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Cambridge Law Journal, 2004; 63(3):605-631

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23 April 2014

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DO WE NEED A HYBRID LAW OF CONTRACT? WHY HUGH COLLINS IS WRONG AND WHY IT MATTERS

JOHN GAVA AND JANEY GREENE*

INTRODUCTION

IN *Regulating Contracts*¹ Hugh Collins takes up the challenge presented by 40 years of empirical studies which show that business people make little use of contract law in settling disputes, preferring instead to rely on trust and various non-legal sanctions to organise their transactions. Indeed, business parties often actively avoid the use of law because of its expense, inconvenience and tendency to harm business relationships. These findings pose a challenge to traditional doctrinal scholars. If business parties do not make much use of contract law, one has to ask what role it does play and whether the attention that is paid to it by orthodox legal scholars is misplaced. *Regulating Contracts* takes on this challenge directly and is the most substantial attempt made so far to explain the role of contract law in light of the questions raised as to its usefulness.²

Collins' argument addresses the apparent slippage between the orthodox view of contract law as central to market exchanges and the empirical findings that suggest that contract law is only of minor importance and may even be an impediment to market activity. He regards the relatively minor use of contract law in the market as a problem because this means that contract law is not a useful tool to governments in their task of regulating markets. He proposes to address this problem by reconfiguring contract law so that it supports commerce. This reconfiguration will take the form of a "hybrid" comprising the "discourses" of law, economics and the sociology of business. This paper will argue that Collins' argument for a hybrid contract law is not convincing, that in fact it pursues a strategy which is at odds with his own carefully

* University of Adelaide. We would like to thank David Campbell, Peter Cane, Frank Carrigan, Jeannie Paterson and Eric Posner for their comments on an earlier version of this paper.

¹ H. Collins, *Regulating Contracts* (Oxford 1999).

² The bibliography contained in Collins' book contains a comprehensive listing of the major empirical studies of contracting practice and much of interest covering other areas of contract as well. Collins' more recent work in this area builds on the ideas developed in *Regulating Contracts* and these will be considered when appropriate; but it is *Regulating Contracts* which sets out his ideas most comprehensively.

constructed understanding of the relationship between the law of contract and business.

COLLINS' ARGUMENT—CONTRACT AND CONTRACTING BEHAVIOUR IN
THE REAL WORLD

How does Collins see the relationship between contract law and transacting in the market? For Collins, any transaction can be seen from three different perspectives: the business relationship, the economic deal and the contract. First, the business relationship:

The social and business relation between the parties both precedes the transaction and is expected to persist after performance. It consists of the trading relation between the parties, made up of numerous interactions, some of which may involve contracts, but often will consist of enquiries, discussions of plans, and sorting out problems which have arisen. Surrounding and sustaining the trading relation, we are also likely to discover informal social relations, such as business lunches, links through family or social networks of friendships, membership of clubs, and ethnic identity Action oriented towards the business relations has as its predominant purpose the preservation and enhancement of trust.³

To the extent that the business relationship matters, either because the parties may expect to deal with each other in the future or because of its reputational aspects (*i.e.*, how others will perceive either of them), the parties will place great importance on maintaining and even deepening that relationship. This might mean, for example, that parties will sacrifice possible gains or advantages associated with either or both of the other two aspects of a transaction in order to protect or enhance the business relationship. Second, the economic deal:

Within this frame of reference, actions are assessed solely by reference to economic self-interest. A breach of contract in order to avoid loss represents a rational application of the criteria, despite the betrayal and loss of trust which the breach causes. The key measurement concerns the price or cost of performance in relation to the value placed upon the expected benefit. Rational conduct by this criterion requires contractual performance only when the benefits exceed costs of default combined with costs of making alternative transactions in the market.⁴

The third aspect or framework of a transaction is the contract, the formal legal relationship between the parties. Collins does not deny

³ *Regulating Contracts*, p. 129.

⁴ *Ibid.*, p. 130.

that this aspect is important. Nevertheless he thinks that it will normally be less important than the business relationship and the particular economic deal. It is only when the relationship has broken down and the benefits of relying on contractual rights exceed the benefits of continuing with the particular deal that there will be recourse to contractual rights. Normally, however, the contract will lie in the background. Indeed, as Collins notes, contracts often will be drawn up principally for internal bureaucratic reasons (for example, to keep records for large organisations or as a management tool to control employees).⁵ Collins also alludes to the practice of disputing parties using contracts as negotiating tools even where, for various reasons such as maintenance of trust relations or the costs of legal enforcement, recourse to the courts is not intended. Often, however, even the recording of a deal in a written contract can be seen as indicating a lack of trust in a trading partner or a possible constraint on future action designed to help that or other trading partners.⁶ In other words, the recording of contracts may be seen as a hostile manoeuvre even without any attempt to give effect to the rights contained in them.

In sum then, Collins believes that the contractual aspect of a transaction is usually a relatively minor or perhaps even unwanted part of that transaction. Trust and non-legal sanctions are the best and most used tools for avoiding and settling disputes and the law is only used when it is economically rational to do so.

It is this understanding of the relationship between law and transacting in the market that Collins believes should determine the role and nature of contract law.⁷ Since Collins believes that contract's role is to assist efficient exchanges, he quite naturally

⁵ *Ibid.*, pp. 135–136, 231.

⁶ *Ibid.*, pp. 130–137.

⁷ Some of Collins' subsequent writing, in our eyes at least, has seen his analysis regress to a less convincing position. In two recent articles, one co-authored with David Campbell, Collins moves away from his tripartite classification and insists, instead, that judges should investigate the implicit dimensions of transacting to facilitate understanding of the proper working of the explicit contract. As Ian Macneil notes, this has the effect of putting the explicit contract at the heart of the analysis and treating the context of the agreement as merely a resource for understanding that contract. In contrast, Collins' tripartite classification places the focus on transacting with the explicit contract as one, relatively minor, aspect of that complex entity. One might say that Collins, having adopted a Copernican strategy in removing the explicit contract from the centre of transacting then reverts to the position that he has criticised. See H. Collins, "Introduction: The Research Agenda of Implicit Dimensions in Contracts", in D. Campbell, H. Collins and J. Wightman (eds.), *Implicit Dimensions of Contract*, (Oxford 2003), p. 1 and D. Campbell and H. Collins, "Discovering the Implicit Dimensions of Contracts", in *ibid.*, p. 25. For Macneil's criticism, see I. Macneil, "Reflections on Relational Contract Theory after a Neo-classical Seminar", in *ibid.*, 207. In another contribution to this book Collins adopts the tripartite analysis: H. Collins, "Discretionary Powers in Contracts", in *ibid.*, p. 219. This is all very confusing but in this paper our focus will be on Collins' tripartite analysis because we believe that this model is the best and most sophisticated analysis of transacting, and the place of contract within it, currently available.

asks whether contract law can be reformulated so that it can enhance the efficiency of market transacting.

Collins argues that by becoming a hybrid form of law contract will have great potential to do this. He argues that contract law is already undergoing what he calls a productive disintegration. According to him judges are increasingly renouncing their fidelity to contract law as a formal system of rules in favour of incorporating economic and sociological information and insights into their judgments in order to further overtly instrumentalist aims. Collins sees this as a golden opportunity. If contract is in a state of flux, this is the ideal time to change it in the way that he feels is appropriate.⁸ Collins' main reason for thinking that contract law provides a promising base for regulating the market is its very nature. The common law, with its relatively loose conceptual framework and less rigorous logical development, in comparison to the civilian tradition, is, he argues, a good candidate to become a hybrid form of law. He concludes by arguing that private law has the potential to achieve the aims of public regulation without falling victim to the problems that have bedevilled public regulation.

