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Clearing the Underbrush for Real-Life Contracting

STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD, AND MARK GALANTER, *Contracts: Law in Action*. Vols. 1 and 2. Charlottesville, Va.: Michie, 1995. Vol. 1: pp. 853, \$31. Vol. 2: pp. 787, \$31.

William J. Woodward, Jr.

In his famous book, *The Death of Contract*, Grant Gilmore dubbed Stewart Macaulay the "Lord High Executioner of the Contract is Dead school" (Gilmore 1974, 3, n.1; Braucher 1995, 52). Gilmore's book portrayed the development and asserted disintegration of classical contract doctrine as an epic battle between contract titans, with Samuel Williston advancing the classical, relatively "objectivist" approach and Arthur Corbin retorting with something far more nuanced, fact-sensitive, and "real." Gilmore declared "dead" the objectivist approach and, with it, the distinctive character of contract law that made it different from the law of torts from which it emerged in the nineteenth century. Macaulay won his dubious cameo role¹ in Gilmore's little drama because his path-breaking research had examined how contract law *actually* operated and his findings had prompted hard questions about the flimsy connection between that "law" and the "law" that lawyers and law students learn about when they study in law school.

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1. Other than a brief mention in Gilmore's first endnote, Macaulay played no part in Gilmore's rendition of the rise and fall of classical contract. That endnote referred to a 1967 symposium on the relevance of contract theory, which Gilmore gave as evidence for his own assertion that contract was "dead."

If Macaulay was Gilmore's metaphorical executioner, he was, in retrospect, just beginning to pile firewood around the stake at the time Gilmore wrote. With the help of his University of Wisconsin colleagues John Kidwell, William Whitford, and Marc Galanter, Macaulay finally put torch to tinder with the 1994 publication of *Contracts: Law in Action* (CLA).² This new book for teaching the first-year law school course in contracts relentlessly develops an understanding of the law as delivered—the “law in action.”³ It then juxtaposes that evidence with traditional staples of more traditional contracts courses,⁴ and thereby exposes the chasm between contract law and real-life business and personal relationships. By focusing on contract law *in action*, this effort offers a real-life context for Gilmore's ideas of contract law⁵ that is unique in this genre. It is in this real world that lawyers operate; the complex combination of law, business, leverage, common sense, and ideology is what can give law practice its challenge and interest. Students sense the distance between law as usually taught and the law in action; they show this by their incessant craving for tales from the real world. The irony is that the executioners' iconoclastic efforts breathe real life into a subject many law students start out believing is “dead.”

Being a “casebook,” this is not the sort of book one can pick up in a bookstore and devour in a weekend, and not the kind of book that would ordinarily serve as the basis for a review essay.⁶ But the book will be widely used in law schools, and it has the power to transform the way students understand and conceptualize the subject. Moreover, the book assembles in one place a most remarkable and unique collection of cases, commentary, and empirical studies about the human phenomenon of making, performing, and breaking agreements. Thus, despite its casebook form, the book's importance cannot be overstated.

2. CLA comes in two volumes as well as an abridged one-volume version. References here are to the two-volume version.

3. More accurately, it develops an understanding of *what we know* of the law as delivered. Students who use this book will develop a strong sense of how much we don't know about the law in action. A strength of the book is its capacity to stimulate further empirical research into the law in action and thereby carry forward through a new generation the work begun by Macaulay several decades ago.

4. The book has a large number of “chestnuts,” famous contracts cases that serve as important common ground for all American lawyers. While the use of these cases serves an important orientation to the language and folklore of contracts, they work very differently in the classroom when located, as they usually are in CLA, within a broader legal, business, or social context.

5. While Gilmore referred to Macaulay as a person putting contract law to death, the “death” Gilmore described in his book was much different from that which we might attribute to Macaulay. Gilmore declared the “death” of classical, objectivist contract law as developed by Holmes and Williston and its replacement with neoclassical contract law containing substantial efforts to locate real, subjective party intent. Macaulay's work, on the other hand, has showcased the limitations of *both* classical and neoclassical contract law in the real world of modern personal and business relationships.

