CONTRACT LAW, CONTRACTING AND INSTRUMENTALISM

Simon Connell

1. INTRODUCTION

1.1 Aim and Structure of this Essay

John Smillie argues that the purpose of contract law is the promotion of contracting, a practice which has economic and moral social value. That purpose, he says, explains and justifies the traditional emphasis on certainty in classical contract law, and can be used as a touchstone for assessing reform.1 In particular, it can be used to reject reforms that depart from the rigid rules and doctrines of classical contract law in favour of flexible standards. Drawing on empirical research that suggests that, in fact, contract law has a minor effect on the actual practice of contracting, John Gava responds that classical contract law cannot be defended on the basis that it promotes market transacting. Furthermore, Gava argues, any attempt to justify contract law on economic grounds leads inevitably to understanding contract law in instrumentalist terms. Gava considers that anyone who accepts the findings of the empirical research (which I assume are true for the purposes of this exercise) and still wants to claim that the purpose of contract law is the promotion of contracting must adopt an instrumentalist version of contract law.2

The primary aim of this essay is to consider the extent to which Gava’s two arguments apply to Smillie’s position. Doing so provides an opportunity to

---

1 Faculty of Law, University of Otago.


contrast a number of different conceptions of contract law, and to explore whether claiming that contract law has a role in the promotion of contracting necessarily leads to instrumentalism. I begin by setting out Smillie's and Gava's arguments in such a way so as to best consider how the latter applies to the former. I suggest that accepting that contract law has only a minor role to play in the actual practice of contracting does pose a problem for Smillie's position. Unlike Gava, I suggest that Smillie's arguments can be modified to address this point without reducing contract law to a mere instrument of market transacting. I argue that instrumentalism would only follow if Smillie took the position that contract law exists simply to describe the practice of market contracting. However, I suggest, it is possible to understand Smillie as putting forward a more complex position – one where contract law's job is to facilitate contract law's own idea of proper contracting. This avoids the instrumentalism that Gava claims is inevitable while still making it valid to claim that the purpose of contract law is contracting.

Before I move on to the substance of this piece, I would like to offer a personal tribute to John Smillie.

1.2 A Personal Tribute to John Smillie

The purpose of this section is to offer my personal thanks to John Smillie, and share some of my personal memories of him. John has played an important role in my path through the world of academic law. As an undergraduate, he taught me Torts and Intellectual Property. My key memory of John's lectures is the clarity with which he explained those often complex areas of law. I recall that he would enthusiastically engage with students who were trying to make sense of the tricky parts of the law, provided that they had actually done the work of reading the cases and attempting to resolve the issues themselves.

When I decided to return to university and undertake postgraduate studies in law after working for the Accident Compensation Corporation for six years, I was fortunate to have John as my supervisor for my Master's degree. I had some difficult settling on an appropriate topic. Essentially, I was having trouble seeing the wood for the trees. I recall that I sent John an email with two written thesis proposals attached, both on relatively narrow aspects of New Zealand's accident compensation scheme. John explained to me in a meeting that neither of those topics would be conducive to the kind of theoretically sophisticated analysis required for a Master's thesis. "However," he said, "this seems much more

---

3 I will refer to him as "John" in this section and "Smillie" elsewhere.
interesting”, pointing to a comment that I had made in passing in the final sentence of my email. John helped me develop that comment into a thesis.

John’s supervision style was relatively straightforward. He was fairly clear about what he expected from me. When writing that I sent him was good, he would tell me. When it was not up to the standard required, he would tell me. John pushed me to produce the best final chapter that I could, going several revisions past the point where I thought I was done. I am grateful, as I was able to adapt that final chapter into an article for publication. I am also grateful to John for agreeing to give me a reference when I began applying for academic jobs. I am certain that John’s support was crucial in my appointment as a Lecturer.

I will conclude this section by thanking John for his writing. John’s writing is of exemplary clarity. His footnotes alone illustrate several things: a commanding breadth of research, a willingness to cite cases and articles that disagree with his position, and also an impressive restraint in terms of the content of his footnotes. These are all admirable things.

2. SMILLIE: THE PURPOSE OF CONTRACT LAW IS THE PROMOTION OF CONTRACTING

2.1 General Structure of Smillie’s Argument

Smillie argues that the purpose of contract law is the promotion of contracting. That position effectively functions as both a conclusion and a premise in the overall structure of a wider argument. Smillie gives two reasons for why we should accept the idea that the purpose of contract law is the promotion of contracting, which I will call the “argument from social good” and the “argument from classical contract law.” Having done so, he puts forward two further points that take his position on the purpose of contract law as a premise. First, he argues that any proposed reforms to contract law should be evaluated in terms of whether they impede or promote contracting. Second, Smillie puts forward an argument as to how the rules and doctrines of contract law should be formulated so as to promote contracting. That conception of how best to promote contracting is then applied to the detail of various aspects of contract law.

The structure of Smillie's position can be set out as follows:5

(1) The argument from social good:
   (a) Contracting is a social good
       (i) Contracting is socially valuable, in moral and economic terms
   (b) (1)(a) provides support for the idea that the purpose of contract law is the promotion of contracting.

(2) The argument from classical contract law:
   (a) The rules and doctrines of classical contract law emphasise certainty
   (b) Contract law that emphasises certainty is necessary for the promotion of contracting
   (c) (2)(a) and (2)(b) together support the idea that the purpose of contract law is the promotion of contracting

(3) Conclusion as to the purpose of contract law:
   (a) Given (1) and (2), it follows that the purpose of contract law is to promote contracting

(4) Conclusion as to the purpose of contract law as a touchstone for reform:
   (a) Given (3), it follows that any reforms to contract law should be assessed in terms of whether they promote or impede contracting

(5) The argument as to how contract law should promote contracting:
   (a) The necessary background conditions for free and informed choice are necessary conditions for contracting
       (i) Contract law has a role in ensuring that those conditions are present
   (b) To promote contracting, contract law must also do the following:
       (i) Given (2)(b), provide a certain set of rules about contract formation, construction and remedies; and
       (ii) Balance the following two interests when providing remedies:
           (A) Providing security of performance to promisees; and
           (B) Preserving the freedom of promisors to change their minds.

---

5 This account of the structure of Smillie's argument is constructed so as to best address Gava's criticisms. It is not presented as a complete summary of his articles.
Having set out the general structure of Smillie’s position, I will now set out the
detail of his arguments.

2.2 The Argument from Social Good

Smillie describes contracting as the exchange of binding promises as to future
action. This practice, he argues, promotes two complementary social values:
the moral value of autonomy and the economic value of efficiency. Contracting
provides a means by which people can pursue their individual ends, thus
promoting individual freedom. Contracting is also an essential part of a market
economy. Contracting facilitates the transfer of scarce resources between parties,
such that those resources end up in the hands of the parties who can make the
most efficient use of them. The collective economic welfare of society is thus
enhanced by the practice of contracting, as well as the welfare of individual players
in the marketplace.⁶

Addressing the moral and economic social value of contracting, says Smillie,
captures the essential insights from both the “will” and economic efficiency theories
of contract.⁷ Taking both the moral and economic dimensions of contracting
together, Smillie suggests, avoids the deficiencies of each of those theories. The
“will” theory of contract proceeds from “the basic premise that a contractual
promise represents the expression of the individual’s free will [and accordingly]
the function of the law of contract [is] to enforce the moral imperative that such
promises should be kept.” A serious problem with this theory, said Smillie, is
that it does not actually explain several features of contract law, including the
law’s focus on apparent rather than actual intentions and that Courts only
rarely actually “enforce” contracts through specific performance.⁸ The economic
efficiency theory of contract claims that the purpose of contract law is to facilitate
economically efficient exchanges. The deficiency in that approach, said Smillie, is
that economic theory has not actually provided any clear basis for determining
what the rules and doctrines of contract law ought to be.⁹ However, says Smillie,
while neither theory gives a satisfactory account of the details of how contract law
might promote contracting, each offers a valuable insight into why contracting
has a social value.

