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I. INTRODUCTION

Karl Llewellyn[1] is famous for numerous accomplishments, including naming and nourishing the legal realist movement of the 1930s,[2] authoring the first major American work on law and anthropology,[3] critiquing legal education,[4] and being the architect of America's greatest work of codification—the Uniform Commercial Code (Code).[5] His work also informed law at a most fundamental level—that of in-

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1. Karl N. Llewellyn (1893-1962), after a few years at Yale, joined the faculty at Columbia in 1925 and remained until 1951, when he joined the faculty at Chicago. *See* Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440, 440 (1968).

2. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV.431 (1930) [hereinafter *Realistic Jurisprudence*]; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter *Some Realism*]. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973) [hereinafter TWINING, THE REALIST MOVEMENT]; AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds. 1993) [hereinafter AMERICAN LEGAL REALISM]; LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969).

3. KARL N. LLEWELLYN & E. ADAM HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941) [hereinafter THE CHEYENNE WAY].

4. Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

5. Llewellyn was the Chief Reporter for the Uniform Commercial Code and the principal drafter of Articles 1 (General Provisions) and 2 (Sales). His wife, Soia Mentschikoff, served as Associate Chief Reporter. Llewellyn was initially interested to draft a new sales act by the end of the 1930s but soon realized that a more expansive code of commercial law was needed. *See* Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 564 (1940). In 1940, Llewellyn accepted William Schnader's invitation to become the Chief Reporter of the new Uniform Commercial Code. *See generally* William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). Grant Gilmore provided the strongest statement of Llewellyn's role in drafting the Code. "[T]his Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from the beginning to end he inspired, directed, and controlled it." Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962).

terpretation.[6] His enormous body of work provides a rich literature in such areas as contract law,[7] commercial law,[8] jurisprudence,[9] and legal sociology.[10] From this body of work a dual track theory of interpretation[11] becomes evident. It is a theory of interpretation in which one track is firmly embedded in the factual world and the other in the conceptual world. The dual track theory will be more closely examined here as applied to contract law.

Llewellyn's most famous innovations are found on the factual side. Llewellyn ably developed the factual-contextual side of the dual track with his focus on fact sensitivity,[12] situation sense,[13] transaction-types,[14] and the importance of contextualism in the interpretation of rules and contracts.[15] The shortcomings of his approach to rule and contract interpretation are found on the conceptual side. For that reason, the writings of Ronald Dworkin[16] will be mined to fuller develop the dual track theory of interpretation.

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6. Llewellyn's theory of interpretation can be surmised from all of his writings and is the primary subject of this Part. *But see* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950). *See generally* John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 285 (2000).

7. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Karl N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938) [hereinafter *Rule of Law*]; Karl N. Llewellyn, *Our Case Law of Contract—Offer and Acceptance* (Part 2), 48 YALE L.J. 779 (1939).

8. *See* Karl N. Llewellyn, *C.I.F. Contracts in American* Law, 32 YALE L.J. 711 (1923); Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936); Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341 (1937); Karl N. Llewellyn, *Through Title to Contract and A Bit Beyond*, 15 N.Y.U. L. Q. REV. 159 (1938); Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939); Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939).

9. *See* Karl N. Llewellyn, *The Theory of Legal "Science"*, 20 N.C. L. REV. 1 (1942); KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960) [hereinafter COMMON LAW TRADITION]; KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962) [hereinafter JURISPRUDENCE].

10. *See* Karl N. Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940).

11. Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. STATE L. REV. 397 (2004) [hereinafter *Reason and Context*].

12. *See infra* Part II.C. (type-facts).

13. *Id.*

14. *Id.*

15. For an explanation of these facets of Llewellyn's jurisprudence and theory of interpretation see *Reason and Context*, *supra* note 11, at 446-458.

16. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1981); RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

The conceptual side of the Llewellynian theory of interpretation was embodied in the *singing rule*.[17] The key component of Llewellyn's singling rule was the provision of the patent reason for the rule's existence on its face. It is through this patent reason that the rule's application is to be guided. In this way, the rule provides its own self-adjustment mechanism in its application to novel fact patterns. Llewellyn's conceptual track also includes general or meta-principles. For example, the meta-principles found in Articles 1 and 2 of the Code include good faith,[18] fair dealing,[19] unconscionability,[20] and impracticability.[21] These principles or standards act as *residual categories*[22] to provide the needed flexibility for a rule-based system of law. They are brought into service to prevent injustice produced by formal rule application; they also can be used to fill in gaps in the formal conceptual system or to mediate conflicts between different rule applications. It is in this area that Dworkin's theory of interpretation can provide additional support.

Llewellyn and Dworkin are both idealists in that their works support the belief in the internal integrity of the law and its ability to provide determinate answers to legal disputes.[23] Together their works provide a rich idealist statement of the power of law as a rational, determinate vehicle for fairness and justice. The strengths of both jurisprudes—Llewellyn's contextual-based rule application and Dworkin's conceptual theory building—provide the means for constructing a theory of interpretation. *Dialectical conceptualism* is the name used to characterize this combined theory of interpretation.

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17. *See infra* Part II.E.

18. UCC § 1-102 (2004).

19. *Id.*

20. UCC § 2-302 (1998).

21. UCC § 2-615 (1998).

22. T. PARSONS, THE STRUCTURE OF SOCIAL ACTION 17 (1937).

23. Llewellyn's designation as an idealist has been demarcated in the legal literature by the reference to the "later Llewellyn." Llewellyn scholars have divided his work between his more radical writings during the realist era and the "later Llewellyn" representing his time as reporter of the Code and moderate idealism. A Japanese scholar compared "the young realist Llewellyn in his 30's [as] criticising lawmen" with the "Llewellyn in *The Common Law Tradition*. . . . The one is a lucid realist, while the other is a mystical idealist." Takeo Hayakawa, *Karl N. Llewellyn as a Lawman from Japan Sees Him*, 18 RUTGERS L. REV. 717, 733 (1964). *See also* WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968) (distinguishing between the "early approach of Llewellyn" and the "later approach of Llewellyn"). Martin Golding describes the two facets of Llewellynian thought: "I suspect, though, that Llewellyn became friendlier toward rules as time went on; the leading spirit behind the Uniform Commercial Code could hardly be a rule denier." Martin P. Golding, *Jurisprudence and legal Philosophy in the Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC.441, 472 (1986). Golding asserts, reasonably so, that Llewellyn was never a true rule skeptic.

The phrase acknowledges that law is a conceptual system that at times will be contradicted by the facts of life (novel cases). A legal concept or rule acts as an idea or synthesis that provides a resolution to a real world dispute. Llewellyn's contextualism sees evolving commercial practice as often providing a contradiction to idealized rule application. In the dual track system of interpretation real world facts, at times, are configured into new transaction-types.[24] These transaction-types act as an *antithesis* that are combined into the conceptual ideal through rule adjustment or rule creation. Llewellyn saw the old "paper rules"[25] of classical contract law as a barrier to the necessary interplay between ideal and fact. Thus, the rules of law, should be structured to allow for the systematic resolution of the continuing contradiction between fixed rules and a dynamic social-economic reality.

This article will frame a reasonable representation of an idealist' theory of interpretation in the realm of contract law. Part I begins with a review of the general tenets of classical contract law. This is required in order to understand the role of rules and contextualism as envisioned by Llewellyn. Part II examines the role of rules and principles in Llewellynian jurisprudence. It examines Llewellyn's view of the interlocking concepts of situation-sense, public/private distinction, objective/subjective theory of contracts, and the role of formality in contract law. It also argues that this vision embodied in contextualism directly affected the evolution of contract doctrine. Part III introduces the concept of contract law as an exercise in theory building. This Part analyzes the law as interpretation insights of Dworkin most relevant to Llewellyn's dual track theory of interpretation. Part IV draws from the analysis of the earlier Parts in developing dialectical conceptualism as a theory of contract law interpretation.

It is important to note what this article is not. It does not critique idealism as a functional legal order. That has been done,[26] and will continue to be done by other scholars. This article is an attempt to

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24. *See infra* Part II.C.

25. *See Realistic Jurisprudence*, *supra* note 2; *Some Realism*, *supra* note 2. In the first paragraph of the later article he frames the issue as follows: "Are some rules mere paper?"

26. *See, e.g.*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (arbitrariness of public-private distinction); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, *Form and Substance*]; Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923) (all law is coercive with distributional consequences) [hereinafter Hale, *Coercion and Distribution*]; Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

restate a version of idealism originally offered by one of America's great jurisprudes—Karl N. Llewellyn.

II. FIRST CITADEL OF IDEALISM: CLASSICAL CONTRACT THEORY

Classical contract theory refers to the brand of abstract conceptualism or legal formalism that characterized the law from the latter part of the Nineteenth Century through the early part of the Twentieth Century.[27] Abstract conceptualism was characterized by formal rule application, a purely deductive reasoning from general principles, and a textual-only focus brand of contract interpretation. This way of thinking about law was a component of what has been branded as classical legal thought.[28] This variety of abstract conceptualism is generally associated with the works of Christopher Columbus Langdell, [29] Joseph Beale,[30] and Samuel Williston.[31] In the area of contract interpretation this brand of conceptualism[32] was characterized by the formulaic application of fixed rules and the plain meaning interpretation of contracts. The role of contextual evidence was minimized through the plain meaning or literal interpretation of written contracts. For the abstract conceptualist, contract law was a dense and gapless body of rules and principles that internally (through deduction) provided answers to all real world disputes. It was this vein of classical legal thought, and for our purposes, classical contract law, that Llewellyn and the legal realists criticized.[33]

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27. *See Reason and Context*, *supra* note 11, at 6-8 and 20-29 (explaining the major tenets of classical contract law and abstract conceptualism).

28. Classical legal thought refers to the style of judicial reasoning that characterized the period from about 1875 to 1940. It has also been labeled as formalism and more pejoratively as "mechanical jurisprudence." *See* Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 THE GREEN BAG 607 (1907); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV.605 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911) and 25 HARV. L. REV. 140 and 489 (1912). Duncan Kennedy in discussing the concept of legal formalism in American law states: "the critical use of the term formalism, against the abuse of deduction and the fantasy of gaplessness in legal discourse, is part of the twentieth century battle between those who have wanted to depoliticize the drama as much as possible, through reason, and those who have seen it as inevitably a dangerous improvisation." Duncan Kennedy, Legal Formalism 13(Jan. 1, 2001) (unpublished manuscript, on file with author) [hereinafter Kennedy, *Legal Formalism*].

29. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

30. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); Joseph H. Beale, *Notes on Consideration*, 17 HARV. L. REV. 71 (1903).

31. SAMUEL W. WILLISTON, TREATISE ON THE LAW OF CONTRACTS (1920).

32. *See generally* Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979).

33. *See, e.g., Realistic Jurisprudence*, *supra* note 2; *Some Realism*, *supra* note 2.

The "early Llewellyn,"[34] was labeled as a rule skeptic due to his work as a legal realist. This is misplaced because the notion of the singing rule[35] and the importance of contextualism[36] in the interpretation of rules were evidenced in his commercial and contract writings of the same era. Llewellyn's famous adage of legal indeterminacy, that for every rule a counterrule[37] needs to be set in context. He believed that commercial rules, symbolized by the Uniform Sales Act, had fallen out of step with the times and that because of the purely deductive nature of judicial reasoning had become indeterminate.[38] This was the reason he shifted focus from revising the Sales Act to promoting a further reaching uniform commercial code.

Llewellyn's "legal realist" jurisprudence also needs to be put in the context of his commercial and contract scholarship. His early work as a jurisprude, lead to the charge that he was a rule skeptic and an ethical relativist, or worst a nihilist.[39] His commercial and contract scholarship work demonstrated his strong belief in the common law system and the power of rules. He saw indeterminacy as being minimized through grand-style judging,[40] institutional morality,[41] and craft skills.[42] His rule skepticism was centered on the closed, fixed paper rules of the time. His acceptance of the code project demonstrated his belief that rules could be made to work or, in his case, to sing. The right kind of rules would be able to overcome the indeterminacy in-

34. *See supra* note 23 (description of "later Llewellyn").

35. *See infra* Part II.E.

36. *See infra* Parts IV.A.1. and 2.

37. Llewellyn stated that "in our legal system we have large numbers of mutually inconsistent major premises available for choice: 'competing' rules, 'competing' principles, 'competing' analogies . . . ." COMMON LAW TRADITION, *supra* note 9, at 12. Llewellyn lists as one of the Realists' tenets the: "[d]istrust of traditional rules and concepts insofar as they purport to describe what either courts or people are actually doing." *Some Realism*, *supra* note 2, at 1237.

38. Llewellyn asserted that: "at no time should law lose contact with its people in their daily affairs; but at this time [1940] the lost contact [between the Uniform Sales Act of 1906 and commercial practice] has become vital to regain." REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941). Llewellyn not only advocated replacing the Uniform Sales Act he also recommended a Federal Sales Act for international transactions. *See* Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558 (1940). Llewellyn's vision came into existence with the United States' adoption in 1988 of the Convention for the International Sale of Goods.

39. See *Realistic Jurisprudence*, *supra* note 2; *Some Realism*, *supra* note 2.

40. *See* Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 U. CHI. L. S. REC. 6 (1960), *reproduced in* JURISPRUDENCE, *supra* note 9, at 225-229.

41. *See* "Group Decision," "Judicial Security and Honesty," "A Known Bench," "Professional Judicial Office," "Horse Sense on Steadying and Depersonalizing," in COMMON LAW TRADITION, *supra* note 9, at 31-35, 45-51, 53.