6. Jean Braucher (1995) reviewed volume 1 in a symposium on *Death of Contract*. A brief review of volume 2 as a basis for an upper-class contracts course is Woodward 1997a.

The book arrives at an opportune time for many reasons. The 1980s and 1990s have witnessed increasing pressure on law schools to teach their students "how to be lawyers." Critics have condemned the increasingly theoretical bent of many legal scholars and their inability or unwillingness to teach their students about the "real world" (Edwards 1992). That real world is at the center of these materials. Readers learn from the raw materials how appellate opinions emerge from the briefs and records that precede them.⁷ They learn from literature how hardball negotiation is conducted. They learn from raw materials about statutory intervention in franchise and employment contracts. They learn from empirical studies what lawyers actually put in contracts, why they do it, and whether it really matters. Law students surely emerge from their studies with a more sophisticated grasp of how a lawyer can actually use the law and how the law will matter to clients.

The timing is nearly optimal from a theoretical perspective as well. The 1980s and 1990s have witnessed perhaps an unprecedented growth of legal, political, and economic analysis based on a "contract" or "contractarian" model, which in turn, is built on an individualist (Braucher 1990), largely objectivist model. In case law, the Supreme Court blithely concludes that consumers freely "choose," by vendor-supplied form contracts, that a far-distant forum must hear their complaints about the vendor (*Carnival Cruise Lines, Inc. v. Shute* [1991]). In politics, the position is seriously advanced that people actually choose the life of inadequate housing, education, and opportunity that accompanies their welfare checks. In scholarship, a professor deploys economic analysis to assert that businesses should be able to "choose" their *law* by contract and thereby transport themselves to a different (and presumably less regulatory) legal regime without leaving the conference room (Ribstein 1993). And in law reform, several committees charged with redrafting the Uniform Commercial Code are marching to the beat of a largely hypothesized "party autonomy."

Because it is a casebook designed to provoke thought and debate among law students, CLA is relatively open-ended and lacks an explicit thesis in a conventional sense. Instead, the book advances a different way of approaching the subject, placing the conventional meat of a "standard" contracts offering into a complex setting of empirical and nonappellate case material. In its structure and in the selection of materials, the book raises deep and disturbing questions about the institution both lawyers and nonlawyers know as "contract law." The book offers us an extraordinary sketch of contracting and its relationship to contract *law* in the late twentieth century. It also offers an opportunity to consider more generally the

7. In addition to excerpts from briefs and records of famous contracts cases, the book includes reports of both published and unpublished studies of business practice, lawyers' negotiations, and judges' behavior. No other published collection of noncase readings on the subject compares with it.

unresolved—and perhaps unresolvable—tensions at the core of this profoundly interesting subject.

My focus will be in two primary areas where the book makes its sharpest breaks from tradition. The first will be on the implications of placing traditional contract appellate cases within a wide range of nonlegal materials about the process and context of contracting. Contract law means little to practicing lawyers when distanced from the world in which it actually operates, and evidence of authors' dogged pursuit of the law as it actually operates is pervasive in the book. The broad scope of the readings affect, at a very basic level, the way one understands the substance of this traditional law school offering.

The second area of focus is connected to the first. Once we expand our understanding of how contracting takes place, we confront the complexity of all but the simplest contractual relations. Yet traditional contract law comes at this complexity with what amounts to a stick-man model of a horse-trade between strangers.⁸ This rift between the simple paradigm and complex reality has bred a cottage industry of scholars, starting with the pioneering work of Ian Macneil, who explore the "relational contract," arguably every contract even a little more complex than the horse trade. These casebook authors built directly on the work of Macneil (1977) by locating early in the materials a very substantial chapter on contract in the context of continuing relations. The early development of this competing—and in many ways contradictory—paradigm for contracting has implications both at the theoretical and pedagogical levels and raises important questions about the entire structure of contract law.