If contracting is a social good, argues Smillie, it makes sense that the purpose of
the law of contract is the promotion of contracting. There are all sorts of thing

⁶ Smillie “Security”, above n 1, at 110.
⁷ At 110.
⁸ At 104-105.
⁹ At 109.
that the law of x could do in relation to x – the law of x could promote x, deter x, regulate x, punish incidents of x, compensate victims of acts of x, and so on, or some combination of those things. Of all the various things that the law of contract could do in relation to contracting, Smillie argues, because contracting is a social good, it makes sense that what the law of contract does in relation to contracting is that it promotes it.

2.3 The Argument from Classical Contract Law

2.3.1 The Rules and Doctrines of Classical Contract Law Emphasise Certainty

Smillie argues that the emphasis on certainty was a defining feature of classical contract law (by which he means the law that developed in the late 19th century).\(^\text{10}\)

Once the formal requirements for a finding of contractual consensus were met, the parties were held strictly to their bargain and few excuses for non-performance were admitted. In the event of breach, the remedial responses were limited in scope and reasonably predictable in application.

The emphasis on certainty in classical contract law can be helpfully illustrated, as Smillie does, by contrasting it with the “fairness”-based reasoning that arose in the latter part of the 20th century, to which Smillie is opposed. The hallmark of that modern reasoning is a rejection of rigid rules in favour of more flexible standards that allow Judges to achieve a just result as between the parties. Consider the following examples:\(^\text{11}\)

(1) Offer and Acceptance

In classical contract law, the presence of a clear offer and an acceptance of that offer were required for the formation of a contract. Modern courts have advocated a “global approach” to offer and acceptance that allows for the conclusion that a contract has formed without having to decide that one specific communication was the offer and a later specific communication the acceptance of that offer.\(^\text{12}\)

\(^{10}\) At 104.

\(^{11}\) These points of law are ones that Smillie uses, though I have used some cases decided subsequent to his article to illustrate the contrast between formalistic classical and flexible modern contract law.

\(^{12}\) For example, see Boulder Consolidated v Tangata [1980] 1 NZLR 560, and Lord Denning’s (minority on this point) judgment in Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401. For more recent examples, see Goodman v Cospack [2004]
(2) Consideration

In classical contract law, the presence of valuable consideration on each side of a bargain was a requirement for contract formation. For example, an agreement to vary a contract for the benefit of one party without any corresponding valuable consideration would be unenforceable.\textsuperscript{13} Modern courts have found that the flexible idea of “practical benefit” to a party will suffice even when that party has not received anything that would traditionally be considered valuable consideration.\textsuperscript{14} The New Zealand Court of Appeal has recently indicated that “[t]he importance of consideration is as a valuable signal that the parties intended to be bound by their agreement, rather than an end in itself”\textsuperscript{15} and endorsed the proposition that “no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure.”\textsuperscript{16}

(3) Uncertainty of Terms

In classical contract law, contracts that were vague, or left important matters to be agreed, were unenforceable – it was not the role of the court to do the parties’ job for them and “fill in the gaps”.\textsuperscript{17} The modern approach to uncertain or absent terms is reflected in \textit{Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd.}\textsuperscript{18} as long as a court is satisfied that the parties intended to be bound, then a court must do everything within its power to resolve any ambiguities or gaps. Sometimes that will not be possible,\textsuperscript{19} but a court must strive to fill in any gaps if possible.

\textbf{2.3.2 Certainty is Necessary for the Promotion of Contracting}

Smillie’s argument for the importance of certainty for the promotion of contracting is this:\textsuperscript{20}

\begin{itemize}
  \item NSWSC 704; Compare Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209.
  \item Silk \textit{v} Myrick (1809) 2 Camp 317.
  \item Williams \textit{v} Roffey Bros \& Nichols (Contractors) Ltd [1991] 1 QB 1 (CA).
  \item Antons Trawling Co Ltd \textit{v} Smith [2003] 2 NZLR 23 at [93].
  \item Teat \textit{v} Willcocks [2013] NZCA 162, [2014] 3 NZLR 129 at [54].
  \item See, for example, \textit{May and Butcher Ltd v The King} [1934] 2 KB 17 with respect to the enforceability of “agreements to agree”.
  \item Electricity Corporation of New Zealand Ltd \textit{v} Fletcher Challenge Energy Ltd [2002] 2 NZLR 433, (2001) 7 NZBLC 103, 477 at [60].
  \item As in, for example, Biotechnology Australia Pty Ltd \textit{v} Pace (1988) 15 NSWLR 130 where meaning could not be given to a term promising an option to participate in a “senior staff equity sharing scheme” that did not actually exist.
  \item Smillie, above n 1, at 110.
\end{itemize}
In order to encourage people to negotiate exchanges of promises as to their future conduct, they must be able to know with confidence whether, and when, they are legally bound.

That claim seems relatively straight-forward. To many, it seems intuitively correct. Joseph Raz stated that “The basic intuition from which the rule of law derives is that the law must be capable of guiding the behaviour of its subjects.”21 As Rex Ahdar observes,22 Lord Mansfield’s statement in Vallejo v Wheeler is perhaps the most frequently cited statement of a claim along these lines:23

In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

Smillie’s claim is what we might call the strong claim of contract promotion: that contract law has a vital role in the promotion of contracting. As Ahdar puts it: “a system of contract law [is] essential to the efficient allocation of resources in a market economy.”24

Since classical contract law emphasises certainty, and certainty promotes contracting, argues Smillie, it makes sense that the purpose of contract law is the promotion of contracting.

2.4 Conclusion as to the Purpose of Contract law

The argument from social good and the argument from classical contract law combine to make Smillie’s case that the purpose of contract law is to promote contracting. Each argument provides some support for the conclusion by itself, but each contributes something different to Smillie’s claim. Allan Beever’s idea of the “purposive” and “performative” functions of law helps elucidate this point.

Beever makes the distinction between the use of the word “function” in the sense of “performative function”, and the same word in the sense of “purposive function”.25 To use “function” in the performative sense means to describe how a thing characteristically functions. Beever gives the example of a car, which functions by

23 Vallejo v Wheeler (1774) 1 Cowp 143 at 153, 98 ER 1012 at 1017. Emphasis added.
24 Ahdar, above n 22, at 41. Emphasis added.
burning fuel in an internal combustion engine to produce movement. The law of negligence could be said to function (in the performative sense) by awarding damages to plaintiffs who have established that a defendant has breached a duty of care to them. A more detailed exposition of the performative function of tort law would break that function down into the detail of the rules and doctrines of negligence law - how courts assess the presence and breach of a duty of care, how and when damages are awarded, and so on. Similarly, a more detailed description of the performative function of a car would go into detail as to how the different parts of a car combine to produce movement.

