

SOME THOUGHTS ON THE EVOLUTION OF THE GERMAN LAW OF CONTRACTS—A COMPARATIVE STUDY: PART I

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I. BY WAY OF BACKGROUND

Liberal (classical) theory of contracts with its emphasis on private autonomy and responsibility has come under increasing attack in the United States and abroad over the last decades. The optimistic belief that a contractual society safeguards its own stability and secures the highest possible social justice has lost much of its appeal:¹

[The] doctrine of natural organization contains more truth of the highest importance to humanity than almost any other But its exaggeration worked much harm, especially to those who delighted most in it. For it prevented them from seeing and removing the evil that was intertwined with the good in the changes that were going on around them²

Small wonder that the pendulum did swing to the opposite extreme. Powerful movements got underway, demanding not freedom of, but "freedom from contract."³ In the words of a widely used English treatise:

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¹ See, e.g., W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 90-102 (2d ed. 1972); G. CHESHIRE & C. FIFOOT, *THE LAW OF CONTRACT* 19-21 (7th ed. 1972); P. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 1-22 (1971); S. SIMLITIS, *DIE FAKTISCHEN VERTRAGSVERHÄLTNISSE* 69 *et seq.* (1957); Raiser, *Vertragsfreiheit heute*, 1958 *JURISTENZEITUNG* 1; Raiser, *Vertragsfunktion und Vertragsfreiheit*, in *I HUNDERT JAHRE DEUTSCHES RECHTSLEBEN, FESTSCHRIFT FÜR DEN DEUTSCHEN JURISTENTAG* 101 (von Caemmerer, Lange & Friesenhahn eds. 1960) [hereinafter cited as Raiser V. & V.]; Flume, *Rechtsgeschäft und Privatautonomie*, *id.* at 135; J. ESSER, *LERBUCH DES SCHULDRECHTS* ¶ 11 (3. Auflage 1968); W. FIKENTSCHEK, *SCHULDRECHT* § 21 (3. Auflage 1971).

² A. MARSHALL, *PRINCIPLES OF ECONOMICS* 246-47 (8th ed. 1938).

³ Patterson, *An Apology for Consideration*, 58 *COLUM. L. REV.* 929, 949 (1958). The famous aphorism: "*qui dit contrat dit juste*" is not heard very often nowadays.

Freedom of contract is a reasonable social idea only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of [our] . . . society, it has ceased to have much idealistic attraction.⁴

The spheres of social life which can meaningfully be left to "autonomous legal ordering"⁵ are constantly shrinking. The moral value of freedom of contract has become problematical, and the ideal of private responsibility, the counterpart of private autonomy, no longer reflects practical reality⁶ in an age where impersonal standard mass contracts have become part of our daily life and where freedom of contract is often bargained away in the name of freedom of contract.⁷

These movements, expressing awareness of the unequal distribution of power, became too strong to be resisted. The social dimension of contract increasingly came to be emphasized in legislation, the activities of regulatory agencies, case law, and literature, here and elsewhere.⁸

But this should not mean that the "years of the contract"⁹ are drawing to a close, nor that "pure" (classical) contract has become a residual category.¹⁰ We should not surrender to a "failure of nerve" and allow the "death of contract"¹¹ to become

⁴ W. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 5 (22d ed. by Guest 1964). The author describes English society as "collectivist". *Id.*

⁵ H.M. HART & A. SACKS, *THE LEGAL PROCESS* 147-48 (tent. ed. 1958).

⁶ Rehbinder, *Fortschritte in der Produkthenhaftung*, 129 *ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT* 171-73 (1967).

As always when dealing with opinion, the [reader] should be alert to the possibility that the countercurrent supporting social control by state action draws its psychological strength from attitudes and convictions which may not have accurately reflected the objective facts of economic and social life. See Sharp, *The Limits of Law*, 61 *Ethics* 270, 276-279 (1951); Promises, Mistake and Reciprocity, 19 *U. of Chi. L. Rev.* 286, 294-296 (1952).

F. KESSLER & G. GILMORE, *CONTRACTS CASES AND MATERIALS* 7 n.29 (2d ed. 1970). The author of the footnote is Professor M.P. Sharp. It has been taken from the *Contracts* casebook by Kessler and Sharp. F. KESSLER & M. SHARP, *CONTRACTS: CASES AND MATERIALS* 6 n.19 (1953).

⁷ In wide areas of our economic life, we are told, contract no longer exercises its function of supporting a free market.

⁸ See, e.g., H. HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 103-28 (1961); Isaacs, *John Marshall on Contracts. A Study in Early American Justice Theory*, 7 *VA. L. REV.* 413, 413-27 (1921); L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1964); S. SIMITIS, *supra* note 1; Rehbinder, *supra* note 6.

⁹ J. W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 18 (1956).

¹⁰ See the admirable and careful discussion of this point in L. FRIEDMAN, *supra* note 8, at 20 *et seq.*

¹¹ See G. GILMORE, *THE DEATH OF CONTRACT* (1974).

a self-fulfilling prophecy. There are still wide areas of social life where freedom of contract and private responsibility are meaningful and efficient ways of social ordering. Here the system of private autonomy is still reaffirming itself with each transaction freely entered into.¹²

Still, the new school of thought deserves our gratitude for constantly challenging us to continue the reconstruction of the law of contracts to meet modern needs. It will not be possible, or even desirable, to restore the unity of the law of contracts, Williston's grandiose dream. The price would come too high in the form of lifeless abstractions which would impede an understanding of the social function of many types of contracts.

The ferment at work in the American common law of contracts, not surprisingly, has its counterparts in the civil law.¹³ A glance at the problems encountered there and the attempts at solving them may be rewarding. It may help us to understand better the strengths as well as the weaknesses of our own law. Arbitrarily, to be sure, this essay is limited to a survey of some of the problems encountered by German law.¹⁴ Because the challenges to the traditional contract model, as well as the responses, have proceeded along similar lines, a comparative analysis is all the more tempting and profitable.