How might the law be "hybridised"? Collins argues that law is a "communication system" similar to the discourses of economics and sociology and that, in order to become an effective tool for the market, the communication system of law should be open to the insights and information offered by those discourses. In practical terms, this would mean that judges would openly incorporate economic and sociological theory and data in legal rule and decision-making. To enable judges to do this the "closure rules" (rules of evidence and procedure) of private law would have to be changed. At the same time, however, Collins believes that the law will always have strong forces favouring autonomy and that, for reasons he does not adequately explain, the law should maintain some autonomy. His position seems to be that the hybrid form is necessary and desirable but that this should not and will not have the consequence of the law becoming overwhelmed by the other communication systems.

Having spelt out his notion of a hybrid law comprising sociological and economic discourses engrafted upon contract law, Collins is then faced with the task of showing that this hybrid form of law is capable of carrying out the regulatory task that he has described.

⁸ *Regulating Contracts*, pp. 31–55.

PRIVATE LAW AS DISCOURSE

Collins sees law as harnessing the knowledge of the discourses of economics and sociology to create a new form of law, independent but closely allied to and modelled on these other discourses.⁹ This means that the formal rules of the old form of law will disappear to be replaced by “more local regulation informed by a more purposive approach to regulation”.¹⁰ By local we assume that he means a more differentiated set of rules to apply to particular situations. According to him this new form of law will not only learn from its interaction with other discourses; it can also learn from its own experiences.¹¹

Collins does not explain what he means by a communication system and why law can be usefully described as such. In fact, to describe law in this way seems to obscure more than it illuminates. Is contract law a “discourse”? Or is it the law, a historically accepted form of state power, that has applied the common law’s conceptions of justice to solve disputes brought before its courts? As Atiyah has argued, law is not an intellectual discourse; it is a closed, formal system of applying rules that does not advance knowledge in an academically rigorous fashion.¹² Economics and sociology by contrast are open systems of knowledge. Unlike law neither has a final authority which can, indeed must, resolve disputes and, unlike the practice of law, both try to expand the amount of knowledge that comes within their compass.¹³

By labelling law a discourse Collins is able to make his argument; but is he really comparing like with like? It may appear persuasive to talk in abstract terms of combining communication systems, but when the fundamental differences between law and the academic disciplines of economics and sociology are properly considered, the mixing seems much less plausible. Law, or more accurately the practice of law, is different from the other, primarily academic disciplines. Sociology, economics and law can all be studied descriptively and thus be labelled sciences. And each can offer prescriptions for government action. But Collins’ rather blithe assertion that the three discourses can be mixed seems to be

⁹ *Ibid.*, pp. 54–55. Collins is not entirely clear whether this will result in law becoming part of these discourses. In several places he states that law has lost its special character (pp. 46, 53), yet his discussion is based on a claim that law has sufficient resilience to maintain its independence even if it is radically transformed (pp. 54–5). We are not told why Collins places so much importance on the independence of contract or private law more generally.

¹⁰ *Ibid.*, p. 55.

¹¹ *Ibid.* As we will see Collins is not always this optimistic about the learning potential of the law.

¹² P. Atiyah, *Pragmatism and Theory in English Law* (London 1987).

¹³ M. Dan-Cohen, “Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience” (1992) 63 *University of Colorado Law Review* 569.

suggesting that the *sciences* of sociology and economics can be grafted onto the *practice* of law, *i.e.*, that academic discourses can be grafted on to an act of governance. Talk of mixing and cross-fertilisation would be persuasive only if Collins had noted these important differences and explained how they were to be overcome.

CHANGING THE CLOSURE RULES

We have expressed concern about Collins' characterisation of law as a discourse. At least as worrying is the package of "procedural reforms" that must be put in place to effectuate the desired melding of contract law and other discourses.

The existing framework or model in which common law judges make private law renders the courts quite passive law-makers. There must be a plaintiff with standing who must bring a live matter before a court of competent jurisdiction and who must make a *prima facie* case against a defendant over whom the court has personal jurisdiction. In addition the court is constrained by evidentiary and procedural rules in the processes it follows and the information upon which it acts. When these requirements of rendering a valid judgment are satisfied, the court may hand down a decision. This decision will bind only the parties to the matter even though it will also state the law which will apply in the future to like cases. Judges who operate within this system are usually quite restrained in commenting on issues which are not squarely in dispute between the parties before them. When they do so comment, it is with the understanding that their comments are not law and are not binding in other disputes. This framework, of course, is deviated from at times, but such deviations need to be carefully scrutinised to ensure that they do not threaten the efficacy and legitimacy of the model as a dispute-resolution tool.

Sprinkled throughout *Regulating Contracts* are admissions that, in order for the private law of contract to play the regulating role that Collins advocates, it will be necessary to open the closure rules described above. These rules are said to "close" the private law process by limiting what information it considers, as indeed they do. A quick look at these proposals, which are rather dismissively summarised in the conclusion of the book as "minor adjustments, often at the level of procedure rather than substantive law",¹⁴ will show courts sometimes deciding questions brought by interest groups as opposed to interested plaintiffs,¹⁵ where the questions do

¹⁴ *Ibid.*, p. 358.

¹⁵ *Ibid.*, p. 88.

not necessarily reflect any live dispute,¹⁶ with the burden of proof shifted to the defendant at times.¹⁷ In deciding such questions the courts will have access to sociological and economic data in a form akin to Brandeis Briefs.¹⁸ The parol evidence rule will have to be completely eliminated so that broad “evidence” of the business context, the relationship between the parties and the deal that they have made, is not blocked by evidence of their written contract.¹⁹

What Collins does not tell us is what the status of these judicial determinations will be. Will they be law, or will they be advisory opinions? Will they bind the party who asked the question or any other parties or future courts? These are important questions because, despite his attempts to play down his “minor adjustments”, Collins is undeniably advocating a brave new role for common law courts. As such these are fundamental, not minor, changes to the nature of the common law.

In an ironic twist Collins advocates some of these changes to private adjudication because they have proven valuable in the sphere of public regulation. For instance, he suggests that the burden of proving compliance with the contract should be shifted to the defendant because this is done in some public regulatory schemes.²⁰ Drawing support from the public sector in this way does not sit well with the claim central to his book that public regulatory models have failed to live up to their promise. Private law is posited as the way forward and yet to function in this way it must sacrifice the characteristics that make it private and take on some of the key characteristics of public regulation. What will not be adopted are the constraints on public law-making and enforcement. No system of legislative or executive oversight, of ministerial control or of responsible government will constrain the power of the courts in their application of hybrid law.

For the most part, though, these suggested changes to the closure rules are only supported by the assumption that Collins’ overall programme is a good one and that these changes are needed to implement it. We think that this programme is seriously flawed on a number of grounds. But even if one thought otherwise, the proposals that the procedures that govern private law adjudication should be dramatically overhauled in order to achieve Collins’ goals are of concern. There is, of course, a large literature on the merits and shortcomings of the various procedural rules that Collins wants to abandon or modify. It would not have been possible, or even

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 90.