In contrast, to claim that a thing has a "function" in the purposive sense refers not to how the thing functions, but to what end the performative functioning occurs. To claim that a branch of law has a "function" \( x \) in the purposive sense is to claim that that branch of law promotes \( x \); where \( x \) is some thing that is desirable to promote. Returning to Beever's example of a car, a purposive function of a car is transport. As an example of a judicial use of function in this sense, Beever identifies Thomas J's view that the law of tort has various functions, including deterrence, vindication of the plaintiff's rights, condemnation of the defendant, education of the defendant and the wider public, and appeasement of the victim.

Let us return to the example of a car. One of the purposive functions of a car is to play the radio; a car furthers the socially valued institution of listening to the radio. However, it would be a mistake to assume that the performative functioning of a car is arranged for the maximum promotion of that purpose. Indeed, the opposite is the case. In my family's car, for example, it is rather hard to listen to the radio when travelling at certain speeds, or on certain surfaces. It would also be a mistake to argue that the performative functioning of a car ought to be arranged for the maximum promotion of listening to the radio, just because the car allows for listening to the radio some of the time. It might certainly be possible to have a mechanic make various changes to my family's car to make it easier to listen

26 At 299.
27 I use this example as Beever's focus is on the law of tort.
28 Where "promotes \( x \)" means "promotes \( x \) at least some of the time".
29 Beever refers to Thomas J's statements in *Bottrill v A* [2001] 3 NZLR 622 (CA), and see an earlier expression of this position in Thomas J's dissent in *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 19-20.
30 I am quite convinced that, at some point or other, I have read or heard a discussion involving the idea that, were we to give a troop of monkeys access to a car, they might discover how to turn on the radio and conclude that the purpose of the car was to listen to the radio. The purpose of noting this is not to suggest that there is any merit to comparing anyone discussed in this piece to a monkey, but to acknowledge that that idea has contributed to my argument.
to the radio (for example, reducing the speed at which it can run, or installing louder speakers which would be more taxing on the battery), but that would not necessarily be a good idea.

The more general point here is this: it does not follow from x being a purposive function of a branch of law that that the rules and doctrines of that branch of law ought to be arranged around the promotion of x. Another way of expressing that point is that, if the characteristic functioning of a branch of law does not consistently promote x, then it does not follow that that branch of law ought to be changed to more consistently promote x, simply because x is socially valued and that branch of law sometimes promotes x.

Beever gives Thomas J’s dissent in *Bottrill* as an example of that sort of problematic reasoning. That case was concerned with whether the rules and doctrines of tort law should limit exemplary damages to cases of advertent wrongdoing. The majority thought yes. Thomas J argued otherwise, along the following lines:

1. Tort law has various function, including deterrence
2. To limit exemplary damages as the majority proposed would limit the ability of tort law to deter wrongdoing
3. Therefore, exemplary damages should not be limited as the majority proposed.

The flaw in this argument, says Beever, is that (3) only follows from (2) if deterrence is also a performative function of tort law. However, it is not. Accordingly, Thomas J’s argument is invalid. That tort law sometimes provides deterrence is not a sufficient reason to arrange the rules and doctrines so as to promote deterrence

---

31 *Bottrill v A* [2001] 3 NZLR 622 (CA).
32 The rationale for the majority position is essentially that exemplary damages exist to punish the worst sort of wrongdoing, and the worst sort of wrongdoing is when the wrongdoer appreciates that they were taking a risk. The majority was overturned by the Privy Council in *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721, but the position was reinstated by a majority in *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149. For Beever’s discussion of the latter, see Allan Beever “The Future of Exemplary Damages in New Zealand” (2010) 25 NZULR 197.
33 I have presented an oversimplified version of Thomas J’s argument, since Thomas J refers to functions other than deterrence, see above n 29.
34 While it is often said that one of the functions of tort law is deterrence, and this is clearly true in the purposive sense since deterring tortious wrongdoing is socially valuable, it is difficult to dispute that tort law is actually pretty bad at promoting deterrence and does not do so systematically. Tort law looks nothing like the kind of system one would expect if the system had actually been put together with deterrence in mind. See Beever, above n 25, at 301–305.
more often. That would be akin to rearranging the inner workings of the family car so as to increase the volume of the radio.

To use a contract law example, contracts are often of benefit or significance for third parties. One of the purposive functions of contract law is that it can facilitate a chain of related contracts – third parties can benefit from a contract between the actual contracting parties. For example, suppose that A contracts to sell gravel to B, which enables B to contract to sell the gravel to C, which enables C to contract with D to surface D’s driveway. The contents of A’s contract with B may be of interest to C and D, and C and D might argue that the rules and doctrines of contractual construction should be arranged so as to give A and B’s contract the meaning that C and D might expect.\(^{35}\) That would be a valid position to take only if benefitting third parties was also a part of the performative function of contract law.

Returning to Smillie’s position, we can now see that he combines arguments about the purposive and performative functioning of contract law to make his claim about the purpose of contract law. The argument from social good is an argument about purposive function, and the argument from classical contract law is an argument about performative function. By itself, the argument for social good establishes that contracting is socially desirable. That might be enough to establish that, in the abstract, the purpose of contract law ought to be the promotion of contracting. However, contract law is not an abstract entity – it is a body of law that already exists. The argument from classical contract law then comes in to make the case that Smillie’s conception of the purpose of contract law is consistent with a defining feature of the contract law that we actually have.\(^{36}\)

When we consider his argument as a whole, Smillie can be taken as putting forward what Stephen A Smith describes as an interpretive account of contract law.\(^{37}\) Smith identifies four ways in which one can put forward an account of a particular area of law. Historical accounts explain how the rules and doctrines of that area of law came to be as they are. Prescriptive accounts are accounts of what the law ought to be. Descriptive accounts are descriptions of the law at a

---

35 For some examples of jurists sympathetic to C and D’s position, see Saville J in *National Bank of Sharjah v Dellborg* [1997] EWCA Civ 2070 and James Spigelman “From Text to Context: Contemporary Contractual Interpretation” (2007) 81 ALJ 322.

36 Or, at least had, before the shift to the modern flexible approach that Smillie opposes.

particular point in time. Interpretive accounts seek to “enhance understanding of law by highlighting its significance or meaning ... in other words ... revealing an intelligible order in the law, so far as such an order exists.” Interpretive accounts of law can be distinguished from prescriptive accounts because they are not simply an account of what the law ought to be like. Rather, they are accounts of how the law now should be understood.38

2.5  Conclusion as to the Purpose of Contract Law as a Touchstone for Reform

If the purpose of contract law is to promote contracting, then it follows logically that that purpose can be used as a reference point for assessing reforms. By “reforms”, Smillie does not mean only that the purpose of contract law can help us evaluate any proposed future changes to contract law. It can also be of use in terms of evaluating the merit of any changes to contract law that have already happened. Indeed, that is much of what Smillie is concerned with as he considers that the movement away from classical contract law has detracted from contract law’s ability to perform its purpose.