II. FREEDOM OF CONTRACT AND THE WILL THEORY

The German law of contracts (*Vertragsrecht*), as codified in the Civil Code, cannot be fully understood without taking into account its philosophical basis. That basis is found in the ethical philosophy of German Idealism, particularly that of Kant. The presupposition of his ethics, the freedom and moral autonomy of the individual,¹⁵ profoundly influenced his notion of contract and that of his followers. One such follower, Savigny, was the founder of classical German contract law.¹⁶ Kant's notion of contract (*Vertrag*) as a meeting of wills became in the work of Savigny a "union of wills with the object of determining legal rela-

¹² For the most impressive defense of the role of private autonomy see Flume, *supra* note 1; Raiser V. & V., *supra* note 1.

¹³ The literature cited in some of the preceding footnotes is ample confirmation. See notes 1 & 6 *supra*.

¹⁴ German law has produced a most impressive amount of case law and the literature dealing with our problems is quite challenging.

¹⁵ For its modern counterpart see J. RAWLS, *A THEORY OF JUSTICE* 251-57 (1971).

¹⁶ Law exists, according to Savigny, to safeguard man's moral freedom, an innate quality of all human beings. 2 F. SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* ¶ 2 (1840). On Kant's influence see F. WIEACKER, *RECHTSGESCHICHTE DER NEUZEIT* 219-20 (1952).

tions."¹⁷ According to Savigny's theory the law of contracts gives expression and protects the will of the parties, for the will is "something inherently worthy of respect."¹⁸ In honoring the will of the *Rechtssubjekt* (i.e., the member of the community with his rights, privileges, immunities, and their correlatives) "the law makes itself the instrument of [his] intentions."¹⁹ Private autonomy and freedom of contract are thus the natural counterparts of the will theory. Private autonomy—the basic principle of any legal system based upon the moral freedom of the individual with his right to self determination—does not mean, as Savigny saw even then, that the contracting parties are creating law. They do so only to the extent that the legal system has delegated law making authority to them and they stay within the scope of their authority.²⁰

The will theory became the cornerstone not only of the German law of contracts, but the basis of all legal transactions (juristic acts or *Rechtsgeschäfte*). The term "*Rechtsgeschäft*" is wider than our "contract" or even "agreement"; it includes unilateral acts (like making a will, avoiding a contract for fraud or mistake) as well as consensual transactions, executory as well as executed contracts.²¹ The category correspondent to our term contract is called "obligatory contract" (*Schuldvertrag*).

The progression from *Rechtsgeschäft* with its ingredient of a declaration of intention, to consensual transaction, and then, to obligatory contract underlies the structure of the Civil Code.²² In contrast to other great codifications of the Civil Law, the obligatory contract has not been elevated to the center of the German system. In carrying the will theory to its logical limits, the Code has utilized categories of a high level of abstraction²³ which are

¹⁷ 2 F. SAVIGNY, *supra* note 16, at §§ 140-41.

¹⁸ Cohn, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933).

¹⁹ F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 145 (6th ed. 1929).

²⁰ W. FLUME, 2 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 4 (1965).

²¹ 1 E. COHN, MANUAL OF GERMAN LAW 73 (2d ed. 1968).

²² Raiser V. & V., *supra* note 1, at 102.

²³ The category "*Rechtsgeschäft*" has been called a "sterile concept," a meaningless abstraction which does not contribute to an understanding of the function of the law of contracts. Wlassak, 1902 ÖSTERREICHISCHE GERICHTSZEITUNG 71. As one author expressed it:

The foreign student of German law will perhaps first ask whether all these distinctions between different levels of abstraction are truly necessary. Would it not be possible to arrange the material and describe the relevant rules without resort to such a great number of specific concepts? Is it necessary to distinguish between juristic act (*Rechtsgeschäft*), declaration of intention (*Willenserklärung*) and contract (*Vertrag*) with the offer (*Antrag*) as a component of the contract? The Anglo-American legal systems have a less intricate terminology; their palette has only two colours, the contract and the promise.

explained in its first book containing general principles and which form the core of Code.

Despite this "shortcoming" the Civil Code has greatly influenced other codifications.²⁴ German theory of contracts has also profoundly enriched French legal literature, thanks to the work of Salleilles, who explained the Code to the French reader and who "discovered" the contract of adhesion.²⁵

The impact of Savigny has been almost as far reaching as that of the Code. Common law contracts scholars, eager to develop a general theory of contracts in the nineteenth century, turned "from the formless confusion of textbooks and the dry bones of students' manuals to the immortal work of Savigny."²⁶ The second paragraph of Chapter I of the first and second editions of Pollock's treatise follows almost literally Savigny's discussion in *System des heutigen Römischen Rechts*.²⁷ Beginning with the third edition of Pollock, the influence of Savigny waned.

III. COUNTERCURRENTS TO THE WILL THEORY

A. *Reliance Principle Versus Will Theory*²⁸

The third and subsequent editions of Pollock moved away from

Schmidt, *The German Abstract Approach to Law*, 9 SCANDINAVIAN STUDIES IN L. 133, 148 (1965). Schmidt, a distinguished Swedish scholar, concedes that the German system results in a considerable economy of thought. *Id.* at 147. See also F. LAWSON, A COMMON LAW LAWYER LOOKS AT THE CIVIL LAW 164 (1955); Rheinstein, *The Approach to German Law*, 34 IND. L.J. 546, 552 (1959). For the German literature criticizing the Code see 1 J. VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 10-11 (11. Auflage by Brändl & Coing 1957) [hereinafter cited as STAUDINGER].

²⁴ The Swiss Code of Obligations is one example. However the Swiss code contains no counterpart to the First Book of the German Civil Code, thus it forsakes the systematic clarity of general abstractions in favor of an introductory section which sets forth rules concerning legal transactions. See The Swiss Federal Code of Obligations of Mar. 30, 1911, ch. 1 (Bollman 1928). On the influence of the Civil Code see 1 K. ZWIGERT & H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 185-89 (1969).