¹⁸ *Ibid.*, p. 87.

¹⁹ *Ibid.*, pp. 158–160.

²⁰ *Ibid.*, pp. 89–90.

desirable, for Collins to have canvassed all of these. But the blithe description of these changes as “minor adjustments” completely misstates and misunderstands their nature.

CONTRACT AS REGULATION

As noted above, Collins argues that private law has the potential effectively to replace public regulation because its flexibility will allow it to overcome the difficulties that have plagued public regulation. But before we consider whether Collins’ arguments about the flexibility and potential of contract law are persuasive it should be considered whether his characterisation of private law as a form of regulation is appropriate and convincing.

Collins assumes that the main, indeed, apparently the only, purpose of contract is to facilitate market exchange.²¹ This allows him to assert that contract is a form of regulation similar in fundamentals to, if somewhat different in detail from, public regulation. How convincing is this analogy? Collins says that regulation can be understood as “any system of rules intended to govern the behaviour of its subjects”.²² The breadth of this definition disables analysis. It equates all law with regulation and forecloses the very point of whether a body of private law can or should be treated as a regulatory tool.

Public regulation, as commonly understood, is a creature of the nineteenth and, mainly, the twentieth centuries. It has usually taken the form of government-appointed bodies giving effect to governmental standards, principles or desired outcomes. Usually, but not always, the persons appointed to such bodies are experts in relevant fields. The Australian Competition and Consumer Commission or the United Kingdom Monopolies Commission are examples of such bodies, sharing in this instance the responsibility for the maintenance of government mandated principles of market competition. The private law, in comparison, has been developed over many centuries by a small body of people expert in a fairly esoteric body of knowledge, who were not formally aligned to the government of the day and whose guiding principles were and are notions of justice and the principled development of a body of rules according the traditions and practices established over those centuries. Ibbetson has made a strong case for seeing the notion of reciprocity as the norm underlying many centuries of the development of common law rules dealing with contract.²³ These

²¹ *Ibid.*, pp. 5–6.

²² *Ibid.*, p. 7.

²³ D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999).

rules and the notions of justice that underpinned them were not government policy; indeed, it could be argued that the common law was developed at a substantial distance from government policy and goals. The judges did not see themselves as government appointees and the result of their work was not measurable against a standard or goal, apart from the dispensing of justice. The latter, of course, could not and would not be quantified in the way that, for example, the Monopolies Commission's work would be.

Of course, the common law and regulation do now intersect at many points.²⁴ Judges frequently have to police the processes of regulatory bodies and in many instances they now apply regulatory regimes. Corporate law is an example of as a mixture of traditional legal rules and administrative procedure. However, this close interaction between law and regulation does not obviate the need for analysis. It is one thing to recognise the increasing interaction between the two. It is another to ignore fundamental differences and assume that the two are now interchangeable and part of one broader regulatory framework. Similarly, the costs as well as the supposed advantages of a closer interaction between private law and regulation have to be recognised and weighed, not simply ignored.²⁵ One is free to *advocate* that law and regulation should be integrated but Collins' assumption that they are, and his consequent failure to analyse the possible disadvantages of such a change, are unpersuasive.

In any event, as we will suggest below, the focus on regulation and regulatory discourse is misguided because we think that the problems facing contract law today are best understood other than by using a regulatory lens.

LITIGATION AS A SOURCE OF REFLEXIVE LAW

Central to Collins' understanding of a hybrid law is the capacity of private law to "learn" from its environment about its effects so that it can continually improve itself as an efficient means of regulating market transactions. In his discussion of *Barclays Bank plc v. O'Brien*,²⁶ he suggests that private law has already commenced its productive disintegration from its formalist roots and that litigation is one means by which this occurs. He notes that the courts have

²⁴ See, for example, J. Black, "Critical Reflections on Regulation" (2002) 27 Australian Journal of Legal Philosophy 1 for a wide-ranging discussion on contemporary views about the nature and reach of regulation and its intersections with law.

²⁵ Simon Deakin provides a thoughtful discussion of the relationship between law and regulation and its future in S. Deakin, "Private Law, Economic Rationality and the Regulatory State" in P. Birks (ed), *The Classification of Obligations* (Oxford 1997), 283.

²⁶ [1994] 1 A.C. 180.

imposed duties on banks to make sure that sureties are adequately aware of the risks of guaranteeing a loan. He then goes on to say:

Through observation of litigation coming before the courts, private law regulation can be adjusted in order to strike an efficient balance between imposing onerous duties on banks to comply with detailed bureaucratic procedures and the protection of vulnerable sureties.²⁷

He adds that

Private law in its applications learns from its environment about the effects of its rules on the subjects of regulation. This observation then permits the recursive process of further refinement of the legal rules in order to modify their effects (as they are understood by the law).²⁸

Can litigation act in this way? After all, is litigation not usually considered to be unrepresentative, unpredictable and dominated by “repeat players”?²⁹ Can cases before the courts be used in the fashion that Collins indicates to achieve the end that he wants? We think it unlikely, and Collins himself provides arguments against this proposition.

He acknowledges that most people do not have the money to fight cases in the courts.³⁰ This means, of course, that the feedback given by litigation is going to be unrepresentative and skewed in favour of those with the resources or temperament to go to court. Surely Collins cannot think that this sort of information is going to help create a new form of private law that is more attuned to the market’s needs? He acknowledges that the source of information emanating from litigation is “haphazard and unreliable”.³¹ He also accepts that the process of private law settlement of particular disputes before the court means that the results do not provide useful lessons for the setting of business standards to guide courts in the settlement of disputes throughout an industry.³² Yet, if the result of litigation cannot provide such information, one has to ask what the law can “learn” from litigation? Collins clearly recognises this problem when he notes that the defect of litigation as a feedback mechanism is “that it provides highly selective

²⁷ *Regulating Contracts*, pp. 50–51.

²⁸ *Ibid.*, p. 55.

²⁹ M. Galanter, “Why the ‘Haves’ come out Ahead: Speculations on the Limits of Legal Change” (1974–5) 9 *Law and Society Review* 95. Indeed, it could be argued that Collins’ description of the operation of hybrid law in the area of sureties is a classic example of repeat players, the banks, using litigation to achieve results that suit them rather than the law being reflexive in the way that Collins wants. We thank Jeannie Paterson for this suggestion.

³⁰ *Regulating Contracts*, pp. 69, 323.

³¹ *Ibid.*, p. 74.

³² *Ibid.*, pp. 81, 292–295.

information”³³ because litigation is dominated by those with a taste for and the money to go to the courts.

This feedback mechanism is therefore likely to provide the courts with a distorted source of information about the effects of regulation. As a consequence, even when the courts introduce into the legal reasoning a more contextual appreciation of the regulatory context, they are starved of reliable information about that context.³⁴

To the extent that Collins’ proposed hybrid law needs information from litigation to become a more efficient reflection of market needs and expectations, Collins’ own arguments show that this is unlikely to happen.

CAN A HYBRID LAW WORK? DISSEMINATION OF CASE RESULTS

One of the ways in which Collins claims that hybrid law will regulate the market is the effect court decisions will have on market behaviour and perceptions.

