

## 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<sup>1</sup> 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

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\* 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.<sup>2</sup> Thus, future lawyers can graduate from most law schools without taking such courses.<sup>3</sup> 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.<sup>4</sup>

While there are exceptions, many instructors who attempt to cover drafting or theory in their Contracts course struggle with time allocation,<sup>5</sup> 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.<sup>6</sup>

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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.

4. A large number of law graduates never litigate, but instead provide advice or help negotiate and document business transactions. See Chaim Saiman, *Transactional Lawyering—A Conceptual Approach*, 12 *TRANSACTIONS: TENN. J. BUS. L.* 77, 83 (2011) (“[M]illions of lawyers practice transactional (or corporate) law . . .”).

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.<sup>7</sup> 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.<sup>8</sup>

To be clear, I am criticizing my own methods, and do recognize that there are exceptions to this general summation of the status quo.<sup>9</sup> 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).<sup>10</sup> The case method, as described herein, his contribution to pedagogy in 1870,<sup>11</sup> 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”)<sup>12</sup> are adjudicated; it is not a course

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7. And, sometimes, clients are willing to accept the risk of disputes later, and thus accept incomplete terms and ambiguity so as to get the deal done and gain the benefits. All of this involves learning to “think like the client.” So much more of our client’s process of creating, and sometimes arguing over, contracts relate to the terms of the deal, such as attendant language ambiguity, or the particular ways in which economic restrictions such as exclusivity arrangements, limitations on liability, and renewal terms are drafted, for example. Protecting clients who often will not litigate, but will instead suffer or gain, or harm relationships over such problems, means learning not just what courts may do after-the-fact, but what can be done at the outset to avoid such conflicts.

8. This information concerning the 2013 MPT is based upon one student’s recollection in September of the July exam. Students were provided with the proposed contractual language, a client interview, and provisions of a state statute.

9. See, e.g., Douglas L. Leslie, *CaseFile Method: Contracts*, CASEFILE METHOD, <http://www.casefilemethod.com/ViewCourse.aspx?CourseID=49> (last visited Oct. 18, 2013); see also Douglas L. Leslie, *How Not to Teach Contracts and Any Other Course: Powerpoints, Laptops and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289 (2000).

10. Bruce A. Kimball, *Christopher Langdell: The Case of an “Abomination” in Teaching Practice*, THOUGHT & ACTION, Summer 2004, at 23–24.

11. Martha Minow, Dean of the Faculty of Law, Harvard Law Sch., Legal Education: Past, Present and Future, Address Before the Harvard Law School Community 7 (Apr. 5, 2010) (“The most significant change that remains associated with Langdell’s name is the case method pedagogy. Focused on appellate judicial opinions, the teaching questioned students about the arguments within written judicial opinions and rather than demanding that students memorize rules divorced from the context of their evolution.”).

12. Schwartz, Saiman & Rubin, *supra* note 5, at 97 (Professor Linzer noting that in a four-credit

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.<sup>13</sup> 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.<sup>14</sup>

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

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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,”<sup>15</sup> Cunningham’s book begins with a more current and familiar dispute over a wedding party interrupted due to a major storm.<sup>16</sup> 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

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15. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929); cf. STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (4th ed. 2012); N.O. Stockmeyer, Jr., *Ten Reasons to Start Contracts with Hairy Hand*, LAW TEACHER, Spring 1995, at 3.

16. LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* 1 (2012).

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.<sup>17</sup> Others inside the system include deans<sup>18</sup> 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.

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17. See, e.g., *infra* Part I.B.

18. 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*.<sup>19</sup> The online version received 152 comments over approximately twenty-four hours.<sup>20</sup> 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.<sup>21</sup>

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<sup>22</sup> 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?<sup>23</sup>

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.<sup>24</sup> 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*.<sup>25</sup> 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."<sup>26</sup>

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](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) ("[Of 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)).

25. Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805.

26. *Id.* at 805.