The conclusion that the purpose of contract law can be used as a touchstone for reform illustrates the value that the argument from social good adds to Smillie’s overall argument. By itself, a claim about the performative function of contract law can be seen as a claim about the positive law. By itself, a claim about the positive law is of limited assistance in assessing proposed reforms to the law. A claim about performative function can tell us whether or not a proposed reform would be consistent with how the law characteristically operates, but it cannot tell us whether or not that consistency is desirable. It might be that the law has characteristically operated in some undesirable way. If so, it can be argued that the performative functioning of the law ought to be reformed to promote some identified purposive function. This is where the argument for social good comes in. Smillie gives a reason to prefer reforms that are consistent with the promotion of contracting (and oppose reforms that are not), because contracting is socially valuable.

“Reform” of law can be considered at different levels of detail. We can have discussions at the doctrinal level - on reforming the detail of contract law. For example, whether a “practical benefit” should qualify for consideration is a question of the detail of the doctrine of consideration. Smillie’s article is primarily concerned with “reforms” in this sense. One can also advocate for law reform

38  Beever and Rickert, above n 37, at 324.
at a whole-of-law level — to suggest that the entire working of an area of law needs to be rebuilt from the ground up. The sorts of arguments that justify this kind of radical reform involve identifying a fundamental mismatch between the purposive and performative functioning of an area of law. The reforms that led to the introduction of New Zealand's accident compensation scheme are an example of this latter sort of reform. The Royal Commission on Personal Injury in New Zealand essentially argued that the measures that existed to compensate injured persons fundamentally failed at performing that function, and ought to be replaced with a new system.39 In general terms, the argument for whole-of-law reform is along these lines:

(1) The purposive function of a particular branch of law ought to be x
(2) The performative function of that branch of law does not promote x
(3) Therefore, the performative function of that branch of law ought to be reformed at the whole-of-law level to promote x.

There is a significant difference between this kind of argument (which Beever does not object to)40 and the kind of argument made by Thomas J (which he does). Beever's point is this — arguments for reform at the doctrinal level are illogical if, despite implementation of the proposed change to the detail of the law, the performative functioning of the law still does not actually promote whatever purpose is invoked to justify the change in question.41 Implementing Thomas J's proposed version of law of exemplary damages in tort, which Thomas J justifies on the basis that one of tort's functions is deterrence, would not really do anything to address the problem that the functioning of tort law is fundamentally unsuitable for promoting deterrence. If we were serious about tort law deterring wrongdoing,

40 Beever, above n 25, at 314-315.
41 As well as arguing that the general structure of Thomas J's argument is invalid, Beever also argues that judicial decision-making is not the right place for fundamental reforms of the law. The place for whole-of-law reform, argues Beever, is Parliament, and the kind of analysis required goes beyond the scope and expertise of what judges can achieve in judgments in single cases. A judge is like the mechanic in our car analogy — both are capable of making minor changes to performative functioning but should not do so in such a way to achieve a goal that contradicts established performative functioning. Whole-of-law reform is for different actors. The task of evaluating purposive function and determining which arrangement of performative function would best promote that function, is simply beyond what we can expect from the individual mechanic (or judge) in the scope of working on a car (or deciding a single judgment). See Beever, above n 25, at 306-308.
then this would require a whole-of-law overhaul. Merely tweaking the details of exemplary damages is akin to a mechanic installing smoother and quieter tyres on the family car to make it easier to hear the radio at the expense of tyre traction. If we were serious about listening to the radio, then we would be better off selling the car and buying a radio, instead of having a mechanic make changes to the detail of the functioning of our car. If Thomas J is like a mechanic who proposes changes to a car to make it easier to listen to the radio, Smillie is like a mechanic who puts forward a view on how best to arrange the components of a car for the purpose of transport. The key difference is that it is part of Smillie’s argument that the promotion of contracting is consistent with the way that contract law actually functions.

2.6 The Argument as to how Contract Law Should Promote Contracting

2.6.1 How to Promote Contracting in General Terms

Smillie argues that the law has two distinct but complementary roles in promoting contracting. First, the law must ensure that the necessary background conditions for genuinely free and informed choice are present. I say “the law” because much of this function is performed by parts of the law that are not generally considered to be part of contract law. Smillie states that strong competition law is essential in order to ensure competitive markets for goods and services. In addition, the law must deter pre-contractual misrepresentations and deceptive trading practices, since they “impair freedom of choice and erode the integrity of markets.”

Having established the basic conditions that mean free choices to exchange promises can be made, contract law then has a further role in promoting such behaviour. Smillie suggests that there are two things in particular that contract must do to perform that function. First, contract law must provide certainty as to the assessment of contract formation, construction, and remedies. This point has already been made at (2)(b) in the argument from classical contract law, but is also a key part of Smillie’s case as to how contract law should promote contracting. Second, Smillie argues that, in providing remedies, contract law must balance the following two competing interests:

---

42 For example, Smillie, above n 1, states at 110, n 36 that: “The Commerce Act 1986 and the Fair Trading Act 1986 were introduced to provide the necessary background conditions for ‘deregulation’ of the New Zealand economy which, of course, increased the opportunities for contracting.”

43 At 110.
Providing security of performance to promisces; and
Preserving the freedom of promisors to change their minds.

Smillie justifies the need for balance by saying that:44

[T]he decision to withdraw [from a contract] is just as much of an
exercise of autonomous choice as the original decision to enter the
contract, and it is entitled to due respect. After all, it is autonomy over
a complete life — rather than in relation to a discrete event — that is truly
important and valuable. And, of course, people would be much less
willing to make contractual undertakings if they knew that they could
never withdraw unilaterally and could always be compelled to perform
as promised.

2.6.2 How the Rules and Doctrines of Contract Law Should Promote
Contracting

Having set out in general terms what Smillie considers is important in terms of
promoting contracting, we can now consider how he puts that to practice in terms
of the rules and doctrines of contract law.

Certainty, with respect to the formation of contractual obligations, requires clear
rules as to when legally binding contracts arise: "the requirements for contract
formation must be clear, readily understandable and objectively applied".45 Smillie
argues that it follows that the law ought not to recognise a “duty to negotiate”,
citing Walford v Miles.46 That some consideration of economic value is required
for contract formation reflects the two social values promoted by the practice of
contracting: consideration provides the best external evidence of a freely chosen
agreement, and it is exchanges of value rather than gratuitous transfers that drive
economically efficient markets.47

Security as to the content of contractual obligations must similarly mean that the
law of contractual construction must, like the law of contract formation, be clear
and objectively applied. Just as parties must be able to know when they are bound
to encourage them to contract, the law must provide parties certainty as to what
constitutes performance and what constitutes breach. In construing the terms of
a contract, courts must seek to give effect to the parties’ bargain, as determined

MLR 167 at 179.
45 At 110.
47 Smillie, above n 1, at 110.
through the application of a clear and objective law of construction. What courts must not do is to substitute in place of the parties’ bargain a set of terms considered “fair” by the judge. To do so would be inconsistent with both freedom (because the judge’s terms override the parties’ freely chosen terms) and economic efficiency (because the judge’s terms override the bargain arrived at through operation of the marketplace).