Part 1 will consider some of the implications of the very broad range of materials this book includes in its study of contracts. Part 2 will then reflect on the relational ideas introduced through these materials and their implications for contract theory. Part 3 will conclude with some observations of recent developments that may open the way for a rethinking of contract theory so provocatively suggested by CLA.

8. Macneil's 1977 casebook describes the horse trade: "[A]t noon two strangers come into town from opposite directions, one walking and one riding a horse. The walker offers to buy the horse, and after brief dickering a deal is struck in which delivery of the horse is to be made at sundown upon the handing over of \$10. The two strangers expect to have nothing to do with each other between now and sundown; they expect never to see each other thereafter; and each has as much feeling for the other as has a Viking trading with a Saxon" (1977, 13). Karl Llewellyn used the "horse trade" to illustrate the distance between theory and actual business practice in a series of articles about sales law in the 1930s and '40s. See, for example, Llewellyn 1939 a, b.

I. THE CONTRACTS CASEBOOK "IN ACTION"

Since the time of casebook inventor Christopher Columbus Langdell, the "case method" has dominated law school instruction. The earliest casebooks were simply a collection of appellate court case opinions with almost nothing in between. While modern casebooks have added questions, problems, statutory provisions, excerpts from law reviews, and text written by the editors, appellate court cases continue to dominate the classroom materials. From a reader's perspective, the strong implicit suggestion is that "the law" resides in the pronouncements of appellate court judges and perhaps in a few statutes. Moreover, traditional materials also suggest that business people behave in the way these appellate cases describe. Modern casebooks too seldom prompt law students or their teachers to consider just how far appellate pronouncements might deviate from real business practice and the "law" that arrives at street level.

CLA is a book that redefines the casebook medium. Appellate court cases are not nearly as dominant, and when they do appear, we find them with excerpts from the parties' briefs, negotiation history, later developments, or other contextual material. At appropriate places, readers encounter large doses of relevant empirical work to further set the context for the issue in question. Elsewhere they discover substantial excerpts from commentators with views ranging from Roberto Unger (e.g., 1 CLA, p. 619) and Robert Gordon (e.g., 1 CLA, p. 623) to Richard Posner (e.g., 1 CLA, pp. 95, 613) and Richard Epstein (e.g., 2 CLA, p.175). The authors introduce through their own text entire areas (such as offer, acceptance, and consideration) that usually dominate weeks of a traditional contracts course. Appellate cases (many of which are found in other casebooks) surrounded with these other materials take on an entirely different feel than they would in a more traditional presentation.⁹

Few readers exposed to these materials would conclude that appellate cases are *the* important texts for study. But more than that, they come away from the book with a very different idea than their more traditionalist peers of what contract law is *about* and what matters about it. Good examples abound of both the power of this pervasive nonappellate case material, and the difference the broader setting makes. A sampling from the materials on remedies for breach of contract and on social control of the contracting process will give some idea of the transformative potential of the new material.

9. There may be a downside to including so much material from disparate sources. The books, particularly the one-volume version, suffer from editing errors that eventually become distracting both to teacher and student. These should be corrected in subsequent editions but, until newer editions are available, the authors might consider preparing errata sheets for the different forms of this work.

A. Contract Remedies “in Action”

1. Epistemology

In their general introduction to the materials, the authors state that a “major theme of the course is that things are not as they may seem” (1 CLA, p. 31). This “epistemological” theme resonates throughout the materials. Throughout the book, the authors’ dominant method is to develop the “rule” through an appellate case and surround that case with materials that suggest the myriad difficulties that lie just beneath the rule’s surface. The appellate case looks very different when seen in a broadened context. This has pedagogical implications: student consumers of these materials develop a more sophisticated understanding of the kinds of problems they will confront as lawyers. The method also has theoretical implications: by sharpening one’s understanding of the divide between the “law on the books” and the “law in action,” the method provokes questions about whether the underlying theory is satisfying, in need of revision, or in need of wholesale reconceptualization. At a different level, the surrounding readings prompt us to question our assumptions about the law’s workings and to ask ourselves what we really know about the law and how we know it. Some examples make this evident.