42. Karl N. Llewellyn, *The Crafts of Law Re-Valued*, 15 ROCKY MT. L. REV. 1 (1942), *reproduced in* Jurisprudence, *supra* note 9, at 316-322; COMMON LAW TRADITION, *supra* note 9, at 213-235 ("Appellate Judging as a Craft of Law").

herent in the old abstract, lump-wise rules.[43] His rules would allow the free flow of commercial-social reality into rule application. In this way, the rules would be constantly replenished and provide reckonability (determinacy).[44]

The formal application of paper rules was supported by a number of the tenets of classical legal thought. The tenets, often attacked by the realists, include the public-private distinction, objective-subjective theories of contract, fact-law distinction, and the role of formality in the legal order. These tenets and their critiques are explored in the following sections.

A. *The Public-Private Distinction*

The public-private distinction was a feature of the apparatus of abstract conceptualism.[45] The classical demarcation of public and private law was foisted upon the foundation of separate spheres of absolute

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43. *See* Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936); Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341 (1937). These two articles discuss the need to "delump" the caveat emptor doctrine which was appropriate for the factorage industry of the early and mid-19th Century and the need for implied warranties for distance sales. *See also*, Karl N. Llewellyn, *Through Title to Contract and A Bit Beyond*, 15 N.Y.U. L. Q. REV. 159 (1938); Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939); Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939). These articles argued for the need to delump risk of loss form the transfer of title (separate the risk of loss determination from the exchange of formal title).

44. See COMMON LAW TRADITION, *supra* note 9, at 178-199 ("Reckonability of Result: Theory of Rules").

45. The U.S. Supreme Court had this to say about the distinction between public and private rights: "It is often convenient to describe particular claims as invoking public or private rights, and this handy classification is doubtless valid for some purposes. But usually the real significance and legal consequence of each term will depend upon its context and the nature of the interests it is invoked to distinguish." Garner v. Teamsters Union, 346 U.S. 485, 494 (1953). The public nature of contract law is not a new revelation. The classic treatise writer Frederick Pollock opens his treatise on contract law as follows: "The law of Contract may be described as the endeavour of the State . . . to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness." FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND EQUITY 1 (6th ed. 1894). *See generally* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) ("loopification of the public/private distinction"); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("The emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century."). From 1905 (Lochner decision) to the 1930's (Realist movement) legal thinkers "devoted their energies to exposing the conservative ideological foundations of the public/private distinction." *Id.* at 1426. *See, e.g.*, Hale, *Coercion and Distribution*, *supra* note 25 (all law is coercive with distributional consequences); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

power.[46] In this classification scheme, contract law was firmly placed within the core of the private side of the distinction. Under classical legal thought freedom of contract provided protection against governmental intrusion into this purely private realm. The privatization of contract law was laid upon the foundation of the will theory of contract. The task of the courts was to simply enforce the will of the contracting parties. Any judicial intervention in the cause of substantive fairness was to be considered an impermissible substitution of judicial will for private will.

1. Will Theory and the Purification of Contract Doctrine

The will theory's claim that contractual obligation was the sole domain of the private sphere led to the transformation of the notion of intent. The doctrine of implied intent, beginning with Lord Mansfield,[47] was reconstituted from an amalgamation of individual intent, community morality, and commercial practice to one solely devoted to the creation of private will. Under pre-classical or Grand Style legal thought "the process of implication of intent [was] based on reasonableness within the context of the basic social-legal relationships."[48] It is here where the affinity of Llewellyn's contextualism for the Grand Style of legal thought is apparent. "Implied intent permitted the same kind of reference to ideals and usage without the abandonment of the claim that the obligations imposed had been voluntarily assumed."[49] The substitution of the will theory for the pre-classical notion of intention resulted in the narrowing of implied intent from the implication of reasonableness to the uncovering of absolute will.

In order to establish the will paradigm, contract law had to be purified of its non-will dimensions. This process of disaggregation[50] began with the "de-lumping" of implied-in-fact contracts from implied-in-law.[51] The implied-in-law contracts were spun off into a separate body of law as confirmed by Keener's 1893 treatise *The Law of Quasi-*

46. Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* 12-14, 163 (1975) (unpublished manuscript, on file with author) [hereinafter Kennedy, *Classical Legal Thought*].

47. *Id.* at 164-65.

48. *Id.* at 175.

49. *Id.*

50. Professor Horwitz coins the phrase "desegregation of concepts" in relation to the removal of quasi-contract from the domain of contract. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 37 (1992).

51. Kennedy, *Classical Legal Thought*, *supra* note 67, at 178.

Contract.[52] The reception of Keener's analysis into the law opened the floodgates of disaggregation. This included the rise of tort law totally disengaged from contract law and the creation of specialized bodies of contract law—employment law, family law, and to a lesser extent, sales law. This purification process also served to isolate promissory estoppel to an extraordinary device at the periphery of the consideration doctrine. A consequence of the disaggregation process was the retarding of the expansion of charitable and business subscriptions, revocable land licenses, and gift promises to the realm of the *sui generis*.[53]

The shift to the will theory also worked toward internal doctrinal purification. The most far reaching was the "undermining and eventual rejection of the idea of 'status' . . . as [an] operative source of the great mass of contract rules."[54] If status impacted the operation of contract rights and duties, then judicial intervention to imply community or public standards of conduct could not be de-legitimated. Thus, status needed to be purged from contract law. The bolstering of the employment-at-will doctrine and the constitutionalizing of freedom of contract to block legislative intervention helped in the purification process. The early Formalists—Langdell, Pollock, Anson—re-scripted contract doctrine through the prism of the will theory.[55] Through the elevation of abstraction, represented by the will theory, they were able to expunge quasi-contract, status, and tort from contract law.[56]

After cleansing contract doctrine of the impurities of status, implied-in-law interventionism, and tort-like influences, contract law was able to sever itself from the contextual elements connected to the spun off areas of law. Instead, the only relevant issue was whether a contract had been created through the sole exercise of individual will.[57] If no such contract by will is formed, then the court is not to salvage one based on a vague sense of general intent. In pre-classical law, the salvage effort was possible through implication from status or transaction type. Instead, the surrogates of the will theory—the consideration doctrine and the requirement of definiteness of terms—

52. KEENER, TREATISE ON THE LAW OF QUASI-CONTRACTS (1893), *as discussed in* Kennedy, *Classical Legal Thought*, *supra* note 46, at 180-181.

53. See DIMATTEO, LARRY A., PRENTICE, ROBERT A., MORANT, BLAKE D. & BARNHIZER, DANIEL D., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION (Carolina Academic Press, forthcoming).

54. Kennedy, *Classical Legal Thought*, *supra* note 46, at 191-204.

55. *Id.* at 213.

56. *Id.*

57. "[T]he essential question was *whether* there was a contract, rather than what type." *Id.* at 214.

were used to quash contract enforcement of obligations that failed to meet the threshold of express, fully actualized, and objective manifestations of will.

By the above noted process of abstraction (will theory) and subtraction (disaggregation) the Age of Formalism or Classical Legal Thought purged the *public* from the law of contracts. The relevance of this purge for contract interpretation was a parallel purge of contextualism. The rise of abstract conceptualism dictated a certain mode of contract interpretation. The purity of the will theory and its conceptualization of contract rules required that the judge find contract meaning in the words of the contract. An inquiry into the true understanding of the parties through a contextual analysis was to be avoided. A contextual inquiry opened the possibility for the public regulation of contract through the imposition of community morality. The judicial inquiry was limited to finding answers not in the context of the contract but in the pre-existing conceptual order.[58]

2. Realist Critique of the Public-Private Distinction

It was the abstractionism and the notion of public-private spheres in classical legal thought, represented by the will theory and freedom of contract, that the Realists laid bare. The foremost challengers of conceptualism's public-private distinction in contract law were Robert Hale, Morris Cohen, and Karl Llewellyn.[59] For them, contract law should be understood "as a state-imposed regulatory regime, and tailor it accordingly, rather than seeing it as the protection of individual rights."[60] Robert Hale, in *Coercion and Distribution in a Supposedly Non-Coercive State*,[61] attacked the policy arguments behind freedom of contract.[62] He asserted that most acts of contracting are acts of coercion and not freedom. Furthermore, every decision to enforce or not to enforce has distributive consequences.

In a narrower critique, Llewellyn saw the judicial role as "marking out the limits of the permissible."[63] Initially, the court would look to

58. *Id.* at 249. For the conceptualist "the set of principles chosen was internally consistent, or at least in the process of becoming so, through a natural, organic, incremental evolution. . . . [T]hey believed in the possibility of deducing rules from these principles, so that new cases could be decided in accordance with the pre-existing scheme." *Id.* at 252.

59. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form*, 100 COLUM. L. REV. 94, 115 (2000).

60. *Id.*

61. Hale, *Coercion and Distribution*, *supra* note 26.

62. "[T]he systems advocated by professed upholders of laissez-faire are in reality permeated with coercive restrictions on individual freedom." *Id.* at 470.

63. Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939).

trade usage and custom for evidence of the community's sense of the permissible or reasonable.[64] If none became apparent, then it is the court's role to impose a solution through the use of the overarching principles of good faith and fair dealing. In the standard form scenario, Llewellyn saw the need for an "official-legal regulation."[65] This public intrusion is implied in his notion of blanket assent.[66] The receiving party of a form contract assents only to fine print terms that are reasonable and decent.[67]

The legal realists debunked the notion of the private nature of contract law. They argued that the initial formulation of the default rules of contract was in itself a regulatory act. In addition, by enforcing a contract or failing to intervene to adjust a contract a court is delegating "to the more powerful party the freedom to exercise her superior power over the weaker party."[68] The courts' decisions as to which contracts to enforce are social decisions with distributive consequences.

In the area of contract interpretation, whether a particular issue of contract law is skewed towards the public or private poles is dependent on a contextual analysis. To wit, it is dependent on the context and the nature of the interests involved.[69] The move to contextualism in the Code was a natural result of Llewellyn's rejection of the promise-will paradigm. In place of the singular focus of promissorial intent, he advanced the agreement-in-fact model of contract interpretation.[70] This model necessarily broadened the analysis from the single point of the promise making (purely private) to a full contextual analysis temporally unconstrained. The agreement-in-fact or true understanding of the parties required searching into the past of custom and usage (quasi-public) along with reviewing the party-to-party communications prior to and subsequent to the time of formation.

B. *The Objective-Subjective Dialectic*

Theophilus Parsons' 1855 treatise on contracts argued for the replacement of the subjective theory of contracts with an objective

64. *Id.*

65. COMMON LAW TRADITION, *supra* note 9, at 363.

66. *Id.* at 370.

67. *Id.*

68. Singer, *supra* note 2, at 482.

69. The Realist believed that "the content of that body of ostensibly 'private' law is largely determined by 'public' polices" and that legal rules "confer advantages on certain parties and disadvantages on others." AMERICAN LEGAL REALISM, *supra* note 2, at 99. *See, e.g.*, Cohen, *Property and Sovereignty*, *supra* note 45, at 8.

70.

one.[71] He argued that the subjective meeting of the minds standard for mutual assent resulted in unpredictability and uncertainty in contract enforcement.[72] Professor Horwitz in interpreting Parsons states that, "[a] just construction of an individual contract is desirable, [Parsons] acknowledged. But it was more important that there be rules regulating the 'rectitude, consistency and uniformity of all construction,' so that parties will be able to take 'precautions' in their behalf."[73] The shift from the subjective to the objective made for a parallel shift from broadly stated fairness principles to a more formal-conceptual law of contracts.[74]

1. Llewellyn's View of Objectivity

Llewellyn believed that pure objectivity in law application was an illusory goal and that it was merely a technique of judicial writing.[75] However, he saw the broader use of contextual evidence as a way to at least bridge the gap between subjective intent and a purely objective intent. In short, in most cases, the attempt to uncover the "true understanding" of the parties envisioned by contextual interpretation is likely to uncover the subjective intent of the parties. There are two questions that need to be studied: (1) How does the contextual mode of interpretation relate to the objective and subjective theory of contracts? (2) How does the objectivity implied in Llewellyn's approach to contract interpretation more likely to uncover the parties' subjective understandings?

In answering the first question, it can be argued that the contextual approach is a rejection of the objective manifestations of mutual assent as represented by merely reading the words of the contract. This view sees the replacement of the formal words with the parties' subjective understanding of the words attributed to them through the

71. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 197 (1977).

72. *Id.*

73. *Id.*

74.

> [H]aving destroyed most substantive grounds for evaluating the justice of exchange, [Williston and others] could elaborate a legal ideology of formalism . . . that could not only disguise gross disparities of bargaining power under a façade of neutral and formal rules but of contract law could also enforce commercial customs under the comforting technical rubric of 'contract interpretation.' *Id.* at 201.

75. "Personally, I am still of the view that the search for an all-embracing, logically consistent 'system' of law will never amount to more than mere wordplay . . . ." KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 26 (1989); "The deciding is done under an ideology which in older days amounted to faith that there is and can be only one single right answer. . . . I refer not merely to a manner of writing but to a frame of thought . . ." COMMON LAW TRADITION, *supra* note 9, at 24.

background discourse of commercial practice. Llewellyn's rejection of the possibility of obtaining a single meaning through a facial reading of contract terms was not a relinquishment to subjectivity. Instead, the use of trade usage, custom, and commercial practice in contract interpretation provided external and objective measures of meaning. It was imperative, therefore, for merchants to learn the customary meaning of terms and practices in their chosen trade or profession. These were the external meanings that would control contract interpretation rather than the variant, subjective meaning of one or both of the contracting parties.

