collins argues that the reliance model, in which non-contractual promises

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[24] *Id.* at 11.

[25] *Id.* This is one point of several at which I was uncertain whether Collins was claiming that the rejected description was wrong as a description or whether it was normatively erroneous. In other words, it was unclear to me whether Collins was claiming that the law has moved beyond reliance type theories in its rejection of individualistic markets or whether, given his criticisms of the exchange model, the law should move beyond individualism altogether. This lack of clarity is not necessarily a weakness because it is an important method of persuasion in legal analysis to present reforms as if they are close to settled law.

[26] H. COLLINS, *supra* note 1, at 11-12.

[27] *Id.* at 13.

[28] *Id.* at 13-14. Collins recognizes here that one of the primary reasons for preferring a market economy to a state-planned economy is that the market allows for greater expression of individual preferences and thus more liberty. *Id.* This means that the degree to which the law regulates the fairness of contracts is tempered by the law's desire to protect liberty. In practice this contributes to the indeterminacy of the common law system; the line between regulation to achieve liberty and regulation for fairness is not clear and decisions will not be the product of the rules of contract law but rather will arise from the decisionmaker's views on fairness and liberty.

[29] *Id.* at 14.

[30] *Id.* at 14-15.

can create liability if the promisee relies on the promise, does not capture the sorts of reforms that follow from these criticisms of the law of contract and the market because it suffers from the problem identified in the third criticism. Because the reliance model focuses on individuals, it can still allow domination and unfairness. Reconstituting the world in a communitarian image allows the legal system to pursue the goals of fairness and cooperation within a system that recognizes inequalities and does not allow these inequalities to be exploited by stronger parties. Reliance theory, with its requirement of a promise, simply fails to address these concerns.[31]

One of Collins's most important methodological points is that contract rules must be analyzed in the context of particular market realities.[32] In other words, different market arrangements need different legal frameworks; therefore, in order to criticize the law, one must have a clear picture of the social arrangement to be regulated. Collins uses the example of the complicated transactions concerning the sale and servicing of new automobiles to illustrate that economic relationships are more complex than the two traders in the competition model.[33] The manufacturer relies on dealers to sell and service the automobiles, on consumers to buy them, and on finance companies to help consumers pay. The dealers rely on the manufacturer for a supply of cars and for advertising, on the finance company to finance both the inventory and the consumer purchase, and on the consumer to purchase the automobile. The consumer relies on the manufacturer to produce a quality automobile, on the dealer to help select a product and repair it, and on the finance company to help with the purchase price. The finance company relies on all of the others to use its services. The legal system suffers if it adheres to a false picture that portrays these relationships only as antagonistic individuals competing in the marketplace.[34] The law of contract

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[31] Collins explains the differences and the similarities between contract theory and reliance theory very clearly in his *Contract Law and Legal Theory*, in LEGAL THEORY AND COMMON LAW 136-54 (W. Twining ed. 1986). Contract theory is based on choice while reliance theory is based on protection of interests. *Id.* Collins demonstrates in that work that both choice theory and interests theory rest on moral visions of the good society and do not meet the liberal neutrality criteria. In many ways, Collins's explanation of reliance theory in the Twining book is richer and more complete than that in Collins's own book.

[32] This is not inconsistent with Collins's earlier point, *see supra* note 15 and accompanying text, that legal principles operate with greater generality than before. Under current law, more general principles are applied in narrower contexts.

[33] *See* H. COLLINS, *supra* note 1, at 10-11.

[34] *See id.* at 9. Reshaping law by telling a different story about the world is an important element of critical methodology. *See* J. Singer, *The Reliance Interest in Property* (1987) (unpublished manuscript). Even though it is often possible to tell a different story about the world, I am uncertain about how much the world actually has changed. It is difficult to know whether the world is a more interdependent place or whether ideology has created that image. Redescription of the world along ideolog-

has changed, according to Collins, as the economic world has become a more interdependent place. As a theoretical matter, the interdependence of economic relationships has replaced voluntariness as the central explanatory factor in market regulation.

3. The Institutions of Lawmaking: Of Politics and Corporatism

Collins believes that in order to understand the law, one must study the institutions that produce the law.[35] Thus, he compares the lawmaking functions of the judiciary, the legislature, and private organizations. Collins notes that many of the more innovative reforms in contract law have been the product of legislative intervention rather than common law development, since legislators have the political authority to inquire explicitly into questions of distributive justice.[36] He says that judges are not able to be as innovative or adaptive as legislators because judges, under current notions of the appropriate judicial role, are constrained by the necessity of appearing to apply the law to their decisions instead of actually creating the law. The false expectation that law evolves through a neutral system also impedes even statutory innovation because the legislature will appear to be embarking on blatantly redistributive programs while the judicial system maintains its appearance of objectivity.

I am surprised that Collins uncritically adopted this structure for analyzing the judicial role. Notions of the appropriate judicial role are very controversial[37] and even in the classical period it is not clear that common law judges were as passive as Collins describes. Judges established contract law to distribute wealth according to success in the marketplace because they thought that was a good way for the system to operate. They refused to reform the system because they preferred the existing rules to any proposed alternatives. I do not think this is passive; it's just conservative. I have always found the "factual" bases for the preference of legislatures for policymaking or "political" decisionmaking dubious. When courts want to act they do not let such matters get in their way. Collins acknowledges that the line between legal and political argument has become more blurry in recent times, and I think much can be said for abandoning the distinction altogether.

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ical lines is related to the portrayal of reformist tendencies in legal doctrine as settled law. *See supra* note 25.

[35] *See* H. COLLINS, *supra* note 1, at 15-16.

[36] *Id.* at 16-20.

[37] *Cf.* Beermann, *Crisis? What Crisis?* 80 NW. U.L. REV. 1383 (1986) (discussing appropriate role for federal judges); Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275 (1983) (discussing dilemma of judicial activism versus judicial passivism).