Turning to contractual remedies, balancing the promisee’s interest in security of performance with promisor’s interest in changing their minds means that the default remedy in contract law must be the payment of expectation damages that represent the economic value of the promised performance. Specific performance, which, if awarded as a general rule would prioritise security of performance at the expense of autonomy, must be awarded in cases only where damages do not provide an adequate substitute for performance. In addition, awards of damages for non-compensatory purposes ought not to be a part of contract law, because extra-compensatory damages over-deter breach and deter contracting. Similarly, inability to predict the scope of one’s potential liability also deters contracting, therefore assessment of compensatory damages must be governed by clear and predictable rules. Mental distress and intangible harm, says Smillie, are inherently subjective and personal and therefore unpredictable – awards for general damages must therefore be denied in contract actions. In the usual case where the cost of curing a failure to perform is much greater than the market value of performance, such as in the Ruxley case, Courts must decided to award one or the other. To do as the House of Lords did in Ruxley, and award damages based on “loss of amenity”, Smillie says:

[Captures the worst of all worlds by sacrificing certainty of outcomes for discretionary adjudication on the facts of each individual case.]

In terms of consequential economic losses, Smillie endorses the rule in Hadley v Baxendale on the basis that it makes perfect sense to limit recovery to losses

---

50 Smillie, above n 1, at 112. Marlborough District Council v Altimarloe Joint Venture Ltd [2012] NZSC 11 could perhaps be said to reflect Smillie’s approach – the Supreme Court was concerned whether cost of cure or diminution of value was the appropriate basis upon which to award a remedy, in a case where the former was substantially higher than the latter. The members of the Court approached the issue in terms of which was the appropriate basis for awarding damages. The court was split 3:2 on the outcome, but the important point for present purposes is that there was no consideration of some “loss of amenity” or other “third way” remedy between the two.
51 Hadley v Baxendale (1854) 9 Exch 341.
which the parties, at the time of entering into the contract, ought to have had in mind as likely to result from breach. Finally, Smillie argues that, in order to incentivise exchanges of promises, expectation-based remedies should be available only when there is actually a contract.\textsuperscript{52}

3. GAVA: ALL ECONOMIC ROADS LEAD TO INSTRUMENTALISM

3.1 General Structure of Gava’s Argument

Gava argues that any attempt to justify classical contract law on the basis that it promotes market transacting, of which he gives Smillie’s arguments as an example,\textsuperscript{53} is doomed to failure. Gava provides two main arguments. The first I will term the “argument from empirical evidence.” That argument is essentially that empirical evidence contradicts the claim that contract law promotes marketplace contracting. The second I will term the “argument of inevitable instrumentalism.” That argument, which follows on from the argument from empirical evidence, is essentially that any economic justification for contract law unavoidably makes contract law the mere tool of an external end. Having rejected an economic justification, Gava suggests that the most plausible justifications of the rules and doctrines of classical contract law are historical and constitutional.

3.2 The Argument from Empirical Evidence

The argument from empirical evidence is relatively simple:

1. The Factual Premise: Empirical evidence shows that classical contract law does little to actually promote market contracting; the strong claim of contract promotion is false.

2. Conclusion: To the extent that it rests on the strong claim of contract promotion, the claim that the classical law of contract promotes contracting must be rejected, and the rules and doctrines of classical contract law cannot be justified on the basis that they promote contracting.

There is a substantial body of research that suggests that, in reality, contract law has little effect on marketplace contracting. That is, the rules and doctrines of contract law do not actually, in fact, do much to promote contracting – contract law is not especially important for planning or dispute resolution. Some of the

\textsuperscript{52} cf Wilton Parking New Zealand Ltd v Fanshawe 136 Ltd [2014] NZCA 407.
\textsuperscript{53} Gava, above n 2, at 253.
reasons for the relative insignificance of contract law to actual businesspeople indicated in the research are:

- That reference to the law in bargaining could be seen as disparaging to the other party or suggest litigiousness;\(^{54}\)
- Parties putting the secrecy of their transactions above any benefit to resolving disputes through contract law;\(^{55}\) and
- That reputation and the creation of close relationships can serve as a substitute for the legal system in terms of providing security that contracts would be honoured.\(^{56}\)

If the factual premise is false, then the conclusion of the argument from empirical evidence does not follow. However, if the factual premise is true then, as Gava argues, the idea that the purpose of contract law is the promotion of contracting is questionable because contract law does not actually do much to promote contracting. To give serious consideration to Gava’s arguments, and because I do not hold a strong view on this empirical question, I will proceed on the basis that the factual premise is true.\(^{57}\)

### 3.3 The Argument of Inevitable Instrumentalism

The argument of inevitable instrumentalism picks up where the argument from empirical evidence left off. Gava suggests that there are two positions one can adopt that allow for accepting the argument for empirical evidence and maintaining that contract law has a role in promoting contracting. The first position is antiformalism: the position that the rules and doctrines of classical contract law ought to be changed so that contract law does promote contracting. This is achieved,


\(^{57}\) For detailed surveys of the empirical evidence see Gava, above n 2, at 254-255 and Catherine Mitchell “Contracts and Contract Law: Challenging the Distinction Between the “Real” and “Paper” Deal” (2009) 29 OJLS 675 at 678-680. As Mitchell observes, at 680: “[T]he studies at least suggest that it cannot be assumed that the law is of central importance in facilitating trade and economic growth. The stronger conclusion often drawn from all this is that the legal institution of contract is often unnecessary, even unhelpful, to the success of commercial economic transactions.”
according to the anti-formalists, by relaxing the strict rules of classical contract law so the “contracts” that contract law enforces more accurately reflect the actual bargains made by businesspeople. At the doctrinal level, an example of an anti-formalist argument is that courts ought to admit contextual evidence to assist with contract interpretation because that is more likely to capture what the parties actually intended. At a whole-of-law level, Hugh Collins proposes an anti-formalist overhaul of contract law into what he calls a hybrid system – one which takes into account economic, legal and sociological reasoning in a system of rules that is always updating itself to better serve the goal of supporting the practice of contracting. 58

The second position is neo-formalism. 59 Neo-formalists generally endorse the rules and doctrines of classical contract law in contrast with the anti-formalists who demand substantial changes. However, since they accept the argument from empirical evidence, the neo-formalists' justification for endorsing classical contract law cannot be based on the strong claim of contract promotion. Instead, the neo-formalist position entails what we might call the weak claim of contract promotion, which is that contract law has a minor role in the promotion of contracting. Given that contract law does have some effect on contracting, the neo-formalists argue, the rules and doctrines of contract law still ought to be formulated in such a way that they promote market contracting as much as possible. Neo-formalists consider that contract law can best benefit market contracting by providing a certain and determinate set of rules about contract formation, construction, and remedies. Gava succinctly expresses the neo-formalist position on this: “the market's preference is for a formalist regime. The predictability that flows from a formalist regime allows the market to use law tactically.” 60 Smillie and the neo-formalists thus both endorse the formalistic rules and doctrines of classical contract law, but for different reasons. Smillie endorses the rules and doctrines of classical contract law because he considers that those specific rules and doctrines promote contracting. The neo-formalists endorse those same rules and doctrines simply because they are certain, and certainty promotes contracting.

The neo-formalists oppose a shift to the flexible set of rules and doctrines that anti-formalists propose because those rules and doctrines are less certain, and also because a change from a settled set of clear rules is in itself undesirable.

