Canadian Journal of Law & Jurisprudence XXXVI No.2 August 2023, 525-551

© The Author(s), 2023. Published by Cambridge University Press on behalf of University of Western Ontario (Faculty of Law). doi: 10.1017/cjlj.2022.31

Metaethics and the Limits of Normative Contract Theory

Shivprasad Swaminathan
Jindal Global Law School, O.P. Jindal Global University, Delhi (NCR), India

Abstract

This article outlines two models of constructing contract theory: The impinging model (based on metaethical cognitivism), which gives central place to truth and justification; and the projectivist model (based on metaethical non-cognitivism), which gives central place to attitudes and motivation. It is argued that modern contract theories which typically seek to present the whole body of contract doctrine as deducible from, and morally justifiable by, one or a small number of apex principles, presuppose the impinging model. By contrast, a projectivist approach to theory creation does not purport to offer justificatory apex principles, but rather argues for propositions that are likely to have maximum motivational purchase in the practical reasoning of contract law's subjects. The article then goes on to point out the theoretical cost of the impinging model and argues that projectivist accounts do a better job of accommodating the internal point of view of contract law's subjects.

Keywords: *Contract theory; Metaethics; Non-cognitivism; Internal point of view*

I. Introduction

The metaethical literature bears witness to a perennially ongoing debate between two rival conceptions of the nature and foundations of morality, namely, cognitivism and non-cognitivism. The cognitivists assert that our morality is the offspring of the god of reason, Apollo, as it were; and the non-cognitivists, that our morality is the offspring of Dionysus, the god of passion, involving as it does, passion, sentiment, and attitudes.[1] On the Apollonian picture, moral judgments aim at moral truths; the Dionysian picture denies any such truths and claims that moral judgments express subjective attitudes. At first blush, these rarified—even metaphysical, in part—concerns might seem to be worlds apart from theorizing about contract law, which should profess to answer more down-to-earth questions.[2] At worst, it might be thought, the contract theorists might carry on with their "knitting," to borrow Ronald Dworkin's phrase, undistracted by this metaethical debate.[3] At best, it may be thought, philosophical comity might require

1. See Simon Blackburn, *Ruling Passions: A Theory of Practical Reasoning* (Clarendon Press, 1998) at 84-91.
2. Any metaethical account does involve a metaphysical or ontological element—the question of nature and the existence of moral truths. See David O Brink, *Moral Realism and the Foundations of Ethics* (Cambridge University Press, 1989) at 1.
3. Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at 85.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

more engagement with the debate, which is easily done—by crossing one's heart and signing up to one of these positions, after which one can continue with the knitting as usual.[4] But the metaethical question is more central—and more imperial—than either of the above responses might allow.

The central claim advanced here is that contract theory—as is the case with general jurisprudence—is profoundly influenced by this metaethical debate. The choice of metaethical position determines the *shape* contract theory assumes—that is what is meant by the *imperialism* of the metaethical debate. The claim, in fact, is more specific. The claim is that contemporary contract theory *presupposes* the Apollonian picture of morality along with its ontological assumption about the nature of moral truth, and that the *shape* that a token theory of contract takes, and its mode of *argumentation*, is directly influenced by the Apollonian picture. A word, first, on the *shape* of contract theory and its mode of *argumentation*. The typical modern contract theory seeks to present the whole body of contract doctrine as deducible from, and morally justifiable by, one or a small number of principles; and its methodology is that of "*ratio mathematica*," the paradigm of which is Euclidian geometry, namely, that of beginning with a small number of axioms or first principles and deducing a body of rules as following logically from that starting point.[5]

A genealogical study of the shape of contract theorizing will then be undertaken to demonstrate that this mode of argumentation and the kind of theorizing it serves are inexorably intertwined with the Apollonian model and developed in tandem with the *rationalist* ethics and the *natural law* tradition of the sixteenth to eighteenth centuries, which took their theories to be uncovering *truth* in these fields, and the geometric method, which was then the chosen method employed to expound scientific truths and was thought to be extendable to the domains of morality and law as well. A theory of such a shape is the result of an imagining of the law in the mould of a *science* (in the Aristotelean sense of the term), and consequently orders it along the lines of a deductive system—just as the laws of a science were supposed to stack up on the Aristotelian ideal of science, then in vogue. While this method of theorizing was originally at home in the Civilian tradition, it will be argued that it arrived in the Anglo-American common law world in the nineteenth century with the birth of the legal treatise. Incidentally, it is the contract law treatise—constructed under the influence of the 'will theory' borrowed from the Continent—through which this method was introduced to the common law. After somewhat of a lull in the early twentieth century, this form of theorizing has reincarnated, and the typical modern contract theory takes this form of theorizing.

4. This is, of course, not at all to suggest that contract theory is any less sophisticated, philosophically, than metaethics or metaphysics—just that the nature of the enterprise does not require engagement with these questions.
5. Diego Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate Between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius" in Pierre-Marie Dupuy & Vincent Chetail, eds, *The Roots of International Law* (Brill, 2014) 211 at 213.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

Once we have unpacked the metaethical assumptions underlying contract theory and brought our genealogical explorations to fruition, what are we left with? 'So what?'—one might wonder, if one has discovered that contract theory is shaped by the Apollonian picture and its method reflects this assumption. This article *does not* seek to argue that such theorizing is mistaken or misguided. Nor does it seek to establish that this form of theorizing is inconsistent with the common law—I have made such a claim elsewhere.[6] What we will do instead is interrogate the metaethical assumption that it presupposes for just a little bit longer—with a view to assessing what theoretical price it comes at and exploring what other plausible meta-theoretical alternatives there are. When confronted with the metaethical roots of the theory they endorse, it could well be that the ontological baggage that comes along with the conventional contract law theorizing may make it less appealing to some. This should certainly be the case with those who find the Dionysian picture of morality appealing. Even those who endorse the Apollonian picture, however, might find that this model of contract theory is simply not equipped to handle a very crucial element in moral phenomenology—that they take as central to morality—namely, motivation and its cognate in the field of legal theory, namely, the internal point of view.

Consider the following question—just what *affect* is a contract theorist's elegant justification, which purportedly captures truth, supposed to have on someone to whom it is conveyed? No 'truth' in itself can motivate—this follows according to the *standard picture of psychology* going back to Hume—about which we will have more to say later. Bernard Williams had poignantly demonstrated the utter futility of the "Professor's justification" which captures so-called *truth*, in the teeth of motivation to the contrary.[7] Lewis Carrol's Tortoise demonstrates, in a lighter vein, a more general point, along the same lines, in its conversation with Achilles—that no logical syllogism, even those elegant ones of Euclid, can move the mind, unless the interlocutor is in some sense already motivated.[8]

On the other hand, passions, attitudes, emotions—the warp and woof of the Dionysian model—are all inherently motivating. Someone who sets off theorizing with a Dionysian starting point would put motivation at the heart of theory. The point of theory would not be the production of justifications, mathematically elegant, but, ultimately, motivationally inert; but rather, that of finding arguments that are likely to have real motivational purchase in the practical reasoning of the agent. The aim is especially important for legal theory. Since Bentham, motivation has played a crucial role in legal theory. Although his idea of how the law motivates—namely, by threat of sanctions—has been discredited, the idea of motivation itself has survived and only gone from strength to strength. The

6. See Shivprasad Swaminathan, "*Mos Geometricus* and the Common Law Mind: Interrogating Contract Theory" (2019) 82:1 Mod L Rev 46.

7. Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, 1985) at 23.

8. See Lewis Carrol, "What the Tortoise Said to Achilles" (1895) 4:14 Mind 278 at 280 (as we shall find out, Euclid makes a return later).

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

Scandinavian Legal Realists saw it as the central point of legal theory—as something that explained the normativity or bindingness of law: a subject who *internalizes* the law is motivated to follow it without sanctions. H.L.A. Hart's *internal point of view*—which comprises of an attitude of approval of the law—is also a development of the same idea.[9] If internalization or the internal point of view is to be taken seriously, and given central place, legal theory cannot possibly ignore motivation. Starting off from this standpoint, it is argued, would lead to a very different kind of theory. One that is concerned not with "*ratio mathematica*" but rather with "*philosophia morum*" or the practiced mores of the contract law's subjects.[10] What such a theory might hope to achieve, and its outlines, will be sketched briefly.