Contemporary contract law is not made only by public institutions. Decision-making power is divided among more than private parties in economic relationships and government agencies exercising public power. There are also private groups that partake of both sorts of power. Private trade associations representing interested individuals and groups engage in bargaining on a large scale over the terms of trade-wide standard agreements.[38] Private arbitrators adjudicate disputes, thus employing the power to establish the norms of conduct that constitute contract law.[39] While these sorts of arrangements have been around for a long time,[40] Collins says that the infusion of public law norms into private civil society constitutes a "third transformation" of the law of contract: the rise of corporatism.[41]

The important examples of corporatist behavior are negotiation of standard form contracts by interested groups; arbitration of grievances under these and other contracts; self-regulation of professions by private organizations like bar associations and other trade groups; and collective bargaining over the terms and conditions of employment, which often takes place between an association of employers and a group of local unions.[42] Public agencies supervise these forms of private governance, and courts subject these private decisions to judicial review, but these private groups exercise significant discretionary power.

Collins believes that the corporatist pattern he outlines is a procedural complement to the infusion of substantive communitarian values into contract law.[43] He says that a corporatist system can preserve the efficient elements of a market while also providing "a more comprehensive approach to questions of the distribution of power and wealth."[44] Collins believes that corporatism can provide an opportunity to provide for a more participatory form of economic governance and can be used to "[avoid] the distributive unfairness and organizations of domination which the classical system permitted."[45]

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[38] *See* H. COLLINS, *supra* note 1, at 205.

[39] *See id.*

[40] *See* Post, *Equitable Resorts Before 1450*, in LAW, LITIGANTS AND THE LEGAL PROFESSION 73-74 (E.W. Ives & A.D. Manchester eds. 1983); H.W. ARTHURS, 'WITHOUT THE LAW': ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND 50 (1985).

[41] H. COLLINS, *supra* note 1, at 203-09 (chapter entitled "Corporatism").

[42] *Id.* at 205-06. Corporatism is part of a larger pattern of privatization which places previously governmental power in private hands. Good examples of privatization involve recent sales, both in England and the United States, of previously publicly held industries into private ownership.

[43] *Id.* at 208-09. It is thus no historical accident that corporatism is associated in the United States with the reforms of the New Deal. *See generally* P. IRONS, THE NEW DEAL LAWYERS (1982) (describing corporatist structure of New Deal recovery programs).

[44] H. COLLINS, *supra* note 1, at 208.

[45] *Id.*

I do not understand why Collins thinks that contemporary corporatism is a good thing. Collins explains that corporatism transcends the public/private dichotomy, allowing private business to function away from the "stranglehold" of public bureaucracies, and that corporatist government is "participatory and devolved," therefore resembling the communitarian values of contract law.[46] I agree with the first half of his statement, but I am not so sure about the second.

Many corporatist arrangements delegate what looks like governmental power to private organizations. But nothing in the organizational structure of such institutions makes me confident that the organizations are looking out for the welfare of the weaker members of society who are affected by their policies. Trade associations do not elect their members or representatives from the public at large; they are chosen from the ranks of the trade itself. Trade associations are also subject to takeover by factions just like government. Wealthier and more powerful members of trade associations might use stringent standards of conduct to drive weaker competitors out of the business. Although the power of trade associations may be more decentralized than that of government bureaucracies, devolution of power to small but undemocratic power centers is not a victory for democracy.

It is a familiar understanding that trade associations often seek government regulation to protect their members' profit margins. The same associations, left largely to their own devices, could substitute private regulation for what was previously promulgated by the government. The potential for domination of consumers by trade associations made up of all manufacturers of a product or providers of a service seems to be much greater than if there were no such organizations. An example of a group like this is real estate associations. Real estate associations in many localities in the United States promulgate standard form residential leases that are extremely unfavorable to the tenant. If one assumes that groups seek legislation in order to maximize their own welfare, then the members of the trades in which corporatism exists most strongly will view it as the best method of maximizing their own welfare. Trades that succeed in a non-corporatist setting may not set up powerful trade associations and may not push for the legal reforms necessary to give legal sanction to the activities of such associations. Only if the members of the trade feel that their position can be maximized through corporatism will they push for it.

Thus I am not confident that corporatism is necessarily linked to progress in contract law. The potential for democratic reform of the economic system is great, but I am not persuaded that it will come in the form of greater private governance, unless the private institutions are forced to open themselves up to input and influence from all affected groups.

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[46] *Id.*

B. *Values and Doctrine in Contract Law*

It is incredibly difficult to take a confusing body of legal doctrine like contract law and draw any conclusions regarding the values underlying the doctrine. Collins concentrates his efforts on illustrating how values of fairness, altruism (or cooperation), and paternalism appear throughout contract law. He admits that even under current law, these values are often balanced against considerations of liberty and efficiency that might point toward maintaining the minimally regulated market. Collins's work is an important step toward incorporating doctrinal developments into contract theory, despite the obstacles facing his effort.

Fairness refers to movements toward a more equitable distribution of wealth and power in society. In the welfare state, concerns of fairness in this sense are addressed mainly through social welfare legislation. Contract law reforms play only a small part in implementing society's decision to ameliorate the harsh distributional consequences of the unregulated market.[47] In part this is due to the difficulty in using contract law to effectuate major reforms. Even when contract law acts, the reforms remain hidden and obscure, expressed in largely traditional contract terminology.

Collins ties his discussion of fairness to doctrines such as unconscionability, unequal bargaining power, and mistake. It is through those doctrines that courts police the fairness of individual contracts. Under unconscionability and unequal bargaining power doctrines, courts police the fairness of the bargain by focusing both on the negotiation process and the substantive results of the bargain. Collins notes that courts, acting under these doctrines, measure the fairness of the bargain by market standards: a price is unfair if it deviates substantially from the market price under conditions that indicate more than typical disparities in bargaining power.[48] This factor ensures that the law will not make radical changes through these doctrines since the measuring stick, the marketplace, is not likely to produce radical shifts in economic power from sellers to consumers.[49]

Collins admits that courts rarely, if ever, directly regulate the price term of a contract.[50] Rather, courts regulate fairness indirectly, in ways that are tied to the other values, paternalism and cooperation, that underlie Collins's analysis.

In addition to fairness, paternalism and altruism are important new values

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[47] Collins argues that society has rejected the political view that the unregulated market results in a fair distribution of wealth and power. *Id.* at 139-41.

[48] *Id.* at 147.

[49] *Id.* at 148.