Although the application of a state sanction provides the occasional dramatic conclusion of the legal process, the more pervasive effect of the legal system in steering social behaviour derives from the dissemination of its legal reasoning into other communication systems The court provides an authoritative statement of what has happened. This statement is usually regarded by the community as reliable, as fact, as truth. Moreover, it is a public statement, which can be heard and acted upon by all members of the trading community.³⁵

But Collins himself appreciates that things might not be that simple. In his discussion of the failings of private law as an instrument for market regulation he admits that it is incapable of publicising its results. After all, can we really expect busy market players to read, let alone understand, law reports and other legal literature (assuming that a case is reported, of course)?

The detailed regulatory standards produced by private law can only be gleaned from the reports of courts’ decisions, which are seldom complete. These decisions are then only disseminated by uncoordinated private publicity in the form of books and articles about the law Effective standard setting plainly requires the dissemination of information about the requirements, for otherwise exact compliance tends to be fortuitous. *But the private law system can rarely achieve*

³³ *Ibid.*, p. 85.

³⁴ *Ibid.*, pp. 85–86.

³⁵ *Ibid.*, pp. 123–124.

*adequate dissemination of its standards to the regulated industry or market.*³⁶

The contrast with Bernstein's diamond traders or cotton traders and the efficiency of their information networks, *i.e.*, gossip, is stark indeed.³⁷

CAN JUDGES APPLY A HYBRID LAW?

Collins' central contention is that a suitably developed hybrid law has the potential to become an efficient regulatory tool for the market. In this section we will ask whether judges can carry out the task demanded by Collins' hybrid law and whether the information they need will be available.

We have seen that Collins believes that a hybrid law will take into account not only the formal terms of a contract but the business relation and the social and economic context of the transaction. First, the business relation. A hybrid law must appreciate the relationship between the parties:

The most appropriate form of legal regulation would temper its formalism with a sensitivity to the particular facts of the case, especially the history of prior dealings, and an understanding of the informal conventions (and formal trading standards where available) governing the business relation.³⁸

In order to uncover the latent intentions of the parties, the judges would have to engage in a process of legal reasoning "that examines the context of the transaction in order to discover a *complete* picture of the parties' intentions and expectations".³⁹

How is a judge to form an understanding of the informal conventions governing a business relation? Is it really plausible that

³⁶ *Ibid.*, p. 81 (emphasis added). See also *ibid.*, p. 233 and S. Macaulay, "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in Campbell, *Implicit Dimensions of Contract* at pp. 51, 77.

³⁷ L. Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions" (2001) 99 *Michigan Law Review* 1724 and L. Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry" (1992) 21 *Journal of Legal Studies* 115. John Kidwell has argued that to the extent that litigation does pass on information to prospective transactors it can only do this within a formalist regime. Attempts to take into account the nature of a particular relationship render any information so idiosyncratic that it would be useless to other transacting parties. J. Kidwell, "A Caveat" [1985] *Wisconsin Law Review* 615.

³⁸ *Regulating Contracts*, p. 181 (footnote omitted). Collins has subsequently raised doubts about the wisdom and the capacity of judges to do what he earlier claimed that they can and should do. D. Campbell and H. Collins, "Discovering the Implicit Dimensions of Contracts" in Campbell, *Implicit Dimensions of Contract* 25 at 48; H. Collins, "Discretionary Powers in Contracts" in *ibid.*, 219 at p. 237. See also his comments on pp. 253-254 where Collins acknowledges that the operation of hybrid law would result in general, abstract standards rather than decisions which precisely fitted the contours of the parties' expectations and experiences.

³⁹ H. Collins, "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in Campbell, *Implicit Dimensions of Contract* 1 at p. 13 (emphasis added).

anyone apart from the parties could have any understanding of their business relation? Indeed, even the parties may have different conceptions about the nature of that relationship. Judges do not have the luxury of getting to know both parties in the way the parties do in an evolving relationship. This means that they will not have the sensitive and precise information about the parties' relationship that Collins requires of them. And, if the business partners themselves have different perceptions, how is a judge to decide between them? After all, both may be right—from their respective points of view. A classic example of the difficulty here would be a situation where a history of waivers for breach of strict delivery dates might be understood by the breaching party as just part of the normal give and take of daily business, while the other side might see it as increasing evidence of the unreliability of the breaching party and to be put up with only until an alternative source of supply is found. By its very nature, the evidence for either point of view is likely to be non-existent or extremely fragmentary and ambiguous. How is a judge supposed to find the "true" nature of the business relation? Of course, Collins refuses to acknowledge that formalism is designed to overcome the impossibility of anyone knowing what goes on in the minds of contracting parties.

Collins' position also ignores the possibility of opportunism. How is a judge to know whether one of the parties in the above example has decided, opportunistically, to claim that the nature of the business relationship is X rather than Y? Collins also fails to consider the possibility that the parties or one of them may hide information either for gains associated with a particular transaction or to protect valuable trade or operational secrets.⁴⁰ Can judges discover such information? Will the parties want it to be made public in court proceedings?

If we examine an example that Collins gives of judges supposedly understanding the business relationship, it quickly becomes apparent that the task is not easy. Collins acknowledges that the report of *Williams v. Roffey Bros.*⁴¹ did not explain the nature of previous dealings between the parties but says that one could "surmise" that the parties were familiar with each other and that one could "infer" that a continuing business relationship was likely to be important to the parties.⁴² Surely it is a dangerous strategy for a judge to base his or her decisions about the actual

⁴⁰ R. Scott, "The Case for Formalism in Relational Contract" (2000) 94 *Northwestern University Law Review* 847, 863–864.

⁴¹ *Williams v. Roffey Bros and Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1.

⁴² *Regulating Contracts*, pp. 144–145.

beliefs of the contracting parties on such guesswork. And Collins does acknowledge the impossibility of reading the minds of the parties.

Compared to the stark evidence of the written contract, however, the court will encounter difficulty in abstracting from the conduct of the parties the content of their normative standards based upon the deal or business relation. *The best evidence is likely to be found in past conduct, such as previous dealings or deviations from the contractual self-regulation in practice. But even this evidence is always open to different interpretations.*⁴³

The next level of knowledge required by the judges is that of the context of the transaction. Can judges incorporate the learning generated by economic and sociological studies in their decision-making? The problems facing them are daunting. The first problem is the lack of expertise and knowledge of the judges. How can they incorporate this knowledge when their training and work experience are not directed towards acquiring it, and their skills are not necessarily helpful in analysing such information? In his discussion of *Smith v. Eric S Bush Ltd*,⁴⁴ Collins admits this. In *Smith* the court was not in a position to judge whether denying surveyors the right to exclude liability would price some consumers out of the market. As Collins admits,

[Reasoning in] the private law lacks the capacity to examine this evidence by the standards of an empirical and systematic economic analysis to discover where the new equilibrium will be set. Instead, private law regulation fixes the standard by reference to an economic hypothesis about the effects of regulation, and then awaits further information from subsequent litigation to determine the validity of the hypothesis. The source of the information is, of course, haphazard and unreliable.⁴⁵

It is not clear that it helps if there is empirical work available despite Collins' best endeavours to show that it would. *Williams v. Walker-Thomas Furniture Co.*⁴⁶ is a celebrated case involving the sale of stereo equipment on terms that would allow the company to repossess the goods on a failure to make a payment, with the transaction having the legal form of a conditional sales agreement. Some fifteen years after the case was decided, a study of the operations of the company was published and it is this study that Collins attempts to use as an example of how hybrid judging would

⁴³ *Ibid.*, p. 147 (emphasis added).