What follows below is a brief section-wise map, laying out the argument in the rest of the paper. Section II discusses the metaethical background underlying moral and legal theorizing and the role that truth and motivation play on the cognitivist (Apollonian) and non-cognitivist (Dionysian) accounts. We will find that these metaethical outlooks lead to two different accounts of the normativity of law which are purported answers to the question of moral bindingness of law. The cognitivist model gives central place to truth and justification; while the non-cognitivist model, which does not countenance truth, gives central place to attitudes and motivation. Section III discusses the nature and the shape of contract theory. It will be argued that a typical contract theory tries to present the whole body of contract doctrine as deducible from, and morally justifiable by, one or a small number of principles. It will then be argued that this form of theorizing presupposes the cognitivist, Apollonian model of normativity of law. Such a theory, it will be argued, purports to set out truth conditions on which contract law will come to be morally justified. This method is that of *ratio mathematica*, namely, that of beginning with a small number of axioms and deducing a body of rules as following logically from that starting point. Section IV provides a genealogy of this form of theory construction. This kind of theorizing, it will be argued, found its roots between the sixteenth to eighteenth century in rationalist ethics and natural law, which saw morality and law as sciences and hence emulated the Euclidian paradigm of scientific theorizing. In the nineteenth century, it will be argued, such theorizing made its way into the Anglo-American common law through the medium of the great contract law treatises. Section V discusses the theoretical price of the cognitivist Apollonian model, particularly, its ontology and its lack of attention to, arguably, the central concern of modern legal philosophy, namely, motivation of the law's subject, the *internal point of view*. Section VI will lay down the groundwork for a contract theory that is compatible with the non-cognitivist model of normativity of law. Such a model will not purport to offer justifications but rather seek to support propositions that are likely to have maximum motivational purchase in the practical reasoning of contract law's subjects. Such a theory would move from a rule or a small cluster of rules in

9. See HLA Hart, *The Concept of Law* (Oxford University Press, 1961).
10. Panizza, *supra* note 5 at 213.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

essential areas of contract law—consent, formation, performance, remedies, etc.—which people do, by an overlapping consensus, *incontrovertibly* take an internal point of view to, and discursively reach other rules with a similar set of properties with the result that the rule argued for has a greater likelihood to have motivational purchase in the interlocutor's practical reasoning. This form of theory creation is a form of *philosophia morum* that is 'immersed in ordinary moral conversation' of the various participants—whether officials or judges or citizens—who are subject to contract law.[11] Such an approach to theory construction would, at best, yield pockets of local coherence but it is unlikely to exhibit global coherence like traditional contract theories.

II. Metaethics and Legal Theory

Cognitivism views our moral judgments as being capable of being true or false in relation to some moral reality that they purport to represent. These truths "impinge" on moral agents.[12] Cognitivists who offer non-debunking accounts of morality include moral realists, constructivists, and relativists. Non-cognitivism views our moral judgments as expressions or "projections" of our subjective emotions or attitude-like conative states.[13] David Hume is considered to be the intellectual ancestor of this view of metaethical theorizing, which was cast in its present shape in the twentieth century by the Scandinavian Legal Realists—Axel Hagerstom, Karl Olivecrona, and Alf Ross—and later developed by A.J. Ayer, Charles Stevenson, Richard Hare; and Simon Blackburn and Alan Gibbard, among contemporary philosophers.

Cognitive states of mind are world-to-mind, which is to say, they seek to capture what is there in the world; and they are motivationally inert. Conative states of mind are mind-to-world, which is to say, they seek to order the world in a certain way, and they are motivationally laden. This is a consequence of the *standard picture* of psychology on which cognitive states do not motivate while motivationally laden conative states do not capture truth or reality.[14] These two starting points lead to two entirely different views about the most central feature of morality, namely, bindingness or normativity, or authority of morality.[15] Let us call these the *impinging model* (based on a cognitivist metaethics) and the *projectivist model* (based on a non-cognitivist metaethics) respectively.[16] The bindingness or normativity of morality according to the impinging model is a function of the objective moral standards and hence an account of normativity of morality

11. See Gerald J Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986) at 69 (to adopt a phrase used by Postema to describe the role of the common law judge).
12. Simon Blackburn, *Spreading the Word: Groundings in the Philosophy of Language* (Oxford University Press, 1984) at 181-82.
13. *Ibid*.
14. See Michael Smith, *The Moral Problem* (Blackwell, 1994) at 7-9.
15. See Christine M Korsgaard et al, *The Sources of Normativity*, ed by Onora O'Neill (Cambridge University Press, 1996).
16. See Shivprasad Swaminathan, "Projectivism and the Metaethical Foundations of the Normativity of Law" (2016) 7:2 Jurisprudence 231.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

will elucidate the truth conditions that makes morality binding.[17] According to the projectivist model, moral bindingness or normativity is nothing but the motivational pull exerted by a moral judgment owing to the attitude *constituting* it.[18] A projectivist will eschew any account of normativity or bindingness of morality which involves truth conditions;[19] the projectivist's ontology does not countenance any such texture in the "fabric of the universe."[20] The impinging theorist's gripe with the projectivist picture is that it is altogether bereft of normativity (read: truth and justification). The projectivist retorts by arguing that it is merely the 'illusion' of normativity that the account dispenses with, and not anything real.[21] The projectivist counterclaims that it is the impinging model that leaves unaddressed the central issue of motivation as an objective moral justification, which as a moral fact is in and of itself motivationally inert. It is not uncommon to refer to Hume and the projectivists as 'sceptics', but this label is not particularly illuminating. As George Berkley's Philonous reminds Hylas, a sceptic is the one who doubts the 'reality' of what is immediately obvious to the senses and purports to discredit it—not someone who questions the received wisdom.[22] The projectivist would claim that it is the impinging theorist, who, like Hylas, is the sceptic in questioning *empiricism*, and not one who, like Philonous, questions the received wisdom which denies empiricism. All said and done, the impinging and projectivist models of moral bindingness are both plausible, respected, and non-sceptical in the sense of being non-debunking philosophical positions.

Unsurprisingly, the metaethical debate outlined above has a significant bearing on accounts of the normativity of law. A successful account of the normativity of law is meant to establish how legal requirements come to be morally binding.[23] Since there are two ways of understanding moral bindingness or moral normativity, it follows that there are two plausible ways of going about accounting for the normativity of law. On the impinging model of normativity of law, the source of normativity of law is objective moral standards, and the function of an account of normativity is to elucidate the truth conditions that make the law binding in the sense of *truth*. On the projectivist model, the source of normativity is the subjective attitudes of agents subject to it. Given the projectivist's ontological parsimony, setting out truth conditions does not figure in a projectivist account of normativity of law. An overwhelming majority of contemporary legal philosophers have an unspoken adherence to a cognitivist metaethic and the impinging model of normativity of law emerging from it, on which, accounting for the

17. See Simon Blackburn, *Essays in Quasi-Realism* (Oxford University Press, 1993) at 52.

18. See Luke Russell, "Two Kinds of Normativity: Korsgaard v Hume" in Charles R Pigden, ed, *Hume on Motivation and Virtue* (Palgrave Macmillan, 2009) 208.

19. See Simon Blackburn, "Majesty of Reason" (2010) 85:1 Philosophy 5.

20. HLA Hart, *The Concept of Law*, 3d ed by Les Green (Oxford University Press, 2012) at 12.

21. See Blackburn, *supra* note 17.

22. See George Berkley, *Three Dialogues Between Hylas and Philonous*, ed by Jonathan Dancy (Oxford University Press, 1998) Perhaps we could call it an 'emotive' word, bereft of *descriptive* meaning and completely bracket the question of who the 'real' sceptic is.

23. See Swaminathan, *supra* note 16.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

normativity of law along the lines of the impinging model might almost seem to be a meta-theoretical mandate.[24] If this is the case with those theorists working on *general* jurisprudence whose work entails that they make a more-or-less conscious choice with respect to the metaethical theory they support, then given this general philosophical milieu, how much more dominance of the impinging theory's meta-theoretical model should we hope to find in areas such as contract theory, where theorizing does not begin at such an abstract level of theory or with any obviously conscious metaethical choice?

The shape of the typical modern contract theory is greatly influenced by the impinging model. The typical contract theory seeks to provide a justification for contract law, which it does, by elucidating the truth conditions that make contract law binding—where moral bindingness is understood as the truth of the proposition being advanced.[25] Not only is the aim one that is influenced by the impinging model, so is the style of *argumentation*. A typical contract theory seeks to present the whole body of contract doctrine as deducible from, and justifiable by, one or a small number of principles.[26] This method, as we will see, is purportedly tailor-made to expound so-called *truths*. The fact that Charles Fried's *Contract as Promise*—which kicked off modern contract theory—adopted this method might also go some way towards explaining its prevalence.[27]

Now, where does this leave the projectivist account? The dominance of the impinging model has not meant that among legal philosophers working on general jurisprudence, the projectivist account has no adherents. After being prominent in the first half of the twentieth century, the projectivist model of normativity of law suffered somewhat of a crisis in the second half. The last two decades, however, have seen a revival of the projectivist model. Why the projectivist model should have come to this existential crisis is quite perplexing, because its counterpart in moral philosophy has continued to be seen as a plausible—if contested—contender to the cognitivist account.