[50] He makes the insightful point that in mistake cases, a finding of the materiality of the mistake is often determined, or at least heavily influenced, by the disparities between value and price. *Id.* at 145. He also notes that legislation such as rent control and usury laws regulate price directly. *Id.* at 141-42, 150.

that explain recent developments in contract law. Collins adopts a rather narrow definition of paternalism in contract law. To Collins, paternalism appears in modern contract law as a means of preventing strong parties from dominating weaker parties.[51] Collins acknowledges that paternalism in its broadest sense means intervention to set the terms of an arrangement according to the government's notions of what is good for the parties regardless of what the parties desire.[52] He raises the notion of paternalism as explaining the invalidation of contracts that violate the community's moral standards,[53] but in most of the discussion he abandons that notion in favor of the power relations model mentioned above.[54] This fits well with Collins's general insistence that a doctrine must be understood in its social context and not in isolation. Onerous terms may be repugnant only because they place a weak party at the mercy of the stronger, and the very same terms might be perfectly valid if the contract were between two large corporations and not a consumer and a finance company. In contract, then, paternalism should be understood in light of considerations regarding bargaining power and the like.[55]

Altruism encompasses the value that the law places on cooperation. Collins uses the example of the performance of long term contracts to illustrate how altruism and paternalism motivate current contract law.[56] Unforeseen circumstances often cause oppressive consequences for one party to such contracts. Under classical rules, the allocation of the risks according to the supposed intent of the parties would be dispositive, and even if the eventuality was not covered by a term in the contract, the court would use implied intent to solve the problem.[57] Concerns of altruism today might lead courts to require the parties to cooperate and arrive at a reasonable accommodation. Concerns of paternalism might prevent terms of such

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[51] *See id.* at 116.

[52] *See id.* at 115-16. Paternalism has been defined to include all government intervention that purports to replace the will of a party with what the decisionmaker thinks is better for the party. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572 (1982).

[53] H. COLLINS, *supra* note 1, at 115.

[54] *See, e.g., id.* at 117 (explaining invalidation of wrap-around consumer financing arrangements on grounds of oppression of the weaker party, not moral repugnance of the terms).

[55] Hence the requirement of both procedural and substantive unconscionability; a contract that is unfair will not be invalidated unless there is a problem in the bargaining process as well as with the substance of the transaction.

[56] H. COLLINS, *supra* note 1, at 158.

[57] *Cf. id.* at 153-54 (citing Sherwood v. Walker, 66 Mich. 568, 33 N.W.2d 919 (1887) (setting aside contract for sale of a pregnant cow on grounds of mistake where price indicated sale of a barren, and not fertile, cow)).

contracts from allowing domination of one party over another.[58] Thus, courts have revised the pricing formula in long term contracts and have allowed termination of an apparently perpetual arrangement, achieving what might be viewed as a fairer result.[59] In this way, paternalism and altruism complement fairness.

Cooperation values are most influential in modification and termination of contracts.[60] Businesses have strong incentives to allow their trading partners to modify contracts when the terms become onerous, even when under strict contractual norms they would be entitled to stand on their contract rights. Parties do not wish, in most circumstances, to drive their trading partners out of business because of the potential benefits of future trading and good will.[61] Current law, most notably Article Two of the Uniform Commercial Code, allows parties, in the spirit of cooperation, to modify their contracts to meet the exigencies they face.[62] The important point for Collins is that the duty to cooperate, and rules that encourage cooperation, pervade all aspects of performance of contracts.

Collins also attempts to explain the law of conditions with reference to situations in which cooperation should be required.[63] Contract terms are conditions, breach of which excuses performance by the innocent party, only if as a matter of fairness the duty of performance should be excused. Collins notes that parties with power could insist on labeling unimportant terms "conditions," and the courts would respect the label under classical intent theory. This would allow the more powerful party to terminate the contract on the slightest pretext.[64] In the name of fairness, and in order to encourage cooperation, the courts no longer respect the parties' label, but instead decide independently whether a breach warrants termination.[65]

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[58] *Id.* at 158-59 (citing Aluminum Co. of Am. v. Essex Group, 499 F. Supp. 53 (W.D. Pa. 1980) (revising price term in long term contract)).

[59] *Id.*

[60] *See id.* at 166-77. Cooperation is also important in the negotiation stages in which the law imposes duties of good faith and modest disclosure requirements. *See id.* at 85.

[61] *See id.* at 167.

[62] U.C.C. § 2-209(1) (1978); *see also* H. COLLINS, *supra* note 1, at 168.

[63] H. COLLINS, *supra* note 1, at 173-74.

[64] *See id.* at 174-75. (citing L. Schuler AG v. Wickman Machine Tool Sales Ltd., [1974] A.C. 236; [1973] 2 All E.R. 39 (a company of sales representatives agreed to make weekly visits to regular customers as a condition of contract).

[65] *Id.* A great recent example of this substantive doctrine is Judge Posner's opinion in Morin Building Prods. Co. v. Baystone Constr., Inc., 717 F.2d 413 (7th Cir. 1983). In that case, a contract to supply and erect aluminum walls on a factory specified that all work was to be done "subject to the final approval of" General Motors. *Id.* at 414. Despite rather clear language to the contrary, the court held that a reasonableness requirement should be read into the approval clause because "[i]t is unlikely that Morin intended to bind itself to a higher and perhaps unattainable standard . . . ." *Id.*

Despite my overall favorable impression of Collins's treatment of values and doctrine, there are some important issues that Collins either overlooks or does not express clearly enough. Collins attributes many deviations from strict enforcement of contracts to changes in views concerning the importance of individual liberty. For example, he argues that the motivating force behind different tests for enforceability are different views on the appropriate balance between the values of efficiency, liberty, and privacy. Collins describes the rules of consideration, which he calls the "exchange model,"[66] and the rules of reliance, which he calls the "reliance model,"[67] and he illustrates how movement from an exchange-based test to a reliance test indicates a diminished concern for liberty[68] and a heightened concern for efficiency, especially in complex transactions.[69]

Collins's argument here rests on the notion that liberty is maximized when contractual responsibility attaches only under conditions in which the consent requirements of the exchange model are met. This assumes a very narrow definition of liberty. The exchange model, as Collins acknowledges, allows parties with bargaining power to coerce others. Parties with control over resources coerce others who want or need those resources to enter into transactions.[70] If reliance theory and other changes in contract law reduce the potential for such coercion, then liberty for some people is increased. Duncan Kennedy has shown that the concept of voluntariness is ambiguous enough to accommodate very different conceptions of free contract.[71] Projects like Collins's are difficult because the values that Collins argues are important to contract law, as well as contract law itself, are radically indeterminate. One must recognize the ideological content of concepts like liberty when one employs them in analysis.