In reference to the second question, assuming that the parties fulfilled their "contractual duty" to understand the meaning of trade terms and practices, then the contextual meaning of the words of their contract would indeed reflect their true subjective understandings. In the event a merchant party failed to internalize the usage and customs of her trade or business, then her subjective understanding of the contract terms would be irrelevant under the contextual approach.[76]

C. *The Fact-Law Distinction*

Grant Gilmore shifted the objective-subjective interpretation of contract law into a fact-law transformation. Contract law, and its rules, become objectified by a transformation of known fact patterns from questions of fact to questions of law:

> If in contract . . . the actual state of the parties' minds is relevant, then each litigated case must become an extended factual inquiry into what was intended . . . If, however, we can restrict ourselves to the externals, then the factual inquiry will be much simplified and in time be dispensed with altogether as the courts accumulate prece-

76. This view of contextualism revolves around the issue of culpability. A party's failure to internalize trade usage and custom can be seen as professional negligence. Thus, a tort analysis can be utilized in applying the appropriate meaning to contract language. The parties have a duty of care to exercise competence in the negotiation of a merchant-to-merchant contract. That duty requires the merchant party to educate herself in the meanings attributed to contract terms in commercial practice. Failing to do so results in the abdication of authority over the meaning of the contract. It can be argued that such incompetence should be weighed against the party claims of mistake, misrepresentation, and fraud. Professor Patterson has also developed a gap-filling dichotomy that he labels as interpretive and substantive incompleteness. Dennis M. Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 SO. CAL. INTERDISCIP. L.J. 235, 243 (1993). A judge faced with an open term problem will seek to fill the gap. The preferred means is interpretive gap filling in which she looks to the contextual evidence to bolster a case for implied intent. "The court weaves a conclusion of implied intent by examining the essence of the contract within the context of the contracting." LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 15 (1998) [hereinafter DIMATTEO, CONTRACT THEORY]. When the fiction of implied intent is not available then the judge is forced into an overt normative inquiry.

> dents about recurring types of permissible and impermissible conduct. By this process questions, originally perceived as questions of fact, will resolve themselves into questions of law.[77]

To bring consistency to contract interpretation and enforcement, classical legal thought shifted the determination of the issue of contractual intent from a question of fact to a question of law.[78] Formalism's embrace of the objective theory was aligned with its view that contract interpretation is best handled as a matter of law. In Llewellynian terms, the recognition of a standard fact pattern or situation-type leads to a finding in law.[79] "The discretion [is] in labeling of the fact pattern, not the application of the rule."[80] Under classical legal thought, the labeling process was decided as a matter of law. This shift is what allowed for the fuller conceptualization of contract law. Contextualism, in turn, required the interpretation of extrinsic evidence as a matter of fact.[81]

In the domain of contract interpretation, the plain meaning rule focused the inquiry on the text without resort to contextual evidence. It required the direct application of rule to text—a matter delegated to the deductive reasoning of the judicial mind. "If words are deemed to have a natural meaning, then interpretation of a writing may be viewed as raising a legal issue because the reasoning process is deductive. There is only one right answer."[82] Cases of only one right answer translate into that answer being imposed as a matter of law.[83]

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77. GRANT GILMORE, THE DEATH OF CONTRACT 42 (1974). Gilmore refers to Holmesian thought for this proposition. *Id* at 41.

78. *Id.*

79. *Infra* Part II.C.

80. DIMATTEO, CONTRACT THEORY, *supra* note 76, at 16.

81. It should be noted that Llewellyn was not a believer in the lay jury's ability to interpret merchant facts. He unsuccessfully argued for the institutionalization of merchant juries. *See generally* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987) [hereinafter Wiseman, *Merchant Rules*].

82. William C. Whitford, *The Role of the Jury (And the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WISC. L. REV. 931, 936. Professor Whitford further notes that the fact-law distinction rests upon the distinction between general and particular. "Sometimes we use the occasion of a law application to further specify a general standard . . . In such circumstances, the general/particular distinction suggests that the law application should be considered a question of law." *Id.* at 933.

83. The shift to contextualism in American contract interpretation should have lead to a greater role for the jury in contract law disputes. In theory this is true but in practice the role of judge as gatekeeper of extrinsic evidence has preserved the dominant role of judges in contract interpretation. The admissibility of contextual evidence is often limited to the role of determining if the words of a contract are susceptible to more than one interpretation. After reviewing the evidence, the court may decide as a matter of law whether this is indeed the case. If it decides that there is no reasonably viable alternative meaning then the interpretation is made as a matter of law. *See, e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968) (opinion of Chief Justice Charles Traynor).

D. *Formality as Servant of Concept and Context*

Rudolf von Jhering in the late Nineteenth Century separated the uses of formalities in contract law from the debate over the role and uses of rules and standards.[84] A formality, in his scheme, although often embedded in a formal rule, is a device to manifest contractual intent. Some have interpreted Llewellyn's dislike of the formalized application of rigid rules as a broader rule skepticism.[85] This misconception spilled over to his view of the role of formality in the law. In fact, Llewellyn saw formalities as serving important channeling functions. As early as 1931, Llewellyn had this to say about the Statute of Frauds: "After two centuries and a half the statute stands, in essence better adapted to our needs than when it was first passed."[86] Lon Fuller is generally given credit for elaborating a tripartite typology of the functions of legal formalities. In his Sections 2, 3, and 4 of *Consideration and Form*, Fuller explains the evidentiary, cautionary, and channeling functions of legal formalities.[87] In fact, this typology, in a more rudimentary form, existed ten years earlier in Llewellyn's *What Price Contract?*[88] The channeling function is apparent in his discussion of primitive form: "Formal acts of the known type then signify openly definitive intent to change the existing situation—and to be relied on."[89] However, for Llewellyn the genesis of formality was not found in the law but in society. Through a process of regularization, transactional practice is formalized and eventually adopted by the law as a legal construct.[90]

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84. RUDOLF VON JHERING, THE SPIRIT OF ROMAN LAW (O. de Meulenaere trans. 1880), *as cited in* Duncan Kennedy, *Principle of Private Autonomy*, *supra* note 62, at 112.

85. Llewellyn was not a rule skeptic in the broader sense. He was a critique of the abstractionism and rigidity of rules and their application in classical legal thought.

86. *What Price Contract?*, *supra* note 7, at 747. It is interesting to note that Fuller did not consider the Statute of Frauds a true form since it did not perform the requisite channeling function. "The Statute of Frauds has only a kind of negative canalizing effect in the sense that it indicates a way by which one may be sure of not being bound." Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 802 (1941).

87. Fuller, *Consideration and Form*, *supra* note 59, at 800-01.

88. *What Price Contract?*, *supra* note 7, at 711-12 and 746-48. It is interesting to note that Llewellyn is the first reviewer acknowledged in the * footnote in *Consideration and Form*.

89. *Id.* at 711.

90. Llewellyn's contextualism is apparent in his view of form. Form flows from society to law and then back to society. In a footnote, Llewellyn gives this romantic anecdote: "Dreaming is futile on such points [of whether form flows initially from law or from society]; yet the imagination presses toward picturing the first man to lend unmistakable assurance to his words by drawing on some form—or by creating it—before any form was known. One suspects cumulative accident, rather than invention." *Id.* at 711, n. 18. "[T]he common purpose of form is clear[:] [t]he overt sign of utter intent to assume obligation has been given[;] [t]he other party has reason to rely. The consequence. . .is. . .recognition by law official . . . . *Id.* at 712.

The evidentiary and cautionary functions are alluded to in a section entitled "Prophylactic Form." As to the former, Llewellyn asserts that "no system may ignore the value of forms . . . as permanent and reckonable evidence of what was agreed upon in the deal."[91] The cautionary function is not expressly expounded upon but can be gleaned from the last phrase of the section in reference to the Statute of Frauds and the parol evidence rule: "[T]he net effect of these two rules . . . is almost certainly wholesome . . . in inducing care in the making of that record."[92] Therefore, Llewellyn's contextualism is not aimed at diminishing the value of formal writings. It is an assault on the protection of such writings by the parol evidence rule. He refers to the real world of contracting to isolate two problem areas—the admissibility of negotiation evidence and oral modifications.[93] The Realist technique of questioning the certainty of rules by pointing out counter-rules and counter-polices is in evidence here. As to the former, he states that courts are "faced with the counter policy of recognizing the frequency with which vital terms of oral negotiations are in fact omitted (or not reduced to) a formal writing."[94] The Code later deals with this issue by allowing the admission of prior agreement or contemporaneous oral agreement that does not contradict the final written expression.[95]

As to the common practice of merchants verbally modifying performance under a written contract, Llewellyn states that it is "a problem as yet inadequately solved."[96] He would later venture a solution through the Code by allowing the admission of course of performance evidence,[97] the elimination of the requirement of new consideration for contract modifications,[98] and the recognition of waiver even in cases where the contract excludes oral modifications and waivers.[99] These are examples of the rigid application of formality giving way to the contextualism of real world practices. Llewellyn's critique of the rigid application of formality should not be read more broadly as an attack on the benefits of form in general.

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91. *Id.* at 746-747.

92. *What Price Contract?*, *supra* note 7, at 748.

93. *Id.* at 747.

94. *Id.*

95. U.C.C. § 2-202 (1998) ("Final Written expression: Parol or Extrinsic Evidence").

96. *What Price Contract?*, *supra* note 7, at 747.

97. U.C.C. § 2-208 (1998) ("Course of Performance or Practical Construction").

98. U.C.C. § 2-209(1) (1998) ("Modification, Rescission and Waiver").

99. U.C.C. § 2-209(4) (1998).

III. MAKING RULES WORK: LLEWELLYN

William Twining once stated that "one of [Llewellyn's] favorite themes was the importance of maintaining a continual interplay between abstract ideas and concrete detail."[100] Implicit in Llewellyn's thought is a dialectical relationship between the abstract and the particular; between theory and praxis; and between concept-rule and social reality.[101] Llewellyn in his 1930 casebook sketches the role of conceptualism in law:

> Yet we . . . must retain it as a convenient and fairly accurate summation of past decisions . . . used thus, the verbal formula brings past experience into play, without obscuring the meaning of the facts in the case at issue . . . nor permit our aesthetic pleasure in an abstract rule or system to interfere with our observation of the concrete heterogeneity of life. [It is the] difference between doctrine as a causal factor in inducing a decision and doctrine as a mere ex post facto justification of a decision already reached. Doctrine is emphasized, as doctrine must be, but it is emphasized as the first step in a wider process of seeing what law means and of bringing it to bear on facts.[102]

Llewellyn's attack on classical legal thought was not an attack on conceptualism but on the formal application of concepts. In his 1930 article *A Realistic Jurisprudence*, Llewellyn states that "[l]ike rules, concepts are not to be eliminated . . .[b]ehavior is too heterogeneous to be dealt with except after some artificial ordering."[103] But for the realist the ordering is only the first step in the process of law application. Each new case questions the correctness of the ordering. "[A] realistic approach to any new problem would begin by skepticism as to the adequacy of the *received* categories [or concepts] for ordering the phenomena effectively toward a solution of the new problem."[104] Thus, there is an ever-evolving dialectical relationship between rule and fact and between the general and the particular.[105] The following sections of this Part review facets of Llewellyn's vision on how to for-

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100. WILLIAM TWINING, THE KARL LLEWELLYN PAPERS 21-22 (1968) [hereinafter LLEWELLYN PAPERS], *as quoted in*, Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 198, n.189 (1989).

101. Patterson, *Llewellyn, Wittgenstein*, *supra* note 100, at 198 n.189.

102. LLEWELLYN, LAW OF SALES ix-xi (1930).

103. *Realistic Jurisprudence*, *supra* note 2, at 453. *See generally* Carl A. Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 32 and 56 (1998).

104. *Id.*

105. Pollock's Principles of Contract: "Legal rules exist not for their own sake, but to further justice and convenience in the business of human life; dialectic is the servant of their purpose, not their master." FREDERICK POLLOCK, PRINCIPLES OF CONTRACT x-xi. (9th ed. 1921).

mulate a workable or functional conceptualism, that is, how to make rules work.

A. *Llewellynian Conceptualism*

Although Llewellyn abhorred the abstract conceptualism of classical legal thought, he understood the need for generalization. But his was a generalization generated by the particular. It was essential that legal concepts be continuously refreshed with the concrete facts of daily practice. The relationship between concept or rule and the factual situations of cases was dialectical in nature. The best type of rule calls for the examination of the factual as a precondition for its application:

> His juristic ideas grew to a large extent out of his early work in the law of negotiable instruments and sales; many of his contributions to contract and commercial law, including the Uniform Commercial Code, represent the applications of his theoretical ideas. This emphasis on the interplay between the abstract and the concrete is the keystone of the *bridge* which Llewellyn built between theory and practice.[106]

Llewellyn's contextual system is an attempt to deal with the inherently indeterminate nature of language and concepts. The problem with abstract conceptualism is that it failed to confront the difference between *words in concept* and *words in use*. We understand our words from the way we use them.[107] If we use them in a different way, then our understanding of them will change accordingly. Llewellyn understood that the meaning of words or rules was in a constant state of flux. It was the task of "the imagination to bring within its field of attention the language through which it functions as well as the nonlinguistic world within which it seeks to act."[108] Llewellyn saw situation-sense[109] as a method of affixing a meaning to rules at a specific moment in time. His singing rules'[110] open texture allowed for the affixation of meaning through the application or *use* of its words to

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106. LLEWELLYN PAPERS 21-22, *supra* note 100, *as quoted in*, Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX L. REV. 169, 198 n.189 (1989).

107. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 1953); LUDWIG WITTGENSTEIN, PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" (1965). For an explanation of the similarities between Wittgentstein and Llewellynian thoughts on meaning *see* Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX L. REV. 169, 176, 199 n.190, 204-208 (1989).