In general jurisprudence, the projectivist model of normativity of law was pioneered by the Scandinavian Legal Realists. Hägerström, the founder of Scandinavian Legal Realism, placed motivation at the centre of his legal philosophy. The question of motivation has been central to legal theory at least since Bentham and Austin, who in turn were marking the salience in the legal sphere of a general philosophical issue prioritized by Hume. To be sure, Bentham and Austin drew the wrong connection between law and motivation by pointing to the threat of sanctions. Hägerström, in an argument strikingly reminiscent of Nietzsche's use of the bad conscience, which obviates the need for external

24. *Ibid.*
25. This is a rough rendering of the shape of contract theory. See Section III for a discussion.
26. See Brian Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press, 2012) at 147.
27. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

violence,[28] argued that the subject typically *internalizes* the law, which motivates the subject without the need for sanction and threats.[29] Internalization played a crucial role in the accounts of the other Scandinavian Legal Realists, Ross and Olivecrona, as well. Relying on force or sanctions alone, they argued, would be akin to the Canutian exercise of trying to stem the tide of the ocean with straw. The influence of Humean thinking on all the Scandinavian Legal Realists is obvious. Less obvious—at least until the last decade—is the inclusion of Hart in this category. After Kevin Toh's essays reading Hart's *internal point of view*—the central idea of his legal theory—along non-cognitivist lines, it has become increasingly acceptable to put Hart in that camp.[30] Ross, himself, would have endorsed this viewpoint, as he reckoned there was significant contiguity between the Scandinavian Legal Realists' *internalization* and Hart's *internal point of view*. In his review of *The Concept of Law*, Alf Ross persuasively argues that Hart's idea of the internal point of view is a reincarnation of sorts of the Scandinavian Legal Realists' 'internalization'—that is to say, to be understood in entirely motivational terms.[31] After Ross, Olivecrona too, in the second edition of *Law as Fact*, alludes to the similarities between Hart's idea of the internal point of view and the Scandinavian Legal Realist project.[32] John Finnis too argues that Hart endorsed the Humean account of morality and motivation.[33] In support of his argument, Finnis places great emphasis on Hart's book review of Bernard Williams' *Ethics and the Limits of Philosophy*, in which Hart quotes William's famous line about the futility of the Professor's justification in the face of motivation to the contrary.[34]

In responding to Bentham and Austin, Hart did not mean to entirely dismiss the centrality of motivation to legal theory that they argued for, pointing out instead that they had drawn the incorrect connection between sanction and motivation. Sanction was to be only a secondary back-up—in case an agent was not themself motivated to follow the law.[35] The Benthamite description of sanction might describe the case of the Holmesian bad man. But with the normal ordinary

---

28. See Friedrich Nietzsche, *On the Genealogy of Morals,* translated by Douglas Smith (Oxford University Press, 1996); Hans Ruin, "Hägerström, Nietzsche and Swedish Nihilism" in Sven Eliaeson, Patricia Mindus & Stephen P Turner, eds, *Axel Hägerström and Modern Social Thought* (Bardwell Press, 2013) 177.

29. See Max Lyles, *A Call for Scientific Purity: Axel Hägerström's Critique of Legal Science* (Rättshistoriskt Bibliotek, 2006).

30. See Kevin Toh, "Hart's Expressivism and His Benthamite Project" (2005) 11:2 Leg Theory 75; Kevin Toh, "Raz on Detachment, Acceptance and Describability" (2007) 27:3 Oxford J Leg Stud 403.

31. See Alf Ross, Book Review of *The Concept of Law* by HLA Hart, (1962) 71:6 Yale LJ 1185.

32. See Karl Olivecrona, *Law as Fact*, 2d ed (Stevens & Sons, 1971) at 165.

33. See John Finnis, "On Hart's Ways: Law as Reason and Fact" in Matthew Kramer et al, eds, *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 3.

34. See HLA Hart, "Who Can Tell Right from Wrong?", Book Review of *Ethics and the Limits of Philosophy* by Bernard Williams, *The New York Review* (17 July 1986) 49. See also Williams, *supra* note 7.

35. See HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) at 254.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

citizen, the motivational situation is very different. They take the internal point of view towards the law, which comprises of a critical reflective attitude. They take the law as reason for action.[36] It is this internal point of view—this critical reflection attitude towards the law—which has been read to be a non-cognitivist moral stance of approval of the law, a stance that is motivationally laden.

If one takes the non-cognitivist account and projectivist picture seriously, the central aim of theory becomes that of accommodating *motivation*. Just how might one go about doing this? We shall in Section VI go on to sketch a brief outline of what a putative theory of contract law compatible with a projectivist account of the normativity of law will look like. It should suffice for our present purposes to point out that this approach will not assign theory the role of capturing any truth and will be sensitive to the motivation of contract law's subjects.

III. Shape of Contemporary Contract Theory

A contract theory typically seeks to answer two kinds of question—one, explanatory, and the other, normative.[37] The former seeks to provide an account of the conditions that create contractual obligations.[38] And the latter seeks to provide a "justification" for such contractual obligations.[39] A token contract theory could either clearly separate the two explanatory and justificatory projects or braid them together. Analytic theory is ordinarily a prelude to normative theory, which seeks to answer the question of providing a "justification" for contract law.[40] The justification being sought here is 'moral' given law's claim to moral justification. What is the philosophical function of the 'justification' which comprises the normative project? It is that of elucidating the truth conditions under which contract law comes to be justified.[41] This overarching aim should also neatly explain the symmetry between analytic and normative theory. A putative justification for contract law offered by a normative can only succeed if the transitivity of the justification is relayed to the entire body of doctrine, which is something that is not possible unless the analytic theory obliges. An analytic theory that shows contract law as a welter of discrete rules, not explicable by a unifying principle, is hardly a fit candidate to relay the transitivity of the normative theory's justification. In a non-debunking account, the analytic theory will un-impedingly relay the justification.

The typical modern contract theory tries to present the whole body of contract doctrine as deducible from, and justifiable by, one or a small number of principles.[42] In this respect, the methodology resembles that of Euclidian geometry,

36. See Hart, *supra* note 20 at 89-91. Hart, of course, did not mean to deny the live possibility of pathological cases of legal systems where the internal point of view may not be pervasive among citizens. *Ibid* at 117.

37. See Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at 42.

38. *Ibid* at 43.

39. *Ibid* at 46, 106.

40. *Ibid*.

41. See Martijn W Hesselink, "Democratic Contract Law" (2015) 11:2 European Review of Contract Law 81 (for discussion on connection between truth and contract theory).

42. See Bix, *supra* note 26.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

namely, that of beginning with a small number of axioms and deducing a body of rules as following logically from that starting point. As we shall see later, the resemblance is not merely coincidental—historically, legal theorists had deliberately modelled contract theory along these lines after Euclid, and there are good metaethical reasons for their having done so. So dominant has this shape of theorizing come to be, that it may well seem to present some inviolable meta-theoretical mandate. The key methodological move here, is to posit an apex principle (or small number of apex principles) that seeks to justify the whole body of contractual obligations.[43]

Now, these apex principles could either be deontological or consequentialist (or teleological).[44] A deontological system—deriving from *deon* or duty—makes the rightness of the action dependent on the application of a logically-prior standard rather than on the consequences of the action. A consequentialist (or teleological) ethic, by contrast, makes the rightness of an action turn on its consequences—'teleological' deriving from the Greek *telos* or goal. If the Kantian system of ethics with the categorical imperative at its heart is the paradigm of a deontological one, the Benthamite utilitarian system with the felicific calculus at its heart is the paradigm of a consequentialist account. It is somewhat important to note that, from our point of view, the great antagonism of deontological and consequentialist systems notwithstanding, both of these systems rely on apex principles and are, therefore, Cartesian.

It would perhaps be fair to say that deontological theories dominate the contemporary theoretical space around contract law.[45] Deontological theories could be based on rights,[46] consent,[47] reliance,[48] property,[49] promise,[50] or will.[51] In comparison to deontological accounts, there are not that many consequential apex principles to choose from.[52] The typical form they tend to take is that of 'efficiency' accounts offered by law and economics scholars.[53] Of this array of

43. See Swaminathan, *supra* note 6; Martijn W Hesselink, *Justifying Contract Law in Europe: Political Philosophies of European Contract Law* (Oxford University Press, 2021).

44. See Peter A Alces, *A Theory of Contract Law: Empirical Insights and Moral Psychology* (Oxford University Press, 2011) at 2.

45. See Hesselink, *supra* note 41.

46. See Peter Benson, "The Unity of Contract Law" in Peter Benson, ed, *The Theory of Contract Law* (Cambridge University Press, 2001) 118 [Benson, *Theory of Contract Law*]. For an overview see Smith, *supra* note 37 at 140-58; David Winterton, *Money Awards in Contract Law* (Bloomsbury, 2015) at 9. See also Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) (an influential rights-based theoretical account of tort law).

47. See Randy E Barnett, "A Consent Theory of Contract" (1986) 86:2 Colum L Rev 269.

48. See PS Atiyah, *Promises, Morals, and Law* (Clarendon Press, 1981).

49. See Andrew S Gold, "A Property Theory of Contract" (2009) 103:1 Nw UL Rev 1 (transfer of property).

50. See TM Scanlon, "Promises and Contracts" in Benson, *Theory of Contract Law*, *supra* note 46 at 86.

51. See Charles Fried, *supra* note 27.

52. See Anthony T Kronman, "Contract Law and Distributive Justice" (1980) 89:3 Yale LJ 472 (for an account of distributive justice).

53. See Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88:3 Mich L Rev 489; Anthony T Kronman & Richard A Posner, eds, *The Economics of Contract Law* (Little Brown & Co, 1979); Richard Craswell, "Two Economic Theories of Enforcing Promises" in Benson, *Theory of Contract Law*, *supra* note 46 at 19.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

contract theories,[54] the will theory (Fried) and the efficiency-based theory are so dominant in the contemporary contract law that in his recent book (which offers a deontological, *unitary* account based on the liberal idea of justice) Peter Benson picks out these two to engage with and argue against.[55] There are two interlocking features—both of some significance in the scheme of things—that can be noted about this shape assumed by contract theorizing.