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at 416. The court explicitly rejected paternalism as the ground for the rule allowing it to read the reasonableness requirement into the contract, relying instead on the implied intent of the parties. *Id.* at 415. This case thus illustrates that the intent of the parties is not dispositive but that courts are unwilling to recognize that fact.

[66] *See* H. COLLINS, *supra* note 1, at 25.

[67] *See id.* at 36.

[68] *See id.* at 40.

[69] *See id.* at 45. Collins denies that the reliance model is based on a moral sentiment in favor of enforcing promises. *Id.* at 43. Collins argues that there are too many examples of non-promissory liability to rest the reliance model on the principle of enforcement of promises. *See id.* at 52-55. He concludes that rules regarding contractual responsibility are fashioned with an eye toward conflicting goals of personal autonomy and altruism. *Id.* at 55.

[70] *See* Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-75 (1923).

[71] *See* Kennedy, *supra* note 53 at 580-83. Kennedy argues that the expansion of contract defenses such as duress can be viewed as an attempt to maximize the voluntariness of arrangements. Thus, refusing to enforce contracts might indicate more, not less, concern for liberty.

Another weakness in Collins's analysis of particular doctrines is that sometimes the "ideals of social justice," which he argues contract law is designed to serve, seem to disappear in favor of other values. This occurred, for example, in his above noted discussion of enforceability tests.[72] Collins does, near the end of that chapter, which is entitled "The Ascription of Responsibility," explain that the reliance model "encourages trust and responsibility for others,"[73] and I think a good case can be made for explaining reliance theory on fairness grounds.[74] Yet by focusing primarily on the values of efficiency, liberty, and privacy, Collins's account of consideration and reliance doctrine ends up looking very traditional. Contractual responsibility is explained largely without reference to the values Collins believes provide the foundations for contract law.

Collins could have avoided this problem by taking some of his own methodology more seriously. As noted, Collins thinks it is appropriate to analyze the transformation of contract law together with the social welfare programs that are common in Western capitalist countries. The existence of such programs is evidence that the market's distribution of wealth no longer satisfies the requirements of social justice. Economic responsibility for others in contemporary society is largely non-contractual; for example, tax laws force members of society to devote a substantial portion of their income to altruistic endeavors. While market activity might be relatively free from forced altruism, non-market altruism is extremely important to contemporary social practice. Consideration and reliance thus constitute only a small portion of the legal rules that create economic responsibilities. It may be more effective and desirable to legislate altruism in social welfare programs than to modify consideration doctrine. Viewed from this perspective, it is not a problem for Collins's analysis that consideration and reliance doctrine do not rest primarily on the communitarian social values. But Collins should have included membership in society in his explanation of tests for responsibility, for these non-contractual economic responsibilities—such as paying taxes—are prime examples of legally required altruism.

I find that several of Collins's doctrinal discussions do not integrate the values with discussion of the particular doctrines. At times the discussion of

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[72] *See* text accompanying notes 67-70.

[73] H. COLLINS, *supra* note 1, at 45.

[74] I may simply be confused here about Collins's terminology. Perhaps implicit in his claim that reliance doctrine entails a diminution of personal autonomy is the argument that personal autonomy is replaced by altruism. It seems to me, however, that personal autonomy can be threatened by government intervention that has nothing to do with helping people who are dependent or weak. For example, personal autonomy is threatened by government regulations which raise prices by creating barriers to entry in businesses or which even grant monopolies. The recipients of such benefits are often not sympathetic candidates for altruism. Rather, they have used their power to procure the favorable regulation.

the larger social values is either missing or too vague to be of much help. It is very difficult to explain the intricacies of a doctrine while explaining how the doctrine is infused with values of paternalism and fairness. Yet I think it is legitimate to criticize Collins for failing to do this in certain instances. For example, Collins outlines the rules regarding contract formation and shows clearly how courts manipulate the rules of offer and acceptance to prevent parties from taking advantage of each other.[75] Offers may not be revoked, Collins argues, when the possibility of revocation would allow one party to take advantage of market changes to the disadvantage of the other party. This obviously smacks of altruism, of forcing one party to look out for the interests of others. Collins says so, but only in the final paragraph of the section.[76] There is no discussion of altruism in the body of the discussion of the cases. The presentation would have been more persuasive and easier on the reader had Collins raised altruism early on in the discussion and been specific about which doctrinal moves depended on altruism.[77] My most serious criticism of the book is that while the discussions all explain what values are involved in individual doctrines, I was often left to construct the relationship to the main communitarian values myself.

This criticism is significant when viewed in light of the potentially important contribution that Collins's doctrinal work could make to contract scholarship by providing a framework for integrating progressive elements of contract law into the main body of doctrine. Collins observes repeatedly that lawyers are still hung up on the classical model of pure intent-based contract law, even though doctrinally, contractual norms are less important than paternalistic ones.[78] Even law students seem to latch on quickly to the classical law's hierarchy of intent over regulation.[79] Given the way the legal

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[75] *See* H. COLLINS, *supra* note 1, at 77-84 (citing Drennan v. Star Paving Corp., 51 Cal. 2d 409, 33 P.2d 757 (1958) (enforcing subcontractor's mistaken bid upon which general contractor reasonably relied)).

[76] *Id.* at 83-84. Part of the difficulty here is that Collins is usually very concrete in his illustrations of how classical theory explains doctrine and how doctrine has moved beyond the limits of that theory. Collins uses very specific case examples in that part of the discussion, but he relies on generalities that seem vague in comparison when he discusses the values. Collins's effort could have been improved significantly if he would have illustrated more specifically how the values and doctrines interact.

[77] This problem recurs in Collins's presentation of disputes over the terms of a contract. The doctrines that impose duties on parties to accurately represent the terms of an agreement force the stronger parties to engage in altruistic behavior. Once again, this point is not made explicit until the concluding sentence of the discussion. *See id.* at 96-103.