108. James Boyd White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1973 (1987).

109. *See infra* Part II.C.

110. *See infra* Part II.E.

every context. The next two sections will examine how the Llewellynian interplay of abstract concept and concrete application impact the roles of generalization and rules in the legal order.

B. *General-particularized*

To more fully appreciate the intersection of contextualism with conceptualism, we will briefly examine the role of classification in the conceptual order. We will use the classification of standard forms as contracts to illustrate law's tradeoff between generalization and particularization. Arthur Leff noted that the classification of things as the same thing is an illusion—"there are no identical things."[111] Thus, the classification of things as contracts is merely an intellectual construct based upon an *unreality of identity*.[112] Classifying a standard form as a contract is to state that it possesses some degree of contract-*ishness*.[113] Whether it is indeed a contract is a different story. Limiting the analysis to the criteria that are aligned with its contract-*ishness* allows it to be classified as a contract and thus enforced under contract law. Therefore, if the criterion is that the subject-matter of the paper or thing is the type that is generally considered the subject of contracts, then the thing or paper must be a contract. Or, if the thing or paper indicates a general intent to form a binding agreement, then that exhibition is enough to make the thing a contract.

However, if the criterion is expanded to include factors not conducive to classical contract theory, then the classificatory distinction between contract and non-contract will be *exploded*.[114] For example, if manifestation of intent is determined not by the existence of the standard form, but by the consistency of the terms with the negotiated agreement—or in the case of an exchange of forms, the consistency between the terms of both forms—then the legal conclusion should be that a contract has not been formed. It is only when the criterion is limited to a level of generality that the classification of a standard form, as being the same as a fully negotiated, customized contract, that the inclusion of standard form contracts within the classical contract scheme is successful. When the criterion is shifted from the level of generality to the level of particularity the *family resemblance*[115] be-

111. Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132 (1970). In the words of G.E. Moore, "[e]verything is what it is, and not another thing." G.E. MOORE, PRINCIPIA ETHICA (1960).

112. *Id.*

113. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 65-67 (1967).

114. Leff, *Contract as Thing*, *supra* note 111, at 133.

115. *Id.*

tween the custom contract and the standard form breaks down. At the level of increased particularity it becomes clear that the two things are of different classes.

Arthur Leff asked the following question: "Why classify at all?,"[116] when all classification may be exploded by increasingly particularized criteria. His response is that generalized classification promotes "intellectual and operational efficiency."[117] The classification of things at some level, as contracts versus non-contracts, is imperative for the functioning of a well-ordered marketplace.[118] The loss of some degree of particularity, accuracy, or truthfulness is accepted in order to reap the benefits of efficiency.

The *aesthetics* of pigeonholing standard form contracting into the general classification of classical contracting is performed at a cost. The price is the decreased accuracy or truthfulness that greater particularity would produce. The problem with a given classification scheme is that it has the inherent tendency to ignore important differences between two things that are grouped into the same class. The classification scheme must constantly be re-examined to see if particularity may be increased without a total loss of efficiency. Certain class groupings, such as custom contracts as contracts and standard form contracts as contracts, will need to be stripped of their *artificial class homogenization*[119] if the divergence between truthfulness (social reality) of the classification and the efficiency of the classification (inner morality of law) becomes too great.

The fact of a dynamic social reality ensures the on-going divergence between law's classification scheme and real world practice. The law's likely response is the continuous creation of sub-groupings (sub-classifications). This has happened in contract law with the enactment of the Code, along with separate statutory regulation of insurance and labor contracts.[120] The sub-classification process has extended into the law of sales with the enactment of Article 2A (leasing of goods) of the Code.

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116. *Id.* at 134.

117. *Id.*

118. Leff presents a more embellished description for this rationale:

> Actually, this utilitarian answer is at most only part of the story. I suspect that people classify for the same reason that tigers hunt and most animals copulate, which is *not* solely to have food and children, respectively. It is a terrible mistake, in assessing the power of ends, to overlook the aesthetics of getting there.

Id. at 134 n.11.

119. *Id.* at 136.

120. *See generally* Robert S. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L. J. 525 (1969).

Throughout Llewellyn's writings on contract and jurisprudence one can see at work the general theme of "the importance of maintaining a continual interplay between abstract ideas (general) and concrete detail (particular)."[121] Corbin explained that for Llewellyn the judge "must compare the specific situation with other similar (never identical) situations and thus find a 'type-situation' that enables him to construct a tentative working rule that can be applied to all of them."[122] He further explains that this conceptualization of similar fact situations is not a return to abstract conceptualism. "It is a tentative, not an 'eternal or changeless' generalization. . . . [It] is to be corrected or replaced by other generalizations by other judges . . . as new situations and new life conditions press on their attention."[123]

John Dewey counseled that legal analysis must incorporate the abstractness of concepts and rules, along with the particularity of concrete facts and social values. In this way the goals of systemic certainty and particularized justice can be achieved.[124] Llewellyn's centrist brand of legal realism offers much in constructing such a blending of conceptualism and contextualism. Despite the Realists' overall critique of judicial reasoning, Llewellyn's belief in the case law system and the role of precedent remained one of guarded optimism. The role of precedent as a formalistic control was to be rejected; the role of precedent as a guide to decision is to be embraced. Instead of using cases as the core of abstract conceptualism, the cases can be viewed as evidence of situation-types and thus compared by analogy to the case at hand.[125]

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121. LLEWELLYN PAPERS, *supra* note 100, at 21.

122. Arthur Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805, 811-12 (1962).

123. *Id.* at 812.

124. See generally, Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the 'Law of Satisfaction'—A Nonunified Theory*, 24 HOFSTRA L. REV. 349 (1995) (discusses the competing norms advanced by contract law).

125. Within the domain of the particularized, a different parameter presents itself. I will call this the general-specific parameter of the particularized. The general-specific parameter focuses upon the contextual viewfinder. In a contract formation, there is both a specific and a general context. The issue is what types of contextual factors can or should be weighed by the judicial interpreter. Alternatively stated, should the contextual analysis include factors beyond the contextualism envisioned by Llewellyn. Clearly, the use of some of the personal features of the contracting parties as important contextual elements were envisioned in his view of standard form contracting and the doctrine of unconscionability. Professor Morant's work on the need for more flexible applications of contract rules in order to factor in race and gender disparity is an example of an expanded contextual framework. "[F]actors of racial or gender bias command attention, particularly when they can impact the formation or judicial interpretation of agreements." Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & POL'Y 1, 8 (1998) [hereinafter Morant, *Law, Literature, and Contract*]. *See generally* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997); Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bar-*

C. *Situation-Sense*

The idea of using existing cases as evidence of situation-types to be used in the interpretation of a contract and in the application of contract rules was more fully developed in Llewellyn's concept of situation-sense. Situation sense methodology looked to uncover type-facts (operative facts) found in a series of cases including the case at bar. These type-facts could then be used to respond to real world developments through the fabrication of a situation-type.[126] The grouping of the case at bar with a situation-type was the linchpin for meaningful contract interpretation and orderly rule application. Todd Rakoff described the situation-sense interpretive methodology[127] as a process of "constructing models which describe type-situations."[128] The situation-sense methodology and the reconstruction of rules are backward and forward-looking. They look to the past reason behind the existing rule and how alternative reconstructed rules will fit, and justify situation-types in the future. Through this methodology, legal rules are made to fit a "structured" social context.[129]

Llewellyn provided this version of situation-sense in 1954:

> [T]he existing law can sometimes point up clearly how *not* to make law, whether simplicity has been sought by way of some mere *word-formula which does not fit the situation and the situation's set of problems*. . . .[T]he effort to throw into a single basket the hugely varied situations . . . has led again and again either to plain injustice or to the court's jumping whatever traces were sought to be imposed upon it—with a resulting complete uncertainty. Where oper-

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gains: The Case of the Fledgling Writer, 18 HASTINGS COMM. & ENT. L.J. 453 (1996). Professor Morant asks: "How can parties or scholars highlight the possible pejorative function of bias or prejudice in bargaining relationships within the confine of present contract rules?". Morant, *Law, Literature, and* Contract, *supra*, at 17.

126. Situation-sense is "the type-facts in their context and at the same time in their pressure for a satisfying working result." COMMON LAW TRADITION, *supra* note 9, at 60. Professor Todd Rakoff uses Jacob & Youngs Inc. v. Kent to illustrate this point. Cardozo saw two situation-types for deciding whether a builder is owed final payment despite constructing a building possessing a relatively minor defect. The two situation-types were the sale of "common chattels" and a contract to build a "mansion or a skyscraper." Ultimately, he decided that the second type required its own rule—substantial performance—while the first dictated the application of the traditional rule of perfect tender. Todd D. Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense', in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 208 (Jack Beatson & Daniel Friedmann eds. 1997); *see also* Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L.J. 19, 22 (1993) (the construction of legal categories is partially an adoption of roles and transactions defined by society). *See generally Reason and Context, supra* note 11, at 447-450 (discussing situation-sense methodology).

127. *Id.* at 216-19.

128. Rakoff importantly notes that "[t]hese models do not aspire to the universality present in abstract rules." *Id.* at 216. They are rules that are cut from social content and not from an internal conceptual ordering.

129. *Id.* at 221.

> ation and results are today scrambled and unreliable even though the word-formula *looks*, then what is needed is to re-examine the problems and the material and to come out with language which *really fits the need.*[130]

Thus, the indeterminacy of facts in a novel case can be somewhat ameliorated through their attachment to a category of facts[131] that the law views as significant.

D. *The Role of Rules in the Legal Order*

As discussed earlier, Llewellyn possessed a moderate form of rule skepticism. He was a believer in the usefulness of properly drafted rules. Rules singing with patent reason and open-textured enough to allow the law of society (commercial practice) to illuminate that reason were what the old abstract rules lacked. An unpublished manuscript, *The Theory of Rules*,[132] gives insight into his view of the proper role of rules in the legal order. He rejects the ultimate precision of legal rules.[133] Instead, he attributes the goal of legal precision to the formalism of abstract conceptualism. Llewellyn asserts that if a corrected ideology is implemented by stripping the dominate ideology of the formalism of logic and its goal of a logically precise legal structure, then rules could be made to work.[134] Although not a true believer of the transformative or critical power of law, he nonetheless saw a role for rules as guiding principles. They could encourage the selection of the better options available in commercial practice.

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130. Statement of Karl N. Llewellyn to Executive Committee on Scope and Program of the NCC Section on Uniform Commercial Acts, *reprinted in*, TWINING, THE REALIST MOVEMENT, *supra* note 2, at 538.

131. In Llewellyn's 1930 casebook his narrow categorization of transaction types included a separate index in which transactions were cataloged according to commodity types. The Index listed the following commodity types: Agricultural and Foodstuffs, Animal Products, Livestock, Fish, Forest, Mineral, Semi-Manufactured Goods, Manufactured Foodstuffs, Other Finished Manufactures, Stocks of Goods, and Obligations. LLEWELLYN, LAW OF SALES 1073-77 (1930). Llewellyn saw the major task of the judge of "constant[ly] reaching for a sound way to fit facts into some significant pattern or type." COMMON LAW TRADITION, *supra* note 9, at 125.

132. "Rule of Thumb and Principle" in LLEWELLYN PAPERS, *supra* note 100, at 81. Professor Twining estimates that it was written in the period 1938-40.

133. The demise of rule precision is endemic in the dynamic nature of modern society: "The pace of an industrial civilization, its ongoing regroupings of interest, people, and problem, have presented new states of fact too rapidly for knowledge to keep up with them." *Id.* at 83.

134. The rules of classical legal thought were detached from underlying purpose and policy. "A statute merely declaring a rule, with no purpose or objective, is nonsense." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

E. *Llewellyn's Singing Rule*

The rules-standards debate[135] focused on the differences between rules and standards, along with their appropriate roles in the legal system. For purposes of the present undertaking, the distinction between rules and standards is implicated by Llewellyn's notion of singing rules. One way of understanding the singing rule is to view it as a rule-standard hybrid. Rules are generally viewed as closed, fixed edicts that can be directly applied to a determinate amount of issues and disputes. Standards are more open in nature and generally provide a continuum of possible responses. Although, standards are directly applied they are generally applicable to larger varieties of cases than rules. Furthermore, the application of standards often entail greater interpretive work for the judicial applicator. This interpretive work requires the judge to look at the policies behind the standard.

Llewellyn's singing rule (or standard) explicitly implicates the principle, reason, or policy that it is attempting to serve. Soia Mentschikoff summarized the essence of his technique as first stating the applicable law, then measuring that law with the reality it is suppose to reflect, and finally evaluating the reason or policy "thus reflected."[136] This type of analysis suggested that the best type of law was the type that provided the reason for its adoption on its face. Thus, Llewellyn's singing rule collapses the verticality between overarching principle and underlying rules. At the same time it bridges the separation between underlying rationales and rule. A singing rule is one that provides its reason, purpose, and use on its surface. This provides the judicial arbiter with guidance or direction when applying the rule to a novel situation. At the same time, the singing rule is open-textured to allow contextual input. The patent reason provided by the rule allows for an orderly adjustment (expansion or contraction) of the rule.[137] The rule adjustment is also informed by the ad-

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135. *See, e.g.*, Mark D. Rosen, *What has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WISC. L. REV. 1119, 1160-76; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-69 (1992).

136. Soia Mentschikoff, *Karl N. Llewellyn*, 9 INT'L ENCYCLOPEDIA SOC. SCI. 440, 440 (1968).

137.

> In drafting the Code, Llewellyn continuously . . . employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means. . . . The patent reason principle also assigns a definite role to the courts in interpret ing the open-ended principles of the Code. . . .

