CONTENTS

SYMPOSIUM

CONTRACTS IN THE REAL WORLD

ESSAYS

The Perspective of Law on Contract

Aditi Bagchi 1227

Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World

Brian H. Bix 1251

Reflections on Contracts in the Real World: History, Currency, Context, and Other Values

Lawrence A. Cunningham 1265

Contract Stories: Importance of the Contextual Approach to Law

Larry A. DiMatteo 1287

Contract as Pattern Language

Erik F. Gerding 1323

Cases and Controversies: Some Things to Do With Contracts Cases

Charles L. Knapp 1357

Unilateral Reordering in the Reel World

Jake Linford 1395
Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students

Jennifer S. Taub 1427

COMMENTS

Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-For-Hire Dilemma

Glenda A. Gertz 1465
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THE PERSPECTIVE OF LAW ON CONTRACT

Aditi Bagchi*

INTRODUCTION

Contract is an essential component of the first-year curriculum in American law schools. But law students do not all take the same course in contracts. More so than in countries where students in different classes, even universities, are given common examinations, American law students draw something of a lottery in their assignment to particular law professors.

The aspects of that lottery most immediately salient to law students may concern the pedagogical style and personality of their professors. But arguably more important, even than the subject matter covered by a particular course, is the picture of contract and contract law offered to students. Although students have their own direct experiences with contract, they might plausibly take their first-year course to present the definitive legal perspective on contract.

What is the perspective of law on contract? This Article will consider two dimensions of the perspective we offer students. Part I will consider how we present the nature of contract law. That is, it will explore the extent to which traditional methods of teaching unduly underplay indeterminacy and disagreement. In that Part I distinguish between inductive and deductive legal reasoning and suggest we may give short shrift to the former in teaching. Part II will consider the attitude of the law toward contract as a social practice. Here I distinguish between internal and external perspectives on law and suggest that many professors may be inclined to systematically favor one perspective over the other. We should strive to help students integrate those perspectives.

I. INDUCTIVE AND DEDUCTIVE REASONING IN CONTRACT LAW

Traditional contract courses emphasize doctrine. More rigorous
variants of doctrinally focused classes may emphasize logical continuity between doctrines. They might tease out underlying principles of contract to which the law appears committed, whether it be the requirement of agreement or the objective character of agreement, and demonstrate how those principles play out in one area after the other. In showing contract law to be more than an ensemble of isolated legal rules pertaining to the enforcement of agreement, a “cohesion” approach illuminates how rules hang (or fall) together, their common presuppositions as well as their tensions.

Presenting contract law as a body of law that aspires to regulate exchange in a consistent way reveals law at its best. The idea that rules constrain or direct—even if they do not fully determine—the ways in which powerful actors in our legal order adjudicate disputes between private persons who find themselves at the mercy of a court is the essence of the rule of law. If contract professors can show how the rule of law operates in an area so fundamental to commercial exchange and social order, we will have imparted something important to not only the practice of law but also the professional identity of budding lawyers.

The cohesion approach, which is doctrinal teaching at its best, proceeds by working through a set of classic and a few contemporary cases, each of which stands in for some doctrine or doctrinal development. The cases selected for students are usually ones that come closest to articulating key principles expressly. If the rules amount to a three-part test, then all the better. Sometimes selected cases also (or instead) offer the most elaborate justification for the related legal rule or the most detailed and systematic application of it. Sometimes they have especially compelling facts that demonstrate either the suitability or limits of the rule. Casebook authors appear to apply similar criteria because we see the same cases in numerous casebooks.

1. For example, most casebooks use Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898), to illustrate promissory estoppel, and Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965), to illustrate the possibility of pre-contractual promissory estoppel.


4. See, for example, the oft-used Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch.); 2 Hurl. & C. 906, to illustrate failure of agreement, and Sherwood v. Walker, 33 N.W. 919 (Mich. 1887), to illustrate mutual mistake.

5. Each of the cases cited above, supra notes 1–4, appears in IAN AYRES & GREGORY KLASS, STUDIES IN CONTRACT LAW (8th ed. 2012); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE (4th ed. 2008); LON L. FULLER, MELVIN ARON EISENBERG & MARK GERGEN, BASIC CONTRACT LAW (9th ed. 2013); FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY T. KRONMAN,
Although the thrust of this Article is to emphasize differences in the perspective on contract we offer students, what standardization we do see in classrooms results from the convenience of assigning casebooks that have preselected a set of cases, a set that is, again, substantially overlapping across casebooks. Those cases amount to a canon that even seasoned practitioners might refer to as representative of certain key legal rules. For example, one might long refer to the Hadley principle (of Hadley v. Baxendale\(^6\)) to stand in for the idea that damages are limited to those foreseeable to the other party, or to Wood v. Lucy, Lady Duff-Gordon\(^7\) for the idea that a duty of good faith will be implied to cure apparent lack of mutuality in an agreement that was intended to be enforceable.

A common canon has advantages and disadvantages. From a pragmatic standpoint, it must be reassuring to law students that their grasp of the essential rules is not entirely contingent on the idiosyncrasies of their professors, especially as our idiosyncrasies are often rather apparent and not always reassuring on their face. It is also useful for attorneys to have a shorthand and common reference for fundamental rules. The common law is more common if students from law schools in different states, studying under professors with various priorities, come away with a common understanding of the most important rules and even the most important justifications offered for them. We cannot speak of an internal point of view\(^8\) if there is no common perspective shared by participants in the legal system. Without such an internal point of view, the cohesion and doctrinal unity that we might aspire to impart to students would be an illusion.

A legal canon comes with costs, however, just as there are costs to a literary canon, philosophical canon, or to a single history of any development or event.\(^9\) First, legal rules are indeterminate. Law students often resist indeterminacy, and depending on the perceived authority of their professor, may attribute the indeterminacy of her answers to reflect only her own uncertainty. In fact, indeterminacy is an essential feature of...
The indeterminate application of legal rules and precedent to individual cases creates the space in which those rules evolve, and in which justice can be done for particular litigants whose facts depart from precedent in ways for which any formal articulation of the rule will not take adequate account.

There are a number of obvious ways in which we might attempt to impart the fact of indeterminacy to students. We might give them cases and ask them to apply them to facts and show that they and their peers arrive at radically different results, thus illustrating a simple feature of how the mind works. Or we might present them with apparently contradictory cases, as we often do in certain areas. For example, *Hill v. Gateway*\(^{12}\) and *Klocek v. Gateway*\(^{13}\) neatly show how very smart judges construct offer and acceptance differently on very similar facts. Jurisdictional differences, such as those that surround the parol evidence rule or the plain meaning/contextualist rules on extrinsic evidence, begin with judges diverging at some point.\(^{14}\) The cases in which they self-consciously turn—often while emphasizing continuity—reveal the multiple paths available to that court under existing precedent.

But another important way in which the fact of indeterminacy is revealed to students, and remains salient to lawyers throughout their careers, is the fact of perpetual disagreement about law and its application. To the extent lawyers refer to a canon that inevitably reflects one strand of law, albeit a dominant one, we artificially stifle genuine disagreement about the state of the law, its reasoning, and its merits.

Even if it turns out that all things considered we benefit from a common core of cases that most students read, there is a more substantial pedagogical loss to presenting these cases to students in a pre-selected fashion. The method inherently favors the deductive aspect of legal thinking. We deduce the appropriate disposition of a case from legal rules when we invoke a general rule and apply that rule directly to

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12. 105 F.3d 1147 (7th Cir. 1997).


our facts. But inductive reasoning, which in principle is not rivalrous but merely precedes deductive reasoning, is often regarded as the distinctive hallmark of common law reasoning.\textsuperscript{15} That is, though we might apply a rule deductively, we infer it in the first place from myriad cases. Especially in an era of electronic searching on Westlaw and Lexis, we do not stop with one statement of a legal rule. Rarely does a single formulation suffice to explain how a case should be handled, at least those cases that justify the time and attention of commercial litigators. In order to construct the nuanced formulation a lawyer needs, either for purposes of advising a client or in briefing to a court, an attorney must combine elements of the rule gathered from multiple cases, and she must combine them in the most elegant, logical, and normatively compelling way.

The usual method by which students learn contract rules is wholly unlike the manner in which they will acquire more subtle knowledge of the law later in practice. Although we may have good reason for proceeding as we do, we do not normally challenge them to extract a rule from cases but instead identify a case that ostensibly states the rule. We do not normally challenge them to construct a nuanced version of the rule from multiple cases; instead we discuss the application of the formulation offered to precisely those facts from which that formulation arose.

Consider an analogy to legal rules as formulas that predict (or determine) points on a graph, points that represent the outcomes of particular cases. Our usual way of teaching law might suggest that we use substantive considerations of equity or policy to construct the formula. We then apply that formula to individual cases. But in reality, in the practice of law that formula is not constructed from reason alone. We do not plot points, or determine case outcomes, by applying the formula to facts. Rather, at any given moment of decision about what the rule is, we already have thousands of data points but do not agree on the formula. We draw a line through the data points in order to construct a formula and then apply that formula to additional inputs—the facts of a new case—in order to extrapolate from precedent. Using a preselected set of cases that appears to present fixed and determinate rules distorts the process of legal reasoning because it makes it look like legal

\textsuperscript{15.} See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22–23 (1921) (“The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively[, but its] method is inductive, and it draws its generalizations from particulars.”); Arthur L. Corbin, What is the Common Law?, 3 AM. L. SCH. REV. 73, 75 (1912) (describing common law as “creation of law by the inductive process”).
reasoning consists primarily in the application of a formula to new inputs, rather than the earlier construction of that formula from existing data points.

Given time constraints and the risk aversion of first-year law students, it is difficult to pursue meaningful alternatives to the common core. We cannot humanely assign them 300 cases from which to extract each legal rule we expect them to learn—even though that may be what they end up doing at a law firm. But there are some alternatives we can pursue in a partial way. First, we can systematically seek out apparently conflicting cases and ask them to apply the law of both cases (without choosing between them) to new facts, forcing students to synthesize and construct rules on their own. Second, we can focus less on the admittedly important skill of close reading and better cultivate the equally important skill of skimming. Students often come to class with each case heavily marked up. Some attempt to memorize the facts, rule, result and even procedural history of cases. We might lower these expectations and assign more cases, explicitly instructing them to skim for the important information. We can use class discussion to help them understand what they should have looked for, what they should focus on next time.

Third, we can ask students to argue, either orally or in writing, issues from two sides. This would highlight for students the malleability of the law, pushing them to identify the indeterminacies in law and practicing the all-important skill of persuasion. At present, because our common core may feed an illusion of determinacy, exercises in legal reasoning have the quality of explanation. While judges of general jurisdiction sometimes do need the law explained to them, clients pay more for effective persuasion, and the development of law depends on a bar that is capable of helping judges make new law with the best arguments on either side at hand.

The essential distinction of this Part has been that between inductive and deductive reasoning in the common law. The next Part will consider another distinction among legal perspectives on contract, that between internal and external perspectives on law. Both inductive and deductive reasoning might be offered within an internal perspective on contract. Deductive reasoning might be doctrinal or thematic in the way described earlier, or it might be more normative. We have to try harder to ensure that students acquire a balanced perspective on the role of inductive and deductive reasoning in the law, and are able to integrate them in their practice. Similarly, we must strive to ensure that students come away with a balance between the internal and external perspectives on law and assist them in integrating those perspectives over the course of their time.
II. INTERNAL AND EXTERNAL PERSPECTIVES ON CONTRACT LAW

Internal and external perspectives on law fundamentally differ in the attitude they assume toward both legal rules and legal practice, and toward the social activity of contracting.

An internal perspective takes seriously the reasons that actors within the system give for their own behavior. Internal explanations for judicial behavior are ones that we can expect judges to accept. For example, judges might agree that they are more willing to award specific performance when there is little cost to the court of monitoring performance. But they would deny that they award remedies based on the color of plaintiffs’ hair. Even if judges believe that they decide most cases based on precedent alone, rather than equitable or policy considerations, judges would still accept reasons cited in internal perspectives as valid reasons they might in principle invoke.

Similarly, the reasons for legal rules and judicial decision-making offered in an internal perspective are ones that litigants could reasonably accept as valid reasons that appropriately bind them. Litigants would reject a ruling as unfair and “out of bounds” were they to learn, rather than merely suspect, that the judge had decided based on the prestige of their respective counsel. But we might expect even the losing party to be more accepting, rather than more resentful, of her loss if she were told that the judge had applied a statute, and that a Congressional committee

16. By internal perspective I mean something akin to but less rigorous than what legal philosophers refer to as “conceptual explanation” or “pragmatism.” I isolate here one element of their approach, i.e., that a theory’s reasons for legal rules be compatible with the reasons given and accepted by actors within the legal system. See Jody S. Kraus, Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency, in 1 LEGAL AND POLITICAL PHILOSOPHY: SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 395–410 (Enrique Villanueva ed., 2002) (“[C]onceptual explanation” aims “to identify a concept, or set of concepts that render the phenomena sought to be explained maximally ‘coherent’ [so as to capture its] immanent, inherent, intrinsic, or internal rationality or intelligibility, deep structure, animating or underwriting principles, logical consistency, or theoretical or conceptual unity.”); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 3–12 (2001).

17. The transparency of reasons behind the exercise of state power and the possibility of citizens accepting those reasons go to the legitimacy of state action. See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7 (2004) (describing deliberative democracy as “a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible”).
had drafted the relevant provision in order to solve certain observed problems in commercial contracting. Internal reasons have the mark of legitimacy because they are open (they do not depend on secrecy for their efficacy) and they take legal reasoning to be sincere and transparent.

Legal philosophers have been most deeply committed to understanding law from this perspective. Especially in private law, but in public law as well, they take their task to be the illumination and elaboration of law as we know it, in a way that is recognizable to its participants. Although philosophers are skeptical, economic legal reasoning might also be regarded as internal, at least with respect to contract law. Economists appear more willing to describe legal reasoning as misguided where it departs from their own; the significance of their intellectual enterprise does not turn, in their own eyes, on its correspondence to an existing legal order. Nevertheless, whatever their skepticism about statutory law, economists are on the whole quite sanguine about the common law. They believe that the common law has evolved into a largely efficient body of law. Although they might describe this as at least in part the product of the invisible hand at work in legal evolution, the process by which judges respond to market pressure is one that involves some judicial attention to the efficiencies of possible rules. In that respect, economists, like philosophers, believe that the reasons they offer for why one rule might be preferable to another are the kinds of reasons that interest judges and inevitably interest socially responsible persons. Their brand of legal reasoning does not depend on opacity for efficacy, in contrast to external perspectives.

External accounts of contract law are incompatible with the self-understanding of participants in the legal system. They reject the reasons actors give for their own decisions, identifying other social, political, and economic reasons that are inconsistent with judges’ own accounting. That inconsistency threatens to be delegitimizing and even destabilizing. Once the acknowledged reasons for legal decisions fall outside recognized boundaries, the boundary between law and politics crumbles and we are left with just another arena for political struggle. In that case it is not clear what lawyers and legal scholars are doing: are we merely erecting an elaborate ruse for the exercise of power? If that is the case,

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18. See Kraus, supra note 16; COLEMAN, supra note 16.
on what grounds do we expect litigants to abide by judicial decisions? What guidance can case law have for people deciding how to conduct their lives and interact with others? Law quickly appears morally arbitrary and our enterprise less noble than we like to think. The external perspective might disillusion students at just the moment when they are eager to learn how to use law as a tool for justice.

Yet arguably only an external perspective allows for deeply critical analysis of the legal order, as well as the larger social, political, and economic orders from which it arises and which it in turn supports. Such critique is all the more essential and powerful when lodged against the law and social practice of contract, which is the bedrock of a market economy. Contract law has profound implications for the ordinary patterns of civil life in a polity, and is the mechanism by which social resources are allocated among persons. Contract law thus goes to the heart of essential questions of the political order. We need to ensure students are equipped with the analytic tools by which to assess that order from the ground up.

Law professors are often more conservative than their counterparts elsewhere in the university, perhaps because we are so concerned with understanding the legal system from the inside out. But lawyers are also often important agents for political and social reform, and we prepare our students to perform this important function only when they are able to step out of the closed system and explain it on terms that, precisely because they are critical, may not be palatable to insiders.

Two methodologies or approaches to contract law that are decidedly external are political economy and critical legal studies. What both methods share, in contrast to dominant approaches to contract law, is a focus on the distributive consequences of legal rules. The absence of sustained attention to distribution by prevailing economic and philosophical theories of contract is not a coincidence. It is facially presupposed by one of the most notable features of common law contract: its bilateral structure. That is, in contract disputes one private person brings a claim against another. Plaintiff does not bring a claim against “the system,” or the legal order, or the institution of contract. Plaintiff makes the fairly narrow claim that defendant has breached their contract. That contract alone is the legal source of the obligation plaintiff seeks to vindicate—not tort, or moral principles vaguely ensconced in the law, or other involuntary duties that might frame their commercial exchange. It takes some theoretical footwork to explain how matters of institutional justice bear on the bilateral claims that private litigants
make against each other.  

How then, do political economy and critical legal studies incorporate distributive concerns into their explanation of contract doctrine? Neither method presumes a relationship between bilateral justice and institutional justice. Both explain rules without presupposing that rules implement justice at all. Instead, they focus on the motivation of powerful actors. That is, by showing how rules favor certain groups over others, they show what reasons winners have for promoting particular rules, and how the legal system might actually operate as still another political arena in which familiar winners prevail at the expense of familiar losers. As I will discuss further below, political economy and critical legal studies differ in important ways: they do not posit the same causal mechanisms in their explanations of how power translates into favorable legal rules. More important, political economy as a method is not inherently delegitimizing in the way that critical analysis of legal rules intends to be. Nevertheless, both represent a sharp rebuke to internal perspectives on the law, accusing internal perspectives of romantic idealization, or worse, serving as a deluded apologia for the already powerful. Scholars from an external perspective are in turn rebuked for deep cynicism, possible paranoia, and most dangerously, a lack of respect for the normativity of law and its importance to the project of a rule of law.

Although I have only observed a few contract law professors in the classroom, my impression is that professors tend to gravitate to either an internal or an external perspective, based in substantial part on their own research agendas. This is evident in how professors talk about the material they teach, the readings they assign, and the kinds of questions they pose in examinations. Although the sharpest divide may be between the internal and external perspectives as contrasted here, even within the internal perspective, legal economists and legal philosophers are sometimes dismissive of the methodologies and utility of considering contract from the other’s viewpoint. Given the sincerity with which professors hold their objections to certain methods, it may be unrealistic to call upon them to be methodologically agnostic in their teaching.

There is, though, a loss to teaching from one perspective alone. For teacher-scholars, we miss an opportunity to remain engaged with a broader range of legal scholarship than we might use in our own writing. More important, we owe our students a broader perspective than our

However erroneous we may deem a particular perspective, it may be one that resonates with some students more than our own, and helps them make sense of the law or their intuitions about it (which may be critical) more than our own. Just as emphasizing deductive over inductive methods artificially diminishes the appearance of disagreement in the law, eschewing perspectives other than our own in teaching artificially diminishes the appearance of disagreement about the law. Even if students are, through the heroic efforts of a Registrar, assigned to first-year professors of a range of methodological proclivities, most will not be able to apply those methodologies to the material in each class without some assistance in their first semesters. By the end of their law school career they may have developed that important intellectual skill: that is, to be able to hear someone talking about a subject matter from one perspective and extrapolate rival perspectives on that same subject matter from the one presented. For that reason, methodological pluralism is less important in upper-year courses. But in first-year contracts, we ought to move back and forth between internal and external perspectives, helping students construct a synthesized, albeit tentative, perspective that they can revise over the course of their careers.

I will now go through several interdisciplinary perspectives on contract in greater detail. The aim is to highlight the distinctive value in each. In addition to philosophy, economics, political economy, and critical legal studies, each of which I have touched on briefly above, I will also consider psychology and legal realism as potentially internal perspectives. Although these methods do not exhaust the array of ways in which legal scholars today write and think about contract, they cover a large swath of the relevant range. And although these perspectives in law may not easily co-exist within the attitudes of individual contract law professors, I will suggest how we might begin to integrate these into the perspective we present law students. More important than the particular method of integration I propose is the imperative to integrate them in some manner, such that law students are not left with the sense that these are entirely alternatives to each other, or worse, that the only legitimate perspective is the one to which they happen to be exposed.

A. Philosophy

The most important philosophical theory of contract is the promissory theory. This view of contract is compelling on its face. After all, the

first section of the Restatement defines contract as “a promise or a set of promises.” Promises are obligations to particular other persons that we assume by communicating an intention to do so; so too are contractual obligations. To be sure, there are problems with the promissory view of contract but it offers a way of thinking about the moral content of contractual obligation in a systematic way that can piggyback on a rich philosophical literature. Contracts as promises invite us to think about why promises are binding, when they are binding and when they are not, when their breach gives rise to a remedial duty, and what the relationship should be between the moral obligations that attend promise and the legal obligations recognized by contract law. These questions nicely track many of the key questions in contract. For example, if contractual commitments are promises, why do we enforce promises that are made in exchange for consideration, or those that give rise to reliance, but not others? Why must a promise be accepted to become contractual? In interpreting obligations, why does objective intent prevail over subjective intent? What are the conditions under which we are morally excused from voluntary obligations, and are those conditions the ones under which we should be legally excused? What remedial obligations arise after breach of an ordinary promise, and how do those inform our liability upon breach of a legally binding agreement? Although it is possible to offer a cohesive account of contract law without systematically engaging these moral questions, treating questions of contract to be in part questions about promise gives students an accessible and systematic way to consider essential features of common law contract.

There are alternatives to the promissory theory within the philosophical perspective. Consent theory, championed by Randy Barnett, focuses on what justifies state enforcement of contract, with no presumption that moral obligations per se justify legal liability. Contrasting the promissory and consent theories of contract is a good way to tap students’ own intuitions about the relationship between law and morality.

Other philosophical approaches abound. What they have in common is that they take seriously the moral language in cases, in which legal liability seems contingent on moral responsibility. More so than any

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other interdisciplinary perspective, philosophy of law self-consciously aspires to offer an account of contract that resonates with case law reasoning and the style of argument in which ordinary litigants engage. Private law is distinctively moralistic in its tone, vocabulary, and structure. Whatever its limitations, the philosophical perspective makes more sense of contract law as know it, read it, and practice it than any other. It would be difficult to teach cases without engaging in at least some casual philosophical talk but even contract law teachers disinclined to pursue this literature in depth could use the analytic rigor of philosophical analysis to improve the rigor of in-class legal reasoning and to show students that law is intimately related to other areas of moral life with which they are already familiar.

B. Economics

Economic analysis of law has become dominant in contract scholarship. Even legal scholars not formally trained in economics use the basic concepts and vocabulary of law and economics. Those who make recommendations that are at odds with traditional economic analysis feel compelled to offer explanation for their deviance. The intellectual dominance of economic thinking in the American legal academy—though not outside it—is sufficient reason for us to take economic analysis of law seriously. Judges and policymakers are increasingly attentive to economic analysis. To ensure that students can argue persuasively to these audiences, we must ensure that our students are minimally proficient in it.

But there is more to be said on behalf of legal economics than that. Putting behavioral economics aside for the moment, economics tends to assume that people are rational and pursue their material self-interest. The literature implies or argues that courts should be welfare-maximizing, and it implicitly or explicitly assumes that wealth maximization is a legitimate proxy for welfare maximization by liberal courts. These assumptions may be flawed, but they capture deep strands in liberal thinking about the appropriate attitude of the law. If the


philosophical literature taps into our intuition that the legal responsibility has something to do with moral responsibility, even if the former cannot be equated with the latter, the economic literature taps into our intuition that the law must usually take us as we are, and that it cannot and should not attempt to paint too fine a portrait of its subject. Whether we are in fact rational, we might wish the state to assume that we are. Whether we are in fact moved by considerations other than the pursuit of wealth, we might prefer a contract law that facilitates collective wealth maximization rather than other more personal goals that we differentially value, and for which we may not wish to engage the support of state institutions. Support of a market economy is at least among the essential functions of contract law, and economic analysis is critical to understanding how rules perform that function.

Students who identify with progressive politics sometimes resist legal economics. But this resistance is misguided and worth challenging gently. Although legal economists might tend to take wealth maximization as a policy goal, whatever our policy ends, economic analysis helps us understand how to operate the lever that is contract law, in order to achieve our policy goals. For example, students committed to more equitable distribution of material resources might resist the idea that contract rules should be designed to maximize transactional surplus without attention to how that surplus is distributed between the parties. Similarly, they might reject economists’ rejection of bargaining power (at the time of contract) as usually irrelevant; some students would instead use law to correct for imbalances of bargaining power. Without suggesting that there is a definitive answer to questions of this type, students that wish to steer the law in another direction need to understand the ways in which rules can be expected to alter outcomes, or not. They need to understand the relationship between rules, contracting behavior, and micro and macro outcomes. Only then can they plausibly use rules to promote outcomes different from the ones they now observe.

C. Psychology

There has been a surge in recent work in the psychology of contract.27

That work has been offered as a corrective to both philosophical and economic accounts of contract law. Philosophical theory often proceeds as if we all share common intuitions about the morality of promise, agreement, and contract itself. Such starting assumptions are necessary and usually resonate with enough people, and with enough of the case law, to justify the effort of drawing out the moral implications of those assumptions. But empirical studies in psychology that directly inquire about people’s views of moral obligation are important to tethering moral-philosophical analysis of contract.28

Behavioral psychology has also fathered a whole area within economics: behavioral economics. Scholars working in behavioral economics show how the assumptions in economic models are often misguided, and justify legal rules that may not be justified on a more realistic model of human behavior. Especially because consent is critical to philosophical and economic analyses of contract, psychological insights about the severe limitations to the quality of our consent under various circumstances should lead us to question how much of our legal rules we want to rest on assumptions about robust consent, and to search out alternative grounds for legitimacy. 29 This will be especially important in the context of standard form contracts, or other contracts involving persons who are unlikely to read and understand the terms of their agreements.

Rethinking the psychological assumptions in other theories of contract is a valuable payoff from attention to the psychology of contract. But that literature has another, more subtle payoff as well. The subject of contract law is a highly abstracted contracting party. For the most part, the move from status to contract entailed deliberate inattention to features of particular parties. We do not want to know too much about a person’s situation in life in the context of adjudicating contracts, we might think, because we risk having their entitlements in contract law turn on social facts that judges are poorly situated to determine and to which they will assign inconsistent and inappropriate significance.

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Although we do not want to lift the veil on the contracting subject completely, nor do we want the presumed subject of contract law to depart too radically—or at least, arbitrarily—from natural persons as we know them (or corporations, as we know them to operate under the control of natural persons). To the extent philosophical presumptions about persons depart from the reality of our cognitive processes, moral theorizing about contract might be irrelevant to persons with our actual capacities. To the extent economists presume persons to operate more rationally than they do, or define rationality in ways that do not correspond to even our idealized behavior, economists will no longer shed light on how legal rules relate to behavior and outcomes.

This is not to say that philosophers and economists should be limited to discussing only what we flawed people, with our actual messy psychologies do or can do. But we must be careful when our assumptions about the subject of contract law depart from natural persons. We might have good reason to depart: because we wish the state to respect autonomy in persons even if they are not capable of exercising it, or because we wish to hold persons responsible for choices even where we would not have expected them to choose differently. But artificial assumptions, though they may be justified, should be made consciously. Psychological perspectives on contract force us to do that.

D. Legal Realism

Unlike the other perspectives considered thus far, legal realism is a perspective homegrown within law schools, not imported from other departments in the university. In some ways, we need not worry that this perspective might not get its due in a particular classroom. It was so influential that “we are all legal realists now.”

But though we may now all aspire to be “realistic” about the law, legal realism had some more subtle insights that could be overlooked, or at least, not conveyed to students. Part I focused on the fact of indeterminacy in the law. Legal realism made this feature central. It emphasized the open-endedness of doctrine and the inevitability of


lawmaking by common law judges. Interestingly, it did not take this exercise of authority to be de-legitimizing. To the contrary, though legal realists were skeptical about scholarly talk about the law, they were rather optimistic about the law itself. In particular, the fact-driven process of adjudication makes possible, on this view, legal evolution that keeps pace with changing social facts. Legal realism eschews the formality of philosophical and economic models that would have doctrine turn (in most cases) on apparently eternal “facts” about the moral structure of agreement, or dynamics of bargaining and market behavior. Although neither philosophy nor economics expressly rests on obviously unattractive claims about the irrelevance of social facts, neither is focused on the contingent nature of their theories of contract. Legal realism sees law as responsive to social fact, and for the better.

Two opposing schools of thought about contract in particular might be seen to stress the core insight of legal realism. First, relational theory claims that contract law should take better account of the social relationships that accompany the legal relation of contract. Social facts, especially the social norms that govern those relationships, should be incorporated into judicial decision-making. Relationalists are associated with the view that the law should support the norms of private relationships by enforcing them, or recognizing them by interpreting contractual obligations in their light and offering remedies that take into account the impact on the underlying relationship. As legal realists would, relationalists sometimes suggest that judges already take into account the norms of contractual relationships; they advocate that they do this more explicitly and systematically.

On the other side, formalists eschew such calls for contextualism. But they do so on reasoning that is also realist, in that they too think that the manner of contract interpretation pursued by courts should depend on social facts about commercial contracting. Formalists in contract theory argue that judges should sharply limit the evidence they hear about context and restrict themselves to plain meaning because parties draft agreements with that expectation, and would not want judges to

34. Id. at 900.
engage in guessing games about which norms parties wished to enforce, and which they did not. 36 Thus, formalists in contract also justify their position with respect to the social practice of contracting and the interaction between interpretive rules and contract design.

Most professors of contract law probably spend some time talking about the choice between contextualist and formalist interpretation, as that choice corresponds to jurisdictional differences in the rules pertaining to parol evidence and the admissibility of extrinsic evidence. Noting the lessons of legal realism expressly casts that debate in an interesting light. Its call for responsiveness to social fact highlights empirical questions about how contract operates on the ground, the preferences of contracting parties, and the capacity of judges to be responsive to those preferences on a case-by-case basis.

I include legal realism as an internal perspective here because, as argued above, inductive reasoning that extends precedent to the facts in particular cases in ways that are not wholly determined by any single, authoritative formulation of a legal rule is at the heart of the common law model. It is not, nor did legal realists perceive it to be, a dirty secret about the common law. They did not claim, after all, that legal rules do no work, only that they mediate between past and new cases and that it would be a mistake for observers of the legal system to reify what insiders know to be flexible and evolving. In our teaching, it is useful to highlight the insights of legal realists and thereby caution against accidental assumptions about legal process that we now generally reject upon reflection.

E. Critical Legal Studies

Critical legal studies is sometimes spoken of in the past tense, but arguably it too so successfully permeated legal discourse that we are, to some extent, all crits now. It has been the most important fully external perspective on the law to receive sustained attention.

Like legal realists, critical legal theorists are skeptical of claims about the law’s formal purity. 37 But though these empty formalisms may be indeterminate in themselves, critical theorists do not view the law as ultimately indeterminate. To the contrary, the ideological power structures that manifest in legal doctrine may be quite predictable. Law is, after all, not a bubble within which judges and other lawmakers are

36. Kraus & Scott, supra note 35; Schwartz & Scott, supra note 35.
shielded from politics. Powerful groups in society—whether those are defined by wealth, race, or sex—use the law to perpetuate their hegemony.\(^{38}\) The normative justifications to which the law appeals distract us from the best explanation for legal rules and the political consciousness and mobilization that we need to make them more just. That is, at least, the heart of critical legal theorists’ claims. They add politics and power to the legal realist narrative. In so doing, critical theorists make legal theory considerably more realistic—and biting.

Some critical legal studies in contract have been more successful than others in shifting prevailing views of contract. Duncan Kennedy’s *Form and Substance in Private Law Adjudication* and his *Distributive and Paternalist Motives in Contract*\(^{39}\) have both been highly influential. They are widely cited even by those unsympathetic to his politics.\(^{40}\) Scholarship focusing on class and the ways in which law develops and is applied to the material advantage of the lawmaking class has been well-received relative to other critical work, even if operates as a reality check on the classical view of contract rather than a substitute for it.

Critical work on sex and race in contract has operated as a less consistent corrective. On the one hand, casebooks do sometimes include a note or reference an article that deconstructs a case from the perspective of sex. Deconstruction from the vantage of sexual politics may be especially productive in the context of *Lumley v. Wagner*,\(^ {41}\) *Wood v. Lucy, Lady Duff-Gordon*,\(^ {42}\) or *Vokes v. Arthur Murray, Inc.*\(^ {43}\) Some professors might reference race in the context of disparate pricing or the relationship between racial experience and preferences for formality in contracting.\(^ {44}\) But it is unclear how much time professors

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41. (1852) 42 Eng. Rep. 687 (Ch.) 693 (availability of specific performance for personal service contracts).

42. 118 N.E. 214 (N.Y. 1917).


44. Some articles on race and contract include Ian Ayres, *Fair Driving: Gender and Race*
spend on these casebook asides in class. Without classroom time, it is unclear how seriously students take these issues. Even professors unpersuaded that deconstructive accounts are accurate would do well to challenge their students to think through them. For many students, the sexual and racial biases of the law are intuitive and potentially delegitimizing; professors who fail to acknowledge them risk leaving those students vaguely skeptical and silent. But quite possibly the students who need to hear it the most are those for whom deconstruction is entirely alien and unintuitive. Professors should challenge those students to defend their priors against the skepticism of their peers.

F. Political Economy

Political economy is a rich social science as housed in political science departments, but it is only sporadically used in legal scholarship. Two kinds of political economy are worth distinguishing.

First, there is the branch of legal economic scholarship that concerns judicial behavior and its determinants. That literature uses institutional features, such as judicial elections, tenure or partisanship to predict judicial outcomes. Although it tends to rely disproportionately on evidence from Supreme Court decision-making, it makes more general claims about judicial motivation. For obvious reasons, such a
perspective is deeply incompatible with the self-understanding of participants. Nevertheless, this external check on our assumptions about the neutrality of institutional design should inform more deliberate construction of institutions to promote the kind of judicial behavior we prefer; or at least, it should chasten those who would speak too naively about legal process.

There is a less cohesive but arguably still more important type of political economic work about the law. I refer to scholarship on various aspects of contract regulation that shows how interest group constellations promote or preserve particular pieces of legislation. For example, there has been work on the regulation of mortgages and consumer finance.46 This work is reminiscent of critical legal studies except that instead of focusing on the role of ideology, it details the ways in which political processes determine legal content. As statutory law, even in the law governing private exchange, comes to overshadow the common law, such political economic accounts become more important. As law schools make deliberate efforts to train students to read and apply statutes, educating students about the dynamics of regulation in a fundamental area like contract will both give them a broader view of contract law and its sources, and also prepare them for similar analysis of legislation in other areas.

CONCLUSION

Internal perspectives on law dominate in the classroom, and for good reason—though the result is not necessarily a good one. We have good reason to privilege the internal perspective of the law because law school is the only place, outside of practice, where students can acquire this perspective. It is the one they need to inhabit when they practice.

However, the aggregate result is less obviously favorable. Although individual students need to be trained in the internal perspective in order to be effective lawyers, they need to be exposed systematically to the external perspective in order to develop sophisticated and complete professional identities, and in order to be the agents of political change and reform that lawyers have traditionally been. External perspectives are important to professional identity because lawyers need to do more

than navigate the law; at the end of the day, they need to be able to situate themselves in society. For work to be intellectually and personally satisfying, they must be able to account for their own role. They cannot do this without ever stepping back and critically assessing the claims the law makes on its own behalf. And without taking that step back, they will not be able to effectively identify the minor and major changes that will improve the law, and the social order of which it is an essential part.

Some law students come out of their first year feeling a bit schizophrenic, having been taken back and forth between internal and external perspectives in various courses. This is surely better than having wandered through their first year with a naively simplistic view of the law. But it does not necessarily follow from the methodologically pluralistic approach recommended here. In principle, we should try not just to offer multiple perspectives to our students but also to help them integrate those perspectives.

For example, we might spend some precious class time on the question of which causal explanations for legal content undermine legitimacy, and which can be reconciled with internal accounts. Political economic accounts of legislation usually seem to be intended to delegitimate the law in question; but we might just as well embrace the politics that underlie law as the concrete form that democracy takes. We might think that democratic production of law, even in the indirect case of judge-made law in the common law, will be responsive to the policy considerations that economists advocate, or the moral considerations on which legal philosophers dwell. Law may be over-determined, in that more than one explanation for it exists; even as we come to appreciate it as a contingent object of deep disagreement.

There is more than one way to make sense of the apparently competing truths of multiple perspectives. However one proceeds, the project of integration is essential because the distinctive perspective of law on contract is precisely the integrated one. We must do more than individually translate scholarship in other fields that pertain to law, or even apply their methods to subject matter with which lawyers are especially adept. After translation comes integration. It is imperative that we undertake that in our teaching, even where our writing adopts a particular view.

For while integration in legal scholarship may take place over the course of a literature without deliberate management, it is more likely to take hold in the mind of a law student with the assistance of her instructor. If each law student were to have each core class taught by someone of a distinct methodology, we might leave to students the task
of integration. But in first-year courses, this is a tall order. Few students are lucky enough to draw such a diverse range of first-year professors, and many would not attempt to synthesize a perspective of their own—especially when unchallenged to do so. Whatever our individual slant on contract, it is incumbent on us to at least help our students with this process of integration.
Abstract: Lawrence Cunningham’s *Contracts in the Real World* offers a good starting place for necessary conversations about how contract law should be taught, and, more generally, for when and how cases—in summary form or in longer excerpts—are useful in teaching the law. This Article tries to offer some reasons for thinking that their prevalence may reflect important truths about contract law in particular and law and legal education in general.

INTRODUCTION

Those of us who have been teaching law for a long time, and have been teaching contract law for a long time, are experts of a sort about teaching that subject. Just ask us—we’ll tell you. We are also—most of us, anyway—complete amateurs. Few among us have done, for example, any empirical work about the relative benefits of different kinds of casebooks or different kinds of teaching styles. I belong to the general majority of law professors who can only offer armchair speculations. And like the general majority of law professors, I will not allow the lack of informed expertise to prevent me from expressing opinions—lots of them, and with unwarranted confidence.

In this article, I will use Lawrence Cunningham’s wonderful book, *Contracts in the Real World*,¹ as the starting point for some reflections on contract law textbooks, teaching contract law, and contract law itself. Part I considers what one might learn from a broad overview of contract law texts. Part II offers a brief defense of using more full judicial opinions (or at least substantial excerpts), rather than case summaries or simply lists of doctrinal rules, in teaching contract law. Part III offers some reflections on the advantages and disadvantages of using cases

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota Law School. Many of my biases on both Contract Law and teaching Contract Law are on display in BRIAN H. BIX, CONTRACT LAW: RULES, THEORY AND CONTEXT (2012). I am grateful for the comments and suggestions of the editors of this journal.

involving well-known persons and events in contract law texts.

I. CONTRACT TEXTS

In looking for texts on contract law, there are two major alternative categories. On one hand are the type of texts that have been used to teach contract law since contract law scholar and Harvard Law School Dean Christopher Columbus Langdell first put forward the basic theoretical and pedagogical idea over a century ago: course-books that are basically case-books. Such texts are primarily lightly edited versions of reported judicial opinions, generally from appellate courts. Because of the influence of the American legal realists, who criticized the belief that legal reasoning could or should rely entirely on the analysis of cases, we now have some discussions of policy and theory interspersed with the cases. However, most of the pages in these course-books remain devoted to the texts of actual opinions.

On the other hand are treatises, where the text contains primarily declarations of the doctrinal rules. To a varying extent, a treatise may also contain quick summaries of some of the more important or instructive cases. Study aids tend to have the general structure of treatises, though on a smaller scale, focusing on declaring the rules, with occasional reference to case summaries.

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2. For an overview of Langdell’s approach to law and legal education see, for example, Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983).


5. E.g., E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS (5th ed. 2011); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (6th ed. 2009).

6. E.g., MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (7th ed. 2013); ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW (2d ed. 2009); CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL (7th ed. 2010).

7. One can also find texts—especially among books devoted primarily to the drafting of contracts—that provide the sort of problem-based approach more commonly associated with business school courses. E.g., SUE PAYNE, BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH (2011); DAVID ZARFES & MICHAEL L. BLOOM, CONTRACTS: A
That summaries of cases—and predominantly reported appellate cases—still dominate teaching texts in contract law (and most other first-year law school courses) is itself an interesting story. The standard progress story of the history of American legal thought is that the legal realists showed: (1) that formalist approaches to legal reasoning and judicial reasoning were unsustainable—based inevitably on bias and pre-judgment; (2) that legal reasoning was not really autonomous; and (3) that even if legal reasoning could be autonomous, it would be better if supplemented by policy, science, and other forms of wisdom from outside of law.

The legal realist critique left its mark on legal education, though how large an impact it had can reasonably be debated. Is it an important change or a trivial one that our texts are no longer subtitled “Cases on Contracts,” but now are subtitled “Cases and Materials on Contracts”? As reflected in these texts, the vast majority of contract law courses go beyond mere close reading of the judicial opinions, adding some amount of economic analysis, contract theory, critical reflections, and whatever else might fit under the broad realist rubric of “policy.” At the same time, most contract law course-books and most contract law courses continue to rely primarily on the close reading of judicial opinions, and primarily opinions from appellate courts. Whatever “policy,” theoretical, or inter-disciplinary content is present is marginal. At the same time, an observer sympathetic to the lessons of legal realism would note that it is a sign of realism’s success that first-year law school courses now, almost universally, no longer focus exclusively on cases. The courses, as taught, now support the view that non-doctrinal arguments are proper subjects of study in a law school and that these extra-legal (non-doctrinal) arguments are both appropriate and, in the hardest cases, likely inescapable.

One can come at the same set of questions about the role of cases in understanding contract law from the other direction. Even (or especially) when we are not worried about the teaching of first-year law students, it is still hard to escape individual cases entirely. As mentioned, treatises

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TRANSACTIONAL APPROACH (2011). However, these approaches remain very much a small minority, especially in the texts used for first-year contract law courses.

8. I confess to being guilty of contributing to or reinforcing this narrative. See Bix, supra note 4, at 193–204.

9. See, e.g., FARNSWORTH ET AL., supra note 3 (“Cases and Materials” in subtitle of textbook); KNAPP ET AL., supra note 3 (same).

10. In a growing number of courses the traditional focus on the close reading of cases is now supplemented by contract drafting exercises.
(and even most study aids) contain some case summaries, however condensed. It is worth considering why this role for cases (in full opinions, excerpted opinions, or summaries) remains so pervasive. Is it merely the residue of Langdellian formalism that we lack the energy or courage to finally shake off?

Perhaps the persistence of cases in course-books (including Contracts in the Real World) could be explained in terms of pedagogy. Even if one did not accept the Langdellian view, one still might believe that first-year law school courses are meant to teach not only the doctrinal rules of the courses in question, but also to teach certain basic skills: for example, how to read cases and how to argue within a precedential system (using prior cases as authority, or distinguishing prior cases, among other skills). Contracts in the Real World in fact takes the students through their paces this way in a fairly effective manner. For example, at one point the book offers the following question of analysis: how does a couple in a separation agreement making a mutual mistake about the value of shares of a not-yet-discovered Ponzi scheme fit into a line of cases involving mutual mistakes about whether a rare dime was forged, whether a violin was in fact a Stradivarius, and whether a cow was in fact barren?11

Accepting that one use for cases in course-books is to help train students in different kinds of case analysis, one suspects that the ubiquity of case excerpts and summaries in both course-books and treatises reflects something beyond pedagogical value for training students to “think like a lawyer.” In part, the presence of cases may reflect a different aspect of teaching: that certain doctrines cannot be clearly explained without examples. Consider the following “black-letter rule,” taken from the Second Restatement:

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstance indicate the contrary.12

We can put aside for the moment that the text (like other provisions in the Restatements and the Uniform Commercial Code) looks like it was badly translated from the Latin.13 How should such a rule be applied?

11. CUNNINGHAM, supra note 1, at 59–66.
13. I do not mean to be too critical. As someone who has worked as a Reporter on a proposed uniform law (the Uniform Premarital and Marital Agreement Act), this author knows only too well
What is meant by “impracticable” and an event’s non-occurrence being “a basic assumption on which [a] contract is made”? The doctrine begins to take clearer shape when we see a case in which the doctrine was held inapplicable to a situation where a Fortune 500 company was losing two million dollars a day. And the Restatement itself is a document that understands the need for, or at least the value of, examples, as almost every Restatement section is followed by short “illustrations” (the impracticability section just quoted is followed by six “comments” and sixteen “illustrations”).

Additionally, I would speculate that the prevalence of case summaries likely reflects a number of considerations, including an uncertainty or flexibility intrinsic, if not to all law all of the time, at least to certain areas of law. The great cases contain rich facts that ground conflicting moral principles and intuitions. Sometimes these cases are open to different interpretations that would justify quite different ways of applying the “rule” of that case to subsequent cases. At other times, it is not that the meaning of the case is uncertain so much as the clash of interests, values, and arguments is so nicely poised in the case, and the conflict so well-handled in the opinion, that the case repays frequent re-reading. It is not an accident that cases like Hadley v. Baxendale, Jacob & Youngs v. Kent, Frigaliment Importing Co. v. B.N.S. International Sales Corp., and Nanakuli Paving & Rock Co. v. Shell Oil Co. appear in almost every contract law course-book and treatise, almost always with extensive quotations from the opinion, or at least an

how hard it is to draft language that is both precise and understandable; and, in legal documents, it is usually the clarity that gets sacrificed first (and properly so).

14. Karl Wendt Farm Equip. Co. v. Int’l Harvester Co., 931 F.2d 1112, 1117 (6th Cir. 1991). And it may round out the complexities of the doctrine further to note that in the case both the trial court and a dissenting judge on appeal thought that the doctrine was in principle applicable to those facts. Id. at 1124 (Ryan, J., dissenting). This case is used by a number of contract law course-books. See, e.g., KNAPP ET AL., supra note 3, at 691–700.

15. From the point of view of law professors, who often teach the same cases, year after year, over the course of decades, there is obvious value to cases that do not become stale upon the 20th reading and public discussion. (One knows the uncharitable excuse for frequent new editions of course-books—that they are meant to force students to buy new books rather than used copies—but new editions may also be an unintended mercy for the teachers, who might otherwise be unable to bring any interest or energy to lesser cases that have been taught too many times before. Changing many “second-tier” cases every few years, through the revised editions, helps veteran teachers make it through a few more repetitions of the same course.)

17. 129 N.E. 889 (N.Y. 1921).
19. 664 F.2d 772 (9th Cir. 1981).
extensive paraphrase of the case’s facts. These are cases that both students and contract law scholars can argue about endlessly, without reaching any consensus either about the rightness of the result or about the “lessons” that should be drawn from the cases. There is a sense that there are subtleties and nuances and uncertainties within the law that cannot be reduced to clear and clean descriptions of a “black-letter” rule.

That there may be a point to having some reference to the facts of some cases is, of course, a great distance from concluding that contract law courses should be made up primarily of the close reading of case opinions. Perhaps contract law courses could track treatises, and mostly describe the doctrinal rules—for my taste, also adding in some attention to how the doctrine developed historically—but discussing only those cases that display in distinctive ways the complexity or uncertainty of the rules.

This analysis also leaves open the question of how the content of a course—cases, rules, policy, drafting, negotiation, and so on—should be taught. For many of us, what is taught and how it is taught are linked by the simple truths of tradition and inertia: we teach the way we were taught, and the way that most of our colleagues teach. And for many of us that means using some version of the Socratic Method, with variations on how much we rely on volunteers rather than “cold calling” and the harshness of the responses to unprepared students and bad answers.

A small but growing number of scholars argue that the Socratic Method is actually, contrary to what is generally believed, an ineffective way of teaching the law. This claim is often combined with the observation that the uniqueness of this approach to legal education is an argument against it, not for it (noting that even when the best universities teach their undergraduates and graduate students about Socrates, they do not use the “Socratic Method” to do so). As the argument often continues, we unenlightened law teachers stay with the Socratic Method because we are captured by a myth of its effectiveness,

20. For an argument by example of how such historical material helps us better to understand some contract law doctrines, see BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 4–11, 32–34 (2012).


22. See, e.g., Leiter, supra note 21.
or perhaps just too timid to try something different from the way we were taught in law school and different from the way most of our colleagues teach. Most of us have had experience with the pushback, and sometimes negative student evaluations, that can come with doing anything in one’s teaching significantly different from the way students in the other sections or even at other universities are being taught.

The idea behind the Socratic Method is relatively straightforward, at least for those who use the method to teach—rather than primarily to intimidate, to use fear of embarrassment to encourage class preparation, to obscure simple truths, or to fill out sixty minutes of class with ten minutes of material. The positive justification for this Method is that students will remember answers better if they reason to them on their own, and will get better at (legal) reasoning if they practice the process publicly while in class. On the other hand, if students become preoccupied with avoiding being called on, or with minimizing their embarrassment when they are called on (or when they participate voluntarily), this may deflect from learning rather than encourage it. In any event, I must leave it to others to offer empirical evidence on the effectiveness of this method of teaching, with the hope that many of us would be willing to change our course if we were shown sufficient evidence that other approaches were clearly superior.

*Contracts in the Real World* helps us to think through what it is we are trying to do as law professors when we teach first-year contract law classes, and whether we are going about it the right way. Why do we teach through cases rather than simply giving the doctrinal rules, and does it really benefit the students for us to try to pretend to be Socrates in the Platonic dialogues?

II. THE BENEFITS OF FULL OPINIONS

I am not a classical formalist who believes that all that law students need to learn can be taught through reading judicial opinions. The addition of contract drafting exercises, negotiation exercises, complaint drafting work, and so on, to contract law courses clearly reflects skills that would be valuable to most, if not all, would-be lawyers. At the same time, I *do* believe that there are benefits from the close reading of judicial opinions.23

There are a variety of benefits to reading full judicial opinions or

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23. These opinions should be both at the trial court and appellate court level; I think the continued predominance of appellate court opinions in course-books—likely a residue of the Langdellian approach—is a mistake.
significant excerpts; I will mention only a few. One matter that I emphasize to my contract law students is the importance of the procedural posture of a case. There are different standards a court applies in responding to a motion to dismiss, a motion for summary judgment, a motion for a directed verdict, and a motion for judgment notwithstanding the verdict (JNOV). Similarly, an appellate court hearing an appeal will apply different standards of review depending on at which stage of the litigation the case was resolved below. These are basic points, but I have found that even high-ranked graduates of very good law schools seem to miss these basic procedural points in figuring out (for example) how to argue a case on appeal. Matters of procedural posture are most easily investigated in full opinions, or at least opinions where the procedural posture and standards of review have not been edited out.24

Another element that can be missed when one has summarized cases rather than full-text opinions is a sense of the struggles of the court, working both within and, in a sense, against the existing doctrinal rules. For this purpose, the well-known case of *Webb v. McGowan*25 is a classic example. In *Webb*, an employee had saved his employer from death or grievous injury by using his own body to push away a heavy falling object, and in the process the employee suffered a significant injury. In gratitude, the employer promised the employee regular payments until the employee died, and the employer kept that promise until his own death, at which point his executor refused to make further payments.26 The employee sued to enforce the promise, but the problem was that there did not appear to be valid consideration for the employer’s promise; the consideration of saving the employer’s life came before the

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24. Of course, in principle one *could* include the procedural posture of the case and the statement of the standard of appellate review even in a brief summary—but once all of that was included, the summary would no longer seem so brief, and any benefit in brevity relative to an opinion excerpt would likely be lost.


26. Of course, students ought also to be told why their cases are full of executors, testatrixes, and the like, seemingly always refusing payment on what seem to be legally, or at least morally, strong claims. The reason is that executors of estates and trustees of trusts, etc., may be personally liable to other beneficiaries if they pay out on claims that are not legally well-grounded. This could lead to discussions of whether it would be better to impose liability under a looser standard—for example, removing liability where decisions are made in good faith or when claims have a strong moral basis even if not legally enforceable. This could take discussion far afield, but that is always a danger with contract law courses—they can quickly turn into courses on trusts and estates law, family law, employment law, etc.
promise rather than at the same time. Contract law was later changed, establishing a limited exception to the requirement of contemporaneous consideration, to cover cases whose facts were very similar to *Webb v. McGowan*. However, that justification was not available to the *Webb* court, which nonetheless struggled to find a way to enforce the promise. What makes *Webb* a great teaching case in my view is that it presents an opportunity for students to follow that struggle through the reasoning of the court, a struggle that would not be displayed in short summaries of the case.

The *Webb* court begins its analysis by noting that there is existing case law holding that where a person cares for another’s property, this can be sufficient to ground a subsequent promise to compensate another for the care. It then notes that human life similarly has a value, as indicated by life insurance and other forms of insurance. Within legal analysis, one sometimes must deal with legal categories and precedent by using analogy and indirection: (1) promises to compensate for earlier care for property are enforceable; (2) caring for another person’s health and life are like caring for property in that both can have a monetary value—as shown by insurance policies; and (3) therefore, promises to pay for prior care for another person’s health or life should be enforceable. However, the strangest part of the opinion was still to come.

The *Webb* court notes that there was some disagreement regarding whether or when a prior or existing moral obligation would be sufficient consideration to make a promise enforceable, with many courts and commentators having held that there must be some existing legal or equitable obligation that was for some reason unenforceable. The court continues:

> [W]here the promisor, having received a material benefit from

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27. At least in the *Restatement*, see *Restate ment (Second) of Contracts* § 86 (1981) ("Promise for Benefit Received"), and followed in many jurisdictions.

28. *Webb*, 168 So. at 197. The analysis could have gone in a slightly different direction, and noted that emergency care for either person or property has been held to justify actions for restitution, even without any subsequent promise to pay. This long-standing principle appears in the recent *Restatement (Third) of Restitution and Unjust Enrichment* as Sections 20 and 21. *Restatement (Third) of Restitution and Unjust Enrichment* §§ 20–21 (2011). However, that would have been a more indirect route to showing what needed to be shown here: the enforceability of the employer’s promise.

29. *Webb*, 168 So. at 197–98. There are also lessons to be learned from the efforts the *Webb* court feels it needs to exert to get to what would seem an obvious point: that life is valuable, value potentially expressible in monetary terms, and that contract law should be as willing to enforce promises to compensate for benefits to life and health as it should be to enforce promises to compensate for benefits to property.

30. *Id.* at 198.
the promisee, [that promisor] is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made . . . . McGowin’s express promise to pay [the employee] for the services rendered [that is, saving the employer’s life] was an affirmance or ratification of what [the employee] had done, raising the presumption that the services had been rendered at [the employer’s] request.31

The Webb court thus seems to be telling us that because of the employer’s promise to pay, we should presume that there had been a remarkably quick and detailed discussion between the employer and employee while the heavy object was falling, negotiating the terms of compensation for the rescue that was in the process of occurring. This is, of course, absurd, but it is an example of a category that all of us who read a lot of cases come across regularly: a court using a “legal fiction”32 or formalistic reasoning to come to a result that the court (and most readers) finds to be right or just. Whether such outcome-determinative practices by judges is a good thing or a bad thing (or only seems like a good thing when the judge reaches an outcome we like) is obviously another topic worth discussing with students in any law school course.33 All of this comes from requiring students to read the actual opinion, and question why the court made the arguments it did.

Complete or nearly complete excerpts of cases also allow the teacher to emphasize many other matters: for example, the wonderful brevity of Judge Cardozo (as he then was) in Jacob & Youngs v. Kent,34 Wood v. Lucy, Lady Duff-Gordon,35 and other cases, where every sentence displays (or hides) an important step in a packed analysis and argument, where doctrine, policy, “common sense,” and rhetoric intermingle freely; an example is given in the footnote below.36 There are

31. Id.
33. As indicated throughout this article, there are many important topics that could, and perhaps should, be raised in a first-year Contract Law course, but there are the countervailing pressures of how hard it is to cover the substantive law now that most of us must squeeze the contract law course into three or four credits, rather than six credits.
34. 129 N.E. 889 (N.Y. 1921).
35. 118 N.E. 214 (N.Y. 1917).
36. One of the questions in Jacob & Youngs is whether the builder was to lose all right to sue on
comparable virtues from the more recent Richard Posner opinions, which are now starting to populate Contract Law casebooks with almost as great a frequency as Cardozo opinions. 37

One last small matter: full opinions allow the teacher to point out to the student how every case requires the judge to construct a narrative, first and foremost a narrative of what happened (the facts), and that it is no coincidence that almost all the factual narratives in judicial opinions display the actions underlying the case solely or primarily from the point of view of the party that ultimately prevails in that court. The choice of point of view is likely not conscious, but it is still important. To narrate from the point of view of one party is a natural way to increase the reader’s sympathy for that “protagonist.”

III. CELEBRITY CASES

I have mixed feelings about the use of cases involving celebrities, television shows, and other well-known recent events, as Contracts in the Real World does to a great extent, but many course-books do to some extent. 38 On the positive side, one should not lightly dismiss a strategy that could increase interest in a topic many law students find dry and dreary. Cases involving actors, athletes, and politicians that students recognize may very well increase students’ willingness to pay attention to the cases they are required to read.

One problem is that the fame of the party could distract from the doctrinal lesson—that students might be so caught up in liking or hating the construction contract (for building a mansion) upon any breach, however small in importance or value relative to the remainder of the contract (what would become the doctrine of “substantial performance,” in contrast to the “perfect tender” in sale of goods contracts). Cardozo writes:

From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

*Jacob & Youngs*, 129 N.E. at 891. A modern judge or commentator would likely unpack those few sentences into an argument that went on for many pages. Students accustomed to the lengthier form of analysis often get tripped up when trying to work through analysis as compact as Cardozo’s.


38. See, e.g., *Knapp et al.*, supra note 3, at 219–24, 1000–09 (cases involving Martin Luther King, Jr., and former Minnesota Governor and professional wrestler, Jesse Ventura).
Charlie Sheen,\textsuperscript{39} in wanting him to win or lose the case, that they become less able to focus on the intricate questions of conditions involved in Sheen’s case. Additionally, today’s celebrity may be an obscurity in a short time. It may not be that long before students need the help of an internet search engine to figure out who Sheen, Sandra Bullock,\textsuperscript{40} Eminem,\textsuperscript{41} Kevin Costner,\textsuperscript{42} or Vanessa Redgrave\textsuperscript{43} are (we are likely already there for some of those figures).

The other risk of working to be up to date and relevant is that the book’s narrative may be overtaken by events. For example, as already noted, \textit{Contracts in the Real World} features a case where a separation agreement was challenged because of the parties being mutually mistaken about the value of shares in a Madoff Ponzi scheme fund. The book characterizes the appellate court as getting the outcome right; however, that decision was reversed after the book was finished.\textsuperscript{44} (Of course, being reversed does not mean that the appellate court was necessarily wrong, but it does indicate that there were significant arguments for a different outcome.)\textsuperscript{45}

**CONCLUSION**

Lawrence Cunningham’s \textit{Contracts in the Real World} is not only a wonderful book about contract law and an excellent teaching tool for contract law courses, it is also a good starting place for necessary

\textsuperscript{39} See Cunningham, supra note 1, at 176–79, 181–86 (discussing case involving Sheen).

\textsuperscript{40} See id. at 186–92 (discussing case involving Bullock).

\textsuperscript{41} See id. at 126–30 (discussing case involving Eminem).

\textsuperscript{42} See id. at 172–76 (discussing case involving Costner).

\textsuperscript{43} See id. at 87–88 (discussing case involving Redgrave).

\textsuperscript{44} See id. at 59–60, 66 (discussing Simkin v. Blank, 915 N.Y.S.2d 47 (N.Y. App. Div. 2011), \textit{rev’d}, 968 N.E.2d 459 (N.Y. 2012)). It should also be noted that the text’s comment that the property the married couple were dividing in their separation agreement was “virtually all . . . considered jointly owned because it was obtained during their lengthy marriage,” Cunningham, supra note 1, at 60, misstates the relevant family law principle. In a common law property state like New York, which divides property “equitably” upon divorce, each spouse may have a claim on an equitable portion of all property obtained during the marriage, but it is not the case that all such property was “jointly owned.” See, e.g., Brian H. Bix, \textit{Family Law} 153–69 (2013) (chapter on property division). One other important family law correction: the famous “palimony” case of \textit{Marvin v. Marvin} was decided by the California Supreme Court in 1976, not 1966, as the book states. Compare Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), with Cunningham, supra note 1, at 47, 223 n.23 (giving the date as 1966).

\textsuperscript{45} While the text indicates that the best argument against the outcome in the appellate court was the special nature of separation agreements, the decision reversing the appellate court in fact relied primarily on a general analysis of contract law mistake doctrine. Compare Cunningham, supra note 1, at 66, with Simkin, 968 N.E.2d at 462–65.
conversations about how contract law should be taught, and, more
generally, for when and how cases—in summary form or in longer
excerpts—are useful in teaching the law. Perhaps the use of full judicial
opinions (or long excerpts) in course-books is just a practice left over
from the bad old days of formalism, but this article has tried to offer
some reasons for thinking that their prevalence may reflect important
truths about contract law in particular and law and legal education in
general.
REFLECTIONS ON CONTRACTS IN THE REAL WORLD: HISTORY, CURRENCY, CONTEXT, AND OTHER VALUES

Lawrence A. Cunningham*

_The beginner can often go better from the present to the past than from the dim and uncertain past to the present._

—Prof. Henry W. Ballantine (1922)

INTRODUCTION

Open any contracts casebook and you will find the content dominated by hundreds of pages of canonical appellate opinions with an old and rising average age, supplemented by notes posing questions or providing perspective.² Visit any classroom and you will hear professors leading students through the cases by recitation of often-obscure facts while developing contending legal arguments. Consult related students and you will hear some variation on one complaint: the study often lacks sufficient familiar context.³

The problem is age-old, for the description of books—if not

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classrooms and students—is not new but has been apt for scores of years. The learning environment has changed radically, whether considering fashions such as dress and relative formality, or norms such as student diversity or professorial solicitude for the unprepared or unconfident. The books, by contrast, have evolved glacially, attesting to the plodding pace of change in the curriculum and methodology of American legal education.

Using old cases from strange settings compounds the inherent difficulty of learning the art of persuasive legal argument. Students of the twenty-first century are not often stimulated by the musty, dusty tales dominating today’s contracts casebooks. Most such cases were chosen for our classroom lessons by people like C.C. Langdell, Samuel Williston, or Arthur Corbin—all born in the nineteenth century and dead for generations!

I love old contracts cases as much as the next professor, and judging by their regular appearance in all standard casebooks, we professors love them quite a bit. But students hate them and have a hard time appreciating how so many of the classic cases are relevant to their lives.4 Experienced teachers know that drawing on current events stimulates student interest, yet our current contracts course materials do not make this easy.