[78] *See* H. COLLINS, *supra* note 1, at 127-28.

[79] This is true even though scholars have been saying for a long time that contract law is largely a body of regulation that does not have much tolerance for the intent of the parties. *See*, e.g., Cohen, *The Basis of Contract*, 46 HARV. L. REV. 533 (1933);

mind tends to work, perhaps the only way to eliminate this discontinuity between ideology and reality is to create a new, systematic looking, ideological framework for contract law. Collins's book thus goes beyond illustrating the breakdown of classical contract law and tries to reconstruct contract law along the lines of a general theory of values.

Thus, I do not mean my criticisms of the lack of integration of value-based discussions into the doctrinal core to be merely a quibble with the order of the sentences in the book. For Collins to have succeeded in his attempt to provide a basis for significant progress in the development of contract doctrine and theory, it was important to integrate the discussion of values into the body of the doctrinal descriptions. This is true for two related reasons. First, one of the weaknesses of more traditional descriptions of contract doctrine is that the reader often has the impression that the values are of secondary importance *to the writer* and thus can be safely ignored or at least relegated to second-class status. This impression is reinforced by the absence of value-based discussion in the cases. Second, the law too often ignores the values that are behind doctrinal developments and detaches the doctrines from their instrumental concerns. To avoid non-instrumental reasoning, critics should incorporate the values into the main body of doctrinal discussions, thus ensuring that the reader will not ignore the values in favor of concentrating only on the rules.

Collins's book is not only a theoretical discussion of contract theory and methodology. It also contains thorough and comprehensive discussions of the important features of contract doctrine. These discussions are not meant to catalog every detail of the legal landscape. Rather, they are comprehensive in that they attempt to provide the reader with a framework for understanding large bodies of doctrine. What I like most about the doctrinal discussions is that Collins refuses to pigeonhole doctrine according to conventional categories. In fact, the entire organization of the book is designed to provide an excellent functional understanding of contract law. This allows Collins to make thought-provoking observations about doctrines that are not connected in the literature generally.[80]

All of Collins's doctrinal discussions proceed in roughly the same manner as his discussion of consideration and reliance. His discussions of doctrines

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see also Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

[80] An example of this sort of observation relates to Collins's discussion of modification of contracts. Collins argues that modification is now freely allowed without consideration under principles that encourage cooperation between contractual partners. H. COLLINS, *supra* note 1, at 166-70. He notes that in some circumstances parties might be under a duty to accept reasonable modifications. This is accomplished by limiting the non-breaching party's damages where a reasonable modification of the contract, as opposed to insistence on strict adherence to original terms, could have avoided much of the damage. *See id.* at 170.

are remarkably clear, both as exposition of the doctrinal system and as illustration of the values underlying the particular rules.[81] Collins's doctrinal method usually begins with a statement of how the classical intent theorists addressed the issue and how the crazy applications of the classical lawyers prove that intent cannot be the true explanation. The next step is to show that in the modern law, intent is not, and should not purport to be, the explanation for the doctrinal feature. Finally, the main values are raised again, and their involvement in the doctrine is summarized.

An example of this form of exposition is Collins's discussion of the relationship between the doctrine of mistake and its connection to the content of the contractual obligation.[82] Classical theory held that a party is bound only to the terms to which she consented.[83] In most situations, unforeseen circumstances do not excuse performance. Collins characterizes this as entailing a presumption of omniscience, because the party burdened by the unforeseen circumstances is presumed to have consented to performance even under the new circumstances.[84] However, classical theory allowed for a doctrine of mistake, and characterized it as resting on the fact that "the consent of one or both parties to the contract is negatived, because their intentions rest upon false suppositions of fact."[85] This explanation cannot work for the classical theorist, Collins argues, because the logic of the doctrine of mistake would hold that "all relevant mistakes can potentially negative a person's intent."[86] Collins concludes that when courts determine which mistakes should excuse performance, they are not looking at the intent of the parties but instead are balancing the "conflicting interests" of the contractual partners.[87]

Another noteworthy example is the privity doctrine and related rules determining who is allowed to sue on an obligation. It is clear that the intent of the parties cannot explain privity rules, which are still apparently important in English law.[88] Yet the cases often still purport to explain privity with regard to the intent and autonomy of the parties. Collins describes how modern cases, and his independent analysis, regard the privity problem as

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[81] This should be read in light of the reservations expressed above regarding instances in which the connection to the main communitarian values could have been made more effectively.

[82] *See* H. COLLINS, *supra* note 1, at 87-95.

[83] *Id.* at 87.

[84] *Id.* at 92.

[85] *Id.* at 94.

[86] *Id.* I was convinced by Collins's argument that mistake does not depend on the intent of the parties, but notice here again that the values underlying the courts' decisions are not clearly brought forward.

[87] *Id.* at 94-95.

[88] *See id.* at 104-08.

one of fair business arrangements.[89] Courts arrive at fair arrangements by using a foreseeability test to determine the appropriate parties to sue on a contract.[90] This effort is a step toward convincing lawyers that privity should generally be conceived as a fairness problem, not as a problem of intent or autonomy. In this fashion, throughout the book, Collins shows how numerous cases that appear to deviate from the intent norms of contract law are consistent with the values he identifies. This is reconstruction.

That is not to say that Collins's method eliminates controversy from contract law. Returning to the discussion of privity, Collins explains that privity can sometimes be supported as a way to prevent a "wide class of beneficiaries" from suing on a contract.[91] Collins does not discuss whether this decision resulted in a "fair" arrangement, or whether it was consistent with the general test of reasonable foresight. Restrictions under even the modern, expansive version of the privity requirements maintain the undemocratic character of the market. Interested parties, such as workers, consumers, and community members, are routinely excluded from the process of bargaining and determining the proper uses of property. Consumers have little if any voice in corporate decisionmaking that affects their everyday lives. The rules of privity, and more general rules establishing corporate organization and market structures, make our economic system undemocratic.