John J. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV.341, 385-386 (1988) (hereinafter Gedid, *U.C.C. Methodology*).

mission of contextual evidence in which the type-facts of the case can be used to align with "known" type-facts (past cases) to evolving situation-types (commercial practice). This evolving rule adjustment, through the use of reason and context, prevents the obsolescence and rigid application that characterized the paper rules of classical legal thought.[138]

For Llewellyn, even in a system of properly drafted singing rules, the use of patent reason is not an insular affair. Rule application requires theory building up the hierarchy of rule to principles or meta-principles and "horizontally" across the entire subject matter of contract law.[139] Thus, the rule application is not only made to fit and justify that particular area of contract law but it is also made to help fit and justify the patent reason (purpose, reason, policy) of all of contract law. The next Part will examine the idea of contract interpretation and rule application as an exercise in theory building from the perspectives of Dworkinian and Llewellynian legal theory.

IV. DWORKIN-LLEWELLYN THEORY BUILDING

Karl Llewellyn and Ronald Dworkin are both idealists in that they believe in the integrity of the common law system. As such, they both are theory builders. Both believed that the common law system provided restraints (Dworkin's institutional morality and Llewellyn's craft skills) that guided judges in their task of fitting rules to novel cases and justifying rule adjustments within the whole body of (contract) law.[140] Each in different ways believed that law could provide

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138. Llewellyn described such a formalistic system of rule application as follows: "[A] rule in its harshest form is applied in a recurring situation *which the harsh form of the rule happens to fit.*" COMMON LAW TRADITION, *supra* note 9, at 124.

139.

> . . . The text of each section [of the Code] should be read in the light of the purpose and policy of the rule or principle in question, as also the [Code] as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved. . .

U.C.C. § 1-102(2)(b), cmts. 1 & 2 (2004).

> The important point is that Llewellyn's understanding of the judicial process led him to draft language of principle and to use policy, purpose, and reason to convey meaning. Faced with that statutory architecture, courts should not and probably cannot avoid using policy and purpose in interpreting the Code. . .

Gedid, *U.C.C. Methodology*, *supra* note 137, at 385-386 (1988).

140. *See* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200 (1984). Judges feel a loyalty to the institutional value in "the orderly development of the law." *Id.* at 215. *See also* Samuel I. Shuman, *Justification of Judicial Decisions*, 59 CAL. L. REV. 715 (1971) (judges feel compelled to justify their decisions objectively using external analogues). *See generally* David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984) (discusses rule application and judicial justification).

determinate answers to novel or hard cases. For Llewellyn, rules remained the most important part of an orderly, functional legal order. For Dworkin, principles play the most crucial part in legal ordering. This Part will examine both versions of theory building. It will then take from Dworkin's theory building scheme to improve on Llewellyn's contextually-driven dual track theory of interpretation.

A. *Llewellynian Theory Building: The Is, What Might Be,*[141] *and the Ought of Rule Application*

Llewellyn's realism dictated that when stating or restating the law one looks to narrow categories of cases to derive workable rules. The jurist begins by reading existing cases, not to deduce broad statements of law and principle, but in order to derive narrow legal issues and the key facts that are crucial to the decision (*is*). This ground up view of legal precedent also applied to "reading" cases still to be decided (*what might be*). The *what might be* can be seen as a temporal extension of the *is*. Thus, Llewellyn's view is not the temporally fixed focus of existing law but includes a projection of the *is* into the future.[142] It is only then that one can determine if the court is actually doing what doctrine supposedly dictated. If there is a divergence, then the rules need to be adjusted to fit and justify the rule application (*ought*).

Thus, Llewellyn's separation of the *is* from the *ought* of law was confined to the first stage in a multi-stage process of interpretation. The first stage is one of rule identification involving the finding of the current state of the law (rule). This work is done within law's conceptual side. The second stage is the determining of the *is* of the case within an existing, or more importantly, within a novel group or category of cases. This recognition of a new category of cases includes an extenuation of the *is* into future cases that would need to be folded into the new category. The final stage of rule adjustment is the fusion of *is-ought*. The novelty of the formulated category of cases informs a rule adjustment. The rule adjustment has both *is* and *ought* components. The *is* component is represented by the recognition of the needed rule application's divergence with the current state of the rule. The divergence is represented by the inability to adequately fit and justify the rule to the case. Llewellyn asserted that classical contract

141. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

142. Llewellyn in the Report of the Second Draft of the Revised Uniform Sales Act discussing the malleability of its provisions stated that the "borders need to be left open for new Cases of similar reason, *as yet unimagined*." REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941) (emphasis added).

law often masked any such ill-fit through the use of covert devices.[143] The requirement of patent reason in the crafting of singing rules forces the court to overtly justify its rule fit.

The *ought* component is represented by the projection of the *is* into the future or *what might be*. This interpretive license creates a feedback loop in which the future *is* is only a possibility—a possibility that is effected by the present rule fit or adjustment. The projection of the *is* to the *what might be* allows the court to in essence go back in time and change the *what might be*. The future consists of numerous possibilities and *what might be's*. The court's *presentiation*[144] of future *is's* provides the opportunity for normative change. For example, different rule adjustments can be seen as impacting the evolution of business practice. The court can select a rule adjustment that allows for the preemption of the future evolution of a bad practice. The rule adjustment can be a transformative device to impact future practice and shape the characteristics of future cases.

B. *Dworkinian Theory Building and the Law of Contracts*

Ronald Dworkin's law as interpretation theory rejects the indeterminacy arguments of rule skeptics. For Dworkin, even if one acknowledges the veracity of Llewellyn's axiom that for every rule or principle there is a counterrule or principle,[145] law's internal rationality or order dictates when the rule or counterrule and when the principle or counter principle can appropriately be applied. Under Dworkin's scheme, the problem of rule or principle indeterminacy presents itself only at a lower level of abstraction. The judge can find the proper rule or principle-fit by ascending up a pyramid of legal abstraction.[146] For Dworkin, this moving up the pyramid of abstraction or principles is not an exercise in transcendental nonsense[147] but an instrumental undertaking grounded in the concrete. It is clear, nonetheless, that Dworkin's exercise in interpretation is internal to the law. For Dworkin, the key element in the legal order is the princi-

143. These would include doctrines like misrepresentation, mistake, and duress, along with the use of the notion of implied intent.

144. *See* Ian R. Macneil, Commentary, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974). Macneil describes "presentiation" as the "recognition that the course of the future is bound by present events *and* that by those events the future has for many purposes been brought effectively into the present." *Id.* at 589.

145. *Supra* note 37.

146. Duncan Kennedy shares Dworkin's view of the power and utility of abstraction but where Dworkin sees harmony Kennedy sees contradiction. *Compare* Kennedy, *Form and Substance*, *supra* note 26.

147. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

ple.[148] In the case of ambiguity, whether it be a rule or standard application, the decision-maker works up a hierarchy of principles to find the appropriate application or answer.[149]

In contrast to Dworkin's internal examination, Llewellyn's idealism is further grounded in real world contextualism. Through the interaction of the patent reason of singing rules and the community morality of situation-sense, Llewellyn sees the rules of contract constantly evolving to fit and justify social reality. For Dworkin, the need for constant rule reformulation is minimal because of the density of contract law. Almost all of the time the rule needed to deal with a novel situation already exists in the law. Through Hercules' theory building exercise an appropriate fit of an existing rule is discovered.[150] In short, the existence of rule conflict or rule-counterrule is unlikely since the theory building exercise produces the one true rule and rule fit.

Dworkin's theory building exercise is tested by a novel fact pattern or hard case exposing a rule conflict or gap in the rules. But this exposure is only a surface phenomenon. Hercules seeks the guidance of the principles behind the conflicting rules or the surrounding rules in the case of gaps. If this analysis fails to produce an answer then he ascends to a higher level of abstraction—contract law's meta-principles. These meta-principles are used to fit and justify a rule application in harmony with the whole body of contract law. The meta-principles vary in different eras or theories of contract law. Under classical contract theory, the meta-principles include freedom of contract, plain meaning interpretation, and the sanctity of private will. Parties had the expectation and right to strict and literal performance. Under neoclassical or relational contract theory additional meta principles are posed, including good faith, fair dealing, and liberalized excuse. Parties not only have a right to performance but also a duty to cooperate and to adjust their demands and expectations.

In Dworkin's theory stare decisis plays an important role in constraining discretion and maintaining the integrity and internal logic of the legal order.[151] However, the reading of past cases is not a purely

148. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985). "[A]djudication is characteristically a matter of principle rather than policy." *Id.* at 3.

149. "[A]n interpretation of any body or division of law, . . . , must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve." *Id.* at 160.

150. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (Dworkin introduces Hercules as the judge that hard cases are presented to for adjudication).

151. *See* Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963). *Cf.* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM.

descriptive undertaking.[152] It is also an interpretive undertaking that requires the judge to develop the best interpretation of precedent when fabricating a rule fit in the hard or novel case. Dworkin states that "the nerve of my argument that the flat distinction between description and evaluation on which skepticism relies is misplaced because interpretation is something different from both."[153] It is this descriptive-prescriptive blend that allows for an adjustment of a rule to fit to the hard case. However, under Dworkin's theory, the prescriptive portion of interpretation is constrained by the body of law as a whole. An interpretation that produces a rule fit that is not consistent with a large body of the existing law would be a false interpretation. For example, a reformation of a contract term that evades an express allocation of risk would be a false interpretation.[154]

V. A THEORY OF INTERPRETATION

The earlier Parts of this article examined the realist critique of abstract conceptualism, explored the tenets of Llewellynian jurisprudence and the important role of contextualism within it, and the Dworkinian notion of theory building. This Part will build upon the analysis of the earlier Parts by further exploring the interface between the contextual meaning of a contract and the rules of contract law in the notion of *dialectical conceptualism*. Dialectical conceptualism uses Dworkin's concept of theory building to extend Llewellyn's dual track theory of interpretation.[155] It offers a reconstructed vision of contract

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L. REV.359. (1975). Professor Greenawalt describes Dworkin's concept of coherence as a judge giving effect "as objectively as he can to the values already implicit in the legal system." *Id.* at 396.

152. *See* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982). "[P]ropositions of law are not simply descriptive of legal history . . . [t]hey are interpretive of legal history . . ." *Id.* at 528.

153. *Id.* at 546.

154. Critical legal studies scholars see Dworkinian theory building as masking contract law's internal contradictions. The *conflict thesis* argues that the search for determinacy in the principles of contract law masks the contradictions that infect it all levels. Duncan Kennedy asserts that "there are no meta-principles to explain just what it is about particular situations that make them ripe for resolution." Kennedy, *Form and Substance, supra* note 26, at 1724. Furthermore, the abstractionism of Dworkin's brand of legal idealism allows for the enforcement of contract rules as exercises of rationality, objectivity, and neutrality. Dworkin's abstractionism masks the fact that law is a product of political choice. Abstraction allows rules to be strictly applied in a dispute between Part A and Party B. Such an acontextual rule application is impossible under Llewellynian contextualism. The unveiling of Party B as an individual of inferior bargaining power or a victim of overreaching unmasks law's neutrality. In the words of Roberto Unger: "The real sovereigns that stand behind the demiurge are the interests that lead men to classify things as they do." ROBERTO UNGER, KNOWLEDGE AND POLITICS 80 (1975). In short, Dworkin's inner morality of law is the product of a particular social vision.

155. DiMatteo, *Reason and Context, supra* note 11, at 476-85

interpretation founded upon Llewellyn's contextualism and Dworkinian idealism.

Dialectical conceptualism represents an attempt to bridge the contextual-conceptual mindsets.[156] Dialectical conceptualism is the form of rule and contract interpretation that best describes Karl Llewellyn's vision of contract interpretation and rule application. That vision sought to better understand the proper relationship between conceptualism and contextualism. After fabricating the framework for this theory of interpretation, the infancy law doctrine and the law of excuse will be used to apply dialectical conceptualism to existing contract doctrine. The role of contextualism in this theory is examined in the areas of promissory estoppel, expanded recognition of precontractual liability and implied contracts, and the greater enforceability of gift promises. An analysis is then undertaken of the implications that dialectical conceptualism poses for the reasonable person standard.

A. *Rule Fit and Resolving Rule Non-Fit*

A theory of contract interpretation ultimately needs to relate three strata. First, from a bottom-up view, the real world produces disputes over contractual meaning. Second, the context or factual background of the dispute provides the data for the determination of the true meaning of the contract. Third, courts look to the law to provide interpretative guidance. This is the domain of concept application.[157] In this strata, the judge looks first to see if there is a particular "rule fit" that provides a determinate answer. This is unlikely given the fact that litigation is discouraged unless there is at least a plausible argument against a particular rule fit. The interpretive inquiry presented in this section (dialectical conceptualism) uses the Code as the source of law.

The lack of a particular rule fit can occur in two ways. First, the context reaches an interstitial place within a rule (gap within the rule). Second, the context reaches an interstitial place within the rules in general (gap between or among rules).[158] In the second instance, the

156. The terms *abstract conceptualism* and *dialectical conceptualism* are used also as a chronological demarcation. The former refers to the brand of conceptualism associated with the formalism of 1900. The latter refers to the brand of conceptualism at work circa 2000.

157. Llewellyn recognized this tension between the conceptual and the contextual sides of the law. He describes the judicial process in the area of sales law as the "interplay of received rule and concept with the urge of the case-law facts, and with the general background." *Across Sales on Horseback*, *supra* note 8, at 727.

158. *See generally* Gedid, *U.C.C. Methodology*, *supra* note 137 (discussing the Code as comprehensive and unified; the use of coordination and *superordination* for handling conflicting rules in the Code).

context elicits possible application of more than one rule. This is an area of potential rule conflict. In either case, there is a lack of a direct fit between a rule or group of rules and the context.