59 Gava uses “new formalism” but I will use neo-formalism. For the avoidance of doubt, the use of “neo-formalism” herein is a reference to the position that Gava describes (not to other positions which could also be described the same way).
60 Gava, above n 2, at 262.
Neo-formalists would also oppose a shift from one set of clear, settled rules to a different set of clear, settled rules. This is because a shift in the rules detracts from the ability of businesspeople to use contract law as a bargaining and planning tool, and creates an ongoing state of uncertainty about the permanence of the content of contract law. The neo-formalists would have been equally happy defending a different set of clear and settled rules, had classical contract law been constituted differently. For example, if classical contract law had adopted a version of the postal rule where acceptance by post was effective upon delivery to the offeror rather than upon postage by the offeree, or if classical contract law had treated compensatory damages as an exceptional remedy and normally ordered specific performance, then neo-formalists would oppose a move away from that settled position. Even though it could be argued that features of the classical law of contract formation are overly formal and inconvenient for business, neo-formalists could oppose changing that law on the basis that, as Neil MacCormick puts it: “Even if the law impinges in an unwelcome way, at least [business people] know where they stand. Not knowing is extremely uncomfortable.”

It is what anti-formalism and neo-formalism have in common – that they see contract law as aiding market contracting – that is vital for Gava’s argument of inevitable instrumentalism. Gava argues that:

What unites both groups is a bedrock belief that the role of contract law is to aid transacting in the market place. This means that both groups evaluate contract law against a metric of market efficiency. Both are willing to change any or all contract rules for this purpose. Neither group has any fidelity to classical contract law.

The claims that the purpose of contract law is to promote market contracting, argues Gava, inevitably leads to instrumentalism.

Any economic justification for contract law leads inevitably to understanding contract law in instrumentalist terms. Once contract law is understood in this way it loses any independent reason for its existence and becomes hostage to ever-changing and unpredictable economic needs.

An instrumentalist account of contract law is one that conceives of the purpose of contract law as being some end that is external to contract law. The assessment of

62 Gava, above n 2, at 262.
63 At 253.
whether the rules and doctrines of contract law are consistent with that purpose can only be made with reference to some external reference point – in this case, the extent to which contract law actually promotes market contracting. As Gava says, if anti-formalists and neo-formalists are indeed loyal first and foremost to the idea that contract law is justified on economic grounds, they ought to set aside any beliefs about how best to promote contracting if compelling empirical evidence suggests otherwise. Whether or not contract law actually promotes contracting is an empirical question, which cannot be answered with reference only to legal doctrine and philosophical reasoning. This empirical question thus exists outside contract law.

The argument of inevitable instrumentalism can thus be set out as follows:

(1) The argument from empirical evidence is sound

(2) There are two possible positions that accept the argument from empirical evidence and nevertheless claim that the purpose of contract law is to promote market contracting:

(a) Anti-formalism:

(i) The rules and doctrines of contract law ought to be altered so that they do promote contracting

(ii) This is best achieved through a series of flexible rules as opposed to the rigid classical contract law

(iii) Implementing such a series of rules would allow contract law to perform a vital role in promoting contracting

(b) Neo-formalism:

(i) The ability of contract law to promote contracting is relatively limited (ie the weak claim of contract promotion)

(ii) Nevertheless, the rules and doctrines of contract law should still be formulated in such a way that they promote contracting

(iii) This is best achieved through formalistic contract law

(iv) Classical contract law is formalistic and ought to be retained on that basis

(3) Both anti-formalism and neo-formalism evaluate the rules and doctrines of contract law based on a metric of economic efficiency

(4) That metric of economic efficiency is an empirical question and exists outside of contract law

(5) Therefore, both anti-formalism and neo-formalism lead to understanding contract law in instrumentalist terms.
3.4 Gava’s Justification for Classical Contract Law

Having argued that classical contract law cannot be justified in terms of promoting contracting, Gava then puts forward his own justification, which he describes as a “historical” and “constitutional” one.64

[Professional judges … tried to create a system of rules which expressed their legalistic notion of fairness and which developed according to the institutional pressures of a professional judiciary and bar.

The reason that contract law might appear to be driven by commercial needs, argues Gava, is simply that “most of its ‘customers’ were involved in commerce and the disputes before the court were commercial disputes.”65

4. DISCUSSION

Having argued that classical contract law cannot be justified on the basis that it supports market transacting, Gava argues that the most plausible justifications are historical and constitutional, rather than economic. There are two senses of “justification” that are at play here. The first is justification in the historical sense, which is historical in the same sense that Smith’s category of historical accounts of law is historical.66 One can dispute a historical justification on the basis that it does not accurately reflect legal history. The second sense is justification in the value sense, where justifying x means making a claim that the state of x is desirable because it produces some valuable result. One can dispute a value justification on the basis that x does not actually produce the claimed result or on the basis that the claimed result is not actually valuable.

A portion of Gava’s argument is concerned with historical justification. Gava rejects historical explanations of classical contract law that claim that contract law was molded to meet the needs of a changing economy. He argues that the constitutional position of judges in the common law system is a key causal factor leading to the development of classical contract law, and economic changes and consequences are mere background factors in comparison. That is an entirely reasonable discussion to be having, especially since there are some that make the kind of historical claims that Gava disputes.67 However, I do not take Smillie to

64 At 264.
65 At 264.
66 That is, it is an explanation of the causal factors in how the rules and doctrines of contract law came to be the way that they are.
67 Gava gives the following as examples of those sorts of claims: Morton Horwitz The
be claiming that judges consciously developed contract law around the purpose of promoting market contracting. Instead, I take Smillie to be engaged in a kind of ex post facto rationalisation of classical contract law. He argues that the rules and doctrines can be interpreted so as to reveal an intelligible purpose: the promotion of contracting. Since Smillie does not provide a historical justification of classical contract law, Gava’s historical material does not engage with what Smillie has to say.

However, Smillie can be taken as making the value justification claim that classical contract law is desirable because it promotes market contracting. This gives a clear line of engagement between Gava’s arguments and Smillie’s, because Gava disputes the link between contract law and contracting. In particular, Gava’s argument from empirical evidence poses a direct challenge to Smillie’s argument from classical contract law. We can observe that the argument from classical contract law is only part of Smillie’s overall argument. Gava does not give us a reason to doubt Smillie’s argument from social good – Gava disputes that contract law produces the results that Smillie claims, not that those results are desirable. However, the argument from classical contract law plays an important role in Smillie’s overall schema. The argument for social good gives us one reason to accept that the purpose of contract law is the promotion of contracting. However, the argument from social good by itself tells us nothing of how that purpose can effectively be served – it only tells us what end contract law ought to be pursuing at a very detached and abstract level. There is no “necessary link to the lived experience of an historically derived developed system of law”, as Gava puts it. Without the link to classical contract law that is provided by the argument from classical contract law, Smillie could only be making a prescriptive claim about the law, and a particularly abstract one at that. This is clearly a serious problem, since Smillie clearly wants to do more than that.

Logically, the next question to consider is whether Smillie’s arguments can be modified in such a way that the argument from empirical evidence no longer poses such a problem. According to Gava’s argument of inevitable instrumentalism, there

---

Transformation of American Law 1780-1860 (Harvard University Press, Cambridge, 1977) and Richard Danzig, “Hadley v Baxendale: A Study in the Industrialization of the Law” (1975) 4 JLS 249 (Danzig suggests at 250 that the rule in Hadley v Baxendale can usefully be analysed as a “judicial invention in an age of industrial invention.”)

68 To use the language of Beever and Rickett, above n 37, at 324. The use of “ex post facto rationalisation” is intended to be descriptive rather than critical (as is the case of Beever and Rickett’s usage.)