⁴⁴ [1990] 1 A.C. 831.

⁴⁵ *Regulating Contracts*, p. 74.

⁴⁶ 121 US App DC 315; 350 F 2d 445 (1965).

work if empirical evidence were available.⁴⁷ Of course, one could ask whether the passage of fifteen years, which encompassed the end of the long post-war boom and which ended with the stagflation following on the two OPEC oil price rises in the 1970s, would raise questions about whether the information relevant for 1980 was useful in considering what happened in 1965. Collins never considers this aspect of the use of contextual knowledge and claims that “we can be reasonably confident about most of the context by drawing on Greenberg’s study”.⁴⁸ This confidence is misplaced. Collins asserts that the contract price was greatly inflated but gives no evidence of this, instead suggesting that “we may infer” that the normal price was much lower. He admits that there was no evidence about the allocation of risks for faulty goods but says that one “may surmise” that the risk was against the buyer although “it seems” that it was the practice to give some form of warranty, although this might have been “illusory” because the company “apparently” reserved the discretion to determine whether goods were faulty or not.⁴⁹ Collins believes that the only way in which a hybrid judge could determine whether the contract was unfair is to compare the contractual provisions against the contextual evidence of the transaction. He argues that the company’s contractual advantages may have been balanced by the fact that one “may surmise” that the buyer was considered to be a poor credit risk by the company.⁵⁰ He concedes that there is insufficient information to know whether the amount of the price paid for the guarantee was fair but that this “might” result in a relatively fair bargain.⁵¹ Was this contract unfair because the price was excessive? According to him this is not an easy question to answer.

We cannot be sure on the basis of the available information whether or not we should regard this contract as unfair on the ground of excessive price. We would need to discover what interest rates might have been charged to the appellant in the open market and how the price of the goods was calculated The problem here is to decide which market may be the appropriate comparison, and then to make some allowance for a normal variation of prices within markets. Nevertheless, these obstacles can be overcome by some *rough estimates*, which *would probably demonstrate* that the price charged was greatly at variance with any competitive market.⁵²

⁴⁷ D. Greenberg, “Easy Terms, Hard Times: Complaint Handling in the Ghetto”, in L. Nader (ed), *No Access to Law: Alternatives to the American Judicial System* (New York 1980), 379.

⁴⁸ *Regulating Contracts*, p. 262.

⁴⁹ *Ibid.*, p. 263.

⁵⁰ *Ibid.*, p. 264.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 265 (emphasis added).

Collins' after-the-event analysis of *Walker-Thomas* starkly illustrates that even were contextual information available it would lead only to guesswork. Is hybrid judging going to be just a matter of inferences, surmises and rough estimates? We must remember that this is the case Collins picks; most contractual disputes would not have an available study to fall back on. Just how much guesswork would *then* be required is a matter of guesswork.⁵³

Collins' problem is that he asks the impossible of judges. He expects them to apply law in a way that takes into account the intimate economic and social relationships between the parties and the economic and social context of transacting more generally, and also to be sensitive to the special problems arising from contracts with the government.⁵⁴ All this as well as, of course, having an appropriate level of expertise in law. A superhuman made up of Oliver Williamson, Max Weber, Ronald Dworkin's Hercules and Sir Humphrey Appleby might succeed at doing some of this, but even this superhuman would balk at getting into the heads of disputing contracting parties! Judges are never going to be able to do what Collins asks of them.⁵⁵

Another difficulty facing Collins, however, may be that the information about context, especially where it concerns business custom and expectations, does not exist or where it does exist, it is not information that can be used in the straightforward way he suggests.⁵⁶

⁵³ Stewart Macaulay's analysis of *Oglebay Norton Co. v. Armco Inc.* 52 Ohio St. 3d 232, 556 N.E. 2d 515 (1990) provides a fine example of a judge trying to "contextualise" the decision but being reduced to guesswork because information was either non-existent or unavailable. S. Macaulay, "The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in Campbell, *Implicit Dimensions of Contract*, 51 at pp. 85–88. Collins' use of a study by Richard Lewis on the law of firm offers in the building industry raises similar problems and ignores Lewis's own advice that his study could not be used for the type of argument that Collins makes. *Regulating Contracts*, pp. 190–191. The study cited is R. Lewis, "Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 *Journal of Law and Society* 153, 169–170.

⁵⁴ *Regulating Contracts*, pp. 318–320.

⁵⁵ For Eric Posner this "radical incompetence" is merely part and parcel of a judicial role which accepts that contracting parties will use the courts tactically as part of a broader menu of governance options. Under this understanding the parties will take advantage of formalist judging when trust or non-legal sanctions are either weak or inappropriate. Thus, Posner does not think that judges can make hybrid decisions—indeed he thinks the opposite but sees this as a realistic appraisal of what judges can do, of what parties want from the law and how the law is used. E. Posner, "A Theory of Contract Law under Conditions of Radical Judicial Error" (2000) 94 *Northwestern University Law Review* 749. Stewart Macaulay provides indirect support for Posner's thesis in his analysis of large corporations using court decisions tactically as part of a wider dispute resolution process. S. Macaulay, "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in Campbell, *Implicit Dimensions of Contract*, 51 at pp. 84–101.

⁵⁶ While the focus of our discussion in this paper is on the insurmountable practical problems facing judges who want to make contextualist decisions we are happy to endorse Roger Brownsword's illuminating discussion of the theoretical indeterminacy associated with a contextualist project such as Collins'. See R. Brownsword, "After *Investors*: Interpretation,

DOES BUSINESS CUSTOM EXIST AND IF IT DOES CAN JUDGES USE IT?

Lisa Bernstein has argued that business customs do not exist in the form of clear-cut rules which apply across a business community. Her investigation of early twentieth century attempts by several large commodities industries to codify their respective customs showed an incapacity to identify customs, to agree about the “meaning of common terms of trade or discover the content of many basic commercial practices”.⁵⁷ Bernstein did find that merchants found it valuable to have an understanding of how trade was generally carried out as this helped them to evaluate a potential transacting partner. She argued that these “weak-form” customs

... provide transactors with a pool of common knowledge that in the early stages of their contracting relationship enables them to better assess whether the other transactor is a cooperator or a defector, thereby facilitating the emergence and maintenance of repeat-dealing cooperative contracting relationships.⁵⁸

In other words, the customs that existed were not ready-made, neat rules that could be used to settle disputes. Rather, they provided “transactors with a set of vaguely defined yet workable relationship-creating norms that initially add tremendous value to contracting relationships but that gradually diminish in importance as contracting relationships mature”.⁵⁹ While such norms are important to the parties, they are not going to be useful to a judge looking for guidance in settling a dispute. Indeed, Collins has subsequently acknowledged that the latter form of customs may not exist.⁶⁰

Kraus and Walt have raised important objections to Bernstein’s position. First, they suggest that Bernstein’s argument that national customs did not exist is premised on the existence of competing local customs whose existence prevented national agreement. If this is the case, they argue, it would be perfectly sound for a judge to apply the local standard or custom in a dispute between local merchants.⁶¹ Even if this is correct, this argument does not help

Expectation and the Implicit Dimension of the ‘New Contextualism’” in Campbell, *Implicit Dimensions of Contract*, 103.