[W]ere it not for the bar exam and inertia (i.e., Langdell 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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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 i[n] the first year. It would teach basic business & finance concepts, as well as

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27. Jeffrey M. Lipshaw, *Teaching Contracts*, LEGAL PROFESSION BLOG (Dec. 17, 2009), [http://lawprofessors.typepad.com/legal\\_profession/2009/12/teaching-contracts.html](http://lawprofessors.typepad.com/legal_profession/2009/12/teaching-contracts.html).

28. *Id.*

29. Jeffrey M. Lipshaw, *Synergistic Teaching and Scholarship in Contract Law: Concepts and Metaphors*, FACULTY LOUNGE (Sept. 3, 2010), <http://www.thefacultyounge.org/2010/09/synergistic-teaching-and-scholarship-in-contract-law.html> (emphasis in original).

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.<sup>30</sup>

Another critical insider is Professor Steven J. Harper, author of *The Lawyer Bubble: A Profession in Crisis*.<sup>31</sup> 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.”<sup>32</sup>

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*.<sup>33</sup> 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.<sup>34</sup>

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*.<sup>35</sup> 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.”<sup>36</sup> The conference featured fifty-eight presentations from law professors and practitioners.<sup>37</sup> Stark observed that in anticipation of a similar event two years earlier, the organizers received no responses to a request for

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30. *Id.* (comment to Lipshaw’s blog post).

31. STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013).

32. *Id.* at 44.

33. Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55 (2004).

34. *Id.* at 55–56.

35. TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007).

36. Tina L. Stark, *Welcome & Opening Remarks*, 12 TRANSACTIONS: TENN. J. BUS. L. 3 (2011) (opening remarks for conference held at Emory University School of Law).

37. Kuney, *supra* note 5, at 3.

proposal for best practices. However, by 2010, she observed, “[W]e have come a long way.”<sup>38</sup> 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.”<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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,<sup>42</sup> though Stark did identify open databases of materials including at Emory and at the Kauffman foundation.<sup>43</sup>

Stark identified another obstacle—the apparently limited number of law professors with transactional experience who are willing to teach transactional skills.<sup>44</sup> In addition, Stark cautioned that teaching such skills “remains professional suicide: a sure-fire way to make tenure difficult if not impossible to obtain.”<sup>45</sup> 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

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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.<sup>46</sup>

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.<sup>47</sup>

### *B. Washington Law Review 2013 Survey Data*

In early 2013, the Washington Law Review invited Contracts instructors to take an online survey.<sup>48</sup> 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.<sup>49</sup> 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 casebook<sup>50</sup> 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

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46. *Id.*

47. *Id.* at 6.

48. Wash. Law Review, Contracts Casebook Survey Results (Spring 2013) [hereinafter Wash. Law Review Survey Results] (on file with the Washington Law Review).

49. *Id.*

50. DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS (3d ed. 2011).

was condensed.<sup>51</sup>

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).”<sup>52</sup> Another wrote, “4 units first semester inevitably sacrifices coverage, depth, and skills training opportunities.”<sup>53</sup> 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.”<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup>

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.”<sup>57</sup> Another questioned the case method

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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.”<sup>58</sup> In contrast, one instructor noted, “I think the case method is worthwhile for contracts.”<sup>59</sup>

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.”<sup>60</sup> 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.<sup>61</sup>

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.”<sup>62</sup>

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.”<sup>63</sup> Another instructor took the most

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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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup>

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

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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.<sup>69</sup> His first casebook was *Selection of Cases on the Law of Contracts*.<sup>70</sup> 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.<sup>71</sup>

Langdell was not the only person to select cases for publication in a single volume.<sup>72</sup> What made his casebook unique was its organizational approach. Casebooks had existed as specialized reporters for some time.<sup>73</sup> Other contemporary books or manuals had been indexed by the

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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 Curmudgeons: 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.<sup>74</sup>

Langdell also attempted to treat law as if it were a scientific discipline.<sup>75</sup> 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.<sup>76</sup>

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.”<sup>77</sup> 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.<sup>78</sup> Langdell also advanced the notion that the law existed separate and apart from politics.<sup>79</sup>

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

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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.”<sup>80</sup> He also contended that classroom instructors, not practicing lawyers were best able to impart legal knowledge and train lawyers.