First, that it presupposes the impinging model of normativity of law and a cognitivist metaethic.[56] The direction-of-fit of this kind of theorizing is world-to-mind. There is an objective moral reality the theory seeks to capture. Given the ubiquity of contract theory of this shape, it is all too easy to forget that it presupposes a certain view about the nature of morality which is *only one of two* equally (meta-theoretically) plausible competing views. It is certainly not the case that *a priori* this is the shape or direction of fit demanded by the nature of the enterprise, that is, contract theorizing. Another view about the nature of moral bindingness that can be taken is that stemming from the non-cognitivist metaethic, which yields the projectivist account of normativity of law. If one assumes this standpoint, the shape of a contract theory will be different. Just what the difference will be we shall see later, but suffice it to note here that the direction of fit of the theory will be mind-to-world and the point of the theory will not be to elucidate the truth conditions but instead to set out under what conditions contract law doctrines will have the most motivational traction in the practical reasoning of an agent.

Second, contract theory tied to an impinging model neither has among its stated aims calibrating the motivations of contract law's subjects nor does it possess the resources to bring about any such calibration. An objective moral justification, which is a moral fact, is in and of itself motivationally inert—this consequence follows naturally from the standard picture of psychology. A fact, which is discoverable by a cognitive state of mind, is motivationally inert; and a non-cognitive attitude, which is motivationally charged, does not aim to discover a fact.[57] Charles Stevenson explained the centrality of motivation to morality in two ways. One is that bindingness is to be explained in terms of "magnetism" of the good.[58] And the other that moral judgments have an element of pressure upon the interlocutor's actions—"do so as well"—built into them.[59]

Should theory bother about motivation? One response—that of the cognitivist —is that motivation although psychologically salient is a red herring qua

54. This is, admittedly, not an exhaustive catalogue. The interpretivist account offered by Steven Smith does not neatly fall into either category. However, arguably, it has a lot more in common with deontological accounts—and it is obviously not consequentialist.
55. See Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Belknap Press, 2019).
56. This argument does not, however, seek to make cognitivism isomorphic with deductivism. Cognitivism is best seen as the genus of which Euclidian deductivism is the specie.
57. See Smith, *supra* note 14 at 7-9.
58. Charles Leslie Stevenson, "The Emotive Meaning of Ethical Terms" (1937) 46:181 Mind 14 at 16.
59. See Michael Ridge, "Non-Cognitivist Pragmatics and Stevenson's 'Do so as well!'" (2003) 33:4 Canadian Journal of Philosophy 563.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

normativity and hence an account of normativity need not strain to accommodate it.[60] On another view—that of the non-cognitivist—motivation is central. The attitude of approval of the law is the internal point of view and any theory must accommodate it. Seen from this viewpoint, an account of law that does not care for the motivations of the contract law's subjects does not bother about the internal point of view. Taking the internal point of view seriously requires putting the motivation of contract law's subject at the centre. The task of normative theory in a projectivist mould then is not to explain what best justifies the existing body of doctrine but what is most likely to have motivational salience in the practical reasoning of the contract law's subjects.

IV. *Ratio Mathematica* and Truth in History of Theorizing: A Genealogy

One of the features of the 'new' science in the fifteenth and sixteenth centuries was the use of Euclid's geometric method in arranging the laws of science in a deductive system.[61] In doing this, scientists were obeying a meta-theoretical construct imposed by the Aristotelian ideal of science.[62] Physicists, including Galileo and Newton, "were at pains to construct their theories in the image of Euclid's."[63] Hobbes went to the extent of calling geometry the "mother of natural science."[64] Scientific truth, it was thought, ought to be of a kind capable of being captured by this geometric model. Philosophy in the sixteenth and seventeenth centuries could not possibly have remained untouched by this methodological imperialism of the deductive Euclidian method that had swept science. Descartes, the father of 'rationalism', openly endorses the method in his *Discourse on Method* as a method especially suited to capture truth:

> Those long chains of reasoning, simple and easy as they are, of which geometricians can make use in order to arrive at the most difficult demonstrations, had caused me to imagine that all those things which fall under the cognisance of man might very likely be mutually related in the same fashion.[65]

---

60. See Derek Parfit, "Normativity" in Russ Shafer-Landau, ed, *Oxford Studies in Metaethics*, vol 1 (Clarendon Press, 2006) 325; Derek Parfit, "Reasons and Motivation" (1997) 71 Proceedings of the Aristotelian Society, Supplementary Volumes 99.

61. See Anders Wedberg, *A History of Philosophy*, 2d ed (Clarendon Press 1982) at 7.

62. *Ibid* at 32.

63. *Ibid at* 35. Their works too wear this ambition on their sleeve. Consider, for instance, Galileo's *Discourses and Mathematical Demonstrations Relating to Two New Sciences*, and Newton's *Philosophiae Naturalis Principia Mathematica*. See Galileo Galilei, *Two New Sciences*, translated by Stillman Drake (Wisconsin University Press, 1974); Isaac Newton, *The Principia*, translated by I Bernard Cohen & Anne Whitman (University of California Press, 1999); Wedberg, *supra* note 61 at 35. See also Franz Wieacker, *History of Private Law in Europe with a Particular Reference to Germany*, translated by Tony Weir (Clarendon Press, 1995) at 203.

64. Gregory S Kavka, *Hobbesian Moral and Political Theory* (Princeton University Press, 1986) at 5.

65. René Descartes, *Key Philosophical Writings* (Wordsworth Editions, 1997) at 83.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

For Descartes, 'reason' had to follow the path of logical deduction.[66] This was seen as the only path to certainty in a world strewn with disputation and uncertainty—the only cure to his radical scepticism. Hayek sees this as a continuation of the Cartesian dualism—a mind substance independent of the cosmos which can guide it.[67] The Cartesian idea that any truth that can be reached by cognition must adhere to a Euclidian model, displays a method that believed in "mathematicization of reality"[68] or a "reduction of nature to relationships expressible in numbers."[69]

The Cartesian endorsement of the Euclidian method of "deduction from set axioms" was to have a profound impact on law and in the formation of the legal science[70] and turn it into a "science of norms."[71] This has been remarked to be the defining feature of modern civil law that it assumes the structure of a deductive theory with foundational principles at the apex linked in logical chains to the rest of the system. And this geometric method still continues to remain the organizing idea of civil law systems.[72] The ambition of this system is the practical one of deriving answers to all legal questions from the least number of postulates.[73]

Pascal endorsed this as *the* method of "proving truths."[74] This "unreserved adoption" of the Aristotelian ideal of science and its extension to philosophy, Wedberg argues, also characterizes the method of the other leading lights of the so-called rationalist tradition, namely, Spinoza and Leibniz.[75] Accordingly, the aim became that of philosophizing like a geometer. Spinoza's geometric method is found in his *Ethics, Proved in Geometric Order* (1677).[76] Leibniz, as well as being a mathematician, philosopher, and scientist, was also a jurist and played no small part in introducing the paradigm of geometric theorizing to legal thinking.[77] Leibniz advanced two cognate ideas. One was that law is as much a science as the natural sciences.[78] The other flowed from the first—that if law is a science, it must be understood just as the other principled sciences are,

---

66. See FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, 1982) at 10.
67. *Ibid*.
68. Pierre Legrand, "Adjudication as Grammatication: The Case of French Judicial Politics" in Luís Pereira Coutinho, Massimo La Torre & Steven D Smith, eds, *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer, 2015) 47 at 56.
69. Wieacker, *supra* note 63 at 202.
70. *Ibid* at 218. See also RC van Caenegem, *An Historical Introduction to Private Law,* translated by DEL Johnston, (Cambridge University Press, 1992) at 127.
71. Hayek, *supra* note 66 at 106.
72. See Wieacker, *supra* note 63 at 218; Maximiliano Hernández Marcos, "Conceptual Aspects of Legal Enlightenment in Europe" in Enrico Pattaro, ed, *A Treatise of Legal Philosophy and General Jurisprudence*, vol 9 (Springer, 2009) 69 at 98.
73. See FH Lawson, *A Common Lawyer Looks at the Civil Law* (University of Michigan Law School, 1955) at 31.
74. Wedberg, *supra* note 61 at 39.
75. *Ibid* at 38.
76. See van Caenegem, *supra* note 70 at 127.
77. See MH Hoeflich, "Law & Geometry: Legal Science from Leibniz to Langdell" (1986) 30:2 Am J Leg Hist 95 at 95, 99.
78. *Ibid* at 101.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

namely, "on the model of classical [Euclidian] geometry."[79] Leibniz found that the deductive geometric method had already been used masterfully by the Roman lawyers, which was something he urged the emulation of.[80] Leibniz set himself to the task of reordering all of Roman law in accordance with the geometric model, a project he named *Corpus Juris Reconci*.[81] Leibniz's theoretical ambition was certainty and easy retrievability of the law for any situation that could be readily applied by a judge.[82]

Domat, a scholar of law and geometry who referred to himself as a "scientist of law,"[83] claimed that knowledge of law had to be gained like that of the natural sciences; methodologically, it followed that like science, it must also be deducible from undisputed overarching or organizing principles.[84] For Domat, as it was for Descartes, the geometric method commended itself by the "reliability" of knowledge it offered.[85] The resulting system, the argument went, would be valid for all times and places. Another influential jurist who contributed to this movement to geometrize legal thinking was Wolff, whose "deductive paradigm in law" Hoeflich notes, was "even more extensive" than that of Leibniz, whose student he was.[86] A lawyer must set himself "in the footsteps of Euclid," Wolff noted.[87] Van Caenegem offers a succinct summary of Wolff's method:

> It is a characteristic of Wolff's work that … scientific method is used to deduce all rules of law strictly according to the principles of geometric proof.… It was his method which influenced the judgments of courts into employing logical deduction from fundamental norms.[88]

Leibniz and Wolff provided the philosophical basis for the later Pandectist movement in law, which had it that law could be reduced to a mathematical system "consisting entirely of principles and axioms."[89] Lebniz and Wolff strengthened the scientific paradigm in the law which influenced the courts into applying "logical deduction from fundamental norms and general concepts rather, than the example of precedents."[90]

---

79. *Ibid* at 100.
80. *Ibid*.
81. See Peter Stein, "Elegance in Law" (1961) 77:2 Law Q Rev 242 at 253.
82. See James Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013) at 195.
83. Thomas D Musgrave, "Comparative Contractual Remedies" (2009) 34:2 UWA L Rev 300 at 304.
84. See Amalia D Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (Yale University Press, 2007) at 153; Jean-Louise Halperin, "French Legal Science in the 17th and 18th Centuries: To the Limits of the Theory of Law" in Pattaro, *supra* note 72 at 43.
85. Legrand, *supra* note 68 at 57. See also Jean Domat, *The Civil Law in Its Natural Order,* translated by William Strahan (Charles C Little & James Brown, 1850) vol 2 at 510.
86. Hoeflich, *supra* note 77 at 103.
87. *Ibid*.
88. Van Caenegem, *supra* note 70 at 120. See also Legrand, *supra* note 68 at 55 (the aim was '*mos geometricus*' which meant to mathematicise law so that adjudication became superfluous).
89. Hoeflich, *supra* note 77 at 104.
90. Van Caenegem, *supra* note 70 at 120.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

This method agreed with the natural lawyers who produced legal scholarship between the sixteenth and eighteenth centuries that was both enduring and influential.[91] They viewed law as a science that was concerned with the discovery of eternal pre-existing principles.[92] At the heart of this was the idea of deductive rationality which led them to the search "for the self-evident and axiomatic principles from which they could deduce all other rules *more geometrico*."[93] The geometric heart of the natural law method, as Gottfried Achenwall and Johann Putter put it, was the idea of immutable first principles from which one could deduce "an endless number of inferior rules."[94] The assumption for all this was the 'rational' nature of human thinking.[95]

To this understanding of natural law, "the geometric model fit perfectly."[96] The ambition of "methodical ordering"[97] which has its roots in terms by Grotius[98] was continued in the direction of "mathematical rationalism"[99] by Pufendorf, a follower of Grotius' who wrote his *Elements of Universal Jurisprudence*(1660) in "geometric fashion."[100] This was congruent with this metaethical idea that that "moral entities … were subject to mathematically determinable laws, precisely in the manner of physical entities."[101] This endorsement of the paradigm of truth and scientific theorizing[102] by the leading jurists of the era imposed a meta-theoretical imperative that there ought to be an overarching principle from which each rule of the body of law derived.[103] Natural lawyers freely borrowed from Roman law "whenever they needed to formulate concrete rules for specific questions."[104] The method of natural law consisted in "precise and exact deduction from set axioms, just like mathematics."[105]

91. See Stein, *supra* note 81 at 253.
92. See David Ibbetson, "Sir William Jones and the Nature of Law" in Andrew Burrows & Lord Rodger of Earlsferry, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 619 at 623.
93. Van Caenegem, *supra* note 70 at 118.
94. Merio Scattola, "*Scientia Iuris* and *Ius Naturae*" in Pattarro, *supra* note 72 at 29.
95. *Ibid* 28-29.
96. Hoeflich, *supra* note 77 at 104. See also van Caenegem, *supra* note 70 at 118.
97. Wieacker, *supra* note 63 at 230.
98. See Martti Koskenniemi, "Legal Fragmentation(s): An Essay on Fluidity and Form" in Christian Calliess et al, eds, *Soziologische Jurisprudenz: Festschrift für Gunther Teubner* (De Gruyter, 2009) 795 at 803; Rogelio Pérez-Perdomo, *Latin American Lawyers: A Historical Introduction* (Stanford University Press, 2006) at 12; Panizza, *supra* note 5 at 212.
99. Wieacker, *supra* note 63 at 214.
100. JB Schneewind, *Essays on the History of Moral Philosophy* (Oxford University Press, 2010) at 170. See also Tim J Hochstrasser, *Natural Law Theories in Early Enlightenment* (Cambridge University Press, 2000) at 41; Peter Stein, "The Quest for a Systematic Civil Law" (1996) 90 Proceedings of the British Academy 147 at 158.
101. Alberto Artosi, Bernardo Pieri & Giovanni Sartor, eds, *Leibniz: Logico-Philosophical Puzzles in the Law* (Springer, 2013) at xviii, n 32.
102. See van Caenegem, *supra* note 70 at 119 (van Caenegem notes that Pufendorf was greatly influenced by "contemporary scientific thought," *ibid*).
103. See Wieacker, *supra* note 63 at 218 (even Leibniz subscribed to this view); Gordley, *supra* note 82 at 177.
104. Van Caenegem, *supra* note 70 at 120.
105. *Ibid* at 127.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

While until the early eighteenth century it was the lawyers who were attracted by this systematicity, it came to occupy a place in the political agenda of Continental Europe.[106] This, Stein notes, is the environment which gave birth to the codification movement. The judge was supposed to be nothing more than the "mouth of the law" and do nothing more than apply the code.[107] With the codification, however, appeals to natural law began to dwindle and eventually became non-existent.[108] However, the natural law provenance of a lot of civil law theorizing is undeniable—as is the metaethical shape that civilian legal scholarship assumes.

Peter Stein notes that around the eighteenth century this systematic mathematic method turned from the system as a whole to the 'internal arrangement' of areas of law.[109] The first principles or axioms of an area of law were set out and rules deduced therefrom. Pothier was the greatest exemplar and his treatise on the law of obligations, *Traite des Obligations*, first published in 1762, provided the model for treatises around the world—and as we shall soon see was to also provide the impetus for the urge to geometrize the common law. Pothier and Domat are regarded the "fathers of the Napoleonic code."[110] In Pothier's version of the will theory, all of contract law was to be explained on the basis of one single principle—the will or autonomy of parties. It was through the will theory that this deductive method of legal theorizing was to enter the common law world in the nineteenth century.

In the late eighteenth century, the rationalistic impulse that had swept over the continent was still alien to English law.[111] The desire to see the law as a science—as something more than just a thicket of discrete "single instances"[112] or a "collection of husks" without "germinating principles," as Bishop would put it[113]—was first brought up by the polymath William Jones, the one who aspired to become "Justinian of India."[114] Jones was also a natural lawyer and, in line with the civilian natural lawyer's affinity for geometric theorizing from first principles, presented the following manifesto:

> [I]f law be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason; but, if it be merely an

106. See Stein, *supra* note 100 at 170.
107. Van Caenegem, *supra* note 70 at 122-23.
108. *Ibid* at 172-73.
109. See Stein, *supra* note 100 at 159.
110. Halperin, *supra* note 84 at 45.
111. See van Caenegem, *supra* note 70 at 134.
112. Sir Arthur Underhill, *Change and Decay: The Recollections and Reflections of an Octogenarian Bencher* (Butterworth & Company, 1938), cited in Stephen Waddams "Nineteenth-Century Treatises on English Contract Law" in Angela Fernandez & Markus D Dubber, eds, *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart, 2012) 127 at 133.
113. Roman J Hoyos, "A Province of Jurisprudence?: Invention of a Law of Constitutional Conventions" in Fernandez & Dubber, *supra* note 112 at 114.
114. AWB Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48:3 U Chicago L Rev 632 at 680.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

> unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened.[115]

The thread was then picked up by the great treatise writers of the nineteenth century. The treatise writers took themselves to be *expounding* on the science of law in a systematic manner.[116] The first principles were to be capable, in theory, of deductively determining concrete cases.[117] The shape that the theories underlying the early treatises took is not all that different from the shape of contract theory that was discussed in earlier sections. Consider Theodore Plucknett's description in *Early English Legal Literature*:

> It begins with a definition of the subject matter, and proceeds by logical and systematic stages to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end these principles were found to cover a large multitude of cases deducible from them.[118]

It was, incidentally, contract law that became the first to be subject to a flurry of theorizing under the spell of the new method imported from the Continent.[119] The theory that came to dominate contract theorizing in England was the will theory, which viewed contracts as an expression of individual autonomy.[120] The contract treatise sought to fit the common law of contract into a "rational framework," influenced by Pothier's version of the will theory.[121] It should not come as a surprise that contract law was the point of entry for this continental method into the English common law, as it appeared to present an especially "promising area for the discernment of principles."[122] Also, contract law attracted some of the finest minds of the generation, including Henry Maine, Frederick Pollock, and William

---

115. William Jones, *An Essay on the Law of Bailments* (J Nichols, 1781) at 123-24, cited in Ibbetson, *supra* note 92 at 623.