As any practitioner knows, a great gulf lies between traditional, classical contract theory and the nitty-gritty of contract practice. In the area of contract remedies, this manifests itself in the hidden complexity of what seems a very simple set of rules. As a basic policy matter, the law declares that one should be made as “well off” with contract damages as one would have been with full performance (e.g., Uniform Commercial Code [UCC] §1-106).¹⁰ Beneath the surface of this simple statement is (for newcomers to contract law) unbelievable complexity. The authors set out right at the start to show the reader what is potentially involved in trying to implement such a policy.

In the first case, *Shirley Maclaine Parker v. Twentieth Century-Fox Film Corporation*, we are presented with the simple question “What is an equivalent to the promised performance?” (1 CLA, p. 51). Twentieth Century-Fox contracted to pay film star Shirley Maclaine a hefty sum to star in its musical motion picture, *Bloomer Girl*. The studio decided not to make that movie and offered Maclaine instead a starring role in a Western, *Big Country*, *Big Man*, for the same money. Maclaine declined the second movie and sued for the money she had not been paid for the first. An exten-

10. The Uniform Commercial Code, or UCC, is a statute developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) for eventual promulgation to the state legislatures. It covers many areas of commercial law in separate articles and is the predominant source of commercial law in the United States.

sion of the principle that the victim of a breach is entitled to the equivalent of full performance is the proposition that one is entitled to nothing if, following the breach, one has been offered or given the equivalent of the promised performance. The studio's defense therefore was that Maclaine should have mitigated her loss by taking the second movie and, as a result, had no damages. Citing differences in the projects as well as the underlying contracts, the Supreme Court of California concluded that the movies were not equivalent and rejected the defense.

Parker is a staple of a traditional contracts course and casebook editors usually present it to demonstrate the mitigation principle in the context of an employment contract. People shouldn't sit idle if there is "equivalent" employment available, and the mitigation principle is thought to encourage them to seek out (or at least not reject) alternatives. The hard problems lie just below the surface. Why would anyone reject a 14-week job that paid \$750,000? How is an appellate court (or anyone for that matter) to judge whether *Big Country*, *Big Man* was the "equivalent" of *Bloomer Girl*? The authors give us nonappellate court materials with which to consider these issues.

In text following the case, they describe a series of interviews a former student conducted with Maclaine's agents and lawyers in 1979. Those interviews reveal that Maclaine had been willing to settle her case and that part of her willingness came from a need to maintain good relations with the studios. We are also told that she was associated with liberal causes and was involved in the political campaigns of Robert Kennedy and George McGovern. *Bloomer Girl* was a movie about independent women, whereas *Big Country*, *Big Man* was to be a Western, and a Western projects a very different female image. Finally, *Bloomer Girl* was a big-budget movie and Twentieth Century-Fox was at the time pressed financially. The authors state a recurring, basic question when they ask, "Is the difficulty of deciding . . . issues of comparability reason enough for courts to limit the question to the economic or financial aspects of a substitute job which an employer asserts the employee should have accepted?" (1 CLA, p. 65). This material sets up a tension that should be very close to the core of contract law. One might ask, as did Richard Danzig in his path-breaking book, *The Capability Problem in Contract Law*,¹¹ whether the difficulty of judging the complex actions of others "impede[s] and distort[s] efforts to further preferred values through a legal system" (Danzig 1974; 1 CLA, pp. 1-2).