²⁵ See R. SALEILLES, DE LA DECLARATION DE VOLONTE, CONTRIBUTIONS A L'ETUDE JURIDIQUE DANS LE CODE CIVIL ALLEMAND (1929).

²⁶ G. CHESHIRE & C. FIFOOT, *supra* note 1, at 20. See also W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS (1898); J. BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS § 313 (1878); E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 388 (1953).

The influence of Pothier, whose treatise on the law of obligations or contracts was translated into English in 1806, should not be overlooked. See, e.g., *Foster v. Wheeler*, 36 Ch. D. 695, 698 (1887).

²⁷ See note 16 *supra*. Cheshire and Fifoot remark with obvious relief that Pollock, since the third edition of his book, "relegated Savigny to the decent obscurity of an appendix." G. CHESHIRE & C. FIFOOT, *supra* note 1, at 20 n.4.

²⁸ See STAUDINGER, *supra* note 23, at 532-33 (Randziffer 76); *id.* at 594 (Randziffern 19a & b); C. CANARIS, DIE VERTRAUUNGSHAFTUNG IM DEUTSCHEN PRIVATRECHT 411 *et seq.* (1971); Wolf, *Rechtsgeschäftslehre*, 1 ATHENÄUM-ZIVILRECHT 81-84 (1972).

the will theory toward an objective theory of contracts, stressing the historical basis of contract and the element of reliance on the promise, rather than "the artificial equation of wills or intentions:"

He who has given a promise is bound to him who accepts it not merely because he has expressed a certain intention, but because he has so expressed himself as to entitle the other party to rely on his acting in a certain way.²⁹

These statements may easily convey to the reader the impression that because of the will theory, German law is unqualifiedly committed to a "meeting of minds" theory, in contrast to the common law which has adopted an objective theory of contracts.³⁰ This is not altogether true. The subjective (will) theory has not been applied *à outrance* by German law, nor can the (American) common law be fitted into the straightjacket of the objective theory.³¹ American courts, in attempting to find acceptable solutions mediating between the legitimate interests of promisor and promisee, have made inroads on the traditional objective theory in a substantial body of case law.³²

German law, to be sure, has not gone quite as far as has the common law in adopting the objective theory of contracts. Still, it recognizes that the will to create legal relations and the declaration of intention belong together³³ and in solving the unilateral mistake problem, for instance, it has settled on a compromise: To the extent that a unilateral mistake is operative,³⁴ the contract is voidable to protect the mistaken party, but only on pain of reliance damages, even in the case of nonnegligent mistake.³⁵ The reliance principle has thus found recognition and it has continuously been expanded. The declaration of intention, for instance, can be found by implication.³⁶ German law also has developed de-

²⁹ F. POLLOCK, *PRINCIPLES OF CONTRACTS* 1 (9th ed. 1921).

³⁰ See E. PATTERSON, *JURISPRUDENCE* 387, 388 (1955); Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859 (1928).

³¹ For a most penetrating criticism of the adoption of the objective theory of contracts by the Restatement see Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441 (1929).

³² To illustrate: Death of offeror or of offeree unknown to the other party revokes the offer. RESTATEMENT (SECOND) OF CONTRACTS, § 48 (Tent. Draft No. 1, 1964). The meeting of the minds theory furnishes the explanation for section 21A of the *Restatement* (*Id.*, § 21A, Illustration 5, at 100.) and also for the decision in *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864). See also *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760-62, 766-67 (2d Cir. 1946) (Frank, J., concurring). See, finally, the cases involving mistaken bidders for public construction, e.g., *Boise Junior College Dist. v. Matfey's Constr. Co.*, 92 Idaho 757, 450 P.2d 604 (1969) and authorities cited therein.

³³ W. FLUME, *supra* note 20, at ¶ 4.

³⁴ BGB §§ 119, 120, 122 (Staudinger 1957).

³⁵ Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 403 (1964).

³⁶ See, e.g., STAUDINGER, *supra* note 23, at 582-91; J. ESSER, *GRUNDSATZ UND NORM* 127 *et seq.*, 215 *et seq.*, 319, 354, 370 (1968).

vices akin to our waiver and estoppel theory.³⁷ This evolution indicates that the will theory has found a rival in the reliance principle. It is widely debated whether the ideal of private autonomy is violated in the many instances where the reliance principle is recognized.³⁸ This controversy is reminiscent of the difficulties encountered by promissory estoppel on its way to full recognition by the common law.³⁹

B. *Compulsory Contracts*⁴⁰

As a rule, German law, like the common law, respects freedom of contract at the making level, *i.e.*, at the formation of a contract.⁴¹ However, public policy limitations upon the freedom of contract have resulted in recognition of compulsory contracts. A duty to contract (*Kontrahierungszwang*) exists with regard to services necessary for a decent standard of living under the conditions of modern life (including, *e.g.*, public transportation, mail and supply of energy).⁴² Furthermore, to increase the protection of members of society against one of the dangers of modern life, the owner of an automobile is required by statute to take out public liability insurance and liability insurance carriers are under duty to provide coverage.⁴³

Furthermore, case law has taken the position that a monopolist's refusal to deal will be actionable if it results in "unconscionable injury" because no close substitute is available.⁴⁴ An enterprise, however, which merely dominates the market is under no such duty, but discrimination between customers without good cause may give rise to a claim for damages.⁴⁵ Protection against

³⁷ See C. CANARIS, *supra* note 28, at 411 & *passim*.

³⁸ See Wolf, *supra* note 28, at § 3(bb).

³⁹ See the rhetoric in *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965). The court overlooked section 1 of the *Restatement*. This observation is not meant to criticize the soundness of the result reached by the court. See generally 1 A. CORBIN, *CORBIN ON CONTRACTS* § 205 (1963).