In the case of non-fit, the court will undertake an interpretative inquiry as to whether a rule or series of rules should be expanded or contracted in order to solve the problem presented by the case. The avenue for resolving issues of non-fit or gaps in the rules is the tapping into the "P" behind the rules consisting of purpose, patent reason, policy, and principles. The first two types of "P" (purpose and patent reason) under Article 2 are what the judge initially looks to for interpretive guidance in the application of a rule to a novel context. Although more particularized principles and policies may be attached to the different rules, the "Ps" of purpose and patent reason capture Llewellyn's vision of a singing rule. "Principles" (and to a lesser extent policies) will be reserved to the relatively few meta-principles that overlay the Code rules. They will be used to complete the model of contract interpretation referred to here as dialectical conceptualism. We will briefly postpone the place of principles or policies ("Big P") until after further mapping the other pieces of the theory. The next section will first compare the different ways abstract conceptualism and dialectical conceptualism deal with the novel context and the problem of rule non-fit.

1. Abstract Conceptualism Versus Dialectical Conceptualism

Under abstract conceptualism, a meaningful "P" is severed from its underlying rule through a process of formalism. Rule interpretation and application becomes a totally self-contained enterprise. The judge must fabricate an interpretive application completely from a textual reading of the rule and written contract (plain meaning rule). In order to accomplish such an undertaking, and retain a degree of logical integrity, the novel case is made to appear less novel. The novelty of a case comes from the uniqueness of the context. By excluding contextual evidence the conceptualist judge is able to narrow the problem within the formal frame of the rules. He then weaves a reading of the rule that provides a formal answer without addressing the novel contextual issues that generated the non-fit in the first place.[159]

It should be noted that the arbitrariness of context avoidance prevalent in the abstract conceptual system was at least partially mollified

159. This is what Clare Dalton has called "the method of hierarchy in duality [that] allows our doctrinal rhetoric to avoid underlying problems." Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000-01 (1985) (Dalton's underlying realities being masked are the problems of power and knowledge).

by structures within the system. For example, when context makes freedom of contract rationales untenable the system provides narrowly constituted exceptions such as fraud, duress, incapacity, and excuse. It also provided a roving interpretive escape hatch of implied intent or lack of intent to be bound.[160] These are what Duncan Kennedy refers to as *pseudo-resolutions*.[161] They are pseudo-resolutions because they feedback into the same abstract-formal-indeterminate structure of freedom of contract that they are attempting to mollify. In the hands of the conceptualist, the exceptions act purely to mask the absolutism of abstract conceptualism; at the same time they portray a pseudo-sensitivity to the context of cases.[162]

In contrast, dialectical conceptualism allows a free flow of context into the case and discourages the type of formalism that characterized abstract conceptualism. Llewellyn's attempt to create singing rules and encourage purposive interpretation invited the folding in of novel contextual evidence to give meaning to the rules. Llewellyn collapsed the traditional verticality of principle to rule. The singing rule incorporates the reason or purpose within the rule. Thus, the search for higher principle or abstraction is unnecessary.

2. Llewellyn's Free Flow of Context

There will generally be two contexts in all but the truly novel case[163]—the particularized context of the individual case and the context of situation-sense. In essence, Llewellyn built a second level over the ground floor of factual context. Instead of proceeding upward from case to rule to concept-principle, the direction is from case context to situation context to rule to concept-principle. The particular case is assessed for a similarity to a group or category of transactions. Once placed within or near a category, the situation-sense provided by that grouping is used to direct the court to rule fits previously applied.[164] Situation-sense is the recognition that a case may be made a

160. Kennedy, *Distributive and Paternalist Motives*, *supra* note 26, at 582.

161. *Id.* at 682.

162. This is the notion of fabricating a wholeness of legal structure by masking its internal contradictions. Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001) ("dialectical transformation").

163. The "truly novel" case presents a fact pattern so different that it fails to relate in anyway to existing transaction or situation-types. In such a case, the court may be prompted to recognize the beginning of a new situation-type.

164. "The realist goal of grouping legal situations into 'narrower categories' that fit, that are based on the actual commercial circumstances, has indeed been achieved . . ." Wiseman, *Merchant Rules*, *supra* note 81, at 538.

part of an ongoing development of commercial practice. As such, the case is folded into an evolving rule-fit.

3. The Danger of Judicial Arbitrariness

The free flow of context anticipated in Llewellynian jurisprudence is still susceptible to the danger of judicial arbitrariness. The danger is in the fact that context may be fabricated by the judicial decision-maker.[165] In abstract conceptualism the fullness of context was avoided in order to maintain the formal conceptual apparatus. Contextualism opens the judge to additional data but the relevancy of that data is judicially constructed. The opening up of rule application to context is unlikely to deter the conceptualist judge from continuing work within a self-contained pyramid of abstraction.

However, Llewellyn jurisprudence attempts to minimize the judicial temptation to partake in arbitrary construction necessary to maintain the doctrinal purity advanced by abstract conceptualism.[166] The nature of singing rules provides the judge with the patent reasons that allow for rule adjustment. The singing rule's inherent flexibility allows for overt tailoring to contextual novelty. The covert means of adjustment that characterized legal formalism have no place in such an interpretive methodology. Rules that provide patent reason allow for theory building without resorting to broader principles or abstractions. Such reason-induced rule application creates the type of rule fit that allows the law to evolve to meet changing commercial practices.

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165. "[T]he particular fact situations decision-makers construct from the testimony submitted to them, requires us to search for other explanations." Dalton, *Deconstruction of Contract*, *supra* note 159, at 1010. *Compare* Todd D.Rakoff, *The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense'*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 222 (Jack Beatson & Daniel Friedmann, eds. 1997) (1995). Professor Rakoff argues that there are two constraint to liberal-conservative "wobble" in the fabrication of context. First, the situation-type is constructed upon actual situations that have "some preexisting structure . . . that is hard to fake." *Id.* Second, the institutional restraint of "craft criticism." *Id. See also* Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L.J. 19 (1993) (the construction of legal categories is partially an adoption of roles and transactions defined by society). Thus, a judge's ability to construct a context that allows for an arbitrary rule fit may succeed in the ad hoc case but not in a class or category of such cases.

166. Lawrence Friedman assessment of the role of in regulating contracts is supportive of this claim. "When old theories had been taken apart brick from brick, there was nothing to stop the court from doing directly, what it sued to do by indirection." LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 215 (1965). Once the edifice of abstract conceptualism was removed, "the court paid ever more attention to the particularities of the situations before." *Id.* Although this speaks to the increased role of contextualism, Friedman's reference to fairness indicates that the focus is on what Llewellyn denigrated as "fireside equities." For Llewellyn's situation-sense was not aimed at ensuring the fairness of the particular case, but the rightness of commercial practice over the long haul. "[T]he sense of the type-situation, where it can be tapped, outranks and outshines any 'fireside' stuff." COMMON LAW TRADITION, *supra* note 9, at 245.

B. *Dual Track Theory of Interpretation*

The process of fitting and justifying a rule not only requires an interpretation to fit and justify the particular class of cases or problems, but also to fit and justify all types of cases that the rule is expected to cover. An example is demonstrated in justifying the exceptions to the Statute of Frauds. The reasons for hinging the enforceability of certain contracts on the existence of a written instrument include prevention of fraud, along with the promotion of channeling and cautionary concerns.[167] In certain types of cases the requirement works an injustice that may dictate an adjustment to the rule. However, any such adjustment must be justified by a modified version of the rule that produces a better *overall* rule fit.

The cases of injustice that troubles courts were ones where the plaintiff's actions were hard to explain but for the defendant making a promise upon which the plaintiff relied or cases where the defendant received a large benefit at the plaintiff's expense. A rule adjustment to allow the enforcement of such promises would seem to create a better rule fit for these types of cases. However, such an adjustment to the Statute of Frauds could cause a non-fit in other cases covered by it. For example, if the promise relied upon was for an employment contract of five years, then a rule adjustment that fails to address the overarching reason for the rule would cause non-fit elsewhere and must be rejected.[168] Thus, a rule adjustment or exception to elevate an injustice in one area is precluded if it undermines the rule's purpose in other types of cases. The requirement of a writing in the five year employment agreement scenario serves to advance the evidentiary rationale that underpins the Statute of Fraud's mandate that contracts that cannot be performed within one year need to be in writing. At the same time, the requirement bolsters the judicial enforcement of the employment at will principle.

1. The Second Track: Applying "Big P"

There still remains the possibility that the purposive expansion or contraction of a rule in response to contextual meaning will produce an undesirable result. Undesirability needs to be defined in order to proceed. Assume, from the perspective of rule to context or from the perspective of a system of interrelated rules, a purposive rule fit is

167. Fuller, *Consideration and Form*, *supra* note 59.

168. This example was taken from *Rule of Law*, *supra* note 7, at 1264. It should be noted that the although the injustice that the rule adjustment sought to avoid did not result in a formal adjustment of the Statute of Frauds it has been given relief through application of the independent rules of promissory estoppel and unjust enrichment.

achieved. The rule application is justifiable from the perspective of freedom of contract or the enforcement of the true understanding of the parties. Nonetheless, the concrete result has a taste of social unacceptability. An example of this would be the development of a trade usage or custom that is unfortunate from the point of view of morality or efficiency. Put simply, how does a court deal with bad business practice?

Faced with such a result, the court will need to undertake a second level interpretive inquiry. This is where "Big P" comes into play. "Little P" relates to the underlying principles or policies that inform specific rules. "Big P" refers to overarching principles of greater abstraction that are *transubstantive*[169] in nature—occupying the entire area of law (contracts or sales). The incorporation of meta-principles, such as good faith,[170] fair dealing,[171] unconscionability,[172] and excuse,[173] provides a type of Dworkinian umbrella.[174] The judge in the case of an undesirable result, can theory-build to justify the non-application or modification of the rule to the given context. If the contextual analysis provides an understanding that is based upon prior dealings or trade usage that produces overreaching, windfall, or relational abuse, then the judge can see if the enforcement of that interpretation conforms to the institutional morality represented by the Code's meta-principles. The meta-principles are used to fabricate a more particularized P to fit and justify a reconstructed rule.

This type of rule construction through theory building utilizing Big P is premised upon the availability of the principles to fit and justify any novel fact pattern. But, what if the Code's meta-principles fail to support a rule reconstruction? The Code provides an alternative avenue for the judge to find principles to fit and justify rule reconstructions. For example, Section 1-103 expressly authorizes the adoption of

169. Rosen, *What Has Happened to the Common Law?*, *supra* note 135, at 1165.

170. U.C.C. § 1-202 (2004).

171. *Id.*

172. U.C.C. § 2-302 (2004).

173. U.C.C. § 2-615 (1998).

174. *See generally* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); RONALD DWORKIN, LAW'S EMPIRE (1986). *See also* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (Dworkin-style theory building of contract law). It is important to note here the Critical Legal Scholars attack on Dworkinian theory building. In short, the indeterminacy of rules is not overcome by Herculean theory building. Because for every principle there is a counter-principle; for every theory a counter-theory. Ultimately, the principle of theory chosen is a matter of ideological choice. *See generally* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*Fin De Siècle*) (1997) (showing that a judge with an ideological preference for an outcome can work to make that outcome law); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986) (summarizing CLS critique of Dworkin).

"principles . . . of equity."[175] A comment to Section 2-615 further expresses the need to work into deeper structures of the common law to instill additional meaning to the Code's meta-principles. It states that it is the general policy of the Code "to use equitable principles in the furtherance of commercial standards and good faith."[176]

It needs to be stressed that this type of reasoned analysis is exactly what Llewellyn attempted to foster with his methodology of situation-sense (contextualism) and singing rules (patent reason). A simple application of a fixed rule, except in cases of formality, have no place in his theory of legal interpretation.[177] Llewellynian interpretive methodology requires that rules and decisions exhibit the reasons behind their words, and, if necessary, to explore deeper structures of purpose. In such an exploration he believed that the rules are able to respond to novel or hard cases.

C. *Interpretation as Exercise in Theory Building*

Both Llewellyn and Dworkin view the proper interpretation of law and its application to the particular case requires an exercise in theory building. What separates Llewellyn's methodology from Dworkin is his contextualism. For Dworkin, rules are framed solely by using law's internal morality. Llewellyn's contextualism bridges the gap between community morality (situation-sense) and law's morality (patent reason). For Dworkin, the meta or general principles of a body of law (Big P) are acontextual. For Llewellyn, general principles like rules are context dependent. What is good faith or unconscionable for one situation-type is not necessarily so for another type.

For both Llewellyn and Dworkin, rules are not the operative feature of the law's internal morality. For Llewellyn, it is the reason behind the rule; for Dworkin, it is the relatively stable but more abstracted higher principles. Such higher principles for Llewellyn were matters of last resort. Properly constructed singing rules would normally be sufficient to satisfactorily fit and justify most rule applications. However, such construction is never complete—"a *rule* never rises to the full level of a rule."[178] The combination of reason behind

175. U.C.C. § 1-103 (2004). *See generally* Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906 (1978).

176. U.C.C. § 2-615, cmt. 1 (1998). *See generally* LARRY A. DIMATTEO, EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES (2001) (historical review of the role of equity in contract law).

177. This use of principles reasoning is found in both Dworkin and Llewellyn's interpretative methodologies. The difference is that Llewellyn recognizes an element of choice that Dworkin disdains. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 519 (1988).

178. COMMON LAW TRADITION, *supra* note 9, at 343.

the rule, novel fact patterns, and evolving situation-types implies that adjudication is a continuing process of rule improvement or updating.