The contract law question is whether this difficulty in judging demands and justifies the kinds of simple rules that characterize our contract

11. CLA leans heavily on Danzig's book and pervasively develops the questions it raises. CLA's authors were, in turn, involved in creating the essays that are collected in Danzig's book: Stewart Macaulay wrote one, and John Kidwell contributed to a second. See Danzig 1974, 3.

law doctrine, or whether a doctrine that was more complex, better matching real-world complexity, would give us better decisions at acceptable cost.¹² The non-case law material makes possible an inquiry into these far deeper questions.

By adding empirical material, another remedies staple of the contracts course, *Anthony Neri v. Retail Marine Corporation* (1 CLA, p. 67) becomes an opportunity to confront a similar rift between contemporary contract theory and the law "in action." If a retail buyer breaches a sales contract with a seller and the seller resells the goods for the same retail price as that in the breached contract, has the seller suffered any loss? A first approximation would be no: the second sale averted the loss from the first, so the seller is even. If Shirley Maclaine had agreed to the second movie and been paid her salary, she would have suffered no loss.¹³ But the UCC makes special provision for the "lost volume seller" in recognition of the fact that, in the retailing situation, a lost sale is not made up for by a subsequent sale that the seller would have made anyway.

Neri raises this "lost profits puzzle," a problem that has garnered great scholarly debate in the past 20 years.¹⁴ Once again, what lies behind this case is at least as interesting as the theoretical points it raises. We learn, for example, that the parties' lawyers had scarcely thought about the lost profits issue when they tried the case, and the buyer's lawyer probably had no opportunity to mount a factual challenge to the appellate court's assumption that the seller qualified as a lost-volume seller. As any practitioner (and many a client) knows, the litigation system "in action" deviates from its theoretical model of two equally strong advocates whose battle generates truth. The real system, of course, includes incompetent counsel and courts that reach for issues not adequately presented to them. Whatever one makes of the law's supposed orderliness and logic after this revelation, it is unraveled further by the authors' report of a small empirical study of 16 new car dealers suggesting that sellers' business concerns make the lost profits problem all but irrelevant. They quote one dealer: "Realistically, how long could a dealer who sues customers for lost profits last in a competitive market? Once the word got out, such a reputation would drive customers away" (1 CLA, p. 78).

12. Neither answer is dominant in the materials. A critical legal studies scholar, Jay Feinman, is critical of judicial capacity to use complex, multidimensional rules: "First, the courts are so distant from the actual contexts of cases that judicial application of the method is properly characterized as interpretive rather than empirical. Second, the courts' interpretive activity is not and cannot be consistently executed. Third, judicial interpretation is necessarily based on a subjective application of policies more complex than any simple preference for facilitation of commercial exchange" (1 CLA, p. 416 quoting Feinman 1984, 703).

13. This is surely a "rough" approximation in the Maclaine case. While, by hypothesis, she would have had the same income from the substitute movie and therefore would suffer no direct pecuniary loss, in the longer run, the substitute could have resulted in long-term reputational loss. This latter kind of loss would likely be unprovable in a legal proceeding.

14. An early economic analysis is Goetz and Scott 1979.

The *Neri* case is one of the first concrete examples of this epistemological theme in the book. If we read the case without the surrounding materials, we might naturally assume it was the product of a litigation system functioning as designed. The case's value as precedent, one might argue, depends on those assumptions. If those assumptions are not valid (as so often they are not), what is the case and how valuable is it? When the authors present *Security Stove & Manufacturing Co. v. American Railways Express Co.* (1 CLA, p. 141), a case that appears in numerous contracts casebooks, they supplement it with the observation that this 1932 case from the Kansas City Court of Appeals has been cited by a court only nine times since (1 CLA, p. 150). What sort of law does this case represent?