In England "promissory estoppel," we are told, can be used only as a shield and not as a sword even today. See, *e.g.*, *Combe v. Combe*, [1951] 2 K.B. 215. See also G. CHESHIRE & C. FIFOOT, *supra* note 1, at 88-91 (discussion of the evolution of promissory estoppel according to later case law).

⁴⁰ The term "compulsory contract" includes "dictated" contracts, *i.e.*, contracts whose terms are prescribed in whole or in part by statute. STAUDINGER, *supra* note 23, at 861-62.

⁴¹ See J. ESSER, *supra* note 1, ¶ 11, § II, at 83.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* See also Kessler & Fine, *supra* note 35, at 410.

⁴⁵ Law Against Restraints of Competition (Cartel Act) of Aug. 3, 1973, ¶ 26 (2) [1973] 1 BGBl. § 17. Its provisions are discussed by Giles, *Commercial Law*, in 2 E. COHN, *supra* note 21, at 46-58; an English translation of the text is given in R. MULLER & H. SCHNEIDER, *GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN* (1973).

monopoly abuse is not limited to the economic sphere. The country physician in *Hurley Administrator v. Eddingfield*⁴⁶ who enjoyed a factual monopoly would be liable under German law if he refused his services without cause.⁴⁷

German theory, with its subjective underpinnings, understandably did not find it easy to fit compulsory contracts into the contractual scheme of things. This is not surprising when we remember that American legal theory ran into similar conceptual difficulties in accepting compulsory contracts despite the fact that "Anglo-American law, with its consensual-relational duties, its feudal survivals and its original tort theory of contract can stretch its conception of consensual obligation pretty far."⁴⁸ German case law and literature, to accommodate the new source of obligation, has developed the concept of factual contractual relation (*faktisches Vertragsverhältnis*):⁴⁹ Provider and recipient of public services will be treated as if they had entered into a contract. The recipient who acts in a manner which, under contemporary social conditions, typically indicates the existence of such a relation will not be heard to claim that he did not intend to enter into a contract. An obligation results from "typical social contact." It is life and not contract which creates the obligation. Even an express protest will be of no avail.⁵⁰ A person, for instance, who uses parking space provided for the public on payment of a fee is liable even if he informs the supervisor in charge

⁴⁶ 156 Ind. 416, 59 N.E. 1058 (1901).

⁴⁷ See W. FIKENTSCHER, *supra* note 1, at 75. Pharmacists are also under a duty to serve. *Id.*

⁴⁸ Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 743 (1943). Raiser in discussing the problem under German law raises the same points as did Patterson. *Raiser V. & V.*, *supra* note 1, at 124.

⁴⁹ See, e.g., Judgment of July 14, 1956, 21 BGHZ 319; Judgment of Jan. 29, 1957, 23 BGHZ 175; S. SIMITIS, *supra* note 1; Lorenz, *Manifestation of Assent Without Identifiable Sequence of Offer and Acceptance*, in 2 R. SCHLESINGER, *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 1602 (1968). Lorenz gives a good survey of the scope of the doctrine which he regards as unnecessary. Its use is not confined to implied contracts by virtue of a social obligation to perform. It has been used to explain why partnerships or labor contracts which are nonexistent or void ab initio, but which have been carried out for a certain length of time, are treated as having existed. They are held as valid until terminated. For instance, an employment contract entered into by a minor without parental consent can be terminated only with regard to the future. For past services, the minor is entitled to full payment in accordance with the terms of the contract. See generally Esser, *Gedanken zur Dogmatik der "faktischen—Schuldverhältnisse"*, 157 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 86 (1958-59) and the fascinating discussion of the issues at the "Tagung der Zivilrechtslehrer." *Id.* at 100.

⁵⁰ See, e.g., Judgment of July 14, 1956, 27 BGHZ 335; Judgment of January 29, 1957, 23 BGHZ 157, 176. In either case liability in the form of restitution could have been found.

of the parking facility that, in his view, the municipality should provide free services.⁵¹

The *faktisches Vertragsverhältnis* loses its strange flavor for the American reader when we remember its counterpart in Costigan's⁵² implied-in-fact contract without mutual assent and the English case of *Upton-On-Severn Rural District Council v. Powell*.⁵³ In that case the owner of a farm was held liable in contract to pay for the services of a fire brigade despite the fact that plaintiff did not expect to charge and defendant did not expect to pay, both parties erroneously assuming that defendant's farm was situated in plaintiff's fire district and defendant therefore was entitled to free services. Lord Greene, M.R., held that the contract did exist since the defendant asked for the services which plaintiff provided.⁵⁴

C. Contractual Justice (Theory of Equivalence)⁵⁵

The representatives of the contractual justice (*Vertragsgerechtigkeit*) school of thought postulate "Material fairness within the contract,"⁵⁶ but the foreign reader of the relevant literature should not expect that in advancing this concept, they meant and mean a complete and radical break with the ideal of freedom of contract as developed by liberal theory.

To be sure, the beginnings of the doctrine of contractual justice were ideological.⁵⁷ They reflected a sharp reaction against the Civil Code's rejection of the *just price* and *laesio enormis* theories which dominated the teaching of both the Schoolmen and the Enlightenment.⁵⁸ But whatever the ideological origins of the doctrine, its modern advocates do not suggest a resurrection of these theories.⁵⁹ Their concern is the reexamination of the role

⁵¹ See cases cited note 50 *supra*.

⁵² See Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 386 (1920). Lorenz uses the term "implied-in-law contract." See Lorenz, *supra* note 49, at 1603-08.

⁵³ [1942] 1 All E.R. 220 (C.A.).

⁵⁴ An American lawyer familiar with the writings of Underhill Moore with their heavy emphasis on the normative force of "standard patterns of overt" behavior will also find suggestive parallels to the German concept of *faktisches Vertragsverhältnis*. His relevant titles are collected in F. KESSLER & G. GILMORE, *CONTRACTS* 119 (2nd ed. 1970).