69 Gava, above n 2, at 268.
is only one move available to Smillie: he can become a neo-formalist.\footnote{I think we can easily rule out the possibility of Smillie becoming an anti-formalist. Gava himself makes no claim about what position Smillie would take, if confronted with the argument from empirical evidence. It is, of course, open to respond to the argument from empirical evidence by disputing the factual premise. My attempt to modify Smillie’s arguments is based on the assumption that the factual premise is true.} Doing so would allow Smillie to maintain the claim that the purpose of contract law is contracting – but requires moving to the weak claim of contract promotion and giving up the idea that contract law is important for contracting. It would also still allow Smillie to advocate in favour of classical formalistic formulations of the rules and doctrines of contract law over modern flexible ones – but requires abandoning the view that there is anything special about the particular rules and doctrines of classical contract law other than that they are certain. The shift to neo-formalism would also entail a shift to instrumentalism - which means that Smillie’s account would no longer be an interpretive one because an instrumentalist account of contract law is concerned only with achieving some external end rather than seeking internal intelligibility of the law.

In my view, Smillie can escape instrumentalism, because Gava does not capture the spectrum of positions one can take of contract law while still maintaining that the purpose of contract law is the promotion of contracting. To help demonstrate this, it is useful to posit the idea of prescriptivist and descriptivist accounts of the relationship between contracting and contract law, akin to prescriptivist and descriptivist accounts of the relationship between linguistics and of language. Prescriptivist accounts of linguistics set out “proper” usage of language,\footnote{John Edwards Language and Identity (Cambridge University Press, Cambridge, 2009) at 259.} while descriptivist accounts of linguistics seek only to describe usage of language.\footnote{“Linguistics is scientific in its methodology. The linguist attempts to describe how a language works, not to give opinions as to how it should work or what is ‘correct’ or ‘incorrect.’” Francis Stork and John Widdowson Learning About Linguistics (Routledge, Oxford, 2014) at 16.} With “contracting” referring to a broad conception of behaviours involving exchanges of promises that may or may not actually be legally enforceable as contracts,\footnote{It could be possible to define contracting as meaning “the practice of entering into legally enforceable bargains”, in which case there would be little sense in distinguishing descriptivist and prescriptivist accounts of the relationship between contract law and contracting. Moreover, it would not be very interesting to talk about the relationship between contract law and contracting at all.} a purely descriptivist account of the relationship between contract law and contracting holds that the law of contract formation and construction should be concerned only with describing actual contracts that parties enter into. This is a reasonable description of Gava's exposition of anti-formalism. A purely descriptivist account of the relationship between contract law and contracting can rightly be described...
Contract Law, Contracting and Instrumentalism

as an instrumentalist account, since the purpose of contract law is to give effect to the practice of contracting, which has its own existence independent of contract law.

However, it is also possible to take a prescriptivist approach to the relationship between contract law and contracting. That is, to suggest that contract law's job is not simply to recognise contracts but that contract law gives effect to some conception of what is "proper" contracting, which sets out how contracting parties ought to behave before, during, and after contract formation. Parties that have not been contracting properly will either find that the law will not give effect to their bargains at all, or will find that contract law will enforce a "proper" set of terms rather than what one or perhaps both parties actually intended.74 There are several ways that this kind of prescriptivism can manifest itself. First, contract law can outright rule out certain sorts of contracts, or certain sorts of contractual terms, from being legally enforceable. For example, exchanges of promises for future performance can be the result of illegitimate pressure, the exploitation of a vulnerable individual, or the improper application of one person's influence over another. However, the doctrines of duress, unconscionable bargains and undue influence effectively prescribe that those are not the sort of agreements that contract law will give effect to.75 The now defunct doctrine of

74 Of course, statute law can also prescribe that certain contracts or contractual terms are unenforceable, because Parliament chooses to legislate in such a way, to achieve some ends or other. The point here is that this can also occur in contract law.

75 It might be also possible to object to the above exposition of prescriptivist and descriptivist accounts of the relationship between contract law and contracting along the following lines (thank you to Jessica Palmer for this point): The prescriptivist/descriptivist distinction is unhelpful, because what really matters is how you define "contracting", not "proper" contracting. For example, the idea that contracts are freely chosen is an inherent part of the idea of contracting, so bargains entered into under duress are not voidable because they are the result of improper contracting, they are voidable because they are not contracts at all. As a result, no one account of contract law is more or less descriptivist or prescriptivist than any other, and what differentiates them is what counts as "contracting". I have several responses to that objection. First, all it really does is emphasise that the idea of a prescriptivist/descriptivist spectrum rests upon "contracting" meaning something other than "the practice of entering into legally enforceable bargains". The empirical research certainly suggests that there is an actual practice of parties exchanging promises as to future actions (often thinking of their interactions as contracts or bargains), and that that practice has an existence at least partially independent from contract law. There is room for different accounts of the relationship between that practice ("contracting") and contract law, as the descriptivist/prescriptivist spectrum illustrates. One might object to the labels, but I do not think it is feasible to dispute that some accounts of contract law recognise as legally binding far fewer incidences of what might broadly be referred to as "contracting" than others. I suggest that one explanation for this is that some accounts of contract law give effect to a narrower conception of proper contracting than others. Second, it could perhaps be said that contracts entered into under
fundamental breach can be seen as an example of contract law prescribing that certain sorts of terms are improper.\textsuperscript{76} Second, contract law can prescribe certain formal steps that are the proper way to go about contracting and must be taken for an exchange of promises to be given legal effect. The classical approach to offer and acceptance, for example, reflects a relatively prescriptive approach to the global approach's relatively descriptivist approach. Finally, contract law can combine these two approaches and require certain formal steps for certain sorts of contracts or contractual terms. For example, the idea that certain exclusion and limitation clauses must be printed in red ink\textsuperscript{77} to be effective can be said to reflect a prescriptive approach about the proper way to exclude or limit liability.

While taking a pure descriptivist approach leads to instrumentalism, a prescriptivist approach provides a potential escape from instrumentalism. A prescriptivist approach to the relationship between contract law and contracting rests upon an idea of which types of contracting and contractual terms are desirable, which will then be manifested in the rules and doctrines of contract law. Thus, we can say that contract law, to the extent that it takes a prescriptivist approach to the relationship between contract law and contracting, is not merely instrumentalist. Contract law does not simply give effect to anything that can be described as a "contract" in the broad sense. Instead, contract law gives effect to contract law's idea of contracting - the rules and doctrines of contract law effectively act as a screening mechanism to which contracts and which contractual terms will be given effect to. Since it is manifested in the rules and doctrines of contract law, contract law's idea of contracting is internal to contract law. The stronger the case that the rules and doctrines of contract law cohere around a particular conception of proper contracting, the stronger the case that contract law exists to give effect to that particular conception of contracting as opposed to some external goal. The task of elucidating the strength and nature of contract law's idea of contracting is an interpretive project. If we understand Smillie's account of contract law as an interpretive one, this suggests that is not purely instrumentalist.

\textsuperscript{76} \textit{Photo Production Ltd v Securicor Transport Ltd} [1980] AC 827, [1980] UKHL 2, overturning Lord Denning MR's finding that the doctrine of fundamental breach applied to invalidate an exclusion clause.