Another example of the authors' tendency to press this theme is their development of another major case, *Peevyhouse v. Garland Coal Co.* This 5-4 Oklahoma decision rejected, as essentially too costly, contract damages measured by the actual costs (some \$29,000) of performing the coal company's bargained-for promise to fill in the pit created on the plaintiffs' farm by the company's strip mining (1 CLA, p. 198). Instead, the court awarded the homeowners \$300, the difference in the value of the apparently barren farmland with and without the hole. Through added material, we learn, among other things, that members of the court switched votes, that the plaintiffs' lawyer was a sole practitioner and made some bad legal decisions, and that two members of the court majority who decided against the *Peevyhouses* were accused of taking bribes in other cases and left the bench. The implicit question recurs: what sorts of principles can we build on the backs of cases such as this?

Through their selection and placement of the materials, the authors frontally challenge the pedagogical notion (originally brought to us by Langdell) that students can acquire what they need to know about contracts by reading appellate court opinions. For the theorist (or the student who will become one), the materials do much the same thing by emphasizing the constructed reality that appellate cases represent. If we are to learn about contracts and, in particular, if we are to formulate sound policy about contracting, we need to study far more than appellate cases to do so. Several developments suggest that the need for an expanded approach to legal scholarship in this field may be more pressing now than ever.

Whatever guidance appellate cases once gave in developing or formulating contract policy, that guidance is much diminished now. Gilmore pointed out the obvious—that appellate decisions were being eclipsed by statutes as the primary source of law governing contracts (1974, 68–69). In the UCC revision process, main objects of a revision are to “simplify, clarify and modernize the law” and “permit the continued expansion of commercial practices through custom, usage and agreement of the parties” (UCC

§ 1-102).¹⁵ But where do drafting committees who attempt to improve these areas of contract law look for guidance in formulating modern policy? While the old UCC itself can, through dysfunction, point to areas requiring change, it cannot prescribe the changes needed. The anecdotal experiences of business lawyers may be myopic, unrepresentative, or consciously¹⁶ or unconsciously biased. And common law cases, often a source of contract policy for later codification, are much less reliable for policy guidance now than before.

Common law cases, always ill-equipped to keep pace with developing commercial practices, may simply not be plentiful enough for our rapidly changing culture. Besides the exponential expansion of the criminal docket, an expansive reading of the Federal Arbitration Act has made an unreported arbitrator's decision a far more likely conclusion to a civil dispute than it was in Gilmore's day. Indeed, there is evidence that arbitration provisions in preprinted adhesion contracts are becoming commonplace and enforceable.¹⁷ If the trend continues,¹⁸ the obvious result will be an even smaller number of reported decisions from which to glean a policy direction.¹⁹ Less obviously, an expansion of arbitration through form contract for customers of businesses could result in a substantial weakening of the pro-

15. See also note 10, *supra*.

16. Paid lobbyists now regularly participate in the UCC revision process. If this is not a new development, its existence in the past was a little-known secret. In one iconoclastic article, Schwartz and Scott set out to prove false the assumption "that politics do not influence the ALI and NCCUSL" the private groups that sponsor the UCC revision process (Schwartz and Scott 1995).

17. Cases are collected in David Schwartz 1997. Cases in which employers have attempted to enforce arbitration clauses in the employment area are now common in advance sheets. See, e.g., *Nelson v. Cyprus Bagdad Copper Corp.* (1997)(unenforceable); *O'Neil v. Hilton Head Hosp.* (1997)(enforceable). Speidel 1996 addresses adhesion contracts to arbitrate in the securities industry.

18. One bit of evidence suggests that the trend toward private arbitration via adhesion contract may have reached its zenith. On August 7, 1997, the National Association of Securities Dealers voted to eliminate mandatory arbitration (appropriately named) of discrimination claims made by its registered brokers. Currently, "agreement" to arbitration of all such claims is a condition of employment in that industry, its imposition coming in the guise of a contract the brokers are required to sign in order to work. The practice of requiring arbitration of discrimination claims has been opposed by the Equal Employment Opportunity Commission. See *U.S. Law Week* 2105-6 (1997).