The defense of the market is that consumers vote their preferences with their money; companies succeed if they fulfill consumer desires. This gives consumers only an indirect voice, and consumer selection of a product or service cannot mean anything more than that the product or service is, in the buyer's opinion, the best available and affordable alternative. It is argued that consumers should not have a more direct voice because they do not have the expertise to make the decisions that businesses must make. I think there are at least two good responses to this argument. First, selecting the best available alternative requires the same general expertise. If consumers

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[89] *Id.* at 112. Privity is less important today both because of the expansion of explicit third party rights, largely in the United States, and because lawyers have successfully used tort cases to avoid privity requirements of contract law. *Id.* at 108-14.

[90] *Id.* at 108-14 (citing Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962) (holding lawyer responsible to intended beneficiaries for negligently drafting a will)).

[91] *Id.* at 108. In the example Collins uses, a class of poor and unemployed persons attempted to sue as beneficiaries of a contract between a company and the government in which the company agreed to train and employ local residents in an area designated as suffering from high unemployment and poverty. *Id.* at 107-08. The court, according to Collins, held that the government did not intend to grant any legal rights to the poor and unemployed persons who the legislation was intended to benefit. *Id.* at 108 (citing Martinez v. Socoma Co., 11 Cal. 3d 394, 521 P.2d 841 (1974)).

have this expertise, then their direct input into making better alternatives might be valuable. Second, voting in governmental elections involves selecting representatives who will act on matters that the average voter may have even less expertise about than consumer matters. The argument against economic democracy is even stronger with regard to political democracy. If consumers can be trusted to vote in business matters with their dollars, I think they ought to be trusted to vote for representatives or policies as well.

This discussion may be beyond the scope of Collins's focus on contract law, but it is relevant to an understanding of the institutional framework within which the market operates. Collins defends the market as providing a good mechanism for distribution. He warns against excesses in criticism both against and in favor of the market. The ideology of the market still has a grip on many of us, and I do not think that fear of the excesses of state economic planning should make us shy away from criticism of the market that points toward greater democratization. Many of the doctrinal criticisms Collins makes illustrate how concerns about domination have motivated important reforms in the law of contract. Domination is present on a large scale in modern society, and democracy may be a tool against it.

It should be obvious that the explicit discussions of values are not completely distinct from Collins's more purely doctrinal discussions. Collins explains doctrine in light of values and values in light of doctrine. While I found that the connections to classical values are expressed more clearly than the connections to the communitarian values, the presentation is generally very effective. Any lawyer reading this book will gain a better understanding of doctrines that may have seemed vague and unconnected with the body of contract law. On the other hand, the absence of extended theoretical discussion of the values that Collins believes reside throughout contract law makes it a bit difficult to persuade the reader completely. There is still the nagging question of how much the values are influencing the law today and how much of current law is explainable in terms of a more enlightened application of the old norms in light of current business realities.

II. CONTRACT THEORY AND CONTRACT DOCTRINE

The legal system never discards its old ways and incorporates completely the discoveries and theories of a new generation of scholars. Typically, doctrinal development mirrors theoretical evolution imperfectly: the new generation's scholars think they have debunked previously held beliefs but the legal system manages to harmonize the old and the new. Contract law contains elements of several eras of legal thought.[92] Collins notes that the method of common law reasoning constrains judges who wish to change the

[92] *See* Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 18 (D. Kairys, ed. 1982) (noting that periods of legal thought are often overlapping).

law to do so through "an elaboration of the existing legal concepts."[93] Thus, the conservative appearance of contemporary judicial opinions will be at least partly a matter of form.

It is also true, as Collins admits, that contract law is still influenced greatly by traditional values that promote intent-based responsibility and minimal government intervention into transactions. There are many judicial decisions to be found in which altruistic and paternalisitic values take a back seat to free contract ideology. This may not be a cause for worry if it leads to economic efficiency without great cost to the other values. Collins worries that too much regulation could destroy the virtues of the market.[94]

Collins's desire to balance regulatory values against free market values makes it difficult to evaluate the accuracy of his description of the law of contract. Decisions that advance intent-based theories may be consistent with Collins's description because they preserve the efficiency of the market at no great cost, or inconsistent because they denigrate the importance of cooperation and fairness. Collins has, in the end, written a critique that can be incorporated into a rather moderate theoretical view of contract law. This fact, together with the anti-progressive nature of legal discourse discussed above, makes it difficult to examine the connection between legal theory and legal doctrine.

Nevertheless, I thought it might be interesting to try an informal test of whether Collins's description of contract law was accurate. I wondered how often judges actually depart from strict, intent-based liability and how much they were influenced by the values Collins identifies. I looked at a set of randomly selected recent cases and have the following observations.[95]

My sample contained more cases that at least formally treated contract law strictly as a matter of intent than cases which appeared to construct doctrine to further values other than intent. Some of these opinions were in business situations in which the only value at stake was cooperation, but several opinions dealt with parties that were dependent on the other party

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[93] H. COLLINS, *supra* note 1, at 60.

[94] *See id.* at 204.

[95] To do this experiment, I asked my research assistant to choose randomly a recent volume of the Northeastern Reporter, which contains opinions from Illinois, Indiana, Massachusetts, New York, and Ohio. The volume he selected was 491 N.E. 2d. I chose the Northeastern Reporter because it contains the reported cases from the two states with whose law I am best acquainted, Illinois and Massachusetts. The cases I read came from those two states and, in addition, Indiana and Ohio. For some reason, this volume of the Northeastern Reporter contained very few New York decisions, and none raised issues of contract law. I recognize that this is not a scientific method of doing an empirical study. Also, my sample was fairly small—only twenty-seven opinions. Therefore, the observations that follow should be taken as anecdotal. Incidentally, I recommend this type of experiment to any teacher of contract law. Reading a randomly selected group of cases proved to be quite educational.

and were still held to the rather harsh consequences of the language of the arrangement. I have divided the opinions into four categories that will be addressed separately[96]: (1) opinions in which consumers were held strictly to the terms of their agreements; (2) opinions in which consumers were not held strictly to the terms of their agreements; (3) opinions in which businesses were held strictly to the terms of their agreements; and (4) opinions in which businesses were not held strictly to the terms of their agreements.