⁵⁷ L. Bernstein, “The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study” (1999) 66 *University of Chicago Law Review* 710, at p. 715.

⁵⁸ *Ibid.*, p. 717.

⁵⁹ *Ibid.*, p. 717.

⁶⁰ H. Collins, “Discretionary Powers in Contracts” in Campbell, *Implicit Dimensions of Contract*, 219 at p. 237.

⁶¹ J. Kraus and S. Walt, “In defence of the Incorporation strategy” in J. Kraus and S. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge 2000), 193 at pp. 201–202.

Collins very much. What is a hybrid judge to do when a dispute is between market players who adhere to different, perhaps inconsistent, customs?

Kraus and Walt further argue that Bernstein misstates her position. Rather than showing that customs do not exist because of widespread disagreement about the meaning of usual terms or practices, they argue that all she has shown is that these terms and practices are not precise. As they argue, the “incorporation strategy is useful even if it incorporates imprecise customs, so long as these customs serve at least to define a range of reasonable ... disagreement over the meaning of contract terms”.⁶² Even if true this it renders implausible Collins’ picture of a hybrid law which allows judges *precisely* to adapt contract law to follow the workings of commerce.⁶³

Clearly, much work needs to be done to see whether, in fact, trade customs do exist. What Bernstein has done, however, is challenge the assumption that they do, and while her arguments have been criticised they have not been refuted. Even if one concedes the criticisms of Kraus and Walt, Collins’ proposal is still undermined because if custom exists in a form that is local and imprecise it is not clear that this is the form of custom that he needs for his hybrid jurisprudence to operate.

Craswell concedes that customs exist. But that by itself tells us nothing because, according to him, customs can make sense only when they have been interpreted and until this happens they are essentially meaningless. Customs, even those which seem to be hard and fast rules, have to be considered and evaluated by traders to see whether and how to apply them in the particular circumstances of the transaction before them. The custom has to be evaluated in the light of the goals of the transaction (which could be either immediate profit or relationship-building for future profit or a mixture of both) and by weighing its application against other, sometimes competing customs. Craswell’s conclusion challenges Collins’ position.

In short, many industry customs will require a considerable amount of case-by-case judgment on the part of the industry members. If courts rely on the members’ testimony about what a particular custom requires, they will be relying on the industry members’ own judgments, and not on a set of rules that makes such judgments unnecessary.⁶⁴

⁶² *Ibid.*, p. 203.

⁶³ *Regulating Contracts*, p. 191.

⁶⁴ R. Craswell, “Do Trade Customs Exist?” in Kraus and Walt *Jurisprudential Foundations*, 118 at p. 135.

As Kraus and Walt point out, this understanding of custom does not rule out an incorporation strategy. What it does require, however, is that the judgment will have to be that of experts, in this case merchants, because their judgment in interpreting and applying custom will be better than that of the judges.⁶⁵

Scott and Danzig have noted separately that the courts have never really carried out the empirical work needed to discover norms, relying instead on deductive speculation⁶⁶ or the projection of the judges' own values through a false claim of discovery,⁶⁷ to identify the norms necessary for the incorporation strategy of the US Uniform Commercial Code. Craswell emphasises the inescapable role of judgment in identifying norms, whereas Scott and Danzig emphasise the empirical reality that judges are effectively creating the norms that they apply.

A systematic examination of the litigated cases interpreting the "reasonableness" standards of Article 2 [of the UCC] reveals that courts have consistently interpreted these statutory instructions not as inductive directions to incorporate commercial norms and prototypes but rather as invitations to make deductive speculations according to "Code policy" or other noncontextual criteria.⁶⁸

Partly this is a matter of cost. Can courts be expected to carry out anything other than deductive speculation when there is usually no study to call upon and no money, expertise, or even power to conduct one? Partly this is a matter of legal culture. Common law judges have become judges, in the main, because of their expertise in law, an expertise developed over many years. Is it surprising that their treatment of business custom is filtered through a legal mind and a legal methodology that has been at the heart of their professional lives? Here Collins ignores the professional forces that will always operate to make the incorporation of business custom in law a difficult exercise.⁶⁹

In theory, of course, Collins' project does not necessarily have to exhibit the sort of application of norms that Scott and Danzig have described. However, the living example of what judges have actually done when given a task that is essentially similar to that

⁶⁵ Kraus and Walt, "Incorporation Strategy", pp. 204–206.

⁶⁶ R. Scott, "The Uniformity Norm in Commercial Law" in Kraus and Walt, *Jurisprudential Foundations*, 149 at p. 166.

⁶⁷ R. Danzig, "A Comment on the Jurisprudence of the Uniform Commercial Code" (1975) 27 *Stanford Law Review* 621 at pp 628–629.

⁶⁸ Scott, "Uniformity Norm", 166. Richard Craswell makes also makes a similar argument. See Craswell, "Do Trade Customs Exist?", 118, at pp. 124–125.

⁶⁹ Paddy Ireland has argued that legally imposed norms, by giving effect to non-market, public values will in turn become part of the context in transacting: P. Ireland, "Recontractualising the Corporation: Implicit Contract as Ideology" in Campbell, *Implicit Dimensions of Contract*, 255 at pp. 284–286.

promoted by Collins does suggest that the same institutional, intellectual or financial constraints that have operated on US judges would have similar effects on Collins' hybrid judges.

So far a number of issues have been raised about what can be seen as Collins' naïve reliance on the incorporation of business custom as a central strategy in the creation and operation of a hybrid contract law. Bernstein's work raises doubts about the existence of business customs in a form that could be useful for a hybrid judge. Craswell adds a dimension that is missing in Collins' discussion by showing that customs are not neatly packaged, ready to be picked off the shelf by a judge who can slot them seamlessly in a hybrid judgment. The necessity for interpretation and judgment renders this a task that can be best (maybe only) done by market players. Finally, investigations of how US judges have dealt with the incorporation strategy of the UCC suggest that speculation or the imposition of the judge's own views will be the *modus operandi* of a hybrid judge.

But the problems associated with the notion of incorporating business custom into judging do not end here.

ARE CUSTOMS EFFICIENT?

Even if it is accepted that business norms exist in a form that courts can use, it is still not clear that Collins' project is viable. Underlying his argument is an assumption that business norms are efficient and fair, at least from a business perspective. If he did not think that they were, the whole point of hybrid judging would be defeated. Is this assumption valid? Eric Posner has suggested that the formulation and continued existence of business norms may owe little to efficiency and fairness and more to the "path dependency" which explains continued use of the QWERTY keyboard.⁷⁰ In business there is no guarantee that the best customs survive; indeed Posner argues that it may be unlikely that the most efficient customs will survive and prosper. We should remember Robert Gordon's warning about the "dark side" of relational contracting,⁷¹ where dominant market players create and shape business customs in ways that favour their needs. A hybrid judge implementing this form of custom would merely be giving a legal

⁷⁰ E. Posner, "Law, Economics, and Inefficient Norms" (1996) 144 *University of Pennsylvania Law Review* 1697. See also, J. Kraus, "Legal Design and the Evolution of Commercial Norms" (1997) 26 *Journal of Legal Studies* 377.