⁵⁵ I have borrowed the phrase from Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777, 780 (1941).

⁵⁶ I have borrowed the expression from Cohn, *The Basis of Contract*, 46 HARV. L. REV. 553, 581 (1932).

⁵⁷ See Raiser V. & V., *supra* note 1, at 105, 116-20.

⁵⁸ See F. WIEACKER, *supra* note 16, at 290. For a discussion of these terms see Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 364 *et seq.* (1937).

⁵⁹ See text accompanying note 70 *infra*.

of free contract within the legal system. The justification for the binding force of contractual promises, so runs their argument, cannot be found in the principle of private autonomy. They find this justification inadequate. It leaves open the question of why and to what extent private autonomy should be respected and why society should place legal sanctions at the disposal of contracting parties thus enabling them to regulate their affairs without governmental intervention.⁶⁰ Contract, for the advocates of contractual justice, is an appropriate principle of order only if under the circumstances of the bargaining process there is a high probability that the parties were able to evaluate the material fairness (rightness) of the resulting contract. The idea of "rightness" is "immanent" in the notion of contract. Private autonomy and "immanent rightness" are not in opposition but in "dialectical correlation."⁶¹ The term "rightness" has not been clearly defined. It combines elements of justice (not defined), expediency, security of transactions and, according to the latest version of the theory, respect for the individual and his informed choice.⁶² These elements, admittedly, may come into conflict with one another.⁶³

Despite heavy criticism of its vagueness, the doctrine has been accepted by an increasing number of scholars⁶⁴ who have employed the case law interpreting the statutory sources (the Constitution, the Civil Code, and a host of special statutes) as raw material to fashion the emergent philosophy of contractual justice which is meant to provide reliable guidelines for decision making.

It is impossible to give an exhaustive report on the manifold ramifications of the equivalent theory within the confines of this

⁶⁰ See, e.g., Schmidt-Rimpler, *Grundfragen einer Erneuerung des Vertragsrechts*, 147 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 130, 155 et seq. (1941). The latest version of Schmidt-Rimpler's position is to be found in Schmidt-Rimpler, *Zum Vertragsproblem*, in FUNKTIONWANDEL DER PRIVATRECHTSINSTITUTIONEN, FESTSCHRIFT FÜR L. RAISER 1, 12 (1974) [hereinafter cited as RAISER FESTSCHRIFT]. Because of his difficult style it is quite possible that my summary of Schmidt-Rimpler's thought has not done him full justice. My misgivings are shared by Raiser V. & V., *supra* note 1, at 118.

Schmidt-Rimpler's theory has been modified by M. WOLF, RECHTSGESCHÄFTLICHE ENTSCHEIDUNGSFREIHEIT UND VERTRAGLICHER INTERESSENAUSGLEICH (1970). His version of the theory requires only that the parties were given a chance to make good use of the opportunity to arrive at a just result. *Id.* at 74. This version has met with the disapproval of the author of the original idea (RAISER FESTSCHRIFT, *supra* at 12).

⁶¹ K. LARENZ, GESCHÄFTSGRUNDLAGE UND VERTRAGSERFÜLLUNG 160 (3. Auflage 1963). See also F. BYDLINSKI, PRIVATAUTONOMIE UND OBJEKTIVE GRUNDLAGEN DES VERPFLICHTENDEN RECHTSGESCHÄFTS 105 et seq. (1967).

⁶² See note 60 *supra*.

⁶³ See Raiser V. & V., *supra* note 1, at 118.

⁶⁴ See, e.g., Hefermehl, *Willenserklärung*, in 1 Hs. SOERTEL, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 138 (Randziffer 71) (10. Auflage 1967).

Article. Only a few high points will be given to illustrate the tenets of the new creed.⁶⁵

The requirement of contractual justice has been used to permit screening of the provisions of a contract for actual or potential unfairness. In this respect section 138 of the Civil Code has been and continues to be of considerable importance.⁶⁶ Subsection 1 of section 138 makes a contract (more accurately, a legal transaction) void if its contents violate *bonos mores*, i.e., "the sense of decency of every person who possesses understanding of what is just and equitable."⁶⁷ According to subsection 2, a contract is void when

[O]ne person profiting by the carelessness or inexperience of another person, or from an emergency in which the other party finds himself, causes to be promised or granted to himself or to a third party, against a consideration, economic advantages which exceed the value of the consideration to such an extent that in the circumstances of the case there is an obvious disproportion.⁶⁸

Section 138 has not adopted a just price theory: This means that mere disproportion between performances is not enough to void a contract; economic duress is required in addition to obvious discrepancy.⁶⁹ Even the most enthusiastic advocate of the ideal of contractual fairness (who has also introduced the notion of "economic capacity to contract"), has spoken against a return to the just price theory⁷⁰ because requiring courts to determine just price would present insurmountable difficulties. Therefore, the price term must be left to the determination of the parties in the light of the market situation.⁷¹

The idea of contractual justice also looms rather large in the treatment of standardized mass contracts, developed by industrial and commercial enterprises and typically prepared in advance of

⁶⁵ See Wolf, *Schranken der Vertragsfreiheit*, 1 *ATHENÄUM-ZIVILRECHT* 36 (1972).

⁶⁶ Section 138 of the German Civil Code is just as outdated as its counterpart, section 2-302 of the UCC, the latter section being interpreted according to its Comments.

⁶⁷ Judgment of March 13, 1936, 150 RGZ 1.

⁶⁸ I have been using the Cohn translation. 1 E. COHN, *supra* note 21, at 79.

⁶⁹ The person who commits economic duress has to be aware of the circumstances which have created the precarious situation of the victim. W. FLUME, *supra* note 20, at ¶ 18(3). For a discussion of duress according to section 123 of the Civil Code in general, see Dawson, *supra* note 58, at 347.