1. Transformative Nature of Law

Another point of departure between Llewellynian and Dworkinian theory building is the ultimate product of the exercise. The strongest version of Dworkin's right answer theory believes that the right theory will lead Hercules to the one right answer. Llewellyn is more skeptical of the process. He sees any talk of one right answer as a fiction of abstract conceptualism. However, he does see a benefit to the fiction. It serves as a "fictional frame of discourse" or "ideal to unchain constant effort."[179] Doctrine and rules are pluralistic by nature, and will remain so. A combination of that pluralism and the ideal of systemic coherence provide the motive force for assimilating dynamic social context within a relatively stable, functional legal order.

Llewellyn's primary construct is that law is not transformative in nature; rather law flows from commercial-social reality.[180] The singing rule allows that social law to be transformed into legal rule. But this popular view of Llewellynian realism is overdone. He did see a role of law in fostering good commercial practice.[181] In addressing the need for a Uniform Commercial Code in 1940, Llewellyn noted that "large portions of [sales] law *can* be put into terms which afford material guidance to the layman in the *doing* of his commercial business."[182] In *The Cheyenne Way*, Llewellyn intimated that in the hard case the law's transformative potential comes to the surface. "[A]

179. Llewellyn, *Problem of Juristic Method*, *supra* note 10, at 1365.

180. *Contra* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985). Professor Hillinger argues that Llewellyn's Code was primarily a reflection of what he thought commercial practice should be. In short, rules like the written confirmation rule were not written so much to recognize commercial practice but to create a merchant duty. She argues that "the Article 2 merchant rules do not codify trade custom and usages. They codify Llewellyn's law of merchant's peculiar obligations." *Id.* at 1181. She further states that many Code provisions "articulate what Llewellyn believed to be sound, rational commercial rules. They do not reflect *actual* business conduct but rather adopt Llewellyn's *ideal* business conduct." *Id.*

181. *See generally* Wiseman, *Merchant Rules*, *supra* note 81, at 494 ("Llewellyn's vision . . . was at least partially a prescriptive conception of merchant reality"). *See also id.* at 505. In his 1941 "Report of the Special Committee on a Revised Uniform Sales Act," Llewellyn states that it is the policy of the Act that "general practice, shall not overstep the bounds of . . . reasonable balance and fairness[; to that end] appellate courts are made the guardians to keep improper or unfair mercantile practices, however pervasive, from encroaching upon the polices declared in the Act." THE REVISED UNIFORM SALES ACT, *supra* note 38, at 29.

182. Memorandum to NCC, "Possible Uniform Commercial Code," *in* TWINING, THE REALIST MOVEMENT, *supra* note 2, at 525.

trouble-case drives so strongly toward becoming a precedent gives the imperative or standard repeatedly to *leap ahead* of the actual behavior pattern—not to flow from a behavior pattern, but perhaps to create a pattern on the model of even a single instance."[183] Once again, in selling his Uniform Commercial Code in 1954, he states that there is a need to cure "the continuing presence in the law of technical traps which can . . . be used in bad faith to do outrage."[184] One can argue that if he believed that poorly formulated law could induce bad faith, then the opposite also holds true.

The clearest expression of Llewellyn's view of the transformative or critical role of contract law can be seen in his analysis of standard form contracting:

> [It is the role of the judge through contract law to] see that free contract presupposes free bargain, and that free bargain presupposes free bargaining . . .The background of trade practice gives a first indication [of the reasonableness of a term]; the line of authority rejecting unreasonable practice offers the needed corrective.. . . Courts' business is not the making of detailed contracts for parties; but courts' business is eminently the *marking out the limits of the permissible*, and the reading of fair understanding . . .[185]

In contract law interpretation, the reasonable person standard[186] has been used for the marking out process. The reasonable person is imbued with the totality of the circumstances[187] including the background of trade usage and custom. Llewellyn viewed the reasonable person standard as both a descriptive and normative undertaking.[188] It functions not only to uncover the *is* of the transaction but also to mark off the impermissible.

For Llewellyn, bad business practice that was clearly bad was not a major issue under his contextual system. Business practice that is a product of bad faith is likely to be idiosyncratic and would probably

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183. THE CHEYENNE WAY, *supra* note 3, at 287 (emphasis added).

184. Statement to the Law Revision Commission, *in* TWINING, THE REALIST MOVEMENT, *supra* note 2, at 537.

185. Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939).

186. *See infra* Part IV.F. *See generally* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293 (1997) (traces sources and composition of reasonable person standard).

187. *Id.* at 318-25. An Official Comment to Section 1-205 of the Code states that the language found in a contract shall be "read and interpreted in the light of commercial practices and other surrounding circumstances." U.C.C. § 1-205 cmt. 1 (2004).

188. I discussed the transformation of the descriptive to the normative reasonable person in a previous article: "The barometer of custom and usage provides insight into the *is* [true understanding] of what the parties intended. It also provides a measurement for what the community believes the contractual terms *should* mean." DiMatteo, *Counterpoise of Contracts*, *supra* note 186, at 330.

stink of "badness." Such egregious, particularized forms of conduct would be relatively unproblematic for the law to reject. The court could look to their idiosyncratic nature to preclude their elevation to reasonable trade usage or custom in the first place. If this particularized thesis is untenable, then the meta-principles of good faith and fair dealing would provide a good fit for their non-enforcement or adjustment. What most concerned Llewellyn is the re-enforcement of inefficient business practice. This was the more difficult issue for the Code and provided a transformative challenge to contextualism. The next section's discussion of good faith and fair dealing as being related to both institutional and community moralities provides additional insight into to the law's response to this challenge.

2. Institutional Versus Community Morality

One issue remains: Are the Code's meta-principles a part of institutional morality or simply a reflection of community morality? This is a perplexing problem—one in which we will venture some speculation. For purposes of simplicity, we will pick the principles of good faith and fair dealing to discuss. Are the Code's principles of good faith and fair dealing in the performance and enforcement of contracts part of the law's internal morality or are they a reference to the community's morality (business reality)? The answer is both. Good faith and fair dealing affect the application of all the Code provisions or rules. They are therefore part of the internal morality of the Code. They also relate to the community's view of a given practice or deviation from a certain practice. The characteristic of community is important in this regard. Since bad faith or inefficient practice is a reflection of a specific community, it is also a reflection of that community's morality. However, contextualism allows for the expanding of the community to check the true nature of a given practice. The practice that is condoned in a particular business or trade can be condemned as abusive when held to the standard of good faith adhered to by the more general business community.

Seen as serving both law's and community's morality supports the dual role of such principles in Llewellyn's contextual system. The "goodness" of a certain practice or usage can be measured against the good faith principle as a reflection of the real world morality of expanded communities. Good faith as legal concept or principle can be used to theory build within law's internal morality. The contextual flow into the rule can be redirected upward into the meta-principles to see if an adjustment to the rule in the particular case is dictated.

As mentioned earlier, the device of situation-sense is part of Llewellyn's contextual system. It can be viewed as a factual check on the digression of Big P into transcendental nonsense. The abstractness of principles like good faith and fair dealing are made more particularized by the contextualism of situation-sense. It is in this way that Big P is reduced to a Small P rationalization for the particularized rule adjustment. Alternatively, the meta-principles can be used as what Lon Fuller referred to as *doctrinal bridges*[189] to justify an adjustment of a rule or a denial of contextual meaning. The Big P provides the doctrinal bridge lacking in Small P in order to change a rule interpretation despite the existence of a rule fit.

D. *Llewellyn Theory Building and the Dual Track Theory of Interpretation*

To summarize, Llewellynian theory building runs on two tracts—the factual and the conceptual. The theory building nature found in Llewellyn's contextualism and rule reason is made clear towards the end of *The Common Law Tradition*:

> No rule or principle can ever, . . . , tell any court, in concretely definitive terms, what scope *the* problem situation before it has, or, more accurately, is best made to have. . . the problem situation extends as far as you have grasped the picture fully and completely *in life-essence and in its detailed variants* . . . it is wise to deal with it, because small things take fuller meaning in the context of greater ones. And also because the law does well to trend into ever larger unities, *so long as they remain meaningful as they grow*. But those unities must be and remain meaningful, over the whole scope, in terms of life and sense, not merely in terms of formula . . . [or] else they do harm. That is why a court is doing its duty when. . . it goes to bat on the whole of a broad situation.[190]
>
> . . .
>
> But that is also why any doubt about whether the court has the whole situation in sure grasp is to be resolved *by the court always in favor of a narrower* rather than a wider scope. When felt mastery is present, wide scope is indeed not only sound; it verges on duty. Precedents are always needing synthesis into rules which make better sense for a whole situation-type, for a whole set of really or seemingly variant decisions. Rules, too, are always needing to be regrouped and rephrased around principles which can guide

189. Lon Fuller, *American Legal Realism*, AM. PHIL. SOC'Y 191, 208 (1936). Pound acknowledges that general provisions often act as doctrinal bridge substitutes. "Where a large number of general provisions are available, as they are in most codes, 'doctrinal bridges' are not necessary." *Id.* Llewellyn recognized Fuller's conceptual bridge as a "neat observation." COMMON LAW TRADITION, *supra* note 9, at 59.

190. COMMON LAW TRADITION, *supra* note 9, at 427.

> through still wider situations in terms of surer sense. But, just as truly, facts are constantly emerging which call for sub-division and distinction even within those older, wider rules and categories . . . Which way to do the growing . . . that is a question of sense. . .[191]

The preference for the "narrow" is the essence of situation-sense modeling. But the construction of the narrow with the advent of novel fact patterns and new situation-types is accomplished through a ground-level look at social roles and transaction-types and an upward look for conceptual coherence. This coherence is found in the reasons behind the rules, principles, and meta-principles of contract law. Incoherence is produced by a divergence of the legal and the social. This occurs when rule application is produced through an abstract hierarchy uniformed by social context, and results in the formalistic application of fixed, unitary rules to different situation-types.

E. *Reconstructing Contract Doctrine*

The above-described theory of interpretation can be utilized to reconstruct existing doctrine and rules that fail to provide a proper fit between theory and rule application.[192] This reconstruction can be accomplished by theorizing from cases in a piecemeal restructuring or as part of a broader reform project. Three examples will be used to examine the evolution of contract doctrine through the prism of dialectical conceptualism: (1) infancy law doctrine, (2) law of excuse, and (3) promissory estoppel. In the area of promissory estoppel, the impact of the doctrine on the areas of precontractual liability and gift promises will be explored.

1. Reconstructing the Infancy Law Doctrine

The areas of *per se* rules in contract law seem open to reconstruction. The infancy law doctrine is an example of such a *per se* rule.[193] The fragmented, conflictive state of this common law doctrine makes

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191. *Id.* at 427-428.

192. In the opening pages of *The Cheyenne Way* Llewellyn and Hoebel allude to a process of theory building akin to that of Dworkin:

> The best one can do is to try to make his own conceptual structure somewhat explicit, so that the reader may be warned by it. If that be done, and if that structure be taken, so far as may be, not as a something given in nature, but as a working hypothesis, then it may be possible to let any odd, sharp corners of the cases be felt and continue to be felt in whatever intellectual discomfort they may offer, *until the conceptual frame reshapes itself to hold* all *the cases*. . . .

THE CHEYENNE WAY, *supra* note 3, at 19 (emphasis added).

193. Another example is the per se rule against the assignability of personal service contracts. *See generally* Larry A. DiMatteo, *Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability*, 27 AKRON L. REV. 407 (1994).

it susceptible to reconstruction through a process of contextual theory building. The infancy law doctrine in its pristine form holds that someone under the age of majority may disaffirm her contracts without consequence (penalty).[194] It allowed a minor within a reasonable time after reaching the age of majority to void her contracts and receive full refunds of any monies paid. The ancient lineage of this paternalistic doctrine has lost touch with the socioeconomic condition of minors in the modern world. The law's response has produced a patchwork of sub-doctrines that continue to pay homage to the pristine version. The attempt to bridge the gap between the social reality of minority and legal doctrine through the use of exceptions has produced a chaotic jurisprudence. The result is the replacement of the majority rule with an ever-growing set of minority rules and doctrines.[195] The marginal protection of minors offered by such doctrinal chaos, and its divergence from social reality, has rendered the doctrine unable to fit and justify case decisions.

The unmasking and reconstructing offered by situation-sense and theory building is one alternative. The *per se* rule of disaffirmance needs to be replaced by a case-by-case rebuilding of the law. The process begins with an acknowledgement that incapacity is an exception to contract law's core premise of freedom of contract. A number of the sub-rules—the necessities, emancipation, and misrepresentation doctrines—simply become part of the contextual analysis. The competing policies and principles should be laid bare. They include the need to protect minors from unscrupulous adults, the need to protect innocent adults from the "offensive use" of the infancy doctrine by savvy minors, the freedom-limiting nature of incapacity, and the role of parental responsibility. On balance, the elimination of the infancy law doctrine may better reflect society's view of minor accountability and parental responsibility. The better rule fit would then replace the *per se* rule of incapacity with a presumption of enforceability premised upon a full contextual analysis. The rule could be coupled with an exception or the use of a meta-principle to police the application of the presumption.

2. The Reconstruction of Excuse

The historical evolution of the excuse doctrines in Anglo-American law also illustrates the process of situation-sense confronting existing

194. *See generally* Larry A. DiMatteo, *Deconstructing the Myth of the 'Infancy Law Doctrine': From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481 (1994).