A better teaching strategy is to use at least some content plucked from contemporary disagreements and current experience, and I have attempted to provide a coherent roadmap for doing so in the book Contracts in the Real World: Stories of Popular Contracts and Why They Matter. It tells forty-five modern stories intended to bring this subject alive for a modern audience. Far from eliminating the still-valuable classics, however, the book’s contemporary tales show starkly, fully, and entertainingly, how the classics relate to today’s world. This brings modernity into contracts texts and classrooms.5 The stories,

4. For example: the sale of a silk mercer’s business circa 1773 England; payments for itinerant farming circa 1834 New England; a delayed rail transport for a mill’s crank shaft circa 1854 England; musty gambling loans circa 1859 Buffalo; the destruction by fire of a London theater circa 1863; sailing ships lacking radio call letters plying for Liverpool circa 1864; mistakes about bovine reproductive attributes circa 1887; £100 rewards to those catching the flu despite using screwball medicine circa 1893 England; damages for delay delivering marble for a mausoleum circa 1885; salmon fishermen using nets off Alaska circa 1902; an exclusive marketing license for fashions circa 1917; experimental skin grafting surgery on a young boy’s hand circa 1929; and a bridge to nowhere circa 1929.

5. See, e.g., LAWRENCE A. CUNNINGHAM, CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER 148–52 (2012) (poet Maya Angelou’s Hallmark greeting card contract (formation in exclusive license deal)); id. at 21–24 (a lawyer’s boasts on
mostly culled from the recent news, all pivot on the dusty/musty cases, but are more interesting, accessible, and relevant to students. 6 A few stories in the book will be more familiar to veteran contracts teachers, as they already appear in several leading books. 7

With respect to my approach, technological sophistication is both a cause and a cure: students’ appetites are stoked by information-saturation arising from the proliferation of the Internet and related applications that surround them. They promptly get detailed news about contract disputes in ways no previous generation has. Students are naturally curious about how their daily study relates to the steady stream of news they receive. As a consumer of such information myself, as well as an occasional producer, I am positioned to harness technology to convert media content into pedagogical material in ways Langdell, Williston, and Corbin could scarcely have dreamt of.

My narrative reflects and develops an understanding of how today’s contract law bears on today’s problems—showing how yesterday’s contract law and yesterday’s problems reappear in new guises. These stories identify the real world, contemporary social and business settings where ancient problems recur. These stories are about context, argument,
possibilities, limits, and alternatives; they deal with things people know about today (celebrity personalities, electronic transactions, internet exchange, cell phones, personal lifestyle choices) and dwell less on the archaic materials necessary to break through the ancient cases (transport and milling at the dawn of the industrial revolution; nineteenth century navigation technology; communications by handout; and antiquated attitudes toward paternity, homosexuality, mental illness, gambling, drinking, and the treatment of animals).

It is gratifying to read that this symposium issue of the Washington Law Review was stimulated by *Contracts in the Real World*. Thanks to the editors for the opportunity to ruminate on the place of the book’s approach—stressing context through stories—in the tradition of contracts pedagogy. To that end, Part I first pinpoints relevant historical milestones in the field of contracts casebooks. Building on that historical grounding, Part II then highlights the values of currency and context that the stories approach epitomizes. Turning more speculative, Part III considers the value of this approach from the perspective of the purpose and place of teaching books.

Finally, Part IV offers thoughts about the sequence and themes that appear in my book’s organization of the subject, which contrasts with motifs manifest in both traditional casebooks and many strands of contract law scholarship. *Contracts in the Real World* regales readers with stories I wrote rather than providing primary legal materials for study. The positive reception to *Contracts in the Real World* prompted me to begin preparing a course book consisting of cases and materials based on its pedagogy, content, and architecture.

I. HISTORICAL GROUNDING

To situate my book and this essay, I start with a brisk journey across a century and a half of contracts casebooks, highlighting the changes that have occurred in the seven generations since C.C. Langdell first published his contracts casebook in 1871. The survey, drawing on scholarly reviews of such books, facilitates reflection upon the scores of


different teaching books printed over the years. Features vary, yet have a
strong tendency toward one nearly universal constant: using a core of
canonical cases over and over again. Though some of these were new
when Langdell lived, and even when Williston and Corbin followed him,
they were old within decades and are now ancient. There is value but
also some cost in this.

The closest thing to a revolution in the production of law school
materials was Langdell’s original (1871) contracts casebook.11 But the
book was not created parthenogenetically, and it was not an instant
success. Langdell’s compilation of cases and instruction using the case
method—teaching case after case in a logical order to reveal simple
underlying legal ideas and categories—was a response to a long history
of grappling with alternative ways to teach law.12 The principal
approaches were the lecture and the treatise, though neither seemed
entirely satisfactory. But students had always read cases; Langdell did
not invent the idea that they should do so. He did make cases the
centerpiece of his system and induced followers to proselytize
effectively for its expansion. Yet Langdell did not see the project
through, leaving others to build incrementally on his advance.

Ever since Langdell’s time, it has been tempting to identify new eras,
paradigm shifts, and revolutions in legal pedagogy. But the changes are
rarer and smaller than the heralds suggest. Perhaps it was not an
exaggeration in 1922 for David Amram, when reviewing new casebooks
by both Arthur Corbin13 and Samuel Williston,14 to pronounce that
public policy aspects of their contract law casebooks portended a huge
shift.15 But neither Williston’s nor Corbin’s book inaugurated any such
transformation. They reinforced the Langdellian method that had been
solidifying during the intervening fifty years as a result of kindred books
by other devotees of the case method, such as William Keener.16

A new outlook, if not a new era, did emerge the next generation, with

11. Id.
12. Steve Sheppard, Casebooks, Commentaries, and Curmudgeons: An Introductory History of
Law in the Lecture Hall, 82 IOWA L. REV. 547 (1997) (providing an overview of the various
methods used to teach law).
13. ARTHUR L. CORBIN, CASES ON THE LAW OF CONTRACTS: SELECTED FROM DECISIONS OF
15. David Werner Amram, Book Review, 70 U. PA. L. REV. 373, 373 (1922) (“That we are at the
beginning of a new era of development in our philosophy of social relations is a generally accepted
truism.”).
16. WILLIAM A. KEENER, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1898).
the arrival of Edwin Patterson’s two-volume contracts casebook in 1935. This was championed as “the product of a new generation,” featuring “new points of view,” and “reveal[ing] a tendency to inject into the study economic and sociological data.” Others celebrated the achievement as reflecting the scientific advances of the period, especially concerning psychiatry and mental capacity to contract. This was an achievement and the beginning of a shift, but adding scientific perspectives was hardly a new paradigm.

The tendency of the case method’s proponents to meet complaints with incremental adaptation is magnificently displayed in Lon Fuller’s innovative 1947 casebook. Fuller’s book not only included cases for serial examination but also extensive notes, problems, and drafting exercises, together with probing questions about the nature of law. Moreover, Fuller replaced the familiar framework of the contracts course with a new organization by starting the book with contract remedies instead of contract formation. Contemporaries beheld the result as a masterstroke, blending the case method tradition with new approaches of notable originality. As Malcolm Sharp wrote reviewing the volume, this was “more than a case book.” In fact, Fuller’s book, rather than Langdell’s fossil, is best seen as the true forerunner of contemporary casebooks.

Of course, Fuller’s book did not accomplish a revolution either, and there was much left to do. The next milestone was Sharp’s 1953 book with Friedrich Kessler, another impressive combination of tradition and innovation. It presented all the great cases along with detailed notes on them. But instead of implying that they formed a coherent doctrine, Sharp and Kessler revealed glaring tensions, doctrinal contradictions, and the dissolution of the Langdellians’ revered ideas and categories, such as the distinction between contracts and torts.

Sharp and Kessler’s monumental achievement was incompletely

17. EDWIN W. PATTERSON, CASES AND MATERIALS ON CONTRACTS II (1935).
19. Judson A. Crane, Book Review, 49 HARV. L. REV. 512, 513–14 (1936) (“In an era of experimentation and change in society at large, and even in law schools, it seems that the entire subject matter of these volumes deserves a place in the curriculum.”).
realized, however, though a generation later it remained aptly extolled as a “reorganization of the subject” and “a radical and enormously creative innovation.”24 It was left for a future co-editor of the book, Grant Gilmore, to draw out the work’s implications in its 1970 edition.25 These included the expansion of liability in America, the further blurring of the distinction between torts and contracts, and the socialization of contracts that Gilmore depicted in his famous text, The Death of Contract.26

Though momentous, even these accomplishments did not constitute a revolution, as demonstrated by the next major development. Charles Knapp’s 1975 casebook27 not only built on Kessler/Sharp and Gilmore’s innovations, but it also took a turn back towards the doctrinal orientation of the earlier generations’ casebooks. Having fused many of these new strands, it then welded them to the traditional doctrinal categories.

Strikingly, a reviewer of this work reached end-of-era conclusions that turned out to be unjustified. Karl Klare declared in 1979 that “Knapp’s attempt to give students access to the experience of thinking through contracts (and the contracts-tort relationship) as a whole surely signals the impending demise of the casebook method of first-year instruction and of the traditional casebook as a medium of legal scholarship.”28 That would indeed have been a revolution, but it did not occur. The casebook has been thriving ever since, and has been endlessly dynamic, though it has been demoted as a vehicle of scholarly inquiry.

This dynamism led to the “law in action” approach epitomized by Stewart Macaulay’s 1995 casebook.29 The casebook drew expressly on Fuller and Kessler/Sharp,30 putting remedies first and then showing doctrinal contradictions and policy tensions. Its most distinctive feature, however, was its insistence that, in contracting, business reality was more important than legal doctrine.31 Macaulay implemented this insight by organizing cases by transaction type, rather than according to the

28. See Klare, supra note 24, at 895.
30. Id. at v.
31. Id. at 22–23.
familiar doctrinal pattern.\footnote{Id. at ix–xvii.} Though impressive, this was not entirely novel either, as contract materials had been so arranged as early as 1950 in Harold Havighurst’s casebook.\footnote{See Kaplan, supra note 23, at 1039 (discussing Harold C. Havighurst, Cases and Materials on the Law of Contracts (2d ed. 1950)) (Havighurst’s book “goes immediately to various groups of contracts such as employment contracts, contracts for building and construction, and so forth.”).} By developing and extending these earlier efforts, moreover, Macaulay joined critics of the case method who debunked the practice of teaching contracts using common law appellate opinions, saying that was akin to teaching zoology by focusing on unicorns and dodos.\footnote{Lawrence M. Friedman, Contract Law in America: A Social and Economic Case Study 25 (1965).}

Macaulay’s book was influential in altering the contracts course, but it did not transform it. Books today increasingly concentrate on materials other than appellate opinions, but the casebook still dominates the classroom, and aging common law appellate opinions remain the mainstay of the contracts course.\footnote{One thing that has changed, and is part of a revolution, is the use of the masculine pronoun. Before 1975, all casebooks and all reviews of them used the masculine pronoun exclusively. That simply reflected the reality of the worlds of business and law; worlds dominated by men with women out of sight. See Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 Am. U. L. Rev. 1065 (1985). Professor Klare applauded a 1975 effort of the Knapp casebook: “Another attractive feature of the book is its modest but noteworthy effort to respond to the pervasive sexism of American legal culture.” Klare, supra note 24, at 896.} \textit{Contracts in the Real World} departs from that approach in the spirit of currency and context, spotlighted next.

\section{Currency and Context}

The most salient advantages of the approach outlined in \textit{Contracts in the Real World} concern currency and context. The book draws on contemporary matters that provide an accessible context to appreciate the classics paired with them.

\subsection{Currency}

A big selling point of any course book, from Langdell to today, is currency: the appeal of fresh materials, including new cases. The first edition of Arthur Corbin’s contracts casebook\footnote{Corbin, supra note 13.} in 1921 set the record.\footnote{Clarke B. Whittier, Book Review, 31 Yale L.J. 220, 220 (1921).}
Corbin’s motivation in the book, for students, teachers, and practitioners alike, was the forward-looking goal of enabling earnest thinking about “What are our American courts going to decide to-morrow?” 38 Reviewers noted with approval that nearly half the cases in the book were decided since 1900—within twenty years and thus during the lives of the law students who would use the book in the next several years. 39 Corbin’s creativity was the talk of faculty lounges. 40 Samuel Williston followed in lockstep, with his second edition of the same period featuring more than sixty new cases. 41

The purpose of adding new cases has always had a pedagogical goal: provide “modern factual situations readily understandable by the student” 42 “that will hold the interest of a first year class.” 43 But even Corbin and Williston retained certain chestnuts, and ensuing generations of casebook producers followed their lead so that a large number of today’s classic cases were those chosen nearly a century ago. Letting them go is not easy as they are landmarks that provide intrinsic value, historical illumination, and a sense of tradition for law and legal education. And they still help predict what courts will decide, as Corbin had hoped. So throwing out the classics always provokes regret among teachers, 44 and editors dutifully apologize. 45 These editors must make choices, however, about when to eliminate a classic case and how to choose among vying modern ones.

The appeal of the latest cases invites reflections about production capability, which has improved dramatically in recent years. Historically, casebook editors would keep a physical file of new developments as days go by. At year-end, they would compile the file into a printed teachers’ update; this often was developed into a printed supplement to the main text released every year or two, and culminated in a prepared book that was held in high regard by those in the field. The book was a synthesis of all that had happened in the past year, providing a comprehensive overview of the latest cases and decisions, and setting the stage for the upcoming year. This process allowed for a more dynamic and timely update of the material, reflecting the latest developments in the field.

References:
38. Id.
39. Id.
41. Amram, supra note 15, at 373.
42. Crane, supra note 19, at 512.
43. D.W. Woodbridge, Book Review, 24 Va. L. Rev. 824, 824 (1938); see also I. Maurice Wormser, Book Review, 3 J. Legal Educ. 145, 145 (1950) (“[S]tudents are always clamoring for the most recent cases.”)
44. See, e.g., Woodbridge, supra note 43, at 825 (lamenting that Foakes v. Beer, [1884] H.L. 1, was demoted from a principal case).
in publication of a new edition of the book itself after a number of years. Current events were left to classroom teachers. Retrieving relevant material was difficult and the production process took time. The result: current events or deeper exploration of popular stories were essentially off limits. No longer.

Editors today are not limited to maintaining a daily-developments file for integration and transmission annually or less often. They identify important new cases in real time and quickly and cheaply access troves of related materials, including actual agreements, filings, briefs, opinions, and the rest. True, it takes a lot of time to incorporate such materials into a teaching program in a systemic way. Ideally, one or a few people can perform the task for use by larger numbers. My book is an effort to do that. Notably, I began writing most of the stories as blog posts that I would use in daily teaching. Now harnessed to the doctrinal terrain and linked to seminal cases, the book brings the contracts course to life like no other device I have seen in twenty years of teaching this subject.

To be sure, there are risks and uncertainties. For instance, the cases Corbin chose have stuck around for a century while the cases I am choosing should not stick around for perhaps more than a decade. Rather, content must regularly be refreshed, more frequently and with higher cost than historically. But technology eases that burden and reduces the costs as well. As a related matter, printed versions of contemporary materials may have shorter lives if they feature pending cases, which may settle or be reversed. That problem is mitigated by the use of electronic versions of texts that can be updated more readily; it can be converted into a teaching opportunity when the presentation of pending material amounts to a law professor’s prediction of what courts will do. Whether upheld or rejected, students engage real time in the process of legal prognostication and its hazards.46

For students and pedagogy in general, the benefits are considerable. Treating current events in the classroom is one of the oldest pedagogical strategies to engage students. True, if the primary purpose of legal education is to develop the students’ analytical abilities, it matters little

46. Teachers may face such situations whenever drawing on pending cases in class. A court may decide a case the class is studying, thereby cutting class discussion short. The class may prove correct and others incorrect. Lessons abound. I had done such a thing with a case later discussed in Contracts in the Real World (Simkin v. Blank, 19 N.Y.3d 46 (N.Y. 2012) concerning mistake and the Madoff Ponzi scheme). The text endorses an intermediate appellate court opinion that was, post-publication, reversed on appeal. I will have to update the point in the book’s next edition. See CUNNINGHAM, supra note 5, at 59–60.
whether discussion centers on a classic pair of vexing cases from the 1870s or 1920s or a pair of cases from last week. But student engagement and stimulation may be markedly different between cases set in the alien settings of old and those involving the known reality in which students live. Spotlighting cases featuring a hogshead of tobacco, primitive shipping practices, and itinerant farming, imposes a cognitive tax on developing students’ legal skills that disappears when discussing cell phone early termination fees, internet ticket sales, or a Pepsi television commercial involving a Harrier jet.

B. Context

People learn better when they gather new information or hone fresh skills in a context they understand. Law teachers have experimented with many different ways of providing context. Proponents of the pure casebook and case method were content to rely entirely on cases printed in the book as the basis for class discussion, with context and qualification provided by lecture. Early on, editors noticed that some such perspective could be provided more readily in the book, using footnotes, a practice that, in contracts, Williston began and Corbin continued.

Lon Fuller in 1947 rendered the note feature into the form recognized today. No longer footnotes, these rich analytical materials followed the cases and appeared throughout the book with equal prominence. Many gave supplementary facts about the case or provided historical perspective, some presented comparative law contrasts, and others explained the business and economic context of an exchange.

Above all, the point was pedagogical: to provide material that

53. See Harold Shepherd, Book Review, 1 J. LEGAL EDUC. 151 (1948) (reviewing LON L. FULLER, BASIC CONTRACT LAW (1947)).
54. Id. at 153 (“The first year is not too soon to learn that the whole story may not appear in the reported opinion.”).
prevented students from missing the forest for the trees—something teachers in earlier generations had difficulty doing when assigning books consisting wholly or mostly of case after case, sans context. Those earlier teachers had to provide by lecture the essential material that went beyond the inherent limits of an appellate decision; now the text provided it.

Despite this innovation, cautions against excess were voiced then and endure now. Law teachers have long argued about the proper pedagogical balance between spoon-feeding students the law and Socratic interrogation more reliant on the technique of “hiding-the-ball.” In his 1948 review, Harold Shepherd observed about notes in Fuller’s book: “[O]ne need not fear an overdose of spoon-feeding, for there is still enough of orthodox case material and problems to satisfy the most ardent case-method teacher.” That debate, though it continues, is less pronounced than in earlier eras. Hard core Socratic law teaching is a fading relic while lecture and print materials increasingly attune to giving context. There are many ways to do so; providing stories of popular cases and controversies is an effective one.

III. PURPOSE AND PLACE

The contextual approach underlying Contracts in the Real World may contribute to debates about the purpose and proper place of the casebook. Faculty members debate whether law teaching is primarily intellectual or vocational and whether casebook production is primarily a contribution to pedagogy or scholarship. The contextual approach is valuable to promote both an intellectual and vocational vision of the casebook and suggests how the teaching-scholarship debate may involve a false dichotomy.

A. Theory-Practice

From long before the casebook’s inception, law teachers have debated whether the purpose of legal education is the delivery of knowledge (the

57. See, e.g., MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK (2009) (innovative casebook loaded with tutorials about technique, including how to read a case, marginal annotations highlighting important points in a case, tips on preparing for class, formulas for writing legal analysis, and graphical maps of the doctrinal structure of contract law and the book).
transfer of information) or the development of ability (specifically analytical reasoning). Langdell not only created the casebook, he ensconced the law school in a graduate level university program, leaving law teachers to debate endlessly whether legal education is professional training or academic exploration. In fact, it is both in different measures.

To find the optimal mix, one must appreciate differences between law school and law practice.58 Even within the most practice-oriented clinic, students remain students and lawyers are the lawyers. But there is also an intimate connection between law school and practice; even in the most theoretical and abstract seminar, students are becoming lawyers. In addition, it seems clear that in both these educational settings, as well as others, the students are acquiring both knowledge and skills. The earliest casebooks were hailed as offering value not only to students but to practicing lawyers and judges as well.

Such a school-practice debate may not be central to the relative merits of the contextual approach. After all, stories of popular contracts may be chosen to present matters practical, theoretical, or both. And to any such end, modern familiar settings make exploration easier. Teachers sooner get to the heart of an issue, quotidian or conceptual, by broaching known rather than obscure territory. Students—and teachers!—have a better sense of what a morals clause is doing in a twenty-first-century acting contract than sobriety clauses in eighteenth-century author contracts. Furthermore, stressing contemporary context rather than anachronism can often help diminish gaps between practice and theory: the concrete question of whether such a clause is a promise or condition merges into an analytical assessment of the appeal and limits of such categories.

The question of purpose also implicates the broader topic of skills training. In 1922, the prescient Henry Ballantine emphasized the importance of using problems rather than or in addition to cases. Problems are needed to position law students in the place practice will put them, he wrote, as a “lawyer and investigator . . . seeking the solution.”59 Ballantine added: “Our case-books and case method of instruction still have undeveloped possibilities.”60

In a similar spirit, Lon Fuller, father of the contemporary course book, underlined skills training in his 1947 contracts book. It featured

59. Ballantine, supra note 1, at 570 (“[M]ore problem material should be included in our case-books . . . .”).
60. Id.
problems throughout to train students in lawyering skills. In two chapters towards the end of the book the exercises intensified, focusing on the dynamic context of conditions, and devoting “attention [to] problems of draftsmanship” and “problems of counseling and negotiation which may arise when a condition has not been fulfilled or when the other party has defaulted.” The Fuller book was innovative in its time, and these features that made a “stimulating contribution” to “training in lawyers’ skills” show how truly modern it is.

In 1975, two generations later and two generations ago, Charles Knapp’s book contributed similarly valuable materials to build lawyering skills. As described by Karl Klare, Knapp’s “doctrinal exposition is organized around a series of skillfully drafted hypotheticals, posing difficult counseling issues.” After expressing enthusiastic approval of this approach, Klare opined: “[T]he problem-solving and counseling emphasis is further confirmation of the coming demise of the casebook method of instruction.” That prediction overlooked how the problem method and the casebook are not antithetical but complements—true at least since Fuller’s 1947 book. The Knapp book remains such a complementary combination of cases, materials, and problems, through its current edition.

Many are amazed that standard contracts courses in American law schools do not necessarily involve presenting an actual contract to the class, although fragments may appear via the cases. Of course, many casebooks do present contracts and many teachers supply them separately. Drafting exercises even occur. But an interest in the more extensive use of transactional materials has emerged in the past generation, building to a widespread movement today. To be sure, this is also not exactly something new under the sun, as William O. Douglas pioneered this approach as early as the 1930s. Many books today lend themselves to a pedagogic approach that presents the lawyer as counselor, adviser, and deal coordinator, rather than merely as litigator.

61. Sharp, supra note 21, at 795.
62. Id.
63. Id.
64. Klare, supra note 24, at 897.
65. Id. at 898.
67. Sheppard, supra note 12, at 626.
68. See DeLong, supra note 55, at 304.
To put students in the position of advocates for purposes of training, it is likely advantageous to provide a contemporary context, one that exists today and in which students can expect to be placed tomorrow. It may be instructive to reenact the courtroom scenes transcribed in reported classics (say, *Kingston v. Preston*,69 *Hadley v. Baxendale*,70 and *Krell v. Henry*71).72 But such exercises probably yield more historical insight than practice guidance. To put students on stages like those where they will soon act, have them emulate the lawyers developing arguments for Charlie Sheen versus Warner Brothers or the steps in the dispute between Dick Clark’s production company and the sponsors of the Golden Globe Awards.73

In *Contracts in the Real World*, moreover, many stories did not result in litigation or judicial opinions. This enables teachers to convey how most contracts are not litigated. It facilitates engaging skills of negotiation and problem solving and the transactional perspective. It’s easy to find the actual contract underlying many of these deals too, for those wishing to walk through such things. They are easier to find, easier to understand, and more relevant than original documents accompanying the more dated cases chosen by Langdell, Williston, or Corbin.

Storytelling has become an increasingly popular pedagogic strategy throughout the curriculum in recent years. Evidence includes the *Law Stories* series edited by Paul Caron and the expanding interest in legal archeology.74 Again, this is often seen as more novel than it is. Harold Shepherd in 1948 celebrated Fuller’s notes providing additional facts about cases by quipping that “the first year is not too soon” to let students know that appellate opinions do not provide the full story of a case.75

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69. *(1773) 99 Eng. Rep. 436 (K.B.).*
70. *(1854) 156 Eng. Rep. 145; 9 Ex. 341.*
71. *(1903) 2 K.B. 740 (Eng.).*
72. Reports of classic cases, including these, often are fragmented, consisting of partial transcripts of oral arguments and hearings. Such forms pose a modest cognitive tax on the modern reader when reported cases take the form of stylized judicial opinions and courtroom dialogue is found in other records.
73. *See Cunningham, supra* note 5 (discussing these cases).
B. Scholarship-Teaching

The contextual approach may thus offer to revive the scholarly status once accorded to the production of teaching materials. Professors of earlier generations, especially from the 1920s to the 1950s and perhaps as recently as the 1970s, seemed to prize the value of casebooks as scholarship along with their value as teaching materials. They invested considerable effort to producing books that would organize or reconceptualize a field. Famous casebook editors were all recognized in various ways as providing intellectual discoveries such as Kessler/Sharp’s stunning demonstration of doctrinal contradictions through matching pairs of conflicting cases. Charles Knapp’s selections were credited as “distinctive” in teasing out the emergence of new trends and themes in the case law through the mid-1970s, especially the roles of reliance and good faith.

The days of treating casebooks as a vehicle for such scholarly pursuits—to organize or reconceptualize a field or reveal newly discovered relations—may seem numbered, but they need not be. Editors of today’s popular casebooks deserve credit for scholarly discoveries in their casebook work, including Allan Farnsworth and William Young, who demonstrated the value of a casebook in establishing connections between doctrines, and Robert Hillman and Robert Summers, who presented a layer of general theories of obligation (bargain, reliance, restitution, statute, and so on) as an organizing theme. Although such efforts to rethink, reorganize, and reshape occur increasingly in articles and scholarly books, there is room for doing so via teaching books, attested by the recent example of stories of outsider voices and taking a more literary or feminist turn. I consider Contracts in the Real World to be a work of scholarship as well as an exercise in pedagogy, as the next section will elaborate.

76. See Klare, supra note 24, at 876.
77. Id. at 889.
IV. SEQUENCE AND THEMES

Taking a contextual approach to preparing and using contracts teaching materials may not imply any particular direction about the sequence of materials. For example, take the sequence of any of the existing casebooks and you can probably update the entire book with contemporary stories of popular contracts and keep the order intact. On the other hand, when preparing *Contracts in the Real World* from scratch while consciously committed to the contextual, story-based approach, a certain sequence emerged. It differs from that of all existing casebooks. Intended to promote clarity and understanding, the resulting sequence made implicit discoveries or revelations about the structure of contract law.

The earliest contracts casebooks sequenced material historically, showing how case law evolved. Arthur Corbin took a transactional approach, presenting materials in the order that they occurred in contracting, from formation to discharge. Lon Fuller’s 1947 book made the radical move to put remedies first, on the grounds that the stakes in contracts revealed by remedies pervade the entire course. An even bolder reorganization of doctrine appeared in Kessler and Sharp’s 1953 book. Doctrines were not isolated into sections for serial examination but woven pervasively, with several topics—such as consideration, excuses, and restitution—reappearing throughout. Likewise, Ian Macneil’s approach of ordering materials according to contract type presented issues more in their social and business context than in legal categories.

The sequence of *Contracts in the Real World* is context-driven. Using informal description, it proceeds as follows: (1) getting in; (2) facing limits; (3) getting out; (4) paying up; (5) rewinding; (6) writing it down;

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83. KESSLER & SHARP, *supra* note 22.
85. Perhaps some of this matters little for practical purposes, since teachers can assign the casebook’s materials in a different sequence to suit their needs or tastes. As Douglas Leslie quipped about Fuller’s leadership, anyone can start with remedies using any book: “Just begin the course with Chapter Nine.” Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 St. Louis U. L.J. 1289, 1300 (2000). On the other hand, a well-designed book often builds knowledge cumulatively. Such books cannot readily be assigned in different orders without sacrificing that design value.
Among the striking features of this arrangement, remedies is neither first nor last but about in the middle—a novel placement for contracts texts. Unenforceable bargains come on the heels of formation to establish boundaries and are followed by excuses to delineate the scope of binding bargains within them. Contract remedies are followed directly by restitution, as a remedy and a theory of liability. The rest of the sequence fans out logically to explore the rest of contract’s doctrinal machinery.

Nor may the contextual approach automatically produce given themes. But again the approach that I took revealed themes that likewise are novel compared to existing and historical books and much scholarship. Since the 1950s, there have been a few casebooks with a particular interdisciplinary bent, such as realism (then called functionalism) or economics. Today’s examples not only include such interdisciplinary perspectives but also critical theories and viewpoints, especially race, class, sexuality, and gender. These perspectives can even displace doctrine or law as a book’s organizing principle. The law and economics perspective seems to have become sufficiently mature to sustain this role.

Critics lament excessive reliance on such perspectives because they can unduly complicate a book. Many teachers today long for a return to the purer casebook, one consisting primarily or exclusively of cases. Opposing such nostalgia is the continued press for new perspectives, with stern reminders of the ahistorical, thin, insular flavor of the case-only approach, and championing instead a rich interdisciplinary approach thick with “details of lived human experience.”

In creating *Contracts in the Real World*, wedding current materials to

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86. Cunningham, * supra* note 5, at vii–x.
87. Id.
88. Dawson, * supra* note 84 (noting how Havighurst and Mueller concentrated their recent books “on function or economic ‘context’”).
90. Ledwon, * supra* note 80, at 120.
classic cases, I found a milder middle ground. What I found in reflecting on contracts from a contemporary perspective—stressing context and currency—began with common misconceptions about contracts and extended through the field’s apolitical proclivity.

As for misconceptions, many people think that promises must be kept, come hell or high water.91 They say promises are sacred and suppose that judges force people to perform them.92 Many believe judges punish those who breach promises. Some think that a valid contract must be signed, sealed, and delivered—as in the title of Stevie Wonder’s popular song.93 Hourly workers think companies can only fire them for “just cause.”94 All these beliefs are mistaken.

These examples of mistaken beliefs reveal that a huge gap separates people’s beliefs about contracts from the reality of contracts. The gap entices visionaries to recommend changes to contract law. Moralists see in promise-making a higher order of behavior that is sacrosanct and prescribe that promises should be kept.95 Economists think promise-making can be measured solely in utilitarian terms. So they dictate choosing among alternative actions, such as performing a promise or breaching it, by comparing costs and benefits.96 Some on the political left suspect that contract law privileges the rich against the poor and the powerful over the weak. They urge a more egalitarian revision. Their foes on the political right declare that contract law is too paternalistic and yearn to oust normative law from the market altogether.

These positions are alluring. Approaching the world with a measuring device like a utility function, and hunting for the efficient solution, offers the satisfaction of a definite course of action. Taking a moral approach to problems and appreciating the plight of others brings the

92. Id.
93. STEVIE WONDER, Signed, Sealed, Delivered I’m Yours, on SIGNED, SEALED & DELIVERED (Tamla Records 1970).
satisfaction of empathy. Despite allure, *Contracts in the Real World* illustrates how the settled doctrines of contract law have long served our widely accepted social and business goals. It shows how this body of ideas holds a sensible center against both extreme political positions and misguided populist intuitions.

True, the substance of contract law expresses a political philosophy. In a capitalist society, contracts and contract law are essential. Where people are free to own and exchange property, contracts and contract law establish ownership and facilitate commerce. “Freedom of contract” describes an approach of deference to private autonomy and individualism. It means courts have a limited but crucial role: to decide whether contractual liability exists and to order appropriate remedies for breach. Freedom of contract can be a wonderful way to unleash creative energies and expand productive capacity and well-being.

Yet this contractual freedom is neither unchecked nor unbridled. Government regulation provides some social control over individuals by curtailing licentious pursuits of self-interest. Governmental regulation aims to protect people from the unscrupulous who would take advantage of contract law’s freedom. “Freedom from contract” provides a way to limit such exploitation. This gives courts a broader role. They not only decide questions of liability and remedy, but police against objectionable bargains. While there can be conflicts between private autonomy and state regulation, in contract law, there is remarkable harmony between the two: you can bargain for anything you want—almost.

But that does not stop people from advocating that contract law should move towards the extremes. Devotees of pure capitalism, on the right, campaign for uncompromising devotion to freedom of contract, and resist state regulation that limits individual autonomy or contractual possibilities in any way. Opponents of rampant capitalism, on the left, vigorously object to such rugged individualism, pushing for substantial social control, and urging freedom from contract. They exhort judges to review bargains for fairness or impress standards of behavior on people even if they did not agree to accept them.

As portrayed in *Contracts in the Real World*, contract law in the United States reflects neither extreme. U.S. citizens may be conservative or liberal, Republican or Democrat, even libertarian or socialist. But the country, as a whole, is none of those things and neither is its contract law. The country’s practices are capitalist and democratic, capacious notions stressing both entrepreneurship and responsibility. The nation’s contract law gives enormous but not unlimited space for freedom of contract. Of course, contract law is dynamic, adapting as society and the
economy change. And the philosophies of particular judges in individual cases affect their analysis and sometimes the resolution of a dispute. But contract law’s evolution and its application by particular judges have vacillated within stable, practical boundaries.

For example, at one end stands classical contract’s relative strictness, limiting the scope of contractual obligation, and this is accompanied by an equivalent strictness of enforcement: if a contract is hard to get into, it is also hard to get out of. People could be bound to contracts that were made based on mutually mistaken assumptions or even where performance became impossible. At the other end, the ambit of contractual obligation is broader and so are grounds for excusing it, like mutual mistake about the terms of a trade, or impossibility of performance, such as a power outage in a rented banquet hall. Similarly, classical contract law venerated written records, limiting the scope of obligation to what was plainly meant within a document’s four corners. The realists were more willing to consider evidence supplementing these written expressions.

Unbounded is the range of subjects contracts involve, which is as large as life. Contract law addresses all exchange transactions and the universe of promises. Given such a sprawling enterprise, expect to find occasional tensions or contradictions between cases or within doctrines, or variation among states. Despite such findings, however, which tend to be clearest at microscopic levels of inspection, contract law shows a surprising degree of coherence across settings and geography.

Many have tried to provide a grand theory of contract law, but it is unsurprising that contract law’s vastness defies tidy explanation using any single account. True, much of contract law is based on promises, but not all promises are recognized as legally binding; much of contract law probes whether people have consented to some exchange, but it is likewise true that not every consented deal is valid, and liability can attach though consent is not obvious. It is particularly difficult to explain everything about contract law in terms of protecting people when they rely on others or of determining which arrangements are the most economically efficient, though both reliance and efficiency are often relevant.

If pressed, the best way to account for the vast run of contract law doctrine is pragmatism—a search for what is useful to facilitate transactions that people should be free to pursue. At least that’s what I found in preparing *Contracts in the Real World*, with a conscious
commitment to supplying familiar context to traditional doctrine.97

CONCLUSION

The prescient contracts scholar and teacher Henry Ballantine wrote in 1922:

In a case-book the important thing is to have cases which raise the crucial and vital problems of the subject, in an interesting way, to stimulate thought and discussion. In any argument the first thing to do is to define the issues. It may be suggested that historical materials should be introduced at a point where they will shed light on these crucial questions. They frequently make a poor introduction to a subject because the student cannot appreciate their use and bearing, or what the problem is that they are intended to elucidate. The beginner can often go better from the present to the past than from the dim and uncertain past to the present.98

Nearly a century later, those words still resonate. I wrote Contracts in the Real World using this pedagogy. Though teachers legitimately love the classic cases, students understandably clamor for the latest. They want to know how hoary principles matter today, how to apply traditional knowledge to the breached promise they’ve recently heard about. In that spirit, I’m using the architecture and text of Contracts in the Real World to produce a course book intended to add a novel alternative to the traditional teaching materials in this field. The combination of student interest and professional capability seems to warrant such a fuller book to teach contracts.

97. For engagement with these assertions, as well as other assessments fellow law professors have made, please see the online symposium about Contracts in the Real World that appeared at Concurring Opinions (October 16–18, 2013). Lawrence Cunningham, Symposium on Contracts in the Real World, CONCURRING OPINIONS (Oct. 16–18, 2013), http://www.concurringopinions.com/archives/2012/10/symposium-on-contracts-in-the-real-world.html.

98. Ballantine, supra note 1, at 570.
INTRODUCTION

How law is taught is at the center of the debate over the need to change legal education to better prepare students for a difficult and changing marketplace for legal services. This Article analyzes the benefits of using “stories” to teach law. The stories to be discussed relate to contract law: this Article asks whether they can be used to improve the method and content of teaching law. The ruminations offered on teaching contract law, however, are also relevant to teaching other core, first-year law courses.

The use of contract stories to bring contracts alive, and to better tie theory to practice, is based upon the power of narrativity and contextualism to deepen the understanding beyond doctrinal analysis. The narrative approach to teaching law is at its best when it is highly

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2. Id. at 95.
contextualized—including contextual facts of a case (recognized facts); context of the law of precedent as a story of legal development; law creation within context of a particular cultural, economic, and social era; and those elements of case context that are left unrecognized, but likely influence party behavior and conduct (e.g., bias, discrimination). This Article will discuss these different contextual factors in relationship to the narrative approach to teaching law. This broad view of contextualism will show how narrativity not only descriptively conveys the law, but also will show the normative role of law in society and how law can be reformed to enhance that normative role.

Contract law is the quintessential first-year law school course, often taught by the Socratic method of teaching. It introduces students to the doctrinal nature of law—as a series of fixed rules, principles, and standards. The rules-based nature of contracts allows the Socratic stiletto to parse from rule to exception and to exception to exceptions. However, the true Socratic teaching of law no longer holds a dominative perch in law schools, as it did some twenty or thirty years ago. It was a cherished experience when used by my contract law professor, Robert S. Summers, of Cornell Law School. But, alas, even by the second semester of the first year its ability to rivet student attention began to wane. In the end, most of my professors morphed into a lecture-discussion format. The educational benefits of a hard Socratic method of teaching are debatable and whether it is the most efficient method of teaching deductive and analogical reasoning is suspect. In the end, it may be efficient in the hands of a truly gifted Socratic teacher as opposed to the lazy, but brilliant, mind able to raise queries with no pre-mediated path in sight. But, even in the hands of a Socratic master, it can be argued that it is a time consuming approach in which the richness of a case cannot be completely exploited. The complexity of modern contract transactions may require a different approach.

The different approach will still be a case-based approach, but one in which the case is the basis of a story—a story connecting iconic case law with modern cases that emphasize the continuity of law, as well as its inherent flexibility. This flexibility allows the law to respond to novel contract disputes. However, often what may seem novel may not be that novel after all. Thus, the tying of cases from different eras of the law into a narrative leads to a greater understanding of the dynamic nature of law.

This Article examines Lawrence Cunningham’s use of “contract stories” in his innovative book, *Contracts in the Real World: Stories of Popular Contracts and Why They Matter* (Contracts in the Real World), to flesh out the importance of narrative and context for understanding law and its application to real world disputes. Part II provides some initial observations of the Socratic and narrative approaches to teaching law and reviews the structure of the law school casebook and the need to develop a modern legal textbook that uses cases to weave a narrative of the development of legal rules. Part III examines the narrative approach to understanding contract law. Part IV looks at the internal-external; conceptual-contextual; and descriptive-prescriptive dimensions of law and its study. Law is often viewed as an internal, conceptual structure that provides the rules, principles, and standards that form the rule of law. But how law is applied—more specifically, how it can best be applied—is an external, contextual, and prescriptive undertaking. This Article argues that the narrative approach is at its best when it immerses the cases in their real-world context. This Article offers some general remarks on the practical implications of a more contextual-narrative approach to learning law and attuning legal education to real-world practice. Finally, Part V briefly notes that American law schools need to present law in a global context.

One note in passing: it is clear to many, especially law firms seeking to hire new attorneys, that legal education is in need of transformative change. True transformative change would be the creation of a totally new model of legal education. The German legal education system is an example of a completely different approach. In the German legal education system, as is the case in most European countries, law is offered as an undergraduate degree. However, the trend is that many students stay on for a Masters of Law and some for a Ph.D. in the law before proceeding on to practice. The Masters and Ph.D. in the law are not purely academic in nature, but make students more marketable. Following graduation, students must pass a national exam. If successful, they are then placed by the government with a law firm or government legal office for two years of practice training. Following the two years of practice training, students must pass a second bar exam. The idea of making students more “marketable” has taken on added significance after the 2008 financial crisis and the downturn in the legal job market.5

The German legal education system, or the somewhat similar English system, offers numerous insights into reforming the American legal education system. They produce students with skill-sets and practice experience that make them immediately productive to would-be employers. However, the American law school model is premised on generating three years of tuition revenues. The high costs of legal education and the poor state of the legal job market has resulted in a dramatic decline in law school applications. Ultimately, for law schools to continue admitting the same class sizes they will need to lower admission standards, but they will do that at the cost of being less competitive in attracting quality students. The lowering of standards will make their students less competitive in the legal marketplace, and so it will go. The more likely scenario is that schools will maintain their standards, which will force them to reduce class sizes. It should also lead to a free-market competition to innovate curriculum so that law schools can distinguish themselves as better preparing their students for legal practice. This will be difficult given traditional mind-sets, but it is the challenge that will be necessary to confront.

The exploration of models of legal education brings us back to the questions posed by Karl Llewellyn, some eighty years ago, in his infamous diatribe on American legal education, *The Bramble Bush*:

What a lawyer does in court, and what he does outside, what relationship either court or lawyer has to the law, what relation the law school has to any of these things—around these things, I take it, there floats a pleasant haze.6

[W]hat is the orientation of the law school with regard to the profession? . . . Why does it offer some things and not others? What do you need for your practice which it does not offer?7

[H]ow does the study of the law here bear upon the work that you will do and the life that you will live when you leave this school and go into the practice?8

These are the challenges law school administrators must confront. These challenges come at a time of structural change in the legal job market; they place law schools in a bind between the need to generate revenues and the need for dramatic changes that would likely diminish those revenues. Maybe radically changing legal education to include a practice component will come from the public universities that are not quite as

6. LLEWELLYN, supra note 1, at 11.
7. Id. at 92.
8. Id. at 11.
dependent on tuition-only revenues. Of course, public universities’ ability to make such changes would likely be hampered by institutional constraints, internal and external to their law schools and their universities.

The need for “radical” change in legal education is an old storyline going back many decades through the production of numerous studies. As recently as 2007, the “Carnegie Foundation for the Advancement of Teaching . . . concluded that our nation’s law schools are failing to prepare graduates adequately for the practice of law.”9 The Carnegie Report supported the MacCrate Report10 sponsored by the American Bar Association some two decades earlier. The MacCrate Report emphasized the need for enhanced skills training; the Carnegie Report also emphasized the need for a more integrated curriculum. More recently, proposed law school accreditation standards state that each law school “shall identify and publish learning outcomes designed to achieve for its students, upon graduation, competency to represent clients and to participate effectively, ethically, and responsibly [in] the legal profession.”11

Law practice and legal education have been under attack for some time, but in the years since the financial crisis of 2008 there has been a shift from intellectual self-critique to professional survival. So change will come slowly,12 but it certainly will come. For now, the change will be incremental in nature. One of those changes is the topic of the current symposium—changing the materials used to better teach students about law’s maddening blend of continuity and indeterminacy.

I. INITIAL OBSERVATIONS

Looking back at some of my classes so many years ago, the hard


12. See Nancy B. Rapoport, Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools, 81 Ind. L.J. 359, 366 & n.26 (2006) (noting that the last major innovation in legal education was the introduction of the case method towards the end of the nineteenth century).
Socratic method of teaching was still ingrained in the first year of law school. But, in a number of instances, the pedagogy could not honestly be characterized as either “hard” or Socratic. To the truly gifted teacher, the Socratic method possesses the ability to train students to think critically and analytically. But, for some less gifted professors, the Socratic method devolved into using student questioning in a haphazard way, and not as a guiding force as it was initially intended. Some professors seemed to use it as a way of terrorizing or ridiculing students. But does it adequately serve pedagogical objectives? I will simply repeat what is stated above—yes, if used by a well-prepared, passionate teacher trained in the Socratic method.

The second question relating to the Socratic method is whether it is an efficient methodology for teaching students how to think like a lawyer. Part of the question is answered by the above paragraph. The other part is that done properly it is a slow device for covering material. Its value is in the development of an analytical skill-set. The cost is much less substantive coverage than a lecture-discussion-exercise format is able to accomplish. In the end, the Socratic method as initially envisioned has been dying in American law schools for decades.13

The next tenet of traditional law school teaching is the case method—the use of mostly appellate court decisions to illustrate the nuanced nature of law. It makes clear that black letter law does not get one very far when both parties cite case precedents to support diametrically opposed arguments and outcomes. The student is introduced to the importance of operative facts in finding precedents, whether mandatory or persuasive, and how to distinguish a case from seemly dense case law. This is good stuff, but the question again becomes: at what costs to other curricular goals? R. Michael Cassidy states that “[p]roviding students with the analytical skills necessary to ‘think like lawyers’ by teaching them to read and dissect appellate decisions may no longer be sufficient to meet the demands of the legal marketplace.”14

A number of criticisms can be lodged at the traditional case method system. First, it is questionable whether a single case or a series of cases treated as autonomous units is the best way to impart knowledge of the law. Second, cases severed from context provide only a narrow

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13. See Christie A. Linskens, What Critiques Have Been Made of the Socratic Method in Legal Education? The Socratic Method in Legal Education: Uses, Abuses and Beyond, 12 EUROPEAN J. L. REFORM 340 (2010); Patricia Mell, Taking Socrates’ Pulse, MICH. B.J., May 2002, at 46 (“Today’s Socratic method is far less robust in terms of frequency of use and severity of method than was its predecessor of 20 or 30 years ago.”).
14. Cassidy, supra note 9, at 1516.
perspective on what internal and external elements may have impacted the case. Internally, who were the parties? What were the arguments given by the opposing attorneys? Were multiple legal doctrines argued in the alternative? Externally, what was the cultural and economic milieu of the case? Has society changed in a way that questions the correctness of the case outcome?

This type of contextual understanding of cases requires changes in the materials used to teach our students. The quality of a course is mostly dependent on the quality of the instructor, but is also dependent on the quality of the course materials. There are some very good casebooks, many more that are mediocre, and some that are outright awful. The awful casebooks simply string cases together, and the cases used may not be the most illustrative or fit the flow of the other cases for the area of law being examined; the “related materials” are spotty at best or almost non-existent; and the case questions lack creativity or are repeated throughout the book. Fortunately, most casebooks try to blend cases with other materials in rational ways. However, the mix of cases and related or explanatory materials is uneven, and the types of materials used can vary significantly. A Washington Law Review “Contracts Casebooks Survey” of contract law professors showed that “excessive length” and an “insufficient number of drafting exercises or problems” were the two most common criticisms of current casebooks. Another interesting finding is that “Personal Course Packets” were the third most common “casebook” used among the survey participants. This indicates a possible trend away from the extremely costly traditional casebook to a more multi-dimensional approach to teaching beyond the case method.

The subject of contracts is an example of a subject where a narrative approach to teaching would be beneficial. Numerous theories of contract have been offered to explain—descriptively and normatively—the essence of contract law. In the end, a given theory at best explains part of contract law. Nonetheless, contract theory plays a vital role in helping to understand contract law and how best to reform its shortcomings. The advancement of a unitary theory of contract law, however, ignores the complexity and multiple functions of contracts. Cunningham correctly states that “the best way to account for the vast run of contract law doctrine is pragmatism—a search for what is useful to facilitate exchange transactions people should be free to pursue.”

16. CUNNINGHAM, supra note 4, at 9 (citing Nate B. Oman, A Pragmatic Defense of Contract Law, 98 GEO. L.J. 77 (2009)).
contract law, and pragmatic use of contract law, is premised by a certain degree of continuity, which a narrative approach can highlight, as well as the importance of context to give law meaning and to allow for its pragmatic application.

Changes in methodological approaches to teaching law will require active engagement with faculty training opportunities. Neil Hamilton notes, “Faculty education will be essential to help each faculty member and the faculty as a whole to develop new curriculum and pedagogies that address the challenge. The faculty will need a willingness to experiment and to learn from trial and error in this new kind of teaching.”17 The mistake of traditional legal teaching that emphasized the use of the Socratic method in the presentation of the legal canon was that new professors were rarely schooled in the method and may never have experienced the teaching of it in the proper way; it was assumed that an intellectually gifted new hire would inherently be able to develop the technique without any training or guidance. This mistake must be avoided as law schools and law teachers experiment with new teaching methodologies. It should be acknowledged that many law professors have forsaken the Socratic method for general lecture and discussion formats, and some have taken the more ambitious problem-solving approach that confronts legal problems across different subject categories, but these approaches are mostly used in upper-level courses and seminars. The focus here is the shortcomings of current casebooks and the teaching of the first-year courses. The next two Parts look at the narrative power of law and the role of contextualism in modern contract law.

II. NARRATIVE POWER OF THE LAW

The law as storytelling and the pedagogical benefits of a narrative approach to teaching law has been vetted in legal scholarship.18 Robert


18. See JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE (2002); DAVID RAY PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (1991); Kathryn Abrams, Hearing the Call of Stories, 97 CALIF. L. REV. 971 (1991); Jane Baron, Intention, Interpretation, and Stories, 42 DUKE L.J. 630 (1993); Christine Metteer Lorillard, Stories that Make the Law Free: Literature as a Bridge Between Law and the Culture in Which it Must
Cover famously stated: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning . . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.” ¹⁹ A narrative approach to teaching integrates the descriptive and normative dimensions of law. In the words of Cover, “[True knowledge] requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’” ²⁰

The narrative approach, imbued with a full range of contextual information, provides students with a better understanding of the law and how it can best be used in advancing the interests of their clients. It does this, to some extent, by converging the is and the ought of law. Karl Llewellyn and the legal realists saw the “is” of real world practice—especially in the areas of contract and commercial law—as the “ought” of law. In framing the Uniform Commercial Code, Llewellyn used open textured rules, such as the reasonableness standard, to allow contextual evidence (trade usage, business customs) to refresh and inform the rules of commercial law with the narratives of contract law-in-action. ²¹ “It is in these narratives of commercial life where the meanings of contract rules are located.” ²² All legal and normative rules are found in the contextual narrative that supplies them “with history and destiny,

²⁰. Id. at 10.
²¹. Article 2 uses the reasonableness standard over forty times. See, e.g., U.C.C. § 2-201(2) (2012) (providing that the written-confirmation rule requires that the confirmation be sent “within a reasonable time”); id. § 2-201(3)(a) (providing that in order to qualify for the specially manufactured goods exception to the statute of frauds the seller must “reasonably indicate” that the goods in the process of manufacture are for the buyer); id. § 2-206(1)(a) (providing that unless indicated otherwise in the offer, an acceptance may be sent in “any medium reasonable in the circumstances”); id. § 2-206(2) (providing that the beginning of performance may be a “reasonable mode” of acceptance, but an “offeror who is not notified within a reasonable time may treat the offer as having lapsed”); id. § 2-207(1) (providing that a statement of acceptance must be “sent within a reasonable time”); id. § 2-209(5) (providing that a party who waived a right under a contract “may retract the waiver by reasonable notification”).
beginning and end, explanation and purpose.”

Llewellyn’s “ought as is” equation noted above is subject to attack. An astute lawyer can argue in favor of a normative alternative that exists beyond actual commercial practice. The lawyer presents an alternative narrative in which commercial practice is portrayed as something other than what the law should entail—that is, the lawyer’s argument is that the judge should interpret a legal rule or a contract based upon a vision as to what practice should be. The lawyer argues that existing usage or practice is actually bad or inefficient and that the court should interpret the law in a way to encourage the development of a good commercial practice. The conversion of the “is” of real world practice to the “ought” of contract rules is used to determine the meaning of the parties’ agreement. However, using Cover’s concept of “what might be,” the court can use contract law’s regulatory function—represented by such meta-principles as good faith, commercial reasonableness, and unconscionability—to restructure the “is” to the “what might be.” The continuing exploration and recognition of the “is” allows the rules and principles of the law to become self-revising. However, in refreshing rules through the recognition of modern practice, the courts at the same time can modify the “is” through the application of an alternative normative narrative.

In learning law and its many nuances, students also need to learn how to apply its rules “to new contexts.” These contexts include the stories brought to the practicing lawyer by their clients. “[L]awyers practice their craft, listening to the stories of clients, refashioning and refitting the stories they hear (or the stories they imagine they hear) to fit the language of the law and to accommodate what might be called the ‘law culture’ story.”

Teaching a narrative view of case law better prepares students to respond to their client stories, for it shows law as something more than being “inert, limited, and formal.” James Elkins writes:

23. Id. (quoting Cover, supra note 19, at 5).
24. Cover, supra note 19, at 10 ("To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but . . . the ‘what might be.’"). Another example of the merger of “is” and “ought” is what Richard Parker refers to as “prescriptive-descriptive tenets.” See Richard D. Parker, The Past of Constitutional Theory—And Its Future, 42 OHIO ST. L.J. 223, 240 (1981).
25. Cassidy, supra note 9, at 1520.
27. David O. Friedrichs, Narrative Jurisprudence and Other Heresies: Legal Education at the
[Law as narrative] is more than the telling or listening aspect of the craft of lawyering that makes narrative (and the perspective it affords us) of interest to lawyers. When we think of law as narrative we think of law differently than we do when we conceive of law as a system of rules or as an adversarial contest or game. Law may indeed be a system of rules, a means of conflict resolution, a game, a form of rhetoric and argument, or a discourse, but it is also a vast reservoir of stories—stories about how we use law and how we come to believe in its necessity.\(^{28}\)

The use of narrative or storytelling to understand law has been around for some time. However, it is primarily seen at work as a research methodology in areas such as feminist jurisprudence\(^ {29} \) and law as interpretation.\(^ {30} \) *Contracts in the Real World* attempts to use stories from canonic and modern cases to tell the story of law in action.\(^ {31} \)

What are the potential benefits to this type of narrative approach to the teaching of law? First, connecting old cases, many considered canonical, with recent cases shows the continuity of law. In fact, the new cases bring the old cases to life; students see their immediate relevancy to the modern world. The instructor can explore factual differences that may be used to distinguish the cases or to show that despite such differences the rule or exception still holds true today.

Second, this intergenerational analysis can also be used to note the inherent flexibility of legal concepts that have been around for centuries but continue to find new areas of application. A few legal concepts that come to mind include the concepts of trust and agency, and the evolution of fiduciary duties in business organizations out of those two earlier

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The evolution of the internet, the creation of new types of informational products, and the idea that the license is the product provide other examples. These new “things” raised the question of whether a new body of law or government regulation was needed. In the end, except for some minor tinkering, “old” law was determined to be adequate to facilitate and regulate these new technologies and products. For example, the ancient doctrines of trespass and nuisance have been employed to police inappropriate use of Internet Service Provider’s bandwidth.

Third, it is important to take the student’s perspective in developing teaching methodologies—different students respond better to different methodologies. Narrative or story-telling should be one of a number of teaching methodologies used to reach the different learning propensities of students. Beyond the excitement and trepidation of the first semester of law school, the benefits of the Socratic and case method have run their course and hopefully served the purpose of sharpening critical

32. Directors and officers are agents by the fact of being employed by the corporation. But historically, corporate law evolved from trust law. Deborah DeMott states: “Not surprisingly, the corporate form of business organization proved to be fertile ground for application and development of fiduciary principles. A corporation’s directors occupy a trustee-like position . . . .” Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L.J. 879, 880 (emphasis in original); see also Adolph A. Berle, Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. FIN. ECON. 305 (1976).

33. The rise of electronic transactions and information products led to some attempts to create a comprehensive law to regulate the internet and the licensing of informational products. The most important attempt was the drafting of the Uniform Commercial Code (UCC) Article 2B (Licensing). Article 2B was initially sponsored by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), the two organizations that are the traditional sponsors of the UCC and revisions to the UCC. However, NCCUSL eventually dropped its sponsorship and Article 2B was withdrawn. The ALI tried again by drafting a model law—Uniform Computer Information Transaction Act (UCITA), but the UCITA was a failure as Maryland and Virginia were the only states to adopt the law. See A. Michael Froomkin, Article 2B as Legal Software for Electronic Contracting—Operating System or Trojan Horse?, 13 BERKELEY TECH. L.J. 1023, 1024 (1998) (arguing that states have managed electronic contracting well with “few legal crashes”); Nim Razook, The Politics and Promise of UCITA, 36 CREIGHTON L. REV. 643, 643–44 (2003) (“[T]he UCITA has weathered the pull-out by the American Law Institute’s contributing drafters’ concerted and well-organized efforts to contest its passage and a very cold reception by the states.”) (footnotes omitted); Katy Hull, Note, The Overlooked Concern with the Uniform Computer Information Transactions Act, 51 HASTINGS L.J. 1391, 1391–92 (2000) (arguing that case law can adapt better to the rapidly changing technology that UCITA seeks to govern).

thinking skills. But something more is needed to keep students’ attention and broaden their search for operative facts and issues. One scholar asks: “How can law schools help to vitally engage their students and lay the groundwork for similar vital engagement in their studies and ultimately their law practice?”

If the analogy of case law’s development as a “chain novel” is an overstatement, it is at least a loose-leaf binder, organized by tabs into different bodies or subjects of law—from general principles to specialized bodies of rules. Within each generic tab are many sub-tabs of the individual rules, exceptions, and factors used in the application of law to fact patterns of similarly situated cases. Common law reasoning by its very nature is a narrative undertaking. It must look back to find exemplary precedent—this is required for the court to demonstrate its use of authoritative sources to bolster claims of objectivity, impartiality, and the quality of its deductive reasoning. At the same time, the case before the court has at least some level of particularity that separates it from pre-existing case law. The court also must search for any such particularity in the legal precedent. Finally, depending on the type of particularity, the court may feel it prudent to project that particularity or uniqueness into the future to provide guidance to future courts. The court often poses hypotheticals to flesh out likely future developments of the law.

36. See Dworkin, Hard Cases, supra note 30; Dworkin, Law as Interpretation, supra note 30. The concept of law as a chain novel depicts the law as chapters in a book with a different author for each chapter. In a new case, a judge looks at the legal precedents as if they were chapters in a novel and her job is to write the next chapter. The judge has some discretion as to how she writes the new chapter, but is constrained by the storyline of the previous chapters. For example, if the earlier chapters are in the genre of a traditional murder-mystery, the judge is not free to write a chapter related to the genre of science fiction.
This narrative is both internal and external to the law. The exemplarity of cited case law, as explored by the case method, exposes law students to the conceptual nature of law in which deductive reasoning is used to get students to think like a lawyer. The student learns the roles of rules, standards, and principles, and under a gifted professor, they learn the underlying rationales and public policy behind these various legal norms. But much more has to be learned—why some areas of law are rule-dominated and others are standard-dominated; how a chaotic rules-based regime is sometimes replaced by a standards regime to bring order to the chaos; how standards’ application to a wide range of variant cases leads to the development of exceptions or a categorization of the case law into groups of similarly situated cases, transforming the standard into a rules-based regime; the ability to distinguish cases on behalf of a client no matter how minute the differences in the cases; and so forth.

The formal rules of the law are only part of the narrative enterprise. The rules always need to be placed in the factual context of a given case. This is the area of law application—rule to fact. Here the narrative comes from outside of the law; in many instances, the law looks to the real world of practice to infuse a rule with meaning or to guide the court in applying the law to the case at bar. Commercial law, especially the law of sales, looks to business practice—the stories of merchants and how their businesses, industries, and associations have evolved in order to conduct business based on elements of efficiency, certainty, trust, and professionalism.

Contracts in the Real World demonstrates that the adages of contract law mask the underlying complexity of rule application, of competing policy considerations, and the importance of context. Two examples from the book will be used here to show how a narrative approach reveals the underlying elements of formal contract doctrine. The two examples are the objective theory of contracts and the roles of the Statute of Frauds, plain meaning rule, and parol evidence rule in contract presented in the case. See Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 STAN. L. REV. 953, 1037 (1990).

39. Section 103(a)(2) of the UCC states that one of the UCC’s underlying purposes is “to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.” U.C.C. § 1-103 (2012). Section 202 of the Restatement (Second) of Contracts, entitled “Rules in Aid of Interpretation,” states that “any course of performance . . . is given great weight in the interpretation of the agreement.” RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981). It also states: “When reasonable, the manifestations of intention of the parties . . . [should be] interpreted as consistent . . . with any relevant course of performance, course of dealing, or usage of trade.” Id. § 202(5).
Contracts in the Real World shows how a narrative structure in telling the story of contract law can be done succinctly. In 212 pages, it weaves old cases and sensational new ones to place contract law in its historical context and, at the same time, make the relevancy of its rules to modern transactions apparent to the student. Cunningham covers the traditional topics of contract law: contract formation (gift promises vs. enforceable contracts, invitations to offer vs. offer, acceptance, mutual assent); illegal contracts (unconscionability, familial relations, gambling, surrogacy agreements); performance (express and implied terms, duty of good faith, unanticipated circumstances, modification, accord and satisfaction); breach and substantial performance; contract interpretation, Statute of Frauds, and parol evidence; restitution and unjust enrichment; third-party beneficiaries and assignment; and tortious interference.

In addition, Cunningham uses many of contract law’s iconic cases, including Alaska Packers’ Ass’n v. Domenico; Allegheny College v. National Chautauqua County Bank; Carlill v. Carbolic Smoke Ball Co.; Hadley v. Baxendale; Hawkins v. McGee; Hotchkiss v. National City Bank of New York; Jacob & Youngs, Inc. v. Kent; Krell v. Henry; Lucy v. Zehmer; Marvin v. Marvin; Masterson v. Sine; and...

40. CUNNINGHAM, supra note 4, at 11–34.
41. Id. at 35–58.
42. Id. at 148–71.
43. Id. at 181–82, 186–93.
44. Id. at 84–108.
45. Id. at 126–47.
46. Id. at 109–25.
47. Id. at 194–202.
48. Id. at 202–05.
49. 117 F. 99 (9th Cir. 1902).
50. 159 N.E. 173 (N.Y. 1927).
51. (1893) 1 Q.B. 256 (C.A.) (Eng.).
53. 146 A. 641 (N.H. 1929).
54. 200 F. 287 (S.D.N.Y. 1911).
55. 129 N.E. 889 (N.Y. 1921).
56. (1903) 2 K.B. 740 (Eng.).
57. 84 S.E.2d 516 (Va. 1954).
59. 436 P.2d 561 (Cal. 1968).
Matter of Baby M;\textsuperscript{60} Mitchell v. Lath;\textsuperscript{61} Newman v. Schiff;\textsuperscript{62} Pacific Gas v. G.W. Thomas Drayage;\textsuperscript{63} Paradine v. Jane;\textsuperscript{64} Parker v. Twentieth Century Fox;\textsuperscript{65} Peevyhouse v. Garland & Co.;\textsuperscript{66} ProCD, Inc. v. Zeidenberg;\textsuperscript{67} Raffles v. Wichelhaus;\textsuperscript{68} Sherwood v. Walker;\textsuperscript{69} Taylor v. Caldwell;\textsuperscript{70} and Wood v. Lucy, Lady Duff-Gordon.\textsuperscript{71} These older canonical cases are woven together with modern cases, many featuring celebrity disputants.\textsuperscript{72} Cunningham’s stories demonstrate the continuity and incredible flexibility that contract law brings to bear on modern contract disputes. He demonstrates that contract law is more than mere doctrine but is a vibrant, living law. The student is made aware of the importance of contract law in daily practice.