The Socratic method that Langdell adopted to impart the case method was counter to other techniques including the Dwight Method, named for Columbia Law School Warden Theodore William Dwight.<sup>81</sup> 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.”<sup>82</sup> The emphasis was on rote memorization and recitation.<sup>83</sup>

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,<sup>84</sup> 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.<sup>85</sup> 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.

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80. Nancy Cook, *Law as Science: Revisiting Langdell’s Paradigm in the 21st Century*, 88. N.D. L. REV. 21, 32 (2012).

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.<sup>86</sup> As one student of his later reflected, "Most of the class could see nothing in his system but mental confusion and social humiliation."<sup>87</sup> Many students transferred from Harvard Law School to Boston University School of Law.<sup>88</sup> However, Dean Langdell had the support of the president of Harvard University.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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."<sup>92</sup> 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.<sup>93</sup> Though he would later join the Harvard faculty and accept the case method, Holmes previously disapproved of Langdell's framework, arguing in

86. Sheppard, *supra* note 71, at 598.

87. Kimball, *supra* note 10, at 31 (citing Samuel F. Batchelder, *C.C. Langdell, Iconoclast*, in *BITS OF HARVARD HISTORY* 440–41 (1924)).

88. GALLAGHER BLOGS, *supra* note 71.

89. Kimball, *supra* note 10, at 32.

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)).

91. *Id.* at 33 (citing Letter from Louis D. Brandeis to Otto A. Wehle (Mar. 12, 1876)).

92. Minow, *supra* note 11, at 6.

93. *Id.* (citing WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 25–26 (1982) and citing Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 *VAND. L. REV.* 339 (2007)).

public lectures in 1881,<sup>94</sup> “The life of the law has not been logic; it has been experience.”<sup>95</sup>

#### 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> Langdell’s influence has been long lasting; the line of required courses at Harvard Law School during the 1871–1872 academic year

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94. *Id.* at 7–8 (citing Martin P. Golding, *Holmes’s Jurisprudence*, 5 SOC., THEORY & PRAC. 183, 201 (1979)).

95. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

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.

97. Oliver R. Goodenough, *Developing an E-Curriculum: Reflections on the Future of Legal Education and on the Importance of Digital Expertise*, 88 CHI.-KENT L. REV. 845, 850–51 (2013).

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]assses [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.<sup>100</sup> 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.”<sup>101</sup> 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.<sup>102</sup>

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.”<sup>103</sup> 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).<sup>104</sup> However, the

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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.

102. Sheppard, *supra* note 71, at 618 (citing Erwin Griswold, *Intellect and Spirit*, in *THE PATH OF THE LAW FROM 1967: PROCEEDINGS AND PAPERS AT THE HARVARD LAW SCHOOL CONVOCATION HELD ON THE ONE HUNDRED FIFTIETH ANNIVERSARY OF ITS FOUNDING 149–50* (Arthur E. Sutherland ed., 1968)).

103. Minow, *supra* note 11, at 10 (citing WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 14 (1982), and Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A.J. 532 (1915), reprinted in STEVE SHEPPARD, *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 673–77 (2007)).

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.”<sup>105</sup>

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.<sup>106</sup> 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.<sup>107</sup>

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.”<sup>108</sup> 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.<sup>109</sup> 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

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meeting student interests and connected law schools to current affairs.”).

105. Goodenough, *supra* note 97, at 854.

106. See Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 652 (1933) (Williston as the reporter).

107. Friedman and Macaulay, *supra* note 25, at 806.

108. *Id.* (emphasis in original).