\textsuperscript{77} \textit{Thornton v Shoe Lane Parking} [1971] 2 QB 163 per Lord Denning MR.
The are several features of Smillie’s position that allow us to understand it as having a strong prescriptivist element to it. There are several ways in which this is evident. First of all, the argument from social good tells us that contracting is good because it is morally and socially valuable. Accordingly, says Smillie, contract law should promote contracting. “Contracting” must therefore mean the sort of contracting that is socially valuable, and we can judge what sorts of contracts and contractual terms are desirable by the moral and economic reference points of what makes contracting valuable. That conception of what sort of contracting is desirable, says Smillie, is reflected in the rules and doctrines of classical contract law.

Smillie also clearly takes a prescriptivist approach to the relationship between contract law and contracting when it comes to the law of contract formation and construction. Smillie argues that contract law ought to provide a clear set of rules for contract formation and construction. I take him to hold the view that contract law is effectively saying to contracting parties: “Here is the proper way to go about contracting if you want your contracts and terms to be legally enforceable.” Parties who do not observe the proper formalities of offer and acceptance, or leave ambiguities or gaps in their contracts with respect to important matters, will not find themselves with a legal contract, because it is not the job of contract law to promote improper contracting. Courts should not strive to fill any gaps that the parties leave in a contract, because to do so rewards improper contracting and discourages proper contracting. This demonstrates again that Smillie’s conception of contract law is not simply instrumentalist, because it gives effect to a conception of proper contracting that is contained within contract law.

But what of the argument from empirical evidence? I have said that the argument from empirical evidence poses a problem for Smillie’s argument from classical contract law. This can be addressed by re-formulating the argument from classical contract law along lines that are explicitly prescriptivist:

(1) The argument from classical contract law:

(a) The rules and doctrines of classical contract law emphasise certainty

(b) Contract law that emphasises certainty is necessary for the promotion of [proper] contracting

(i) This is because proper contracting is itself certain

(c) (2)(a) and (2)(b) together support the idea that the purpose of contract law is the promotion of [proper] contracting.

The important difference is at (2)(b). In my earlier formulation of Smillie’s arguments, (2)(b) was the argument that contract law that emphasises certainty
is necessary to promote the actual practice of contracting. The empirical evidence
suggests that that is not the case. Shifting to a prescriptivist account of the
relationship between contract law and contracting shifts the claim to being that
contract law that emphasises certainty is necessary to promote the practice of
proper contracting. The reason for this is that the practice of proper contracting
is itself certain. That is, proper contracting is when parties act in such a way so as
to meet the requirements of contract formation in classical contract law: they go
through a clear process of offer and acceptance, they exchange promises with real
value (thus providing consideration), they set out clear and unambiguous terms,
and so on. Certainty is thus a feature not only of contract law, but of the proper
practice of contracting that contract law promotes.

The consequence of making that sort of claim is that the empirical evidence is
no longer pivotal. The anti-formalists point out that classical contract law does
not recognise or promote much of the actual practice of what might be called
contracting, such as agreements to negotiate, agreements to vary contracts, or the
confusing sorts of 'battle of the form' cases that parties find themselves in when
they conduct their dealings without reference to the classical rules of offer and
acceptance. The prescriptivist can respond that that is exactly how contract law is
supposed to work: contract law exists to give effect to contracts that are properly
formed. If this means a great deal of actual business practice is not recognised by
contract law, and businesspeople turn away from contract law as a result — so be
it. That is a failure of businesspeople to contract properly, rather than a failure
of contract law. The question is which is to be master and, for the prescriptivist,
contract law is the master of contracting, not the other way around. For the
descriptivist, that the purpose of contract law is to promote contracting means
that the success of contract law is to be judged by whether or not it actually
promotes contracting. For the prescriptivist, that the purpose of contract law is
to promote contracting means that the success of contracting parties to contract
properly is judged by contract law.

Of course, we might disagree with a particular account of what constitutes proper
contracting, and we might disagree with Smillie's account. One could reject it
entirely, or could dispute the link between Smillie's argument from social good
and the idea that proper contracting is certain. One might defend Smillie's
account on the basis that the proper practice of contracting is certain is consistent
with both the moral and economic rationales for the social value of contracting.
Expressing one's intentions clearly and certainly, it could be argued, is the utmost
show of respect for the autonomy of one's prospective contracting partners. In
addition, uncertain terms are a limit on one's future freedom because they limit
one's ability to plan for the future. These sorts of arguments tap the intuition that
CERTAINTY is important for contracting, but for the purpose of setting out how contracting parties ought to behave rather than asserting how they actually do. Turning to economic efficiency, it can be argued that contracting parties ought to strive to express the terms of their bargains clearly. To do otherwise risks leaving the determination of the terms of the contract to a judge, who may not be in a position to arrive at an economically efficient construction of the contract. In any case, whether or not one accepts Smillie’s account of proper contracting does not detract from the conclusion that reformulating his arguments along prescriptiveist lines avoids instrumentalism.

5. CONCLUSION

Stephen A Smith has argued that the idea that contract law gives effect to the reasonable expectations of contracting parties is a “slogan” – an ambiguous statement that sounds sensible but adds little. If Smillie were only to make passing reference to it, then perhaps the same can be said of the proposition that the purpose of contract law is the promotion of contracting. However, that is not the case. Smillie gives us two arguments for why we should accept the proposition and then goes on to explain in detail how we can use it as a touchstone for assessing reforms of the rules and doctrines of contract law.

Gava argues that classical contract law cannot be justified on the basis of economic efficiency. He points to empirical evidence that challenges the strong claim of contract promotion that contract law has a vital role in market transacting. This demands a reformulation of Smillie’s arguments, because Smillie’s position in its original form appears to rely to some extent on that strong claim. I have suggested that Smillie’s argument can be reformulated along prescriptiveist lines. That is, that Smillie was not arguing simply that contract law exists to promote any sort of behaviour that could, broadly speaking, be described as contracting. Instead, I suggest, Smillie was arguing that the purpose of contract law is the promotion of proper contracting, based on a specific conception of proper contracting evident in the rules and doctrines of classical contract law, a conception of proper contracting that emphasises certainty. I would note that this interpretive account of classical contract law is not inconsistent with Gava’s historical account of common law judges arriving at a legalistic set of principles that reflected their sense of fairness.

To some, this conclusion might be an unsatisfactory one. My response to Gaya's argument of inevitable instrumentalism could be characterised as saying that the law can look in upon itself to avoid becoming a tool of some external end. Looking within the law is a worthwhile project if there is something there to find, and Smillie gives us a reason to think that there is. It could also, perhaps, be suggested that I have performed some questionable interpretive sleight of hand on Smillie's words that "the purpose of contract law is the promotion of contracting." My answer to that is that different people can use the same words to mean different things (a recurring theme in this essay) and that I have sought to honour John Smillie by giving what I think is a sound formulation of his position.

79 See Hedley, above n 37, at 221: the interpretivists have chosen to look inward, returning to traditional ideas both as to theories of liability and as to legal methodology, and spurning modern developments, whether legal or political. They think, and sometimes even say, that they are on the verge of capturing some timeless entity that lies behind private law reasoning: some secret source of order behind the apparent chaos of the modern law. The claim to esoteric knowledge, which lies beyond ordinary comprehension yet breathes order into the universe, is often a powerful one emotionally; but for precisely that reason, it needs to be examined very closely indeed before its bona fides can be accepted.