In the end, the narrative approach, as a technique of teaching legal reasoning, is captured by the terms exemplarity and typicality or a-typicality. Legal philosopher Maksymilian Del Mar describes exemplarity as follows:

[F]or the purposes of analysing legal reasoning, exemplarity is profitably understood as a complex concept with the following dimensions: first, typicality; second, a-typicality; and third, modelling for the future. These dimensions can also be usefully thought of in temporal terms: typicality is backward-looking, a-typicality is present-regarding and modelling is future-oriented. Any instance of exemplarity delicately balances these dimensions. This is equally so for any legal reasoning process, which must balance respect for the particularity of the present case, with respect for relevant past decisions and respect for the

\textsuperscript{60} 537 A.2d 1227 (N.J. 1988).
\textsuperscript{61} 160 N.E. 646 (N.Y. 1928).
\textsuperscript{62} 778 F.2d 460 (8th Cir. 1985).
\textsuperscript{63} 442 P.2d 641 (Cal. 1968).
\textsuperscript{64} (1647) 82 Eng. Rep. 897 (K.B.); Alyen 26.
\textsuperscript{65} 474 P.2d 689 (Cal. 1970).
\textsuperscript{66} 382 P.2d 109 (Okla. 1962).
\textsuperscript{67} 86 F.3d 1447 (7th Cir. 1996).
\textsuperscript{68} (1864) 159 Eng. Rep. 375 (Exch.); 2 Hurl. & C. 906.
\textsuperscript{69} 33 N.W. 919 (Mich. 1887).
\textsuperscript{70} (1863) 122 Eng. Rep. 309 (K.B.); 3 B. & S. 826.
\textsuperscript{71} 118 N.E. 214 (N.Y. 1917).
\textsuperscript{72} See, e.g., \textit{In re} Marriage of McCourt, No. BD514309, 2010 WL 5092780 (Cal. Super. Ct. Dec. 7, 2010). In this case, a husband and wife disputed ownership of the Los Angeles Dodgers, where there were two sets of original post-nuptial agreements—one set giving the Dodgers to the husband, and the other set splitting ownership of the Dodgers between the husband and wife. \textit{id.}
Del Mar asserts that the best method for demonstrating the continuity of law, at least in its idealized version, is through a narrative accounting. *Contracts in the Real World* represents a general approach to teaching law under Del Mar’s exemplarity-narrativity analysis. First, common-law reasoning is “full of exemplarity and narrativity,”74 in which cases are tied to the past (narrativity) and also distinguished from prior cases (exemplarity). Second, such reasoning “combine[s] narrativity with exemplarity” and by doing so creates “a temporally-organised matrix of happenings,”75 reaching into the past, dealing with the present, and looking to the future, “that resonates emotionally with the audience.”76

Narrative helps the student probe deeper into the indeterminacy of law:

> [T]he concept of exemplarity is bound to experience some dialectical vertigo: thinking of the typicality of an example, one cannot but help to think of its a-typicality (for why was that sample chosen, and not another), and in thinking of its a-typicality, one cannot but help to think of its normativity (for was it not chosen not only because it is unique, but also because it is unique in some positive way?).77

A selection of a case for inclusion in casebook, whether universally accepted as being canonical (e.g., *Hadley v. Baxendale*,78 *Hawkins v. McGee*,79 and *Raffles v. Wichelhaus*80) or merely as one of many cases that could be selected, is meant to exemplify or illustrate a rule or principle of law. At the same time, a case that is treated as an exemplar is also unique or a-typical because in some way it stands out against the rest. The very nature of choice also implicates a normative dimension—the case is meant to point the student in the right direction, to provide guidance as to how future cases should be decided.81

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 2.
79. 146 A. 641 (N.H. 1929).
81. Cunningham’s discussion of a famous Cardozo decision shows the competing notions of typicality and a-typicality. The case involved a “typical” construction contract dispute in which an owner-buyer withholds final payment due to a defect in construction. The doctrinal answer was
The exemplarity of a given case—its typicality and a-typicality—allows the instructor to build a narrative structure tying the case to the earlier cases. In any new case, the professor, lawyer, or judge seeks to tie their arguments and opinions to an ongoing legal narrative that is at the center of the evolution of common law rules. This is the essence of common law reasoning. The typicality and a-typicality of cases allows attorneys on opposing sides to cite the same case law and pose diametrically opposed arguments: one emphasizes the case’s typicality (mandatory precedent), while the other stresses its a-typicality (distinguishing).

The narrative approach also allows the particularization of law’s generality. Broad principles, vague standards, as well as fixed and open-ended rules, can be shown at work in the particular facts of a case. Even more, in telling a story of the use of the principle, standard or rule in a series of cases, the characteristics of choice, nuance, and creativity are exposed in the law. The dialectical relationship between generality and concreteness can be shown in telling a story beginning with the general rule—seeing its applications to different fact scenarios, seeing the tension of general principle or rule and novel facts, the crafting of an application, and the creation of exceptions. It demonstrates the duality of law to fact and fact to law—the law imposing its will on a case based upon precedent, certainty, and predictability; the case at bar and the particularity of its facts influence how the law should be applied and how it should be changed.

In Contracts in the Real World, Cunningham shows the dialectical relationship between rule and fact, and, more broadly, between law and context. At the same time he demonstrates the ability of the narrative approach to cover complicated areas of law with great brevity of text. In twenty-two short pages he covers the story of the statute of frauds and parol evidence rule, as well as their roles in contract interpretation. Many of the cases used are very recent cases involving celebrities and sensational fact patterns. The cases feature the rap artist Eminem, newsman Dan Rather, a case relating to the production of the Golden clear that since the contractor had not fully performed the final payment was not yet due. Cardozo focused on the a-typicality of the case—use of an unspecified brand of pipe of equal quality and the lack of real damages to the owner-buyer—to fabricate the substantial performance doctrine. Cunningham, supra note 4, at 189 (discussing Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921)).

82. Id. at 126–47.
83. F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010).
Globe Awards,\textsuperscript{85} the McCourts’ divorce battle that determined the fate of the Los Angeles Dodgers,\textsuperscript{86} country music personality Cliff Dumas,\textsuperscript{87} Academy Award-winning actress Jane Fonda,\textsuperscript{88} and the cosmetics icon Elizabeth Arden.\textsuperscript{89}

Cunningham covers much ground in a little space, laying out the classic rules of contract, as well as showing the disunity in the application of the rules to similar fact patterns across different states. We learn that the statute of frauds traces its origin to 1677 and that the rationales for its invention have long passed.\textsuperscript{90} Still, the rule requiring a written instrument to enforce certain contracts persists to the present.\textsuperscript{91} We learn that when a writing, whether required by the statute of frauds or not, is intended to be the final integration of the parties’ agreement, then the parol evidence rule precludes the use of extrinsic evidence to supplement the contract (although the word “contradict” the contract may be a better choice).\textsuperscript{92} The judge applies the plain meaning rule to interpret the contract unless she decides the contract is ambiguous.\textsuperscript{93} If the judge decides the latter, the jury decides the interpretation as a matter of fact with the aid of extrinsic evidence presented by the parties.\textsuperscript{94}

In deciding the existence of an ambiguity, Cunningham gives the modern standard of “whether the language is reasonably susceptible to . . . competing interpretations . . . “\textsuperscript{95} However, the narrative story is a bit incomplete. It would have been wise to advise the student of the practicality of this standard. It provides a great deal of discretion to the court. In the event that a “plain meaning” interpretation would lead to an unjust or ludicrous outcome, courts will be tempted to allow extrinsic evidence to be admitted for the court to determine if there is a reasonable

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\item \textsuperscript{85} CUNNINGHAM, supra note 4, at 132–36 (discussing how Dick Clark Productions contested the termination of its rights to produce the Golden Globe Awards show by claiming that the contract provided for automatic renewals).
\item \textsuperscript{86} In re Marriage of McCourt, No. BD514309, 2010 WL 5092780 (Cal. Super. Ct. Dec. 7, 2010) (addressing claims by a husband and a wife for ownership or shared ownership of the Los Angeles Dodgers due to conflicting language in their postnuptial agreement).
\item \textsuperscript{87} Dumas v. Infinity Broad. Corp., 416 F.3d 671 (7th Cir. 2005).
\item \textsuperscript{88} Rosenthal v. Fonda, 862 F.2d 1398 (9th Cir. 1988).
\item \textsuperscript{89} Crabtree v. Elizabeth Arden Sales Corp., 110 N.E.2d 551 (N.Y. 1953).
\item \textsuperscript{90} CUNNINGHAM, supra note 4, at 142.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id. at 134–35.
\item \textsuperscript{93} Id. at 127–29, 146.
\item \textsuperscript{94} Id. at 127.
\item \textsuperscript{95} Id.
\end{itemize}
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alternative interpretation (opposed to the plain meaning interpretation). If the court recognizes the plausibility of the alternative meaning, then it can declare an ambiguity, switching the determination from one of law to one of fact.

In regard to the Eminem case, Cunningham explains the importance of “linguistic structure and cues” in determining whether the purchase of downloads and ringtones were sales for which the royalty rate was fixed at twenty percent or licenses for which Eminem would receive a royalty rate of fifty percent. Here the appellate court focused on the prefatory language of the license provision that followed the sales provision that stated “[n]otwithstanding the foregoing.” It interpreted that to mean that in cases of doubt the residual category was a license, and thus held that Eminem was entitled to the fifty percent royalty rate. The moral of the story is two-fold. First, in complex contracts legal cues, like “notwithstanding,” are ways of signaling the more important or broader terms. Second, the case shows the importance of “think[ing] through plausible future scenarios” in the drafting of long-term contracts.

In the Rather case, the issue was conflicting terms between an original contract and an amendment to that contract. The original contract had a “pay-or-play” clause that gave the broadcasting company the option of paying Rather, not using his services, and not being required to release him from the contract in order to work for another network. The amendment indicated that if released from his news anchor position the network was required to place him in another specified show (a removal-and-reassignment clause). The court held that since the later clause was preceded by the phrase, “except as otherwise provided in this contract,” the pay-or-play clause controlled. Cunningham implicitly makes the point that this was a case of poor contract drafting. The lawyer, in negotiating the amendment, should have cross-referenced the pay-or-play clause and made sure that the removal-and-reassignment clause was replacing the previous clause.

In the Golden Globe case, the dispute pertained to the renewal of the right to produce the awards show. The production company argued

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96. Id. at 127–29, 146.
97. Id. at 129 (discussing F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010)).
98. Id. at 128.
99. Id. at 129.
100. Id. at 130–32 (discussing Rather v. CBS Corp., 886 N.Y.S.2d 121 (N.Y. App. Div. 2009)).
101. Id. at 132.
102. Id. at 132–36.
that the contract granted them the right to an unlimited number of options to produce the show. The contract, meant to be a final integration, required the court to directly interpret the meaning of the clause and precluded it from using extrinsic evidence by the parol evidence rule. Despite the existence of a commonly used merger clause, the court held that a traditional principle of contract interpretation is that individual terms are to be interpreted in the context of the contract as a whole. The “open-ended” renewal clause was preceded by a clause that granted the producer eight options. The court reasoned that if the second clause granted unlimited options then there would be no reason for the first clause’s stipulating a fixed number of options. The court also noted that the parol evidence rule did not bar the admission of course of performance or post-contract evidence. The facts showed the producer always formally requested a renewal and received the express consent of the owner of the show and thus supported the argument that the options were not automatic or unlimited.\footnote{103}

The McCourt case involved a post-nuptial agreement dividing the couple’s property, but the agreement left unclear who was to be allocated the ownership of the Los Angeles Dodgers.\footnote{104} A number of the original copies of the contract stipulated that the team went to the husband, while other copies equally divided the ownership between the husband and wife. Cunningham describes this case as one of a “scrivener’s error” and references two older cases—the case of the “fraudulent architect”\footnote{105} and the 1941 case of the “erroneous deed.”\footnote{106} In the fraudulent architect case, two contracts were prepared with vastly different contract prices.\footnote{107} However, the case was distinguishable because the divergence was intentionally caused by the architect in order to fraudulently induce the parties to enter the contract. The McCourt case involved a drafting error, but no fraud. In the erroneous deed case, a deed was drafted describing the transfer of an entire parcel of land, while the parties had agreed on a sale of only a portion of the parcel. The court held that the case was one of mutual mistake, and not one simply caused by a scrivener’s error and, therefore, the normal remedy for scrivener’s error—the remedy of reformation—was not applicable.\footnote{108} In the end, the court in the McCourt case held that its case was also distinguishable.
from the scrivener’s error cases, since there was conflicting evidence of what the parties actually intended. Therefore, the contract was held to be unenforceable with resolution to be decided under divorce law.

The notion that law is an exact science was implicitly dismissed in the above cases that demonstrated the practice of distinguishing cases. The Dumas case notes that courts use the reasons behind rules as guides to rule application. It further illustrates the problem of applying a rule when the reasons for the rule have run out. The classic example is the statute of frauds, created in 1677, requiring a written instrument in certain types of contract transactions. The Dumas case dealt with the negotiation of a five-year employment contract via a series of e-mail exchanges. In the end, the court held that the exchange of e-mails did not satisfy the statute of frauds. However, this is a weak case for illustrating the need to use “horse sense” in applying the statute because the court held that no contract was formed due to indefiniteness, meaning that the statute of frauds issue was irrelevant to the decision.

The Jane Fonda and Elizabeth Arden cases illustrate the lack of unity in the area of the statute of frauds. In general, courts have loosened the rigidity of its requirements in order to avoid dismissing meritorious claims. However, what the statute actually requires varies across the states. Most states do not require the agreement to be a single document, and instead most states allow the writing and signature requirements to be met by piecing together numerous documents. However, some states require the documents to cross-reference each other, while other states do not. Cunningham summarizes the material presented in the

109. Id. ("Testimony conflicted about [what] the couple intended . . . .").
110. Id.
111. Id. at 141–42 (citing Dumas v. Infinity Broad. Corp., 416 F.3d 671 (7th Cir. 2005)).
112. Id. at 142 ("[C]ourts often look to a statute’s purpose or history.").
113. Id. ("Judges rely instead on horse sense.").
114. Id. at 142–44 (discussing Rosenthal v. Fonda, 862 F.2d 1398 (9th Cir. 1988)).
115. Id. at 144–45 (discussing Crabtree v. Elizabeth Arden Sales Corp., 110 N.E.2d 551 (N.Y. 1953)).
116. See U.C.C. § 2–201(1) (2012) (providing that the statute of frauds is satisfied by “some writing”); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 784 (5th ed. 2003) (“If there is more than one record and all of the records are signed by the party to be charged and it is clear by their contents that they relate to the same transaction,” then the statute of frauds is satisfied; or if all are not signed then “extrinsic evidence is admissible to help show the connection between the documents and the assent of the party to be charged.”); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-4, 58 (2d ed. 1980) (“Presumably several writings can be pieced together to satisfy the requirement, writings which taken alone would not be sufficient.”).
117. PERILLO, supra note 116, at 784 (noting that in some states, if the signed document is “not
Jane Fonda and Elizabeth Arden cases by tapping into the longstanding debate between those arguing for formal versus contextual methods of interpretation: “[I]t is hard to find a court that inflexibly adheres to . . . pure literalism or pure contextualism. Both strands influence the analysis and resolution of disputes over the meaning of words and the scope of documents.” Thus, the formalism of the rules relating to the statute of frauds are not as formalistically applied as they were in the past due to the shift to a contextual approach to interpretation and application of law.

III. ASCENDANT CONTEXTUALISM: IMBUING LAW WITH MEANING

It is repeatedly stated that we are all realists now. An equally apt statement is that we are all contextualists now! Despite the arguments of neo-formalists, law and legal reasoning is only a part of understanding how the legal process works in fact. Karl Llewellyn noted that in teaching law “it becomes vital in a new way to remember that the sound quest cannot be the simple-via-the-shallow; it must drive on despite all defeat toward the simple-via-the-deep.” Oliver Wendell Holmes, Jr.’s oft-cited prediction theory recognizes that a successful lawyer requires something broader than just thinking like a lawyer or, alternatively stated, that the phrase “thinking like a lawyer” needs to be more broadly understood as something beyond legal reasoning or critical thinking. In Holmes’ words: “The object of our study, then, is prediction, the prediction of the incidence of the public force through
The need to institute a more contextualized approach to teaching law was noted in a 1914 Carnegie Foundation report “that recommended a more holistic and contextualized approach be taken in educating lawyers and preparing them for the practice of law.”\footnote{Id. at 457.} A fuller understanding of context and its importance allows a lawyer a greater chance of predicting what the law and the courts will do. This ability enables the lawyer to better serve her clients.

Contracts in the Real World continuously emphasizes context in teaching a deeper understanding of contract law and its application. A father’s gifting of the family home and a promise to pay off the mortgages encumbering the home in exchange for one dollar was a legal gift (handing over the deed), but the promise to pay off the mortgages was unenforceable because the “context of the event left no doubt the father was giving a gift” and not entering a contract.\footnote{CUNNINGHAM, supra note 4, at 40 (discussing Fischer v. Union Trust, 101 N.W. 852 (Mich. 1904)).}

In a case involving the borrowing of money in order to escape Nazi-occupied Greece, the amount of the loan was in dispute, as well as whether the loan agreement was a forgery. The court held that the issue of forgery was secondary given the “context” of a desperate need to leave Greece and, therefore, mere inadequacy of the consideration did not void the contract.\footnote{Id. at 39 (discussing Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. App. 1949)).}

The above two cases illustrate that “contracting parties inhabit two different worlds, a real one created by them and an artificial one created by the law.”\footnote{Catherine Mitchell, Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal, 29 O.J.L.S. 675, 676 (2009).} Catherine Mitchell takes issue with the “two worlds” view of parties engaging in two separate transactions—the business and the legal transaction. She admits that law may, at times, diverge from real world practice, leaving contract doctrines with a veneer of “artiﬁciality and irrelevance.”\footnote{Id. at 677 (internal quotation marks omitted).} However, Mitchell asserts that even though such divergence may occur, “the connection between contract law is much more complex and nuanced than the ‘two worlds’ idea suggests.”\footnote{Id. at 457.}

In the end, she argues that what is needed is a type of legal reasoning that recognizes “the operation of
formal contracts and relational norms as *integrated* phenomena."\(^{130}\)

While socio-legal scholars differ over the precise implications of relational theory for contract law and legal reasoning, most generally agree that a contextual approach to contracts regulation is preferred over an inflexible doctrinal method. Feinman, for example, states that relational analysis is "contextual with a vengeance," requiring a pragmatic, differentiating approach depending on contract type.\(^{131}\) "[C]ourts should recognize that the documents may serve a variety of purposes depending on contractual context and the quality of the parties’ relationship."\(^{132}\)

The use of relational norms in the interpretation of contracts "requires not [just] the construction of the parties’ agreement, but the reconstruction of it—the reassembly of its constituent parts and the expectations and motivations, both documented and undocumented, that helped create it."\(^{133}\) The use of relational norms in the interpretation process, especially in long-term contracts, can be justified because it is in the use of these norms and the contextual evidence needed to flesh them out that a court can best determine the expectations of the parties in the formation and performance of their contract.

What are the elements of context that influence courts and are important to understand when learning about the law? There is no easy answer to this question because there are many dimensions of context—the context of the dispute (characteristics of the parties and their transactions within a given relationship and industry); the context of the case within a greater societal, cultural, and economic environment; and the context of the case within pre-existing and future case law. Appellate cases provide some of the operative facts of the case, but not a full or complete factual accounting. The appellate opinion may touch upon some of the external societal forces at play in a given dispute, but often ignore many important underlying factors, such as discrimination, bias, and stereotyping.\(^{134}\) A narrative approach to teaching law provides an opportunity to weave in these heretofore forgotten or neglected

\(^{130}\) *Id.* (emphasis in original).


\(^{133}\) *Id.*

contextual elements.

Many of the key facts and influences in a case are not found in excerpted appellate court cases; they are found in the nitty-gritty of trial court materials. This was demonstrated in a 2008 symposium dedicated to better understanding the iconic 1917 case of *Wood v. Lucy, Lady Duff-Gordon*,[135] the seminal case in which Justice Cardozo salvaged exclusive-agency contracts by implying a duty of best efforts on the agent in the procurement of endorsements for its principal.[136] The case included Cardozo’s famous adage for the judicial authority to imply terms into such a contract (and others) where the promise is ‘‘instinct with an obligation,’ imperfectly expressed.’’[137] Deborah Zalesne takes issue with Cardozo’s opening characterization of Lady Duff-Gordon: “The defendant styles herself ‘a creator of fashions.’ Her favor helps a sale.”[138] Zalesne notes that the characterization of Lady Duff-Gordon’s “business” is somewhat frivolous in nature.[139] In fact, she was a savvy businessperson in a man’s world who helped shape the fashion world through the mass-marketing of designer clothing.[140] The case could be used to show the nature of stereotyping and gender bias underlying the facts of the case or as they existed at the time of the case.

The duty of best efforts is best rationalized as being dictated by the duty of good faith. Yet Nicholas Weiskopf notes that in researching the New York case law he found the courts rejecting good faith as a ground for the implication of terms.[141] Thus, the case was not the watershed event that it could have been due to its narrow interpretation as simply implying a given duty in a unique form of contract—the exclusive-agency contract.

Miriam Cherry’s article illustrates how the *Duff-Gordon* case can be

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135. 118 N.E. 214 (N.Y. 1917).


138. Id.


140. Id.

141. Nicholas R. Weiskopf, *Wood v. Lucy: The Overlap Between Interpretation and Gap-Filling to Achieve Minimum Decencies*, 28 PACE L. REV. 219, 220 (2008) (discussing how the New York Appellate Division reviewed the case law and in a 5–0 vote held there was not any good faith duty in the law that would allow the court to imply a duty into a contract, such as the duty to use best efforts).
used to place a case within its overall social context. In examining social class, she “open[s] [an] inquiry into the distributional nature of contract law” and encourages “students to think about issues of economic stratification more critically.” The richness of such cases or storylines is demonstrated by Celia Taylor’s article, *Teaching Ethics in Context: Wood v. Lady, Lucy Duff-Gordon in the First Year Curriculum*, which shows how the *Duff-Gordon* case can be used to teach professional ethics. Finally, a further example of the narrative-contextual use of an iconic case to teach a deeper, more nuanced, and more realistic view of law and its application is Zalesne’s demonstration of how such cases are “ideal vehicles for explicit teaching of analytical skills.” He argues the importance of the broader use of such cases because of the current “disconnect” between doctrinal instruction and analytical skill training.

In prior scholarship, I have noted that Cardozo’s decision in *Duff-Gordon*, like most of his opinions, demonstrated his contextual mode of interpretation. His ability to use context to look outside the immediate doctrinal formalities is what enabled him to profoundly change and modernize American contract and tort law. I argued that the implied duty of good faith already existed at the time of the *Duff-Gordon* case and that the case’s importance was due to its use of a contextual means of interpretation to construct the implied duty of best efforts. The importance of context, and not just reading formalized law, to the actual practice of law needs to be more fully emphasized in casebooks. The narrative approach is one means of capturing such all-important context.

*Duff-Gordon*’s extension to modern developments in employment law provides an example of the importance of context in creating a story of law; it also shows the interconnectedness and discontinuities of law.

142. *See* Cherry, *supra* note 134.
145. Fishman, *supra* note 143, at 175.
146. *Id.*
148. *Id.* at 318–24 (discussing the unoriginality of Cardozo’s decision in *Duff-Gordon*). Cardozo’s rejection of the four-corners analysis of formalism in favor of the use of context evidence is borne out by his assertion that “[w]e are not to suppose that one party was to be placed at the mercy of the other.” *See* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917).
Robert Bird examines the application of “instinct with an obligation” as a rationale for extending the duty of good faith into the employment relationship.\textsuperscript{149} Along the same lines, Emily Gold Waldman criticizes the New York courts for failing to extend the implied duty of good faith into the employment context.\textsuperscript{150} In the end, the symposium on Duff-Gordon shows that “[w]e should teach . . . fewer cases and do more with the cases we teach and use other methods for conveying doctrine.”\textsuperscript{151} Or, as another contract law professor states: “Depth is more important than breadth . . . . [L]earning how to extract from an opinion a coherent story of what happened in the case and understanding how the court applied legal doctrine to the facts . . . are far more important than obsessing about doctrine as such.”\textsuperscript{152}

A type of legal scholarship that emphasizes the role of depth over breadth is legal archeology. Legal archeology attempts to fill in the gaps in the official appellate court opinion. It places a case (usually an older, iconic one) in the context of the times. It explores evidence that was unreported in the formal decisions and places the case in the context of similarly situated cases. A fine example of this type of scholarship is Debora Threedy’s \textit{Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts}.\textsuperscript{153} Threedy weaves a narrative of the role of gender stereotypes in one of contract law’s most iconic series of cases—the Arthur Murray dance studio cases.\textsuperscript{154} My first-year contract casebooks include an Arthur Murray case used to introduce the doctrine of undue influence. I find it interesting that some thirty-four years later the case remains vivid in my memory. In thinking about the present Article, the answer for this retention now seems clear—the case simply told a good story. But, as Threedy shows, it did not tell the correct or, at the least, the complete story.\textsuperscript{155} A further discussion of Threedy’s

\textsuperscript{151} Wash. Law Review Survey Results, supra note 15, at 11.
\textsuperscript{152} Id. at 16.
\textsuperscript{155} The cases found in the casebooks depict lonely, elderly women as victims of overreaching by male dance instructors leading them to be unduly influenced in purchasing a large number of dance lessons. See RANDY E. BARNETT, \textit{CONTRACTS: CASES AND DOCTRINE} 991 (4th ed. 2008); CHARLES L. KNAPP ET AL., \textit{PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS} 557 (6th ed.}
Threedy researched a significant number of old Arthur Murray dance studio cases and came upon a stunning realization that a number of the cases involved not only elderly women but also elderly men. Based upon this realization, she analyzed the different characterizations of the plaintiffs by the courts based on gender and, in some cases, the reaching of different outcomes in cases of almost identical fact patterns. Unknown to law students, and subsequent practitioners, gender played a key role in the application of contract doctrine in these cases. The widowed old women were hoodwinked in buying an exorbitant number of dance lessons. The women were victims of overreaching as the studio used attractive male dancers to prey on the ladies’ loneliness. Subsequently, the women sued for a refund under the doctrines of undue influence and misrepresentation. The courts focus on their vulnerability and the hope to become proficient in dancing to fill a void in their lives.

In contrast, the old men were not hoodwinked because they were not vulnerable and were getting exactly what they paid for—the touch of a beautiful woman, or, putting it more vividly, a type of sexual encounter. Of course, the elderly women, all grandmothers, could not possibly have had such thoughts!

Blake Morant, in his work on racial bias in the law, uses contextualism as both a descriptive and a normative device. The

2007). Threedy notes, “Not all of the plaintiffs in the Arthur Murray cases are women, however. Some of the plaintiffs are men.” Threedy, supra note 153, at 759–60.

156. Threedy sketches out the different gender narratives in which the elderly women are “vulnerable” to overreaching and the elderly men are astute purchasers of companionship. Threedy, supra note 153, at 761–67.

157. Threedy provides a composite story taken from two of the cases:

Lonely, vulnerable, typically elderly widow/spinster attends a dance class or demonstration at an Arthur Murray Studio. There, an attentive, presumably attractive, young male dance instructor “sweeps her off her feet” and in no time at all, she has signed up for hundreds, if not thousands, of hours of dance instruction, costing her thousands, if not tens of thousands, of dollars.

Id. at 761 (discussing Vokes, 212 So. 2d at 907–08; Syester v. Banta, 133 N.W.2d 666, 669–70 (Iowa 1965)).

158. Threedy states that the Arthur Murray Dance Studies featured “touch dancing,” which she describes as “rhythmic movements [that] all invoke—let’s be frank here—a sexualized experience . . . .” Id. at 767. She also asserts that “men as a class have greater access to economic resources and thus can more easily be the consumer of companionship or sex.” Id. at 768.

influences of bias in the law and the application of law are a descriptive reality that can be fleshed out through an expanded contextual analysis. However, contextualism as a method to uncover illicit factors (such as racial or gender bias) in the law is also a device for legal reform to neutralize those factors (such as remedying biases when interpreting a contract or recognizing acts of bad faith). Once uncovered, law can overcome racial, gender, and other biases by formally recognizing them as part of the contextual factors a court should weigh in rendering its decision. James Elkins states:

Some stories imagine law as the bulwark of tradition and, miraculous, the means by which we can free ourselves from the shackles of history. Other stories, particularly those of women, people of color, and those for whom the American Dream has been a cynical lie, are also implicated in stories of law.

These parallel stories are often not sufficiently told in casebooks.

Morant asserts that law can be made more objective through the admission of more contextual evidence: “[T]he operation of contractual rules within the reality of human conduct belie the facade of objectivity.” He then poses a positive theory of contextualism to help make contract law true to its mission of objectivity. First, “judicial decisions should be evaluated contextually, as well as literally, in order to gain complete comprehension of its reasoning.” Second, “[w]hile [race, gender, and disparity] are not necessarily important in all contexts, they should be explored whenever they conspicuously or tacitly impact either the bargainers’ actions prior to formation, or the decisionmaker’s adjudication of the formed bargain.” The introduction of these factors as part of judicial analysis results in an initial deconstruction of contract law by “shatter[ing] contract law’s illusion of objectivity.”

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160. See, e.g., Morant, Procedural Unconscionability, supra note 159 (contending that in order to understand the disproportionality of power in bargains, courts must more fully scrutinize the context of the bargain).


162. Morant, Race and Disparity, supra note 159, at 891.

163. Id. at 893.

164. Id. at 938.

165. Morant, The Teachings of Dr. Martin Luther King, Jr., supra note 159, at 71–72 (“The principal term here is realism—where theoretical constructs of bargaining relationships are deconstructed to allow for more proactive measures to counter pejorative conduct.”).
courts and substantive law openly acknowledge the influence of factors, such as bias and discrimination in contracts, the law is able to work towards greater objectivity and impartiality. In Morant’s embrace of contextualism, his brand of deconstruction is not to be equated with nihilistic destruction, but as a means to mold the current structure of contract rules to be more truthful and realistic, by broadening the scope of acceptable contextual evidence. This broadened narrative recognizes the impact of bargaining disparities (power) and biases (discrimination, stereotyping) to the application of legal rules.

In a previous work, I argued for the benefits of using works from other disciplines to illustrate the rationales for law, the greater context in which the legal order operates, and the relationship between law and society. Education theorists see the use of analytical frameworks from other disciplines as a method of teaching students to view a legal problem or issue from “multiple fram[es].” The law student, through the use of narrative, is asked to answer questions not just from a legal viewpoint, but from an economic or historical perspective as well. This allows students to view the law from internal and external perspectives.

The internal view only exposes the student to the conceptual nature of law. The external view allows the student to critically analyze the law. The internal view trains the student to change their arguments as evidence dictates; to remain focused on the point or issue in question; and to deal with complex legal problems in a rational and efficient manner. The external view trains the student to keep an open mind; take into account the entire context of the case; look for options not internal to the law; and be sensitive to the other party’s position.

The narrative approach and other interdisciplinary approaches to understanding law and legal practice can be used to develop students’ emotional engagement and empathy—these skills are needed to better

166. Id. at 70.
167. Id. (“It also commensurately prompts discussion of methods to cure the transitional ills resulting from those problems.”).
168. Morant, Law, Literature, and Contract, supra note 159, at 4 (“The goal is not to demolish contract rules, but to enhance their efficacy and remedial potential.”).
171. Id. at 160–61 (citing Robert H. Ennis, Critical Thinking and Subject Specificity: Clarification and Needed Research, 18 EDUC. RESEARCHER 4, 4–10 (1989)).
relate to clients and to understand the position of opposing parties. Judge Posner has emphasized the importance of what he terms “good judgment” when deciding cases that lack clear-cut solutions—it is “an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense.”  

The narrative approach provides those “other” details of the story not formally reported, which allows the student to better observe and sympathize with the human and societal dimensions of a case or series of cases. Judge John T. Noonan’s Persons and Masks of the Law warns of the tendency of lawyers and judges to allow abstract rules of law to obscure the human beings to whom those rules are applied. Noonan asserts that beginning with Holmes the law has been personified as a sort of living being: “By a form of misplaced concreteness, [Holmes] attributed to an abstraction the action of living men and women.” When that happens, the rules become masks that hide and render irrelevant the humanity of those affected by the law.

The mere indoctrination of students in the substance of the law and the art of legal reasoning fails to develop these important skill sets.

IV. STORIES IN A GLOBAL CONTEXT

Legal scholars and practitioners have increasingly recognized the importance of placing American law and legal education in the context of comparative and international legal orders. Judge Merritt in the case of In re Desilets asserted that multijurisdictional practice was a

174. Id. at 4.
175. Noonan explains the detachment of rules from the humans for which they were created or applied as follows:

Little or no attention is given to the persons in whose minds and in whose interaction the rules have lived—to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it.

Id. at 6.

177. 291 F.3d 925 (6th Cir. 2002).
“quotidian” part of modern legal practice. R. Michael Cassidy argues that “[l]awyers need a more panoramic view of the law to argue from analogy for an extension or novel application of domestic law.” For example, comparative law analysis demonstrates to the student that American legal rules are matters of choice among alternative rules. These alternative legal choices taken by other legal systems provide a source for advancing innovative arguments on behalf of clients and gaining insights on how best to reform existing law.

Most recently, a Symposium entitled Building Global Professionalism: Emerging Trends in International and Transnational Legal Education included a number of articles providing case examples of how knowledge of international and comparative law directly impacts legal practice. A 2006 issue of the Journal of Legal Education provided a number of thought-provoking articles making the case for incorporating transnational and comparative law in first-year civil procedure, constitutional, criminal, and tort law.

From a practice point of view, international, comparative, and transnational perspectives are needed for lawyers to properly advise clients working in a global marketplace. Students graduating with such knowledge and perspectives will become increasingly marketable. Law schools recognize this fact and increasingly offer upper-level courses in international and comparative law. A few schools require such a course as part of the first-year curriculum. Although these

178. Id. at 925.
179. Cassidy, supra note 9, at 1522.
184. See generally Anthony A. Tarr, Legal Education in a Global Context, 36 U. TOL. L. REV. 199 (2004) (arguing that law schools should develop strong international and comparative law programs). Some law schools have taken the step of changing their first-year curricula to include and international or comparative law course. In 2006, Harvard Law School announced that first-year law students would be required to take “one of three specially crafted courses introducing global legal systems”: Public International Law, International Economic Law, or Comparative Law.
courses are beneficial, weaving foreign narratives in core courses is needed to more effectively develop international and comparative law perspectives in the student skill set. The core casebooks (contract, tort, civil procedure, and so forth) need to provide international, comparative, and transnational law and practice materials. Teachers need to embrace these changes and proactively use them in teaching their courses.\footnote{Cassidy, supra note 9, at 1523 (“Many U.S. casebooks in core subject areas are beginning to incorporate comparative perspectives.”)}

The problem is that casebooks are already too long to include comparative law materials. The answer may be the use of a narrative approach that uses fewer cases, but provides additional contextual materials to examine the cases in depth and allow for teaching law much like a storyteller spins a tale. However, just providing these materials and leaving it for the teacher to construct the stories is not very efficient. The more radical and beneficial casebook would provide the stories that weave together different cases from different eras to show the development of legal rules, as well as the context and reasons behind those developments.

CONCLUSION

This is a time of great reflection involving all facets of legal education. This Symposium focused on one of those facets—the traditional casebook and case method of law instruction. The stack of appellate cases assembled by Christopher Columbus Langdell in 1871\footnote{Christoph C. Langdell, A Selection of Cases on the Law of Contracts (1871).} rightly gave way to a more “realist” casebook beginning in earnest in the 1930s. The “related materials” vary among major casebooks, but the template has remained relatively unchanged. It is not a novel suggestion that it may be time for a new type of casebook. The next generation of casebooks should, at least, partially apply a more narrative style as exhibited by Lawrence Cunningham’s highly original book, Contracts in the Real World: Stories of Popular Contracts and Why They Matter.\footnote{Cunningham, supra note 4.} The case-centered focus of legal education will remain the coin of the realm, but its presentation in a narrative format, connecting a series of
cases back in time and setting those cases in their appropriate contexts, should be explored.

It may be time to scrap the label of “casebook” and return to what other disciplines simply refer to as a textbook or course pack. A legal “textbook” captures the essence of the task at hand to blend cases with practice-focused materials and comparative and international materials. The incorporation of the narrative approach into a new generation of law school “textbooks” will serve a number of important substantive goals. First, the acquisition and retention of substantive knowledge will be enhanced. The Arthur Murray case provides an example of the learning power of the narrative approach. The narrative approach, if properly used, can illustrate the variance between formal rules of law and law in action. Alternatively stated, it can show how case facts and the search for a seemingly just outcome leads to a divergence of formal from operative rules. Finally, the narrative approach shows how the spirit of law may be lost in the interest of doctrinal purity.

A proper narrative approach illustrates the role of context in understanding judicial decisions. This context includes the acknowledged context found in the judicial opinion and the “unknown” contextual factors that likely influenced the decision, but were left outside the recognized legal canon. The power of narrative can expand the bracketed context of the formal text to include the range of factors and influences not reconcilable to the view of law as objective and impartial. It is in this deeper understanding of the realities of case decisions that practitioners of law can determine the factors, explicit and implicit (proper and improper), which are most predictive of a judicial outcome. It is in that deeper knowledge that a lawyer can best frame an argument on behalf of a client.

A good story is easier to recall than a mere memorization of formal rules, exceptions, and legal nuance. The history of the effectiveness of oral histories, before the advent of written memorialization, attests to the power of the narrative approach. Stories may prove to be a more efficient means of knowledge acquisition, thus allowing for more time to introduce other core competency features into the curriculum, such as problem solving, drafting, counseling and negotiation exercises in the first-year courses. In the end, a re-tooling of the traditional law school casebook and the introduction of additional teaching methodologies in

188. A Washington Law Review survey shows that among textbooks and other materials, the use of “Course Packs” rated as the third most popular form of course materials used, beyond two more popular casebooks. Wash. Law Review Survey Results, supra note 15, at 3.

189. See supra notes 153–158 and accompanying text.
the first-year curriculum will not cure the ills of American legal education, but they should be explored as part of the overall revamping of how and what we teach in our law schools.
CONTRACT AS PATTERN LANGUAGE

Erik F. Gerding*

INTRODUCTION

Scholars and practitioners routinely talk about the “architecture” of individual contracts.1 Many observers have also noted the broad-brush similarity between the drafting of legal contracts and computer programming or coding.2 It is strange, then, that contract law scholarship has overlooked part of the landmark literature linking design in architecture and computer code.3 In 1977, Christopher Alexander, a professor of architecture at the University of California, Berkeley, drew

* Associate Professor, University of Colorado Law School. I would like to thank Fred Bloom, Anna Gelpern, Paul Ohm, and Harry Surden for comments on this article. This Article was made possible by a summer research grant from the University of Colorado Law School. The author has no financial interests that are the subject of this work or that influenced this work.

1. For example, Larry Cunningham, who is being honored with this symposium, has written about the architecture of contracts in the context of using XML (extensible markup language) in corporate contracting. Lawrence A. Cunningham, Language, Deals, and Standards: The Future of XML Contracts, 84 WASH. U. L. REV. 313, 324 (2006). For a small sample of other recent scholarship discussing the “architecture” of contracts, see Anna Gelpern, Commentary, 51 ARIZ. L. REV. 57, 64–65 (2009) (discussing the “architecture” of the standardized form contracts for derivatives); Scott J. Burnham, How to Read a Contract, 45 ARIZ. L. REV. 133, 142–45 (2003) (arguing for reading contracts by examining their architectural structure); Robert P. Bartlett, III, Commentary, 51 ARIZ. L. REV. 47, 50 (2009) (describing “how the architecture of contracts across a variety of domains” seeks to curb parties taking advantage of one another after the contract has been executed).

2. For an academic article analogizing contract drafting to computer coding, see Henry E. Smith, Modularity in Contracts: Boilerplate and Information Flow, 104 MICH. L. REV. 1175, 1190 (2006). The author of one book on contract drafting uses the computer metaphor to make a strong point on writing style. He writes: “[c]ontract prose is limited and highly stylized—it’s analogous to computer code. It serves no purpose other than to regulate the conduct of the contract parties, so any sort of writerly ‘voice’ would be out of place.” KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING, xxvii (2d ed. 2008). For an extreme example that moves beyond analogy and describes contract and other legal rules as a form of computer code, see Alexey V. Lisachenko, Law as a Programming Language, 37 REV. CENT. & E. EUR. L. 115 (2012).

upon his background in computer science to co-author *A Pattern Language*. This practical book—together with Alexander’s more theoretical companion volume, *The Timeless Way of Building*, and his other work—provided an influential blueprint for architects, urban planners, and the reading public who sought a more organic, humanistic, and democratic way of designing buildings and cities amidst the failures of modern urban renewal and widespread dissatisfaction with the course of architectural modernism. This article examines how Alexander’s pattern language framework explains how attorneys draft contracts, including in response to the types of legal design problems illustrated in Larry Cunningham’s book, *Contracts in the Real World*. Moreover, the pattern language rubric explains how individual legal agreements interlock to create complex transactions, and how transactions interconnect to create markets. Furthermore, this pattern language framework helps account for recent evidence, including from the global financial crisis, of failures in modern contract design, even in cases where sophisticated financial firms and their lawyers were the architects.

8. See infra Part II.A.
9. LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* (2012). This book, which prompted this symposium, serves as an accessible and excellent sample of some of the recurrent design problems for all contracts. Cunningham overlays those problems created by client objectives with those imposed by the common law doctrines of contracts. One could read Cunningham’s book not only as a supplement to a first year law school course in contracts, but also as a catalogue of the challenges, design flaws, and design failures that transactional attorneys routinely face. See infra Part II.B.
10. See infra Part II.D.
11. See infra Part III.
Alexander and his collaborators described a series of “patterns” or design solutions for buildings that meet specific environmental needs of individuals. A pattern represents an encapsulated abstract or conceptual solution to a recurring design problem. Patterns thus free architects and designers from having to reinvent the wheel; they can use the solutions that evolved over time as designers in the past grappled with, and crafted answers to, similar problems. In Alexander’s work, a pattern describes a particular solution that can be used to plan growth in a particular region, city, or neighborhood, to design homes or other buildings, or to create rooms or spaces within a building. Interlocking individual patterns create larger design patterns, which, in turn, connect to form still larger patterns. Thus, patterns for rooms and structural elements combine to create design patterns for buildings. Arranged together, patterns for buildings form patterns for neighborhoods. Patterns for neighborhoods join to create patterns for cities and regions. Through scaling and rules that define when patterns fit together, Alexander’s system created a larger “language” for architectural design.

12. Doug Lea, Christopher Alexander: An Introduction for Object-Oriented Designers, SOFTWARE ENGINEERING NOTES (ACM SIGSOFT, New York, N.Y.), Jan. 1994 at 39. Lea describes patterns as encapsulated in that they are, “[i]ndependent, specific, and precisely formulated enough to make clear when they apply and whether they capture real problems and issues, and to ensure that each step of synthesis results in the construction of a complete, recognizable entity, where each part makes sense as an in-the-small whole.” Id. at 42. Lea also notes that “abstraction” is a critical quality of an Alexandrian pattern. Id.

13. ALEXANDER, supra note 5, at 186–91. Doug Lea describes two related qualities to Alexander’s patterns:
   - Openness. Patterns may be extended down to arbitrarily fine levels of detail. Like fractals, patterns have no top or bottom . . . . [and] Composibility. Patterns are hierarchically related. Coarse grained patterns are layered on top of, relate, and constrain fine grained ones . . . . Most patterns are both upwardly and downwardly composable, minimizing interaction with other patterns, making clear when two related patterns must share a third, and admitting maximal variation in sub-patterns.

Lea, supra note 12, at 42.

14. See ALEXANDER, supra note 5, at 187–91; see also infra Part I.A. The language metaphor is not a loose one. In fact, Alexander developed his theory of an architectural pattern language by borrowing heavily from Noam Chomsky’s research on linguistics. See TOM TURNER, CITY AS LANDSCAPE: A POST POST-MODERN VIEW OF DESIGN AND PLANNING 30 (1996). Alexander sought to create a "generative language" for design, a system in which particular patterns would serve as a vocabulary and which had rules or syntax establishing when certain patterns fit together to make intelligible “sentences.” ALEXANDER, supra note 5, at 183–87; Janet Finlay et al., Pattern Languages in Participatory Design, in PEOPLE AND COMPUTERS XVI - MEMORABLE YET INVISIBLE: PROCEEDINGS OF HCI 2002 160, 164 n.1 (Xristine Faulkner et al. eds., 2002) (linking Alexander’s pattern language to Noam Chomsky’s idea of “generative grammar” in linguistics); see also infra Part I.B.
larger language to meet their own design needs. 15 The concepts in A Pattern Language shaped a generation of new computer languages and approaches to coding, particularly object-oriented programming. 16

Alexander’s work also provides a unique lens to look at how transactional attorneys draft contracts. However, the pattern language framework does much more than explain the function of contractual boilerplate or the process of assembling particular contracts. It also describes how individual contract patterns form complex transactional patterns, and how, in turn, complex transactional patterns form complex financial markets. For example, transactional attorneys arrange individual patterns for provisions in legal agreements—e.g., the basic provision establishing the loan of money in exchange for interest and principal repayments, representations and warranties, covenants, provisions defining default, and remedies—to form legal agreements, such as mortgages or bond indentures. Patterns for separate contracts connect to create transactions. For example, a mortgage, note, deed of sale, and other agreements operationalize the purchase of real estate. Patterns for simple transactions fit together to create more complex transactions and even markets. For instance, mortgage documents, pooling and servicing agreements, trust documents, and indentures create mortgage-backed securities. 17 Patterns of complex transactions and markets, in turn, create more complex financial systems. To extend the examples above, mortgage-backed securities form part of a web of connected financial instruments and markets, called the “shadow banking system,” that connect consumer and commercial borrowers to investors in capital markets. 18

By contract “patterns,” I mean an encapsulated solution within a legal agreement (or set of agreements) to a specific legal problem. This

15. See infra notes 76–77 and accompanying text.
16. See infra notes 76–77 and accompanying text.
problem might consist of a need to match the particular objectives of both counterparties in a discrete part of a bargain. The solution might also address a certain feature of the legal environment, such as one of the contract doctrines examined so colorfully in Cunningham’s book. Lawyers can repeat and adapt a contract pattern each time a version of that problem, whether miniaturized or supersized, appears. Each contract pattern interlocks, nests, and works together with other contract patterns to solve more complex problems and create more intricate and elaborate bargains.

Moreover, interlocking patterns enable scalability. That is, arrangements of individual patterns form larger patterns, which combine with other patterns to form still larger patterns. Just as Alexander’s patterns for rooms create patterns for buildings, which create patterns for neighborhoods and then cities, so then patterns of individual contract provisions form legal agreement patterns, which interlock to create patterns for transactions, which, in turn, mesh to create patterns for markets. Larger patterns solve larger problems and can meet more complex demands of a greater range of counterparties. This scalability differentiates contract design from contract boilerplate. It also highlights how contract patterns are different than other examples of preformulated language in the law, such as writs or pleadings in procedural law.

This essay examines how patterns enable the transformation of contractual provisions into contracts, contracts into transactions, and transactions into markets. Although contract design patterns are broader than contract boilerplate (as described in Part II.C. below), some of the extensive legal scholarship on boilerplate helps explain how contract patterns generate agreements, transactions, and markets. The work of Henry Smith on the modularity of contract boilerplate proves particularly useful in this regard. Contract patterns perform several functions. Contract patterns break complex problems and bargains into components. Attorneys can then repeatedly apply these particular


20. Smith, supra note 2.

21. Id. at 1176, 1179–80, 1196, 1197.
solutions to similar problems. Patterns also serve as heuristics for attorneys, i.e., devices to estimate quickly whether particular language solves certain bargaining problems, meets client objectives, and will be interpreted by courts in an anticipated manner.22

Contract patterns, like Smith’s modules, allow teams of lawyers to work on different aspects of a contract or transaction simultaneously. Multiple persons can work on the same agreement, Smith explains, because contract modularity restricts the information transfer of certain “boilerplate” provisions. This means that if one lawyer modifies one module of a contract, other modules can remain relatively unaffected.23

Patterns also enable scalability or the transformation of contracts into transactions and transactions into markets.24 Smith’s work on modularity and restricting information transfer comes into play here too. To boil part of his theory down: standardized contract language means that third parties need to incur less cost in valuing either certain contracts or parties to those contracts.25 We can expand Smith’s logic to explain how contract patterns enable standardized contracts to be traded on organized financial markets. In extreme examples, contract patterns allow certain debt contracts to become what economist Gary Gorton calls “informationally insensitive” debt.26 Certain financial instruments become informationally insensitive when they are (at least in theory) immune to adverse selection by traders with inside information. Investors can value informationally insensitive contracts at low cost. The ease of valuation, in turn, makes these tradeable contracts both highly liquid and endows them with many of the economic features of money.27

The pattern language framework explains not only how sophisticated contracts function, but also how they fail. The pattern language framework provides a lens through which we can examine recent contracts law scholarship on the failures of sophisticated contract design, including “sticky” contract provisions in sovereign bond agreements,28

22. See Part II.E generally. A view of pattern as heuristic has parallels to Kahan and Klausner’s idea that boilerplate provisions in corporate law agreements enable and result from learning effects. See Kahan & Klausner, supra note 19, at 729–33.
23. See Smith, supra note 2, at 1207; see also infra notes 132–133 and accompanying text.
24. See infra Part II.D.
25. See Smith, supra note 2, at 1210.
27. Id. at 9.
“Frankenstein” contracts in mortgage-backed securitizations, and the “flash crash” and other episodes of massive losses generated by automated, algorithmic trading on financial exchanges. Just as modularity and contract design patterns foster the development of new financial instruments and markets, so too can their features contribute to the unraveling of these markets. For example, by restricting the information content of contracts, patterns and modularity not only midwifed the creation of liquid markets for those contracts, they also played a role in the catastrophic freezing of these markets. This essay points to the “shadow bank runs” triggered when modularized and standardized asset-backed securities became almost impossible to value during the financial crisis. So failures of contract design can have broader social consequences far beyond the private relationship of the two parties to a bargain. More broadly, the failure of contracts can have systemic effects for entire markets when a particular contract enjoys widespread use or when it is so connected to other critical contracts that cascading failures occur.

Common threads run through these separate contract failures. These sovereign bond contracts); id. at 33–44 (surveying previous literature explaining contract stickiness). Professors Kahan and Klausner provided an early economic analysis of why contract boilerplate provisions might become “sticky” even if they did not use that term in their work. Kahan & Klausner, supra note 19, at 727–36 (analyzing how “switching costs” associated with boilerplate terms and other dynamics may lead to persistence of suboptimal boilerplate). Continued use of these “sticky” terms might serve the expressive, symbolic, or political needs of clients. See Anna Gelpern & Mitu Gulati, Public Symbol in Private Contract: A Case Study, 84 WASH. U. L. REV. 1627 (2006). However, these obsolete terms may also fool those clients into a false sense of security that contracts perform their stated functions, match the parties’ intent, or protect clients’ interests as advertised. See generally Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract, 73 CALIF. L. REV. 261, 288–89 (1985) (analyzing consequences when boilerplate language becomes rote and its meaning unintelligible).

29. The financial crisis revealed a more destructive aspect of increasingly rigidified, modularized, and interconnected financial contracting. Anna Gelpern and Adam Levitin describe how the rigidity of certain contracts involved in a securitization prevented mortgage servicers from renegotiating mortgages with financially strapped borrowers. Anna Gelpern & Adam J. Levitin, Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities, 82 S. CALIF. L. REV. 1075, 1124–27 (2009). This harmed not only the investors in securities based on those mortgages, but also had larger systemic consequences of deepening the “subprime” crisis. Id.


31. See infra Part III.C.

32. See Anna Gelpern, Financial Crisis Containment, 41 CONN. L. REV. 1051, 1056 (2009) (discussing abrogation of financial contracts as historic mechanism to containing financial crises).
failures proliferated as contracting became increasingly rigidified, routinized, modularized, interconnected, and even automated. These same dynamics mean that Alexander’s ideas in architecture have more purchase for contract design, given that he wrestled with analogous changes in contemporary architecture.

At first blush, Alexander’s description of architectural patterns may appear to have little application to contracts. Indeed, contracts are not buildings, not least because contracts represent social rather than physical constructs (and for all the other reasons explained in Part II.G. below). However, Alexander’s pattern language framework also illuminates how modern contract design has failed spectacularly. Alexander’s pattern language framework recasts the problems created when interconnected contracts no longer work together, when inflexible contracts do not or cannot adapt to legal or economic shocks, and when automated contracts remove human judgment and generate both agreements and errors at light speed. In addition, Alexander’s rubric has much to say for the consumer end of the contracting spectrum. His program speaks to problems of consent, equity, and error as contracts of

33. For example, Anna Gelpern and Adam Levitin analyze how the rigidities built into certain contracts that govern a securitization contributed to the severity of the subprime crisis. See Gelpern & Levitin, supra note 29; see also infra Part III.B.

34. Cf. Smith, supra note 2, at 1176 (arguing boilerplate provisions create a modularity in contract design that allows lawyers and clients to manage complexity; boilerplate represents a middle point in the spectrum that runs from “information-rich contract rights limited to a particular deal to simple standardized property rights availing against ‘the world.’”).


37. See Max Jacobson, Max Jacobson Interviews Christopher Alexander, 42 ARCH. DESIGN 768, 768 (1971) (quoting Alexander: “One of the most serious difficulties in the environment today is the machine-like character of the buildings that are being made. They are alienating and untouched by human hands.”); ALEXANDER ET AL., THE PRODUCTION OF HOUSES, supra note 6, at 24 (critiquing modern “mass housing”: “[p]laced and built anonymously, the houses express isolation, lack of relationship, and fail altogether to help create human bonds . . . ”); id. at 39–40 (criticizing “efficiency” of current mass housing design for producing alienating buildings and for failing to involve residents in design process). See also ALEXANDER, THE LINZ CAFÉ, supra note 6, at 85–94 (describing Alexander’s attack on Modernism in architecture).

38. See infra Part III.A.
adhesion migrate online\textsuperscript{39} and to a mobile device world.\textsuperscript{40} It also provides a framework for thinking about improving contract design as companies, such as LegalZoom, enable consumers to bypass transactional lawyers and draft and botch their own complex agreements.\textsuperscript{41}

This essay also briefly considers how Alexander’s normative program serves as a starting point for a longer discussion of ways to improve contract design. Alexander’s collective work served not merely as an instruction manual—it also represented, in roughly equal measure, hymnal and manifesto.\textsuperscript{42} For Alexander and his collaborators, better design of the built environment served not merely to increase its functionality or aesthetics. \textit{A Pattern Language} and Alexander’s other work also aimed to make the design process more \textit{democratic}, by providing lay people with a clear vocabulary, grammar, and syntax to create their own architectural plans.\textsuperscript{43} Alexander also sought to make individual buildings, neighborhoods, cities, and regions more \textit{harmonious} with one another and with the natural environment.\textsuperscript{44} At the same time, his work underscored the need for a pattern language of design to be \textit{adaptive} to changing social needs and environmental conditions.\textsuperscript{45} Finally, \textit{A Pattern Language} and Alexander’s other writings present a thoroughly \textit{humanistic} vision of architecture, in which design meets basic needs of individuals and families rather than those of abstract, mechanistic institutions or ideologies.\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{41} LegalZoom and other companies have enjoyed considerable success in selling “do-it-yourself” legal agreements to consumers covering an array of complex transactions from divorce settlements to the formation of a limited liability company. See Lindzey Schindler, \textit{Skirting the Ethical Line: The Quandary of Online Legal Forms}, 16 \textit{Chap. L. Rev.} 185 (2012) (analyzing online services that provide form contracts under professional responsibility rules for lawyers).
  \item \textsuperscript{42} For an analysis of the philosophical and ideological implications of Alexander’s work, a critique of Alexander’s reticence in confronting all of those ideological implications, and a description of the enemies that have challenged Alexander’s work, see Kimberly Dovey, \textit{The Pattern Language and Its Enemies}, 11 \textit{Design Stud.} 3 (1990).
  \item \textsuperscript{43} See infra Part I.C.1. Note that Alexander’s poetic style makes it difficult to boil his normative arguments down to a handful of points.
  \item \textsuperscript{44} See infra Part I.C.2.
  \item \textsuperscript{45} See infra Part I.C.3.
  \item \textsuperscript{46} See infra Part I.C.4.
\end{itemize}
These normative elements and, moreover, the descriptive power of *A Pattern Language* provide guideposts for how contract design and drafting can move from teaching a legal skill, which is too often relegated to the outskirts of the legal academy, to studying and addressing complex, cascading, and catastrophic failures of contract design in modern markets, if not a more ambitious, normative program. In short, the increasingly automated, routinized, rigid, interconnected, complex, and opaque nature of modern contracts presents practical problems for meeting client needs and averting systemic contract failures. Moving from a descriptive plane, these failures also pose deeper philosophical challenges to values central to contract law, such as individual consent and equity. On a normative plane, rethinking contract design and drafting in terms of a pattern language may make contracts not only more intelligible, but more closely hew to the human needs and values of the individuals ultimately bound.

This short essay follows the following simple plan. Part I provides an overview of Christopher Alexander’s writings on architectural design and explains how *A Pattern Language* created a vocabulary, syntax, and grammar for architects and planners. It also sketches how computer science borrowed pattern language to structure solutions to its own design problems. Part II describes how the design of legal contracts exhibits some of the same logic of a pattern language. It describes how contract patterns work to create contracts, transactions, liquid markets for financial instruments, and entire financial systems. If Part II describes how contract patterns function, then Part III examines how they break down, sometimes catastrophically. This final Part considers how the pattern language framework describes and illuminates recent contract failures and provides some normative guideposts for improving contract design.

I. PATTERN LANGUAGE IN ARCHITECTURE AND DESIGN

A. Alexander’s Approach

Alexander and his collaborators created a process for creating better buildings and cities by starting with a series of design patterns that meet particular human needs or solve particular problems in a structure. They isolated patterns that recur throughout rooms (e.g., “Entrance Room,” “Zen View,” or “Couple’s Realm”) or structures (e.g.,

47. ALEXANDER ET AL., *supra* note 4, at x, xiii.
48. *Id.* at xxvii–xxviii.
“Cascade of Roofs,” “Arcades,” “Staircase as a Stage”). Alexander and his co-authors assert that these patterns represent the fundamental design building blocks from which all cities and structures are formed: “at the larger scale of towns and buildings, the world is also made of certain fundamental ‘atoms’—that each place is made from a few hundred patterns—and that all of its incredible complexity comes, in the end, simply from the combination of these few patterns.” Alexander believes that the best contract patterns evolved in traditional settings as the people who lived in buildings developed their own design solutions.

Yet Alexander’s patterns represent more than isolated and abstract elements. Rather, each design pattern relates to other design patterns. Individual patterns may be composed from other smaller patterns. For example, Alexander describes how traditional stone houses found in the South of Italy are composed from the following patterns:

- Square Main Room
- Two Step Main Entrance
- Small Rooms off the Main Room
- Arch Between Rooms
- Main Conical Vault

In turn, Alexander’s patterns can be used to form larger patterns. Those Italian stone houses fit into a larger pattern of the town:

- Narrow Streets
- Street Branching
- Front Door Terrace
- Connected Buildings
- Public Wells at Intersections
- Steps in the Street

In short, Alexander creates a system for placing together individual patterns for a room to create patterns or solutions for the design problems of entire buildings. He sets rules for how mosaics of patterns

49. Id. at xxvi–xxvii.
50. ALEXANDER, supra note 5, at 99–100.
51. ALEXANDER, supra note 6, at 38. Nikos Salingaros takes Alexander’s implicit evolutionary view of architecture quite a bit further and develops a Darwinian theory of how architectural design has developed. See NIKOS A. SALINGAROS, A THEORY OF ARCHITECTURE 195–210 (2006); see also id. at 21–22 (citing Alexander’s influence).
52. ALEXANDER ET AL., supra note 4, at xviii.
53. ALEXANDER, supra note 5, at 188.
54. Id. at 190–91.
for individual buildings together form patterns or solutions for
neighborhoods (e.g., “Eccentric Nucleus,”55 “Promenade,”56 and
“Housing Hill”57). In turn, *A Pattern Language* describes rules for
joining neighborhood patterns, (e.g., “Mosaic of Subcultures,”58 “Local
Transport Areas,”59 and “Community of 7000”60) to create design
solutions for cities. Urban and rural patterns, when arranged together,
create regions (e.g., “City Country Fingers,”61 “Agricultural Valleys,”62
and “Independent Regions”63). This interlocking structure of patterns
provides architects with an endless number of combinations of patterns
to use in design. “A pattern language is a system which allows its
users to create an infinite variety of those three dimensional combinations of
patterns which we call buildings, gardens, towns.”64

The genius of Alexander’s writing is that it creates rules for which
patterns belong together in any particular context. Alexander describes
when and why particular design patterns fit together and, by implication,
when combinations of patterns make little sense:

There is a structure on the patterns, which describes how each pattern
is itself a pattern of other smaller patterns. And there are also rules,
embedded in the patterns, which describe the way that they can be
created, and the way that they must be arranged with respect to other
patterns.65

Whether patterns make sense together is determined by whether they
solve particular human needs and problems posed by the natural and
built environment. Alexander explains this, somewhat elliptically, by
arguing that architectural patterns work when they are “congruent” or
when there is a “fundamental inner connection” between the pattern and
the human events that occur within that pattern.66 So a successful pattern
for a Chinese kitchen stems from a “pattern of relationships required for

56. *Id.* at 168–73.
57. *Id.* at 209–14.
58. *Id.* at 42–50.
59. *Id.* at 63–69.
60. *Id.* at 70–74.
61. *Id.* at 21–25.
62. *Id.* at 26–28.
63. *Id.* at 10–15.
64. ALEXANDER, *supra* note 5, at 186.
65. *Id.* at 185.
66. *Id.* at 92–93.
cooking Chinese food.”