116. See AWB Simpson, *Legal Theory and Legal History: Essays on the Common Law*, (Hambledon Press, 1987) at 324.

117. In practice, however, they are often woefully underdetermined cases. Consider, for example, the case of will theory and the postal rule in *Adams v Lindsell*, [1818] EWHC KB J59, (1818) 1 B & Ald 681, 106 ER 250. A deductive application of the will theory did not dictate the postal rule, but the treatise writers persisted with it because it had the backing of Pothier and Savigny. See Gerhard Lubbe "Formation of Contract" in Kenneth Reid & Reinhard Zimmermann, eds, *A History of Private Law in Scotland*, vol 2 (Oxford University Press, 2000) 1; Shivprasad Swaminathan, "The Will Theorist's Mailbox: Misunderstanding the Moment of Contract Formation in the Indian Contract Act, 1872" (2018) 39:1 Stat L Rev 14.

118. TFT Plucknett, *Early English Legal Literature* (Cambridge University Press, 1958) at 19.

119. See AWB Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91:2 Law Q Rev 247.

120. See Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press, 2011) at 87.

121. David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) at 220 [Ibbetson, *A Historical Introduction*]. See also Warren Swain, "The Changing Nature of the Doctrine of Consideration, 1750-1850" (2005) 26:1 J Leg Hist 55; David Ibbetson "English Law Before 1900" in Jan Hallebeek & Harry Dondorp, eds, *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff, 2008) 93 at 95; Joseph M Perillo, "Robert J Pothier's Influence on the Common Law of Contract" (2005) 11:2 Tex Wesleyan L Rev 267.

122. Waddams, *supra* note 112 at 133.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

Anson; and was certainly thought more amenable, as an area of study, to the idea that one could find uniting principles underlying it.[123]

Offer and acceptance, to consider just one illustrative example of the rationalizing effect of the new theoretical framework, were entirely missing from the English law of contract in the late eighteenth century, and made their way into the English law under the influence of the will theory.[124] As Ibbetson notes, the allure of the will theory and the systematic approach of the continental lawyers came largely from the fact that it promised "intellectual coherence."[125] Swain points out that in the writing of the nineteenth century, "the idea that the law of contract could be reduced to a set of basic principles" was dominant.[126] Simpson cites Pollock's boast in a letter to Holmes *a propos* his book on torts, that it was a "book of principles, if anything" as illustration of the then prevailing faith in system and principles.[127] Simpson notes that these 19th century treatise writers "self-consciously embraced a theory" that private law "consisted essentially of a latent scheme of principles."[128]

This form of theorizing, at its inception—in its 'civilian' home—involved a conscious metaethical comportment to the Apollonian model. The motivation of these early system builders, however, was not primarily a metaethical one—the influence of the Apollonian model on their account is a more indirect one. As Peter Stein notes, when the academic mind in the common law world has looked to soar, it is the continent to which it has turned for inspiration.[129] Thus, when the nineteenth-century fervour to systematize the common law took hold, the early system builders in the common law world enthusiastically borrowed the civil lawyer's methods. This is where Pothier was enormously influential.[130] To be sure, these early system builders were not motivated by a desire to import metaethical cognitivism or the Apollonian model as such. Rather, what they were looking to import was the civilian method of systematization—which happened to be steeped and dyed in Cartesian rationalism and metaethical cognitivism. As I have argued elsewhere,[131] the same forces also influenced common law pedagogy in the nineteenth century—a time when University legal education and new law degrees (BA in Jurisprudence at Oxford and the Law Tripos at Cambridge) were making their way into British universities.

But this legal treatise seems to have died a natural death by the end of the nineteenth century. The greatest challenge treatise writers faced was of having

123. See Simpson, *supra* note 116 at 324.
124. See Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press, 2015) at 183; Simpson, *supra* note 119.
125. Ibbetson, *A Historical Introduction*, *supra* note 121 at 221.
126. Swain, *supra* note 124 at 202.
127. Simpson, *supra* note 114 at 665-66.
128. *Ibid*.
129. See Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980) at 123.
130. See Ibbetson, *A Historical Introduction*, *supra* note 121 at 221-244.
131. See Shivprasad Swaminathan, "Dicey and the Brick Maker: An Unresolved Tension between the Rational and the Reasonable in Common Law Pedagogy" 40:2 (2019) Liverpool Law Review 203.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

to accommodate real cases.[132] It became progressively unwieldy for treatise writers to accommodate the morass of caselaw that defied their clean rational models.[133] The neat and elegant theories on paper bore no resemblance to the actual case law on the ground. Indeed, what "ought to have been neat and logical [on paper], resembled the miscellaneous character of a pig's breakfast when the cases had been accommodated."[134]As the twentieth century advanced, the 'scientific' paradigm in the common law world began to lose its allure. Along with it, the codification movement in England came a cropper. While some of the nineteenth-century treatises survive nominally (such as Anson's), they do not seek to replicate the rationalist models of their predecessors.

Contemporary and modern contract theory is a reincarnation of this nineteenth-century contract law treatise in that it replicates the rationalist structure borrowed from Pothier and the civil lawyers.[135] It is no accident that Charles Fried's work that inaugurated this field assumes this structure. In modern contract theory, as in the nineteenth-century contract treatise, the transitivity of justification of one or a small number of apex principles is supposed to transmit down to every contract case.[136] The typical modern contract theory with its affinity for *ratio mathematica* does indeed presuppose the Apollonian picture of morality. This is not to suggest that modern contract theorists have made this choice consciously. Some may have. But many are likely to have found themselves as participants in a practice that had an established form of theorizing. For them, the practice of theorizing must have held out this form of theorizing as an *a priori* pre-theoretical mandate. This might be understood in terms of a "paradigm" to borrow Thomas Kuhn's idea.[137] A young scholar finding their way into contract theory, internalizes this 'paradigm' and seeks to produce theory in its template—namely, seeking to justify contract law with one or a small number of apex principles. And in this fashion, a form of theory construction presupposing a metaethical model likely came to dominate a field of inquiry without the theorists necessarily consciously signing up to the metaethical model underlying it. To borrow John Seeley's phrase, this empire may well have been acquired in a fit of absent-mindedness.[138]

The chequered past of this form of theory creation has not deterred the modern legal theorist. Modern contract theory astutely avoids one of the biggest pitfalls of

---

132. See Roscoe Pound, *The Formative Era of American Law* (Little, Brown & Company, 1938) at 162.

133. See Waddams, *supra* note 112.

134. Swaminathan, *supra* note 6 at 50.

135. See *ibid* at 50; Bix, *supra* note 26 at 147-48.

136. See Nathan Oman, "Unity and Pluralism in Contract Law", Book Review of *Contract Theory* by Stephen A Smith, (2005) 103:6 Mich L Rev 1483 at 1484-85; Roy Kreitner, "On the New Pluralism in Contract Theory" (2012) 45:3 Suffolk University Law Review 915 at 915-16 (describes these theories as based on a 'single' justificatory principle).

137. Thomas S Kuhn, *The Structure of Scientific Revolutions*, 2d ed (University of Chicago Press, 1970) at 45ff.

138. See R T Shannon, "Seeley, Sir John Robert (1834-1895)" in Lawrence Goldman, ed, *Oxford Dictionary of National Biography*, (Oxford University Press, 2004) at 12: "We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind."

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

the abortive nineteenth-century legal treatise project. It does not at once seek to create a rational theory and *also* act as the key to all the case law. While modern contract theories do discuss case law occasionally, when they do so, they tend to rely on a carefully curated list of leading cases. Besides, they tend to transact with general doctrines and concepts—which are far less troublesome than the whole fasciculus of actual cases and therefore lend themselves to theorization with much lesser embarrassment for the theorist than they did for the nineteenth-century treatise writer. Typically, they offer what is described in the literature as "universal" and timeless theories of the common law of contract, without specifically pointing to any particular jurisdiction to which they are supposed to be applicable.[139] The universalist, rationalist contract theories have come under attack by a number of philosophers on this count.[140]

Elsewhere I have argued that such rationalist geometric accounts do a poor job of capturing how the common law of contract works.[141] This paper will not, however, rehearse those arguments. Now, legal theorists can quite legitimately continue to debate the role of system in the common law. There is a camp that strongly feels that a system is needed to tame "the garden gone to seed."[142] There are others who feel that such systems are doomed to be "self-defeating."[143] Whatever view one is inclined to take on this debate, it could, in all fairness, be said that system is ostensibly more at home in the civil law world than the common world. However, in what follows, we will side-step these hardy perennials entirely, and in any case, the argument being advanced here is not contingent on their satisfactory resolution. We will also side-step many other pressing questions that can be raised about the utility of contract law theorizing—regardless of their congruity in a legal system—such as the possibility of abstract theoretical principles yielding concrete answers,[144] or the ability of theory organized around first principles being a helpful heuristic tool in navigating the complexity of the body of doctrines.[145] Rather we will train our focus on the methaethical cost of these theories and the extent to which projectivist theories fare better on that score.