195. These include the necessities doctrine, benefit rule, depreciation rule, misrepresentation of age exception, and the emancipation doctrine.

doctrine and producing reconstruction.[196] Excuse is a doctrinal exception to the primary rule of paying compensatory damages for all breaches of contract. A party is obligated to honor her contractual promises or pay damages. Excuse as exception to *pacta sunt servanda* holds that where the breach is involuntarily rendered and not the fault of the breaching party, then it is unjust to force her to honor the contract or to pay damages. Initially, the common law's lone excuse doctrine required objective impossibility in order for a party to be relieved of contractual liability. One can then imagine the development of factual situations that challenged the fit of such a strict excuse rule to social reality. These cases sought to reject the "objectiveness" of impossibility and provide an excuse where performance although not objectively impossible has become functionally irrelevant. The English coronation cases[197] where a premium is charged for hotel rooms for purposes of witnessing the coronation of a king or a queen were the hard cases of change. When the coronation is delayed the purpose of the contract, along with its premium rate, were frustrated.

Moving behind the impossibility doctrine to principle and purpose, the novel fact patterns prodded a reconstruction or expansion of excuse into the realm of commercial frustration. A more rational law would excuse a party who is prevented by unforeseen, external events from performing or from reaping the expected benefits of performance. It is also recognition that not all breaches are the same using a culpability measurement and therefore, the law should be made to fit and justify the enforcement of some breaches and the non-enforcement of others. The frequency of frustration cases eventually produced a category or situation-sense. The reason behind the existing excuse doctrine of relieving an "innocent" non-performing party was applied to reconstruct—fit and justify—a parallel excuse of frustration of purpose.

To carry the analysis further, one can envision a series of fact patterns where performance has not been rendered impossible, nor has it been "objectively" frustrated, but nonetheless social reality, and possibly commercial custom, questions the strict enforcement of a contractual obligation. In these "novel" cases the underlying requirements of non-foreseeablility and non-fault are present, but the performance is still performable and the receiving party still wants performance. Therefore, the rule fit diverges from the social reality. Thus a new

196. For other examples of situation-sense and its role in legal theory building *see* Rakoff, *supra* note 126 (evolution of substantial performance doctrine); HUGH COLLINS, REGULATING CONTRACTS 189-92 (1999) (promissory estoppel doctrine).

197. *See* Krell v. Henry, 2 K.B. 740 (Eng. C.A.1903).

situation-sense calls for a reconstruction or expansion of the rule. This new rule of excuse would allow for the voiding or reforming of contracts that because of external occurrences have been rendered impracticable to perform. The principled broadening of the base of the excuse rule allows for the law to fit and justify different fact categories or situation-senses.

The enactment of the doctrine of impracticability in Section 2-615 of the Code can be seen as an example of the adaptive characteristic of law or the transformative power of law. The adoption of Section 2-615 can be used to illustrate possible relationships of law to society. Hypothetically, Llewellyn's review of commercial practice may have uncovered a custom or usage whereby merchants voluntarily released each other from contracts when they have been rendered commercially impracticable to perform. In such a scenario, Section 2-615 would be an example of contract rules adjusting to commercial reality. In an alternative scenario, Llewellyn's search of commercial practice saw no clear usage but a muddle of different practices. He saw, possibly as a matter of good faith, the release of contractual duties under such situations as the better practice. In this way Section 2-615 would be an example of the transformative power of the law.

If we take the reconstruction of the excuse doctrine a step further, we see a court faced with a situations-sense involving a long-term supply contract. Owing to a historically high increase in the cost of a component, the contract has been rendered unduly burdensome to the supplier. However, the long-term nature of the relationship and the supplier's financial commitment and dependency on the contract questions the rule fit of granting an excuse. The issue then shifts from promisor excuse to promisee duty. Should the law require the promisee to adjust the contract to maintain its viability to the promisor?[198] One approach that would seem to be a good fit in a realm of contextualism is to be guided by the purpose or spirit of the contract. What were the goals of the parties in entering such a long-term contract? Would these goals be served by forcing the party to perform under the strict terms of the contract (promisee perspective) or by providing an excuse out of the contract (promisor perspective)? Would forcing the promisee to adjust the contract better preserve the goals of the contract, rather than strict enforcement or outright excuse? The *ALCOA*

198. *See generally* Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An analysis under Modern Contract Law*, 1987 DUKE L.J. 1 (argues for a duty to adjust in certain situations). *Contra* Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985) (no duty to adjust).

v. Essex Group, Inc.[199] court performed such an inquiry in asserting a duty to adjust. "The court gave close attention to the legitimate business aims of the parties and the need to *frame* a remedy to preserve the essence of the agreement. To that extent this decision exemplifies the new spirit of contract law."[200] The facts of particular cases and the situation-sense type of long-term, relational contracts are likely to continue to play important roles in the adjustment of excuse and the law's remedial response.[201]

3. Expansion of Contractual Liability: Promissory Estoppel, Precontract, Implied Contract, and Gift Promises

Unlike other theories or approaches related to contract interpretation, dialectical conceptualism in general, and the contextualism it promotes, provides the mechanism rather than the rationale for expansive enforceability in the areas of promissory estoppel and the related areas of precontractual liability, implied contract, and gift promises. This section will offer some insight into the role of theory building and contextualism in the areas of precontract, implied contracts, and gift promises. The contextual track allows for the freer flow of evidence to support claims of reliance under the theory of promissory estoppel and thereby the rationales for the greater enforcement of precontractual and gift promises, along with the increased recognition of previously unenforceable obligations represented by the expansion of implied-in-fact contracts. The conceptual track allows for the use of meta-principles, such as fair dealing, good faith, and reasonableness, to provide the express rationales for expanding the safety net of contractual liability.[202]

Promissory estoppel necessarily requires the more liberal admissibility of extrinsic evidence and the expansion of contract-based rationales into the area previously characterized as noncontract:

> The most wide-ranging effect of contextualism is the allowance of the entrance of a pre-contractual promise through the backdoor of contract interpretation. Evidence of promises made during the negotiation stage, formerly precluded by strict application of the plain

199. 499 F. Supp. 53 (W.D. Pa. 1980).

200. *Id.* at 91 (emphasis added). *See generally* Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982); John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1 (1984).

201. "Conflicts can be resolved by responding to the type of transaction involved and resorting to equitable principles when needed." Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305 (1994)

202. The meta-principles have also provided the rationales for an expansion of limiting doctrines, such as economic duress and the liberalization of contractual excuse as discussed previously.

> meaning and parol evidence rules are now admitted as evidence to 'clarify' the written contract.[203]
>
> In a broader way contextualism made possible the rise of reliance theory and the expansion of the good faith performance doctrine. As contractual liability increasingly began to hinge on the reasonable expectations of the promisee and not the plain meaning of the words of the promisor, contextual evidence became imperative in order to prove reasonable reliance. Good faith as embodied in the Code necessarily requires a contextual inquiry. The acontextual nature of classical contract law and its fixation on contract language retarded the evolution of a thicker conceptualization of good faith.[204]

The loosening of the evidentiary threshold and the acceptance of the need to protect reliance or the reasonable expectations of the promisee resulted in the expansion of contractual liability. The need to enforce promise coupled with the need to protect reliance allowed for more expansive use of meta-principles like fair dealing, good faith, and prevention of injustice. This expansion has manifested itself in a number of ways including, the enforcement of promises not encased in an agreement or not supported by legal consideration (donative promises), the blurring of the line between precontract and contract (precontractual liability), the weakening of the power of integration to prevent the admission of precontractual promises in contract interpretation (studied ambiguity), and the expansion of implied contracts, most notably in the area of employment[205] and the creation of *sui generis* types of contract relationships, such as franchising and distributorships.

One can offer a number of characterizations regarding the impact of the recognition of meta-principles, such as good faith, and the greater use of context on the line between contract and noncontract. Here are a few. It is relatively easy to suggest that the line between contract and precontract has moved in that what was needed to prove a contract under classical contract law (definiteness of terms) has weakened to the point where contract has expanded into areas previously considered precontract.[206] An alternative characterization suggests that the primary impact of new meta-principles and

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203. *Reason and Context*, *supra* note 11, at 474.

204. *Id.* at 475.

205. *See generally* Julia Barnhart, Comment, *The Implied-in-Fact Contract Exception to At-Will Employment: A Call for Reform*, 45 UCLA L. REV. 817 (1998); Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994).

206. *See, e.g.*, E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987) (discussing intermediate regimes between negotiations and ultimate agreement).

contextualism has not so much been the movement in the line of contract formation but in the development of different remedial regimes; that contract remedies (expectation damages, specific performance) have simply been supplemented by precontractual remedies (reliance). A simpler explanation is that the increased use of promissory estoppel in the areas of precontractual liability and gift promises is a result of the increased level of complexity in modern contracting. The use of negotiation blueprints and memorialization-inducing devices such as preliminary agreements, agreements to agree, detailed letters of intent, comfort instruments,[207] along with the increased complexity and formalization of charitable donations, have rendered the definiteness requirement of classical contract obsolete. In effect, the common law of contracts can be seen as simply catching up with the Code's jettisoning of the notions of materiality (implication of all necessary terms) and formality (weakening of Statute of Frauds and consideration requirements).

F. *Reasonable Person and the Contractual Shelf*

Contract interpretation as envisioned by the objective theory of contracts requires a neutral, objective interpreter. This interpreter is embodied in the reasonable person standard. The reasonable person replaces the actual contractual selves represented by the subjective, internal interpretations of the contracting parties. The *contractual self* can be seen as a device to expand the scope of the reasonable person standard in contract interpretation. Dialectical conceptualism does not question the central place of the reasonable person standard in contract interpretation. It does impact the fabrication and application of the standard. It envisions a broader version of the reasonable person. The notion of the contractual self represents that broader version of the reasonable person standard.

The reasonable person of contract interpretation has always been a contextual undertaking. The contractual self takes Llewellynian contextualism and extends it to a natural conclusion. Defining the contractual self is central to understanding the relationship of the theory, rules, and practice of contract law.[208] It is also essential that any the-

207. *See* Larry A. DiMatteo & René Sacasas, *Value and Credit Comfort Instruments: Crossing the Line from Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 BAYLOR L. REV. 357 (1995).

208. "Whether the self is viewed as the antecedently individuated personification of Rawlsian and Kantian moral philosophy or represented by the more communitarian view of the self as communally constituted is central to how the institution of contract impacts contract as practiced." DIMATTEO, EQUITABLE LAW OF CONTRACTS, *supra* note 176, at 269.

ory of contract interpretation account for such a mechanism of interpretation. For example, the reasonable person of classical contract was purely an instrumental device. The reasonable person is placed within the conceptual framework of liberal theory. This reasonable person is static in nature seeing freedom of contract as a linear progression, rationally based. Such linear rationality is premised upon the autonomous, unencumbered self. An expanded version of the contractual self is premised upon the belief in the inherent sociality of a more fully-constituted self. It is premised upon "what Margaret Jane Radin describes as the role of the *self within groups*."[209]

The importance of the self within groups (transaction-type, situation-type, merchant rules) is a central tenet of Llewellyn's contextualism. The problem with the classical reasonable person is that her rationality is narrowly confined to her words and actions at the time of contract formation. The contractual self recognizes that the self is a product of many contractual selves that project both historically and into the future.

Llewellyn's contractual self is a contextual phenomenon in a number of ways. It operates within the context of the specific transaction and within group-determined embedded structures. The group's notions of fair dealing and good faith are examples of such embedded structures. The temporally narrow reasonable person of abstract conceptualism is replaced with a continuous, broad-based social-contextual self. This brand of the reasonable person is a natural appendage to the decentralization of contract interpretation mandated by the Code. Under the Code, each contractual self is unique and reflects the personhood of a specific human subject. Each contractual self is a product of the unique experiences of past contractual selves and the evolving relationship between the individual self and the group of similarly situated selves.[210]

VI. CONCLUSION

The Llewellynian model of theory building rests on a simple belief that social reality possesses an internal coherence that implies the ability to construct an internal legal coherence through the flow of

209. *Id.* at 270, *quoting* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982). *See also* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992) (notion of the *contingent self*). "The view of the self as a fixed entity defined prior to and independent of social relationships has come under increasing attack. . . .The *contingent self* . . . permits us to articulate an alternative to the free will paradigm of responsibility." *Id.* at 961.

210. This view embraces the work in social norms and behavioral decision theory.

social context into legal rules. In the end, Llewellyn's attempt to bridge the conceptual-contextual divide through a dual track theory of interpretation positions him between abstract conceptualism and the indeterminacy of critical legal theory. His theory of interpretation grounded contract rules and their application in a contextualism connected to an evolving social dynamic. This grounding avoids the freezing of the law's conceptual apparatus that characterized the formalism of classical legal reasoning. His use of "singing rules" and meta-principles was an admission that law (rules) could be made to be functionally determinate.

Llewellyn's theory of interpretation was premised on the belief that rule application could be made functional when formal rules and doctrines were tempered by the reasons and purposes that underlie them. The goal of Llewellyn's singing rule was to make these reasons and purposes accessible to the person applying the rule. In the case where the reasons are not apparent, where there is a gap in the rules, or where there is rule conflict, recourse is to be made to meta-principles. It is these meta-principles that allow for the use of Dworkinian theory building in interpreting the "best" contract law possible. The application of such meta-principles as good faith, fair dealing, commercial reasonableness, and unconscionability allows for the prescriptive channeling of behavior that Llewellyn's realism was attacked as lacking. In this way the *right* to contract, as reflected in the unencumbered reasonable person of liberal theory, is not allowed to completely separate from the outcome or *good* of the contract, as reflected by a more fully constituted (social-contextual) contractual self. Dialectical conceptualism as a theory of interpretation is founded upon a broad view of contextualism and the contractual self. This expanded interpretive inquiry aims to bridge the distances between context-concept and subjectivity-objectivity.