B. Vocabulary, Syntax, and Grammar: Linguistics and Design

In creating this system for architectural design, Alexander borrowed heavily from linguistics and mathematics. Indeed, he analogizes his pattern language to logical languages, which contain two features:

1. A set of elements, or symbols.
2. A set of rules for combining these symbols.\(^68\)

Alexander explains that natural languages, such as English, represent more a complex variation of this simple logical language.\(^69\) The two elements are again present. A natural language consists of words and then rules that outline the permissible arrangements of words.\(^70\) However, a natural language also defines the relationships between words. Alexander writes, “there is... a structure on the words—the complex network of semantic connections, which defines each word in terms of other words, and shows how words are connected to other words.”\(^71\) Just as a natural language contains words and rules of grammar for creating sentences that make sense, so too an architectural pattern language contains both a vocabulary of patterns and syntax for combining those patterns to create buildings that make sense. Alexander finds direct analogues between the systems of natural languages and pattern languages:

<table>
<thead>
<tr>
<th>Natural Language</th>
<th>Pattern Language</th>
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<tbody>
<tr>
<td>Words</td>
<td>Patterns</td>
</tr>
<tr>
<td>Rules of grammar and meaning which give connections [between words]</td>
<td>Patterns which specify connections between patterns</td>
</tr>
<tr>
<td>Sentences</td>
<td>Buildings and places(^72)</td>
</tr>
</tbody>
</table>

The individual patterns in Alexander’s works serve as the equivalent to a “vocabulary” or collection of words in a language. Alexander’s

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67. Id. at 94.
68. Id. at 183–84.
69. Id. at 184–85.
70. Id. at 184.
71. Id.
72. Id. at 187.
patterns describe particular design problems and solutions. Alexander’s work also contains a “syntax” or system to link together the individual patterns or vocabulary into longer, more complex descriptions of design solutions (that is, buildings, neighborhoods, and cities).

Alexander argues that this pattern language has a “generative” quality.73 It provides individuals with conceptual building blocks and rules to design an infinite number of buildings. Alexander writes, “[A] pattern language . . . gives us the power to generate these coherent arrangements of space. Thus, as in the case of natural languages, the pattern language is generative. It not only tells us the rules of arrangement, but shows us how to construct arrangements—as many as we want—which satisfy the rules.”74 Alexander’s work thus builds directly off the linguistic theories of Noam Chomsky, who developed the idea that human languages possess a “generative grammar.”75

*A Pattern Language* deeply impressed computer scientists, who faced their own design problems. Programmers adapted Alexander’s approach to create “patterns” in computer codes. As with architecture, computer programmers could break complex design problems into components and find a pattern solution for each component. Programmers could then combine each pattern to a particular design problem to create organized, modularized solutions to more intricate problems.76 Alexander’s writings exerted a particularly strong influence on the development of “object-oriented” programming.77

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73. *Id.* at 186.

74. *Id.* Alexander connects this generative quality of an architectural pattern language to a human language, “[B]oth ordinary languages and pattern languages are finite combinatory systems which allow us to create an infinite variety of unique combinations, appropriate to different circumstances . . . .” *Id.* at 187.

75. In linguistics, a generative grammar describes a system of rules that relate “signals” (such as words) to the semantic interpretations of those signals. See NOAM CHOMSKY, TOPICS IN THE THEORY OF GENERATIVE GRAMMAR 12 (1978); see also Finlay et al., supra note 14, at 163 (discussing connections linking Chomsky’s work with Alexander’s pattern language with computer languages).

76. JAMES O. COPlien, SOFTWARE PATTERNS (1996) (outlining Alexander’s influence on software programming); Lea, supra note 12, at 39.

77. Lea, supra note 12. Object-oriented programming is an approach to computer coding which decomposes complex problems into “objects.” Object oriented programs encapsulate particular abstract concepts into discrete “objects,” with each object formed by a data field. Objects also encapsulate certain procedures (or “methods”) for manipulating data. A program functions by these objects or modules doing the problem-solving work, rather than employing a top-down hierarchy of algorithms. Object-oriented programming languages include C++ and Java. GRADY BOOCH ET AL., OBJECT-ORIENTED ANALYSIS AND DESIGN WITH APPLICATIONS (3d ed. 2007).
C. Alexander’s Normative Program

Alexander’s intellectual project extends far beyond merely describing how traditional architecture is made. Instead, he sets out to create both theory and instruction manual for improving architectural design and urban planning. He aims not only to improve the functionality (which is an objective more associated with architectural modernism) or aesthetics of architecture. It is hard to pin down Alexander’s normative program; after all, he famously made the search for a “quality without a name” the centerpiece of his theories. Yet several normative themes reverberate throughout Alexander’s work. He sought to make design more democratic, harmonious, adaptive, and humanistic. Each of these objectives deserves elaboration as they have implications for modern contract design.

1. Democratic: The dust jacket cover of A Pattern Language states that a primary goal of the book is to enable citizens outside the architecture profession to participate in the process of designing and improving the built environment. The jacket reads:

At the core of these books is the idea that people should design for themselves their own houses, streets, and communities. This idea may be radical (it implies a radical transformation of the architectural profession) but it comes from the observation that most of the wonderful places of the world were not made by architects but by the people.

Alexander and his collaborators write in the body of the book that they seek to give citizens the tools to develop their own pattern languages for designing buildings and cities.

2. Harmonious: Alexander also sought to develop a means to build individual homes, buildings, neighborhoods, cities, and regions that exist in more harmony both with each another and with the natural

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79. ALEXANDER, supra note 5, at 17.
80. ALEXANDER ET AL., supra note 4.
81. Id. at xvii. See also ALEXANDER, supra note 5, at 167. Alexander argued:

The people can shape buildings for themselves, and have done it for centuries, by using languages which I call pattern languages. A pattern language gives each person who uses it, the power to create an infinite variety of new and unique buildings, just as his ordinary language gives him the power to create an infinite variety of sentences.

Id. See also ALEXANDER ET AL., THE OREGON EXPERIMENT, supra note 6, at 5, 38–41 (describing “principle of participation” in which users of buildings must make decisions on architectural design); Dovey, supra note 42, at 4 (“Many of the patterns imply a kind of democratic, participatory socialism . . . .”).
environment. Alexander’s quasi-mystical prose makes this quality hard to define concretely. He speaks of creating architectural patterns “free from internal contradictions.”

He defines architectural patterns as “fabrics of relationships” that must be “congruent” with the human events that occur within those spaces.

Alexander sought to address the “inability [of design and engineering] to balance individual, group, societal, and ecological needs.”

3. Adaptive: Alexander and his collaborators did not see their pattern language as fixed, but rather as fluid and evolving. They likened the pattern language to experiments or “hypotheses of science.” They called their catalogue of 253 patterns in A Pattern Language their “best guess as to what arrangement of the physical environment will work to solve the problem presented.” But all these patterns remain “free to evolve under the impact of new experience and observation.”

One computer software scholar argues that Alexander aimed to address both: “[a]esthetic and functional failure in adapting to local physical and social environments” and designs that were “ill suited for use in any specific application.” Alexander himself remarked, “one of the characteristics of any good environment is that every part of it is extremely highly adapted to its particularities.”

82. ALEXANDER, supra note 5, at 26.

83. Id. at 89.

84. Id. at 92–94. The following passages underscore how important harmony between the design of spaces and the lives lived in those spaces are to Alexander’s vision. Alexander writes of the essential nexus between good design patterns and the human activities and events that happen within those patterns: “[T]here is a fundamental inner connection between each pattern of events, and the pattern of space in which it happens. . . . [E]ach pattern of relationships in space is congruent with some specific pattern of events.” ALEXANDER, supra note 5, at 92–93. He then describes how advocates for patterns that are “alive,” i.e. those that “let our inner forces loose,” rather than those that are dead, which “keep us locked in inner conflict.” Id. at 101. He elaborates:

[A] person is so far formed by his surroundings, that his state of harmony depends entirely on his harmony with his surroundings . . . in some towns, the pattern of relationships between workplaces and families helps us to come to life . . . . In other towns where work and family life are physically separate, people are harassed by inner conflicts which they can’t escape.

Id. at 106–08. See also ALEXANDER ET AL., THE OREGON EXPERIMENT, supra note 6, at 9–11 (discussing the principle of “organic order” that marks good architectural design and use of patterns); ALEXANDER ET AL., A NEW THEORY OF URBAN DESIGN, supra note 6, at 2–3, 22 (describing use of architectural patterns to promote “organicness” and to “heal the city”).

85. Lea, supra note 12, at 39.

86. ALEXANDER ET AL., supra note 4, at xv.

87. Id.

88. Id.

89. Lea, supra note 12, at 39.

4. **Humanistic:** Alexander’s writing places human needs, experiences, and emotions at the center of the problems of design. Alexander and his collaborators indicated that the state of architecture as they found it was “fragmented” and “not based on human, or natural considerations.” Good patterns, Alexander writes, help an individual achieve personal harmony, which “depends entirely on his harmony with his surroundings.” Alexander places human beings and their needs at the center of architectural patterns. He sought to remedy architecture’s “[l]ack of purpose, order, and human scale.”

II. **HOW CONTRACT DESIGN WORKS: THE PATTERN LANGUAGE OF CONTRACTS**

A. **Basic Patterns of a Contract**

Legal contracts also exhibit the traits of a pattern language. In designing and drafting agreements, lawyers also use a series of patterns. Each pattern solves a particular problem that the contracting parties face in establishing the terms of their relationship going forward. Often these different patterns correspond to different numbered parts or sections of the agreement. The following patterns appear in most legal agreements:

*The preamble:* This pattern names the parties to the transaction and establishes the date on which the agreement has been signed.

*The exchange:* This type of pattern usually appears as a section towards the beginning of the agreement. It establishes the exchange of promises or performance at the core of the contract. For example, this pattern might cover the sale of an asset for a sum of money, the lease of particular property for future rent payments, or a loan repayable at a certain interest rate repayable in installments over a set term.

*The conditions to an exchange:* Another group of patterns sets the conditions to one or more party’s obligations under the

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91. ALEXANDER ET AL., supra note 4, at xvi.
92. ALEXANDER, supra note 5, at 106. Alexander notes that “stress and conflict are a normal and healthy part of human life,” id. at 113, but that “a pattern which prevents us from resolving our conflicting forces, leaves us almost perpetually in a state of tension.” Id. at 114.
93. See supra note 37.
94. Lea, supra note 12, at 39.
95. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 51 (2007).
96. Id. at 95 (labeling this an agreement’s “action sections”).
contract. This pattern might take the form of closing conditions (if there is a time lag between the signing of the agreement and when obligations become effective), conditions precedent, or conditions subsequent.97

**Representations and warranties:** In this family of patterns, the parties make statements of fact, such as those regarding their capacity to contract, financial health, or the quality of the assets involved in the bargain. Should a party’s statements be untrue, the other party might have certain rights (specified elsewhere in the contract), such as to cancel the contract, not to perform its obligations, or to seek monetary damages or other remedies.98

Indeed, as architectural patterns, contractual patterns must fit together coherently in accordance with rules of syntax.

**Covenants:** This type of pattern specifies other ongoing agreements the parties make ancillary to the basic exchange. These include agreements to perform certain obligations (positive covenants, such as obtaining insurance) and agreements to refrain from taking certain actions (negative covenants, such as not incurring any other indebtedness).99

**Default:** Many contracts employ one pattern that defines when one or both parties have defaulted on its obligations. This may occur on a violation of the basic exchange, when a particular representation or warranty is untrue, or upon the breaking of a covenant.100 This particular pattern then meshes with the next pattern.

**Remedies:** This pattern describes one party’s recourse when the other party defaults under the agreement, which might include: ceasing to perform its obligations, terminating the contract, seeking monetary damages, or obtaining injunctive or non-monetary relief.

**Termination:** This pattern functions to define when the contractual relationship ends, what happens when it ends, and which obligations might continue past termination.

**Other patterns, including “boilerplate”:** Contracts often employ other patterns, such as recitals that appear at the beginning of the

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97. *Id.* at 133.
98. *Id.* at 113 (introducing representations and warranties); *id.* at 159–60 (listing misrepresentations among triggers for default provisions, rights of a party to terminate contract, and other remedies).
99. *Id.* at 125.
100. *Id.* at 159–60.
contract before the operative provisions and provide context for why the parties are entering into the agreement. A definitions section provides the meanings of terms used in multiple places in the agreement. Finally, the end of many contracts contain general (often “boilerplate”) provisions, such as specifying which jurisdiction’s law governs the contract, where and how disputes relating to the contract will be resolved, how the contract may be amended, and whether third parties have rights under the contract.

Many practitioner’s manuals and model agreements serve a similar function of *A Pattern Language*, namely to provide a guide to negotiating and drafting patterns and outlining a syntax for fitting the patterns together. These manuals specialize in particular types of transactions, such as mergers or loan agreements in business transactions.

**B. Environmental and Legal Design Problems: Cunningham’s Contribution**

Lawyers practice their craft by modifying provisions culled from previous agreements to meet their client’s particular objectives, as well as to match the terms of the negotiated deal. The overlapping and conflicting objectives of the parties represent the *environmental design problems* to which contract patterns must respond. Provisions borrowed from previous agreements into which one or both of the current parties had entered (contractual precedent) may provide both negotiating leverage and comfort that those patterns had satisfactorily addressed these environmental problems.

Lawyers earn their keep not merely by acting as scriveners, but by negotiating and drafting in the shadow of complex legal regimes. Particular bargains may not be enforceable or may trigger a host of legal consequences. Larry Cunningham’s *Contracts in the Real World* serves as a user friendly guide to some of these *legal design problems* created by the types of common law doctrines found in a first-year law school.

101. *Id.* at 38, 60–62.
102. *Id.* at 73–78.
103. *Id.* at 167.
104. See, *e.g.*, JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS (1975).
105. See, *e.g.*, LEE C. BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS (2d ed. 2000); ANTHONY C. GOOCH & LINDA B. KLEIN, DOCUMENTATION FOR LOANS, ASSIGNMENTS AND PARTICIPATIONS (1996).
contracts course. These include legal rules for when certain bargains are unenforceable, the limits on particular contractual remedies, and how courts will interpret contractual language. Like Alexander with his photographs and drawings of cathedrals, town squares, and house floor plans, Cunningham illustrates these legal design problems with colorful examples from court cases, including staples of the first year Contracts course and modern parables such as the contract travails of rap star Eminem. Cunningham’s book could be read in conjunction with contract patterns that map onto the various legal design problems he identifies. For example, he outlines a typical parol evidence controversy and discusses how a merger clause can reduce the risk of a court looking outside of a written contract to prior or contemporaneous agreements.

Contract patterns operate to solve problems and exploit opportunities in more complex regulatory regimes. For example, tax lawyers often develop standardized and modularized financial instruments and transactions that can help clients lower their tax rate while achieving the same economic benefits. Lawyers engaged in tax planning thus also employ contract patterns.

C. Contract Patterns Compared to Boilerplate

Contract patterns bear a strong resemblance to contract boilerplate. However, my definition of a contract pattern is more expansive than boilerplate. I define a contract pattern as an encapsulated solution captured in legally enforceable language (whether in a single provision in a single contract or in an entire series of contracts) to a particular legal problem. That legal problem might be the difficulty of matching the objectives of the two contracting parties in a discrete bargain (an environmental design problem). The problem might also be a legal design problem, as described above.

106. CUNNINGHAM, supra note 9, at 35–58.
107. Id. at 84–108.
108. Id. at 126–47.
109. See, e.g., id. at 63–64 (providing an account of Sherwood v. Walker, 33 N.W. 919 (Mich. 1887)).
110. CUNNINGHAM, supra note 9, at 126–29 (describing the controversy over licensing rights to rap music).
111. Id. at 132–34.
A contract design pattern is conceptual. It might not take the exact same form—the rote incantation of the same words—in every contract. Boilerplate, by contrast, uses the same written formulation—the same sequence of words—again and again. Scholars generally use boilerplate to mean particular provisions, sections, or clauses in an agreement, but contract patterns describe much more than parts of legal agreements.

D. The Hierarchy of Contract Patterns: From Contracts to Transactions to Markets

A pattern language describes not only the way that individual provisions form legal contracts, but, moreover, the way in which lawyers arrange particular legal contracts together to create transaction structures. Consider a simple purchase of a residential home. Parties often effect this transaction with a purchase and sale agreement (governing the purchase of the property), a note (governing the financing of the purchase), a mortgage (relating to the security interest of the lender in the property), a deed of trust, and other ancillary agreements (such as insurance) and disclosures.113 These individual agreements must cohere, just as smaller architectural patterns for buildings must join to fit a larger building complex or neighborhood.

Individual agreements also form patterns in more complex, commercial transactions. The sale of a business might involve more than a basic agreement covering the purchase (such an asset purchase agreement or merger agreement).114 The transaction might also require organizational documents (article of incorporation or bylaws for a corporation).115 If the acquisition is being financed, the pattern for the acquisition agreements must mesh with the appropriate pattern for a loan financing (such as a credit agreement for a bank loan, an indenture for bonds, a security agreement for an interest in collateral, etc.) or an equity issuance (changes in a company’s organizational documents, a stock

113. ALEX M. JOHNSON JR., UNDERSTANDING MODERN REAL ESTATE TRANSACTIONS (3d ed. 2012). See id. at 58 (describing purchase and sale agreement); id. at 119–21 (describing uses of note and mortgage); id. at 129 (explaining deed of trust); see also id. at 87–97 (describing other documentation for closing a real estate transaction); id. at 13 (describing broker listing agreement).

114. See FREUND, supra note 104, at 139, 147–61 (describing acquisition agreement and its component parts). Employment agreements are another example of documents critical to many acquisitions. Id. at 399–418.

115. See id. at 105–07, 109–11 (describing corporate law mechanics of a merger); id. at 78–79 (describing use of specially created subsidiaries to effect acquisition transactions); see also ROBERT CHARLES CLARK, CORPORATE LAW, §§ 10.3, 10.4, 418–37 (1986) (describing various merger structures, including the use of specially created subsidiaries).
Patterns for financing may join together to form more complex credit transactions. Consider a securitization, in which an originating lender sells pools of mortgages or other loans to trusts or other investment vehicles, which then issue asset-backed securities to investors. A securitization funnels the cash investors use to purchase their securities back to originating lenders, who can make fresh mortgages or other loans. When mortgage borrowers make payments on their loans, the cash streams funnel through the investment vehicles to make payments to the holders of asset-backed securities.

Securitization thus joins the module or suite of residential mortgage agreements to the module or pattern of agreements involved in issuing bonds. Securitization includes a series of other patterned agreements, such as a pooling and servicing agreement. Under this agreement, a financial firm acts as agent for the trust (i.e., the investment vehicle) in collecting payments on the underlying mortgages or loans and enforcing the rights of the trust vis-à-vis the borrowers on those mortgages or loans. As we will see in a moment, the relationship between this particular agreement and the other patterns in a securitization began to break down during the financial crisis. This failure evidenced a problem in the pattern language and contract design of securitization.

Securitization, in turn, forms one of the components of a larger web of financial instruments and markets that connects consumer and commercial borrowers to investors in capital markets and links different financial intermediaries to another. This web of instruments—asset-backed securities, asset-backed commercial paper, repurchase agreements (repos), money-market mutual funds, and credit derivatives—provides a network for providing credit and transferring

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117. See Freund, supra note 104, at 67 (describing disclosure documents required (at that time) for many acquisitions), 427 (describing proxy statement needed to obtain shareholder consent).

118. Gerdin, supra note 17, at 147–51; Schwarcz, supra note 17, at 135–36.

119. See infra Part III.C.
credit risk. Many scholars see the evolution and market freeze in this system as central to understanding the global financial crisis. For this essay, the insight is more basic: individual provisions form patterns for legal agreements, patterns of legal agreements arranged together form patterns for more complex transactions and financial instruments, and patterns of transactions and instruments are essential to the construction of larger financial systems and markets.

E. The Functions of Contract Patterns: How They Work

The modularity and standardization of contracting design patterns allow lawyers and clients to achieve economies of scale and reduce transaction costs for complex market transactions. Constructing contracts from modified, pre-formulated patterns lowers transaction costs in several ways. Most obviously, lawyers must spend less time drafting and negotiating. Contract patterns potentially reduce transaction costs by serving several different kinds of functions. First, they may act as heuristics for legal analysis of contract terms under conditions of legal risk and uncertainty. Patterns give lawyers comfort that particular provisions “work”—that is, they achieve the business objectives of clients, are internally consistent, and run a lower risk of unforeseen consequences under various legal regimes. Patterns perform a checklist function for

120. See Gerdinger, Law, Bubbles, and Financial Regulation, supra note 18, at 397–418.
121. See Gorton, supra note 26.
122. See Stephen J. Choi & G. Mitu Gulati, Innovation in Boilerplate Contracts: an Empirical Examination of Sovereign Bonds, 53 Emory L.J. 929, 936 (2004) (surveying literature that contract standardization is driven by high volume players looking to achieve economies of scale); Smith, supra note 2, at 1187–88 (describing how modularity in contracts allows contracting parties to save on transaction costs). This phenomenon meshes with the influential theory of the firm literature, in which entrepreneurs face a choice in deciding how to assemble products or services: they can either “make” (produce a given product or service within the hierarchy of a firm) or “buy” (buy the necessary input products or services in a market). See Ronald H. Coase, The Nature of the Firm, 4 Economica 386 (1937). All things equal, by reducing the transaction costs of purchasing products and services in a market, contract design patterns shift the calculus of entrepreneurs towards markets and away from expanding the size of their firms.
124. Kahan and Klausner note this “drafting efficiency” as one subset of “learning benefits” or “learning externalities” that accompany the use of boilerplate. Kahan & Klausner, supra note 19, at 720–21.
transaction lawyers with basic issue spotting. Patterns also may give lawyers greater comfort that courts will enforce the contract language and interpret it in an expected manner.¹²⁵

Second, patterns may also economize on the ex ante costs of interpreting contracts, whether by the parties, a court, or a third party.¹²⁶ Henry Smith analyzes how modular contracts restrict information flow.¹²⁷ The resultant move towards standardization means that interpreting a contract requires less time in analyzing the particular parties and the context of the transaction.¹²⁸

Third, contract patterns serve to economize on bargaining.¹²⁹ They may provide shortcut arguments during negotiation with other parties. In other words, they can serve as bargaining precedent (either for a particular counterparty or as an industry standard). Patterns also can help in “bargaining” with courts. Widespread use of contract patterns may have the collective effect of being perceived as “too big to fail”; in other words, lawyers may believe that a court could not invalidate a particular

¹²⁵. See Kahan & Klausner, supra note 19, at 722.

¹²⁶. Again, this insight is not new, but can be found in the germinal work of Professors Kahan and Klausner. They argue that use of boilerplate leads to another “learning benefit” or “learning externality” of greater certainty as to how courts or other lawyers, professionals and investors will interpret standardized contract terms. See Kahan & Klausner, supra note 19, at 720–22 (discussing how boilerplate may have been tested in judicial precedent); id. at 723–24 (discussing how boilerplate reduces the cost of providing advice or evaluating securities or investments). Kahan and Klausner then describe an additional series of positive “network externalities” that might accrue with the more of widespread use of particular boilerplate terms. Greater use of a term lowers the cost of legal and other advice as more professionals gain expertise with the term. Id. at 726. Network benefits also accrue to firms that employ a boilerplate term after a judicial opinion has upheld or interpreted that term favorably. Id.

¹²⁷. See Smith, supra note 2, at 1187–88.

¹²⁸. Lawyers and law firms may thus enjoy an advantage as collectors and aggregators and tailors of patterns. They may have a comparative advantage in understanding how and when to apply patterns and to fit them together for particular situations. They may also have a better ability to predict how courts and regulators might interpret patterns. See generally Kahan & Klausner, supra note 19, at 736–39 (analyzing role of lawyers, securities underwriters and other “contracting agents” in promoting the diffusion of learning benefits with boilerplate terms, coordinating contract choices, and enabling cross-subsidization to promote learning and network externalities associated with particular boilerplate). Cf. Victor Fleischer, Regulatory Arbitrage, 89 TEX. L. REV. 227, 239–40 (2010) (describing crucial role of lawyers and law firms in creating and implementing regulatory arbitrage strategies for clients). At the same time, the organizational dynamics of law firms as “assembly lines” may explain the “stickiness” of contract provisions that make little sense. Barak Richman, Contracts Meets Henry Ford, 40 HOFSTRA L. REV. 77 (2011).

¹²⁹. Cf. Gulati & Scott, supra note 28, at 34 (surveying literature on learning and network externalities associated with contract boilerplate); id. at 36 (arguing that a party who may not insist on idiosyncratic change to boilerplate for fear of sending negative signal about its future behavior); id. at 37–38 (surveying literature on how parties may resort to boilerplate because of satisficing in negotiations and otherwise).
contract provision because it would thus invalidate a huge swath of contracts in the marketplace.130

Contract patterns thus offer many of the same benefits of “modularity” that Henry Smith associates with boilerplate language. Patterns aid in decomposing complex problems. They provide a middle ground between information-rich, completely bespoke contract terms and more standardized rules of property.131 Placing contract provisions in modules reduces the ripple effects of revising or committing an error in a particular provision.132 Contract patterns also allow the duties of drafting and negotiation of agreements to be broken up in space (for example, with different specialists in a law firm focusing on different aspects of a merger agreement) or in time (with different provisions being drafted in the past and then pulled off the shelf and re-assembled).133

F. Trading Contracts

We can extend Smith’s theory of how modularity limits the information flow of boilerplate provisions to explain how contract patterns ultimately form patterns for financial markets. Smith argues that by standardizing language, boilerplate essentially strips out information from parts of contracts. This has the somewhat counterintuitive effect of making those provisions more valuable, because standardized language means that counterparties (or third parties) must invest less time to determine what a provision means. By extension, they need invest less time in evaluating the contracting party and how it might interpret or apply the standardized term.134

130. Historical financial crises bear witness that this gamble does not always pay off. See Gelpern, Financial Crisis Containment, supra note 32, at 1056 (describing historical instances in which governments rewrote private contract provisions because of financial crisis conditions).

131. See Smith, supra note 2, at 1176.

132. Id. at 1188–91.

133. Cf. id. at 1180–85.

134. Id. See also Kahan & Klausner, supra note 19, at 723–24. Kahan and Klausner explain how boilerplate lowers the cost of valuation for investors:

[T]he use of a common term reduces the expense that investors and securities analysts incur in evaluating a firm’s securities and comparing them to alternative investments. This reduced cost increases the liquidity of a security, thereby reducing the issuer’s cost of capital. If a term is commonly used, the cost and effort entailed in understanding the term and its impact on value can be spread over many investments.

Id. When more firms employ a particular boilerplate term, they enjoy “network benefits.” Id. at 725–27. This stems from the greater “availability of a large number of investors and securities analysts who will learn how to price a firm’s securities at later public offerings and on the secondary market.” Id. at 726.
Smith’s logic can be extended even further to explain how standardized contracts can become fungible enough for investors to trade on an exchange. Smith’s work thus dovetails with the research of economist Gary Gorton. Gorton argues that certain financial instruments, such as senior asset-backed securities, can become “informationally insensitive.” This means that no trader can earn additional returns by trading the instruments based on inside, non-public information. Conversely, other traders will no longer fear being at an information disadvantage in the marketplace. Investors can easily price informationally insensitive instruments. This promotes the formation of deep and liquid markets for these types of instruments with many buyers and sellers. Information insensitivity and liquidity mean that these instruments begin to assume many of the economic features of “money.”

The creation of liquid markets to trade certain contracts, such as asset-backed securities, stems in part from interlocking contract patterns. Asset-backed securities are formed by a web of dozens of contracts from indentures to thousands of mortgages. Investors need not expend enormous amounts of effort evaluating the particular provisions of each of these contracts or of the system as a whole because of the use of contract patterns. Investors can assume that certain mortgage patterns will mean certain things to other investors or, heaven forbid, in a court of law. Investors can assume that contract patterns of mortgages will fit together with patterns of other agreements, like indentures, to create easy-to-value asset-backed securities. Of course, the crisis revealed that investors make these assumptions until they do not (a topic discussed in Part III).

Note that this information stripping or hiding feature of contract patterns and contract modularity has a direct analogue in object-oriented computer programs, another branch in Alexander’s intellectual genealogy. Object-oriented programs often hide key details of a code

136. Id. at 7.
137. Id.
138. See id.
139. Id.
140. Id. Instruments become more like money when they serve as a medium of exchange, a unit of account, and a store of value. See N. GREGORY MANKIW, MACROECONOMICS 75–77 (5th ed. 2003).
141. Lea, supra note 12, at 44–45.
from the user of information. When solving problems with the program, the user or programmer needs only to deal with a more abstract layer or module of the code, rather than delving into (and possibly debugging) all the details of the program.

For now, note how contract patterns, standardization and modularity had important benefits for the development of securitization markets. Investors purchasing asset-backed securities needed to invest fewer resources in acquiring information about pools of supposedly standardized mortgages. This feature enabled investors to trade these asset-backed securities more easily, sell them to be re-securitized (creating new layers of asset-backed securities), or pledge them as collateral for extremely short-term loans such as repos. In other words, contract patterns formed patterns for markets, which formed patterns for entirely new financial systems.

G. The Limits of Metaphor: Contracts Are Not Buildings

Of course, differences abound between contracts and a contractual pattern language and the built environment and an architectural pattern language. Where buildings stand or fall based on the natural forces of load, contracts are purely social constructs. Unlike buildings, contracts, by their nature, can never have a sole architect. Contracts arise only out of that so-called “meeting of the minds” of at least two parties. Often (but not always) this occurs after some negotiation between the parties. Contracts only bind when individuals make decisions to comply with them or when courts enforce their terms. The shape of contracts—what they mean—comes from human interpretation. As those interpretations change, contracts change. The existence and effects of contracts may thus be contested and change over time.

Moreover, one of the central goals of Alexander’s architecture, to present a “morphologically and functionally complete” language, cannot be accomplished in contract design. Alexander describes this goal for an

142. MEILIR PAGE-JONES, FUNDAMENTALS OF OBJECT-ORIENTED DESIGN IN UML 12 (2000).
143. Id. at 12–14.
144. See Gorton, supra note 26, at 7, 9.
145. See id. at 14.
146. Some contracts, such as adhesion contracts, involve no negotiation between parties; one party drafts an agreement and presents it to another on a “take it or leave it” basis. See infra Part III.E.
147. For a famously provocative judicial opinion using linguistic scholarship to argue that the meanings of words and contracts are fluid and change over time, see Pacific Gas & Electricity Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968).
architectural pattern language thus:

The language is a good one, capable of making something whole, when it is morphologically and functionally complete. It is morphologically complete, when the patterns together form a complete structure, filled out in all its details, with no gaps. And it is functionally complete when the system of patterns has that peculiar self-consistency in which the patterns, as a system, generate only those forces which they themselves resolve—so that the system as a whole, can live, without the action of self-destroying inner conflicts.148

Contracts can never achieve these particular goals. A long literature in law and economics explains how contracts are fundamentally “incomplete”; that is, they cannot specify a rule for every future contingency that may arise affecting the relationship between the contracting parties.149 Nonetheless, despite all these differences between the functions of, and forces acting upon, physical architecture and legal/social contracts, many of Alexander’s concepts map quite nicely from architectural design to contractual design.

III. WHEN CONTRACT PATTERNS FAIL

Not only does Alexander’s pattern language provide a description of how lawyers draft contracts, but both his description of patterns and his normative program also provide insights into how contract design has failed and how it might evolve to address these failures. Indeed, contract design faces many of the same technological and social forces that shaped twentieth century architecture. Contracting is becoming increasingly automated and rapid. Contracts are becoming increasingly complex and interconnected. At the same time, contract design has suffered from increasing rigidity and design failures, both small and systemic.

The following paragraphs sketch out some of the lessons of viewing contracts as pattern language for some of the contract design failures identified in recent contracts scholarship. Alexander’s description of the syntax and grammar of a pattern language provides a useful lens through which to view these failures. In addition, his normative goals—creating a more harmonious, humanistic, adaptive, and democratic design—

148. ALEXANDER, supra note 5, at 316.
provide guideposts for how contract design and drafting might change. The aim of this final Part III is not to match Alexander’s mystical style or his manifesto prose. Instead, it is to underscore the rich implications of his approach for modern contract design. My objective is limited. Rather than suggest sweeping reform of contract law doctrine, I seek only to propose a new lens for looking at contract design and its failures.

A. Increasing Automation and Flash Crashes

Contract drafting has become increasingly automated as many lawyers move from word processing to software programs for drafting complex legal agreements. At the extreme, attorneys have begun writing contracts in computer-readable form, so that machines can interpret and follow legal agreements. As different stages of the contracting process—from drafting to interpretation and compliance—increasingly involve machines, the risks of severe mistakes multiply. This risk became most evident in the high-frequency algorithmic trading on financial markets that triggered the 2010 flash crash and the 2012 losses of Knight Capital. These losses occurred because of errors in the syntax of the contract patterns that financial firms use to make financial trades. Even human trading can trigger stock market-crashes, but markets now face the risk of catastrophe due to small shocks triggering cascading failures of automated contracting. Removing humans from the critical stages of contracting creates the potential for catastrophic failure of contract design to adapt to changed environmental conditions. This meshes with the conclusions of economist Amar Bhide, who argues that when financial conglomerates began to automate decisions on financial risk-taking, they removed the critical element of human judgment and set the stage for the global financial crisis.

Yet automation may trigger smaller scale failures as well. A software bug in an online contract market for airline tickets might cause significant losses for companies or travelers. Similarly, parties may not correctly tailor a complex contract written with the aid of contract drafting software to their individual circumstances.

151. See Surden, supra note 36.
152. See Kirilenko & Lo, supra note 30.
153. Cf. Partnoy, supra note 30, at 171 (examining 2010 flash crash); Kirilenko & Lo, supra note 30, at 64 (analyzing use of algorithms in automated trading and its role in flash crash and 2012 trading error that caused losses in excess of $400 million for Knight Capital).
154. AMAR BHIDE, A CALL FOR JUDGMENT: SENSIBLE FINANCE FOR A DYNAMIC ECONOMY (2010).
B. Frankenstein Contracts

The syntactical errors of algorithmic contracting have been more quickly resolved than the failures of other contract patterns in financial markets. The global financial crisis revealed a modern danger that routinized, rigid, and modularized complex financial contracts cannot easily adapt to economic and legal shocks and may thus deepen systemic financial crises. Anna Gelpern and Adam Levitin describe how rigidity built into the terms of pooling and servicing agreements for mortgage-backed securities prevented mortgage servicers from agreeing to restructure mortgage loans. 155 Restructuring might have lowered the defaults of mortgage borrowers and the ultimate losses to investors in the affected mortgage-backed securities. Conversely, a lack of flexibility in these contracts helped cement a collective failure of financial institutions to address underwater mortgages, which deepened the systemic financial crisis. 156

Gelpern and Levitin outline several different kinds of rigidity built into these pooling and servicing agreements. One was contractual: the agreements limited the discretion of the servicers to modify loans to mitigate opportunism by the servicers at the expense of investors. 157 Another rigidity was functional: the multiple investors in these bonds could not overcome the collective-action problems to waive the necessary contract provisions. These collective action problems became even more severe because many of the bonds were re-securitized and held by other investment trusts with multiple beneficial owners. 158 As with the flash crash, mechanistic contracting created overly rigid contract patterns that could not adapt to changing environmental conditions with catastrophic consequences.

C. Modularity, Information Loss, and Bank Runs

The modularity and interconnectedness of asset-backed securities also had other consequences for the financial crisis. The information stripping described in Part II.F above that enabled the development of

155. See Gelpern & Levitin, supra note 29, at 1087–89.
156. Id. at 1124–27.
157. Id. at 1091–93 (describing how interplay between statutory and contractual provisions in these agreements circumscribed ability of servicers to modify mortgages). Gelpern and Levitin also describe how these contractual limitations on the discretion of servicers reflected a structural rigidity: the need to comply with legal rules to make the mortgages “bankruptcy remote” from the potential insolvency of the original mortgage lenders. Id. at 1093–98.
158. Id. at 1098–1102.
securitization and shadow banking markets also contributed to their collapse. When the mortgages underlying asset-backed securities began defaulting in waves, the consequences of this information loss from modularizing contracts became manifest. Investors in mortgage-backed securities could not easily discern whether their particular instruments were affected by mortgage defaults. This problem was compounded for investors in second and third layers of asset-backed securities that were based on those mortgage-backed securities. Similarly, lenders who extended credit based on asset-backed collateral could no longer evaluate their credit risk adequately. Consequently, the information loss and valuation problems caused markets in asset-backed securities, repos, and other instruments to freeze. Complex financial markets suffered shadow banking runs.  

159 The modularity and information loss created by rigid contract patterns both fathered and ultimately froze these markets. Scholars have only begun to worry about a larger class of “systemic contracts,” the widespread use of which might cause financial markets to buckle during an economic shock.  

160 Widespread use of a particular contract pattern that cause massive losses among numerous financial firms increases systemic risk by exposing firms to common shocks.  

161 This provides an extreme example of excessive uniformity in contract terms.  

D. “Sticky” Contracts and Boilerplate Language

This failure of contract patterns to adapt occurs even when highly sophisticated attorneys in high-stakes transactions have the ability to make appropriate changes in response to legal shocks. For example, a number of scholars have documented how lawyers failed to modify key provisions in sovereign bond indentures to reflect seismic shifts in the

159. See Gorton, supra note 26. This same information loss triggered runs on other instruments in the shadow banking system. See GERDING, BUBBLES, FINANCIAL REGULATION, AND LAW, supra note 18, at 452–54; see also Gary Gorton & Andrew Metrick, Securitized Banking and the Run on Repo, 104 J. FIN. ECON. 425 (2012).

160. See John H. Cochrane, Lessons from the Financial Crisis, REGULATION, 34, 36–37 (Winter 2009–2010) (discussing “systemic contracts” that when widely offered by financial institutions increase systemic risk); see also Gelpern, Financial Crisis Containment, supra note 32.

161. Systemic risk has been defined as “the risk . . . of breakdowns in an entire system, as opposed to breakdowns in individual parts or components.” George G. Kaufman & Kenneth E. Scott, What is Systemic Risk, and Do Bank Regulators Retard or Contribute to It, 7 INDEP. REV. 371, 371 (2003). One way systemic risk increases is when multiple financial firms have exposure to common economic shocks, which would cause them to fail simultaneously. Id.

162. See Kahan & Klausner, supra note 19, at 734 (discussing how boilerplate may lead to negative externality of excessive uniformity in contract terms).
applicable legal rules. “Sticky” contract terms represent an example of a larger puzzle of routinized contract terms in sophisticated transactions that are appear to be unenforceable, incomprehensible, or illogical. Although continued use of these terms might serve the expressive, symbolic, or political needs of clients, they may also fool those clients into a false sense of security that contracts perform stated functions or protect their interests as advertised.

E. Contracts of Adhesion in a Digital and Mobile World

As consumer contracting increasingly migrates to online click-through contracts and to mobile devices, the classic concerns surrounding adhesion contracts become both magnified and less visible to individuals. Lack of consumer understanding and consent and unequal bargaining power all become more pronounced in an electronic environment in which the pace of contracting accelerates, business can alter contract terms rapidly, and the ability and propensity of individuals to read and process those terms on a screen diminishes. This set of problems has led to a rich literature in privacy law scholarship, as well as numerous high-tech solutions (such as the use of avatars on websites and various augmented reality mechanisms) to alert individuals to what rights they are contracting away.

It would be a mistake to dismiss these sci-fi solutions to contracts of adhesion. They highlight a very real need to consider the human element in policies with respect to consumer contracting; patterns in consumer contracts must be carefully designed for individuals to be able to process their import and effectively consent to their terms. Hi-tech devices and designs may be able to make contract patterns more intelligible and more important contractual terms appear more salient.

163. E.g., GULATI & SCOTT, supra note 28.
164. See generally GULATI & SCOTT, supra note 28, at 33–44.
166. See Goetz & Scott, supra note 28. Scholars have long argued that boilerplate can lead to excessive use of suboptimal terms. See Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 VA. L. REV. 757 (1995); Kahan & Klausner, supra note 19, at 734.
168. See e.g., Peppet, supra note 40; M. Ryan Calo, Against Notice Skepticism in Privacy (and Elsewhere), 87 NOTRE DAME L. REV. 1027 (2012).
F. Democratization

The user interface of contract design has become increasingly important even outside contracts of adhesion. Hand-in-glove with increasing automation comes the increasing democratization of the contract drafting process. Consumers can now download wills, trusts, organizational documents for corporations and other business entities, residential leases, marital settlements, and other agreements online from providers such as LegalZoom.169

While removing lawyers from the process may make contract drafting more affordable and democratic, this trend also brings significant risks for individuals. Individuals may lack the expertise and awareness of what the provisions in form contracts mean, how they should be adapted to individual situations, and how they might become inappropriate, overly restrictive, or obsolete given changed circumstances.

CONCLUSION

Seeing contracting and contract design in terms of a pattern language offers insights into what contracts and their drafters do. The pattern language framework also sheds new light on recent contract failures. From the flash crash to Frankenstein contracts to online privacy agreements, contract patterns have become overly rigid and routinized. Automation, interconnectedness, and contractual complexity have created a disjointed syntax. This means contract patterns no longer perform their stated roles, parties can no longer effectively consent to contract terms, and parties cannot adapt their contractual relationships to economic and social shocks, big or small.

I leave for later work important questions such as the appropriate roles of legislatures, regulatory agencies, and courts in addressing broken contract patterns, whether policymakers should require or prohibit particular contract patterns or mandate disclosures to consumers or investors regarding those patterns, or whether courts should adopt particular interpretative rules for contract patterns.170 The task this article undertook was more modest: to sketch out how and why the pattern

169. See Davis, supra note 150, at 117.

170. Scholars have begun asking these questions with respect to contract boilerplate. See, e.g., Boardman, supra note 19 (analyzing interpretative rule that courts apply to boilerplate in insurance contracts); Hillman, supra note 19 (analyzing whether mandating disclosure with respect to boilerplate in online contracts might have perverse effects); Rakoff, supra note 19 (questioning embedded assumptions in boilerplate scholarship that courts and regulators should have limited roles).
language of contract works and to identify when this pattern language fails. A more ambitious normative program for contract patterns remains for another day. For now, one message remains: improving contract design—to become more adaptive, democratic, harmonious, and humanistic—is too important to view as mere skills training.
CASES AND CONTROVERSIES: SOME THINGS TO DO WITH CONTRACTS CASES

Charles L. Knapp*

INTRODUCTION

Nearly a century and a half has passed since Christopher Columbus Langdell waded ashore at Harvard Law School, bringing to its benighted natives the civilizing influence of law study through the “case method.” Like his namesake, Langdell has long since sailed on to a more distant shore, but his legacy remained at the heart of legal instruction throughout the twentieth century, and persists into the present day.

As a co-author of one of the two dozen or more currently-in-print Contracts casebooks, I obviously have both a point of view about, and a personal stake in, the survival of this particular method of instruction. Whether the legal casebook—or any other book, in the form of bound sheets of paper—will remain a part of our academic culture much longer is clearly up for grabs, however. Electronic records have so many advantages over the printed page that, at least for many purposes, they will surely become the dominant form of preserving, retrieving, and transmitting information, if indeed they are not already. But through whatever medium, I hope that legal training will continue to retain the study of “cases” as an important component of a legal education. In this brief discussion I will ruminate a little about the various ways in which case study can contribute to law study—or at least to the study of contract law, the area with which I am most familiar.

Stretching back at least to Richard Danzig’s 1975 exploration of Hadley v. Baxendale, contracts scholars have engaged in what is

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sometimes referred to as “legal archaeology.” They examine well-known contracts cases from a variety of angles—historical, sociological, economic, or what-have-you—to see what insights can be gleaned therefrom. Many cases familiar to several generations of law students have been subjected to this kind of inquiry, with interesting and sometimes surprising results. Besides Hadley, prominent cases given this sort of in-depth analysis include Peevyhouse v. Garland Coal & Mining Co., Alaska Packers’ Ass’n v. Domenico, Kirksey v. Kirksey, Mills v. Wyman, Williams v. Walker-Thomas Furniture Co., and Hoffman v. Red Owl Stores, Inc. I did a little digging in this ground myself, some years ago, with an exploration of J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc. Even some unpublished studies in this genre have found their way into semi-circulation. These individual pieces have in turn spawned anthologies in which such case studies are collected for law students, teachers, and other interested parties.


6. See Threedy, supra note 5, at 135.


8. 117 F. 99 (9th Cir. 1902); see Debora L. Threedy, A Fish Story: Alaska Packers’ Association v. Domenico, 2000 UTAH L. REV. 185.


Professor Lawrence Cunningham’s *Contracts in the Real World*\(^\text{16}\) is somewhat different in its approach. It aims to interest the modern reader in the stories of literally dozens of contract disputes, many of which have some present-day resonance, with an eye toward assembling these bits and pieces into a structure more or less recognizable as the American common law of contract. Although I admire both the ambition of Professor Cunningham’s reach and the achievement of his grasp, my aim here is a much more modest one: it is merely to discuss some of the ways in which over several decades of teaching I have employed individual cases as part of the study of contract law.

I. CHESTNUTS COASTING ON AN OPEN FIRE: THE CASEBOOK TRADITION

Particularly from the perspective of a casebook author (or editor, if you prefer), it seems that no method of case selection is more time-honored (or more vulnerable to criticism) than the recycling of old “chestnuts” familiar to generation after generation of law students. These are cases that one remembers for their facts—often odd, sometimes funny, always in some sense “memorable”—more than for their legal content. What law student does not remember at least some of the following cases: the broken mill-shaft;\(^\text{17}\) the wrong (non-“Reading”) pipe;\(^\text{18}\) the falling block;\(^\text{19}\) the nephew’s reward for not smoking;\(^\text{20}\) the bridge to nowhere;\(^\text{21}\) the hairy hand;\(^\text{22}\) the carbolic smoke ball;\(^\text{23}\) the two ships “Peerless”;\(^\text{24}\) the surprisingly pregnant cow;\(^\text{25}\) or the letter to “sister Antillico”\(^\text{26}\) Each of these cases has seemed to many instructors over the years to nicely encapsulate a legal principle important to contract law.

Some of them, at least, seem to be irreplaceable. But taken in toto,

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\begin{align*}
\text{16. Lawrence A. Cunningham, Contracts in the Real World: Stories of Popular Contracts and Why They Matter (2012).} \\
\text{18. Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921).} \\
\text{20. Hamer v. Sidway, 27 N.E. 256, 256 (N.Y. 1891).} \\
\text{21. See Rockingham Cnty. v. Luten Bridge Co., 35 F.2d 301, 307 (4th Cir. 1929).} \\
\text{22. See Hawkins v. McGee, 146 A. 641, 641 (N.H. 1929).} \\
\text{23. Carlill v. Carbolic Smoke Ball Co., (1893) 1 Q.B. 256 (C.A.) (Eng.).} \\
\text{25. Sherwood v. Walker, 33 N.W. 919, 920 (Mich. 1887).} \\
\text{26. Kirksey v. Kirksey, 8 Ala. 131, 132 (1845).}
\end{align*}
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they represent a kind of laziness on the part of casebook authors, and whether they are effective tools for actually teaching the principles they exemplify is questionable. What law student in fact does remember the contract rule illustrated by the broken mill-shaft, the wrong pipe, the falling block, and all the rest? These are the nursery rhymes of law study, the little vignettes that are part of the shared memory of us all. As with “Ring Around the Rosy,” however, we tend to remember the children’s game and forget the plague.27

Having said that, I too plead guilty, with a set of explanations: (a) some of these cases actually do seem memorable both factually and legally, although reasonable people would doubtless differ as to which ones those are; (b) I just can’t bear to part with some of them myself; and (c) contracts teachers protest when time-honored favorites are omitted. Even so, my co-authors and I have managed over time to kick off the back of our sled some cases whose place once seemed secure: *Raffles v. Wichelhaus*;28 *Allegheny College v. National Chautauqua County Bank*;29 and *Hawkins v. McGee*.30 A good teacher can still pull fire out of these chestnuts, but relying too heavily on cases like these is playing it too safe.

II. WHAT’S GOING ON HERE? CONTRACT IN CONTEXT

Whether a case is a revered chestnut or a newly-discovered acorn, most of us expect it to do something more than just quote a rule in highlightable form; we expect it also to show or tell the student something about the rule that is not apparent just from its mere statement. This, after all, is the raison d’être of the case method; otherwise we would just state the rule and ask students to apply it. And of course that’s something most of us do anyway, either on our own or with the help of a casebook editor or other source: pose a hypothetical problem and ask our students to apply to it a rule or set of rules they are learning. But actual cases—true stories of events that come packaged in judicial opinions—may not only provide an answer to the legal issue posed by a set of facts, but also illustrate how a legal rule works in a concrete context.

27. Whether “Ring around the Rosy” actually has anything to do with the Black Plague is a matter of dispute. See Ralph Slovenko, “When the Saints Go Marching In,” 28 J. PSYCHIATRY & L. 553, 554 n.3 (2000) (noting disagreement). The metaphor was irresistible, however.
29. 159 N.E. 173 (N.Y. 1927).
30. 146 A. 641 (N.H. 1929).
The following more or less random examples show how cases can add context to legal rules, and illustrate some property of the doctrine or rule at issue that might not be apparent just from its statement. In *Normile v. Miller*, 31 would-be realty buyers learn that a counter-offer, like the original offer, can be freely revoked unless supported by consideration, 32 and that those who “snooze” are apt to “lose.” 33 In *Dougherty v. Salt*, 34 a beloved nephew discovers that his late aunt’s generous monetary promise may not be enforceable even if made in what looks like a formal, “legal” document 35 (and incidentally, that gratuitous legal advice is apt to be worth its price 36). In *Plowman v. Indian Refining Co.*, 37 retired employees find that even if promises of pensions are made at the time of their discharge, those may not be enforceable absent some “consideration” received by their employer, 38 even if the court feels badly about that. 39 However, in *Harvey v. Dow*, 40 a father learns that an earlier generous promise to his daughter may be enforceable after all if it results in a substantial financial change of position on her part. 41 Some of these rules are “technical,” while some are “equitable”; taken together they may seem confusing and contradictory. Encountering real people in real situations helps the student to see how and why the rules have developed as they have, and why they may apply in some situations but not in others.

If cases are helpful in understanding rules of common law, they seem well-nigh indispensable in understanding some complex statutory provisions, such as Uniform Commercial Code (UCC) section 2-207. 42 Without the aid of one or more cases like *Brown Machine, Inc. v. Hercules, Inc.*, 43 this statutory rule is virtually impossible to comprehend or apply; with a concrete example, it takes on a little life of its own, and becomes potentially manageable. Somewhat the same could be said of

32. See id. at 18.
33. See id.
34. 125 N.E. 94 (N.Y. 1919).
35. See id. at 95.
36. See id. at 94.
38. See id. at 2, 4.
39. See id. at 5.
40. 962 A.2d 322 (Me. 2008).
41. See id. at 326.
42. U.C.C. § 2-207 (2002).
43. 770 S.W.2d 416 (Mo. Ct. App. 1989).
UCC section 2-201. This provision is not nearly so complex or puzzling as section 2-207, but still, a case like *Buffaloe v. Hart* can help the student understand not only how the statute does what it does, but why.

III. WHAT’S INSIDE THE BALLPARK? ALTERNATE SOLUTIONS

Recognizing that this may simply be my own bias at work, it has nevertheless always seemed to me that, more than any other “basic” law course, Contracts offers the opportunity to open students’ eyes to the fact that American law—particularly common law, but not only that—does not necessarily produce a single “right” answer when applied to a fact pattern, real or hypothetical. Although this lesson can be overdone, particularly for students who already have some sophistication about legal matters, the fact remains that most of our students arrive in law school assuming that for every legal question there may be a lot of wrong answers, but only one “right” one. One of our most important responsibilities as law teachers is to demonstrate that, given the plasticity of language plus the infinite variety of possible fact patterns, there is often more than one plausible answer to a legal question—sometimes there are two, sometimes more than that. When solving legal problems, the question is not simply: “what answer is the correct one?” but rather: “how many ‘ballpark’ answers are there?” “what are they?” “among them, which is the most correct, and why?” and “what does it mean for an answer to be ‘correct,’ anyway?” Answering these questions is the judge’s job, yes, but before that it is the analytical task of the lawyer, and training students to ask (and answer) these questions is the job of the law professor.

This perspective can of course be cultivated through the medium of carefully composed and delicately balanced hypothetical problems (and on final examinations it will be). But the study and discussion of actual decided cases has an additional benefit. Our case method of instruction is routinely criticized for employing mostly appellate cases, and thereby overlooking the complexity and importance of the work that trial lawyers and trial judges do. Fair enough, and other courses in trial advocacy, negotiation, and alternate forms of dispute resolution can—and increasingly, do—help make up for this deficiency. But when we read an appellate decision in a litigated case, we are encountering an

44. U.C.C. § 2-201.
actual dispute in which the legal arguments on both sides were strong enough for the losing side below to invest additional resources in an appeal. Assuming at least minimal attorney competence on both sides, an appellate case should therefore present a dispute in which rational judges could reasonably differ on the appropriate outcome. In a trial court, admittedly, such indeterminacy might stem simply from the credibility (or lack thereof) of the opposing witnesses. By the time a case reaches the appellate level, however, this factor should have been filtered out. On appeal, indeterminacy should be the result of doubt either about what the rule is, or about its proper application to particular facts.

Once class discussion has progressed at least as far as explaining the basics of the case under discussion (facts, issue(s), holding, and reasoning is one customary formula for doing that), it is appropriate to discuss whether the court’s decision holds together—whether there are holes in the court’s understanding and presentation of the facts or in its reasoning to a result. But even more useful (and a lot more fun) is to consider one or more alternate ways in which the court could have decided the case, and then to compare the possible versions of a decision. Here are a few examples.

In C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., the Iowa Supreme Court was faced with the defendant insurer’s denial of coverage for a burglary from the plaintiff’s office/warehouse. The defendant based its denial of coverage on the absence of “marks” of “actual force and violence” on the “exterior of the premises,” as required by the language of defendant insurer’s policy—language presumably intended to avoid covering an “inside job.” There were such marks, in fact, but on an inside door to a chemical storage room, from which chemicals had been taken. Since there apparently was little reason to think this had actually been an inside job, the defendant’s stance seemed technically correct but substantively harsh. Reversing a judgment for the insurer, the court used the case as a vehicle for discussing generally the adhesive nature of insurance contracts and the appropriateness of using a “reasonable expectations” approach to cases like this one. Fair enough;

46. 227 N.W.2d 169 (Iowa 1975).
47. Id. at 171.
48. Id.
49. See id. at 172.
50. Id. at 171.
51. Id.
52. See id. at 176.
proponents of “modern contract law” might well nod approvingly. But the court, in defending its wide-ranging and somewhat “legislative” approach to the case, suggested that conventional lawyering would have approached the case differently:

[I]t should be noted appellate courts take cases as they come, constrained by issues the litigants formulated in trial court—a point not infrequently overlooked by academicians. Nor can a lawyer in the ordinary case be faulted for not risking a client’s cause on an uncharted course when there is a reasonable prospect of reaching a fair result through familiar channels of long-accepted legal principles, for example, those grounded on ambiguity in language, the duty to define limitations or exclusions in clear and explicit terms, and interpretation of language from the viewpoint of an ordinary person, not a specialist or expert.54

For the law student, here is a challenge: how might the plaintiff have prevailed on the basis of “familiar” and “long-accepted legal principles,” such as “ambiguity in language”? One version involves stretching the meaning of “exterior” by adding a hypothetical fence around the plaintiff’s building, thus complicating the otherwise seemingly “plain meaning” of the word “exterior.” Surely marks of forcible entry on the fence would then be sufficient to satisfy the policy’s terms, since the fence could be regarded as the “exterior” of the “premises.” What if there were no marks on the fence, but there were marks on the door of the building: is the fence still the “exterior”—or is that now the door again? Another argument might involve questioning what should be seen as the “premises”: could a locked interior room be regarded as the premises, for this purpose? Some arguments might be closer to the (metaphorical) fence than others, but still within the ballpark of being potentially persuasive.

The C & J case presents essentially a case of “interpretation,” leavened by “adhesion contract” concerns. Other cases require the

54. C & J Fertilizer, 227 N.W.2d at 175.
55. See id.
56. See id. at 171.
57. See id.
58. See id.
59. See id. at 174–75.
examination and application of common-law doctrines, such as the distinction between “consideration,” the conventional basis for promise enforcement, and “promissory estoppel,” enforcement based on detrimental reliance. Are these concepts distinct, or do they overlap? How do you tell one from the other?

In *Katz v. Danny Dare, Inc.*, plaintiff Katz, a former employee and sometime officer of defendant (which apparently made and sold clothing), sued to recover payments allegedly due to him under a promised pension plan. Defendant had employed plaintiff in various capacities over the years, and for a time plaintiff had even been an officer of the company; he also happened to be the brother-in-law of defendant’s president, Harry Shopmaker. When plaintiff’s health began to fail (due at least in part to an injury suffered in attempting to protect defendant’s property from a thief), Shopmaker tried to persuade him to retire. Plaintiff was initially unwilling to do so, but finally agreed to retire only on the strength of a promise made by Shopmaker (and formally ratified by defendant’s board of directors) that defendant would pay him a monthly pension for life. Defendant made the payments initially, but eventually ceased, and plaintiff sued to recover the amounts due. Despite plaintiff’s invocation of earlier Missouri case law and section 90 of the *Restatement of Contracts*, a Missouri trial court gave judgment for the defendant, accepting defendant’s argument that since plaintiff would have been fired anyway if he refused to voluntarily retire, he had suffered no actual “detriment” by quitting his job. A Missouri court of appeals reversed, however, on the ground that Katz had indeed detrimentally relied by voluntarily retiring, and his case

60. 610 S.W.2d 121 (Mo. Ct. App. 1980).

61. See id. at 122.

62. “Danny Dare” was registered as a trademark for various types of clothing in 1962. The mark was assigned to Harry Shopmaker in 1987, and cancelled in 2011. See Danny Dare, UNITED STATES PATENT AND TRADEMARK OFFICE, http://tsdr.uspto.gov/#caseNumber=72134952&caseType=SERIAL_NO&searchType=statusSearch (last visited Aug. 14, 2013).

63. See *Katz*, 610 S.W.2d at 123.

64. See id. at 122.

65. See id. at 122–23.

66. See id. at 123.

67. See id.

68. See id. at 124 (discussing Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959)).

69. See id. The court’s reference is to the first *Restatement of Contracts* section 90; the *Restatement (Second)* version is substantially similar, and it retains the illustration based on the *Pfeiffer* case. See *RESTATEMENT (SECOND) OF CONTRACTS* § 90 cmt. b, illus. 4 (1981).

70. See *Katz*, 610 S.W.2d at 123–24.
therefore came within the rule of section 90.71

The real challenge of the Katz case lies not in deciding who should win (seriously? deny an aging retiree his admittedly promised pension payments merely because of the technicalities of contract law, and a heroic retiree at that?) but in explaining why. Despite the efforts of the appellate court, it must be conceded that under the conventional statement of promissory estoppel, a successful plaintiff needs to show that he suffered a detrimental change of position in reliance on the defendant’s promise.72 If the defendant truly would have fired Katz anyway (and the trial court in effect so found73), then his voluntary quitting was not a detrimental change of position, and the trial court was right. But Katz was determined not to quit voluntarily, and it was apparently important to the defendant—or at least to its president—that he do so.74 The act of retiring was something Katz was free not to do (in terms of the doctrine of consideration, it was a “legal detriment”), and defendant obtained Katz’s voluntary departure only by promising him in return a series of monthly payments.75 Whether this was a “fair” bargain is not supposed to matter as far as the consideration requirement is concerned; that’s up to the bargainers themselves to decide.76 So, paradoxically, the “technical” doctrine of consideration in this case probably does a better job of achieving justice than the supposedly more “equitable” one of promissory estoppel. A hypothetical question with similar facts could elicit the same analysis, but it would be unlikely to present the human elements or the emotional pull of the real-life Katz case.

Another case presents a similar combination of an appealing plaintiff and doctrinal difficulty. Agnes Syester, like others before her,77 was inveigled by defendant dance studio into paying an exorbitant amount for dance lessons, on the strength of blandishments involving her ability to become an excellent, even professional, dancer, despite her somewhat advanced age of seventy or thereabouts.78 At one point, she became

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71. See id. at 125–26.
72. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b.
73. Katz, 610 S.W.2d at 124.
74. See id. at 122 (Katz had held more responsible positions at Danny Dare during the course of his employment there; as noted above, he was the president’s brother-in-law.).
75. See id. at 123.
76. See RESTATEMENT (SECOND) OF CONTRACTS § 79(b) cmt. c.
77. See generally, Debora L. Threedy, Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts, 45 WAKE FOREST L. REV. 749 (2010). Many similar cases have been collected by Professor Threedy. See id. at 753 n.23.
disenchanted with the defendant and actually engaged a lawyer to sue, but agreed to settle in exchange for a partial refund of her payments.\textsuperscript{79} Eventually, however, she did sue in tort on the basis of fraudulent misrepresentation.\textsuperscript{80} This time she followed through, recovering compensatory and punitive damages substantially greater than the sum she had received in the earlier settlement.\textsuperscript{81} In \textit{Syester v. Banta},\textsuperscript{82} the jury at trial apparently believed the plaintiff’s story that she had been told lies on which she relied, lies that were both fraudulent and material, which induced her to buy more dance lessons than she could conceivably benefit from, or even use.\textsuperscript{83} Whether she could reasonably have believed those lies is of course a crucial issue under the law of torts, but an issue of fact that a jury could (and did) decide in her favor, given all the factors at play in the case.\textsuperscript{84}

In terms of tort law, the \textit{Syester} outcome seems both viscerally satisfying and doctrinally ballpark, even if marginal, given all the equitable factors in plaintiff’s favor.\textsuperscript{85} On the contract side, though, the issue is more complicated. The reason why the case even invokes contract law is because the plaintiff had earlier threatened a tort action, but she abandoned that suit pursuant to an agreement with the defendant.\textsuperscript{86} Settlement agreements are favorites of the law, and for good reason. To rescind that agreement and successfully pursue her tort action, plaintiff had to show that the earlier settlement was induced by fraudulent or material misrepresentations upon which she had reasonably relied.\textsuperscript{87} It does not appear, however, that the lies she was told to induce the settlement were any different than the lies she had been told originally—lies that she had already asserted to be fraudulent, \textit{before} the settlement agreement was concluded.\textsuperscript{88} Could she have reasonably relied

\textsuperscript{79}. Id. at 671–72.
\textsuperscript{80}. Id. at 673.
\textsuperscript{81}. Id. at 669, 673.
\textsuperscript{82}. 133 N.W.2d 666.
\textsuperscript{83}. See id. at 674.
\textsuperscript{84}. See id. at 673.
\textsuperscript{85}. Plaintiff Syester was a widow, of advanced age, and apparently not in affluent circumstances, given that she worked as “coffee girl” in a cafeteria. See id. at 669. On the other hand, as Professor Threedy has pointed out, she was able to come up with some substantial amounts of cash for her dancing lessons. Threedy, supra note 77, at 768 n.94 and accompanying text. Professor Threedy has questioned the tendency to see cases like this one through lenses of gender, perhaps of gender bias. See generally Threedy, supra note 77.
\textsuperscript{86}. Syester, 133 N.W.2d at 672.
\textsuperscript{87}. See id. at 673; see also RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).
\textsuperscript{88}. See Syester, 133 N.W.2d at 670–72.
A second time? What happened to that bit of folk wisdom, “Fool me once, shame on you; fool me twice, shame on me”? A possible answer lies in an alternate characterization of the plaintiff’s case for rescission, one that the Syester court did not consider: perhaps the settlement agreement was procured not merely by fraudulent misrepresentations, but by “undue influence.” This defensive doctrine can apply when the parties are in a distinctly unequal position—one dominant, psychologically at least, and the other subservient—and the former takes unfair and unreasonable advantage of that fact. 89 This may happen when the parties are in a formal fiduciary relationship, but the doctrine can also apply when there is a de facto relation of dependence that the dominant party is aware of, and exploits. 90 Mrs. Syester’s former dance instructor testified eloquently, if somewhat ungrammatically, about the campaign of persuasion that he engaged in to get plaintiff to abandon her claim. 91 The combination of factors in the case makes it almost a poster child—or perhaps, literally, a “textbook case”—for the employment of an undue influence rationale.