(1) In most of the cases in which consumer contracts were enforced according to their terms, this meant that the consumers lost, and usually in situations in which altruism and paternalism would have helped the consumers. Most of these cases involved employees who were at the mercy of their employer because of the at-will employment rule or other legal rules that established an unequal balance of power between the parties. In one case, the Ohio Supreme Court refused to recognize the tort of wrongful discharge when an employee alleged he was fired for reporting to his employer that the business was being conducted illegally.[97] The court quoted with approval its rule that at-will employees may be fired at any time, for any reason " 'even if done in gross or reckless disregard of any employee's rights.' "[98] Altruism would dictate that the employer should watch out for the employee's interests, and paternalism might invalidate at-will contracts as too one-sided for the employee to have agreed to in the first place.

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[96] This division is not perfect. For example, some may quarrel with my decision to treat a condominium association as a consumer, but it seems to me that the members of a condominium association, individual owners of condominiums, are likely to be in the same position as consumers with regard to contracts for services in the building. *See* Dana Point Condominium Assoc., Inc. v. Keystone Serv. Co., 141 Ill. App. 3d 916, 491 N.E.2d 63 (App. Ct. 1986). I also included employees in the category of "consumers" in cases involving employment relations. I find it appropriate to treat cases between businesses and individuals of average sophistication together, in most situations.

[97] Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

[98] *Id.* at 102, 491 N.E.2d at 1116 (quoting Peterson v. Scott Constr. Co., 5 Ohio App. 3d 203, 205, 451 N.E.2d 1236 (Ct. App. 1982)). Two more cases illustrate that employees are often at the mercy of employers who have no altruistic duties toward employees. In one case, an employer was held not to have a duty to provide a smoke-free environment for an employee even though the employer knew of the employee's allergy to smoke at the time of employment. Bernard v. Cameron and Colby Co., Inc., 397 Mass. 320, 491 N.E.2d 604 (1986). The court held that the contract between the parties had no such requirement and that no such duty should be implied because "there was nothing before the judge which would tend to show [the employer's] *assent* to such a term." *Id.* at 606. In another case, the court held that a school board was entitled, under a statute dealing with enrollment reductions, to discharge a school psychologist with a term contract even if it was the board's own decision to shift psychological services to local districts that caused the enrollment decline. Bennett v. Board of Educ., 23 Ohio App. 3d 136, 491 N.E.2d 742 (Ct. App. 1986). In both of these cases, altruism would militate in favor of the opposite result and paternalism would condemn the unequal power of the parties.

The courts often treated the language of the contracts as dispositive of consumers' claims, regardless of whether the contracts or the negotiating processes indicated that domination was possible. For instance, one court held that a contract for underinsured motorist coverage did not apply in a situation where conflicting explanatory promotional material provided by the insurance company made the provision ambiguous. The court looked at the insurance policy and determined that the coverage did not apply, despite the ambiguity.[99] A court also refused to construe a release contract made in settlement of a libel lawsuit over a former employer's charges against a former employee as prohibiting future allegedly libelous statements of the same nature concerning the same transaction. The court held that it was required to "enforce the agreement as written."[100] In both of these cases, courts motivated by concerns of altruism might have construed the contracts to force the stronger party to look out for the weaker party's interests.[101]

(2) I found fewer cases in which consumers were helped by creative construction or statutory application, but there were good examples of some of the reforms mentioned by Collins. In two cases involving contracts related to property of a marriage, surviving widows were allowed to avoid the terms of contracts that would have prevented them from receiving property to which they were otherwise entitled.[102] In the more interesting case of the two, a woman signed a pre-nuptial agreement that limited her rights after her husband's death to $700 per month. The husband then transferred most of his property, without consideration, to his daughter. The transfer made it impossible for the husband's estate to meet its obligation to

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[99] Ohio Casualty Ins. Co. v. Yoby, 23 Ohio App. 3d 51, 491 N.E.2d 360 (Ct. App. 1986). The dissent argued that the ambiguity should have been construed against the insurance company. *See id.* at 55-56, 491 N.E.2d at 365 (Parrino, P.J., dissenting). This would force the company to look out for the interests of its customers, and thus make it altruistic. The rules which protect customers from confusing insurance policies and conflicting promotional literature involve duties to refrain from making confusing offers and from misrepresenting the contents of a contract. *See* H. COLLINS, *supra* note 1, at 97.

[100] Costa v. Stephens-Adamson, Inc., 142 Ill. App. 3d 798, 491 N.E.2d 490, 492 (App. Ct. 1986) (citing Rakowski v. Lucente, 104 Ill. 2d 317, 323, 472 N.E.2d 791, 795 (1984)).

[101] In another case, an employee was helped by strict adherence to the terms of a contract. The case involved a contract for severance pay for a bank president, a contract which the bank claimed violated a federal statute. *See* First Nat'l Bank of Danville v. Reynolds, 491 N.E.2d 218 (Ind. Ct. App. 1986). In strict contractual cases, the courts have also refused to recognize tort claims that would avoid the effects of the contracts. *See, e.g.*, Bernard v. Cameron and Colby Co., Inc., 397 Mass. 320, 323-24, 491 N.E.2d 604, 607 (1986) (refusing to recognize claims for negligent and intentional infliction of emotional distress).

[102] *See* Cohen v. Estate of Cohen, 23 Ohio St. 3d 90, 491 N.E.2d 698 (1986); Brewsaugh v. Brewsaugh, 23 Ohio Misc. 2d 19, 491 N.E.2d 748 (1986).

the widow. Even though nothing in the contract limited the husband's right to dispose of his property, the court imposed a constructive trust on the transferred property to assure that the $700 obligation would be met.[103] This placed an altruistic duty on the husband and the daughter to look out for the widow's interests, and was obviously paternalistic by implying a term that the widow did not obtain in her contract.

In another insurance case, the court construed an ambiguous "conditional" receipt against the insurance company and held that the insured had been accepted for coverage.[104] This case is right in line with Collins's altruistic duty to refrain from making a confusing offer.[105] The court held that the contract was in force because a layman could reasonably believe that the receipt was an acceptance for coverage. The court thus required the insurance company to pay attention to the interests of the consumer by explaining the arrangement clearly.[106]

(3) Under Collins's analysis, one would expect that business contracts would be enforced according to their terms because businesses are likely to have the power and expertise to avoid one-sided contracts. Further, businesses are likely to cooperate with one another because they know it is in their own best interests to do so. Most of the cases involving businesses that I read fit this pattern and enforced contracts according to their terms.