A discussion of section 134 of the Civil Code dealing with illegal contracts is of no great analytical interest in our context. An illustration is afforded by the prohibition of cartels under paragraph 1 of the Law Against Restraints on Competition (Cartel Act). Law of Aug. 3, 1973, [1973] 1 *BGBI.* 917.

⁷⁰ See M. WOLF, *supra* note 60, ¶ 3, § I, at 32-33.

⁷¹ See J. ESSER, *supra* note 1, ¶ 11, § III, at 86.

the individual contract.⁷² Their importance for the distribution of goods in West Germany can hardly be exaggerated,⁷³ and they have been a prolific source of litigation. To be sure, German courts, just like the courts in common law countries, have been aware of the practical need for standardization.⁷⁴ Still, the "abuse" of freedom of contract by the party with the superior bargaining power has presented courts with problems they have not always satisfactorily resolved.⁷⁵ The courts have frequently been accused of lacking in realism since they have failed to realize that they may create special dangers to the other party to the contract, to the law that they change, and to the concept of justice.⁷⁶ Case law and literature have pursued two inquiries in evaluating whether standardized contracts or clauses are so obnoxious as to be unenforceable. First, they have asked whether the party complaining about the terms of a standard contract has given his consent to those terms. Then, even if consent is found, they have asked whether the terms of the contract violate notions of contractual fairness.⁷⁷

In answering the first question, courts and commentators have not adopted a unitary approach but have differentiated be-

⁷² See L. RAISER, *ALLGEMEINE GESCHÄFTSBEDINGUNGEN* (1935), reprinted in 1961, is still the most important monograph. The study by G. RAISER, *DIE GERICHTLICHE KONTROLLE VON FORMULARBEDINGUNGEN* (1960) is also indispensable. See also O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937), reviewed in Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700 (1939); Giles, *Commercial Law*, in 2 E. COHN, *supra* note 21, at 29-33; W. WEBER, *DIE ALLGEMEINEN GESCHÄFTSBEDINGUNGEN* (1967); P. RATZ, 3 *HANDELSGESETZBUCH, GROSSKOMMENTAR* § 346, at XI (3. Auflage Bruggemann *et al.* eds. 1968); 2 K. ZWEIFERT & H. KÖTZ, *supra* note 24, at 110.

⁷³ The most important standard contracts (*Allgemeine Geschäftsbedingungen*) are given in the leading commentaries to the Commercial Code (*Handelsgesetzbuch*). See A. BAUMBACH, *HANDELSGESETZBUCH* 679-708 (18. Auflage by Duden 1960).

⁷⁴ See sources cited note 72 *supra*.

⁷⁵ Although the following discussion deals with the validity of standardized contracts in general, it should not be overlooked that many contract disputes involve a standardized contract on both sides of the transaction. Case law dealing with the resulting "battle of forms" has come to different solutions on the validity of contradictory clauses. Some decisions apply the "last shot" doctrine giving effect to the final volley; others apply a rule similar to that advanced in section 2-207(2) of the Uniform Commercial Code which considers the "last shot" terms to be proposed additions to the contract. See Giles, *Commercial Law* in 2 E. COHN, *supra* note 21, at 29-31; Lange, *infra* note 79, at 667-68 (Randziffer 95).

⁷⁶ See Giles, *Commercial Law*, in 2 E. COHN, *supra* note 21, at 29. For the most challenging discussion of traditional approaches see Huhn, *Allgemeine Geschäftsbedingungen*, 1 *ATHENÄUM-ZIVILRECHT* 186 (1972).

⁷⁷ See, e.g., Giles, *Commercial Law*, in 2 E. COHN, *supra* note 21, at 29; W. FIKENTSCHER, *supra* note 1, §§ 21 VII & 26 V, at § 5; 2 K. ZWEIFERT & H. KÖTZ, *supra* note 24, at 11 (the authors correctly observe that courts frequently fail to make the distinction).

tween various types of standardized contracts,⁷⁸ finding consent in varying forms. There are, for example, standard contracts which owe their origin to the cooperation of the various interest groups affected. This is true for the terms of marine insurance contracts and the uniform lease prepared by landlord and tenant organizations. These amount to customary law, displacing those statutory provisions which can be varied by agreement. In other types of standard contracts, the terms are authorized by statute, decree, or an administrative agency. These contracts are used in the transportation, energy, and insurance industries. Some have the force of trade custom, some are regarded as customary law, others even as statutes.⁷⁹ Their binding effect is not dependent on incorporation in the individual contract,⁸⁰ nor upon express consent by the other party.

Apart from the cooperative types of contracts and those created by statute, custom, or trade usage (which do not require explicit consent), individual consent has to be found to make standardized terms part of a specific contract. Courts thus have the opportunity to filter out obnoxious clauses *a limine*. To find the requisite consent, they have relied heavily on Civil Code section 157 which provides that "contracts shall be interpreted according to the requirement of good faith, ordinary usage being taken into consideration."⁸¹ In using this section, case law found the required consent by implication, being satisfied with an implied (tacit) consent.⁸²

Accordingly, in attempting to arrive at a fair solution of the consent problem, courts have distinguished between transactions with enterprises (such as banks) which are known to deal only on the basis of their standard terms or not at all, and transactions with businesses which are willing to bargain about the terms that they are using. Obviously, more will be required by way of notice of an unusual term in the former transaction than in the latter.⁸³ Thus the customer of a bank will not be heard to complain that the bank's terms are unfamiliar to him unless they are unusual.⁸⁴

⁷⁸ The classification roughly follows the one used by Fikentscher. See W. FIKENTSCHER, *supra* note 1, at §§ 21 VII & 26 V, at § 5.

⁷⁹ See A. BLOMEYER, ALLGEMEINES SCHULDRECHT 78 (4. Auflage 1969); J. ESSER, *supra* note 1, ¶ 13, at § I; Lange, *Vertrag*, in 1 Hs. SOERGEL, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 665 (Randziffern 86-88) (10. Auflage 1967).