IV. WHO’S RIGHT, AND WHY? JUDGE V. JUDGE

A common criticism of the focus on appellate cases is that students are not forced to reach their own conclusions, being handed a prepackaged result with its accompanying justification already worked out. Fair enough; certainly that is usually the case. But sometimes the decision of a case provokes from a multi-judge panel more than one opinion. Casebook editors love cases with dissenting opinions, because these immediately hit the student-reader with an important proposition: “maybe the majority’s decision is not in fact the best way to resolve the case.” Hopefully a capable instructor would get to that point anyway, in the classroom. But a dissenting opinion has the virtue of being not just after-the-fact second-guessing, but the immediate assertion of a strongly held difference of opinion, voiced by a judge with just as much information about the case as her colleague who wrote for the majority.

Here are some examples of dissenting opinions that have seemed to me particularly useful. In 1977, J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc. 92 presented New York’s Court of Appeals, its highest court, with the question whether a commercial tenant’s lateness in giving

89. See RESTATEMENT (SECOND) OF CONTRACTS § 177.
91. See Syester, 133 N.W.2d at 671–72.
notice of its intention to exercise an option to renew a lease on restaurant premises could be excusable on equitable grounds, allowing the tenant to retain its leasehold. The seven judges split 4–3 in favor of the tenant, after three lower courts had divided over the issue. Even without a dissent, Judge Wachtler’s majority opinion would be interesting for its structure: the opinion first marshals considerable authority—New York case law, treatises, the Restatement (Second) of Contracts—for the proposition that a notice exercising an option must be given within the time specified in order to be effective. “Thus,” the court continued, “the tenant had no legal right to exercise the option when it did, but to say that is simply to pose the issue; it does not resolve it. Of course the tenant would not be asking for equitable relief if it could establish its rights at law.”

For the present-day student, probably used to encountering the distinction between law and equity only in the context of procedural rules (if at all), this may come as something of a surprise. The majority opinion then proceeds to point out various equitable factors in the case: the tenant made valuable improvements (some apparently after the deadline for renewal had passed); the landlord was aware both of the tenant’s improvements and of its apparent ignorance of the notice requirement (ignorance which the landlord made no effort to dispel); and there may well have been negligence but there was no bad faith on the tenant’s part. Conceding the danger that a tenant in some later case could opportunistically delay giving notice and then claim that its lateness was merely excusable negligence, the majority nevertheless concluded that this tenant should not be denied equitable relief merely because some later tenant might be found to have acted in bad faith: “[b]y its nature equitable relief must always depend on the facts of the particular case and not on hypotheticals.”

Writing in dissent, Chief Judge Breitel countered by stressing the need for a “reliable” rule, to avoid the “instability and uncertainty” that would allow for “ad hoc dispensations in particular cases.” This is an area, he asserted, where “opportunities for distortion and manipulation

93. See id. at 1316.
94. Id. at 1318, 1322.
95. See id. at 1314.
96. See id. at 1316.
97. Id.
98. See id. at 1315, 1317–18.
99. Id. at 1318.
100. Id. at 1321 (Breitel, C.J., dissenting).
are . . . great.”

Whichever argument one agrees with, the opposing opinions force the reader to face squarely the conflicting policies at stake and illustrate the difference in perspective between “law” and “equity.”

Another example of dueling opinions that nicely frame the issues is found in Sherrodd, Inc. v. Morrison-Knudsen Co. In that case, a subcontractor claimed he was deceived by the general contractor into signing a written excavation contract for a lump-sum price he already knew to be unreasonably low, because the subcontractor had begun the work and he feared not getting paid for the work already done. He claimed to have agreed to sign only on the strength of a promise that he would be fairly treated despite the existence of the writing. Despite clearly stated allegations of fraud (and more than a suggestion of wrongful duress, on the facts), a majority of the Montana Supreme Court agreed with Chief Justice Turnage’s opinion that the parol evidence rule barred consideration of the plaintiff’s claim. Despite that rule’s traditional exception for fraud, the Court relied on a narrow “exception to the exception,” finding that because the asserted fraudulent promise directly contradicted the writing, it could not be proven. Parties to a contract must be able to rely on its express terms without fear that the law will later permit the other party to change those terms, the court asserted, otherwise “commercial stability” will be destroyed.

Writing for a two-person minority, Justice Trieweiler argued that the majority applied a legally dubious precedent with a potential for “terrible injustice.” Alluding to the majority’s concern for “reliance” on contracts, the dissent countered that “general contractors who induce subcontractors to enter into a written agreement by fraudulent representations should find no security in the piece of paper which resulted from their culpable conduct.” Again, whichever side one ultimately agrees with, the judges themselves have presented the arguments that each side must address.

Sometimes judicial disagreements are voiced not in the same case, but

101. Id. For further discussion of the J.N.A. decision, see Knapp, supra note 13.
103. See id. at 1136.
104. Id.
105. See id. at 1136–37.
106. See id. at 1137.
107. Id. at 1137 (quoting Baker v. Bailey, 782 P.2d 1286, 1288 (Mont. 1989)).
108. Id. at 1139 (Trieweiler, J., dissenting).
109. See id. at 1137 (majority opinion).
110. Id. at 1139 (Trieweiler, J., dissenting).
in cases that raise similar issues but decide them differently. A pair of familiar “chestnut” cases\textsuperscript{111} that have this quality is \textit{Mills v. Wyman}\textsuperscript{112} and \textit{Webb v. McGowin}.\textsuperscript{113} (Some casebook editors add a third: \textit{Harrington v. Taylor}.\textsuperscript{114}) Without recounting here a set of stories which most contracts teachers already know well, suffice it to say that both factually and doctrinally these are cases that, particularly when taken together, are challenging and (potentially at least) pedagogically useful. Substantially more significant in terms of policy issues are the opinions of Federal Court of Appeals Judge Learned Hand and California Supreme Court Justice Roger Traynor in the classic pair of cases, \textit{James Baird Co. v. Gimbel Bros., Inc}.\textsuperscript{115} and \textit{Drennan v. Star Paving Co}.\textsuperscript{116} Although decided a quarter-century later, Traynor’s application of promissory estoppel in a withdrawn-bid case has been seen as a direct response to Hand’s earlier attempt to confine that doctrine to non-commercial situations,\textsuperscript{117} and contracts casebooks have traditionally presented these decisions as a contrasted pair.\textsuperscript{118} Traynor’s view may have prevailed in that particular line of cases,\textsuperscript{119} but strong differences of opinion remain among judges and commentators about the proper place of promissory estoppel in general contract law.\textsuperscript{120}

V. HOW’RE THEY DOING? LAWYERS AT WORK

Another way of using case reports is to focus on issues that may confront an attorney as a dispute develops and works its way towards some kind of resolution. Courses in lawyering, dispute resolution, legal ethics, and the like all in various ways address these questions in depth and detail. But even in a basic first-year course like Contracts, they can be recognized when the occasion arises. Although the temptation to second-guess how a case was handled should not be lightly indulged—

\textsuperscript{111}. See supra Part I.
\textsuperscript{112}. 20 Mass. (3 Pick.) 207 (1825).
\textsuperscript{113}. 168 So. 196 (Ala. Ct. App. 1935).
\textsuperscript{114}. 36 S.E.2d 227 (N.C. 1945).
\textsuperscript{115}. 64 F.2d 344 (2d Cir. 1933).
\textsuperscript{116}. 333 P.2d 757 (Cal. 1958).
\textsuperscript{118}. E.g., Ian Ayres & Gregory Klass, \textit{Studies in Contract Law} 292, 295 (8th ed. 2012); Knapp et al., supra note 2, at 248, 251.
\textsuperscript{119}. See Knapp et al., supra note 2, at 256.
case reports are not always detailed enough for that—at least issues can be raised, and sometimes the answers seem clear.

In Wartzman v. Hightower Productions, Ltd., a group of entrepreneurs hatched a plan to create and exploit a “flagpole sitting” champion—to be given the nom de pole of “Woody Hightower”—to appear at various venues such as “concerts, state fairs and shopping centers.” They engaged attorney Wartzman to advise them in incorporating their venture and in raising money through the sale of stock to investors. After the entrepreneurs formed the corporation, raised substantial money, and began operations (including the selection of a young man to be their Woody), Wartzman informed his clients that no more stock could be sold because the corporation was “structured wrong,” which apparently meant that the state’s securities law had not been complied with. To remedy the problem, he recommended that they consult with a “securities specialist”—something that Wartzman clearly was not. They asked Wartzman to foot the bill (an estimated cost of $10,000–$15,000), but he refused. Faced with the prospect of substantial additional legal fees and an indefinite delay in using funds already raised, they ran Woody back down the flagpole. Their corporation sued Wartzman’s law firm for breach of contract and negligence. A trial court awarded the corporation damages for the amounts it lost in promoting the aborted venture, and the Maryland appellate court affirmed.

Wartzman’s firm argued that the plaintiff should have been denied recovery because of a failure to “mitigate” its damages, but this met with a stony judicial response: the plaintiff did not have the money to continue paying legal expenses, and could not have raised more money because of the defendant’s lack of competence. Defendant might have

122. Id. at 84.
123. Id.
124. Id.
125. Id.
126. Id. at 84–85.
127. Id. at 84.
128. Id. at 85.
129. See id.
130. Id.
131. Id. at 87, 89.
132. Id. at 85.
133. Id. at 88–89.
avoided liability by showing that the plaintiff’s venture would have failed anyway, the court suggested, but it had the opportunity to prove that at trial, and failed to do so. Plaintiff’s inability to prove its likelihood of success precluded any recovery of expectation damages for lost profits; conversely, defendant’s inability to prove the likelihood of plaintiff’s failure left the defendant open to liability for plaintiff’s “reliance damages.” However, had the defendant been willing to assume the burden of paying to have the needed additional legal services performed by someone else, then Woody could have resumed his perch atop the pole, and the plaintiff’s venture could have gone ahead. In that case the defendant would have had to swallow that cost, but it would probably have avoided the far greater liability ultimately imposed in this lawsuit, either because the venture succeeded (in which event the plaintiff wouldn’t have incurred those losses after all), or it failed, enabling the defendant to meet its burden of proof on that crucial issue. Either way, future lawyers wouldn’t still be reading, a generation later, the cautionary tale of Woody v. Wartzman.

A somewhat better exhibition of lawyering—on both sides—can be found in Sackett v. Spindler, a 1967 case involving the sale of a local newspaper in a small California town. The contract of sale provided for a series of advance payments by the buyer, followed by a final payment in exchange for delivery to the buyer of all the stock in the publishing corporation. The buyer made the first three payments more or less as scheduled, but when it came time for the final payment, his check bounced. The seller in the meantime had placed the stock certificates in escrow, reclaiming them when the buyer’s check failed to clear. The buyer by this time was apparently dealing not only with health problems of an unspecified nature, but also with divorce proceedings. Neither of those factors provided him with a legal excuse for nonperformance under the contract, but they may in fact have made it difficult for him to perform as promised, as well as quite probably diminishing his enthusiasm for embarking on this publishing venture.

134. Id. at 88.
135. Id.
137. 56 Cal. Rptr. 435 (Ct. App. 1967).
138. Id. at 438.
139. Id.
140. Id. at 439.
141. Id. at 438.
142. Id. at 439.
Over the next several weeks the buyer kept proclaiming his intention to (eventually) pay, while the seller continued to assert his right to immediate payment.\textsuperscript{143} In the meantime the value of the newspaper as a going enterprise sank lower and lower.\textsuperscript{144} At one point the seller declared that he would treat the buyer as being in total breach, but shortly retreated from that position.\textsuperscript{145} Eventually, though, the seller did sell the shares to someone else—at a price well below what this buyer had promised to pay\textsuperscript{146}—and sued the buyer for the conventional remedy of expectation damages: the difference between the promised contract price and the lower price for which the property was eventually sold to another.\textsuperscript{147}

The seller’s dilemma in \textit{Sackett} stems from uncertainty about the nature of the defendant’s failure to perform: assuming that the buyer’s various personal problems did not rise to the level of a legal excuse, and assuming also that the seller’s tender of the stock met any “constructive condition” requirement of a performance on his part, at what point did the buyer’s unexcused failure to perform become not merely a “breach,” but a “total breach,” entitling the seller to treat the contract as discharged and sue for a full damage remedy—a remedy that would include not just a refund of his advance payments but the damages stemming from the property’s decline in value?\textsuperscript{148} For the seller to take that position prematurely—to “jump the gun,” as we say—would risk forfeiting a very substantial damage claim. On the other hand, continued delay by the seller meant risking the unwillingness and potentially the inability of this buyer to cover the (increasing) loss.

Two distinct questions can be asked about the quality of the lawyering in \textit{Sackett}. The first is: could/should the seller have attempted to protect himself against this uncertainty with appropriate contractual language, such as a “time is of the essence” clause, a “drop dead” clause, or some such device? The answer would seem to be yes. Of course the buyer might not have agreed to such a provision, but that in turn might have signaled to the seller the possibility of future problems of the type that actually did occur. The other question is whether either attorney should have proceeded differently once the seller’s difficulties became apparent? The seller did successfully avoid one pitfall, by never at any

\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 438–39.
\item \textsuperscript{144} \textit{Id.} at 433.
\item \textsuperscript{145} \textit{Id.} at 441–42.
\item \textsuperscript{146} \textit{Id.} at 442–43.
\item \textsuperscript{147} \textit{Id.} at 445–46.
\item \textsuperscript{148} \textit{See id.} at 440–41.
\end{itemize}
point repudiating the contract, which would have put him immediately in total breach. And the buyer did not too quickly assert his right to treat the contract as terminated. Eventually the seller did make himself whole, except for the cost of a lawsuit, making the best of what turned out to be a bad deal. Possibly with hindsight the buyer should have tried to buy his way out of the deal once his ability (or willingness) to go through with it had been undermined.

VI. HOW MUCH IS THAT IN REAL MONEY? SOME PROBLEMS WITH OLDER CASES

One of the problematic aspects of using actual cases to illustrate legal points is that many of these decisions are, well, old—twenty, fifty, maybe a hundred years old, or more—and thus may seem antique. This can mean that the transactions at issue no longer seem interesting or relevant. This doesn’t change the legal principles, of course, but it may mean that the issues of law are also less important than they once were. If—as seems likely—few contracts of importance are going to be concluded today by “snail mail,” then to the modern eye the “mailbox rule”¹⁴⁹ may seem neither right nor wrong, but merely unimportant. Another aspect of older cases is that often the parties are fighting over sums of money that to the modern eye are minuscule—essentially “chickenfeed.” Of course, one easy (and usually sufficient) answer is that one needs to adjust for the changing value of money (yes, Virginia, there was a time when $150 was a decent annual salary). And occasionally it does seem that the parties may be fighting more about some principle—pride? revenge?—than about money.¹⁵⁰

Occasionally, however, a case comes along that dramatically illustrates the financial potential of a winning contract suit. Although in recent years mass-contractors have routinely tried (with great success) to keep customer disputes out of litigation, and to keep small claims from being aggregated into big lawsuits, occasionally particularly keen lawyering on one side (along with performance that is perhaps less so on the other) will navigate past all the procedural shoals and reach a

¹⁴⁹. See Restatement (Second) of Contracts § 63 (1981).

¹⁵⁰. See, for example, Joyner v. Adams, where the plaintiff persisted in pursuing her contract action through three trials and three appeals before ultimately losing. See Joyner v. Adams, 387 S.E.2d 235 (N.C. Ct. App. 1990); Joyner v. Adams, 361 S.E.2d 902 (N.C. Ct. App. 1987). Plaintiff’s husband was also a lawyer, and his law firm had negotiated the contract that ultimately proved insufficient to entitle her to the payments she sought. The plaintiff may have thought she had “free” legal services, and her husband may have been reluctant to admit to his wife that he had earlier dropped the ball in negotiating the contract.
favorable final outcome, or one that is at least final enough to prompt the losing side to settle rather than prolong the litigation.

Such an event was the collection of federal cases reported in 2010 as *In re Checking Account Overdraft Litigation*.\(^{151}\) In a multi-district proceeding, customers of several major banks sued the banks on a variety of grounds, both common law (including breach of contract, breach of good faith, and unconscionability) and statutory (various consumer protection statutes).\(^{152}\) The major focus of their attack was the banks’ admitted practice of posting overdraft charges in such a way as to maximize the chargeable fees generated.\(^{153}\) After a lengthy analysis covering much ground, including potential federal preemption and the remedial power of common-law unconscionability,\(^{154}\) a federal district court in Florida denied the defendants’ motions to dismiss,\(^{155}\) concluding that the plaintiffs had indeed stated several potentially viable claims for liability.\(^{156}\) As a result, many of the defendant banks settled their cases, rather than proceeding further. One such settlement was reported as being for $410 million.\(^{157}\) This would feed a whole lot of really big chickens.

VII. WHO ELSE IS INVOLVED HERE? WIDENING OUR PERSPECTIVE

One by-product of case study for contracts students, not so obvious as those already discussed, is that although the typical lawsuit is a two-party (or at least two-sided) affair, the facts of actual cases frequently exhibit more complexity than that. Sometimes there are other persons involved in the situation, but not parties to the suit sub judice. Those persons may be involved in a separate lawsuit, or they may have contributed to the development of the dispute without being themselves involved in the resulting litigation. The following discussion provides a few examples.

In 1977, in Lenawee County, Michigan, Carl and Nancy Pickles (hereafter referred to grammatically, if somewhat awkwardly, as “the Pickleses”) bought from William and Martha Messerly a tract of land

\(^{151}\) 694 F. Supp. 2d 1302 (S.D. Fla. 2010).
\(^{152}\) Id. at 1307.
\(^{153}\) Id. at 1308–09.
\(^{154}\) *See id.* at 1318–21.
\(^{155}\) Id. at 1329.
\(^{156}\) Id.
upon which stood a three-unit apartment building. The Messerlys had previously bought this property from a Mr. Bloom, who had installed on it a septic tank that was (unknown to the Messerlys) in violation of the local health code. The Messerlys operated the property as an income-producing rental for a few years, then sold it to another couple, the Barneses. After a few years, the Barneses defaulted on their purchase and deeded the property back to the Messerlys, after which the Pickleses made their contract of purchase. Almost immediately afterward the septic tank problem came (literally) to light when sewage began visibly seeping from the ground on the property. The Board of Health commenced a proceeding against the Messerlys and the Pickleses to enjoin habitation of the property until the violation was removed, thus giving this case its rubric, *Lenawee County Board of Health v. Messerly.*

The Messerlys in turn sued the Pickleses for foreclosure and a deficiency judgment, whereupon the Pickleses counter-sued the Messerlys—for fraud and rescission—and also sued the Barneses—for fraud and misrepresentation. At the trial level the Board of Health got its injunction, and withdrew from the case, after which the court found as a fact that there had been no fraud or misrepresentation by either the Barneses or the Messerlys and dismissed the Pickleses’ actions against both couples. The Pickleses appealed the trial court’s judgment in denying rescission as against the Messerlys, and an intermediate appellate court agreed with the Pickleses, ruling that since both buyers and sellers had in fact been ignorant of the unlawful and unhealthful condition of the property, there had been a mutual mistake of fact sufficient to justify granting rescission in their favor. The case then went up to the Michigan Supreme Court, which reversed again, on the basis of an “as is” clause in the buyers’ contract.

One of the attractive features of the *Lenawee County* case, for contracts teachers, is that it enables one to nod in the direction of the

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 205–06.
165. *Id.* at 206.
166. *Id.*
168. *Lenawee Cnty.,* 331 N.W.2d at 210–11.
famous “pregnant cow” case, Sherwood v. Walker, without having to do a full-scale analysis of that case in all its aspects. In reviewing the lower court’s grant of rescission based on mutual mistake, the appellate court addressed the Sherwood decision, in which Michigan’s high court had applied the doctrine of mutual mistake to relieve the seller of a contract where “the very nature of the thing” being sold was different than the parties had believed it to be. In Sherwood the issue was whether the cow in question was thought by both parties to be incapable of breeding at the time of sale; it was later discovered to be pregnant. The court held that if this was truly a mutual mistake, it could be a basis for rescission by the seller. Expressing some doubt as to the outcome of that case, the Michigan Supreme Court in any event chose to abandon Sherwood’s rhetoric in favor of the Restatement (Second) of Contracts’ “balancing of factors” approach, and concluded that the mistake was both “mutual” in fact and also “material” enough under the Restatement’s approach to justify rescission. However, the court also went on to rely on the Restatement for the proposition that the parties might, by appropriate language in their contract, assign the risk of mistake to one party or the other. These parties had done that, the court ruled, by providing in their contract that the buyer would accept the property “as is.”

Aside from the court’s somewhat problematic (in my view) reliance on the contract’s language, it is instructive to ask how—in the absence of that language—a court should decide this case under the Restatement’s “allocation of risk” rule of “reasonableness.” Two

169. 33 N.W. 919 (Mich. 1887).
170. As mentioned above, Sherwood would clearly be on anyone’s list of classic contracts “chestnuts.” See supra note 25 and accompanying text.
171. Lenawee Cnty., 331 N.W.2d at 208 (quoting Sherwood, 33 N.W. at 923).
173. Id. at 920.
174. Id. at 923–24.
175. After opining that the Sherwood decision did not provide a “satisfactory analysis” and depended on an “inexact and confusing distinction,” the Lenawee County court, while not overruling that decision, asserted that Sherwood’s holding in the future would be limited to its facts—awaiting application, presumably, to the next pregnant cow case that comes along. See Lenawee Cnty., 331 N.W.2d at 209.
176. Lenawee Cnty., 331 N.W.2d at 209–10; see also RESTATEMENT (SECOND) OF CONTRACTS § 152, 154 (1981).
177. Lenawee Cnty., 331 N.W.2d at 209–10.
178. Id. at 210–11 (citing RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. a).
179. See Lenawee Cnty., 331 N.W.2d at 211.
180. See RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. c.
potentially relevant factors are apparent from the court’s opinion, although neither is emphasized. The first is that Bloom—who was not a party to the case, and whose whereabouts the court never discussed—is the one initially responsible for the whole problem.\footnote{181. Lenawee Cnty., 331 N.W.2d at 206.} If Bloom had not installed a non-conforming (and apparently improperly functioning, at least eventually) septic system, the problem would not have arisen.\footnote{182. See id.} The second factor is that during the period of the Barneses’ ownership, they requested and received from the Messerlys permission to sell off an acre of land that was originally part of the parcel.\footnote{183. Id. at 205, 207.} If that acre of land had been retained, it would have been possible to preserve the residential character of the property by installing an appropriate (much larger) septic field.\footnote{184. Id. at 207.} As it was, the amount of land remaining would not support that corrective action, making the property in its reduced state useless for residential purposes, and essentially valueless.\footnote{185. Id.} If this remedial measure indeed is no longer feasible, then we have here an unavoidable loss of value. And assuming the trial court’s findings of fact are correct, none of the parties to the lawsuit was guilty of knowing the true facts and misrepresenting or wrongfully concealing them.

So in this posture the case presents the classic conundrum: when an unavoidable loss occurs, and it must fall on one of two or more innocent parties, how do we decide who should bear that loss? There are a lot of ways to approach that, probably, but the simplest place to begin is to ask which (if any) of the parties is more responsible than the others for the loss event? Which one might best have avoided it? Viewed in that light, it can plausibly be argued that the only parties not responsible here are Mr. and Mrs. Pickles. The Messerlys failed to sufficiently inspect the property to begin with, and dealt directly with Bloom; they also had plenty of opportunity to inspect the property while they owned it, and they gave permission to the Barneses to sell off that extra acre, thereby (unwittingly) turning a soluble problem into an insoluble one. The Barneses, while they owned the property, also had ample opportunity to inspect it, and they were the ones who actually sold off that acre. As for the Pickleses, the worst they can be accused of is possible negligence in inspecting the property. If that was indeed a dereliction on their part, they had plenty of company. Ideally, of course, the liability would have
been passed backward to end up ultimately on Bloom, but that appears not to have been possible, either practically or legally.

Another case where a non-party appears to have played a crucial role is *Morin Building Products Co. v. Baystone Construction, Inc.*, a federal case that arose in Indiana and reached the Seventh Circuit Court of Appeals in 1983. On its face a simple construction dispute, the case is notable for three things: (1) an interesting legal issue, (2) the participation of Circuit Judge Richard Posner, and (3) the brooding omnipresence of General Motors, Inc. Plaintiff Morin, a subcontractor, had contracted with defendant Baystone, a general contractor, to erect the aluminum walls called for as part of the defendant’s performance of its general contract to build an addition onto one of GM’s Chevrolet plants in Muncie, Indiana. Incorporating language from the general contract as well as adding some of its own, the Morin/Baystone subcontract essentially called for the finish on the new aluminum walls to match the finish on the walls of the already existing building, to a degree satisfactory to GM’s authorized agent. When the work was done, GM’s representative declared it unacceptable, and rejected it, so Baystone refused to pay Morin, and instead hired another contractor to redo the work. Morin sued Baystone to collect the contract price for the work it had done. Morin prevailed in the trial court, which held that because the evidence showed plaintiff’s performance to have been objectively acceptable to a reasonable person, it should not have been rejected.

On appeal, Judge Posner was clearly torn between the apparent strength of contract language that gave GM unfettered discretion in granting or withholding its approval, and the well-established common law rule that such conditions of “satisfaction” should, if at all possible, be construed to require only “objective” (reasonable-person) satisfaction. This is particularly so where the performance at issue is one calling principally for commercial utility, rather than the expression

186. 717 F.2d 413 (7th Cir. 1983).
187. Id. at 413.
188. Id. at 414–17.
189. Id. at 414.
190. Id.
191. Id.
192. Id.
193. Id. at 414–15 (discussing the approach stated in RESTATEMENT (SECOND) OF CONTRACTS § 228 (1979)).
of “personal aesthetics” or the achievement of “artistic effect.” After a lengthy opinion in which he strove mightily to find some wiggle-room in the contract language, Judge Posner threw in the towel and said, essentially: “We’re a federal court here, we have to follow state contract law, and the district court judge is an experienced Indiana lawyer, so there you have it; no paternalism here, for heaven’s sake.” The “foundations of freedom of contract,” he concluded, happily remain intact. In other words, General Motors, as the party with the power, is still free to do whatever it wants, to whomever it wants—except the Morin Building Products Co.

Beyond the provocative legal issue of whether boilerplate language should insulate a contracting party from claims of “commercial unreasonableness”—essentially, of “bad faith”—the facts of Morin exhibit a classic example of whipsawing. Should Baystone have rejected this performance from Morin? Clearly not, in the courts’ judgment. So could Baystone instead have accepted Morin’s work to begin with? Not unless it was willing to face a potential contract dispute with General Motors, presumably. Faced with this dilemma, it’s not surprising that Baystone chose to do the bidding of GM. Should GM therefore have ultimately borne the price of this loss? Obviously, yes, it should have. However, GM was not a party to this lawsuit. So did it, in fact, cover Baystone’s loss? From the case report, we can’t tell. We can only trust that GM did the right thing. Or hope that perhaps Baystone’s contract (presumably drafted by GM’s lawyers) had an indemnification clause for just such a situation as this.

Sometimes the person in the wings, although not a party to the lawsuit we are reading, is nevertheless a party to one or more related suits. An example can be found in the 1997 case of Locke v. Warner Bros., Inc. Here the off-stage (or in this case, off-screen) person was movie actor/director Clint Eastwood, who bore somewhat the same relationship to defendant movie production company Warner Brothers as GM did to defendant Baystone in Morin. Eastwood had previously ended a long-term personal and professional relationship with actress and aspiring director Sondra Locke, an event which precipitated “palimony” litigation that eventually culminated (at least temporarily) in a settlement agreement. The settlement agreement involved not only substantial

194. See id. at 415–16.
195. See id. at 415–17.
196. See id. at 417.
197. 66 Cal. Rptr. 2d 921 (Ct. App. 1997).
198. See id. at 922.
payments by Eastwood to Locke, in money and real property, but also Eastwood’s agreement to cause Warner Brothers to enter into a “development deal” with Locke—an arrangement that would guarantee substantial payments to her from Warner over a three-year period, plus the possibility of additional payoff (both financial and professional) should Warner accept for production one or more of her projects or employ her as a director.\textsuperscript{199}

Time passed and Locke received from Warner her guaranteed payment, but nothing more; no project of hers was chosen by Warner for further development nor was she employed to direct any film.\textsuperscript{200} She then sued Warner for fraud and breach of contract, claiming that Warner from the beginning had intended not to accept any of her projects, pursuant to an agreement to that effect with Eastwood\textsuperscript{201} (who in fact had indirectly reimbursed Warner for the payments it made to her\textsuperscript{202}). There was some evidence of this in communications between Warner executives.\textsuperscript{203} A California trial court granted Warner summary judgment on all of Locke’s claims, however, ruling that Warner had no contractual duty to actually approve any of her projects, because under their contract it had non-reviewable discretion to make such artistic judgments of her work, pro and con.\textsuperscript{204}

On appeal, a California court of appeal reversed for trial, declaring that while the implied covenant of good faith did not require Warner to actually accept any of her projects, it might at least require that Warner consider them in good faith and use its honest judgment in assessing their merits, rather than categorically declining even to consider them.\textsuperscript{205} If Locke’s story was true, Eastwood—like GM, above\textsuperscript{206}—had manipulated the defendant to behave in a way that violated the rights of the plaintiff in this lawsuit. Unlike GM, however, which may have paid no price for its actions, Eastwood was also sued by Locke for fraud (in procuring her agreement to the Locke-Warner contract); that suit was

\textsuperscript{199} Id. Her contract with Warner guaranteed Locke a total of $750,000 over a three-year period.  
\textsuperscript{200} Id.  
\textsuperscript{201} See id. at 922–23.  
\textsuperscript{202} Id. at 922.  
\textsuperscript{203} Id. at 923.  
\textsuperscript{204} Id. at 923–24.  
\textsuperscript{205} Id. at 926–27.  
\textsuperscript{206} See supra text accompanying notes 186–95.
apparently settled at the last minute, when jury deliberations had actually begun.207

VIII. WHAT JUST HAPPENED THERE? PLAYING THE OFF-STAGE SCENE

Attorneys need to know more than rules of law, obviously. One of the skills an attorney must develop is the ability to determine what facts she does not know, and whether those facts are important to a legal analysis. Frequently, in a judicial opinion, there are brief references to interactions between the parties that might be relevant, but these are left incomplete and undeveloped. Students should be encouraged to imagine what might have taken place, in light of the facts that are available.

_Berryman v. Kmoch_208 provides one example of this genre. In that case, a Colorado real estate developer claimed that he had an enforceable 120-day written option to buy certain Kansas farmland, which the farmer/seller breached by selling to another buyer before the 120 days had expired.209 The buyer, Kmoch, claimed that he had requested that amount of time to consider his purchase because he would need to find investors to participate in the venture before going ahead.210 Eventually, after the buyer had attempted to enforce the agreement, the seller, Berryman (who by this time had sold to another buyer) sued for a declaratory judgment that the option was not enforceable.211 The court analyzed the transaction both for the presence of consideration and the possible application of promissory estoppel, and concluded that neither would apply to prevent the seller’s revocation of his offer to sell.212

But along the way, in the course of telling this story, the court writes as follows: “Berryman called Kmoch by telephone and asked to be released from the option agreement. _Nothing definite was worked out between them._”213 This call was some five weeks or so after the initial transaction, and we know from the facts that the buyer really hoped that this deal would go through, while by this time the seller did not.214 Even if an option is not legally enforceable and the offer is therefore a

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207. _See Knapp et al., supra_ note 2, at 497–98.
208. 559 P.2d 790 (Kan. 1977).
209. _Id._ at 792–93.
210. _Id._ at 794.
211. _Id._ at 792–93.
212. _Id._ at 793–95.
213. _Id._ at 793 (emphasis added).
214. _See id._ at 792.
revocable one, there might still be a claim that the offer was actually accepted before it was revoked. So a material issue here could be: was the offer revoked during that conversation? Ordinarily, we would assume that when an offeror communicates his intention not to perform, this in effect amounts to a revocation of his offer. But here we are told that the seller “asked to be released.”\textsuperscript{215} That suggests he may have considered himself bound—legally, or at least morally—to keep the offer open. Did he nevertheless revoke?

To answer that question, one would need to know the actual telephone conversation. Here is one possible version:

Seller [Berryman]: Look, I know I said you could have 120 days to think over our deal, but I have a buyer ready and willing to go ahead now. I can’t risk losing that deal unless you assure me that you’re going to go ahead. Otherwise I’m going to have to ask you to release me from our agreement.

Buyer [Kmoch]: I appreciate your problem, but you promised me 120 days to consider this deal, and it’s only been about a month; I need more time. I’ve put a lot of time and effort into this already; it’s not fair for you to just walk away here. I’ll let you know just as soon as I decide whether I can go ahead or not, but you can’t back out now. You gave me a legally binding option. I’m going to have to insist that you to give me more time.

Seller: That’s just unreasonable, and you know it. I need to know now.

Buyer: Well, that’s the way it is. I expect you to stand by your word.

One could go on for few more exchanges, but you get the idea. At this point, was the offer revoked? Reasonable people might differ, I suppose. This (hopefully) reasonable person would say no—that on this version of the facts, the desire to withdraw was there, but never unequivocally expressed. Of course there was not yet an acceptance, either, but that’s the whole point of an option: to permit the offeree to delay his decision while keeping the offeror bound to the prospective exchange.

Park 100 Investors, Inc. v. Kartes\textsuperscript{216} provides another example of an incomplete account. There, an Indiana Court of Appeals upheld a lower court’s finding that the landlord of some business premises had fraudulently manipulated the individual principals of the tenant

\textsuperscript{215} Id. at 793.

\textsuperscript{216} 650 N.E.2d 347 (Ind. Ct. App. 1995).
corporation, James and Nancy Kartes, into personally guaranteeing the lease obligation, by deceiving the Karteses into signing what they believed to be merely copies of the proposed lease agreement.\textsuperscript{217} The guarantees had not been agreed to or even discussed by the Karteses and the landlord beforehand.\textsuperscript{218} The signing took place in a hurried meeting in a building lobby, where the Karteses were approached by Scannell, the landlord’s representative, when they were on the verge of departing for the day, and told that before leaving they had to sign some “lease papers.”\textsuperscript{219} Before he signed what he apparently assumed to be just copies of the lease, from the lobby James Kartes telephoned upstairs to Kaplan, a senior officer of their corporation, and asked him if the lease agreement had been approved by the corporation’s lawyer.\textsuperscript{220} “Scannell remained silent,” we are told by the court.\textsuperscript{221}

We are not, however, told what Kaplan said. Presumably he said “yes,” because the lease agreement in fact had been approved by the corporation’s lawyer. But why didn’t he also say, “why do you ask?” Or maybe he did. If so, a little more conversation should have revealed to Kartes that Scannell was up to something at least odd. Even if Scannell did act with fraudulent intent, for Kartes later to assert a defense based on fraud he has to have been not only the recipient of a misrepresentation, but to have reasonably relied on it.\textsuperscript{222} The Park 100 case seems to come out the right way, but the account of what actually happened is unsatisfyingly incomplete.

A different kind of imagined scenario is that classroom staple, the “what if—?” hypothetical. By varying the facts of the actual case, one can evaluate the court’s analysis. A case already mentioned above, \textit{Webb v. McGowin},\textsuperscript{223} to my mind serves as an ideal example. In \textit{Webb}, the plaintiff claimed that the defendant’s decedent, McGowin, made a promise of life-time support to Webb as a reward for Webb saving McGowin’s life by diverting a heavy block of wood that was about to fall from an upper floor and potentially crush him.\textsuperscript{224} Plaintiff asserted that he had voluntarily allowed himself to fall with the block so as to keep it from hitting McGowin, suffering severe injuries himself in the

\begin{footnotes}
\item[217] Id. at 347–48.
\item[218] Id. at 348.
\item[219] Id.
\item[220] Id.
\item[221] Id. at 348.
\item[222] See \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 164 (1981).
\item[224] \textit{Webb}, 168 So. at 196–97.
\end{footnotes}
process. The trial court sustained defendant’s demurrer on the ground of lack of consideration, because the alleged promise occurred only after the plaintiff’s heroic act had been performed. “Past consideration is not consideration,” as the legal maxim has it. But the appellate court held that in cases such as this “the subsequent promise to pay is an affirmation or ratification of the services rendered carrying it with the presumption that a previous request for the service was made.”

So what the court wanted to see was a previous request from McGowin? Well, what if, as the plaintiff stood poised on the edge of the opening above McGowin’s head, McGowin had looked up, perceived his danger, and cried out “Help!!” If Webb replies, “What’s it worth to you?” and McGowin answers, “Fifteen dollars every other week for the rest of your life!,” after which Webb takes the fall, then the court has the actual bargained-for exchange it seems to want, instead of merely a “presumed” one. Of course, as students immediately perceive, it also has a probable case of duress. What Webb really presents is a case where the doctrine of consideration is not adequate to get the court to where it wants to go. Instead of a problematic legal fiction of bargain, based on a non-existent preliminary request, the court should simply declare that this is an appropriate case for recognizing the enforceability of a promise made for a benefit already received.

IX. IRRATIONAL ACTORS? OR JUST (SEEMINGLY) IRRATIONAL ACTIONS?

One of the challenges that real cases can present is explaining the seemingly irrational actions of the parties. Understanding the motivations of human behavior is a useful skill for everyday life, but for lawyers it’s a vocational requirement.

We have already seen in Katz v. Danny Dare a case where what
otherwise might have seemed an irrational act is revealed as not only rational, but all too human: the president of the defendant corporation was willing to promise plaintiff Katz a lifetime pension if he would retire voluntarily, even though as an at-will employee he could simply have been fired, because Katz was the president’s brother-in-law, and considerations of love, loyalty, and family/marital harmony were collectively stronger than mere efficiency.  

If the plaintiff retirees were to be believed, similar promises were made in *Plowman v. Indian Refining Co.* to a group of senior employees who also could simply have been fired outright. The defendant’s agent offered no explanation, other than possible altruism on the company’s part. In that case, however, a more plausible motive for defendant’s seeming generosity could have been found in the desire to preserve a different kind of harmony: the defendant may have wanted to cut its labor costs while at the same time keeping its remaining work force together and happy until the proposed sale of the company had been accomplished.  

Intra-family tensions also might have been at work in *Ray v. William G. Eurice & Bros.*, a 1952 Maryland case. Defendant construction firm, owned and operated by two brothers, entered into a written contract to build a home for the plaintiffs, a married couple, only to later repudiate that contract angrily and declare unwillingness to perform. Although somewhat complex facts involving several draft versions of the contract enabled the defendant’s officers to plausibly (at least to the trial court) claim that they had actually not intended to sign the particular document in question, a more believable explanation lies in the relative roles of the two brothers. One, John, appears to have handled the business side; the other, Henry, managed the construction process. The latter brother took little or no part in the negotiation of the contract,  

233. *Katz*, 610 S.W.2d at 122–23.  
235. *Id.* at 2.  
236. *See id.*  
237. The promises that defendant Indian Refining made to the plaintiff retirees all required them to come to the plant and pick up their checks at the office, presumably when the other employees would be picking up theirs. *See id.* at 3. Assuming the plaintiffs truly were promised lifetime pensions, the prospect of selling its business could also explain why the defendant was willing to make that part of its promises orally but not in writing.  
238. 93 A.2d 272 (Md. 1952).  
239. *Id.* at 274–75.  
240. *Id.* at 275.  
241. *See id.* at 275–76.
but complained violently about some of its terms once he eventually focused on the details. This shouldn’t change the outcome of the case—the appellate court later reversed the trial court and held the brothers’ firm liable for breach of contract—but it does provide an explanation for otherwise seemingly irrational behavior on Henry’s part.

X. WHAT’S GOING ON HERE? THE WORLD OUTSIDE THE COURTHOUSE

Part of the heritage of Legal Realism is the recognition that law does not exist in a vacuum, that whatever is happening in society is inevitably reflected in the behavior of courts. Real-life cases remind us of that truth in a way that academic hypotheticals are unlikely to do.

The Plowman case, for instance, takes place against the background of the Great Depression of the 1930s. That context may account for the behavior of the defendant employer, trying to keep its business afloat, and points up the predicament of the plaintiff employees, discharged at a time when they were unlikely to find other employment. The social setting is also reflected in the Plowman court’s lengthy discussion of society’s responsibility to provide for the needs of retiring workers, a responsibility that was, at that point, still unmet—Social Security came later.

Another case perhaps reflective of its time and place is Alaska Packers’ Ass’n v. Domenico, the well-known 1902 case involving a dispute between a salmon cannery and the men it had hired to fish for a season in Alaskan waters. The plaintiffs claimed that the defendant had agreed to their demands for an increase in their rate of compensation, following a dispute about working conditions. A trial court found a lack of consideration for the asserted promise, but enforced it anyway; the appellate court agreed as to lack of consideration, but held that fatal to plaintiffs’ claim. Like Plowman, the Alaska Packers’ case was actually decided on the narrow,

242. Id. at 276.
243. Id. at 280.
245. See id. at 5.
246. 117 F. 99 (9th Cir. 1902).
247. See id. at 555.
248. Id.
250. Alaska Packers’ Ass’n, 117 F. at 102–05.
“technical” basis of lack of consideration, but some have seen it as a paradigm example of duress at work.\textsuperscript{251} Others, perhaps more sympathetic to the workers’ side of things, may see it not just as a “contract” case, but as a “strike”—a labor dispute, decided at a time when most courts did not look favorably on the efforts of workers to organize and bargain collectively.\textsuperscript{252}

Other cases arise or are decided against a backdrop of national or even world events, sometimes reflected in the court’s opinion, sometimes not. A dramatic example is the 1949 decision in \textit{Batsakis v. Demotsis},\textsuperscript{253} in which a Texas appellate court enforced a 1942 agreement made between two Greek nationals (written in Greek, and made in Greece).\textsuperscript{254} In that agreement, defendant Eugenia Demotsis promised to repay to plaintiff George Batsakis $2,000 American, with interest, after the end of “the present war” (World War II).\textsuperscript{255} The defendant argued that what she really received from the plaintiff was not in fact 2,000 American dollars but 500,000 Greek drachmae, worth far less.\textsuperscript{256} Although the lower court had substantially reduced the plaintiff’s recovery on the strength of that defense,\textsuperscript{257} the appellate court enforced the entire $2,000 obligation, using the rhetoric of consideration doctrine, which does not require a balanced or “even” exchange.\textsuperscript{258} The court itself never mentions the surrounding circumstances of the case, including the fact that Greece was at the time in the grip of Axis occupation, famine, and runaway inflation. Whether these background facts should matter to the decision is a matter for speculation—duress, fraud, and undue influence are some of the possibilities, depending on one’s assumption of additional facts\textsuperscript{259}—but none of that seems to have occurred to the court.

\textsuperscript{251} E.g., E. Allan Farnsworth, \textit{Contracts} § 4.22, at 273 n.15 (4th ed. 2004) (“particularly outrageous threats”); see also Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 927 (7th Cir. 1983) (Judge Richard Posner stating that a breach of contract may be considered wrongful duress, as exemplified by \textit{Alaska Packers’} case).
\textsuperscript{252} The case is examined in detail in Professor Debora Threedy’s article, \textit{A Fish Story: Alaska Packers’ Ass’n v. Domenico}, 2000 UTAH L. REV. 185, 218–20.
\textsuperscript{253} 226 S.W.2d 673 (Tex. Civ. App. 1949).
\textsuperscript{254} \textit{Id.} at 673–75.
\textsuperscript{255} \textit{Id.} at 673–74.
\textsuperscript{256} \textit{Id.} at 674.
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.} at 675.
\textsuperscript{259} See \textit{Restatement (Second) of Contracts} § 79 cmt. e (1981) (noting that extreme imbalance of a bargain suggests the possible presence of other defects such as mistake, fraud, duress, or under influence).
Our changing sexual mores have often been the focus of litigation, sometimes in disputes involving contract law. In *Odorizzi v. Bloomfield School District*,\(^260\) in 1966, a California appellate court upheld (at least in theory—the decision reversed a judgment for defendant on demurrer\(^261\)) the plaintiff’s attempt to rescind his resignation from an elementary school teaching position.\(^262\) He had been arrested for homosexual conduct (then a criminal offense) and subjected to pressure from the defendant employer that ultimately persuaded him to resign.\(^263\) The appellate court held that the plaintiff’s complaint did allege facts sufficient to amount to undue influence, potentially a basis for rescission, and reversed for trial.\(^264\) Though the court’s opinion has a few examples of the kind of casual sexism about the respective roles of men and women that were typical of the time,\(^265\) on the issue of homosexual conduct, the court seems to transcend completely the homophobic attitudes of the day. It never suggested that if the plaintiff were indeed homosexual, this should somehow disqualify him from the law’s protection. Ironically, however, a decision that most contracts students are taught to regard as a victory for the plaintiff appears to have been a Pyrrhic one at best, benefitting the plaintiff not at all. In fact he never did regain his teaching license, and was unable to return to the classroom (according to investigations conducted by Professor Kellye Testy,\(^266\) the case is one of many whose true facts were very different from those alleged, but since the case was never tried this is not reflected in the legal record.\(^267\)).

On the other hand, the changing social attitudes toward cohabitation outside of marriage have been tested in many cases over the years, and gradually those changes have been reflected in shifts in the courts’ view toward legal issues, such as “palimony.” One example is *Watts v. Watts*,\(^268\) in which a female plaintiff, in 1987, was able to persuade a Wisconsin court to endorse the possibility that, despite the lack of a marital relationship, she might be able to claim a portion of her former

\(^{261}\) Id. at 537.
\(^{262}\) Id. at 538.
\(^{263}\) See id. at 537.
\(^{264}\) Id. at 543.
\(^{265}\) See id. at 541.
\(^{266}\) CHARLES L. KNAPP, ET AL., *supra* note 14, at 7–11.
\(^{268}\) 405 N.W.2d 303 (Wis. 1987).
partner’s wealth on a number of theories—express contract, contract implied in fact, restitution.269 Again, the theoretical arguments in the case take on added weight when they arise from the context of an actual case. Whatever one’s feelings about the public policy of encouraging marriage, it’s hard not to sympathize with a female plaintiff who appears to have been so thoroughly exploited by her partner as was Sue Ann Watts. Ms. Watts, in addition to “cleaning, cooking, laundering, shopping, running errands” and “contribut[ing] personal property” to the relationship, was allowed by Mr. James Watts to “maintain[] the grounds surrounding the parties’ home,” despite the fact that he was the operator of a landscaping business.270 As they say, you can’t make this stuff up.

XI. WHO SAYS SO—AND DOES IT MATTER? THE EVOLUTION OF CONTRACT JUDGING

Finally, one thing that study of judicial opinions can do is to illustrate graphically the differences in judicial style. The differences can be seen in more than just language style, although Justice Cardozo’s flowery and convoluted rhetoric271 is very different from Judge Posner’s direct,
almost conversational tone. It is commonly asserted that there was a shift in contract law over the course of the twentieth century, from a “classical” rule-based approach to a more “modern,” contextual one. This shift can be explored through excerpts from commentators who have discussed this evolutionary process, but it is also instructive to actually compare two opinions that exhibit these contrasting traits.

Thus, in Walker v. Keith, a Kentucky appellate court, reversing the court below, held in 1964, as a matter of law, that a tenant’s lease-renewal option could not be enforced because the parties in the lease had neither specified the amount of the renewal rent nor supplied a formula for its determination. This made it necessary, the court asserted, for it to make an agreement for the parties if the option was to be enforced, and this would be a “paternalistic” task that a court should not have to undertake. The court glosses over the fact that the court below in fact had apparently no difficulty in fixing a “reasonable” rent in the circumstances, and also that the apparent intent of the parties (at least when the lease was agreed to) was to create an “option”—an enforceable right of renewal for the tenant. The appellate court also conveys absolutely no information about—or does it even show any interest in—the use to which the tenant had put the property, the reason why he wanted to renew, or the reason why the landlord wanted to get rid of him. This willingness to decide on the basis of rules alone in an almost fact-free analysis seems in harmony with the “classical” mode of contract decision-making.

272. Here is a sample of Posnerian prose, from the Morin case, supra notes 186–97, addressing the question what standard of “satisfaction” was called for by the parties’ contract:

We have to decide which category the contract between Baystone and Morin belongs in. The particular in which Morin’s aluminum siding was found wanting was its appearance, which may seem quintessentially a matter of “personal aesthetics,” or as the contract put it, “artistic effect.” But it is easy to imagine situations where this would not be so. Suppose the manager of a steel plant rejected a shipment of pig iron because he did not think the pigs had a pretty shape. The reasonable-man standard would be applied even if the contract had an “acceptability shall rest strictly with the Owner” clause, for it would be fantastic to think that the iron supplier would have subjected his contract rights to the whimsy of the buyer’s agent. At the other extreme would be a contract to paint a portrait, the buyer having reserved the right to reject the portrait if it did not satisfy him. Such a buyer wants a portrait that will please him rather than a jury, even a jury of connoisseurs, so the only question would be his good faith in rejecting the portrait.


274. 382 S.W.2d 198 (Ky. 1964).

275. Id. at 205.

276. Id. at 204.
By contrast, in *Nanakuli Paving & Rock Co. v. Shell Oil Co.*,\(^{277}\) the Ninth Circuit Court of Appeals in 1981 gave plaintiff paving company the benefit of a “price protection” usage.\(^{278}\) The decision delayed the impact on plaintiff of a sudden price increase by defendant Shell, its supplier of asphalt paving material, even though the language of the parties’ written agreement ignored or even contradicted the applicability of that usage to the parties’ dealings.\(^{279}\) Having before it evidence of all the circumstances, the appellate court agreed with the court below that the parties must have understood that Shell would respect that usage, as a matter of good faith.\(^{280}\) The contrast in approaches between *Walker* and *Nanakuli* could hardly have been greater. Which approach is preferable? It’s a matter of opinion, but at least the nature of the choice is made clearer by having two actual examples to study.\(^{281}\)

CONCLUSION? NOT REALLY

This brief discussion has had as its aim only to demonstrate some of the ways in which, to me, the “case method” continues to have vitality today, as one means of exploring the body of private law that we call “contract.” However, whether either the case method of teaching or even contract law itself in its present form will survive in the present century is entirely up for grabs. Multiple pressures on law schools may compress not only basic courses but all of legal education into a shorter time frame, and require kinds of skills training that leave little or no time for the luxury of case discussion. And electronic collections of study materials—eclectically assembled from on-line sources, or even self-generated—may shoulder “casebooks” like ours out of the way. Finally, however it may be taught, “contract law” as a court-generated body of principles and rules may disappear entirely into the black box of arbitration. And adhesion “contracts” that have little or nothing to do with true “agreement” may become the way in which private obligations are created and enforced—if those obligations are enforced at all, that is,

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277. 664 F.2d 772 (9th Cir. 1981).
278. *Id.* at 778.
279. The relevant language in the agreement provided the price was to be “Shell’s Posted Price at time of delivery.” *Id.*
280. The court actually upheld the jury’s verdict on either of the alternate grounds submitted, breach of contract (based on evidence of course of dealing and trade usage) and breach of the implied covenant of good faith. *See Nanakuli*, 664 F.2d at 805 (Kennedy, J., concurring).
281. A similar contrast is afforded by another pair of cases discussed earlier, *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933), and *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). *See supra* text accompanying notes 115–20.
since much of present-day “contracting” seems aimed at preventing any enforcement whatsoever against the drafting party.\textsuperscript{282}

This probably sounds curmudgeonly, and indeed it is. Other contributors to this symposium hopefully will take a more, yes, hopeful tone. Clearly a lot of our legal climate is in flux, though, and it’s not easy to be optimistic about our collective ability to deal with this particular kind of climate change. But at least there is a general awareness that change is in the air. \textit{Plus ca change}—well, who knows?

UNILATERAL REORDERING IN THE REEL WORLD

Jake Linford*

INTRODUCTION

Professor Larry Cunningham’s new book, Contracts in the Real World,1 demonstrates that there is much to learn about contract law from a few well-chosen stories. The goal of this Essay is to provide a similar service, relying on stories gleaned from movies and television—contracts in the “reel world,” so to speak—to illustrate and then undermine the traditional stories told about contract formation and modification. We can learn much from the scenes discussed herein about how consumers might be led to think contracts are formed, and perhaps misled about the certainty contracts provide.

Contract law, as it has been classically described, should provide a stable system for the exchange of property between willing parties, a concept often referred to as “private ordering.”2 When stable rules regarding the enforceability of promises made in arm’s length transactions are supported by the state, a framework exists in which parties can have confidence in the deal struck, and plan for the future in accordance with that deal. Unfortunately, this traditional notion of private ordering as a bilateral process is, in many cases, mythological. The reel world—the world of cinema and television—has perpetuated this idea that contracts are negotiated; that there is a give and take that is simply not present in the real world, at least for consumer contracts. Hollywood aside, most contracts are one-sided boilerplate affairs with terms that consumers can take or leave, but not negotiate or change. Furthermore, many of these contracts now include unilateral reordering

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clauses that empower the drafter to change the terms as it sees fit. 3

This boilerplate world is not all bad. Some sellers transact with hundreds of thousands of consumers—if not millions—in a given year. Thus, there are situations when it is most efficient to allow sellers to use fixed terms, which provide for uniform transactions. In addition, fixed terms that limit liability or otherwise reduce costs may result in savings that can be passed on to consumers. 4 Nevertheless, there is something particularly troubling—and I argue inefficient—about a deal that continually changes.

Part I sets the stage by briefly describing how the representations of contracting in the reel world generally perpetuate a classical concept of contract formation. Part II explains some of the differences between perception and reality, particularly when it comes to boilerplate terms festooned with unilateral reordering clauses, and offers different archetypes from the reel world that better reflect modern contract formation and modification. Part III questions the efficiency rationale underlying apologies for boilerplate, explains how that rationale is even weaker when used to justify the enforceability of unilateral reordering clauses, and proposes solutions stemming from that analysis.

I. THE CLASSICAL NOTION OF CONTRACT NEGOTIATION AND MODIFICATION

Negotiation: the essence of capitalism!
—Jack Donaghy, 30 Rock. 5

Contract law, in its classic form, is founded on the concept of a bargained-for exchange. This classic conception of bargains struck at arm’s length by parties wringing concessions from one another also led to a static notion of the contract, one that cannot be modified unless the party seeking the change gives something in exchange. Many representations of negotiation in the reel world dovetail with this classic conception of contract law.

3. In light of the use of unilateral reordering provisions, Curtis Bridgeman and Karen Sandrik conclude that many promises made by sellers to consumers are “bullshit promises,” allowing the seller to take advantage of promissory language without being subject to sanctions for changing its mind. See generally Curtis Bridgeman & Karen Sandrik, Bullshit Promises, 76 TENN. L. REV. 379 (2009).

4. See infra Part III.

A. Representations of Negotiation in the Reel World

When consumers think about contract negotiations, they might imagine something like the following scene from *Network*, a satirical film about television networks, in which the titular network is trying to negotiate a deal with a band of radical terrorists (modeled on the Symbionese Liberation Army) to co-host a program called the *Mao-Tse Tung Hour.* Laureen Hobbs is a self-described “bad-ass commie” trying to control how big a cut the terrorists can take of the program, including sublicensing fees and distribution costs. Helen Miggs and Willie Stein represent the network. The Great Ahmed Khan leads the terrorist group, and Mary Ann Gifford is one of his most ardent devotees. As the narrator intones, the parties endeavor to work through “the usual contractual difficulties”:

Helen Miggs: *[flipping through her copy of the contract]* Have we settled that sub-licensing thing? We want a clear definition here. Gross proceeds should consist of all funds the sublicensee receives, not merely the net amount remitted after payment to sublicensee or distributor.

Willie Stein: We’re not sitting still for overhead charges as a cost prior to distribution.

Laureen Hobbs: Don’t fuck with my distribution costs! I’m getting a lousy two-fifteen per segment, and I’m already deficiting twenty-five grand a week with Metro. I’m paying William Morris ten percent off the top! And I’m giving this turkey *[indicates Khan]* ten thou a segment, and another five for this fruitcake *[indicates Gifford]*. And, Helen, don’t start no shit with me about a piece again! I’m paying Metro twenty percent of all foreign and Canadian distribution, and that’s after recoupment! The Communist Party’s not going to see a nickel out of this goddamn show until we go into syndication!

Miggs: Come on, Laureen, you’ve got the party in there for seventy-five hundred a week production expenses.

Hobbs: I’m not giving this pseudo-insurrectionary sectarian a piece of my show! I’m not giving him script approval! And I sure as shit ain’t cutting him in on my distribution charges.

Mary Ann Gifford: *[screaming]* You fuckin’ fascist! Have you

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seen the movies we took at the San Marino jail break-out, demonstrating the rising up of a seminal prisoner-class infrastructure?

**Hobbs:** You can blow the seminal prisoner-class infrastructure out your ass! I’m not knocking down my goddamn distribution charges!

*[The Great Ahmed Khan fires a pistol into the air.]*

**Khan:** Man, give her the fucking overhead clause! Let’s get back to page twenty-two, number 5, small ‘a’. “Subsidiary rights.”

In the *Network* excerpt, parties hold hard lines, drive hard bargains, use colorful language, and find dramatic ways to punctuate points. Savvy businessmen and experienced lawyers roll up their sleeves and go to work until the deal is done. One can imagine nights full of give and take, crafting the dickered terms to ensure that the parties get a deal that each side can live with, if not love. But each party can be understood to get something from the other party—and likely give something up as well.

There may have been a point in history when this was the typical manner in which contracts were formed, but those days are long past. Most contracts entered into by consumers are one-sided affairs, often called “contracts of adhesion,” due in part to the stickiness, or inescapability, of the terms. The terms within are often referred to as “boilerplate,” because they cannot be changed or negotiated. And when a consumer tries to understand a modern contract, laden with boilerplate terms, she might imagine the scene from *A Night at the Opera*, where characters played by Groucho and Chico Marx simply tear from the page those terms they do not understand:

**Driftwood:** All right. It says the, uh, “The first part of the party

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8. AT&T Mobility LLC v. Concepcion, __U.S. __, 131 S.Ct. 1740, 1750 (2011) (“[T]he times in which consumer contracts were anything other than adhesive are long past.”) (citation omitted).


10. As Professor Radin has noted:

The term [boilerplate] dates back to the early 1900s and refers to the thick, tough steel sheets used to build steam boilers. From the 1890s onward, printing plates of text for widespread reproduction, such as advertisements or syndicated columns, were cast or stamped in steel . . . . Some companies also sent out press releases as boilerplate so that they had to be printed as written.

**Radin,** supra note 2, at xvi n.* (quoting Wikipedia).

of the first part shall be known in this contract as the first part of
the party of the first part shall be known in this contract”—look,
why should we quarrel about a thing like this? We’ll take it right
out, eh?

Fiorello: Yeah, it’s too long, anyhow. [Both tear off the top part
of their respective contracts] Now, what do we got left?

Driftwood: Well, I got about a foot and a half. Now, it says, uh,
“The party of the second part shall be known in this contract as
the party of the second part.”

Fiorello: Well, I don’t know about that . . . .

Driftwood: Now what’s the matter?

Fiorello: I no like the second party, either.

Driftwood: Well, you should’ve come to the first party. We
didn’t get home ‘til around four in the morning . . . I was blind
for three days!

Fiorello: Hey, look, why can’t the first part of the second party
be the second part of the first party? Then you got something.

Driftwood: Well, look, uh, rather than go through all that again,
what do you say?

Fiorello: Fine. [They rip out another portion of the contract]¹²

Of course, there are times when a consumer reads a contract, even in
light of some potentially problematic terms, and signs it anyway. For
example, in The Hobbit: An Unexpected Journey,¹³ Bilbo Baggins, the
titular hobbit, is presented with a lengthy contract identifying the terms
under which he is to provide services as a burglar. Bilbo takes the time
to read, and eventually sign the contract, even though it includes some
potentially troubling clauses: ¹⁴

¹² Id.
¹³ THE HOBBIT: AN UNEXPECTED JOURNEY (New Line Cinema, Metro-Goldwyn-Mayer
Pictures & WingNut Films 2012).
¹⁴ The contract also included a unilateral reordering clause: “I, the undersigned, [referred to
hereinafter as Burglar,] agree to travel to the Lonely Mountain, path to be determined by Thorin
Oakenshield, who has a right to alter the course of the journey at his so choosing, without prior
notification and/or liability for accident or injury incurred.” See James Daily, Read a Lawyer’s
PM), http://www.wired.com/underwire/2013/01/hobbit-contract-legal-analysis/. For those
unfamiliar with The Hobbit, Thorin Oakenshield is the leader of the dwarves that employ Bilbo
Baggins.
Bilbo: [reading aloud] The present company shall not be liable for injuries inflicted by or sustained as a consequence thereof, including, but not limited to . . . lacerations . . . evisceration . . . incineration?15

Both Bilbo’s decision to read a contract from start to finish, and the hard bargaining in a movie like Network, are consistent with a traditional view of contract formation: parties dicker at arm’s length, carefully negotiating terms. Under that traditional view, each party gains some ground and makes some concessions, and each party enters the contract fully informed about the obligations they have undertaken.

As the excerpts discussed above also demonstrate, the reel world teaches us that it matters whether things are written down. The parties in Network were hard at work amending the same type of densely written contractual language through which Bilbo waded so persistently. But the certainty of a written contract can be deceptive. There is a perception that contract formalities and contract language can trip up the unwary. In It’s the Great Pumpkin, Charlie Brown,16 the tripping—or at least the subsequent fall—is portrayed literally.

You may remember the scene where Lucy tries to entice Charlie Brown to kick a football she is holding. He is wise to her, and refuses . . . at first:

Charlie Brown: You just want me to come running up to kick that ball so you can pull it away and see me land flat on my back and kill myself.

Lucy: This time you can trust me. See? Here’s a signed document testifying that I promise not to pull it away.

Charlie Brown: It is signed. It’s a signed document. I guess if you have a signed document in your possession, you can’t go wrong. This year, I’m really going to kick that football. [Charlie Brown runs toward the football, which Lucy pulls away at the last second] Aaaaah! [The document goes flying as Charlie Brown lands flat on his back]

Lucy: [catching the document as it flutters to earth] Peculiar thing about this document. It was never notarized.17

The lesson here is two-fold: First, you can go wrong, even with a signed document in your possession. Second, even a signed document

15. THE HOBBIT: AN UNEXPECTED JOURNEY, supra note 13.


17. Id.
may not be as enforceable as it appears. While formalities like notarization are not required to make a contract enforceable (indeed, an oral contract is enforceable in most circumstances), there is something comforting about the formalities. With Lucy’s deception of the hapless Charlie Brown as the deviant outlier, these scenes from the reel world portray parties committed to getting contract terms right, or at least understanding them, with the idea that they would be bound to meet the terms or pay the consequences once the deal was finalized.