⁷¹ R. Gordon, "Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" [1985] *Wisconsin LR* 565, 570-571. See also C. Milhaupt and M. West, "The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organised Crime" (2000) 67 *University of Chicago Law Review* 41.

imprimatur to this power imbalance and to rent-seeking behaviour by better organised and more powerful market players.⁷²

Of course, Collins could respond by suggesting that problems of inefficiency in commercial norms can be overcome by relying on formal trade customs, rules and the like. But by itself this does not respond to Bernstein's doubts about the existence of workable norms. After all, her study of several major commodity sectors demonstrated, to her satisfaction at least, that even these types of norms were thin on the ground. And it does not respond to the concern that, even if norms are identifiable, they may reflect the needs of dominant or powerful players rather than the best interests of the industry. These norms are unlikely to be efficient, let alone fair. Finally, while the trade associations or other such bodies may have the expertise to best identify norms, their own particular characteristics may lead them to favour inefficient norms. Charny is emphatic about this.

The formulators here are not the innocently decentralised village gossips described in many parables about norms; they are sophisticated political organisations apparently dominated by cohesive groups whose members share a common interest. In terms of "public choice" theory, then, we have an almost formulaic situation for generating inefficient norms—norms that favour the members of the concentrated interest groups, at the expense of more diffuse members.⁷³

Charny's analysis of one of the commodity industry bodies studied by Bernstein, the National Grain and Feed Association, shows that this concern is not misplaced. Schwartz and Scott's study of the workings of the American Law Institute shows how such "private legislatures" are easy targets for rent-seeking behaviour.⁷⁴ Trade association formulation of norms does not overcome the likely problem of inefficiency of business norms.

Collins' proposed hybrid judging cannot work. He demands of judges skills and knowledge beyond their capacity, and the impossibility of these demands becomes evident in the examples of hybrid judging that he gives. Furthermore, while Collins' proposal relies heavily on the incorporation of economic and sociological insights into judging, his examples of this are unconvincing and he does not answer concerns about the cost and availability of such information. Finally, even though his proposed hybrid law would

⁷² One could add here the arguments of Jody Kraus based on his work on legal evolution: J. Kraus, "Legal Design and the Evolution of Commercial Norms" (1997) 26 *Journal of Legal Studies* 377.

⁷³ D. Charny, "Illusions of a Spontaneous Order: 'Norms' in Contractual Relationships" (1996) 144 *University of Pennsylvania Law Review* 1841 at p. 1848 (emphasis in original).

⁷⁴ A. Schwartz and R. Scott, "The Political Economy of Private Legislatures" (1995) 143 *University of Pennsylvania Law Review* 595.

rely heavily on business norms and customs to provide information about the transacting context, he fails to engage with wide ranging debate over the existence and usefulness of these norms. In the next section we will consider whether hybrid judging, were it possible, would actually help commerce.

WILL HYBRID JUDGING HARM COMMERCE? FORMALISM AND COLLINS

Perhaps the biggest problem with Collins' proposal is that it would not be in the interests of business.

Collins argues that private law maximises flexibility by allowing the parties to set standards and monitor compliance with these standards:

The great strength of ... private law regulation of contracts is plainly its responsive or reflexive quality. It devolves an extensive discretionary power of self-regulation to the parties. *Subject to the requirement of a negotiated consensus, the rules produced will then be routinely enforced by the legal system through the agency of the ordinary courts.* By conferring autonomy upon the parties to devise their own regulation, private law achieves considerable flexibility, which in turn achieves the advantage that the regulation permits experimentation with novel types of business transaction that might enhance productive efficiency. *But the greatest potential advantage of reflexive law is the way in which it permits the subjects of regulation, in this instance the parties to a contract, to express their expectations of the relationship in their own language, so that their private regulation minimises any distortion of communication that might be imposed by a regulatory framework.*⁷⁵

The hybrid judging that he advocates would not *routinely* enforce the agreement of the parties because, as we have seen, a judge giving effect to hybrid law would examine the social and economic context of the transaction as well as his or her understanding of the relationship between the parties to decide what the contract meant and how the dispute would be settled, in other words, doing exactly what Collins would not want them to do on the evidence of the just quoted passage. Collins' praise for the regulatory advantages of contract depends on the courts applying what the parties have agreed to in a formalistic manner. Once the courts move away from this formalistic approach, they will run the risk of the very distortion of communication that Collins highlights by replacing the parties' own careful attempts to craft language to give effect to their expectations with the distorted understanding of a judge. The advantage that private law has as a

⁷⁵ *Regulating Contracts*, p. 67 (emphasis added).

regulatory tool for contract is, as Collins so clearly describes, dependent on the judges applying the agreement of the parties as they have expressed it, and not by what will inevitably be ham-fisted attempts to second-guess what the parties meant. If, as Collins asserts, the “reflexive character of private law regulation works best when the parties negotiate the terms of the contract”,⁷⁶ surely this must mean that judges should give effect to what the parties have agreed to in a contract, *i.e.*, formalistic judging. If Collins is right about the regulatory advantages of private law, these advantages will only accrue if the judges ignore his call for hybrid law.

Collins goes on to argue that the nature of modern contracting, especially in transactions such as long-term supply agreements, franchise agreements and employment relationships in a career hierarchy, demands a new role for judges in contract disputes.

The legal response to these new economic institutional arrangements can be found in part in specialised statutory interventions ... but also in shifts towards the use of more open-ended general clauses for regulating the content of contractual obligations, and the toleration of a higher degree of informality in the creation and modification of contractual duties.⁷⁷

The classic example of such standards is good faith.⁷⁸ Two recent studies of good faith in long-term supply contracts and franchise agreements suggest that Collins is wrong here. Both studies emphasise that free-wheeling attempts by judges to impose what is perceived to be a good faith standard of behaviour is economically questionable and often runs counter the parties’ interests and desires.⁷⁹ Goldberg says that the courts have used good faith as a “blunt instrument”⁸⁰ for the protection of parties in long-term supply contracts and that, while he looked more deeply into the economics of these transactions than had the courts, “the moral of the exercise is that courts should look even less”⁸¹ than they do now.

Another example of the commercial unsuitability of hybrid judging arises in Collins’ discussion of the lessons to be learned

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 199.

⁷⁸ *Ibid.*

⁷⁹ V. Goldberg, “Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith” (2002) 35 *University of California, Davis, Law Review* 319; J. Paterson, “Good Faith in Commercial Contracts? A Franchising Case Study” (2001) 29 *Australian Business Law Review* 270. See also Collins, “Discretionary Powers in Contracts” in Campbell, *Implicit Dimensions of Contract*, p. 232 where he discusses the failure of legislation to protect franchisees and the negative impact that this legislation has had on economic activity in this sector.

⁸⁰ Goldberg, “Reining in Good Faith”, at p. 321.

⁸¹ *Ibid.*, p. 323.

from the legal history of two types of financial transaction: negotiable instruments and futures contracts.⁸² According to Collins, these provided such intractable problems for the legal system “that private law has proved incapable of providing any productive assistance in the construction or regulation of these transactions, and that the legal system as a whole is almost irrelevant to these trading relations”.⁸³ But, clearly the non-legal sanctions and trust associated with these transactions were more than adequate to satisfy their regulatory needs so that they could flourish. The lesson to be learned here is not that a hybrid law is somehow necessary for the efficient operation of the market—in these two cases it was not needed at all. Rather, the lesson is that it is likely that law should be a fairly unobtrusive addition to non-legal sanctions and trust. Collins’ hybrid law, by contrast, assumes that the role of law should be to actively try to ape commercial practice and give effect to commercial expectations. Collins seems to ignore the lesson that an examination of negotiable instruments and futures contracts should teach us about the role of the law in commerce more generally.