⁸⁰ See L. RAISER, *supra* note 72, at 57, 173, 208.

⁸¹ A. LÜDERITZ, AUSLEGUNG VON RECHTSGESCHÄFTEN 94 (1966).

⁸² See K. MROCH, ZUM KAMPF GEGEN DIE UNLAUTEREN GESCHÄFTSBEDINGUNGEN 8-9 (1960); Lange, *supra* note 79, at 666 (Randziffer 92). Unfortunately, the maxim that consent to unfair terms cannot be implied has been honored in the breach all too frequently. K. MROCH, *supra* at 15.

⁸³ See W. FIKENTSCHER, *supra* note 1, at § 26 V, at § 5.

⁸⁴ Judgment of Apr. 28, 1954, 13 BGHZ 198, shows that banks are not

Furthermore, courts have given greater protection from oppressive terms to nonmerchants than to merchants.⁸⁵ However, even the latter is not bound by the standard contract terms of a regular supplier, unless they have been brought to his attention in previous dealings.⁸⁶

In order to control the terms of standard contracts courts have utilized a number of tools. Whenever they have found the rules laid down in section 138 too restrictive, they have resorted to the *contra proferentem* rule of interpretation⁸⁷ or to the general provision of section 242 of the Civil Code imposing a duty to perform in good faith. That provision reads as follows: "The debtor is bound to effect performance according to the requirements of good faith, common habits being duly taken into consideration."⁸⁸ In screening the terms of standard contracts for their fairness, courts continue to differentiate between mercantile and nonmercantile parties.⁸⁹ They have also taken into account whether one of the parties has "abused" his bargaining power by depriving the other of all of his statutory rights, thereby upsetting the normal scheme of remedies available for breach of the contract.⁹⁰ A 1916 decision by the former *Reichsgericht* provides an example.⁹¹ The court had to evaluate a clause in a standard sales contract which limited the buyer's remedies for defects to the right of demanding repairs. After several attempts to correct the defect, the buyer sued for refund and was successful despite the contractual

immune to controls of their standard terms. To play safe, banks, as we are sometimes told, give their standard conditions to new customers who are then typically requested to sign a receipt. But posting the conditions in general view seems also a common (?) practice. This master contract (*Bankvertrag*) governs the individual transaction.

The terms of the *Allgemeine Geschäftsbedingungen* used by banks, their origin, and the extension of their use are given in A. BAUMBACH, *HANDELSGESETZBUCH* 507-14 (18. Auflage by Duden 1960).

⁸⁵ According to section 346 of the Commercial Code merchants are bound by existing trade customs.

⁸⁶ Standard terms are typically found in purchase orders, acknowledgement forms, or in letters of confirmation. See G. RAISER, *supra* note 72, at 5. The incorporation of a term in a bill or invoice sent after the contract has been entered into comes too late.

⁸⁷ On the use of section 157 for purposes of interpretation see A. LÜDERITZ, *supra* note 81, at 10 *et seq.*

⁸⁸ 1 E. COHN, *supra* note 21, at 97. Use of section 242 has a great advantage of enabling courts to declare the contract only partially and not totally void as would be the case under section 139 of the Civil Code. See Sandrock, *Subjektive und objektive Gestaltungskräfte bei der Teilnichtigkeit von Rechtsgeschäften*, 159 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 481, 524 (1960-61).

⁸⁹ See Giles, *Commercial Law*, in 2 E. COHN, *supra* note 21, at 29-30.

⁹⁰ See Judgment of Feb. 17, 1964, 41 BGHZ 151, 151-54; J. ESSER, *supra* note 1, at ¶ 13.

⁹¹ Judgment of Nov. 23, 1915, 87 RGZ 335.

limitation of remedy.⁹² A subsequent decision of the *Bundesgerichtshof* has permitted to stand a clause excluding rescission for defects when the contract provided for a duty to repair. However, the right to rescission is revived if the efforts to "cure" are unsuccessful or the seller is unwilling to discharge his duty to "cure."⁹³

In determining the validity of standardized exculpation clauses (*Freizeichnungsklauseln*) the courts have differentiated between direct damages, in particular personal injury damages, and remote or indirect damages. They have also taken into account whether insurance was commercially available for the excluded risk.⁹⁴ On the other hand, the defense that the exculpation clause did enable the enterprise to lower its prices has been found unacceptable and the clause struck down.⁹⁵

IV. IN SUMMARY

The impact of the theory of equivalence (material fairness) on the postulate of freedom of contract has been widely discussed, but few authors have been sanguine enough to proclaim that contractual justice has replaced freedom of contract as the central principle of all contract law.⁹⁶ Most writers are taking the position that although freedom of contract is still a viable principle, it must be restricted in the interest of its own preservation. Its "immanent" limitation of "rightness" has to be observed. This attitude is reflected in the role assigned to the courts in administering the law of contracts. According to prevailing doctrine

⁹² The case of *L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394, discussed in Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 n.5 (1939), forms an interesting contrast. For the background of the case see the remarks of Lord Denning who argued the case for the plaintiff in Bright, *Contracts of Adhesion and Exemption Clauses*, 41 AUSTL. L.J. 261, 261-69 (1967).

⁹³ See Judgment of Oct. 29, 1956, 22 BGHZ 90. Invalidity of the whole contract can be decreed if it contains a myriad of poorly arranged disclaimer clauses making it impossible for the other party to know where he stands. See Judgment of Nov. 11, 1968, 51 BGHZ 55.

⁹⁴ See J. ESSER, *supra* note 1, ¶ 13, § III, 3; 2 K. ZWEIGERT & H. KÖTZ, *supra* note 24, at 13.