V. The Theoretical Price of Impinging Contract Theory

There is a price at which impinging contract theory comes—something that could count as a factor diminishing its appeal—and that has to do with *motivation*. It will be recollected that the standard picture of psychology has it that a cognitive

139. Kreitner, *supra* note 136 at 916.
140. See e.g. James Goudkamp & John Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21:2 Leg Theory 47; Peter A Alces, "Unintelligent Design in Contract Law" (2008) 2008:2 U Ill L Rev 505 at 511; Brian H Bix, "The Promise and Problems of Universal, General Theories of Contract Law" (2017) 30:4 Ratio Juris 391; Swaminathan, *supra* note 6.
141. See Swaminathan, *supra* note 6.
142. Gerald G Postema, "Law's System: The Necessity of System in Common Law" 2014:1 NZLR at 69.
143. Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003) at 2.
144. See Hesselink, *supra* note 43.
145. See Bix, *supra* note 26 at 159-61.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

state of mind that aims at truth does not motivate and a motivationally laden conative state of mind does not aim at truth. Just what *affect* is a contract theorist's elegant justification, which purportedly captures truth, supposed to have? No 'truth' in itself can motivate. Bernard Williams had famously demonstrated the utter futility of the "Professor's justification" before a motivation to the contrary.[146] There is no "apodictic" device that can cause to motivate anyone by displaying a truth.[147] Cognitivist oriented philosophers are not typically perturbed by this. The purity of their account and the elegance of their system is not sullied by such contingent happenstance, or 'merely psychological' issues, as they might be inclined to put it. It is truth they are after, and its psychological purchase in the motivation hardly matters to them. This is not a metaphysically incoherent position either. If truth is motivationally inert, the philosophers who have captured it adequately are hardly to take the rap for it. But it is not entirely obvious that *legal* theorists can take this aristocratic stance qua motivation that their counterparts in philosophy departments can—at any rate, not so quickly. If internalization or the internal point of view is to be taken seriously and given central place, a legal theorist cannot possibly share the metaphysician's indifference to motivation.

Accommodating motivation or the internal point of view places a significant constraint on a putative normative theory of contract. It calls for not a justificatory contract theory but one that is most likely to have motivational purchase in the subjects' practical reasoning. What shape must such a projectivist contract theory, which is calculated to align motivations of the law's subjects, take? In the following section, we shall attempt to lay down some desiderata for an approach to contract theory compatible with the projectivist model of normativity. The importance of this cannot be overstated. When it comes to the internal point of view, apex principles (such as the one underlying the will theory) are of little practical value. It is not given to us to step outside our skins or relinquish our deep-rooted attitudes and feelings at will.[148] We are creatures of habit and internalization. Our ways of going are etched in deep grooves and they are not that easily abandoned. No prescription of how one ought to behave can ignore this just in order to reach results that logically follow from some apex principle.

Here, even the phenomenologist joins forces with the non-cognitivist. Phenomenologists argue that our everyday ethical behaviour involves transparent, non-conceptual coping with situations that we are confronted with.[149] They argue that such behaviour does not involve conscious comportment with any objectively given moral principles. And as a consequence, it should not make

146. Williams, *supra* note 7 at 23.
147. Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press, 1979) at 156-58.
148. See Blackburn, *supra* note 17 at 166.
149. See Francisco J Varela, *Ethical Know-How: Action, Wisdom, and Cognition* (Stanford University Press, 1999) at 9; Hubert L Dreyfus, "Overcoming the Myth of the Mental: How Philosophers Can Profit from the Phenomenology of Everyday Expertise" (2005) 79:2 Proceedings and Addresses of the American Philosophical Association 47.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

the slightest of a difference to our moral behaviour if we are confronted with an apex moral principle—for our morality never depended on that.

Common lawyers appear to have been acutely aware of the centrality of this feature in all juridical activity. J.G.A. Pocock summarizes the gist of Sir Mathew Hale's theory as being the idea that juridical activity aims at "establishing rules of conduct to which all can agree."[150] And this they seek to accomplish by working with "shared understandings of common ways and practices."[151] This is thought more likely to have traction with the community in doing the "job of public ordering that needs to be done."[152] This shows how common lawyers have historically been aware that the reasons that can be adduced by the judge are constrained by what is likely to find the acceptance of the community.

All said and done, all we have is our ways of going on and one cannot seriously entertain the possibility of abruptly casting them aside. If the source of bindingness is a subjective attitude—as the non-cognitivist model argues—the law cannot but make allowances for it. Not unless it wants to hold itself outside a system experienced by the subject from the external point of view—as the Holmesian bad man does—as a system of threats to be avoided at pain of sanctions. In such a system, however, as Hart reminds us, life would be woefully sheep-like.[153]

VI. *Philosophia Morum*: Ambition of Projectivist Contract Theory

How might a projectivist approach to theory construction in contract law look? There do not seem to be the kind of default templates that one finds in the case of impinging accounts of normativity of law. In what follows, we shall attempt to sketch the outlines of a *normative* theory (not merely a procedural one) by building on some of the resources used by non-cognitivists. It is of some importance to note how this theory will still be 'normative'—albeit one where 'normativity' is understood in terms different to those of the cognitivists. For the non-cognitivists, 'normativity' is nothing but the motivational pull exerted by morality. The impinging model considers the task of moral philosophy to be that of *informing* interlocutors. The projectivist model on the other hand considers the task of moral philosophy as that of *motivating* them. To borrow terminology used by Hume himself, moral philosophy according to the impinging model is a matter of "speculation," the chief task of which is to expound the "foundations of morals," which it does by discovery of standards.[154] To borrow Hume's language again, the projectivist model takes us to be "active beings" motivated by "taste and sentiment"

150. JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, 2d ed (Cambridge University Press, 1987) at 171. See also Hayek, *supra* note 66 at 98 (this may be because of the fact that judges were principally tasked with maintaining the King's peace).

151. Postema, *supra* note 11 at 79.

152. *Ibid*.

153. See Hart, *supra* note 20 at 117.

154. David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, 3d ed by LA Selby-Bigge & PH Nidditch (Oxford University Press, 1975) at 5-6.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

and hence considers it the aim of moral philosophy as that of "moulding the heart and affections."[155] On the impinging model of normativity, bindingness is a matter of our judgments conforming to some objective or mind-independent standards. It follows from this that our response to or grasp of them is truth-apt, which is to say, capable of being true or false in relation to these standards. By contrast, on the projectivist model, bindingness or normativity of morality is nothing but the motivational pull exerted by a moral judgment.[156] On this model, the interlocutor and that motivating them take centrality. Hume himself was sympathetic to the motivational model of normativity as are modern non-cognitivists who are the philosophical inheritors of this Humean legacy.

Now how would someone build a normative contract theory that is based on the projectivist model of normativity? It will seek to marshal arguments and considerations which are likely to have motivational efficacy. But how does one go about that? The idea of supervenience provides a promising avenue. Richard Hare, a prominent non-cognitivist philosopher, had argued for the notion of supervenience, which has it that if properties of actions are similar, so must the moral judgments about them be.[157] As Mathew Chrisman explains, "the basic idea is that there cannot be two circumstances that differ ethically without also differing in some relevant way that is uncontroversially descriptive."[158]

A method of rational persuasion that builds on this feature of moral discourse would involve demonstrating to an agent how a moral consideration under discussion is factually similar in relevant respects to another moral consideration with respect to which they hold an opinion. This method relies on the extrapolatory nature of moral discourse, which uses analogical reasoning and casuistry.[159] Something resembling this method can be found in the work of the moral philosopher Jonathan Dancy, who rejects the idea of "moral thought and judgement as the subsumption of the particular case under some universal principle."[160] What he gives us in its stead is an account that resembles the common lawyers' method.[161] The motivational levers of the method being argued for here are provided by the notion of supervenience, which is thought to work with conative attitudes due to a "natural consistency constraint."[162] This approach to theory would be calculated to persuade or motivate rather than provide justificatory truth conditions.

It might not be a propos to point out here that this method of mobilizing motivation also forms the bedrock of 'rhetoric' qua ancient philosophical

---

155. *Ibid* at 6.

156. See Luke Russell, "Two Kinds of Normativity: Korsgaard v Hume" in Charles R Pigden, ed, *Hume on Motivation and Virtue* (Palgrave Macmillan, 2009) 208 at 208-09.

157. See RM Hare, *Language of Morals* (Oxford University Press, 1963) at 145.

158. Matthew Chrisman, "Ethical Expressivism" in Christian B Miller, ed, *Bloomsbury Companion to Ethics* (Bloomsbury, 2014) 29 at 35.

159. For a discussion on the close connection between analogical reasoning, persuasion, and motivation see Shivprasad Swaminathan, "Analogy Reversed" 80:2 (2021) Cambridge LJ 366.

160. Jonathan Dancy, *Ethics Without Principles* (Clarendon Press, 2002) at 3.

161. *Ibid* at 7.