Collins’ discussion of power in what he calls symbiotic relationships raises further doubts about the utility of his hybrid law project. The problem that he discusses is a familiar one and is frequently present in franchise agreements, for example, where one party, normally the franchisor, may be given discretion to terminate the relationship. Should this power be open to regulation by judges, especially as it often seems that there is a power imbalance between the parties? A judge applying a hybrid of law, economics and the sociology of business would presumably say yes. However, Collins is alert to the subtleties of contracting in such situations. He accepts that it is impossible for a judge to decide whether such a power is being used opportunistically or in good faith. He further concedes that legislation is the best way to regulate this potential problem. In other words, Collins wisely ignores his own general thesis as a solution to the problems that he knows may arise in such contracts.

The problem for legal regulation in such cases is that the distinction between opportunism and a permissible exercise of contractual discretionary power cannot be delineated by formal tests. In a franchise relation, for instance, the franchisor may enjoy the power to terminate the franchise at its discretion. The reason for the insertion of such a clause is that the criteria by which the franchisor makes such a business decision cannot

⁸² *Regulating Contracts*, ch. 9, pp. 202–222.

⁸³ *Ibid.*, p. 202.

be reduced to simple formula The problem at the heart of interpretation of this contractual relation is that two rival and incommensurable expectations supply its meaning.⁸⁴

By this stage Collins has accepted that what would appear to be one-sided contracts may in fact be more balanced than a concentration on the formal contract terms would suggest.⁸⁵ The balance is provided by the nature of the economic incentives in the transaction and relationship. Crucially, Collins recognises that the courts will not be in a position to distinguish between opportunistic and economically appropriate use of such contract terms and that, if the economic incentives do not operate satisfactorily, legislation is the best means of regulation. In other words, hybrid judging is neither possible nor useful in regulating such contracts.

In his conclusion to the discussion of the regulation of power in contracts, Collins attempts to retrieve something from the wreckage by repeating his call for a hybrid law that is “tailored precisely to each type of economic relation, so that it can respond to the exigencies of efficiency in different types of transactions”.⁸⁶ Unfortunately his perceptive analysis of power in contractual settings is based on insights that are inconsistent with his call for a hybrid form of contract law.

From the examples outlined above it can be seen that we believe that Collins himself provides good reasons for believing that formalism would be far preferable to his proposed hybrid law if the aim of the exercise is to have a type of law which best suits the needs of those in the market.⁸⁷ Amongst other commentators the matter is still one for debate, but a reading of some of the more important recent contributions suggests to us that the arguments in favour of formalism have reached a position where the onus lies on those opposing it to show that any alternative is superior.⁸⁸

⁸⁴ *Ibid.*, pp. 243–244. See also H. Collins, “Discretionary Powers in Contracts” in Campbell, *Implicit Dimensions of Contract*, 219 at pp. 226–232 where he explains the “powerful” economic arguments against judicial interference with contracts agreed to in the market.

⁸⁵ H. Collins, “Discretionary Powers in Contracts”, in Campbell, *Implicit Dimensions of Contract*, at p. 251 where he notes that a willingness to accept a discretionary power in the other party may act as a signalling device to further trust in the relationship.

⁸⁶ *Regulating Contracts*, p. 254.

⁸⁷ Further examples have been omitted for reasons of length but interested readers might want to consider Collins’ recognition of the importance of security devices at p. 102, letters of comfort at pp. 152–153, and standard form contracting at pp. 230–232 and how each of these valuable commercial devices can only operate in a formalistic manner. All references are to *Regulating Contracts*.

⁸⁸ See, for example, L. Bernstein, “The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study” (1999) 66 *University of Chicago Law Review* 710; L. Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions” (2001) 99 *Michigan Law Review* 1724; R. Scott, “The Uniformity Norm in Commercial Law” in J. Kraus and S. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge 2000), 149.

CONCLUSION

Hugh Collins' project of creating a hybrid form of contract law to further the economic efficiency of the marketplace does not convince. In fact, its failure was almost inevitable given that this project is at odds with the careful and illuminating analysis that he himself provides about the nature of market transacting and the role of contract law in it.

Collins' discussion of the relationship between law on the one hand and the discourses of economics and sociology on the other fails to take into account the significant differences between a form of practice (law) and academic and policy discourses (economics and sociology). His discussion of the autonomy of law fails to explain how law is to maintain its mandated autonomy and to what extent it should be penetrated by the policy discourses he favours. His treatment of the so-called closure rules is unpersuasive because it fails to recognise the costs, material and jurisprudential, that the changes to those rules would generate. His discussion of the relationship between regulation and law is disappointing because his understanding of regulation is so all-encompassing that it obscures very real differences between common law and public regulation and the costs involved in a general merger of the two. His claims that a hybrid law would have the capacity for reflexive learning and that the results of case law can be disseminated widely enough to influence market players are also unpersuasive. While none of these criticisms is necessarily fatal for his project, the cumulative effect is to raise serious doubts about the plausibility of a hybrid law. But our other criticisms do go to the heart of his project.

Collins' project fails because it demands of judges skills and knowledge that no human could muster. Judges will not be able to do what he wants of them. His project fails because the information that his proposed hybrid law needs is not available in the easily accessible form that is required. In fact, there is a real doubt whether it exists at all. Finally, it fails because he himself shows that even if it could be made to work, it would be counter-productive.

Yet as we step back from the immediate failures of *Regulating Contracts*, we must acknowledge its important contributions to contract scholarship. We have noted repeatedly in this paper that Collins' treatment of contract law and practice is rich in important insights. At a broader level, though, it is its very failure which is its most important contribution to contracts scholarship. Collins' instinct that something had to be done to respond to the empirical

work that shows the peripheral, indeed, sometimes harmful, role of contract law in the marketplace was absolutely right. But his exploration of what is perhaps the most obvious avenue of response, “well, then let’s make it useful”, demonstrates that this path is a dead-end. His recognition that the empirical work required a response stands in stark contrast to traditional scholars who write traditional articles and books about contract law. While we ultimately agree that this is what they should do and that theirs is an important task, they themselves have failed to justify their work in light of the empirical findings that drove Collins. It is a nice irony that Collins’ failure rescues traditional contract scholars by showing that the “obvious” response to the empirical studies, one which by-passes their work, goes nowhere.

This is why we suggest that because of its failure to support its project, *Regulating Contracts* is a success. Collins’ productive failure⁸⁹ shows that the obvious and popular response to the empirical reality of contract’s place in the market cannot work. Collins’ most important achievement is to show that the most sophisticated argument for an activist judiciary that openly manipulates the law to further the economic efficiency of the market cannot work. This achievement matters because it frees scholars to engage in more fruitful explorations of the role and trajectory of contract law today.

⁸⁹ Although one should use analogies from science with care we cannot resist comparing Collins’ failure to the famous Michelson-Morley experiment on the supposed ether which enveloped the Earth. Their experiment “failed” because the ether did not exist. The experiment’s failure was its success because it showed that the speed of light in a vacuum was independent of the relative motion of the observer which, in turn, became one of the foundations of the theory of relativity. A. Bullock and O. Stallybrass (eds.), *The Fontana Dictionary of Modern Thought* (London 1977), pp. 388–389.