Those who have survived a first-year course in contract law know that there was a time when a formalized, written document bearing a wax seal was the sine qua non of enforceability. Seals were helpful as a formality because they performed three key functions. The seal was formal evidence that the contract exists, or was formed. Heating wax to apply the seal to a document performed a cautionary function, requiring the parties to slow down, at least for a moment, and consider whether they truly wanted to make the commitments embodied in the sealed document. Finally, the document under seal channels the attention of the courts and parties after the fact. Those commitments made under seal were thus commitments the parties likely intended a court to enforce.

The power of a seal as a formality was diluted over time, and courts replaced it with the formality of consideration, also known as a bargained-for exchange. Contracts are thus enforceable, consistent with the doctrine of consideration, when the parties have each agreed to the exchange, with each either giving something up or promising something to the other party. Thinking back to the example from Network, one can imagine, if not for lack of time, there would be multiple examples in the film of the terrorist organization receiving concessions as well as making them. In the same vein, the problem with Lucy’s promise to Charlie Brown was not that it lacked notarization, but that it lacked

18. But see Cunningham, supra note 1, at 141–47 (describing cases dealing with the statute of frauds and the types of contracts that require a writing).
19. Id. at 12–13, 34, 219 n.4.
20. Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800–01 (1941).
21. Id.
22. Id.
23. Id. at 801 (“[F]orm offers . . . [are] channels for the legally effective expression of intention.”).
24. See, e.g., Hartford-Connecticut Trust Co. v. Divine, 116 A. 239 (Conn. 1922) (citing 1 Swift’s Dig. 174 (1822 ed.)).
25. See Cunningham, supra note 1, at 13; Fuller, supra note 20, at 814–15.
Consideration is primarily at issue when a contract is initially formed, and like the formality of the seal, the formality of consideration ostensibly performs similar evidentiary, cautionary, and channeling functions. In a world where bargained-for exchange is the norm, one expects every contract to be formed in an arm’s length negotiation, and parties to stick to the deal negotiated. Thus, unsurprisingly, consideration was seen as an important signal to aid in determining whether a subsequent agreement to modify a contract was also enforceable.

B. Classic Contract Modification in the Real World

As discussed above, contracts are generally enforceable when there is consideration—mutual benefits received or given by each party. Contracts can also be modified when the need presents itself. For that modification to be enforceable, however, courts historically looked for fresh consideration to support the new terms requested by the party seeking the modification. In other words, the party subject to the modified deal should get something in the exchange. Without such consideration, the newly modified terms were held unenforceable.

Some of the earliest attempts to fix the boundaries of contract modification are found in two English cases decided at the turn of the nineteenth century: Harris v. Watson, and Stilk v. Myrick. Harris and Stilk both dealt with promises made to sailors that the court found unenforceable. In both cases, the captain of a ship agreed to pay extra wages to sailors in different exigent circumstances. In Harris, a sailing ship encountered trouble at sea, and the captain, Watson, promised to

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26. There are some general exceptions to the consideration requirement, like the possibility of a contract formed due to the reasonable reliance of one party on otherwise unenforceable promises by the other. See, e.g., Cunningham, supra note 1, at 7, 16. Perhaps one could find that poor Chuck relied to his detriment on Lucy’s promise in a way that makes the promise enforceable. Given their history, however, it is hard to characterize that reliance as reasonable.

27. See Fuller, supra note 20, at 800; cf. Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,” 100 Colum. L. Rev. 94, 103–04 (2000).

28. See, e.g., Thurston v. Ludwig, 6 Ohio St. 1, 9 (Ohio 1856) (“[A] verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration.”).

29. (1791) 170 Eng. Rep. 94 (N.P.); 1 P.N.P. 102.

30. (1809) 170 Eng. Rep. 851 (N.P.); 6 Esp. 129–30. As discussed, below, two different reports provided significantly different takes on the rationale supporting the decision in Stilk. See infra notes 38–39 and accompanying text.
pay five guineas extra if Harris should take on additional navigating duties. 31 When the ship arrived safely, Harris was not given his extra pay. 32 Lord Kenyon nonsuited Harris, invoking a maritime policy against paying extra wages promised in such exigent circumstances. 33 Lord Kenyon expressed concern that sailors would “in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.” 34

Leaving aside the believability of a sailor willing to go down with the ship, rather than do a bit of extra work without extra pay, one can understand the policy intuitions here. Economic growth in Great Britain in the eighteenth century depended in large part on transoceanic commerce. 35 Honoring contracts renegotiated in dangerous circumstances could encourage negotiating in dangerous circumstances, and drive up prices for shipped goods, whether or not more ships were lost at sea as a result of contract disputes gone wrong. There is also some reason to suppose a captain in such difficult situations might literally say anything to save his life and his ship, and that contract modifications entered into in such a circumstance could not be entered into intentionally or consensually.

In Stilk v. Myrick, 36 two sailors abandoned their ship at the midpoint in a voyage to Russia. The captain tried and failed to hire two new crewmen, so he promised to divide their wages among the remaining men to limp the ship back to London. 37 Stilk was thus distinguishable from Harris on policy grounds, although Lord Ellenborough did not so distinguish it. 38 In the more complete of two reports, John Campbell recounts that Lord Ellenborough based the decision to nonsuit the sailors’ claim on a lack of consideration between captain and crew for

32. See id.
33. Id. (citing Hernaman v. Bawden, (1766) 97 Eng. Rep. 1129 (N.P.), 3 Burr. 1844 (holding that until the ship’s cargo was delivered, wages were not due the sailors, leaving sailors to bear the risk of loss of cargo); Abernethy v. Landale, (1780) 99 Eng. Rep. 342 (N.P.), 2 Doug. 539 (same, even though the plaintiff was not on the ship at the time of capture)); see also GRANT GILMORE, THE DEATH OF CONTRACT 27–28 (1974).
34. Harris, 170 Eng. Rep. at 94.
37. Id.
38. In a report by Isaac Espinasse, id. at 128, Lord Ellenborough is portrayed as persuaded that Lord Kenyon’s policy analysis in Harris was equally applicable to the case of Stilk. This is somewhat hard to follow, as there was not the same state of emergency in Stilk as in Harris, although the captain of the ship in Stilk was admittedly in a tight spot.
the modification to the deal.39

In Stilk, consideration was used not to cabin the initial formation of a contract, but to determine whether or not a subsequent modification to the contract was enforceable. We also see in Harris, expressly, and Stilk, less forcefully, stirrings of a general concept of duress.

The more modern case of Alaska Packers’ Association v. Domenico40 raises some of the same concerns. In Alaska Packers, fishermen hired in San Francisco threatened, on arrival in Alaska, not to fish during the salmon spawning season unless they were paid extra wages. The employer acquiesced, as the hold-out jeopardized its salmon packing venture for the entire year. The Ninth Circuit held that the modification was unenforceable, because the work the fishermen promised to do was within the scope of the initial contract.41 The same principle has applied in cases where an architect refused to perform until he received a cut of a competitor’s deal with the client,42 and when a supplier refused to provide promised components for radar equipment to a naval contractor unless the contractor paid extra and used the supplier for its next contract with the Navy.43 While there are exceptions to this relatively broad understanding about the insufficiency of pre-existing duties to provide consideration for modifications,44 courts continue to invoke the principle,45 to the dismay of some scholars.46 This classical notion of contract formation and modification has nevertheless shifted to a considerable extent, as we consider in the next Part.

40. Alaska Packers’ Ass’n v. Domenico, 117 F. 99, 103 (9th Cir. 1902); CUNNINGHAM, supra note 1, at 161–62.
41. Alaska Packers’ Ass’n, 117 F. at 102 (“Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the [fishermen’s] agreement to render the exact services, and none other, that they were already under contract to render.”).
42. As noted in Lingenfelder v. Wainwright Brewing Co.: “[W]hen a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum [a bare, unenforceable promise], and will not lend its process to aid in the wrong.
15 S.W. 844, 848 (Mo. 1890).
44. For example, courts have held that the discovery of unforeseen conditions can justify an enforceable modification, so long as neither party could have anticipated the condition and the payor agreed to provide extra compensation for the payee’s “extra” work. See, e.g., Brian Constr. & Dev. Co. v. Brighetti, 176 Conn. 162, 405 A.2d 72 (1978); CUNNINGHAM, supra note 1, at 160.
II. UNILATERAL REORDERING IN THE 21ST CENTURY

The classical notion of contract law, and representations thereof from the reel world, suggest that deals are negotiated, as are modifications. This notion that parties are empowered to negotiate contracts fits with other traditional concepts of the common law, such as the notion that failure to read a contract one has signed is no defense against the enforceability of the contract. That particular notion—about the importance of reading contracts—opened the door to a new concept of contract formation: contracts that could be enforceable without negotiation, even if consumers fail to read the terms at the time of formation. Sellers (and sophisticated buyers) began to ply contracting partners with boilerplate agreements, the terms of which are often unalterable, acontextual, and infrequently read.

As an end result, most consumer contracts are non-negotiable. Terms may be accepted or rejected, but not shaped by the buyer. There may be consideration, but it is not bargained for. Consumer contracts governed by boilerplate terms have become the norm. More recently, this brave new world of boilerplate terms features a particularly pernicious specimen: the unilateral reordering clause, which purports to empower the seller to change the terms at any time, for any reason.

The movie excerpts described in Part I are thus more fiction than fact for a majority of American consumers. In this Part, we consider two other archetypes. The first comes from the fifth installment of George Lucas’s Star Wars space opera, The Empire Strikes Back.

In The Empire Strikes Back, a handful of heroes—the smuggler Han Solo; his sidekick, the Wookie Chewbacca; Princess Leia Organa; and the droid C-3PO—have sought aid from Lando Calrissian, one of Han’s old acquaintances. Lando is the administrator of a quasi-legal mining operation. What Han and the others realize too late is that Lando has

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47. As one court noted:

To permit a party when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.

Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989).

48. See infra notes 54–57 and accompanying text.

49. STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm 1980).

50. In one scene, Lando describes his tenuous position:

Lando: So you see, since we’re a small operation, we don’t fall into the, uh, jurisdiction of the Empire.

Leia: So you’re part of the Mining Guild, then?

Lando: No, not actually. Our operation is small enough not to be noticed. Which is advantageous for everybody since our customers are anxious to avoid attracting attention to
already struck a deal, betraying them to Darth Vader, heavy for the Galactic Empire and the ostensible villain of the piece. As Lando characterizes it just before the big reveal, the deal with Vader is designed to “keep the Empire out of here forever.”  

The initial negotiation is not fleshed out on screen, but viewers might reasonably imagine that Vader, as the number two man in the galactic Empire, used considerable bargaining power to secure certain concessions from Lando. Nevertheless, one could also imagine a dickered, if somewhat lopsided, bargain, upon which Lando might reasonably expect to rely. The viewer learns the rough outline of the deal as it changes over the last act of the film. First, Lando watches as Vader grants the bounty hunter, Boba Fett, permission to cart Han off to intergalactic mobster, Jabba the Hutt. Vader then informs Lando that Leia and Chewbacca “must never again leave this city.”

\begin{quote}
Lando: That was never a condition of our agreement, nor was giving Han to this bounty hunter!
\end{quote}

\begin{quote}
Vader: Perhaps you think you’re being treated unfairly?
\end{quote}

\begin{quote}
Lando: \textit{[pauses, then nervously]} No.
\end{quote}

\begin{quote}
Vader: Good. It would be unfortunate if I had to leave a garrison here. \textit{[Vader exits]}
\end{quote}

\begin{quote}
Lando: \textit{[to himself]} This deal is getting worse all the time!  
\end{quote}

Unfortunately for Lando, Vader is not yet finished reordering the deal. After Vader tests a carbon freezing unit on Han, and transfers the enslabbed smuggler to Boba Fett, he turns to Lando:

\begin{quote}
Vader: Calrissian, take the princess and the Wookie to my ship.
\end{quote}

\begin{quote}
Lando: You said they’d be left in this city under my supervision!
\end{quote}

\begin{quote}
Vader: I am altering the deal. Pray I don’t alter it any further.  
\end{quote}

\begin{quote}
\textit{Han}: Aren’t you afraid the Empire’s going to find out about this little operation, shut you down?
\end{quote}

\begin{quote}
\textit{Lando}: It’s always been a danger that looms like a shadow over everything we’ve built here . . .
\end{quote}

\begin{quote}
\textit{Id.}
\begin{quote}
51. \textit{Id.}
\begin{quote}
52. \textit{Id.}
\end{quote}
\end{quote}
\end{quote}

\begin{quote}
53. \textit{Id.} The comedy program \textit{Robot Chicken} spliced the two scenes to create the following running gag:
\end{quote}

\begin{quote}
\textit{Darth Vader}: Leia and the Wookie must never again leave this city.
\end{quote}

\begin{quote}
\textit{Lando Calrissian}: That was never a condition of our arrangement, nor was giving Han to this bounty hunter.
\begin{quote}
\textit{Vader}: I have altered the deal. Pray I don’t alter it any further. \textit{[Vader exits]}
\end{quote}
\end{quote}
While one is left to imagine exact details, it is clear enough that Lando thought he had a better deal when it was first formed. Lando’s indignation—assuming it is not feigned—suggests that he understood the concessions Vader secured from him in the initial negotiation were the only concessions required to keep his mining colony free of Imperial entanglements.

These scenes from The Empire Strikes Back, while not directly about contract negotiation, match modern reality far better than those scenes presented in Part I. Take for instance the typical credit card agreement. The card provider typically claims authority pursuant to a unilateral reordering clause to change the deal as it sees fit after the fact. For example, in one dispute between Sears and customers who used a Sears credit card, the court upheld a change in a credit card policy for which the provider did not directly negotiate. The initial terms agreed to by consumers included a “Change of Terms” provision which claimed that Sears “has the right to change any term or part of this agreement, including the rate of Finance Charge, applicable to current and future balances.”

Lando: [to self] This deal’s getting worse all the time. [Vader enters]
Vader: Furthermore, I wish you to wear this dress and bonnet. [Presents dress and bonnet to Lando]
Lando: This was never a condition of our arrangement.
Vader: [interrupts] I have altered the deal. Pray I don’t alter it any further. [Vader exits]
Lando: [to self] This deal’s getting worse all the time. [Vader enters]
Vader: Here is a unicycle. You will ride it wherever you go. [Presents unicycle to Lando]
Lando: What? I’m not riding no [bleep]-ing unicycle. [Throws unicycle to the floor]
Vader: I have altered the deal. Pray I don’t alter it any further. [Vader exits]
Lando: [to self, aggravated] This deal is getting worse all the time. [Vader enters]
Vader: Also, you are to wear these clown shoes, and refer to yourself as “Mary.” [Presents clown shoes to Lando]
Lando: [throws clown shoe] Oh, [shoe squeaks] you, man! I’m not doing it!
Vader: I have altered the deal. Pray I don’t alter it any further. [Vader exits]
Lando: [to self] This deal . . . [pauses and looks around] is very fair and I’m happy to be a part of it. [Listens for Vader’s entrance. When Vader does not enter, Lando scoops up the dress, unicycle, and shoes, and exits screen left.]

54. One could instead read these scenes as highlighting the high cost of dealing with a corrupt government, or the lengths to which a businessman will go to circumvent government regulation. Ilya Somin, for example, has argued that this dialogue highlights the importance of the Contracts Clause of the Constitution. Ilya Somin, Darth Vader and the Contracts Clause, THE VOLOKH CONSPIRACY (Oct. 14, 2012, 11:50 AM), http://www.volokh.com/2012/10/14/darth-vader-and-the-contracts-clause/.


56. Id. at 888. This Essay uses the term “unilateral reordering clause” instead of “change of terms clause” because there are cases where parties negotiate a change in the terms of a contract at arm’s length, and those changes can be recorded in a “Change of Terms Agreement.” See, e.g., Cranberry
clause. That soon changed. Sears sent out a letter to inform consumers of the new terms. While the cover letter did not flag particular changes, a copy of the new terms included an arbitration clause, requiring “[a]ny and all claims . . . be resolved . . . by final and binding arbitration before a single arbitrator.”\(^57\) The court enforced the new agreement, even though the consumers had not expressly agreed to it, and even though the services delivered by the credit card provider had not changed.\(^58\) In other words, the changes were enforced even though there was no bargaining and no consideration for the modification.

There are cases in which new terms added to a credit card agreement have been held unenforceable because the agreement is “unconscionable”—grossly one-sided both procedurally and substantively.\(^59\) In many other cases, courts have upheld unilateral amendments made pursuant to unilateral reordering provisions in the original agreements against a claim of unconscionability because consumers have a right to opt out of the deal—\(i.e.,\) to immediately stop using the credit card rather than accept the change.\(^60\) The decision to keep using the card,\(^62\) or even the failure to cancel the credit card,\(^63\) has been taken as evidence of the consumer’s consent to the new terms. In \textit{The Empire Strikes Back}, Lord Vader provided an opt-out of a sort to

\(^57\) Hutcherson, 793 N.E.2d at 889.

\(^58\) Id. at 900.

\(^59\) See, e.g., Davis v. Chase Bank USA, N.A., 299 F. App’x 662, 663 (9th Cir. 2008).

\(^60\) See, e.g., Joseph v. M.B.N.A. Am. Bank, N.A., 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (holding that an amendment to a credit card agreement adding an arbitration provision was not unconscionable because plaintiff was given the right to opt out by terminating the agreement and the arbitration provision was not so one-sided as to be per se unconscionable); Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000) \textit{aff’d sub nom.} Herrington v. Union Planters Bank, 265 F.3d 1059 (5th Cir. 2001) (noting that consumers dissatisfied with a new arbitration clause “could have simply declined to accept the arbitration provision by terminating their account before the effective date of the amendment.”).

\(^61\) Hutcherson, 793 N.E.2d at 888. Some card providers do not require such an immediate decision. See, e.g., Citibank (South Dakota), N.A. v. Walker, No. A117770, 2008 WL 4175125, at *5–6 (Cal. Ct. App. September 11, 2008) (holding an arbitration waiver was not unconscionable where consumers could refuse the new arbitration clause and continue using the card until its expiration).

\(^62\) Perry v. FleetBoston Fin. Corp., No. Civ.A.04–507, 2004 WL 1508518, at *5 (E.D. Pa. July 6, 2004) (denying enforcement of a new arbitration term on the ground that it was not contemplated in the original agreement, but noting that, “[i]f Plaintiffs had used their credit cards, they would have manifested their assent to the new term, and the change would no longer be unilateral.”).

\(^63\) Boomer v. AT&T Corp., 309 F.3d 404, 424 (7th Cir. 2002) (“Boomer accepted this offer by continuing to use AT&T’s services, and therefore the CSA constitutes a contract.”).
Lando Calrissian, inviting him to modify the contract if he thought he was “being treated unfairly” and suggesting as part of the price of “opting out,” that Vader might have to leave a garrison of troops at the mining colony.64

Unilateral reordering clauses are not upheld in every case. For example, one recent case was decided in favor of the consumer on appeal, but also poses a puzzle. In Douglas v. United States District Court,65 Talk America, a cellphone provider, attempted to enforce an arbitration clause that it unilaterally added to its terms of service. Talk America had not directly notified customers about the change, but posted the modified terms on its website. The Ninth Circuit granted a writ of mandamus, vacating the district court’s decision compelling arbitration.66 While the district court apparently assumed that Douglas must have visited Talk America’s website because he paid his bill online, the Ninth Circuit recognized that Douglas “would have had no reason to look at the contract posted there.”67 Furthermore, the court reasoned that Douglas was under no obligation to check for new terms, and had no way of knowing when to check for them.68 While the court recognized that assent can be implied in certain cases,69 it concluded that “such assent can only be inferred after [the consumer] received proper notice of the proposed changes.”70 Thus, the new terms were not enforceable.71

Douglas is a puzzle not for its holding, but for seller behavior in its

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64. For reasons discussed below, courts likely overvalue the protection that an opt-out provides consumers. See infra notes 118–19 and accompanying text.
66. A writ of mandamus was necessary because the Federal Arbitration Act, 9 U.S.C. § 16 (2012), does not allow interlocutory appeals of a district court order compelling arbitration.
67. Douglas, 495 F.3d at 1066.
68. Id.
70. Douglas, 495 F.3d at 1066.
71. The court in Douglas also noted the stringent unconscionability standards applied in California to arbitration clauses. Those standards may no longer be good law. To the extent that cases like Douglas are tied to the notable resistance of California state courts to unilateral shifts to arbitration, it is unclear whether those standards would survive direct scrutiny from the Supreme Court, particularly in light of its recent opinions broadening the reach of the Federal Arbitration Act. See Am. Express Co. v. Italian Colors Rest., ___ U.S. ___, 133 S. Ct. 594 (2013); AT&T Mobility LLC v. Concepcion, ___ U.S. ___, 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempted a state law barring enforcement of a class-arbitration waiver); see also Lawrence A. Cunningham, Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts, 75 LAW & CONTEMP. PROBS. 129 (2012).
aftermath. To date, no court has held that changes posted only to a website provide sufficient notice to consumers. Nevertheless, post-

Douglas, firms still include unilateral reordering clauses that promise nothing more than posting the new terms to a website. For example, the terms of service for cloud computing service Box.com claim the right to change the terms at any point, promising only to notify consumers “via the [Box.com] Service and/or by email,” and only if the company decides that the modification is “material.” As non-material changes could be posted to the www.box.com website or “related Box blogs,” customers are “encourage[d]” to “check the date of these Terms whenever [they] visit the Site to see if these Terms have been updated.”

Box.com is not the only company that persists in claiming that it can enforce new terms without providing direct notice to consumers. It is unclear why. Perhaps companies like Box.com have not processed the Ninth Circuit’s decision in Douglas, or think that it will not be followed in other circuits or state courts. Perhaps they have decided to provide notice of any terms they hope to enforce, and are merely reserving a right that they will not attempt to exercise. Perhaps firms are becoming savvier about how to draft unilateral reordering clauses and how to frame consumer obligations. Firms might instead hope that encouraging

72. Courts have upheld forum selection clauses in contracts between Google and users of its email services, because “Google requires all users, after seeing a screen listing the terms or a link to the terms, to agree to the terms of use before creating an email account.” Rudgayzer v. Google Inc., No. 13 CV 120(ILG)(RER), 2013 WL 6057988, *5 (E.D.N.Y. Nov. 15, 2013). The court in Rudgayzer suggested that a unilateral reordering clause in the contract was enforceable, without discussing how consumers were put on notice of the change. Id. at *2 n.1.


74. Id.

75. Google Terms of Service, GOOGLE.COM, http://www.google.com/intl/en/policies/terms/ (last modified Mar. 1, 2012) (“We may modify these terms or any additional terms that apply to a Service to, for example, reflect changes to the law or changes to our Services. You should look at the terms regularly. We’ll post notice of modifications to these terms on this page.”). Instagram’s terms of use instead:

Reserve the right, in our sole discretion, to change these Terms of Use (“Updated Terms”) from time to time. Unless we make a change for legal or administrative reasons, we will provide reasonable advance notice before the Updated Terms become effective. You agree that we may notify you of the Updated Terms by posting them on the Service, and that your use of the Service after the effective date of the Updated Terms (or engaging in such other conduct as we may reasonably specify) constitutes your agreement to the Updated Terms. Therefore, you should review these Terms of Use and any Updated Terms before using the Service.


76. To date, none of the other circuits have cited the case in a reported opinion.
consumers to regularly check the website will convince courts that indirect notice is nevertheless sufficient notice. And perhaps companies take comfort in the fact that many courts and state legislatures seem more interested in policing the behavior of consumers than the behavior of credit card companies.

Considering the behavior of firms like Box.com, the contract-driven reel world interaction most representative of real world reordering played out in a recent episode of *South Park*. The conceit of the episode is that one of the characters, an elementary student named Kyle, never reads the updated terms governing his Apple products. In the process of clicking “yes” to an update, Kyle inadvertently agreed to undergo a medical experiment. He discovers his error when three “business casual G-Men” from Apple show up at a local restaurant to collect him:

**Apple Man 1:** There he is! [The men approach him] Hello Kyle, we’re from Apple. We’re all ready for you now. [A second man sets a scale on the floor]

**Kyle:** What? Ready for what?

**Apple Man 1:** To fulfill the agreement. Can we get a weight please? [The third man puts Kyle on the scale]

**Apple Man 2:** 83 pounds, sir.

**Kyle:** What “agreement”?! 83 pounds, good. Let’s get the blood work.

**Apple Man 1:** 83 pounds, good. Let’s get the blood work.

**Kyle:** Hey! You can’t do that! [The second man pulls out a tape measure to measure the circumference of Kyle’s head, while the third man produces a syringe and prepares to take Kyle’s blood]

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77. See supra note 74 and accompanying text.


80. *South Park: HUMANCENTiPAD*, supra note 79. Decency requires sparing the reader further details about the procedure to which Kyle unwittingly subjected himself.
Apple Man 1: You agreed we could take all the blood we needed.

Kyle: What are you talking about?!

Apple Man 1: When you downloaded the last iTunes update, a window on your screen popped up and asked you if you agreed to our terms and conditions. You clicked “Agree.” Alright, let’s get him to the water tank.

Kyle: The water tank? [Steps off the scale and away from the men] Hey, I’m not going with you!

Apple Man 1: You’ve agreed to all of this! [Kyle runs out of the restaurant] Hey!81

Moments later, Kyle seeks help from his friends, who are incredulous that he never reads the terms and conditions:

Kyle: You gotta help me. These business casual G-men are trying to kidnap me!

Stan: What?

Kyle: It’s crazy, dude! They’re saying it’s because I agreed to the latest terms and conditions on iTunes!

Stan: Why? What did the terms and conditions for the last update say?

Kyle: I don’t know, I didn’t read them!

Butters: You didn’t read them?

Kyle: Who the hell reads that entire thing every time it pops up?

Stan: [earnestly] I do.

Clyde: Me too.

Kyle: You’re telling me that every time you guys download an update for iTunes, you read the entire terms and conditions?

Jimmy: Of course.

Butters: Well, how do you know if you agree to something if you don’t read it?82

There is a level at which the satirists behind South Park are taking a dig at those who suggest consumers are overburdened and should not be required to read every online agreement to which they ostensibly agree.83 As one of the boys asks, “[h]ow do you know if you agree to

81. Id.
82. Id.
something if you don’t read it?” But even if we assume the average consumer has the capacity to understand the terms of every boilerplate contract, she would be hard-pressed to actually read them. Consider a recent study measuring the privacy policies posted on websites visited by the public (which are ostensibly enforceable from the moment the visitor logs on to the website). The study determined that the typical privacy policy on the typical site would take ten minutes to read, and the average American visits approximately 1,462 sites a year. Thus, the average consumer would need to spend thirty eight-hour days a year—a full month—reading privacy policies. The authors estimated the national opportunity costs of reading online privacy policies could reach $781 billion. That time estimate does not take into account changes to website terms. If every website changed policies once a year, that could double the time required.

It seems rather unlikely that a court would enforce a term in an iTunes update that allowed Apple to conduct a medical experiment on its customers. Reason might suggest that unilateral modification of iTunes contracts should be limited to things one might expect from iTunes, like data mining consumers’ music preferences, advertising new MP3s based on music they have purchased, or making prospective changes to pricing structures. For example, in Badie v. Bank of America, the court concluded that a bank could not add an arbitration clause to contracts with current customers, despite the inclusion of a unilateral reordering clause in the initial contract, because the initial contract had nothing to say about arbitration or a right to a jury trial. The court in Badie noted that “permitting the Bank to exercise its unilateral rights under the

84. South Park: HUMANCENTiPAD, supra note 79 (emphasis added).
86. Id. at 554.
87. Id. at 561.
88. See id. at 563.
89. Id. at 564.
90. The study did not account for any terms of service or disclaimers for goods purchased.
91. This is so in part because there is a higher bar to establish informed consent to medical procedures than in other contexts. See, e.g., Omri Ben-Shahar, Regulation through Boilerplate: An Apologia 5 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 640, 2013), available at http://ssrn.com/abstract=2255161.
93. The court in Badie was also persuaded that “the notice contained in the bill stuffer” announcing the new arbitration clause “was ‘not designed to achieve knowing consent’ to the ADR provision.” Id. at 290 (quoting the trial court’s conclusion).
change of terms provision, without any limitation on the substantive nature of the change permitted, would open the door to a claim that the agreements are illusory.\textsuperscript{94} Courts in other jurisdictions, however, reject the \textit{Badie} rule. For example, in \textit{Hutcherson v. Sears Roebuck & Co.},\textsuperscript{95} an Illinois Appellate Court held that a unilateral reordering clause means what it says, and if the contract says anything can change, consumers should expect—and be bound by—changed language.\textsuperscript{96} The reality highlighted by \textit{The Empire Strikes Back} and \textit{South Park} is that most consumers are at the mercy of the seller, so long as they use the seller’s products or services, whether or not they realize that the deal has changed.

III. THE INEFFICIENCY OF UNILATERAL REORDERING

Unilateral reordering clauses would be impossible without a general acceptance of boilerplate in consumer and business-to-business transactions. It is hard to imagine, as the Darth Vader excerpt highlights, one party agreeing in an arm’s length transaction not only to whatever terms the other party articulates during negotiation, but also to whatever terms may suit that other party’s needs over the life of the contract,\textsuperscript{97} at least without significant concessions on other terms by the party that wants the unilateral reordering clause.\textsuperscript{98}

One of the common defenses of boilerplate on efficiency grounds is that it leads to lower prices.\textsuperscript{99} For example, in his opinion in \textit{IFC Credit

\textsuperscript{94}. \textit{Id.} at 284–85, 297. For more on illusory agreements, which are generally held unenforceable, see \textit{Cunningham}, supra note 1, at 150.


\textsuperscript{96}. \textit{Id.} at 900 ("[W]e do not read the ‘change of terms’ provision so narrowly as to preclude an amendment containing an arbitration provision.").

\textsuperscript{97}. Based on a conversation with corporate counsel for a Fortune 500 company, when negotiating deals, boilerplate from the other side often includes a unilateral reordering clause, which the attorney instructs staff attorneys to strike out if they find it.

\textsuperscript{98}. \textit{But see} Randy E. Barnett, \textit{Consenting to Form Contracts}, 71 \textit{FORDHAM L. REV.} 627, 636 (2002) (proposing that in exchange for valuable consideration, one could choose to be bound to do any one thing the other party wrote and sealed in an envelope). In Barnett’s envelope hypothetical, one could imagine that the writing might require "Do any one thing I specify later." The reader could intend to be bound to whatever the writer could later imagine, but the language might just as likely come as an unpleasant or even unfair surprise.

\textsuperscript{99}. \textit{See, e.g., ProCD, Inc. v. Zeidenberg}, 86 F.3d 1447, 1455 (7th Cir. 1996) ("Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets."); George L. Priest, \textit{A Theory of the Consumer Product Warranty}, 90 \textit{YALE L.J.} 1297, 1318–19 (1981) ("Warranty exclusions are a form of product standardization... [If] the incidence or magnitude of an element of loss differs greatly between consumers of a product, the market for insurance may not be sufficiently large to justify offering insurance... [Warranty exclusion thus
Corporation v. United Business & Industrial Federal Credit Union, Judge Easterbrook opined that terms in boilerplate contracts that overwhelmingly favor the seller invariably lead to savings for the buyer:

If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss—though if bench trials reduce the cost of litigation, then sellers may be better off even at the lower price, for they may save more in legal expenses than they forego in receipts from customers.

Nevertheless, there are reasons to be skeptical that savings from boilerplate clauses are passed on to consumers. Professor Margaret Radin suggests there is insufficient evidence for the traditional argument that consumers likely benefit to the tune of reduced prices when companies are allowed to restrict their duties and obligations using boilerplate. Professor David Horton goes farther, suggesting the presumption of consumer savings is at its core not falsifiable. In addition, the cost-saving argument ignores the cost of switching services, which is often the only opt-out available. When switching costs are high, firms can retain a greater proportion of a dissatisfied customer base without passing on significant savings.

As noted above, courts sometimes find unilateral reordering clauses unconscionable, and thus unenforceable. But this presumption about pricing can have some problematic effects on standard unconscionability...
tests. For example, in *United States v. Bedford Associates*, \(^{107}\) the Second Circuit articulated three factors to consider when determining whether a given clause is unconscionable: (1) the benefit of the bargain to the parties at the time of formation; (2) how the contract was negotiated; and (3) the relative bargaining power of the parties. \(^{108}\) If one assumes that terms unfavorable to consumers lead to a reduction in the price of goods and services, the first factor will always benefit the seller, because the benefit to consumers is assumed. Likewise, if one assumes that one-sided “negotiations” always save consumers money, then concerns about actual negotiations are mitigated by the price reduction. Finally, a court willing to assume that unfavorable terms lead inexorably to favorable prices will see no need to concern itself with unequal bargaining power.

Whatever its limitations, boilerplate is a fact of life in modern commercial culture, and it is unlikely to go away. \(^{109}\) Assuming arguendo that some of the economic justifications of boilerplate are nonetheless defensible, unilateral reordering clauses are much less defensible because they severely exacerbate the inefficiencies of boilerplate. The problems identified by behavioral economists regarding the challenges facing consumers who hope to comprehend or comparison shop when dealing with boilerplate are aggravated by unilateral reordering provisions. Even worse, there is some indication that the savings realized by sellers exercising a unilateral reordering provision are rarely, if ever, passed on to consumers post-formation.

### A. Unilateral Reordering Clauses Worsen Problems with Consent

Boilerplate provisions have been challenged on the ground that consumers do not actually consent to them in any meaningful way. Unilateral reordering provisions exacerbate this problem. First, as described above, consumers could waste an inordinate amount of time simply trying to read all the boilerplate that suffuses their lives, and thus often do not bother. \(^{110}\) Unilateral reordering clauses compound the workload and further disincenfivize reading. Second, unilateral reordering clauses reduce the effectiveness of consumer notice and even provide openings for sellers to attempt to evade consumer notice and

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108. *Id.* at 1312–13.
110. *See supra* notes 87–90 and accompanying text.
hide potentially objectionable terms.

As a matter of classic contract law doctrine, the party is bound to the terms of the contract, even if she did not read it.111 There is some sense in this. If we want to encourage consumers to read the contracts they sign (even boilerplate contracts),112 we would be ill-served to allow consumers to avoid clauses they did not read. But if a unilateral reordering clause is construed broadly, as it was in Hutchinson,113 there is no aspect of the contract immune to change from day to day. In such circumstances, it would be fruitless for the consumer to attempt to educate herself about the nuances of the contract. Thus, the unilateral reordering clause compounds the difficulty of comprehending the contract by requiring consumers to invest additional—and potentially futile—effort to understand every change. Some courts have thus limited change-of-terms clauses to ideas contemplated or at issue but unresolved in the original contract. Recall that in Badie v. Bank of America, the court concluded that a unilateral reordering clause did not empower a bank to add an arbitration clause to a credit card contract because the initial contract entered into by consumers did not discuss dispute resolution at all.114 Even with such a limiting construction, there is little benefit in trying to divine which changes a court might consider fair game and which changes are off-limits as not contemplated in the original contract.

Some courts assume that a consumer who uses a product or service after contract terms are updated must be treated as though she consented to the new terms.115 Such an assumption seems defensible when the consumer is sufficiently notified of the change; but as the Douglas case demonstrates,116 notice is often insufficient.117 Even worse, change-of-terms clauses are often held not to be unconscionable because consumers can opt out of the deal with the seller. In reaching that conclusion, courts often overlook the costs of consumer lock-in. For example, Oren Bar-
Gill has described how difficult it is for the typical consumer to correctly estimate the cost of switching to a new credit card once a six-month teaser rate on a credit card gives way to a higher rate.\textsuperscript{118} Other scholars have argued that credit card rates in general are set with one eye to the risk of providing credit to a particular consumer, and with the other to the opportunity presented by the “lock-in” effect.\textsuperscript{119}

There is a second fallacy underlying the assumption that consumer opt-out cures any distortions created by unilateral reordering. A unilateral reordering clause is only valuable in contracts where the seller and buyer will have a business relationship of more than a transitory duration.\textsuperscript{120} Presenting the consumer with an opt-out as the only corrective for a distorted deal strips away the consumer’s ability to plan long term in those situations where it is most essential.\textsuperscript{121} Shifting risk to the consumer post-negotiation hampers the ability of the consumer to plan for and account for risk. Enforcing unilateral reordering clauses empowers the company claiming the right to change terms and pass risk on to consumers without negotiating for that right up front, or even calculating that risk in the initial term. Here, the real world can help us understand the disconnect between assumed ease of opt out and the unfortunate reality of unilateral reordering. Reflect back on the scenes from \textit{The Empire Strikes Back}. Lando had an opt-out of a sort, which he finally exercised when the situation with Vader became intolerable: he shut down the mining operation, told his clientele to scatter, and shot his way out of the city with Princess Leia.\textsuperscript{122} It is not an outcome Lando might have embraced when the deal was first negotiated.

B. \textit{Do Unilateral Reordering Clauses Save Consumers Money?}

As noted above, lock-in effects generally allow sellers to remain

\begin{enumerate}
\item[118.] Bar-Gill, \textit{supra} note 105, at 1407.
\item[120.] Alces & Greenfield, \textit{supra} note 78 at 1125:
\begin{quote}
The power of the unilateral change-of-terms clause in continuing contractual relationships is in the dominant party’s ability to exercise the clause when the subordinate party is impotent to avoid the consequences of its operation. So it is in fact somewhat tautological to acknowledge the prejudice that operation of the clause entails: prejudice is the point . . . . As long as the dominant party maintains leverage, it does so precisely because that limited “remedy” is of no practical use to the subordinate party.
\end{quote}
\item[121.] See, e.g., Jones v. Citigroup, Inc., Inc., St. Unfair Trade Prac. L. (CCH) ¶ 31,169, 2006 WL 6471430 (Cal. Ct. App. Jan. 26, 2006) (Moore, J., dissenting) (“Ultimately, whether in a few months or several years, the cardholder is left in the same position—either accept the arbitration clause or forfeit the ability to use a credit card.”).
\item[122.] \textit{STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK, supra} note 49.
\end{enumerate}
competitive, even if they pass on significantly less than the total savings generated by pro-seller contract provisions to consumers. \(^{123}\) Consumers have a difficult time properly pricing lock-in effects when change is flagged up front. \(^{124}\) It is more difficult when the terms can change with little advance notice and no limit on scope. \(^{125}\) Thinking back to the reel world examples from Part II, Darth Vader’s imperious approach differs stylistically from Apple’s automatic updates, but they lead to the same result—unexpected surprises for consumers for which it is difficult to plan.

There is other evidence that the market for contract terms is typically not sensitive to reordering by consumers. First, there is some indication that even sophisticated attorneys tend to incorporate new clauses into boilerplate without fully understanding their import. \(^{126}\) Second, companies may not actually compete on boilerplate terms at all. To the extent that a clause provides an advantage to a seller (including managing risk), the rational competitor will incorporate that clause if they suspect that consumers do not shop based on contract terms. \(^{127}\) These problems are exacerbated by unilateral reordering. In addition, boilerplate is often defended against claims regarding consumer consent and unfair pricing on the ground that sophisticated consumers will reject terms that are too objectionable, and there are enough sophisticated consumers to shape business practices. \(^{128}\) But adding a unilateral reordering clause to the mix disincentivizes sophisticated consumers and allows a seller to mitigate the impact of sophisticated consumers on its business practices.

Even consumers who understand the general import of a unilateral reordering clause might misapprehend what they give up, especially when it is difficult to predict how a seller might reorder the contract, and what that might cost the consumer in the future. \(^{129}\) The flexibility provided by a unilateral reordering provision makes it likely that a firm will include one when drafting boilerplate. Finally, in some jurisdictions,
some businesses (most often credit card providers) can unilaterally reorder the contract even without reserving the right to do so in contractual language. 130 In those jurisdictions, there will be no competition based on the presence or absence of a unilateral reordering clause because no clause is necessary.

In addition, a seller exercising a unilateral reordering clause is less likely to pass savings on to consumers than in the general case, because the point of a change of terms clause is to shift risk and costs onto the contracting party once it is detected. 131 Once consumers are locked in, the seller has a buffer against the need to make future concessions. As David Horton notes, businesses almost never offer a price reduction to consumers when the terms change. 132 Even if one assumes that the product or service consumers purchase was properly priced to reflect the savings that consumers ostensibly secure through accepting or tolerating onerous boilerplate terms, the contract is almost never re-priced to reflect the saving that the seller supposedly passes on to consumers when it reorders the contract.

Professor Douglas Baird has suggested that despite these typical concerns, we may not need to worry about contracts of adhesion and boilerplate, at least so long as there are some sophisticated consumers that will understand the terms and shop with their feet. 133 The sophisticated consumer is a false hope for several reasons, and the problem is once again exacerbated by unilateral reordering clauses. First, firms have become more adept at dealing with the sophisticated consumer differently than the general populace. Professor Lucian Bebchuk and Judge Richard Posner have argued that businesses are less likely to behave opportunistically than consumers, so the ability to set up

130. Id. at 625 n.132.
131. As noted by Horton:

“[T]he absurdity of the “opt out” period comes into sharp relief when one considers that the adherent would be leaving a company over the existence or non-existence of a procedural term for another company that enjoys the unfettered power to add, delete, or modify its own procedural terms. With no way to be sure that the new firm will continue to use the same procedural provisions in the future, a rational adherent would stay put.”

Id. at 650–51.
132. Id. at 651 (noting one exception, Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410, 1413 (M.D. Ala. 1998), where consumers were given the option to accept a unilaterally added arbitration clause in exchange for a reduction of two percent to the interest rate charged).
133. Douglas Baird, The Boilerplate Puzzle, in BOILERPLATE: MARKET CONTRACTS, supra note 127, at 131, 134. Baird thus acknowledges that in markets which typically lack sophisticated consumers—like the market for rent-to-own furniture at issue in Williams v. Walker-Thomas Furniture, Co., 350 F.2d 445 (D.C. Cir. 1965)—courts should take a more serious look at the enforceability of the substantive terms of the contract, rather than assume the contract is shaped in part by the ability of sophisticated consumers to opt out. Id. at 138.
rigid, business-protective rules in boilerplate language is the most efficient option because the firm is likely to relax those rules for consumers who do not behave opportunistically. What Professor Bebchuk and Judge Posner describe as a benefit becomes a detriment when one realizes that sellers can use the same bright line to forestall the claims of the unsophisticated consumer while preserving the flexibility to treat sophisticated consumers better. A happy sophisticated consumer is less likely to warn her unsophisticated fellows. Thus, the corporation can avoid the need to change the terms of the contract by buying off the sophisticated consumer whose departure might otherwise provide a warning like the proverbial canary in the coal mine.

Another problem posed by relying on the sophisticated consumer is that even when sophisticated consumers bring problems to the attention of the public, the public’s collective attention span is unfortunately short. A seller can play a long game, making substantive shifts in its favor over time while creating the impression that the company is conceding on major points. One need only look at the history of privacy disputes by Facebook users to see this process play out. As early as 2006, Facebook began changing its privacy policy in ways that triggered strong objections from consumers. Facebook responded with occasional retrenchments and invitations to consumers to adjust privacy settings, but the combination of Facebook’s nudges towards full disclosure and its incremental changes in its default settings continually ratchets down baseline privacy expectations regarding access to user information. This occurs despite frequent updates by well-informed

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136. See, e.g., Jake Linford, Speech and Progress Institutions, 16 VAND. J. ENT. & TECH. L. (forthcoming 2014) (manuscript at 56–57) (describing the public outcry against recent copyright reform bills).


139. See McKeon, supra note 137.
users who successfully ferret out every shift in Facebook’s terms of service.  

C. The End of Unilateral Reordering?

What then should be done? The ship has sailed regarding the enforceability of boilerplate, but in light of the manner in which unilateral reordering clauses exacerbate problems with consumer consent and the illusion that products with onerous terms always have pro-consumer pricing, the correct policy response may be a prophylactic rule barring any changes enacted pursuant to a unilateral reordering clause offered in boilerplate language. Such a prophylactic rule is bound to be over-inclusive. For example, in some cases, well-informed consumers might legitimately prefer to accept a unilateral reordering clause. It is also possible that some consumers who fail to consider, or are incapable of fully processing the import of a unilateral reordering clause, might nonetheless prefer it to other alternatives because the lowest price is the only salient factor in the decision regarding which among competing products to purchase or services to use. But the harms stemming from allowing unilateral reordering clauses are sufficiently severe for the majority of consumers specifically, to markets generally, and to any reasonable theory of contract law, that the losses from applying a prophylactic rule are far outweighed by the benefits that will stem from such a rule.

For those skeptical of the prophylactic rule, consider two alternatives: a “two-price” solution designed to help consumers properly price the


142. As noted by Professors Bar-Gill and Davis, Regulation Z, promulgated by the Federal Reserve Board under the Truth in Lending Act, bans creditors from changing terms in a home equity plan. See 12 C.F.R. § 226.5(b)(3) (2013); Bar-Gill & Davis, supra note 117, at 31. Other authors have taken more limited stances against unilateral reordering clauses. Professors Peter Alces and Michael Greenfield have argued that under traditional contract doctrines, the Uniform Commercial Code, and certain statutes, some unilateral reordering clauses would be unenforceable. See generally Alces & Greenfield, supra note 78. Professor Horton supports his call for a bar on the ability of drafters to unilaterally reorder procedural terms like arbitration clauses by noting that consumers are unlikely to benefit from the change, or even recognize the importance of new procedural clauses as changes occur. See Horton, supra note 78, at 652.


144. Ben-Shahar, supra note 91, at 11.
unilateral reordering option at the time of purchase, and a “perceived value” proposal designed to ensure that sellers are passing some savings on to consumers when exercising a unilateral reordering clause. As for the first, Professors Oren Bar-Gill and Kevin Davis argue that the unilateral reordering problem can be corrected by inserting a third party into the contract, one that will determine whether any given attempted reordering is enforceable. These third-party “Change Approval Boards” could market themselves based on how strictly they construe unilateral reordering clauses.

In a way, Professors Bar-Gill and Davis have suggested a complicated means of ensuring a level of transparent pricing. Thus, a simpler solution presents itself: require the seller who offers its goods or services subject to a unilateral reordering clause to also offer the same goods or services without such a clause. The goods or services sold subject to seller reordering are likely to be cheaper than those sold under less alterable deals. This two-price solution would be similar to other circumstances where consumers can purchase what are ostensibly the same goods or services, but with different contract terms and therefore different price points. For example, Professor Omri Ben-Shahar has recently reminded us that more people buy nonrefundable, economy-priced airline tickets than more flexible first-class or business-class tickets, trading flexibility for price. The difference in price is transparent, at least on some websites, where the economy class ticket is often steeply discounted compared to first-class or flexible tickets. Like the difference between economy and business class airline tickets, a two-price solution to the unilateral reordering problem would be a minor improvement compared to the status quo because it would require purveyors of unilateral reordering terms to transparently price the difference.

The downside of the two-price solution is readily apparent. The requirement would likely increase costs for sellers, because it would lead to non-uniform treatment of consumers purchasing the same products and services. Those costs will almost certainly be passed on to

145. See infra notes 147–51 and accompanying text.
146. See infra notes 152–60 and accompanying text.
147. Bar-Gill & Davis, supra note 117, at 991.
148. Some have argued that first and business-class tickets were historically over-priced, due to a lack of sensitivity to price on the part of business travelers in the 1980s. See, e.g., Jon Bonné, Inside the Mysteries of Airline Fares, NBC NEWS.COM (May 8, 2003), http://www.nbcnews.com/id/3073548/ns/business-us_business/t/inside-mysteries-airline-fares/#.UfvYjdK1FCg.
149. This has been the author’s experience purchasing tickets on the Delta.com website.
consumers who prefer the certainty of a deal to one that can be subsequently reordered. There is also a chance that sellers will try to take unfair advantage of consumers who favor predictability over surprises, and price the “plain vanilla” contract like retailers price insurance for electronics—offering too little coverage for too much money, while hoping to take advantage of consumers’ cognitive limitations. Nonetheless, if consumers were offered two options, (1) a cheaper “Darth Vader” deal, where the seller reserves the right to change the terms, and (2) a more expensive contract that could not be changed without something resembling a bargained-for exchange, the seller would at least send a clear signal about the level of contractual predictability offered to the purchaser of its product or service.

If one is concerned that forcing sellers to offer two deals takes away too much necessary discretion, and is still persuaded that cost savings realized through unilateral reordering could be passed down to consumers, a second option—the “perceptible value” proposal—offers the seller the opportunity to put its money where its clause is. In one reported case, Stiles v. Home Cable Concepts, Inc., a credit card provider attempted to keep consumers from exercising the ability to opt out of a new arbitration clause by promising a 2% cut in the interest rate for those who agreed to binding arbitration. The court reasonably found the modification enforceable because consumers accepting the modification were given an actual, perceptible benefit for doing so, and consumers who did not accept the modification were allowed to keep using the card in accordance with the old deal. It is not unreasonable to think that the card provider valued its savings under the arbitration clause at something above the 2% cut. Neither is it irrational to think that even consumers who valued the ability to sue a credit card company for breach of contract might have been willing to trade it away in exchange for a 2% rate cut.

150. Ben-Shahar, supra note 91, draft at 18.
153. The terms of the credit card agreement stated that:
You may elect to reject these changes in terms by completing the attached postage paid postcard and returning it to American General Financial Center postmarked no later than March 1, 1997. If you reject these changes your Annual Percentage Rate(s) will be reinstated to the current rate(s) disclosed on your enclosed billing statement, and there will be no arbitration agreement in effect.
Id. at 1413.
154. Id. at 1417–18.
Following the example in *Stiles*, a change made pursuant to a unilateral reordering clause might be enforceable if the party making the change—almost always the seller\(^{155}\)—gives something of value to the party subject to the change. Unlike the two-price solution,\(^{156}\) which provides clarity ex ante to consumers regarding the value to the seller of the right to unilaterally reorder the contract, the perceptible value proposal would maintain some seller flexibility up front, but require sellers to reify the assumption underlying standard economic defenses of boilerplate that contracting efficiencies will trickle down to consumers. Thus, for example, a unilateral change to Facebook’s privacy policy might be enforceable under the perceptible value proposal if Facebook users subject to the change were provided with free promotion of a post or two.\(^{157}\)

The perceptible value proposal would not require sellers to pass all savings on to consumers. In line with old notions of sufficient consideration, something just north of a negligible benefit could suffice.\(^{158}\) But like the benefit offered in *Stiles*, the benefit conveyed should be some form of cash or savings that lasts for the remainder of the existing term of the contract. For example, it would not meet the goal of the perceptible value proposal to conclude that consumers received something of value from a seller who adds an arbitration clause to a contract simply because the seller is bound to arbitration like consumers.\(^{159}\) In addition, the perceptible value proposal would not necessarily require sellers to provide an opt-out to consumers, which is

\(^{155}\) But see Andrew Trotman, *Man Who Created Own Credit Card Sues Bank for Not Sticking to Terms*, THE TELEGRAPH (Aug. 8, 2013, 4:41 PM), http://www.telegraph.co.uk/finance/personal/finance/borrowing/creditcards/10231556/Man-who-created-own-credit-card-sues-bank-for-not-sticking-to-terms.html (reporting that a Russian court upheld new terms inserted by a consumer in a credit card agreement when the bank signed the modified agreement, apparently without reading it).

\(^{156}\) See supra notes 147–50 and accompanying text.

\(^{157}\) The going rate to promote one of the author’s Facebook posts on September 13, 2013 was $6.99, a price that is, for now, too rich for the author to pay. Facebook claims that promoting a post “simply increases the likelihood that your audience will see your message in their News Feed.” *Promoted Posts*, FACEBOOK, https://www.facebook.com/help/promote (last visited Oct. 20, 2013). How much promotion increases said likelihood has not been disclosed.

\(^{158}\) In fact, courts are unlikely to wade into the question of whether value conveyed by the seller is commensurate with the change made. See, e.g., Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982) (“Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.”).

\(^{159}\) But see *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (holding a new arbitration clause in an employment contract enforceable because “the promise to arbitrate would have been binding and enforceable on both parties”).
of questionable value in any case. 160

CONCLUSION

The proposed prophylactic rule barring the enforceability of unilateral reordering clauses in boilerplate contracts, 161 and the more limited two-price and perceived value proposals, 162 would lead in the same direction—toward something reminiscent of old requirements for bargained-for exchange to support an enforceable contract modification. 163 Some might find the proposals too strong, but at a minimum, there is good reason to question whether standard economic defenses of boilerplate are applicable to unilateral reordering clauses. The public may be required to live with boilerplate, but perhaps they should not be subject to the endless reordering of that boilerplate, like some game of musical chairs that only the seller can win. As the reel world catches up to modern reality, may there seldom be cause to say about our contractual obligations, “this deal is getting worse all the time.”

160. While the contract in Stiles also included an opt-out provision, the ability to opt out is hardly the sine qua non of an enforceable modification in a contract of adhesion, particularly in light of the difficulties presented by calculating lock-in effects. See supra notes 104–05, 121 and accompanying text.

161. See supra notes 141–44 and accompanying text.

162. See supra notes 147–60 and accompanying text.

163. See supra Part I.B.
UNPOPULAR CONTRACTS AND WHY THEY MATTER:
BURYING LANGDELL AND ENLIVENING STUDENTS

Jennifer S. Taub*

INTRODUCTION

Consider this. Over three years of study, most law students take a single course on the subject of contracts in which they rarely (if ever) negotiate, draft, or even review a written agreement. Truly. Actual contracts are quite unpopular. To illustrate what is wrong with this, it may be helpful to imagine a realm where film school students earn a graduate degree without watching a movie, writing a script, or even picking up a camera. They attend classes for which they study an assigned selection of movie reviews penned by an assortment of film critics. From the readings students are meant to discern the elements of quality filmmaking: what makes a good movie and what makes a flop. Limited context or theory is provided. So, this method suffers not just from lack of practical application, but also the absence of frameworks for critiquing the selection of reviews, the critics themselves, or their methods and processes of judgment. In class, the professor fires questions at students asking them to explain each critic’s reasoning. Then, students are asked to hypothesize that particular elements of the described movie have changed. They are expected to predict, given these alterations, whether the esteemed (or hack) critic who panned the film

* Associate Professor of Law, Vermont Law School. I would like to thank the staff at the Washington Law Review for their work gathering and compiling the survey data and editing this piece, Lawrence A. Cunningham for inviting me to participate in this virtual symposium, and my colleagues at Vermont Law School, particularly the members and support staff of our Working Group on Curriculum Innovation, including Lorraine Atwood, Christine Cimini, Oliver Goodenough, Mark Latham, Dean Marc Mihaly, Sean Nolon, Jim Ouellette, Rebecca Purdom, Heide Scheurer, and Pamela Stephens. In addition, Matt Carluzzo and James Ostendorf provided helpful information.

1. There are many definitions for the term “contract.” When I begin my Contracts course each semester, I have the students practice limiting their definition of the word to that provided in section 1 of Restatement (Second) of Contracts (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”). See Restatement (Second) of Contracts § 1 (1981). However, in this sentence, and for purposes of the title of this essay, I am using the word “contract” to also refer to the language (and the document) that memorializes an enforceable agreement.
might then praise it, or vice versa, and why. Upon graduation, those who land jobs as directors (or who strike out on their own) are handed an expensive camera, a sizeable budget, and expected to start filming.

This seems implausible. Yet, this analogy reflects the current reality in many law schools with respect to a required course called Contracts. The casebooks students read mainly include judicial decisions selected and organized around legal issues that concerned contracts scholars more than a century ago. Students infrequently grapple with the murkier contract law challenges of our day. In addition, though some schools do offer upper level courses in negotiations or drafting, these are rarely required. Thus, future lawyers can graduate from most law schools without taking such courses. Yet, as practicing lawyers, drafting, reviewing, and negotiating are skills they will need to hone whether they assist with business transactions, represent consumers in disputes, help negotiate settlement agreements, or craft legislation, as a few examples.

While there are exceptions, many instructors who attempt to cover drafting or theory in their Contracts course struggle with time allocation, given that helping students pass the bar exam, we believe, depends upon sufficient coverage of the common law doctrine. At the same time, many of us recognize that several of the principles of law that take up weeks of classroom time and that the bar exam tests rarely come into play in practice. These principles at times may actually contradict what happens in the courtroom when contract disputes are litigated.

2. Lenné Espenschied, Shaken, Not Stirred: Integrating Transactional Skills into Core Curricular Courses on Contracts and Commercial Law, 14 TRANSACTIONS: TENN. J. BUS. L. 535, 536 (2013) (“We have made a lot of progress in the last four years in terms of teaching transactional skills; however, in most schools, transactional training is still accomplished through elective ‘transactional’ courses.”).

3. Other than a form agreement they might click through on the web, law students often encounter their first agreements in practice. Given their age, many have lived in dorms, thus never signed leases, and have used a parent’s car or public transportation. If they have taken out student loans, it is doubtful they have taken the boilerplate seriously.


5. See, e.g., Michael Hunter Schwartz, Chaim Saiman & Jessica Rubin, All About the First Year of Law School: Question & Answer Segment, 12 TRANSACTIONS: TENN. J. BUS. L. 95, 97 (2011) (comments made by Professor Peter Linzer, describing hoping to fit three to four days of drafting into a four-credit Contracts course, at the Emory University School of Law School Conference in 2010 on “Transactional Education: What’s Next?,” George W. Kuney, Introduction to the Special Report, 12 TRANSACTIONS: TENN. J. BUS. L. 1, 1 (2011)).

6. David A. Hoffman & Alexander Radus, Instructing Juries on Noneconomic Contract Damages, 81 FORDHAM L. REV. 1221 (2012) (“Lay juries have considerably more freedom to award the promisee’s noneconomic damages than the hornbooks would have us believe.”).
And, for lawyers representing (or who are themselves) consumers, employees, or homeowners, the common law doctrine is an insufficient aid as it has in many instances been supplemented or superseded by state and federal regulation. This is not a side issue; it should be front and center. Additionally, knowing the doctrine, even if it has good predictive value, is only a small step in helping business clients build and nurture contractual relationships. Moreover, while we may, in some part “teach to the test,” that test is changing. In at least one jurisdiction, the 2013 Multistate Performance Test (MPT) reportedly included a question requiring students to review and redraft portions of a proposed agreement so that the language better aligned with their client’s objectives.

To be clear, I am criticizing my own methods, and do recognize that there are exceptions to this general summation of the status quo. However, this still appears to be the norm because we have not let go of the innovations made in the late nineteenth century by Harvard Law School Dean and Professor Christopher Columbus Langdell (1826–1906). The case method, as described herein, his contribution to pedagogy in 1870, remains the dominant mode of teaching students about contracts. As a result, Contracts is a course in how a particular set of contract disputes (“busted deals”) are adjudicated; it is not a course...
in contracts.

Whether or not Langdell’s methods for teaching Contracts (or other areas of law) were sound at the time, they have had a long, long life. Examining judicial decisions is useful for teaching students certain fundamental concepts such as the elements of contract formation and remedies. It can also be helpful subject matter for training in legal reasoning. However, with respect to teaching relational and transactional skills, Langdell’s methods are not ideal. And in terms of subject matter, it seems insufficient to spend an entire semester or year mainly covering the common law topics and the Uniform Commercial Code (UCC). Trust me on this. Aside from those who have attended law school, it is absurd that there could be a class called Contracts where no one is likely to examine a contract or to grapple primarily with the hot button contract law issues of the day, which include (a) the tension between old common law principles and modern business practices and regulation, and (b) the ways in which courts allow businesses to use take-it-or-leave-it (boilerplate) agreements to deprive consumers and employees of legal rights granted by state and federal legislatures.

Thus, the purpose of this piece is to provide an alternative: a transformation of how Contracts is taught in law schools so that we meet a variety of educational objectives. This is less of a prescription than it is a resolution made in the public sphere: a promise to shake things up in my own classroom and thus hopefully do better by students in the long run. It is also the beginning of a search to benchmark against the practices of others, and to seek input from those who have already begun to transform their Contracts teaching materials and methods.

This Article is organized into three parts. Part I, entitled “Teaching class, there is not much time to do more than cover what Linzer deemed “busted deals” instead of relational or transactional contracts).

13. Nadelle Grossman, Langdell’s Curse and Transactional Lawyers, MARQUETTE UNIV. LAW SCH. FACULTY BLOG (Feb. 12, 2010, 1:05 PM), http://law.marquette.edu/facultyblog/2010/02/11/langdell’s-curse-and-transactional-lawyers/ (in response to a comment, stating: “[A] transactional attorney must consider the client’s business and business objectives more broadly, and help her client not solely protect its legal rights, but to also further the client’s business and business goals. It is the pervasiveness of business (which effectively is the pursuit of profits in light of risk) that in my view distinguishes a transactional (business) lawyer from litigators.”).

14. While there are many defenses to the status quo, as discussed herein, they may appear to be more the result of discomfort with cognitive dissonance than rational explanation of how the norm furthers particular outcomes. For example, the defenses include that (1) the case method teaches students how to think like a lawyer and they can learn the actual law on the job; (2) it is not possible to teach transactional skills to a large class; (3) teaching transactional skills is not teaching “law,” because it is separate from and not illuminative of the doctrine; (4) teaching transactional skills is a mindless task that will make students technicians, not lawyers; and (5) future employers with more current practical skills will better train graduates making this inefficient if not counterproductive.
Contracts: Obstacles and Opportunities,” shares outsider and insider critiques and data about the current Contracts classroom. This sets out anecdotal evidence and also draws upon the 2013 survey of Contracts instructors by the Washington Law Review. This first part also explores Langdell’s innovations as well as how Contracts was addressed in subsequent curricular reform efforts, including the MacCrate Report, the Carnegie Report, and the most recent 2013 American Bar Association (ABA) Report.

Part II, entitled, “Lawrence Cunningham’s Contracts in the Real World: Stories of Popular Contracts and Why They Matter,” provides an example of a contemporary innovative approach to teaching Contracts. By presenting as the central subject matter disputes seemingly “ripped from the headlines,” Cunningham’s book is engaging and current. In the foreground of each chapter, he presents disputes that a student might encounter on a blue book exam, or in practice after graduation. After sketching the modern dispute, he dips into older, often classic cases at the intersection of various doctrines to illustrate the modern relevance of the common law. Instead of beginning with a “hairy hand,” Cunningham’s book begins with a more current and familiar dispute over a wedding party interrupted due to a major storm. If this book were used as a supplement or main text in the classroom, students might better appreciate the role of courts in interpreting, enforcing, or refusing to enforce private arrangements, as well as the likely remedies.