109. *Id.*

completed.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> Even the “post-realist” development of the UCC reflected common law origins, and set out to resolve problems identified in judicial decisions.<sup>114</sup> As Friedman and Macaulay explain, the UCC was “the realist’s version of the *Restatement*.”<sup>115</sup>

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.”<sup>116</sup> Friedman and Macaulay contended that “contract law suffered from all the ills of law teaching and research, only more so.”<sup>117</sup> 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.”<sup>118</sup> 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.<sup>119</sup> 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.”<sup>120</sup>

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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.<sup>121</sup> 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.”<sup>122</sup> “Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers.”<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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.”<sup>126</sup> This was to be an ongoing process, with regular

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121. 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].

122. *Id.* at 4.

123. *Id.*

124. 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”).

125. Deborah A. Schmedemann, *Finding a Happy Medium: Teaching Contract Creation in the First Year*, 5 J. ASS’N. LEGAL WRITING DIRECTORS 177, 184 (2008).

126. 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].

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.”<sup>127</sup>

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.<sup>128</sup> 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.<sup>129</sup>

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.”<sup>130</sup>

The Carnegie Report suggested that students would learn best with a curriculum supported by three pillars: knowledge of the doctrine, skills, and professional identity.<sup>131</sup> 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.”<sup>132</sup> With regard to the Socratic method, the Report questioned its merits in moving students

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127. *Id.*; see also Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 819–21 (2004).

128. WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, SUMMARY (2007) [hereinafter CARNEGIE REPORT SUMMARY], available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

129. *Id.* at 5–6.

130. *Id.* at 6.

131. *Id.* at 8; 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.<sup>133</sup> 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).<sup>134</sup>

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.<sup>135</sup> 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.<sup>136</sup> 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.”<sup>137</sup>

The topic of teaching contracts appears only a few times in the twenty-five page report. In two instances the Report references press accounts<sup>138</sup> critical of legal education for its failure to teach students “basic tasks such as drafting contracts, negotiating mergers, and other

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133. Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching After the Carnegie Foundation’s Educating Lawyers*, 31 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.”).

134. CARNEGIE REPORT SUMMARY, *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.”).

135. *See* Schmedemann, *supra* note 125, at 184–85.

136. *See* 2013 ABA REPORT, *supra* note 126.

137. *Id.* at 1 (emphasis in original).

138. *Id.* at 1 n.5 (citing David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at 1 and Michele Goodwin, *Law Schools’ Failure to Prepare Students . . . It’s Complicated*, CHRON. HIGHER EDUC. (Dec. 13, 2011, 9:43 PM), <http://www.chronicle.com/blogs/brainstorm/law-schools'-failure-to-prepare-students...it's-complicated>).

key features of law practice.”<sup>139</sup> 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.<sup>140</sup>

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.<sup>141</sup>

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.”<sup>142</sup> 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.”<sup>143</sup>

## 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*

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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*<sup>144</sup> 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 *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.<sup>145</sup>

*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.<sup>146</sup> 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, *Sherwood v. Walker*<sup>147</sup> (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.<sup>148</sup> 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

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144. CUNNINGHAM, *supra* note 16.

145. Jennifer S. Taub, “Unpopular” *Contracts and Why They Matter*, CONCURRING OPINIONS (Oct. 18, 2012, 1:20 PM), <http://www.concurringopinions.com/archives/2012/10/unpopular-contracts-and-why-they-matter.html> (author’s blog entry concerning Cunningham’s book).

146. CUNNINGHAM, *supra* note 16, at 1.

147. 66 Mich. 568 (1887).

148. *See* CUNNINGHAM, *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.<sup>149</sup> Before the outcome is revealed, Cunningham brings in the famous 1917 Lucy, Lady Duff-Gordon case.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

The public outrage over the AIG bonuses is included in Chapter 3 of Cunningham's book, which covers the concepts of "excuses and termination."<sup>155</sup> These bonus contracts were entered into in early 2008,

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149. *Id.* at 148–50.

150. *Id.* at 150.

151. *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/>.

152. 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)).

153. *Id.* at 235.

154. 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).

155. See CUNNINGHAM, *supra* note 16, at 73–78.

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.<sup>156</sup> 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.<sup>157</sup> 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*<sup>158</sup> and in *Contracts in the Real World*,<sup>159</sup> 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

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156. *Id.* at 74.