⁹⁵ See Judgment of Oct. 29, 1956, 22 BGHZ 90, 98. Even a clause in the contract disclaiming liability for gross negligence permitted by Civil Code section 276 II (BGB § 276 II (Staudinger 1957)) may, apparently, be eliminated under proper circumstances. See J. ESSER, *supra* note 1, ¶ 13, at § III.

An evaluation of the usefulness of the choice of rate decisions of American courts for German law is found in G. RAISER, *supra* note 72, at 149. His book contains a fascinating discussion of the American case law particularly *Bisso v. Inland Waterways*, 349 U.S. 85 (1955). Raiser concludes that the American case law cannot be imported into the German law since the choice of rate decisions are anchored in the consideration requirement which has no counterpart in the German law. G. RAISER, *supra* note 72, at 150. *But see, id.* at 151 *et seq.*

⁹⁶ See, e.g., K. ZWEIGERT & H. KÖTZ, *supra* note 24, at 7.

courts cannot rewrite the contract (for instance, change the price term); they can only eliminate obnoxious clauses.⁹⁷ But it may be argued that elimination of an objectionable clause amounts in substance to a rewriting of the contract because the clause is then replaced by the applicable code provisions.⁹⁸

In evaluating the function of the doctrine of contractual justice within the contract (*Vertragsgerechtigkeit*), a comparison with American law may provide the proper perspective. The doctrine of *Vertragsgerechtigkeit* fulfills in German law a function not dissimilar to the common law doctrine of consideration which has no German counterpart. In the heydays of freedom of contract, at the time where courts were most reluctant to strike down contract clauses in the name of public policy, the doctrine that consideration has to be bargained for to make a promise enforceable was frequently used to carry out or to enlarge notions of public policy.⁹⁹ While it is true that the adequacy of consideration will, as a rule, not be looked into, the doctrine of nominal consideration has become a formality and has been cut back by the *Second Restatement*.¹⁰⁰ It is therefore not surprising that Llewellyn always regarded the consideration doctrine as one of the chief weapons in the fight against obnoxious clauses in form pad contracts.¹⁰¹ This is also the function that the doctrine of *Vertragsgerechtigkeit* performs in German law.

But, as we have seen, consideration or its functional equivalent (the requirement of contractual justice) has not been the only weapon in the armory of courts and legislatures to remedy contractual unfairness. Reaction to the "obvious danger of overreaching"¹⁰² has resulted in governmental regulation including administrative review of contracts "affected with a public interest" (such as insurance policies) in both the United States as well as

⁹⁷ See J. ESSER, *supra* note 1, ¶ 11, at § III.

⁹⁸ See Judgment of Feb. 17, 1964, 41 BGHZ 151.

⁹⁹ See, e.g., Purdy v. Rome, W. & O.R.R., 125 N.Y. 209, 26 N.E. 255 (1891); Fitts v. Panhandle & S.F. Ry., 222 S.W. 158 (Tex. Comm. of App. § B 1920).

¹⁰⁰ RESTATEMENT (SECOND) OF CONTRACTS § 89B (Tent. Draft No. 2, 1973).

¹⁰¹ See, e.g., K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 365 (1960); Llewellyn, *On the Complexity of Consideration: A Forward*, 41 COLUM. L. REV. 777, 780 (1941); Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939), reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937). See also Note, *Grower-Canner Agreements: An Abuse of Mass Standardized Contracts*, 58 YALE L.J. 1161, 1164 (1949); Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1090-97 (1935).

¹⁰² I have borrowed the phrase from the *Restatement*. RESTATEMENT (SECOND) OF CONTRACTS, § 237, comment c at 133 (Tent. Draft No. 5, 1970).

in West Germany.¹⁰³ Furthermore, courts in both countries have construed standard terms against their author and they have subjected these terms to "the overriding obligation of good faith."¹⁰⁴ Finally, courts have increasingly exercised the power to refuse enforcement of an unconscionable contract or term.¹⁰⁵

The rich case law has tempted some modern scholars in this country as well as in West Germany, to suggest a new theory for standard contracts. Dissatisfaction with the usefulness of the "contract of adhesion" analysis¹⁰⁶ has led them to suggest that standard contracts particularly in the consumer area should be regarded as "things."¹⁰⁷ This "reification" theory has recently been refined: standard forms, as has been suggested, should be regarded as "things" only to the extent that they are not "true" contracts, *i.e.*, their terms are not agreed upon.¹⁰⁸ Thus qualified, the theory suggests that obligations incorporated in a standard contract may become independent of the consensus of the parties so that the contents of the standard form will be determined by the socioeconomic context which forms their matrix. It may indeed be argued that the courts in dealing with standard contracts have already taken this position, thereby adding a new facet to the requirement of contractual justice.

The second installment of this Article dealing with third party beneficiary contracts will continue to trace parallels in the development of our own law and that of West Germany.

¹⁰³ In this country regulation has affected insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts. For parallels in German law, see note 40 and text accompanying notes 79-80 *supra*.

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 237, comment c at 133 (Tent. Draft No. 5 1970). Courts have interpreted form contracts "to mean what a reasonable [person] would expect it to mean" and they have "added in favor of the weaker party [an obligation neither expressly agreed to nor expressly rejected]." Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 858 (1964). See also Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966 (1970). Courts on occasion have even created ambiguities where none have existed to allow interpretation. Of course, the duty to perform in good faith is not limited to standard contracts. See UNIFORM COMMERCIAL CODE § 1-203; RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Draft No. 5, 1970).

¹⁰⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Draft No. 5, 1970); UNIFORM COMMERCIAL CODE § 2-302; Keeton, *supra* note 104; BGB §§ 138, 242 (Staudinger 1957); text accompanying notes 87-89 *supra*.

¹⁰⁶ See Patterson, *supra* note 104, at 855 *et seq.*

¹⁰⁷ Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

¹⁰⁸ See Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 541 (1971); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 14 (1974); S. SIMITIS, *supra* note 1, at 535 *et seq.*; Raiser V. & V., *supra* note 1, at 123 *et seq.*