Part III, entitled, “Modernizing the Contracts Classroom,” sets out recommendations for modernizing the teaching of contract law, theory, and transactional skills. These recommendations include (1) flipping the case method by properly placing contemporary disputes at the center of the class, not the margins, and thereby inviting students to struggle with “unpopular” contracts—not simply the ones that reinforce the doctrine—including contract disputes that never land in court; (2) accurately treating common law as only one source of law, alongside federal and state statutes and regulations, to reference when creating agreements, struggling to interpret their provisions, or questioning their enforceability; and (3) devoting at least one-third of the semester to negotiating and drafting skills and also offering at least one upper-level transactions course or upper-level negotiations course to hone those


same skills.

I. TEACHING CONTRACTS: OBSTACLES AND OPPORTUNITIES

A. Current Anecdotal Critiques of Contract Casebooks and Classrooms

Contemporary critiques of what may or may not go on in the Contracts classroom abound. This comes from those generally critical of legal education, but also those who are particularly concerned about the lack of transactional experience, financial literacy, and other business-law related skills imparted through the standard law school curriculum. Others concerns include that the way in which the course is structured discourages critical thinking and ignores the broad range of laws that impact contractual rights, as well as how courts actually behave.

Critics are both inside and outside the legal academy. Insiders include instructors who wish to enhance student outcomes, but who are constrained by the need to “teach to the test” for bar passage, limited by the number of credit hours, and restricted by difficulty of providing personalized attention to drafting and negotiation skills development for a large class of students. Critics are both inside and outside the legal academy. Insiders include instructors who wish to enhance student outcomes, but who are constrained by the need to “teach to the test” for bar passage, limited by the number of credit hours, and restricted by difficulty of providing personalized attention to drafting and negotiation skills development for a large class of students. Others inside the system include deans who hope to cajole instructors to modernize, and students who either have been told by practicing lawyers or intuitively sense that the mental gymnastics associated with teasing through some concepts in class will not sufficiently equip them for client interactions. They are concerned that the case method will not build the knowledge, skills, and confidence they need to negotiate deals, or resolve disputes whether in court or otherwise. Still more insiders include the state bar associations, the ABA, and the Association of American Law Schools (AALS) who directly or indirectly influence what actually happens in the classroom through the assorted standards or measures they use.

Critical outsiders include seasoned practitioners who believe that law school today looks just like it did when they were in school many decades ago. For some, this means they perceive that instructors either do not or cannot provide practical experience in the realm of Contracts. 17 See, e.g., infra Part I.B.

17. For example, former Vanderbilt Law School Dean Edward L. Rubin told David Segal of the New York Times, “We should be teaching what is really going on in the legal system . . . not what was going on in the 1870s, when much of the legal curriculum was put in place.” David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html.
They may overstate the lack of reforms, in other words. Others critics outside the system include journalists, bloggers, politicians, parents, and clients who have various degrees of a stake in the system and are pounding on the door from the outside trying to get our attention. And, a significant group of outsiders are those legal academics and practitioners who are no longer with us, but who continue to hold sway over the content and methods of legal education as if their views and practices were binding precedent.

One critical outsider is *New York Times* reporter, David Segal. In 2011, Segal wrote *What They Don’t Teach Law Students: Lawyering*. The online version received 152 comments over approximately twenty-four hours. In this piece, Segal contended that law schools were failing to provide practical training because too much time, in his view, is spent both on old cases and on theory. Segal wrote:

Consider, for instance, Contracts, a first-year staple. It is one of many that originated in the Langdell era and endures today. In it, students will typically encounter such classics as Hadley v. Baxendale, an 1854 dispute about financial damages caused by the late delivery of a crankshaft to a British miller. Here is what students will rarely encounter in Contracts: actual contracts, the sort that lawyers need to draft and file.

While he is correct about practical skills, Segal’s perspective is flawed in that it unnecessarily devalues theory and it also presents pedagogical decisions as an either-or-choice—either study the origins of limiting the nonbreaching party’s recovery for unexpected consequential losses (such as lost profits) to those that were reasonably foreseeable, or teach drafting. Both can be done. This all-or-nothing view is familiar from the other side. For example, one of the online comments responding to Segal’s piece flagged as a “NYT pick” and recommended by ninety-nine readers was written by “MMAFA Z” of Chicago:

[T]eaching students in law school “how to draft contracts”

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19. *Id.*
20. *Id.* The first comment was posted November 20, 2011 at 5:52 p.m. and the last comment November 21, 2011 at 6:52 p.m. The comments are marked “closed.” *Id.*
21. *Id.*
22. A NYT pick is a comment designated by certain employees at the *New York Times* as worthy of reading. Comments can be sorted by viewers so that the NYT picks appear, a method of screening or curating among various comments. Similarly, readers can click on a link to recommend a comment they have read. Viewers can sort comments by those that received the most reader recommendations, or “readers’ picks.” For this piece, only two of the 152 readers’ comments received more recommendations than the comment by “MMAFA Z” (the top received 133 recommendations, the next 103), but neither of those were identified as NYT picks. *Id.*
instead of understanding the fundamentals of contract doctrine would be a great way to set up law students for malpractice suits. . . . [When creating merger agreements, practicing lawyers] crib from other lawyers’ work at their firm, and fill in the blanks. . . . [L]aw schools should [not] waste their students’ time filling in blanks on contracts . . . instead of understanding foreseeability [sic] of damages . . . . [W]ould [the author] want to be operated on by a doctor who had lots of training in how to use a scalpel, but didn’t understand fundamental concepts in biology, chemistry, physiology and anatomy?23

As a medical patient, I would say: why choose? I want my surgeon to know both. This reader’s comment reflects the views of those who resist reform. It assumes that if we teach students practical skills then we cannot or will not teach them either the law or legal analysis. It also assumes that law schools train lawyers only to join large firms that engage in high-stakes multi-million or multi-billion dollar mergers. Yet more than sixty percent of lawyers work in solo practices or small practices with up to five lawyers, not large firms.24 And, “deal” lawyers do much more than fill in the blanks.

Critical insiders include professors like Lawrence Friedman and Stewart Macaulay who in 1967 published an article entitled, Contract Law and Contract Teaching: Past, Present, and Future.25 Their paper was originally presented at a 1966 AALS panel discussion. Unlike criminal law teaching and scholarship, which the authors believed had advanced, contract law was stuck in a rut: “In contract law, teaching and research is unnecessarily fixated at a stage in the past. New direction is long overdue.”26

Another critical insider is Professor Jeffrey Lipshaw, who shared his thought process in 2009 as he prepared to teach a six-credit Contracts class. Lipshaw, who practiced for more than two decades, including as a litigator, transactional lawyer, and general counsel, contemplated how he would approach the curriculum. In a blog entry, he wrote:

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23. **Id.** (online comment on Segal’s article by “MMAFA Z”).

24. William T. Hogan III, *GPSolo and Its Main Street Lawyers*, GPSOLO, Mar./Apr. 2012, available at [http://www.americanbar.org/publications/gp_solo/2012/march_april/gpsolo_main_street_lawyers.html; see also Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. LEGAL EDUC. 189, 199 (2013) (“[O]f lawyers in private practice] 14 percent work in small law offices of two to five lawyers. The largest group of lawyers is made up of solo practitioners. They accounted for 49 percent of the private bar in 2005 and that figure was similar in 1980.” (citations omitted)).


26. **Id.** at 805.
WERE IT NOT FOR THE BAR EXAM AND INERTIA (I.E., LANGEDELL WAS A CONTRACTS TEACHER), WE PROBABLY WOULDN’T BOther WITH MOST OF CONTRACT LAW AS WE PRESENTLY TEACH IT. OR, AS I HAVE OFTEN SAID, PRACTICE IS 5% DOCTRINE AND 95% INTERPRETATION; THE COURSE IS USUALLY 95% DOCTRINE AND 5% INTERPRETATION. 27

One comment written by Chris King, a practicing lawyer, in response to Lipshaw’s blog was particularly insightful.

[I] don’t see the contradiction between contracts practice and contracts . . . . [Y]OU are of course right that the legal issues don’t come up every minute (or day) . . . . I tell young lawyers that the law is just one part of their “tool kit” to build a contract and get a deal done.28

Lipshaw appears to have continued to grapple with these issues in academic articles, the blogosphere, and the classroom. In 2010, he acknowledged that the entire approach to contract law courses is a retrospective look at a deal gone wrong, considered from a late nineteenth century perspective.

Here’s the fundamental first year contracts problem. The predominant approach to contract law (even when the casebook acknowledges and tries to organize around the transactional context in which contracts are created) is the reading of “after-the-fact” cases largely organized by the concepts through which Langdell sought to make the body of contract dispute law coherent in the nineteenth century. . . . Moreover, the primary perspective of the Langdellian approach is that of scholar-scientist-observer, trying to impose its particular approach to coherence on the system as a whole.29

Lipshaw’s prescription seems not to be however, merely providing more practical training, but also offering students a variety of theoretical frames for comprehending contracts. One response to this piece came from Professor Matt Bodie who noted:

I’ve been thinking that a “Contracts and Basic Business Transactions” course would make more sense in the first year. It would teach basic business & finance concepts, as well as


28. Id.

provide more of a mix of common law and statutory contractual regimes. This change in approach could easily be joined with more of a focus on actual business lawyering.

Another critical insider is Professor Steven J. Harper, author of The Lawyer Bubble: A Profession in Crisis. In this 2013 book, Harper described the outcomes that result from strict adherence to the Langdellian method. “Universally, first-year contracts courses dwell on the policies and principles behind offer, acceptance, consideration, breach, and damages. But students emerge from the experience unable to prepare a simple contract that a real client could use.”

Also in the camp of insider-reformers is professor and former dean Edward Rubin, author of the 2004 article, Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It. Rubin wrote:

Contracts have been a central feature of western law for at least a thousand years, and they form an extremely important part of American legal practice. However, American law schools virtually never teach the subject. . . . To be sure, there is a course called Contracts that is included in the first-year curriculum of every law school, but this is not a course in contracts at all. It is a course in judicial adjudication of disputes regarding contracts.

Another proponent of reform is Professor Tina L. Stark, who is also the author of a very useful book entitled Drafting Contracts: How and Why Lawyers Do What They Do. Stark delivered the welcome and opening remarks at a conference held at Emory University School of Law in 2010 on the topic of “Transactional Education: What’s Next.” The conference featured fifty-eight presentations from law professors and practitioners. Stark observed that in anticipation of a similar event two years earlier, the organizers received no responses to a request for

30. Id. (comment to Lipshaw’s blog post).
32. Id. at 44.
34. Id. at 55–56.
35. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).
37. Kuney, supra note 5, at 3.
proposal for best practices. However, by 2010, she observed, “[W]e have come a long way.” Stark described the then-current state as experimental. She informed the audience, “Many more schools now have transactional skills courses or courses with a transactional skills component. But I still do not think we are at a stage when we can talk about best practices. So many of us are still experimenting.” Whereas students receive litigation skills training, they rarely receive training in deal work. She identified the lack of law school support as partially about awareness. Stark explained:

We have for years labored in the shadows of litigation skills training—something our colleagues understand and, therefore, support. Deal work they do not get. No one is researching cases, and appellate briefs are nowhere to be seen. Most of our colleagues are not quite sure what we do or why it has anything to do with law, but they know they do not want anything to do with it.

The problem is not just a lack of understanding, but that we labor anonymously. We are nearly invisible within the academy.

Stark suggested that transactional skills education was “20 years behind litigation skills training,” also because of a lack of “vocabulary and analytical frameworks” that students can employ. Whereas it is easy to observe what trial and appellate lawyers do in open court or in publicly available briefs and court decisions, deal work is largely a private endeavor, though Stark did identify open databases of materials including at Emory and at the Kauffman foundation.

Stark identified another obstacle—the apparently limited number of law professors with transactional experience who are willing to teach transactional skills. In addition, Stark cautioned that teaching such skills “remains professional suicide: a sure-fire way to make tenure difficult if not impossible to obtain.” Thus, for the most part, Stark described transactional-skills instructors as either adjunct professors or legal writing faculty (who often, but not always, hold non-tenure system

38. Stark, supra note 36, at 3.
39. Id.
40. Id.
41. Id. at 4.
42. Id. at 2.
43. Id. at 5.
44. Id. at 4.
45. Id. at 5.
positions). In some cases faculty and administrators ask the latter to take on this new type of writing, without an appreciation of the differences between contract drafting and brief writing.46

This lack of emphasis on transactional skills was exemplified at the conference at Emory. Out of the six professors in attendance who were teaching Contracts in the first year and who responded to related survey questions, three devoted between one and two hours of the semester on drafting or other transactional skills and one devoted seven to eight hours. However, more schools offered upper-level transactional skills courses.47

B. Washington Law Review 2013 Survey Data

In early 2013, the Washington Law Review invited Contracts instructors to take an online survey.48 One hundred and thirty-six individuals responded. The questions related to what casebook (or course packet) instructors used, and inquired as to how many years the instructor had been teaching. The survey also solicited written responses concerning any criticisms of the book they use and sought additional input on teaching Contracts today.49 I did not complete the survey, given that I was already working on this article that would draw upon the results. However, if I had, I would have mentioned that I use a casebook50 that I find very engaging. It includes a good selection of cases as well as lively commentary and useful problems. In other words, I have no quarrels with it. My issue is with the manner in which I teach my course with insufficient time spent on the other matters discussed in this article.

The most common criticism (made by twenty instructors) was that their casebook was either too dense or too detailed. The second most frequent criticism (made by eighteen instructors) was that the casebook had an insufficient number of problems or drafting exercises. In some instances criticisms reflected irreconcilable pedagogical differences where one respondent lamented the over-emphasis on consideration and the other expressed concern that an important matter like consideration

46. Id.
47. Id. at 6.
49. Id.
was condensed.51

When asked to reflect on teaching contracts today, several individuals commented on skills training. Those instructors with only three to four credit hours in a single semester had a more difficult time covering the material whether doctrinal or skills-based. For example, one such instructor noted, “I no longer use [skills-based] methods (other than exam-style practice questions) . . . because we switched from a 2-semester course to one semester (first semester).” 52 Another wrote, “4 units first semester inevitably sacrifices coverage, depth, and skills training opportunities.” 53 Even one instructor with six credit hours over two semesters still struggled. This instructor wrote, “I could use more, not less, time to teach the course. I try to incorporate some skills exercises throughout the course and seem to always be rushed at the end. I don’t understand how anyone teaches the course in 4–5 credits.” 54

Another individual noted that the timing of Contracts in the first semester of the first year of law school made it suitable for training students on how to think like a lawyer:

Depth is more important than breadth, vocabulary mastery, attaining fluency in discussing legal topics, learning how to extract from an opinion a coherent story of what happened in the case and understanding how the court applied legal doctrine to the facts, are far more important than obsessing about doctrine as such.55

The case method presented a challenge to teaching Contracts today according to a few respondents. One explained:

Cases are not the best ways to teach doctrine. Cases are good for teaching critical reading and providing useful real-world context. We should therefore teach fewer cases and do more with the cases we teach and use other methods for conveying doctrine. We should also integrate more drafting considerations into contracts casebooks.56

Another stated, “[A]ll current Contracts casebooks overuse the case method, which I do not believe to be the most efficient means of teaching first year Contracts.” 57 Another questioned the case method

51. Wash. Law Review Survey Results, supra note 48, at 8.
52. Id. at 10.
53. Id.
54. Id.
55. Id. at 16–17.
56. Id. at 11.
57. Id.
more generally, “[T]he case method has lost its impact with the current generation of students. For a variety of reasons that are well documented in the pedagogical literature, students are not as receptive to the process that most professors went through in learning the law.” 58 In contrast, one instructor noted, “I think the case method is worthwhile for contracts.” 59

Practical suggestions for supplements to the case method included problems and other “real world” approaches. One instructor explained, “Casebooks with many problems are my preference. In recent years I have created quite a few problems to supplement the casebook.” 60 A small number of respondents said they had dispensed with the casebook and instead use Professor Doug Leslie’s case files that provide a simulation of a law firm partner’s assignments to an associate. One explained:

I teach one case file per class session. Each file includes an assignment memo from the partner, a paralegal memo with results of factual investigation, relevant documents, UCC or Restatement references, and court opinions. The class discussion involves spotting the legal issues raised by the client’s situation and discussing what arguments could be made in support of the client and what arguments to anticipate and try to counter from the other side. Sometimes a case file involves a problem about negotiating language, or explaining the law on some matter to a client. 61

In contrast, another instructor, who “was looking for a more interactive, student-friendly, practice-oriented book,” explained that he or she had “found that I can add that through my teaching, and that using other professors’ practice-oriented materials was distracting.” 62

A few instructors suggested that the need to shift from purely textual analysis to more visual cues resulted from a new generation of students who are more accustomed to new technology, including reading online and making use of hyperlinks. One suggested a new type of book that blended a graduate school textbook with a law school casebook. “This hybrid would contain (1) full explanations of the law, (2) case summaries illustrating the law, (3) the full opinion of a select group of cases (4) problems to work through.” 63 Another instructor took the most

58. Id.
59. Id. at 12.
60. Id. at 13.
61. Id.
62. Id. at 15.
63. Id. at 12.
innovative route suggesting the development of a “flipped” classroom model. The doctrine would be imparted online. Students would have access to assessment tools online to gauge their comprehension of the law, and the classroom time would be used for problem-solving, drafting, and negotiations. This instructor, who deemed this a multi-year project to develop, said in-class time would include:

[M]ore problem-solving exercises and simulations/role plays, with the goal of teaching higher-level cognitive skills as well as including some skills training in negotiation and contract drafting. In other words, in my opinion, a focus solely on the casebook itself is missing the bigger picture; legal education has to move beyond the casebook even in so-called doctrinal classes.

The most pointed response was that:

Most litigated issues focus on interpretation, and much transactional lawyering centers on those issues prospectively. We teach students how to interpret cases, but we don’t really teach them how to interpret contracts. . . . Because many students don’t take an advanced contracts course, the under-taught subjects and skills—the ones that matter a great deal in law practice—won’t be learned well in law school otherwise.

In contrast, several respondents who praised the traditional method, at least in part, feared that the balance would shift to students spending too much time drafting agreements and not enough time thinking about how to avoid or resolve disputes. This instructor wrote:

The danger I see with the current trend toward more real world or practical teaching is that students are not taught how to think, but primarily what to do or think instead. I think this is wrong and believe that this will ultimately result in lower quality products, whether drafting or litigation.

All of these comments taken together suggest that there are some instructors who are happy with the status quo and others who are interested in changing what they do in the classroom. Within the latter group, however, there appears to be great variation in progress toward such a goal, and uncertainty as to what it would look like to accomplish

64. Id. at 14.
65. Id. at 14–15.
66. Id. at 14.
67. Id. at 15–16.
68. Id.
what they hope to. Also, in the latter group, there is some amount of resignation that time constraints make it unlikely that much will be done to add either real world applications or transactional skills training. Notably, no one raised a concern that failing to teach transactional skills would hurt bar passage rates. Perhaps this is because it is new and rare that the bar exam has included a drafting assignment.

C. Langdell’s Innovation in Teaching Contracts

Those who wish to innovate are up against an entrenched 140-year-old tradition, which at its time was innovative. Christopher Columbus Langdell transformed legal education in 1870 by both introducing the case law approach and the Socratic method to the law school classroom. Langdell was committed to examining original sources, not summations, and his conception of original sources was appellate decisions. His first casebook was Selection of Cases on the Law of Contracts. The selected cases (from the roughly 2000 available in printed reporters) were available for free. However, he created the book because it was impractical to assign the publicly available versions to a large class of students who would all need simultaneous access to the same reporters.

Langdell was not the only person to select cases for publication in a single volume. What made his casebook unique was its organizational approach. Casebooks had existed as specialized reporters for some time. Other contemporary books or manuals had been indexed by the

69. See C.C. Langdell, Selection of Cases on the Law of Contracts (1871); Kimball, supra note 10, at 25–26, 28–29. When Langdell was a student, Harvard Law School had minimal qualifications for matriculation—young (white) men with a high school diploma and a letter of recommendation would be admitted. Kimball, supra note 9, at 25. There were no exams and attendance was not required to earn a degree. Id. at 26. However, Langdell was exceptionally studious, sleeping in a room above the library so that he could study at any time. Id. at 28.

70. LANGDELL, supra note 69.

71. HARPER, supra note 31, at 8; Steve Sheppard, Casebooks, Commentaries, and Gaffulgeons: An Introductory History of Law in the Lecture Hall, 82 IOWA L. REV. 547, 599–600 (1997); David A. Garvin, Making the Case: Professional Education for the World of Practice, HARV. MAG., Sept.–Oct. 2003; Christopher Columbus . . . Langdell!, GALLAGHER BLOGS (Oct. 12, 2012), http://www.gallagherlawlibrary.blogspot.com/2012/10/christopher-columbus-langdell.html. Given the free access students have to case law, both through complimentary subscriptions to Lexis and Westlaw, and through non-subscription based sites, there is no longer an impediment to free access. This differs from using a casebook, as professors carefully edit the cases they select for inclusion in their casebooks. Depending upon one’s perspective, this manicured method has its benefits and shortcomings in that it permits students (or limits them by requiring them) to focus upon a single or a few issues only and to remove headnotes and other summations that would presumably do the work of distillation for them.

72. Sheppard, supra note 71, at 595.

73. Id.
type of parties that might enter into a contract or the subject matter. Classifications included, for example, contracts with innkeepers or with “drunkards” or “infants” and so on. In contrast, Langdell organized his book at a higher level of abstraction. This would seemingly systematize the law, demonstrating the existence of general principles of law applicable to all contractual arrangement. This move occurred in spite of the growing complexity of commercial relationships at that time.74

Langdell also attempted to treat law as if it were a scientific discipline.75 He wrote:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer, and hence to acquire that mastery should be the business of every earnest student of law.76

Interestingly, in the same passage in which Langdell asserted that one can select those cases that contribute to the advance of the essential doctrines, he revealed his opinion regarding judicial decisions in general: “The vast majority are useless and worse than useless for any purpose of systematic study.”77 Thus, it seems that the Langdellian method went beyond revealing the inherent legal principles, but instead was a project to shape the law by shaping students perceptions.78 Langdell also advanced the notion that the law existed separate and apart from politics.79

The case method provided a means for universal training for lawyers regardless of the state in which they would ultimately practice. Langdell, a man apparently much more agile in a library drafting appellate briefs than in the courtroom or other practice, saw the library as the law’s laboratory: “[I]t is to us all that the laboratories of the university are to the chemists and the physicists, the museum of natural history to the

74. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906, at 92 (1999) (“The ‘manual method’ was employed by prominent writers such as Kent (1827), Story (1844), Metcalf (1867), Leake (1867), Parsons (1853, 1855), Hilliard (1872), and Bishop (1878), who organized their discussion of contracts around particular operational topics. For example, the different kinds of parties who might enter into contracts usually consisted of separate doctrinal categories.”).
75. Sheppard, supra note 71, at 597.
76. Id. at 600.
77. Id.
78. See LANGDELL, supra note 69, at iii–vii.
79. Minow, supra note 11, at 8 (citing Paul D. Carrington, William Gardiner Hammond and the Lieber Revival, 16 CARDOZO L. REV. 2135, 2149 (1994)).
zoologists, the botanical garden to the botanists.” The chief distinction was that the former was a dialogue, the latter, a monologue. Under the Dwight Method, instructors lectured students who at home read treatises describing legal doctrine and in the classroom faced public drills to test their recall. The Dwight Method also included practical skills training such as moot court exercises, though his maxim was “principle before practice.” The emphasis was on rote memorization and recitation.

For Langdell, who developed a competing approach, the Dwight Method would not work. Langdell’s casebook did not contain a recitation of the law, but instead required students to figure it out for themselves. Or at least arrive at the conclusions about legal doctrine that he expected based upon the carefully cultivated cases that would lead them there. Langdell assigned students his casebook, which had a short introduction. In theory, this meant they would read only the excerpted appellate decisions and come to their own conclusions about the doctrine. Of course, in reality, since Langdell’s era to the present day, students have used secondary sources including treatises, law journal articles, commercial outlines, flash cards, websites, and other sources in order not to come to their own conclusions, necessarily, but instead to arrive at the conclusion their professor (and bar examiners) expect them to use. Arriving at the doctrine, after all, is only one part of the task of analyzing the sorts of fact patterns students confront on law school exams. The more difficult skill is applying the law to the facts and writing a clear and coherent essay setting forth one’s analysis and conclusions.

81. Sheppard, supra note 71, at 583.
82. Id.
83. Id. at 584.
84. For example, Theophilus Parsons published his Contracts treatise in 1853. See THEOPHILUS PARSONS, 1 THE LAW OF CONTRACTS (1853).
85. See Kimball, supra note 10, at 30 (“Langdell’s practice of questioning students about the meaning of cases was intended to lead them to formulate and challenge their own inferences.”); Garvin, supra note 71, at 58–59.
Langdell’s techniques were not at first popular.\textsuperscript{86} As one student of his later reflected, “Most of the class could see nothing in his system but mental confusion and social humiliation.”\textsuperscript{87} Many students transferred from Harvard Law School to Boston University School of Law.\textsuperscript{88} However, Dean Langdell had the support of the president of Harvard University.\textsuperscript{89} Within three months of his beginning teaching, given the uproar among alumni and students, the president of Harvard University, Charles Eliot called in one of Langdell’s top students to inquire about his methods. The student praised his teacher as follows:

Well, Mr. President, I can go to Professor Washburn’s lectures and hear him read a chapter from his book on real property. I can go to Professor Parson’s lectures and hear him read a chapter from his book. But I learned to read before I came down here. When I go to Prof. Langdell’s lectures I get something that I cannot find in any book.\textsuperscript{90}

Langdell had other supporters, including Louis Brandeis who, as a student at Harvard Law School, seemed to admire the case method as it pushed students to look to the original sources, given that textbook summaries were often inaccurate.\textsuperscript{91} There is no question that Langdell improved the rigor and reputation of Harvard Law School. In 1871, the school, which had been operating since 1815, did not require attendance or much work. It was described, apparently by Oliver Wendell Holmes, as “almost a disgrace to the Commonwealth of Massachusetts.”\textsuperscript{92} Under Langdell’s influence, students had to complete a three-year curriculum, including a sequence of required courses. And by requiring examinations, the low attendance problem was also addressed.\textsuperscript{93} Though he would later join the Harvard faculty and accept the case method, Holmes previously disapproved of Langdell’s framework, arguing in

\begin{itemize}
  \item 86. Sheppard, supra note 71, at 598.
  \item 87. Kimball, supra note 10, at 31 (citing Samuel F. Batchelder, C.C. Langdell, Iconoclast, in BITS OF HARVARD HISTORY 440–41 (1924)).
  \item 88. GALLAGHER BLOGS, supra note 71.
  \item 89. Kimball, supra note 10, at 32.
  \item 90. Id. (citing Frank W. Grinell, An Unpublished Conversation with President Eliot at the Beginning of Langdell’s Teaching, (1929) (Biographical File of Christopher Columbus Langdell, typescript, 1 page) (on file with Harvard University Archives)).
  \item 91. Id. at 33 (citing Letter from Louis D. Brandeis to Otto A. Wehle (Mar. 12, 1876)).
  \item 92. Minow, supra note 11, at 6.
\end{itemize}
D. Incremental Reforms Post-Langdell

By the time Langdell stepped down as dean in 1895, the case method was entrenched at Harvard. By the 1920s, it dominated at American law schools. No small reason was economic efficiency. The Socratic method permitted both for a type of individualized attention without the need for a higher instructor-student ratio. It allowed for a single law professor to stand before a classroom of up to over 100 students, making law schools at one time what some have deemed “cash cows” for their universities. This was not an accident. It was part of the “Langdellian Bargain.” As professor Richard Neumann described, Langdell convinced Harvard President Eliot, that his method would facilitate a mass production of sorts, generating large profits. This project was successful—with some attributing the increase in the number and size of law schools as well as related businesses, like legal publishing, to this method. Langdell’s influence has been long lasting; the line of required courses at Harvard Law School during the 1871–1872 academic year

94. Id. at 7–8 (citing Martin P. Golding, *Holmes’s Jurisprudence*, 5 SOC., THEORY & PRAC. 183, 201 (1979)).


96. See Sheppard, supra note 71, at 608 (“Casebooks and the case method swept through American law schools with rare speed. In one generation, they effectively supplanted the treatise and lecture as the dominant tools of law teaching. The prophets who spread the new religion were the students and faculty who traveled from Harvard across the land.”); Garvin, supra note 71, at 58.


98. Richard K. Neumann, Jr., *Comparative Histories of Professional Education: Osler, Langdell, and the Atelier* 10 (Hofstra University Legal Studies, Research Paper No. 12-10, 2012), available at http://ssrn.com/abstract=2016462. (“[M]asses [sic] of students could be taught law economically in large classes, and the result would be professional learning because students in a Socratic class would do more than passively receive information, as in a lecture. The only substantial investment in such an enterprise would be the library. Personnel costs would be low compared with revenue because of the large number of students in each teacher’s classroom. Teaching would be so financially efficient that a profit could be generated each year. Eliot initially let Langdell keep the profit for law school use, but the bargain has since then evolved so that law school faculties and universities comfortably share the surplus.”).

99. HARPER, supra note 31, at 8 (noting that law schools grew in number and in size, and the number of lawyers grew on a per capita basis: whereas there were about sixty-one law schools with 4500 students enrolled in 1890, by 1916 there were 139 with nearly 23,000 students, and by 1963, 135 schools but with an enrollment of 47,000; and by the 1990s, enrollment was roughly 127,000); *see also* Goodenough, supra note 97, at 853–54 (noting that the rise of the casebook coincided with the development and growth of the legal publishing industry, including, for example, the foundation of the West Publishing Company by John B. West in 1872).
bears a stubborn resemblance to most law schools’ current first year curriculum. This is particularly irksome given how radically the law has changed, impacting the subject matter, including contract jurisprudence.

Some who succeeded Langdell in the deanship expressed an understanding of the limitations of his approach. Dean Roscoe Pound, for example, described the “sociological movement in jurisprudence” as positioning “the human factor in the central place and relegating logic to its true position as an instrument.” Dean Erwin Griswold suggested that the case method was overused. He noted that:

[T]he case method . . . is only a tool. It is not an end in itself, and it is fully as dangerous as it is useful . . . It has often been said, for a smile, that legal education sharpens the mind by narrowing it. To my mind, there is more truth to this than we have been willing to admit. . . . I do not reject the case method. I only argue that we should be careful in its use.

As current Harvard Law School Dean Martha Minow noted in 2010, “[T]he biggest challenges to Langdell’s focus on a general common law came from the rise of legislation, regulation, and administration, largely missing from the classic case method, and the scholarly movement known as legal realism, critiquing the idea of ‘general law’ separate from those people and interests producing it.” Upper-level courses were added to train students as new federal laws and regulations came into being after the New Deal (for example Labor Law was added in the 1940s and 1950s and Environmental Law in the 1970s). However, the

100. See Neumann, supra note 98, at 24. According to Neumann, “[b]eginning with the 1871–1872 academic year, Harvard’s required courses became — at Langdell’s insistence — Contracts, Torts, Civil Procedure, Real Property, Criminal Law, Evidence, and Equity. This is remarkably close to the required curriculum at most law schools today.” Id. (citing JOEL SIGILMAN, THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL 33 (1978)).

101. Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 609–10 (1908). Pound was the dean of the University of Nebraska College of Law at the time that this article was published. In 1916 he became the Dean of Harvard Law School.


104. Minow, supra note 11, at 12 (“Electives mirrored the issues of each succeeding decade; we added labor law in the 1940s and 50s; poverty law, civil rights, and urban law, in the 1960s and 70s, and environmental law in the 1970s and 1980s, internet, entertainment law, and human rights law,
first-year core curriculum changed very little.

During and beyond the Langdell era, there have been minor changes to Contract law curriculum and teaching methods. However, in terms of broad acceptance, these changes have been modest and incremental. Some of these reforms tracked the evolving legal theory movements, and others appear to be responses to challenges from practicing lawyers and the accreditation authorities. As Goodenough sums up: “[T]he first year curriculum is not just Langdell’s corpus. . . . [T]he case method and its progeny have created a set of techniques . . . that . . . any J.D. is expected to be able to reproduce and apply, and that every J.D. program is expected to help perpetuate.”

As for contract law, in particular, the Langdellian approach was further supported by Samuel Williston, including through his efforts producing the Restatement of Contracts, which was adopted by the American Law Institute in 1932. Like Langdell, Williston and others saw their role, as Professors Friedman and Macaulay explain, to:

- distill from the existing body of appellate case law a rational, coherent, and internally consistent set of propositions that they identified as the “true” law of contract. The order in which these concepts were arranged—in casebook, treatise, and Restatement—corresponded with the life history of a bargain from birth to death, beginning with offer and acceptance. . . . Cases were labeled “correct” mainly if they were consistent with the logical pattern of contract doctrine.

Scholars associated with legal realism, a movement that began in the 1920s, took what Friedman and Macaulay deemed a “problem approach to the law of contract.” This method did not depart substantially from, but instead built upon, Williston, guiding students to read cases as source material to evaluate the problems he identified. Though realists would consider more background information regarding parties to the contested agreement, ultimately, the cases still centered on the old problems Langdell and Williston identified, such as whether a unilateral offer could be revoked by an offeror before performance was meeting student interests and connected law schools to current affairs.”).
completed. And even with regard to new issues of concern to the legal realists, such as unequal bargaining power, contracts of adhesion, and unconscionability, these issues were to be identified in the case law. Thus most casebooks continued to emphasize appellate decisions, from which students would identify such problems while also gleaning the ways in which the doctrine furthered particular policy goals. Even those scholars who viewed contract law through more of a political lens—emphasizing, as one example, the “freedom of contract” as in opposition to government regulation of private actors—still depended on the same study of appellate court decisions. Even the “post-realist” development of the UCC reflected common law origins, and set out to resolve problems identified in judicial decisions. As Friedman and Macaulay explain, the UCC was “the realist’s version of the Restatement.”

Friedman and Macaulay also set out what the defenders of the status quo thought about teaching practical skills. They believed that “mastery of concepts is in the highest sense practical; it trains brilliant, lawyerly minds . . . [and] the practicalities of law are either trivial or (essentially) unteachable.” Friedman and Macaulay contended that “contract law suffered from all the ills of law teaching and research, only more so.” They decried the “uncritical acceptance of the problems of Langdell and Williston as the important ones and of the methods of the late 1920s and 1930s as the appropriate ones, all in isolation from the facts of modern business.” As an answer to this criticism, the authors suggested empirical research to arrive at a collection of live contract problems that would differentiate between a large corporation’s contract issues and those of a consumer or in nonbusiness transactions. In the meanwhile, law students taught in the traditional fashion “should not be allowed to leave first-year contracts thinking that they know much about the role of law in exchange transactions in the business world.”

110. Id.
111. Id. at 809.
112. Id. at 806–07.
113. Id. at 807–08.
114. Id. at 808.
115. Id. at 809.
116. Id.
117. Id. at 811.
118. Id. at 819.
119. Id. at 819–21.
120. Id. at 820–21.
In 1992, a task force of the ABA published a report concerning legal education.\footnote{SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].} It is known colloquially as the “MacCrate Report,” after the task force chair, Robert MacCrate. In the introduction, the task force acknowledged that law schools would not be able to single-handedly transform students “into full-fledged lawyers licensed to handle legal matters.”\footnote{Id. at 4.} “Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers.”\footnote{Id.} After an extensive survey, however, the task force discovered that, contrary to the “gap” perception, law schools actually invested substantial resources to skills training. The MacCrate Report listed “fundamental” skills lawyers should possess.\footnote{Ann Juergens, Using the MacCrate Report to Strengthen Live-Client Clinics, 1 CLINICAL L. REV. 411, 417 (1994) (citing MACCRATE REPORT, supra note 121, at 138–207) (noting that the ten identified skills were “problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication skills, client counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas”).} It identified negotiating in the context of transactions as one of the ten essential skills sets. Related skills included the ability to counsel the client, implement the client’s objectives, and prepare for the negotiation.\footnote{Deborah A. Schmedemann, Finding a Happy Medium: Teaching Contract Creation in the First Year, 5 J. ASS’N. LEGAL WRITING DIRECTORS 177, 184 (2008).}

After the MacCrate Report came out, bar associations, practitioners, members of the judiciary, and legal academics convened conclaves in many states to address its results. Law reviews held conferences to discuss related topics including the issues identified in the Report and legal reforms. In response, the ABA ultimately changed its standard to approve law schools. It redefined the mission of law schools, set out in Standard 301(a), from the goal to “qualify[ing] . . . graduates for admission to the bar” to something broader. Now law schools were expected to turn out graduates able to “participate effectively in the profession.”\footnote{MARY LU BILEK ET AL., AM. BAR ASS’N, COMM. ON THE PROF’L EDUC. CONTINUUM, SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 3 (2013) [hereinafter 2013 ABA REPORT].} This was to be an ongoing process, with regular
reflection on curriculum to ensure the mission was fulfilled. Beyond just mission expansion, the ABA also changed Standard 302 to require law schools to also provide skills training including to “offer live-client or other real-life practice experiences.”

In 2007, after an intensive field study of sixteen schools, the Carnegie Foundation for the Advancement of Teaching published a report (the Carnegie Report) of its findings and recommendations. Organized around five key observations, it praised some aspects of legal education, but questioned others. Notably, the first year curriculum as described by the Report echoed the goals of Langdell:

At a deep, largely uncritical level, the students come to understand the law as a formal and rational system, however much its doctrines and rules may diverge from the common sense understandings of the lay person. In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.

The Report found two major limitations in legal education: the absence of both (1) direct skills training and (2) “effective support for developing ethical and social skills.”

The Carnegie Report suggested that students would learn best with a curriculum supported by three pillars: knowledge of the doctrine, skills, and professional identity. The executive summary noted, “The dramatic results of the first year of law school’s emphasis on well-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding.” With regard to the Socratic method, the Report questioned its merits in moving students...

129. Id. at 5–6.
130. Id. at 6.
131. Nantiya Ruan, Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership, 8 LEGAL COMM. & RHETORIC: JALWD 191, 192 (2011) (“In essence, the reports demand that legal education combine the ‘three pillars’ or apprenticeships of legal professionalism—conceptual knowledge, skill, and moral discernment . . . .”).
132. CARNEGIE REPORT SUMMARY, supra note 128, at 4.
from school into practice.\textsuperscript{133} It also suggested that law schools have failed to take into account “contemporary learning theory” in the way in which students’ performance is assessed, noting that law schools tend to emphasize summative assessments (such as a single end of the semester exam) and not formative assessments (ongoing feedback).\textsuperscript{134}

In April 2007, fifteen years after the 1992 MacCrate Report, the ABA Council of the Section on Legal Education and Admission to the Bar organized a conclave. Professor Deborah Schmedemann recalled that, at the time, more needed to be done in skills training for transactional practice.\textsuperscript{135} Then, in 2013, a special committee of the ABA evoked the MacCrate Report when it published its own report on the state of legal education—the 2013 ABA Report.\textsuperscript{136} The 2013 ABA Report is somewhat defensive, at the outset asserting that: “As was the case in the pre-MacCrate era, the criticisms of legal education are based mostly on anecdote rather than empirical research and often overlook or give short shrift to the many important ways in which the academy actually does prepare students for legal practice.”\textsuperscript{137}

The topic of teaching contracts appears only a few times in the twenty-five page report. In two instances the Report references press accounts\textsuperscript{138} critical of legal education for its failure to teach students “basic tasks such as drafting contracts, negotiating mergers, and other

\begin{quote}
\textsuperscript{133} Joseph A. Dickinson, \textit{Understanding the Socratic Method in Law School Teaching After the Carnegie Foundation’s Educating Lawyers}, 31 \textit{W. NEW ENG. L. REV.} 97, 98, 100 (2009) (“In joining the chorus of Socratic Method critics, Educating Lawyers has chosen to stand with those critics for whom the Socratic Method has become a shibboleth of all that is wrong with legal education. The gravamen of that dissatisfaction is that contemporary legal education does not prepare students to be client ready. By amassing all dialogue-based pedagogy into the negatively described ‘case dialogue method’ and casting that conglomerated pedagogy as the ‘signature pedagogy’ of American legal education, Educating Lawyers implicitly denies that dialogue-based pedagogy develops attributes necessary to the practice of law.”).
\end{quote}

\begin{quote}
\textsuperscript{134} \textit{Carnegie Report Summary}, \textit{supra} note 128, at 7 (“Summative assessments are useful devices to protect the public, for they can ensure basic levels of competence. But there is another form of assessment, formative assessment, which focuses on supporting students in learning rather than ranking, sorting and filtering them. Although contemporary learning theory suggests that educational effort is significantly enhanced by the use of formative assessment, law schools make little use of it. Formative assessments directed toward improved learning ought to be a primary form of assessment in legal education.”).
\end{quote}

\begin{quote}
\textsuperscript{135} See Schmedemann, \textit{supra} note 125, at 184–85.
\end{quote}

\begin{quote}
\textsuperscript{136} See \textit{2013 ABA Report}, \textit{supra} note 126.
\end{quote}

\begin{quote}
\textsuperscript{137} Id. at 1 (emphasis in original).
\end{quote}

\begin{quote}
\end{quote}
key features of law practice.” In one instance, Contracts is mentioned as one of about a dozen courses for which the “Educating Tomorrow’s Lawyers” website provides innovative curricular ideas.

After all of this, the first-year contract law curriculum in particular remains substantially similar to the Langdellian model. Notably, Langdell’s casebook left out factual context and provided no examples of contracts. As Professor Richard Neumann recently explained:

[I]n a course called Contracts—Langdell’s casebook includes no contracts, but instead only cases about contracts. As a genre, casebooks are based on the idea that nearly all we can know about what happens in the law comes from litigation in the form of judicial opinions. The Contracts course today still resembles the one Langdell taught. It has little relationship to contracts as they are understood by transactional lawyers. Of the dozen or so chestnut cases that appear in nearly all Contracts casebooks today, about half teach issues that rarely occur in the modern experience of lawyers and courts.

The sum of the MacCrate, Carnegie, and 2013 ABA Report provided little attention to transactions. As Professor Tina Stark commented in 2010 about the first two: “The MacCrate and Carnegie Reports gave transactional education short shrift, not recognizing that the skills we use differ from those used in litigation and that therefore our pedagogy differs.” Similarly, the “outsider” arbiter of law school rankings ignores this area as well. As Stark noted, “[I]t seems that U.S. News & World Report does not know we exist. They report on the best legal writing programs and the best litigations skills programs, but they are silent about transactional skills programs.”

II. LAWRENCE CUNNINGHAM’S CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER

Another new approach focuses on the very issue Friedman and Macaulay identified in their critique of the contract classroom. As noted above, they suggested that attention be paid to contemporary problems. This is something Lawrence Cunningham’s book Contracts in the Real

139. Goodwin, supra note 138.
140. See 2013 ABA REPORT, supra note 126, at 17.
141. See Neumann, supra note 98, at 22.
142. See Stark, supra note 36, at 3.
143. Id.
World\textsuperscript{144} does well. Whether used as a supplement to a standard casebook or as primary source, supplemented with selected referenced judicial decisions, this book could help streamline the way common law is imparted, leaving substantial time during the term to cover other often neglected areas.

With \textit{Contracts in the Real World}, Cunningham brings contract doctrine to life. As I have written previously:

Cunningham concisely, yet colorfully, covers how courts resolve a variety of deals gone wrong. This book is ideal to help students develop an understanding of how the law is used to sort between those bargains that will be enforced and those that will not, as well as what remedies are available when things do not go as the parties to the agreement initially planned.\textsuperscript{145}

\textit{Contracts in the Real World} has considerable range. It starts with a wrecked wedding party—an event few experience, though many may fear. A dispute between a couple and a banquet hall venue results from a regional power outage during the reception.\textsuperscript{146} This fact pattern echoes the type of phone call a recent law graduate might receive from an exasperated family member, punctuated with the dreaded question: “You’re a lawyer. Can we get our money back?” The book provides a sensible explanation of how the wedding dilemma would resolve, and weaves together this type of personal situation with celebrities’ disputes and classic contract decisions. These classic decisions are better appreciated in this fashion, when they are used to explain the outcomes of more modern disputes. For example, \textit{Sherwood v. Walker}\textsuperscript{147} (the fertile cow-mutual mistake case), dating back to 1887, resonates when it is used to analyze a divorce settlement dispute concerning millions of dollars invested with Bernard Madoff’s Ponzi scheme.\textsuperscript{148} In this manner, Cunningham’s book addresses some of the concerns raised by Friedman and Macaulay: that the problems taught in the contracts classroom are stale and not those that lawyers will encounter in regular practice.

In the foreground, chapters contain main stories that describe in clear detail contemporary disputes. Typically each lead story is set up as a cliff-hanger, where the outcome (a settlement or court decision, for

\textsuperscript{144} CUNNINGHAM, \textit{supra} note 16.


\textsuperscript{146} CUNNINGHAM, \textit{supra} note 16, at 1.

\textsuperscript{147} 66 Mich. 568 (1887).

\textsuperscript{148} See CUNNINGHAM, \textit{supra} note 16, at 59–64.
example) is unknown. Then at least one classic contract law case is described to highlight the issues in play. For example, one lead story involves renowned poet Maya Angelou’s dispute with an agent involved in a greeting card deal that she ultimately entered into with Hallmark.\footnote{Id. at 148–50.}

Before the outcome is revealed, Cunningham brings in the famous 1917 Lucy, Lady Duff-Gordon case.\footnote{Id. at 150.} Of course, Ms. Gordon was a celebrity in her own day but has been forgotten. By pairing her dispute with a respected artist from the current era, it comes back to life.

What additionally makes the book compelling is that Cunningham mixes relatable fact patterns and entertaining battles with significant matters of policy. *Contracts in the Real World* accomplishes this, for example, when it covers some very unpopular contracts. These include the infamous agreements under which American International Group (AIG) paid out $165 million in cash bonuses to hundreds of employees. Among those who received more than one million dollars each were seventy-three employees of the business unit that caused AIG’s near collapse.\footnote{When Bonus Contracts Can Be Broken, Room for Debate, N.Y. TIMES (Mar. 17, 2009, 6:25 PM), http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/.} This was the same business unit that helped enable the housing bubble and related financial crisis of 2008 by providing credit protection (selling credit default swaps) on high-risk mortgage-linked securities.\footnote{See generally Jennifer S. Taub, AIG, in CASE STUDIES: CORPORATIONS IN CRISIS 235 (Robert A.G. Monks & Nell Minow eds., 2011), available at http://bcs.wiley.com/he-bcs/Books?action=resource&bcsId=6507&itemId=0470972599&resourceId=26620 (case study available in online edition of CORPORATE GOVERNANCE (Robert A.G. Monks & Nell Minow eds., 5th ed. 2011)).} The AIG bonuses were announced in 2009, just months after the U.S. government paid eighty-five billion dollars for a nearly 80 percent ownership stake in AIG.\footnote{Id. at 235.} This was a part of the more than $182 billion government commitment to rescue the giant insurance firm when it approached insolvency due, in large part, to its inability to make payments to counterparties on its credit default swaps.\footnote{See CONG. OVERSIGHT PANEL, JUNE OVERSIGHT REPORT: THE AIG RESCUE, ITS IMPACT ON MARKETS, AND THE GOVERNMENT’S EXIT STRATEGY 19–21 (2010); THE FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 268–69 (2011).}

The public outrage over the AIG bonuses is included in Chapter 3 of Cunningham’s book, which covers the concepts of “excuses and termination.”\footnote{See CUNNINGHAM, supra note 16, at 73–78.} These bonus contracts were entered into in early 2008,
well before the bailout. The agreements, which promised bonus payments in 2009 and 2010, were designed to encourage employees to stay with the company. In response to an irate public, in 2009, AIG insisted that the contracts with these employees were ironclad. Yet, the company did not publicly reveal the actual language of the agreements nor were legal theories that would have excused performance discussed. Those opposed to paying the bonuses, including certain members of Congress, suggested imposing up to a 100% tax on them. In this manner even the opposition seemed to treat as true the faulty premise that contract law requires all agreements to be performed without any exceptions. Cunningham attempted to correct this misperception. In a contemporary op-ed in the New York Times and in Contracts in the Real World, he suggested that contract doctrine might have been a moderating measure, an alternative to either unexamined payments on the one hand or demands for government confiscation, on the other. It also would have been a teachable moment. Though that moment passed, through this book the lesson is not lost.

Given the comprehensive scope and easy style of Cunningham’s book, this is a natural choice to assign as a supplement to a casebook. Or, one might be tempted to use it as the primary textbook, and supplement it with the UCC, a number of the referenced cases, and other favorites and unpopular decisions (including those discussed in Part III below), including cases at the intersection of common law and federal regulation, and those highlighting where jurisdictions vary. Students may learn faster when they are so guided and engaged. Should this leave extra time in the semester, it might be used for contract negotiation and drafting—skills that nearly all attorneys need but few learn in law school.

III. MODERNIZING THE CONTRACTS CLASSROOM

In order to teach contract law, contract theory, and contract negotiation and drafting, I believe my classroom must modernize. I would like to evenly divide my four-credit, first semester course as follows: (1) assign Cunningham’s book to properly place contemporary

156. Id. at 74.
159. CUNNINGHAM, supra note 16, at 77–78.
disputes of the day at the center of the class, not the margins and thereby invite students to struggle with “unpopular” contracts, not simply the ones that reinforce the doctrine, including contract disputes that never land in court; (2) accurately treat common law as only one source of law, alongside federal and state statutes and regulations, to reference when creating agreements, struggling to interpret their provisions, or questioning their enforceability; and (3) devote at least one-third of the semester to negotiating and drafting skills and also offering at least one upper-level transactions course and upper level negotiations course to hone those same skills. I will address the second concept first, given coverage already above of Cunningham’s book.

A. Shaking up the Doctrine: Recognizing Common Law as Only One Source of Law—Integrate State and Federal Regulation

With weak competition—such as from professors reading books aloud to students—it is understandable that Langdell’s approach would have been considered innovative. But, does that mean it must still be? Let us consider the other important innovations of that era, including the telephone, phonograph, mechanical cash register, dry plate photography, and the light bulb. There is no question of the lasting importance of these inventions as compared to the then-contemporary alternatives. And we should honor and pay tribute to those who made these contributions. Yet, we have carried on since then.

Similarly, since Langdell’s era, the legal system in the United States has blossomed from an emphasis on judge-by-judge-made common law to more complex state and federal legislation and rulemaking, including consumer protection measures that impact contract formation and remedies. There are now state unfair and deceptive acts and practices statutes, door-to-door sales rules, and more, that affect consumer agreements. Moreover there are product, service, or industry-specific laws and rules. This includes, for example, The Real Estate Settlement Procedures Act of 1974 and The Fair Debt Collection Practices Act, enacted in 1977. There are also laws and rules covering contracts for funeral services, the sale of investment services, securities, and vacation time—shares to name a few. Being aware of these is important not just for lawyers counseling business clients on ongoing compliance and drafting agreements, but also for public interest and consumer lawyers advising on the enforceability of such agreements.

Statutory interpretation (as well as participating in the administrative rulemaking process) is a task lawyers encounter as frequently as studying common law decisions, which in contrast is a fairly easy endeavor. Though several law schools are adopting public law or
legislative/regulatory law courses, I am not aware of a similar effort to crack open the Contracts course to integrate the regulatory state. This has theoretical and practical importance. Today a lawyer, perhaps with a consumer client, facing a question of whether an agreement is enforceable, would quite briefly consider the checklist of contract formation provided in a standard common law Contracts course. Very quickly the attorney would need to look at the subject matter of the arrangement to determine whether any number of regulations might also apply. I would like my students to learn how these codes and rules may create default rules or supplant common law contract rules they are pulling from the cases enshrined in the casebook. They should know what cannot be “contracted around.” One way to manage this would be to select a tough case that gets at the intersection of these areas of law, as described in Part III.B. below.

B. Studying Contemporary Disputes and Unpopular Contacts

As noted in Part II above, considering unpopular contracts, including those that are not challenged in court, such as the AIG bonuses, is an important way to teach students about both doctrine and the practical limitations of the law. This might be effective not just because familiar or current cases can be more engaging, but because they deliver on the spirit of the case method.

For example, presently, employee and consumer rights, including under federal law, are being trampled due to the Supreme Court’s elevation of the Federal Arbitration Act (FAA) over other acts of Congress and common law contract doctrine. For example, in 2010 in Rent-A-Center v. Jackson, the Supreme Court limited the ability for an employee to gain access to the courts to bring race discrimination and retaliation claims under Section 1981 of the Civil Rights Act. And, in 2012, in CompuCredit v. Greenwood, the Court limited consumers’ access to the courts to adjudicate claims under the Credit Repair Organizations Act. These cases would fit well under a topical heading that is a critical issue of our time—the way in which civil rights and consumer protection under federal law are in tension with the Supreme Court’s interpretation of the FAA. It would be useful to study these

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161. Id.
163. Id.
164. For an in-depth discussion, see the blog from which this is adapted, Jennifer S. Taub, Mind
cases to help shed light on the way in which common law contracts principles are undermined by the Court’s construction of federal statutes. Professor Margaret Jane Radin refers to agreements that deprive people of substantive rights as “rights deletion schemes.”

These cases, as well others involving take-it-or-leave-it contracts (also referred to as contracts of adhesion, standard contracts, or boilerplate), could be a starting point, and a way to bring out and teach multiple areas of law that get entangled with contract doctrine. In addition, these cases might inspire students to devise common law solutions or legislative action that might remedy the unfortunate outcomes in these cases. To engage students in this fashion, they should have the benefit of the most current academic writing. There is a growing body of writing that examines contemporary contested areas of contract law. Students would benefit from reading articles like Curtis Bridgeman and Karen Sandrik’s *Bullshit Promises* as well as excerpts from books like Margaret Jane Radin’s *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (as well as reviews considering or challenging their work). Bridgeman and Sandrik make recommendations as to how the law should treat illusory promises that do not bind the promisor but do not rise to the level of promissory fraud. These include promises made in standard form contracts with consumers. Radin’s book on take-it-or-leave it contracts is equally provocative. She contrasts the idealized world where contracts are “free exchanges between willing parties” and the world we actually inhabit. Her first chapter begins with the following: “Once upon a time, it was thought that ‘contract’ refers to a bargained-for-exchange transaction between two parties who each consent to the exchange. This once-upon-

Your Peas and Queues at the Supreme Court: Reconciling Rent-a-Center with Citizens United, Part II, RACE TO THE BOTTOM (June 29, 2010, 9:00 AM), http://www.theracetothebottom.org/miscellaneous/mind-your-peas-and-queues-at-the-supreme-court-reconciling-r.html (“They claimed that prior precedent dictated that the right way to ask is the first way.”).

165. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 33, 130–35 (2013) (referring to mass-market boilerplate rights depletion schemes as “the deployment of boilerplate to rework a system of recipients’ rights that are guaranteed by the polity in order to divest recipients of those rights, or of some substantial portion of them, for the benefit of the firm”).

166. Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379 (2009) (drawing on the work of philosopher Harry Frankfurt, the authors deem these “bullshit” promises, but also recognize the term “pseudo-obligation”).

167. RADIN, supra note 165.

168. Bridgeman & Sandrik, supra note 166, at 382.

169. RADIN, supra note 165, at 14.
a-time story is the ideal of contract.” These texts would provide a far better sense of the law than merely the case method. Including theory like this is appropriate for graduate-level studies. Moreover, evaluating students on their ability to detect the contradictions between the “once-upon-a-time” story and the true state of the law would reward truly critical thinkers who will in turn become better lawyers. This does not mean dispensing with the doctrine; in fact it means carefully studying it without blinders on.

C. Including Negotiation and Drafting in First Year and Beyond

A great way to actually teach contracts would be to teach transactional skills in the first year. While many law schools offer an upper level transactions class, because it is often set apart from the first-year Contracts class, and because it is typically an elective, students get what Professor Oliver Goodenough describes as an “atomiz[ed]” understanding of transactions. What they need in contrast is to “be exposed in an integrated way to the logic of contracts, the dynamics of a deal, and the use of such drafting tools as affirmative and negative covenants, representations and warranties, indemnification and conditions of default.” I would add to that list helping clients develop a term sheet and ensuring that the terms of the deal as expressed in the term sheet are contained in the agreement as drafted, further negotiated and finalized. This may mean having the student rewrite only portions of the agreement.

There are several professors bringing transactional skills into the first-year Contracts courses. At a 2010 conference, Professor Michael Hunter Schwartz discussed teaching transactional skills to first-year law students in the second semester of his Contracts class. He explained that an added benefit was the positive outcome such training had for his students, in particular one who at a job interview was asked to review an agreement and identify troublesome provisions. Drawing upon what he had learned in Schwartz’s class, the student found problematic provisions and landed the job. Schwartz mentioned another benefit: improvement in outlook. He explained:

170. Id. at 1.
171. See Goodenough, supra note 97, at 861.
173. Id. at 77–78.
174. Id. at 78.
Another reason that theorists believe that teaching skills might help—no one knows for certain yet—is that a lot of students, when they’re in law school, get the message that the only way to practice law is by engaging in conflict. A transactional orientation may give students a sense that there can be practices of law where both parties win. This approach suggests that the students can choose less conflict-focused practice options.175

Like Professor Cunningham, Professor Schwartz draws upon modern, familiar, and entertaining subject matter to capture students’ attention. A one-page contract he shares with students was used for movie extras who participated in the production of the satirical film “Borat.”176 Professor Schwartz explained:

[F]or about twelve hundred dollars, the contract communicates that the signatories are waiving their rights to later complain about how they are depicted in the movie. Studying this contract is a fun exercise because—for those of you who have noticed this provision—the contract describes the film as a “documentary-style” film, a description that just seems to tickle my students.177

Along the same lines, he also provides his students with the legendary “M&Ms clause” which excused a rock band from performing at any venue if the candy provided included any brown M&Ms.178 For purposes of evaluations, Schwartz suggested:

In the future, I will ask the students to mark up rather than draft a document from scratch. I will present them with a form that contains a number of mistakes which they will be expected to identify. I expect that half of the points will be come from correctly identifying the mistakes and the other half based on what solutions are proposed.179

Schwartz assigns roughly five short, pass/fail drafting exercises to his students each semester. These each involve drafting one or two contract terms, not an entire agreement.180 Professor Chaim Saiman also incorporated transactional skills into his first-year Contracts course.181

175. Id. at 79.
176. BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (20th Century Fox 2006).
177. Schwartz, supra note 172, at 81.
178. Id. (citing his conference handouts).
179. Id. at 97.
180. Schwartz, Saiman & Rubin, supra note 5, at 98.
181. Saiman, supra note 4, at 83.
He did this in two ways. First, he worked with colleagues to have his law school establish a one-credit practicum that would be added on to the first-year Property or Contracts class. He also “steer[ed]” his main Contracts course in a transactional direction. Saiman is aware of the balance he is trying to strike. As he explained, “While I am in favor of educating students to become more sophisticated transactional tacticians, I am unwilling to forgo discussion of policy analysis, legal theory, legal history, and most importantly, the social consequences of the normative commitments embedded in contract law and doctrine.” Given the selection of cases in his book, few of which involved lawyers negotiating deals within the past thirty years, he found it challenging to provide instructional points regarding what a lawyer might have included in the agreement. Further, he noted that, “[L]aw school habitation trains us to read these cases as litigators and policymakers, rather than planners. Because the casebook is largely concerned with the ‘frame’ of contract law, class discussion invariably focuses on validity and enforceability, rather than prudence and good lawyering.” Saiman was wary of a “deal-centric” approach, as first-year students often lack the knowledge of other areas of law including federal securities laws, bankruptcy, agency law, and so on. Thus, he arrived at “conceptual approach.” This entailed teaching transactional issue spotting and reading the cases from the perspective of a transactional lawyer. Saiman mentioned different ways to assess students’ understanding of drafting. He suggested he might provide them with a form that does not fit the described transaction to see whether they can spot issues of concern and mark up the form accordingly.

One way to help deal with the time crunch is flipping the classroom to allow for class time spent problem solving, negotiating, and reviewing drafts and use time outside class to review video lectures and slides that

182. Id.
183. Id.
184. Id. at 84.
185. Id. at 85–86.
186. Id. at 86.
187. Id. at 87.
188. Id.
189. Id. at 87–90 (describing issue spotting exercises involving providing students with a mock-up of a bill of sale for an automobile from a case they review and asking them to determine whether it would be an appropriate form to use for that transaction, and also requiring students to consider business issues including who should bear the risk of loss).
190. Schwartz, Saiman & Rubin, supra note 5, at 98.
clearly impart doctrine.191

CONCLUSION: THE BALANCING ACT

Dean Langdell saw law as a science for which principles could be induced through the study of case law, with the library as the sole laboratory. There are other more suitable metaphors.192 Law is an art,193 a social science,194 a profession, a system to perpetuate hierarchy,195 a set of rituals, a system of signs,196 an expression of values, and more. And Contract law is far more than just what the Restatement (Second) describes as a promise or promises “for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”197 A contract can also be conceptualized in other ways, including as a linguistic structure, a relationship, a plan, and a ritual.198

While teaching law, inevitably, there are tradeoffs. There will be some things instructors are doing well that they will have to stop doing in order to fit in equally, if not more, important substance and methods.

191. For example, in 2012, Professor Deborah Threedy and colleagues at the University of Utah produced thirty-seven online videos that run ten minutes or less and cover topics from the Restatement Second of Contracts. See University of Utah’s Repository of Contracts Lessons on Video, CONTRACTSPROFS BLOG (Sept. 5, 2013), http://lawprofessors.typepad.com/contractspof blog/2013/09/university-of-utahs-repository-of-contracts-lessons-on-video.html (“The goal of this project is to reduce the amount of in-class time spent on conveying doctrine so that more time can be devoted to active learning activities, such as group exercises or skills development”). These videos are available at https://www.youtube.com/playlist?list=PLpbtRdN7xWUIKjRXzfBgaPdQZBQSS1n2Vr.

192. Law is also is a system that operates in a societal context with power relationships and human decision-making frailties. A traditional approach to Contracts would require suppression of that reality.


198. Lipshaw, supra note 29. Lipshaw describes these metaphors and their associated proponents as “relationships (Macauley and MacNeil); communities (Bernstein); engineering (Gilson); thing (Leff); plan (Bridgeman); organization (Smith); social artifact (Suchman); ritual (Lipshaw).” Id.; see also Jeffrey M. Lipshaw, Metaphors, Models, and Meaning in Contract Law, 116 PENN ST. L. REV. 987, 1004 (2012) (discussing contracts as “linguistic structures”).
However, the way in which this gets played out from faculty meetings to public forums is a stark choice between preparing lawyers for a lifetime career in which learning to think like a lawyer is critical versus providing practical training so they might hit the ground running as practitioners. Clearly this is a false choice. It is as silly as imagining a film school where the choice was between reading film reviews versus reading theory versus actually making a movie. We can have it all, even in the first year classroom.