In one case, a court upheld a very low liquidated damages clause, despite the close scrutiny that such clauses often receive.[107] The negligence of an alarm service company allegedly allowed $4,000,000 to be stolen from Purolator's offices.[108] The contract provided that the alarm service company was not an "insurer" and that therefore liability for failure to provide the agreed upon service was limited to the liquidated damages provision of $50.[109] The court held that since there was no evidence of a defect in the negotiation process, the clause would be enforced.[110]

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[103] *Cohen*, 23 Ohio St. 3d at 92, 491 N.E.2d at 699-700.

[104] *See* Wernle v. Country Life Ins. Co., 142 Ill. App. 3d 145, 491 N.E.2d 449 (Ill. App. Ct. 1986).

[105] H. COLLINS, *supra* note 1, at 97.

[106] The court may also have been concerned about the unequal distribution of power between the parties. Under the receipt, if the application were approved, insurance would be effective as of the date of the receipt. If it were disapproved, no insurance would issue at all, even for the period between the application and the rejection. The company thus had unilateral power for the interim period and the consumer might be uncertain for a time whether she had insurance. *See Wernle*, 142 Ill. App. 3d at 147-48, 491 N.E.2d at 450-51.

[107] *See* Purolator Security, Inc. v. Wells Fargo Alarm Service, 141 Ill. App. 3d 1106, 491 N.E.2d 161 (Ill. App. Ct. 1986).

[108] *Id.* at 1107, 491 N.E.2d at 161.

[109] *Id.* at 1112, 491 N.E.2d at 164.

[110] *Id.*

In another case, the court held that a seller was in breach of its contract to provide carpeting and that its attempt to cure its failure to deliver on time ten days after the failed delivery could not cure the earlier breach.[111] Even though the delivery was already late, it would have been possible to allow the seller another chance, especially in light of the U.C.C's liberalization of the perfect tender rule by allowing a chance for cure.[112] Businesses may not often need the courts to intercede since it is assumed they are capable of looking after themselves.

(4) There were business dealings in which more attention was paid to cooperation and protection of weaker parties. In one case, a lien law was construed liberally to protect government contractors.[113] In another, partners were held to high standards of care under traditional rules that make partners fiduciaries for each other.[114] Thus, there was some evidence of altruistic requirements in business relationships, although not nearly so much as in consumer contracts. Paternalistic values are also less threatened by strict adherence to contracts in the business setting.

It is difficult to come to any firm conclusions based on my review of these cases. Contract law is a mixed bag, with different courts and different jurisdictions treating disputes differently. Consumers are sometimes protected by the courts in the ways Collins says they are, but other times consumers are left to live with bad contracts in the name of contractualism. Businesses are usually held to their contracts, even though this sometimes leads to domination and advantage-taking. Further, a sample of cases from 1986 does not tell me how much contract law has changed, although I think it has, assuming that the nineteenth and early twentieth-century opinions in the casebook with which I teach[115] reflect the legal climate of the times.

Further, in many cases, both business and consumer, the possibility of unconscionability or fraud, due to overreaching in the bargaining, was raised, although these claims were rarely successful in the cases. These defenses were typically rejected in cases in which the terms of the contract were unfair, and altruism or paternalism might have led a court to refuse to enforce the agreement.[116] The possibility of voiding a contract on grounds of unconscionability or fraud appears to stand as a safety valve to the enforce-

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[111] *See* June G. Ashton Interiors v. Stark Carpet Corp., 142 Ill. App. 3d 100, 491 N.E.2d 120 (App. Ct. 1986).

[112] *See* U.C.C § 2-508(2) (1978).

[113] *See* City of Chicago *ex rel.* Charles Equip. Co., v. United States Fidelity and Guar. Co., 142 Ill. App. 621, 491 N.E.2d 1269 (App. Ct. 1986).

[114] *See* Donahue v. Draper, 22 Mass. App. Ct. 30, 491 N.E.2d 260 (App. Ct. 1986).

[115] F. KESSLER, G. GILMORE & A. KRONMAN, CONTRACTS: CASES AND MATERIALS (3d ed. 1986).

[116] *See, e.g.*, Estate of Kern v. Handelman, 142 Ill. App. 3d 506, 491 N.E.2d 1275 (App. Ct. 1986); Dana Point Condominium Assoc. v. Keystone Serv. Co., 141 Ill. App. 3d 916, 491 N.E.2d 63 (App. Ct. 1986).

ment of contracts, even where the results are one-sided and unfair. Defenses such as fraud, unconscionability, duress, and unequal bargaining power may not contribute to fairness in contract law; instead, they may give judges an excuse for not policing the results of bargains that do not quite reach the threshold of the defenses. The judge is able to point to the defenses as the saving grace if the bargain is really bad, even though the defenses are rarely employed to void a contract.

Reading these cases has reinforced my impression that it is difficult to characterize the common law of contracts in general terms. Decision-making power in contract law, and common law generally, is widely dispersed, and it would be surprising if judges and legislators from the different jurisdictions were in agreement much of the time. This does not mean that a theoretical attempt to describe the law of contract is futile or useless, but it will always face the problem that general theories lend themselves to contradictory applications by different decisionmakers. No general theory that I have seen succeeds in drawing lines in controversial cases. Collins's book is good because instead of stating hard and fast rules of law, Collins illustrates doctrinal tendencies and possibilities, identifies and acknowledges the limitations of his observations, and explains how those possibilities relate to the values he thinks the law should and does advance. Collins's observations on contract law are much more valuable than those contained in traditional rule-packed hornbooks.

III. Conclusion

Collins adopts the correct plan for his book, and he executes it well. My criticisms should thus be read in light of my overall favorable impression. He makes some important methodological arguments for contract theory, and he opens up discussion of the values in contract law to a greater extent than before. His analysis provides the framework for my analysis of the contemporary cases, and the values he identifies are helpful in understanding and criticizing the whole body of contract law.

I am least convinced by his analysis of corporatism, because he has not shown that the corporatist structure is democratic or altruistic. Insofar as trade associations have imposed limits of conduct that exceed those of the legal regulation of the marketplace, they have been a positive influence. However, the distribution of wealth and power in society is extremely unequal, and private institutions, as far as I know, have not embarked on a program to change that fact.