157. Victoria McGrane, *Rep: Tax AIG Bonuses 100 Percent*, POLITICO (Mar. 16, 2009, 5:39 PM), <http://www.politico.com/news/stories/0309/20080.html>.

158. Lawrence A. Cunningham, Op-Ed., *A.I.G.'s Bonus Blackmail*, N.Y. TIMES, Mar. 17, 2009, at A27.

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 Contracts*

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*,<sup>160</sup> 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.<sup>161</sup> And, in 2012, in *CompuCredit v. Greenwood*,<sup>162</sup> the Court limited consumers’ access to the courts to adjudicate claims under the Credit Repair Organizations Act.<sup>163</sup> 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.<sup>164</sup> It would be useful to study these

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160. *Rent-A-Center, West, Inc. v. Jackson*, \_\_U.S.\_\_, 130 S. Ct. 2772 (2010).

161. *Id.*

162. *Compucredit Corp. v. Greenwood*, \_\_U.S.\_\_, 132 S. Ct. 665 (2012).

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."<sup>165</sup>

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*<sup>166</sup> as well as excerpts from books like Margaret Jane Radin's *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*<sup>167</sup> (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.<sup>168</sup> 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"<sup>169</sup> 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-

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*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.theracetothetbottom.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.”<sup>170</sup> 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.”<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> Drawing upon what he had learned in Schwartz’s class, the student found problematic provisions and landed the job.<sup>174</sup> Schwartz mentioned another benefit: improvement in outlook. He explained:

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170. *Id.* at 1.

171. *See* Goodenough, *supra* note 97, at 861.

172. Michael Hunter Schwartz, *Teaching Contracts from a Transactional Perspective*, 12 *TRANSACTIONS: TENN. J. BUS. L.* 77, 79 (2011).

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.<sup>175</sup>

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.”<sup>176</sup> 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.<sup>177</sup>

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.<sup>178</sup> 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.<sup>179</sup>

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.<sup>180</sup> Professor Chaim Saiman also incorporated transactional skills into his first-year Contracts course.<sup>181</sup>

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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.<sup>182</sup> He also “steer[ed]” his main Contracts course in a transactional direction.<sup>183</sup> 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.”<sup>184</sup> 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.<sup>185</sup> Further, he noted that, “[L]aw school habituation 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.”<sup>186</sup> 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.<sup>187</sup> Thus, he arrived at “conceptual approach.”<sup>188</sup> This entailed teaching transactional issue spotting and reading the cases from the perspective of a transactional lawyer.<sup>189</sup> 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.<sup>190</sup>

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

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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.<sup>191</sup>

## 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.<sup>192</sup> Law is an art,<sup>193</sup> a social science,<sup>194</sup> a profession,<sup>195</sup> a system to perpetuate hierarchy,<sup>195</sup> a set of rituals, a system of signs,<sup>196</sup> 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.”<sup>197</sup> A contract can also be conceptualized in other ways, including as a linguistic structure, a relationship, a plan, and a ritual.<sup>198</sup>

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.

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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/contractsprof\\_blog/2013/09/university-of-utahs-repository-of-contracts-lessons-on-video.html](http://lawprofessors.typepad.com/contractsprof_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=PLpbtRdN7xWUfKfRXfbaPdQZBQSS1n2Vr>.

192. Law is also 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.

193. See Alda Facio, *The Law: An Art or a Science?*, 7 AM. U. J. GENDER SOC. POL'Y & L. 355 (1999).

194. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–81); Judith Resnik, *On the Margin: Humanities and the Law*, 10 YALE J.L. & HUMAN. 413 (1998).

195. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

196. ROBERTA KEVELSON, *THE LAW AS A SYSTEM OF SIGNS: TOPICS IN CONTEMPORARY SEMIOTICS* (1988).

197. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

198. Lipshaw, *supra* note 29. Lipshaw describes these metaphors and their associated proponents as “relationships (Macaulay 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.