To be clear, I believe there is also a great need to teach interdisciplinary courses and I embrace theory and a range of critical perspectives of the law. But, I also believe that particular skills must be taught, and a course called Contracts should do more. It should expose students to actual contract drafting and negotiation. It should include a broader range of laws that govern contracts (including state and federal regulations). It should place at the foreground popular (and unpopular) contracts with classical cases presented as tools to explain and analyze relatable modern disputes. And, it should include secondary sources including law journal articles and portions of relevant books that examine contemporary contested areas of contract law. In other words, it is time to bury Langdell and enliven students.
COPYRIGHTS IN FACULTY-CREATED WORKS: HOW LICENSING CAN SOLVE THE ACADEMIC WORK-FOR-HIRE DILEMMA

Glenda A. Gertz

Abstract: Many copyrightable works of university faculty members may be works-for-hire as defined under current U.S. copyright laws. Copyrights in works-for-hire are treated differently than copyrights in other works with respect to ownership, duration, termination rights, and requirements for transfer. Ambiguity over whether a specific faculty-created work is a work-for-hire creates legal uncertainties and potential future litigation about the initial ownership of the copyright, length of the copyright term, and termination rights which could impact all future transfers and licensing. Many universities have attempted to define ownership of faculty-created works through university policies. These policies are ineffective to alter the presumption of university ownership of works-for-hire, as they do not meet the requirements of U.S. copyright laws for a transfer of such ownership. This Comment argues that the best way to resolve these ambiguities is for the university to retain ownership of the copyrights in faculty-created works and provide the faculty creator with a license to the copyrighted work. Although perhaps counterintuitive, this Comment suggests that a licensing approach would actually result in greater certainty and better protection of the interests of both the faculty member and the university.

INTRODUCTION

University faculty members engage in a wide variety of activities, including teaching, research, and writing. Some of these activities result in the creation of copyrightable materials. As technology has become more fully integrated into the university environment, the variety of copyrightable faculty-created works has increased. In the United States, copyright protection is given to “original works of authorship fixed in any tangible medium of expression.” In a university setting, original works of authorship might include software, websites, data compilations, technical manuals, textbooks, articles, visual artworks, fiction and non-fiction writings, musical works, video games, and on-line courses, which may themselves include a variety of copyrightable components such as text, video, sound, and pictures. There has been some debate over the past thirty years as to whether the copyrights in such materials

belong to the faculty member who created them or to the university as an employer.\(^3\) During this time period, it has become common practice for universities to take ownership of patents on faculty inventions, and in some cases these patents have benefitted the universities financially through licensing or other commercialization strategies.\(^4\) Some commenters of the past decade have speculated that universities may attempt to assert ownership over copyrights as well, particularly when the materials involved have significant potential commercial value, such as distance-learning curricula.\(^5\) Many universities have, in fact, adopted formal copyright policies that address ownership of faculty-created works.\(^6\) Despite the commenters’ fears, however, most university policies surveyed express a desire for faculty members to own the copyrights to “traditional scholarly works.”\(^7\)

The question of how to accomplish that stated goal is more difficult than it might first appear. Some commenters believe that the copyrights in many faculty works, even traditional scholarly works, belong to the university as a work-for-hire.\(^8\) Whether a work was created as a


\(^5\) See Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL’Y 275 (2002); Ware III, *supra* note 3.

\(^6\) See Lape, *supra* note 3 and Packard, *supra* note 5 for surveys of university copyright policies at two different points in time.

\(^7\) See Packard, *supra* note 5, at 306 (stating that, as of 2002, 71% of universities surveyed disclaim ownership of “traditional scholarly work”); see infra Part II.B (regarding the definition of “traditional scholarly works”); see, e.g., University of California Policy on Copyright Ownership, http://policy.ucop.edu/doc/2100003/CopyrightOwnership (last visited Sept. 26, 2013) (“This Policy is intended to embody the spirit of academic tradition, which provides copyright ownership to faculty for their scholarly and aesthetic copyrighted works.”); University of Washington Patent, Invention, and Copyright Policy, http://www.washington.edu/admin/rules/policies/PO/EO36.html (last visited May 6, 2013) (“[T]he University acknowledges the right of faculty, staff, and students to prepare and publish, through individual initiative, articles, pamphlets, and books that are copyrighted by the authors or their publishers.”).

\(^8\) See Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and*
work-for-hire has a dramatic impact on the treatment of the work under U.S. copyright law. The copyrights in a work-for-hire are presumed to belong to the employer rather than the creative employee.\(^9\) The duration of the copyright in a work-for-hire is different from other works,\(^{10}\) and a work-for-hire does not carry termination rights for licenses.\(^{11}\) A work-for-hire also has special requirements for transfer of copyrights, requiring an express writing signed by both the employer and the employee.\(^{12}\) A university copyright policy generally does not bear the signature of both parties and is therefore likely inadequate to alter or transfer ownership.\(^{13}\) Because the copyrights in some scholarly works may belong to the university rather than the faculty member, there is a risk that assignments and licenses executed by the faculty member are ineffective.\(^ {14}\)

This Comment will argue that the best solution to this problem is not for universities to disclaim copyrights or assign copyrights to faculty members, but rather for universities to retain ownership and provide faculty members with licenses to the copyrights in the works that they create. By changing their approach from fighting against the work-for-hire presumption of employer ownership to one which accepts and works within that presumption, universities and faculty members will clarify the legal status of copyright ownership, transfers, and licenses, and can ensure that the rights in faculty-created works are appropriately distributed.

This Comment begins with a review of the relevant copyright law in Part I. This discussion includes the early development of the work-for-hire doctrine and the teacher exception, the changes to the law as a result of the Copyright Act of 1979, the current trend of applying agency law concepts to define terms such as “employee” and “scope of employment,” and the statutory requirements for altering copyright ownership. Part II discusses the application of copyright law to faculty-created works and the impact of university copyright policies. Part III describes the problems that exist within the current model of

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10. Id. § 302.
11. Id. § 203.
12. Id. § 201(b).
13. See infra Part III.B.
14. See infra Part II.B.
copyright ownership, under which many university copyright policies attempt to define ownership of various categories of works. Part IV offers an alternative model, under which universities would retain copyright ownership of faculty works, but provide faculty members with licenses to those works.

I. THE DEVELOPMENT OF THE WORK-FOR-HIRE DOCTRINE AND THE TEACHER EXCEPTION

A. Early Copyright Law Included a Work-For-Hire Doctrine

The United States Constitution authorizes Congress to pass legislation protecting authors’ rights in their works. Article I, Section 8 gives Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” In 1790, the first U.S. copyright law was enacted. The Copyright Act of 1790 gave authors copyright protection for “maps, charts and books” for a fourteen-year term, along with an additional fourteen years if renewed.

Although the Copyright Act of 1790 did not specifically address ownership of works created by employees, at least one court recognized the existence of a work-for-hire doctrine in 1899. In Colliery Engineer Co. v. United Correspondence Schools Co., the court stated that an employer was entitled to copyright the literary products of a salaried employee made in the course of his employment and the employee “would have no more right than any stranger to copy or reproduce [the work].” In 1903, the United States Supreme Court cited Colliery Engineer in support of the proposition that designs “having been produced by persons employed and paid by the [employers] in their establishment to make those very things” are owned by the employers. In other words, the employer was considered the “author” of a copyrightable work created by an employee hired for the purpose of creating such a work.

Congress revised the copyright laws in 1909, in part to correct

16. Copyright Act of 1790.
17. Id. § 1.
19. Id.
20. Id. at 153.
inconsistencies that had become apparent over time and in part to accommodate new technologies, such as the player piano and the phonograph.22 The Copyright Act of 1909 made a number of changes to the 1790 Act, including broadening the subject matter that could be copyrighted to include “all the writings of an author”23 and doubling the length of both the initial term and the renewal term.24 The 1909 Act explicitly stated, “the word ‘author’ shall include an employer in the case of works made for hire.”25 However, the Act did not define either “employer” or “works made for hire.”26

Courts interpreted the “works made for hire” language of the 1909 Act as being consistent with the prior case law. In Brattleboro Publishing Co. v. Winmill Publishing Corp.,27 the Second Circuit stated, “[t]his so-called ‘works for hire’ doctrine was recognized earlier by the Supreme Court . . . and was later codified in the Copyright Act.”28 The court went on to describe the work-for-hire doctrine as applying “whenever an employee’s work is produced at the instance and expense of his employer. In such circumstances, the employer has been presumed to have the copyright.”29 The “instance and expense” test continued to be used to determine when a copyrightable work fell within the category of work-for-hire under the 1909 Act. For example, the writings of a religious leader were held not to be works-for-hire because the employer, a church founded by the religious leader, was not the motivating factor in the creation of the works.30 On the other hand, President Eisenhower’s book Crusade in Europe was held to be a work-for-hire because the publisher persuaded President Eisenhower to write the book and paid for his support staff and illustrations.31

22. See WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:45 (2013).
24. Id. at 1080.
25. Id. at 1087–88.
26. Id.
27. 369 F.2d 565 (2d Cir. 1966).
28. Id. at 567.
29. Id.
30. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 206 F.3d 1322 (9th Cir. 2000) (considering copyright ownership of works governed by the Copyright Act of 1909).
31. See Twentieth Century Fox Film Corp. v. Entm’t Distrib., 429 F.3d 869 (9th Cir. 2005) (considering copyright ownership of works governed by the Copyright Act of 1909).
B. A Teacher Exception Was Established Within the Work-For-Hire Doctrine

Although the “instance and expense” test creates quite a broad definition of work-for-hire, a teacher’s non-instructional work at a school or university might not fall into this category. In 1929, the Supreme Court of the District of Columbia held in *Sherrill v. Grieves*\(^\text{32}\) that a military instructor owned the copyright in a book he wrote covering the same subjects that he taught.\(^\text{33}\) Clarence Sherrill taught at a school for army officers.\(^\text{34}\) On his own time and initiative, Sherrill wrote a text on “military sketching, map reading and surveying.”\(^\text{35}\) He allowed the school administration to print a pamphlet for students containing an excerpt from his copyrighted but, as yet, unpublished book.\(^\text{36}\) When Sherrill sued a third party for publishing an infringing work, the defense argued that the material in the pamphlet could not be copyrighted, as it was the property of Sherrill’s employer, the U.S. Government.\(^\text{37}\) Under the Copyright Act of 1909, U.S. Government publications were not to be copyrighted, but were to be placed in the public domain.\(^\text{38}\) Although Sherrill’s work was not created at the direct instance or expense of his employer, the defendants argued that the work contained the same information that Sherrill was employed to teach and, therefore, should be considered to be within his duties as an instructor.\(^\text{39}\) The court rejected this argument, stating that “[t]he court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him.”\(^\text{40}\) The court then noted that military officers did write books that were both copyrighted and used for instruction in military academies.\(^\text{41}\) This decision, with its reliance on custom and lack of judicial precedent, is commonly cited as the origin of the “teacher exception” to the work-for-hire doctrine.\(^\text{42}\)

33. Id. at 291.
34. Id. at 289.
35. Id. at 290.
36. Id.
37. Id. at 287.
40. Id.
41. Id.
42. See Williams v. Weissner, 78 Cal. Rptr. 542, 548–49 (Cal. Ct. App. 1969); Strauss, supra note
Very few cases since Sherrill can be cited in support of the teacher exception. In the opinion of Judge Posner, as expressed in Hays v. Sony Corp. of America, 43 this lack of precedent exists because “virtually no one questioned that the academic author was entitled to copyright his writings.” 44 In addition to Sherrill, the case of Williams v. Weiss 45 is often used to support the existence of a teacher exception under the 1909 Copyright Act. 46 The issue in Williams was whether a person selling his class notes after attending a lecture was infringing a copyright belonging to the professor or to the university. 47 Because the lecture was not in any fixed format, such as written text or recorded sound, it was not protected by the federal Copyright Act. 48 The only copyright in the lecture was a common-law copyright under the laws of the State of California, 49 which the court held belonged to the professor rather than the university. 50 Although the reasoning used by the court was similar to that used by the Sherrill court, including custom, lack of precedent, and “the undesirable consequences which would follow from a holding that a university owns the copyright to the lectures of its professors,” 51 the case did not address federal copyright law and therefore has limited precedential value with respect to the existence of a federal teacher exception.

C. The Copyright Act of 1976 Redefined Work-For-Hire Using Agency Law Concepts

In 1976, Congress passed another major revision to the federal copyright laws intended, in part, to conform U.S. copyright laws to the international copyright provisions of the Berne Convention treaty. 52 This
revision included language that expanded on the work-for-hire doctrine. A “work made for hire” was explicitly defined as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.53

For works that fall within the category of “work made for hire,” as defined above, “the employer . . . is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”54

Despite Congress’s attempt to clarify the work-for-hire doctrine,55 the courts were again called upon to define the limits of the doctrine. Three distinct interpretations developed in the federal circuit courts, each using a different test to decide when a work was created by an employee and thus fell into category (1) of the definition.56 The United States Supreme Court addressed this confusion with its decision in Community for Creative Non-Violence v. Reid.57 Reid involved a dispute over ownership of the copyright in a statue commissioned by a non-profit group.58 The dispositive question in Reid was whether the sculptor was an employee of the non-profit group.59 As the only decision to date in which the Supreme Court has interpreted the work-for-hire provisions of the 1976 statute, Reid has been the subject of many commentaries.60 The relevant

Copyright Act); id. § 1:89 (regarding the legislative history of the Berne Implementation Act of 1988).

54. Id. § 201(b).
56. See, e.g., Dumas v. Gommerman, 865 F.2d 1093, 1102 (9th Cir. 1989) (using whether one party was a formal, salaried employee of the other); Easter Seal Soc’y v. Playboy Enters., 815 F.2d 323, 335 (5th Cir. 1987) (using the rules of agency law); Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, 551 (2d Cir. 1984) (using the instance and expense test developed prior to 1976).
58. Id. at 733.
59. Id. at 738.
60. See Katherine B. Marik, Community for Creative Non-Violence v. Reid: New Certainty for


point for purposes of this Comment is that the Court used the general common law of agency to interpret the term “employee” as used in § 101.\textsuperscript{61} Because the Court held that Mr. Reid was not an employee as defined by agency law,\textsuperscript{62} the question of whether the work was made within the scope of his employment did not arise in this case. It has been suggested, however, that it would be consistent to apply agency law to the interpretation of scope of employment as well,\textsuperscript{63} especially considering that, as noted by the Fifth Circuit, “‘scope of employment’ is virtually a term of art in agency law.”\textsuperscript{64}

D. The Teacher Exception Did Not Survive the 1976 Revision of Copyright Law

The Copyright Act of 1976 was noticeably silent with respect to the teacher exception. One commenter who reviewed the history of the teacher exception in 2003 included an extensive discussion of the legislative history of the 1976 Act.\textsuperscript{65} That commenter observed that the teacher exception was never mentioned during the drafting of or debate regarding the 1976 Act.\textsuperscript{66} A number of commenters have argued that the 1976 Act abolished the judicially created teacher exception.\textsuperscript{67}

Since 1976, courts have had few opportunities to consider the existence of a teacher exception. Two cases,\textit{ Weinstein v. University of Illinois}\textsuperscript{68} and\textit{ Hays v. Sony Corp. of America},\textsuperscript{69} regarding faculty copyright ownership arose in the Seventh Circuit in the 1980s, but neither case was decided on the basis of a judicially created teacher exception due to the precise questions on appeal.\textsuperscript{70} In\textit{ Weinstein}, one of

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\textsuperscript{61} Reid, 490 U.S. at 750–51.
\textsuperscript{62} Id.
\textsuperscript{63} See infra Part II.A.
\textsuperscript{64} Easter Seal Soc’y v. Playboy Enters., 815 F.2d 323, 335 (5th Cir. 1987).
\textsuperscript{65} See Townsend, supra note 3, at 227–34.
\textsuperscript{66} Id. at 234.
\textsuperscript{67} See Leonard D. DuBoff, An Academic’s Copyright: Publish and Perish, 32 J. COPYRIGHT SOC’Y U.S.A. 17 (1984); Simon, supra note 8.
\textsuperscript{68} 811 F.2d 1091 (7th Cir. 1987).
\textsuperscript{69} 847 F.2d 412 (7th Cir. 1988).
\textsuperscript{70} Weinstein, 811 F.2d 1091; Hays, 847 F.2d 412.
several authors of a scholarly article sued his university when the names of the authors were re-ordered prior to publication. In deciding ownership of the copyright in the article, the Seventh Circuit considered the Copyright Act of 1976, the University’s internal copyright policy, and the existence of academic traditions supporting faculty ownership of copyrights, but it did not explicitly name or rely on the teacher exception doctrine. Judge Easterbrook’s opinion argues that the copyright belonged to the authors, but as the outcome of the case would have been the same whether the article was a work-for-hire or not, this argument is dicta.

Shortly after the Weinstein case was decided, the Seventh Circuit heard Hays. This case concerned copyright ownership of a word-processing manual produced by high school teachers. The plaintiffs originally sued under common-law copyright, which was abolished by the Copyright Act of 1976, and therefore inapplicable to the work in question. The lower court dismissed the case for failure to state a claim and sanctioned the plaintiffs’ attorney for his conduct in pursuing the suit. On appeal, the Seventh Circuit upheld the sanctions, which were primarily based on failure to pursue the suit effectively. Despite the fact that the sanctions were not dependent on whether the complaint was frivolous, the court considered in dicta whether there might have been a genuine claim for infringement of statutory copyright, even if there was no valid common-law claim. The answer to that question hinged on whether the teachers owned the copyright in the work, or if it was owned by the school district as a work-for-hire. In his opinion, Judge Posner conducted a thorough review of the work-for-hire doctrine and included policy arguments in support of a teacher exception, but stated that “it is widely believed that the 1976 Act

71. 811 F.2d at 1092–93.
72. Id. at 1094–96.
73. Id.
74. Id. at 1095.
75. 847 F.2d 412.
76. Id. at 413.
77. Id. at 415.
78. Id. at 413.
79. Id. at 417–19.
80. Id. at 417.
81. Id. at 416.
82. Id.
abolished the teacher exception.\textsuperscript{83}

One of the most thorough recent analyses of the teacher exception is given in \textit{Molinelli-Freytes v. University of Puerto Rico (Molinelli-Freytes I)}.\textsuperscript{84} In this case, the plaintiffs were professors at the University of Puerto Rico who developed a proposal for a new graduate program.\textsuperscript{85} By the time the University approved and began to implement the proposal, the parties appeared to have had a falling out, resulting in the plaintiffs’ suit against the University for copyright infringement over unauthorized use of the proposal manuscript.\textsuperscript{86} The plaintiffs filed a motion for a preliminary injunction, basing their argument on the existence of a teacher exception to the work-for-hire doctrine.\textsuperscript{87} The question of whether a teacher exception exists was therefore squarely before the court. Judge Dominguez’s opinion provided a thorough review of the history and policy of the work-for-hire doctrine and the teacher exception.\textsuperscript{88} On the basis of Congress’s silence with respect to the teacher exception in the legislative history of the Copyright Act of 1976, the apparent abandonment of the teacher exception by courts following the 1976 Act, and the Supreme Court’s application of agency law in \textit{Reid}, the court held that the teacher exception no longer exists.\textsuperscript{89}

II. THE WORK-FOR-HIRE STATUS OF FACULTY-CREATED WORKS AND THE IMPACT OF UNIVERSITY COPYRIGHT POLICIES

A. Some Faculty-Created Works Fall Within the Faculty Member’s Scope of Employment

If the teacher exception has, in fact, been abolished, then the critical question for ownership of faculty-created works becomes whether the creation of the copyrighted work was within the faculty member’s scope

\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} 792 F. Supp. 2d 164 (D.P.R. 2010); see also Pittsburg State Univ./Kan. Nat’l Educ. Ass’n v. Kan. Bd. of Regents/Pittsburg State Univ., 122 P.3d 336, 345–47 (Kan. 2005) (holding that faculty works are not automatically works-for-hire merely because the faculty are employees, nor are faculty works automatically subject to a teacher exception, but that the principles of agency law must be applied on a case-by-case basis to determine the work-for-hire status of a faculty work).
\textsuperscript{85.} \textit{Molinelli-Freytes I}, 792 F. Supp. 2d at 164.
\textsuperscript{86.} \textit{Id.} at 165.
\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} \textit{Id.} at 166–72.
\textsuperscript{89.} \textit{Id.}
of employment. Works created by faculty members within the scope of their employment would belong to the university as works-for-hire. Courts have applied the agency law definition of “scope of employment” in the context of copyrighted computer software, thus extending the Supreme Court’s use of agency law in Reid. The Second Circuit applied the same reasoning to the academic world in Shaul v. Cherry Valley-Springfield Central School District, which concerned the copyright ownership of tests and homework problems created by a high school teacher. The court in Shaul considered the elements of “scope of employment” found in the Restatement (Second) of Agency:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master.

The court found that Shaul’s teaching materials met all three elements, despite the fact that they were written at least partly outside the regular school day, stating that:

It is clear that preparing materials for class was the kind of work that he was employed to perform as a teacher (satisfying the first prong) and that Shaul was motivated to spend the time to prepare materials for class in order to fulfill his duties as a teacher (satisfying the third prong), regardless of his purported desire to publish the materials. With respect to the second prong, the very nature of a teacher’s duties involves a substantial amount of time outside of class devoted to preparing materials.

91. See id.
92. See, e.g., Miller v. CP Chems., Inc., 808 F. Supp. 1238 (D.S.C. 1992) (using the Restatement (Second) of Agency to determine that a software program written by an employee on his own time, but for the purpose of allowing him to perform his job duties more efficiently and with fewer errors, was a work-for-hire); Roeslin v. District of Columbia, 921 F. Supp. 793 (D.D.C. 1995) (using the Restatement (Second) of Agency to determine that a software program written by an employee on his own time for the purpose of creating job opportunities for himself and simply to prove that it could be done was not a work-for-hire).
93. See supra Part I.C.
95. Id. at 184.
96. Id. at 186.
97. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
lessons, problem sets, and quizzes and tests — which is clearly within the scope of his employment.\textsuperscript{98}

The court declined to express an opinion on the existence of a teacher exception, stating that the academic tradition cited to support a teacher exception in cases like \textit{Weinstein}\textsuperscript{99} does not include “teaching materials that were never explicitly prepared for publication.”\textsuperscript{100}

Determining the kinds of work that fall within a faculty member’s scope of employment was also a crucial question in a second opinion in the \textit{Molinelli-Freytes} case \textit{(Molinelli-Freytes II)}.\textsuperscript{101} The \textit{Molinelli-Freytes I} opinion discussed above dealt only with the plaintiffs’ argument for a teacher exception.\textsuperscript{102} Following the finding that no such exception exists, the University of Puerto Rico moved for summary judgment on the basis that the University owned the copyright in the proposal.\textsuperscript{103} The University argued that creation of the proposal was within the plaintiffs’ scope of employment and the proposal was therefore a work-for-hire.\textsuperscript{104} In an unpublished opinion, Magistrate Judge McGiverin considered each of the relevant elements of agency law.\textsuperscript{105} First, the court found that the graduate program proposal was the kind of work plaintiffs were employed to perform, on the basis of plaintiffs’ status as University employees, their job descriptions, and an assessment of the regular duties of University faculty.\textsuperscript{106} Second, the court found that the work was created within the authorized time and space, even though plaintiffs had done much of the work at home, because the University gave faculty the flexibility to work at home, and on evenings and weekends, in the performance of their jobs.\textsuperscript{107} Finally, the court found that plaintiffs were motivated by a desire to further the interests of the university in the creation of the proposal, as they “designed it with the intent of submitting it to the . . . approval process, and . . . actually did so.”\textsuperscript{108} Having found all three elements satisfied, the

\textsuperscript{98}. \textit{Shaul}, 363 F.3d at 186.
\textsuperscript{99}. 811 F.2d 1091, 1094 (7th Cir. 1987).
\textsuperscript{100}. \textit{Shaul}, 363 F.3d at 186.
\textsuperscript{102}. \textit{Molinelli-Freytes I}, 792 F. Supp. 2d 164 (D.P.R. 2010); \textit{see supra} Part I.D.
\textsuperscript{103}. \textit{Molinelli-Freytes II}, 2012 WL 4665638, at *1.
\textsuperscript{104}. \textit{Id.} at *11.
\textsuperscript{105}. \textit{Id.} at *12.
\textsuperscript{106}. \textit{Id.}
\textsuperscript{107}. \textit{Id.}
\textsuperscript{108}. \textit{Id.} at *13.
court held that the proposal was, in fact, written within the scope of plaintiffs’ employment.109

B. Universities Have Attempted to Define Copyright Ownership
   Through the Use of Internal Copyright Policies

   In an effort to address the uncertainty regarding whether a teacher exception survived following the Copyright Act of 1976, an increasing number of universities have adopted institutional policies regarding copyright ownership.110 Two prior studies have surveyed university policies. In 1992, Laura Lape surveyed the seventy universities classified as “Research Universities I” by the Carnegie Foundation for the Advancement of Teaching.111 In 2002, Ashley Packard surveyed the copyright policies of the same seventy universities.112 The Carnegie Foundation updates its classifications every five years, and the most recent version uses “Research Universities – Very High Research Activity” as the equivalent class to the one used in the 1992 survey.113 This class contains 108 universities, the copyright policies of which were surveyed for the present Comment.114 These policies appear to take one of two basic approaches.115 The first approach, used by approximately one-third of the policies, is to generally claim ownership of faculty works, with exceptions for specific kinds of works in which university ownership is disclaimed.116 The second approach, used by

109. Id.

110. See Lape, supra note 3, at 252 (surveying the copyright policies of large research universities and finding that fifty-four out of seventy universities surveyed had such a policy in place); Packard, supra note 5, at 294 (surveying the same universities and finding that sixty-six had such a policy in place ten years after the initial survey).

111. See Lape, supra note 3, at 252.

112. See Packard, supra note 5, at 294.


115. These are very broad categories and while the distinction is clear for some policies, others are more difficult to categorize. The statistics that follow are based on this author’s interpretation of the policy language.

116. See, e.g., Univ. of S. Cal., University of Southern California Intellectual Property Policy
approximately two-thirds of the policies, is to generally disclaim ownership of faculty works, with exceptions for specific kinds of works in which university ownership is claimed.\footnote{117}

Both groups of policies typically disclaim ownership of “traditional scholarly works,” which is variously defined, but generally includes textbooks, popular or scholarly non-fiction, novels, poems, musical works, dramatic works, and works of art.\footnote{118} Some policies include a statement explaining the university’s motivation in disclaiming these works. The reasons given commonly include academic tradition, preservation of faculty members’ academic freedom, and a desire to encourage production and dissemination of scholarly works.\footnote{119}

Most policies of both kinds typically claim ownership of works created by employees specifically assigned to create such works and works created with significant or unusual use of university resources.\footnote{120}


\footnote{119}. See, e.g., Columbia Univ., Preamble to the Columbia University Copyright Policy (June 3, 2000), available at http://www.columbia.edu/cu/provost/docs/copyright.html (“Faculty at the University must be free to choose and pursue areas of study and concentration without interference, to share the results of their intellectual efforts with colleagues and students, to use and disseminate their own creations, and to take their created works with them should they leave the University.”); Dartmouth Coll., Copyright Ownership Policy (Sept. 27, 1994), available at http://www.dartmouth.edu/~osp/resources/policies/dartmouth/copyright.html (“As a matter of fundamental principle, however, the College encourages wide dissemination of scholarly work produced by members of the Dartmouth community, including copyrightable works.”); N.D. State Univ., Policy Manual: Section 190 (rev. Nov. 2010), available at http://www.ndsu.edu/fileadmin/policy/190.pdf (“The primary purposes of this policy are to encourage and promote research and scholarship based on the traditional principles of the academic profession.”).

These provisions often explicitly reference the work-for-hire provisions of copyright law and some use specific assignment, significant use of university resources, or other similar factors to identify works that fall within the scope of employment.  

Two leading treatises on copyright law, *Nimmer on Copyright* and *Abrams on Copyright*, argue that these policies are not effective to alter copyright ownership of a work-for-hire.  

Under 17 U.S.C. § 201(b), the initial authorship of a work-for-hire may be changed, but an express written agreement signed by both parties is required.  

Nimmer points out three cases that suggest that a university copyright policy does not meet the § 201(b) requirement.  

In the first case, *Manning v. Board of Trustees of Community College District No. 505*, a university staff photographer argued that he owned the copyright in his photographs, which were works-for-hire.  

The court found that a collective bargaining agreement that included a policy statement asserting that

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121. See, e.g., Yale Univ., Yale University Copyright Policy § 2 (Oct. 2001), available at http://www.yale.edu/ocr/pfg/policies/copyright.html ("Under the Copyright Law, the copyright to a work created by a person in the course of his or her employment belongs to the employer rather than to the individual creator. The law provides, therefore, that works created by faculty members in the course of . . . their jobs, are the property of the University."


124. NIMMER ON COPYRIGHT, supra note 122, § 5.03[D].


126. Id. at 978.
Copyrights in Faculty-Created Works

Copyrights were owned by staff members did not satisfy the § 201(b) requirement for an express writing signed by both parties. The second case, *Rouse v. Walter & Associates, L.L.C.*, concerns the copyright in a software program designed to rate beef cattle that was written, in part, by University of Iowa professors. The *Rouse* court found that the plaintiffs were university employees who created the software as a work-for-hire, and that a university copyright policy contained in a faculty handbook did not satisfy the § 201(b) requirements to alter ownership. The final case discussed is *Foraste v. Brown University*, another university photographer copyright suit. As in *Manning*, the court found that the photographs in question were works-for-hire and that the University’s copyright policy did not alter copyright ownership, as it did not meet the § 201(b) requirements.

Interestingly, the plaintiff in *Foraste* made an alternative argument that even if the photographs were works-for-hire and the copyrights originally vested in the university, the university’s copyright policy operated to transfer the copyright back to the employee who created the work. For works that are not works-for-hire, the 1976 Act allows the copyright to be transferred to another party with a written instrument signed only by the transferor, rather than by both parties, as required for works-for-hire. The court was not persuaded by this argument, however, and found that an employer’s transfer of a work-for-hire to the employee must comply with the § 201(b) requirements. Allowing a work-for-hire owned by the University to be transferred to the employee under the general provisions of the Copyright Act would, according to the *Foraste* court, circumvent the work-for-hire provision and be contrary to the statutory text’s plain meaning.

127. *Id.* at 981.
129. *Id.* at 1045–46.
130. *Id.* at 1062–64.
132. *Id.* at 73.
133. *Id.* at 81.
134. *Id.* at 74 (The court quotes the University’s copyright policy as stating, in part: “It is the University’s position that, as a general premise, ownership of Copyrightable property which results from performance of one’s University duties and activities will belong to the author or originator.”).
137. *Id.*
III. THE CURRENT MODEL FOR FACULTY COPYRIGHT OWNERSHIP CREATES LEGAL UNCERTAINTIES

As discussed in Part II, the existence of a teacher exception is now seriously in doubt, and the work-for-hire status of a particular work is a question of law independent of the parties’ traditional understanding. This creates problems for the current model for ownership of faculty-created works, which relies on either the existence of a teacher exception or the parties’ ability to define what constitutes a work-for-hire. This Part will argue that the ownership of faculty-created works is ambiguous under the current model, and will discuss the possible repercussions of that ambiguity.

A. Work-For-Hire Status is Determined Using a Complex, Multi-Factor Test

The Copyright Act’s work-for-hire provisions contain terms that are interpreted under the rules of agency law, as seen in Reid and Shaul.\(^\text{138}\) The factors that a court considers when determining whether creation of any given copyrightable work is within an individual’s scope of employment are particularly difficult to apply in the context of faculty works.\(^\text{139}\) When considering whether a university faculty member’s work falls within the scope of his or her employment, a court would need to decide if: (1) it is the kind of work the faculty member was employed to perform, (2) the work occurs substantially within the employer’s authorized time and space limits, and (3) the work was motivated partially by a desire to further the interests of the university.\(^\text{140}\)

None of these elements fall decisively one way or the other with regard to traditional scholarly works, such as textbooks and journal articles. With respect to the first element, some commenters have argued that production of scholarly works is not the kind of work that faculty members are employed to perform because the university typically does not assign a specific faculty member to write a specific article on a specific topic.\(^\text{141}\) Others, however, have argued that the production of scholarly works is expected of all faculty members and is one of the


\(^{140}\) See Shaul, 363 F.3d at 186; RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

\(^{141}\) See Scully, supra note 1, at 253; Townsend, supra note 3, at 240–41.
criteria on which faculty performance is judged, suggesting that it is the
kind of work they are employed to perform. The second element is
equally problematic. When universities permit their faculty members to
have flexible working hours and locations, the time and space element
alone cannot be used to categorize works as within or outside the scope
of employment. The third element, motivation, is fundamentally
subjective. It seems likely that most scholarly works are motivated by a
combination of factors, possibly including the desire to promote one’s
own career, the desire to promote the reputation of the university or
department, and the desire to contribute to the advance of thought in the
field. Agency law requires only that the motivation be in part to benefit
the employer, which could be plausibly argued in almost any faculty
works context.

The elements of scope of employment are sufficiently complex to
make it difficult to predict the outcome for any given scholarly work by
a faculty member. The status of any given work as a work-for-hire is
unclear, leaving the question of whether the copyright in the work
belongs to the faculty member or the university unresolved.

B. University Copyright Policies That Disclaim Ownership Are Not
Effective

University copyright policies typically disclaim ownership of
traditional scholarly works. The assumption appears to be that if the
university disclaims ownership, ownership will somehow “revert” to the
faculty member. If the work in question is a work-for-hire, however,
this disclaimer does not satisfy the Copyright Act’s requirement for an
express writing signed by both parties. University copyright policies
are broad statements of policy and procedure and do not adequately
define the works to be transferred, nor are they generally signed by
individual faculty members. Reliance on a copyright policy alone,
therefore, will not settle copyright ownership issues satisfactorily.

142. See Simon, supra note 8, at 501–09; Strauss, supra note 3, at 45.
143. See Shaul, 363 F.3d at 186; Molinelli-Freytes II, No. 09-1655, 2012 WL 4665638, at *12
144. See RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
145. See supra Part II.B.
146. See supra Part II.B.
147. 17 U.S.C. § 201(b) (2006); see supra Part II.B.
148. See Centivany, supra note 8, at 405–08.
C. The Express Writing Requirement of Section 201(b) Provides No Equitable Protection for Faculty Members

The requirement for an express, signed writing to transfer copyright ownership has been likened to the signed writing requirement of the statute of frauds. For those types of contracts that fall under the statute of frauds, a writing must reasonably identify the subject matter, indicate that the parties have reached agreement, and state the essential terms of the agreement with reasonable certainty. In the work-for-hire context, § 201(b) requires an express writing signed by both parties, which ensures that both parties understand who will own the completed work. As with the statute of frauds, no equitable defenses are available to parties who allege the existence of an oral or implied contract. Some commenters have argued that university copyright policies, even if not legally effective to transfer copyright ownership, estop the university from asserting ownership against the faculty member. This line of reasoning fails to consider that estoppel is a form of equitable defense and, as such, is not available in disputes over ownership of copyrights. Therefore, in the absence of an express, signed writing, there can be no transfer of copyright ownership.

D. The Duration of a Copyright Is Dependent on the Work’s Status as a Work-For-Hire

Understanding whether a given work falls within the work-for-hire category is important for more than just deciding ownership. Work-for-hire status also determines the duration of the copyrights and whether licenses are subject to termination. Copyrights in works that were not created as works-for-hire last for the life of the author plus seventy years. For works-for-hire, the copyrights last for either 120 years from the creation of the work or ninety-five years from the first publication of the work, whichever is shorter. Although in many cases

153. See Centivany, supra note 8, at 411.
156. Id. § 302(a).
157. Id. § 302(c).
the value of faculty-created works is weighted toward the present, there are some works that will continue to be cited and reproduced for many years. If there is no consensus on whether the work was originally a work-for-hire or not, it will create uncertainty and potential litigation in the future over the length of the copyright term.

Further ambiguity is introduced by the question of termination. Licenses in works that were not originally created as works-for-hire may be terminated by the copyright holder anytime during the five years following the thirty-fifth year of the copyright. This termination right is owned by the author’s spouse, children, or grandchildren if the author dies. Licenses in works-for-hire are not subject to termination. This distinction could be significant for licensees of scholarly works, such as textbook publishers. The length of the copyright term and the existence of a termination right are likely to be significant issues in negotiating the terms under which the copyrights are licensed. Knowing with confidence whether a given work is a work-for-hire is therefore important to both licensees and licensors.

E. University Policies That Decide Ownership by Genre of Work May Be Ambiguous or Controversial

Many university copyright policies provide lists of the kinds of works the university claims ownership of and the kinds of works that they intend to belong to faculty members. These lists tend to divide works between the two categories by genre. For example, copyrightable software is usually claimed for the university, while textbooks are usually disclaimed by the university. If the ownership of the work is a

158. Textbooks tend to require frequent updating while works of a more literary or artistic nature may have a longer lifespan. For example, James Watson, the Nobel Prize-winning biologist, wrote a textbook in 1965 entitled *Molecular Biology of the Gene*. Although still in use, the textbook is currently in its seventh edition and now carries the names of five additional authors. In contrast, Watson’s popular account of the events leading to the discovery of DNA’s molecular structure, *The Double Helix: A Personal Account of the Discovery of the Structure of DNA*, was written in 1968 and is still available in essentially its original form. Both works were created while Watson was a member of the Harvard University faculty and, if they had been created after the passage of the Copyright Act of 1976, would be subject to the kind of copyright ambiguities discussed by this Comment.

160. Id. § 203(a)(2).
161. Id. § 203(a).

162. A compilation of the university copyright policies reviewed for this Comment is available at http://www.law.washington.edu/wlr/issues/featuredarticles/dec13.aspx.
binary decision, either going solely to the university or solely to the faculty member, then the decision to place a given genre in one category or the other will determine ownership of all the rights in all works within that genre. This could make writing and enforcing such a policy controversial within the university community, particularly as hybrid or completely new forms of faculty works—such as those used in distance learning applications—are developed.

Problems may also arise when works do not fit neatly into one of the listed categories. This seems most likely to happen when new forms of works are developed which may not have been provided for in an existing copyright policy. For example, when distance-learning curricula were first developed at universities, which policy category the new curricula fell into was often unclear. Some university policies include dispute-resolution processes, generally providing for adjudication by university representatives. Resolving a complex, hard-fought dispute could therefore constitute a drain on university resources and a distraction to faculty and administrators.

F. Copyright Ownership May Be Governed by Multiple University Policies

Copyright ownership of works created by faculty members is usually addressed in a university’s copyright policy, but other university policies may also impact copyright ownership. Universities often have ethics rules, conflict of interest policies, and outside activities policies that bear on ownership of faculty-created works. In one situation where ownership of certain teaching materials was in dispute, it was reported that the university amended its employment policies to prohibit faculty


from engaging in some kinds of outside activities rather than address the issue over ownership of the works directly. Requiring faculty and administrators to refer to multiple policies in order to determine the copyright status of a faculty-created work creates additional potential for confusion in an already ambiguous situation.

G. Current Policies May Require Onerous Paperwork to Be Enforceable

Although a blanket university policy does not satisfy the § 201(b) requirement for an express writing signed by both parties, it is certainly possible for universities and faculty members to create such a writing to alter the ownership of works-for-hire. The amount of paperwork required to do this on a routine basis, however, may be a significant burden. In order to comply with the requirements of § 201(b), the university would need to execute a contract with each faculty member describing the works to be owned by the faculty member. Further, the federal copyright statute has been interpreted to require that an agreement altering copyright ownership of a work-for-hire must be made before the work is completed. This prevents universities and faculty members from altering the presumption of employer copyright ownership retrospectively. Any transfer of copyrights in works already completed would require an additional contract between the university and the faculty member, adding unnecessary complexity to the situation.

In many cases, faculty members, believing that they own the copyrights in their works, have executed agreements assigning those copyrights to publishers. In the event that the work in question was actually a work-for-hire, the copyright never belonged to the faculty

167. See Strauss, supra note 3, at 7; Townsend, supra note 3, at 218–19.
169. There is currently a circuit split on whether the agreement must also be in writing before the work is completed, or if an oral agreement that is put into writing after completion of the work is effective. The Seventh Circuit and Ninth Circuit have disallowed after-completion agreements. See Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 412–13 (7th Cir. 1992); Gladwell Gov’t Servs., Inc. v. Cnty. of Marin, 265 F. App’x 624, 625–26 (9th Cir. 2008). The Second Circuit and district courts in Alaska, Texas, and Puerto Rico have allowed after-completion agreements that confirm an earlier oral agreement. See Campinha-Bacote v. Rearden, No. 3:10-cv-00139-JDR, 2011 WL 1343343, at *3 (D. Alaska Apr. 8, 2011); Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 558–59 (2d Cir. 1995); TMTV, Corp. v. Mass Prods., Inc., 345 F. Supp. 2d 196, 206–07 (D.P.R. 2004); Compaq Computer Corp. v. Ergonomie Inc., 210 F. Supp. 2d 839, 842–44 (S.D. Tex. 2001); Zyware, Inc. v. Middlegate, Inc., No. 96 CIV. 2348 (SHS), 1997 WL 685336, at *3 (S.D.N.Y. Nov. 4, 1997).
170. See Centivany, supra note 8, at 387.
member, making the assignment ineffective. 171 The large number of textbooks and other works that have been assigned to publishers by faculty members over the years means that casting doubt on the legal status of these works would create a tremendous disruption. Publishers would likely have to contract with the university to resolve this situation, creating an additional strain on university resources as these contracts are negotiated and executed.

IV. LICENSING WORKS-FOR-HIRE TO FACULTY MEMBERS PROVIDES GREATER CERTAINTY

Because there is significant ambiguity in the work-for-hire status of faculty-created works under the current model, there is also significant risk that, in the event of a dispute, the ownership of these works would not be resolved consistently with the parties’ intent. As discussed in Part III.B, universities’ attempts to resolve this problem using copyright policies are probably inadequate. This Part argues that universities and faculty members can accomplish their goals with respect to control of copyrighted works without ambiguities by using a licensing model rather than an assignment model.

A. Universities Should Retain Ownership of Copyrights in Faculty-Created Works

When universities attempt to give ownership of works-for-hire to faculty members, they are fighting against the presumption of employer ownership in the Copyright Act. 172 As a result, the process required to transfer ownership is burdensome and the result is often unclear. 173 Recent case law reflects a trend toward abolishing the teacher exception and finding that many faculty works belong to the university as works-for-hire. 174 It is time for universities and faculty to move to a new model of copyright ownership that takes these legal realities into account. The first step is for universities to include the creation of traditional scholarly works within the scope of employment for faculty members. Although university policies cannot remove works from the work-for-hire category, as that determination is a matter of law, 175

171. See supra Part II.B.
173. See supra Part III.
174. See supra Part II.A, Part I.D.
175. See PATRY ON COPYRIGHT, supra note 22, § 5:47.
university policies and employment contracts can broaden the scope of a faculty member’s employment, thus including additional works within the works-for-hire category. This would allow all faculty-created works to begin in the same, well-defined legal category. Universities should then accept ownership of copyrights for all faculty-created works. Although seemingly counter to the parties’ intent, university ownership will provide a clear, legally grounded starting point for all further licensing and assignment of rights. This will, in turn, allow the parties to create effective, enforceable agreements that allocate the copyrights in scholarly works in an appropriate manner.

B. Universities Should License Copyrights to the Faculty Member

It appears from university copyright policies that universities want to provide faculty members with the copyrights to their traditional scholarly works. The simplest way to accomplish this goal is for the university to provide the faculty member with an exclusive license to the copyrights in his or her work. A licensing approach avoids many of the problems that are present in a scheme dependent on university policy statements. Because licensing does not invoke the requirement of § 201(b) for the signatures of both parties, it is much easier to write and execute an effective license than to attempt to transfer ownership. Licensing contracts are subject to the statute of frauds, if such a provision exists in the relevant state law, but only to the same extent as any other contract not to be performed within one year. Courts may find an informal letter, a series of related documents, or a memorandum signed by one party sufficient to satisfy the statute of frauds. A

176. There are limits to what can be included in the works-for-hire category, as this is still a matter of law and will be decided using agency principles. For example, musical compositions created at home by a chemistry professor, and having no relation to any subjects of the professor’s research or teaching would probably not be considered within the professor’s scope of employment regardless of broad contractual provisions. Materials relating to a faculty member’s teaching or research topics, however, can plausibly be included within the scope of employment and some have argued that such material already falls within that scope. See discussion supra Part II.A.

177. See supra Part II.B.

178. There is some debate as to whether an exclusive license is equivalent to transfer of ownership. See ABRAMS, supra note 122, § 4:44. Analysis of this question is beyond the scope of the present Comment, however the issue could be avoided by retention for the university of some rights. The right to internal use for educational purposes, for example, is commonly mentioned in university copyright policies as being retained by the university and may not be objectionable to faculty members.

179. See MELVIN F. JAGER, LICENSING LAW HANDBOOK § 8:7 (2012).

180. Id.
university copyright policy that purports to transfer ownership cannot be enforced under the doctrine of estoppel, as discussed previously, but a policy that states the university’s intent to license works could be enforced under estoppel in the event of a future dispute. As works-for-hire, the faculty works being licensed would not be subject to termination rights, further protecting faculty members’ rights in the event of a future change in university policy. An additional advantage of licensing is that it allows the parties to divide the rights according to their respective interests. Many current university policies seek to retain the right to use the works internally, even when they attempt to transfer ownership to the faculty member. Under a license, the university could easily retain the rights that it values most, while granting to the faculty members the rights that are of most importance to them.

C. The Rights Granted in a License Can Be Customized for Different Types of Works

Under current university policies, works are divided into only two buckets: those the university will own and those the faculty member will own. Determining which category a given work fits within becomes a high-stakes decision, as one party gets all the rights and the other gets nothing. Licensing could decrease the controversy around categorizing works by allowing the creation of more buckets. Universities can create a full set of categories that distribute the rights between the university and the faculty member in ways that make sense for a variety of works. For example, the university could retain full rights in an administrative proposal, grant some rights to the faculty member for distance learning curricula, grant more or different rights to the faculty member for teaching materials, and grant all rights to the faculty member for textbooks. By providing a variety of options,

181. See supra Part III.C.
183. See, e.g., Northwestern Univ., Copyright Policy § A.1.b (Sept. 1, 2006), available at http://invo.northwestern.edu/policies/copyright-policy (“The Creator shall grant, or use best efforts to cause others to grant, to the University a perpetual, royalty-free right and license to use, perform, display, copy, or reproduce such works, for all traditional, customary or reasonable academic or research purposes of the University.”); Kan. Bd. of Regents, Policy and Procedures Manual II.D. § 8(a)(2) (rev. Apr. 18, 2013), available at http://www.kansasregents.org/resources/PDF/2582-BoardPolicyManual.pdf (“Except for textbooks, institutions shall have royalty-free use of the [scholarly] work within the institution, unless otherwise agreed in writing.”).
184. See supra Part III.E.
185. See supra Part III.E.
universities and faculty should be able to reach an agreement on rights in a specific work that addresses the interests of both parties. Additionally, providing a variety of licensing options could allow universities to permit some kinds of outside work that may currently be prohibited due to an inability to agree on copyright ownership of the works involved. Providing a variety of licensing options would create a system that is flexible enough to adapt to the specific copyright needs of faculty members and universities in a wide variety of circumstances.

D. Publishers Should Accept Licenses from Faculty

It is common practice for publishers of scholarly works to require that faculty authors assign their copyrights to the publisher.\(^{186}\) If many of these works were in fact works-for-hire, then the copyrights are held by the university, making these assignments ineffective.\(^{187}\) Rather than requiring an assignment of rights, however, publishers can accept licenses to the copyrights, as is done in the non-academic publishing industry.\(^{188}\) If the university grants a license to the faculty member which permits sub-licensing, the faculty member is then free to sub-license his or her rights to a publisher.\(^{189}\) If exclusivity is important to the publisher, the faculty member can grant an exclusive sub-license. If the publisher wants to be able to sell its rights in the work, the faculty member can grant a transferrable license. As the faculty member can only sub-license the rights that have been licensed to him or her,\(^{190}\) it will be important to ensure that the faculty member is granted appropriate rights for works intended for publication. As long as this factor is taken into account, it is difficult to imagine a situation that could not be addressed satisfactorily by licensing the appropriate rights.

E. Attribution Provisions Can Ensure that Faculty Members Receive Credit for Their Works

Faculty members may be concerned about receiving appropriate credit for their scholarly writings when they do not own the copyrights in the works. It is likely to the benefit of both the university and the

186. See Centivany, supra note 8, at 379 (discussing academic publishing practices).
187. See supra Part III.B.
190. Id.
faculty member to have the faculty member’s name associated with the work. Toward that end, the university should adopt an attribution policy that requires any use of the work by the university to include creative attribution. Faculty members can also include an attribution provision in any sub-licenses that they grant to publishers or other third parties. This will ensure that the faculty author is credited for his or her contributions to the field, even though he or she is not the legal author of a work-for-hire. One simple solution for attribution would be to include the faculty member’s name on the same line as the copyright notice. For example, the copyright notice appearing on the title page of a scholarly article could read: “Created by Professor John Doe, © 2013 University of Anystate.” In this manner, the correct copyright information is given and, at the same time, creative attribution is clear and easy to locate.

For works already published that list a faculty member as the copyright holder, the fact that the actual copyright holder may be the university does not invalidate the copyright. The Copyright Act allows copyright holders to provide notice to potential infringers that a work is copyrighted by marking the work with a symbol and a name. Under the Berne Convention Implementation Act of 1988, a copyright is still valid even if the work carries no copyright notice. Nimmer notes that even when notice was required, giving notice under the wrong name did not necessarily make the notice ineffective. Mistakenly listing the faculty member’s name in the copyright notice, therefore, should be legally effective and not jeopardize the copyright in the work.

CONCLUSION

Current trends in copyright law leave the ownership of faculty-created works ambiguous at best. It is possible that even the copyrights in traditional scholarly works created by faculty members belong to their respective universities as works-for-hire. This ambiguity results in legal uncertainties about ownership and duration of copyrights that could impact universities, faculty members, and assignees or licensees of these rights.

191. See Scully, supra note 1, at 252–53 (discussing the benefits of faculty publication to the university and to the faculty member).
194. See NIMMER ON COPYRIGHT, supra note 122, § 7.09; see also 17 U.S.C. § 406.
In order to resolve these ambiguities, this Comment argues that universities and faculty members should agree that the copyrights in faculty works belong to the university, as an employer. The university should then provide faculty members with an exclusive license to the copyrights in the works that they create. This strategy would clarify ownership, ensure that licenses provided to publishers and other third parties are enforceable, and allow universities and faculty members to divide the rights in ways that make sense for a variety of different types of works. Although the university would own the copyrights, attribution provisions and copyright notices can ensure that faculty members receive appropriate recognition for their work.

Such a dramatic change in universities’ approach to copyrights would, no doubt, be controversial. It is important, however, to focus on the substantive result of any system for distributing copyrights. The current approach, based on vague and potentially unenforceable university policies, provides a formalistic affirmation of faculty ownership of scholarly works, but paradoxically creates a risk that faculty members will have no rights in their scholarly works. A licensing scheme, however, could provide greater clarity, enforceability, and control for faculty members, thus better serving the parties’ substantive goals.
AUTHOR INDEX

Adler, Robert W.
The Decline and (Possible) Renewal of Aspiration in the Clean Water Act 88:759

Bagchi, Aditi
The Perspective of Law on Contract 88:1227

Bix, Brian H.
Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World 88:1251

Boxx, Karen E.
Washington Trust Laws' Extreme Makeover: Blending with the Uniform Trust Code and Taking Reform Further with Innovations in Notice, Situs, and Representation 88:813

Carsley, Nikki C.
When Old Becomes New: Reconciling the Commands of the Wilderness Act and the National Historic Preservation Act 88:525

Collins, Ronald K.L.
Lerman, Lisa G.

Craswell, Richard
Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure 88:333

Curry, Stephanie
Washington’s Electronic Signature Act: An Anachronism in the New Millennium 88:559

Cunningham, Lawrence A.
Reflections on Contracts in the Real World: History, Currency, Context, and Other Values 88:1265

DiMatteo, Larry A.
Contract Stories: Importance of the Contextual Approach to Law 88:1287

Dolan, Peter
An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State 88:1119

Ellington, Anne L.
Lutzenhiser Jeanine Blackett
In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions 88:491

Ennis, Josephine L.
Making Room: Why Inclusionary Zoning is Permissible under Washington’s Tax Preemption Statute and Takings Framework 88:591

Feld, Kayla
Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act 88:245

Gerding, Erik F.
Contract as Pattern Language 88:1323

Gertz, Glenda A.
Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-For-Hire Dilemma 88:1465

Gillette, Justin
Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions 88:645
Goodling, William James  
Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing 88:1153

Gorod, Brianne J.  
The Collateral Consequences of Ex Post Judicial Review 88:903

Grossi, Simona  

Hartzog, Woodrow Stuzman, Frederic  
Obscurity by Design 88:385

Johnson, Kristin N.  
Governing Financial Markets: Regulating Conflicts 88:185

Kamisar, Yale  
A Rejoinder to Professor Schauer’s Commentary 88:171

Knapp, Charles L.  
Cases and Controversies: Some Things to Do With Contracts Cases 88:1357

Levine, Lee Wermiel, Stephen  
The Landmark that Wasn’t: A First Amendment Play in Five Acts 88:1

Linford, Jake  
Unilateral Reordering in the Reel World 88:1395

Logan, Wayne A.  
Informal Collateral Consequences 88:1103

Nelson, Scott L.  
Dun & Bradstreet Revisited—A Comment on Levine and Wermiel 88:103

O’Neil, Robert M.  
A Tale of Two Greenmoss Builders 88:125

Said, Zahr K.  
Mandated Disclosure in Literary Hybrid Speech 88:419

Schauer, Frederick  
The Miranda Warning 88:155

Sheff, Jeremy N.  
Disclosure As Distribution 88:475

Siler, Ross  
The Lesson of the 2011 NFL and NBA Lockouts: Why Courts Should Not Immediately Recognize Players’ Union Disclaimers of Representation 88:281

Simon, David A.  
The Confusion Trap: Rethinking Parody in Trademark Law 88:1021

Smith, Jenna C.  
“Carving at the Joints”: Using Issue Classes to Reframe Consumer Class Actions 88:1187

Smith, Paul M.  
Dun & Bradstreet v. Greenmoss Builders as an Example of Justice Powell’s Approach to Constitutional Jurisprudence 88:143

Stiefel, Oliver  

Taub, Jennifer S.  
Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students 88:1427

Zanzig, Laura  
The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry 88:723

1498
TITLE INDEX

A Rejoinder to Professor Schauer’s Commentary
Kamisar, Yale 88:171

A Tale of Two Greenmoss Builders
O’Neil, Robert M. 88:125

Grossi, Simona 88:961

All Carrot and no Stick: Why Washington’s Clean Water Act Assurances Violate State and Federal Water Quality Laws
Stiefel, Oliver 88:683

An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State
Dolan, Peter 88:1119

“Carving at the Joints”: Using Issue Classes to Reframe Consumer Class Actions
Smith, Jenna C. 88:1187

Cases and Controversies: Some Things to Do With Contracts Cases
Knapp, Charles L. 88:1357

Contract as Pattern Language
Gerding, Erik F. 88:1323

Contract Stories: Importance of the Contextual Approach to Law
DiMatteo, Larry A. 88:1287

Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World
Bix, Brian H. 88:1251

Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a “Foreign Official” in the Foreign Corrupt Practices Act
Feld, Kayla 88:245

Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-For-Hire Dilemma
Gertz, Glenda A. 88:1465

Disclosure As Distribution
Sheff, Jeremy N. 88:475

Disclosure, Scholarly Ethics, and the Future of Law Reviews: A Few Preliminary Thoughts

Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing Doctrines
Goodling, William James 88:1153

Dun & Bradstreet Revisited—A Comment on Levine and Wermiel
Nelson, Scott L. 88:103

Dun & Bradstreet v. Greenmoss Builders as an Example of Justice Powell’s Approach to Constitutional Jurisprudence
Smith, Paul M. 88:143

In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions
Ellington, Anne L. & Lutzenhiser, Jeanine Blackett 88:491

Informal Collateral Consequences
Logan, Wayne A. 88:1103

Governing Financial Markets: Regulating Conflicts
Johnson, Kristin N. 88:185

Making Room: Why Inclusionary Zoning is Permissible under Washington’s Tax Preemption Statute and Takings Framework
Ennis, Josephine L. 88:591
Mandated Disclosure in Literary Hybrid Speech
Said, Zahr K. 88:419

Obscurity by Design
Hartzog, Woodrow & Stuzman, Frederic 88:385

Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions
Gillette, Justin 88:645

Reflections on Contracts in the Real World: History, Currency, Context, and Other Values
Cunningham, Lawrence A. 88:1265

Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure
Craswell, Richard 88:333

The Collateral Consequences of Ex Post Judicial Review
Gorod, Brianne J. 88:903

The Confusion Trap: Rethinking Parody in Trademark Law
Simon, David A. 88:1021

The Decline and (Possible) Renewal of Aspiration in the Clean Water Act
Adler, Robert W. 88:759

The Landmark that Wasn’t: A First Amendment Play in Five Acts
Levine, Lee & Wermiel, Stephen 88:1

The Lesson of the 2011 NFL and NBA Lockouts: Why Courts Should Not Immediately Recognize Players’ Union Disclaimers of Representation
Siler, Ross 88:281

The Miranda Warning
Schauer, Frederick 88:155

The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry
Zanzig, Laura 88:723

The Perspective of Law on Contract
Bagchi, Aditi 88:1227

Washington’s Electronic Signature Act: An Anachronism in the New Millennium
Curry, Stephanie 88:559

Washington Trust Laws’ Extreme Makeover: Blending with the Uniform Trust Code and Taking Reform Further with Innovations in Notice, Situs, and Representation
Boxx, Karen E. & Groblewski, Katie S. 88:813

When Old Becomes New: Reconciling the Commands of the Wilderness Act and the National Historic Preservation Act
Carsley, Nikki C. 88:525

Unilateral Reordering in the Reel World
Linford, Jake 88:1395

Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students
Taub, Jennifer S. 88:1427
SUBJECT INDEX

Administrative Law

Governing Financial Markets: Regulating Conflicts, Johnson, Kristin N. 88:185

The Decline and (Possible) Renewal of Aspiration in the Clean Water Act, Adler, Robert W. 88:759

Advertising Law

The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry, Zanzig, Laura 88:723

Civil Procedure


“Carving at the Joints”: Using Issue Classes to Reframe Consumer Class Actions, Smith, Jenna C. 88:1187

Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing Doctrines, Goodling, William James 88:1153

Constitutional Law

A Rejoinder to Professor Schauer’s Commentary, Kamisar, Yale 88:171

A Tale of Two Greenmoss Builders, O’Neil, Robert M. 88:125

Dun & Bradstreet Revisited—A Comment on Levine and Wermiel, Nelson, Scott L. 88:103

Dun & Bradstreet v. Greenmoss Builders as an Example of Justice Powell’s Approach to Constitutional Jurisprudence, Smith, Paul M. 88:143

Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions, Gillette, Justin 88:645

The Collateral Consequences of Ex Post Judicial Review, Gorod, Brianne J. 88:903

The Landmark that Wasn’t: A First Amendment Play in Five Acts, Levine, Lee & Wermiel, Stephen 88:1

The Miranda Warning, Schauer, Frederick 88:155

Contract Law

Cases and Controversies: Some Things to Do With Contracts Cases, Knapp, Charles L. 88:1357

Contract as Pattern Language, Gerding, Erik F. 88:1323

Contract Stories: Importance of the Contextual Approach to Law, DiMatteo, Larry A. 88:1287

Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World, Bix, Brian H. 88:1251
Reflections on Contracts in the Real World: History, Currency, Context, and Other Values, Cunningham, Lawrence A. 88:1265

The Perspective of Law on Contract, Bagchi, Aditi 88:1227

Unilateral Reordering in the Real World, Linford, Jake 88:1395

Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students, Taub, Jennifer S. 88:1427

Criminal Law and Procedure

A Rejoinder to Professor Schauer’s Commentary, Kamisar, Yale 88:171

Informal Collateral Consequences, Logan, Wayne A. 88:1103

The Miranda Warning, Schauer, Frederick 88:155

Disclosure

Disclosure as Distribution, Sheff, Jeremy N. 88:475


Mandated Disclosure in Literary Hybrid Speech, Said, Zahr K. 88:419

Obscurity by Design, Hartzog, Woodrow & Stuzman, Frederic 88:385

Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure, Craswell, Richard 88:333

Environmental Law

All Carrot and no Stick: Why Washington’s Clean Water Act Assurances Violate State and Federal Water Quality Laws, Stiefel, Oliver 88:683

The Decline and (Possible) Renewal of Aspiration in the Clean Water Act, Adler, Robert W. 88:759

When Old Becomes New: Reconciling the Commands of the Wilderness Act and the National Historic Preservation Act, Carsley, Nikki C. 88:525

Federal Court Jurisdiction


Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing Doctrines, Goodling, William James 88:1153

Financial Markets

Governing Financial Markets: Regulating Conflicts, Johnson, Kristin N. 88:185

1502
Subject Index

Freedom of Speech

A Tale of Two Greenmoss Builders, O’Neil, Robert M. 88:125

Dun & Bradstreet v. Greenmoss Builders as an Example of Justice Powell’s Approach to Constitutional Jurisprudence, Smith, Paul M. 88:143

Dun & Bradstreet Revisited - A Comment on Levine and Wermiel, Nelson, Scott L. 88:103

The Landmark that Wasn’t: A First Amendment Play in Five Acts, Levine, Lee & Wermiel, Stephen 88:1

Intellectual Property

Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-For-Hire Dilemma, Gertz, Glenda A 88:1465

The Confusion Trap: Rethinking Parody in Trademark Law, Simon, David A. 88:1021

International Law


The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry, Zanzig, Laura 88:723

Labor and Employment Law

The Lesson of the 2011 NFL and NBA Lockouts: Why Courts Should Not Immediately Recognize Players’ Union Disclaimers of Representation, Siler, Ross 88:281

Land Use and Planning


Pedagogy

Cases and Controversies: Some Things to Do With Contract Cases, Knapp, Charles L. 88:1357

Contract as Pattern Language, Gerding, Erik F. 88:1323

Contract Stories: Importance of the Contextual Approach to Law, DiMatteo, Larry A. 88:1287

Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World, Bix, Brian H. 88:1251

Reflections on Contracts in the Real World: History, Currency, Context and Other Values, Cunningham, Lawrence A. 88:1265

The Perspective of Law on Contract, Bagchi, Aditi 88:1227

Unilateral Reordering in the Real World, Linford, Jake 88:1395

1503
Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students, Taub, Jennifer S. 88:1427

Statutes—Interpretation and Construction

The Decline and (Possible) Renewal of Aspiration in the Clean Water Act, Adler, Robert W. 88:759

Trust and Estate Law


Washington Law

All Carrot and no Stick: Why Washington’s Clean Water Act Assurances Violate State and Federal Water Quality Laws, Stiefel, Oliver 88:683

An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State, Dolan, Peter 88:1119

In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions, Ellington, Anne L. & Lutzenhiser, Jeanine Blackett 88:491

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