162. Chrisman, *supra* note 158 at 35.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

method—rid of the pejorative connotations of the term. This is most clearly elucidated in the nineteenth century Scottish philosopher, George Campbell's *Philosophy of Rhetoric*, which builds on a Humean theory on ethics.[163] At the heart of rhetoric and persuasion, argues Campbell, is the (Humean) idea of attraction and association among impressions. The central function of rhetoric is the transfer of force from one impression to another by relying on resemblance and contiguity.[164] Persuasion is effective when built upon relations of resemblance and similarity with already accepted opinions.[165] The leading philosopher of rhetoric in the twentieth century, Chaïm Perelman has a similar account of the persuasive value of resemblance and similarity.[166] Until rationalism crowded out rhetoric and encrusted it with pejorative connotations—Pascal is supposed to have played a key role in precipitating this downfall—it was regarded as a respectable tool in the philosophical repertoire.[167] It was especially respected by lawyers—particularly, the common lawyers.[168] Theodore Viehweg has demonstrated the centrality of rhetoric to the common law tradition.[169] Indeed, it could be argued—as I have done elsewhere[170]—that common law's analogical reasoning is deeply rhetorical. It could be argued that common law's analogical reasoning is a form of rhetorical reasoning where past decisions (precedent) are used as rhetorical counters in a discursive enterprise to persuade the legal community.[171] This is not to suggest that rhetoric was any less central to the civilian tradition (at any rate, at least before rationalism took over) and the work of Continental scholars such as Giambattista Vico is testament to that. Whatever view one takes of this, it might be fair to say that the common law seems to have retained more of a link to its rhetorical past than the civil law does. This is perhaps owing to the fact that rationalism did not have as great an impact on English law and philosophy as it did in Continental Europe.[172]

An account aligned to the projectivist model would be calculated to persuade or motivate rather than offer justificatory truth conditions. One way of building on this would be to begin with a rule or a small cluster of rules in essential areas of contract law—consent, formation, performance, remedies, etc.—which people do, by an overlapping consensus, *incontrovertibly* take an internal point of view to, and discursively reach other rules with a similar set of properties with the

---

163. See George Campbell, *The Philosophy of Rhetoric* (Harper & Brothers, 1841).
164. See Lloyd F Bitzer, "Hume's Philosophy in George Campbell's Philosophy of Rhetoric" (1969) 2:3 Philosophy & Rhetoric 139 at 153.
165. See Hume, *supra* note 154 at 290 (Hume supports this idea of transfer of moral imagination).
166. See Chaïm Perelman & L Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame Press, 1969) at 107, 219.
167. See Albert R Jonsen & Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (University of California Press, 1988).
168. See Michael H Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Ashgate, 2005).
169. See Theodor Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, translated by W Cole Durham (Peter Lang, 1993).
170. See Swaminathan, *supra* note 159.
171. *Ibid* at 385.
172. See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3d ed (Clarendon Press, 1998) at 259.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

result that the rule argued for has a greater likelihood to have motivational purchase in the interlocutor's practical reasoning. This form of theory creation is a form of *philosophia morum* that is 'immersed in ordinary moral conversation' of the various participants—whether officials or judges or citizens—who are subject to contract law.[173] The casuistic method of analogical reasoning employed by the common law is a familiar discursive technique that seems, with suitable refinements, to be geared to perform this task—particularly when it is rid of its excessive formalism and technical opaqueness.

The substantive account this method yields is likely to be a collection of numerous clusters of *locally* coherent accounts of different areas of law, rather than one single elegant *globally* coherent complete theory. Something resembling the method outlined here is, in fact, already familiar in contract law scholarship of a doctrinal nature, which is not produced under the rubric of a grand justificatory theory.[174] In what follows, we will not seek to do much more than consider two practical examples from contract law scholarship to identify in them two corresponding key *elements* of the kind of theorizing being argued for here. Needless to add, this is not, in any shape or form, meant to be the final word on projectivist theory construction in contract theory. Far from it, much work needs to be done to make projectivist approaches to theory construction feasible and meaningful. And that attempt would far outstrip the space and resources available for this article.

First, let us consider an argument advanced by Garry Muir against the so-called *penalties* rule that has been a part of the common law for the better part of two centuries now.[175] Muir does not premise the argument on any first principles. Rather he uses a casuistic form of reasoning to make a supervenience-based case for abolition of penalties. The proposition that the courts do not rescue a person from a "bad bargain," Muir argues, should extend across the whole gamut of contractual stipulations, including those of agreed sums.[176] Muir argues that there is no "catholic objection" to overcompensation, which is to say, a party getting more for something less—a fact that is evidenced by the so-called *adequacy of consideration* rule.[177] If a court will not interfere if someone sells their family jewels for a peppercorn—barring situations where consent could be said to be lacking in some form, which engage a different rule altogether—why should it when it concerns an *agreed sum*? The courts deny the inevitability of that inference by justifying interference in the latter but not in the former case on the

173. See Postema, *supra* note 11 at 69 (to adopt a phrase used by Postema to describe the role of the common law judge).

174. For a discussion see Shivprasad Swaminathan, "What the Centipede Knows: Polycentricity and 'Theory' for Common Lawyers" (2020) 40:2 Oxford J Leg Stud 265.

175. See Garry A Muir, "Stipulations for the Payment of Agreed Sums" (1985) 10:3 Sydney L Rev 503. As it so happens, the rule has taken quite a battering recently by the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi* and its companion case *ParkingEye Limited v Beavis*, [2015] UKSC 67 [Cavendish]. The distinction between primary and secondary obligations, underlying the old rule, however, continues.

176. Muir, *supra* note 175 at 518.

177. *Ibid* at 519.

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

ground that whilst it is impermissible to interfere with *primary* obligations that parties have willingly entered into, it is all right to interfere in cases covered by the penalty rule as it concerns *secondary* obligations or obligations accessory to primary obligations, which come into play only upon breach.[178] This is how the distinction works in practice. If a contract stipulates that consideration of £10 is to be paid, reducible to £5 if performance is completed satisfactorily before a certain day, the stipulation would dodge the penalty rule completely. But if the consideration is £5 and a defaulting party agrees to pay an additional £5 in case of failure to perform in a timely manner, the penalties rule would be engaged. For all practical purposes and considering all relevant factors, both situations are similar. Both stipulations are just as onerous on the defendant and come into operation under identical conditions, but the former would be out of the purview of the penalty rule as it is couched in terms of a primary obligation, whereas the latter would come within its purview as it is couched in terms of a secondary obligation. Muir is using the adequacy of consideration rule, which is thought to be beyond reproach, to argue against the penalty rule, by extrapolation. Qua supervenience, Muir has a very strong point, and this appears to be as attractive an analogical argument as any. The court only manages to block it by employing the formalistic categorization of *primary* and *secondary* obligations. In the circumstances, this distinction ought to make no difference, as the illustration demonstrates.

Another example of scholarship which uses some of the elements of projectivist accounts discussed here is Mindy Chen-Wishart's approach to undue influence in contract law.[179] Undue influence has proved resistant to rationalistic accounts with apex principles. Defendant-sided (based on defendant's wrongdoing) and claimant-sided (based on impairment of claimant's consent) accounts of undue influence seek to understand all of the law of undue influence on the basis of a single rationalistic principle. Judicial attempts at articulating an organizing principle—for instance, the principle of 'inequality of bargaining power'—have also faltered. They have had to be qualified with numerous defeasibility conditions thereby greatly diminishing their predictive power in predicting outcomes in real cases. The search for apex principles for undue influence, as Chen-Wishart argues, is un-illuminating and consequently debates here have become sterile.[180] On this point, it might be noted parenthetically that recently, Jane Stapleton has also emphasized the redundancy of invoking ultimate values of the kind routinely invoked by theorists in their theories.[181] Rather than start out theory construction

178. See Mindy Chen-Wishart, "Controlling the Power to Agree Damages" in Peter Birks, ed, *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996) 271 at 273 (despite the jolt it gave the doctrine, the court has followed this distinction in *Cavendish*).

179. See Mindy Chen-Wishart, "Undue Influence: Vindicating Relationships of Influence" (2006) 59:1 Current Leg Probs 231 at 252-59 [Chen-Wishart, "Undue Influence"]. See also Mindy Chen-Wishart, "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62:1 ICLQ 1 at 13 (the author highlights the role played by tacit knowledge in Singaporean law in lending a local trajectory to the doctrine of undue influence).

180. See Chen-Wishart, "Undue Influence", supra note 179.

181. See Jane Stapleton, *Three Essays on Torts* (Clarendon Press, 2021).

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press

with an apex principle and then move to the cases, Chen-Wishart recommends theory construction by appeal to the law by grappling in the detail of cases, even if it is 'messy.' Starting out from this point, one can capture the intuitions which seem to vary on the dynamics of case—such as the nature of the underlying relationships, the nature of transaction and the factors motivating the demand. It is these elements which do the work of pulling lawyers' and courts' intuitions in their direction and explain what kind of decision is likely to be motivationally affective. Indeed, even if theorists give such considerations a wide berth, lawyers do nevertheless glean them from the case law and routinely rely on them as a gauge for anticipating judicial behaviour. This approach gets to the heart of the factors that have resonated with the court and are likely to do so in cases in the future. It is no small virtue to be able to claim that such an approach is likely to have superior predictive power.

Acknowledgements: An earlier version of this paper was presented at 'Contract Law in a Liberal Society' at the Centre for the Study of European Contract Law, University of Amsterdam. I am grateful to Martijn Hesselink, Hanoch Dagan, Aditi Bagchi, Laura Burgers, Zhong Xing Tan, Lyn Tjon Soei Len, Mirthe Jiwa, and others who participated in a robust discussion on the paper; and to Abhinav Shankarraman for his research assistance.

Shivprasad Swaminathan is Professor and Director, Centre for Legal Theory at Jindal Global Law School, O.P. Jindal Global University. He works in the areas of legal theory and private law. Email: sswaminathan@jgu.edu.in

https://doi.org/10.1017/cjlj.2022.31 Published online by Cambridge University Press