Whether opposition to "mandatory arbitration by contract" will outpace businesses' embrace of arbitration by form contract in other areas is anybody's guess. One business lawyer recently touted arbitration as the solution to the "class action problem" for banks. Because there are no class actions in arbitration, a business can reduce the threat of customer class actions by including arbitration clauses in agreements with customers. For this reason (and no doubt because there will be little threat of customers "taking their business elsewhere"), the lawyer opined that all banks would have arbitration clauses in their customer agreements within five years.

19. Compare Galanter and Cahill 1994, 1385, addressing the analogous phenomenon of unreported (and confidential) case settlements.

tection the law offers customers who fall victim to occasional egregious or predatory business conduct.²⁰

But even the group of remaining judicial decisions might well be suspect. Widespread use of arbitration clauses in form contracts opens the way for businesses to litigate selectively their "good" cases to a judicial decision while leaving their "bad" decisions to an unreported arbitration award.²¹ Business's ability to selectively litigate, while not new (it was detailed at length in Galanter 1974), is increased substantially both by the potential ability to arbitrate disputes selectively and by enhanced power to gather and share information.²²

If the gathering and synthesis of appellate decisions becomes an unreliable source of policy wisdom about contracting or commercial practice, and we eliminate lawyer anecdote, industry assertion, and plain ideology as myopic or biased in policy setting, empirical research of the kind the authors present holds the best prospect for a deepening understanding of contracting and the needs of participants in various contracting contexts. The rift between case law and the studies CLA juxtaposes with the cases leave

20. Arbitrators are reasonably well paid by the parties to the arbitration process and contractual arbitration usually permits either party to reject arbitrators they find unacceptable. This means that arbitrators will be strongly motivated not to render decisions that will result in their being regularly stricken by future parties to contractual arbitration. Particularly if "repeat players" in arbitration share information about the decisions of particular arbitrators, the arbitrators' financial incentive of obtaining "repeat business" makes them far less "independent" than even elected judges. One would therefore be hard-pressed to imagine an arbitrator (who wanted to continue working as an arbitrator) rendering an award against a "repeat player" that included substantial punitive damages or other penalties. To the extent the law permits extreme damages or penalties for extreme conduct, we would expect arbitrators to be less likely (perhaps far less likely) to award them than would relatively independent judges or juries.

In *Gordon Tameny v. Atlantic Richfield Co.* (1980) (1 CLA, p. 471), the California Supreme Court permitted the plaintiff's complaint seeking compensatory and punitive damages in tort for wrongful discharge to proceed for reasons of public policy. One would be hard-pressed to imagine an arbitrator (again, interested in being an arbitrator in the future) arriving at the same conclusion.

21. Some cases suggest that arbitration provisions that are enforceable by one party but not the other may come under enhanced judicial scrutiny. In *O'Neil v. Hilton Head Hosp.* (1997), the court upheld an employee's agreement to arbitrate Family and Medical Leave Act claims. Citing *Hull v. Norcom, Inc.* (1985, 1549), however, the court suggested that the result might be different if the provision permitted the employer to ignore the results of arbitration.

22. In the context of private settlement, Galanter and Cahill (1994, 1385-86) suggest that repeat players' ability to gather and analyze private settlement information will give them further strategic advantages in disputes with one-shotters. Perhaps related to the further accumulation of advantage by repeat players is a trend identified by Ralph James Mooney (1995) in the cases of several Western jurisdictions that show a resurgence of a primitive, Willistonian approach to contract and related issues. The decisions he details tend to favor the contract drafter, the employer, or the business partner with the power to dictate terms. The accumulated wisdom of courts and scholars about contracting from the 1930s onward is neither confronted in the new decisions nor anywhere in evidence. Do these cases reflect a newly enlightened thinking about contract law or systematic "law reform" efforts on the part of American business?

both teacher and student with no doubt that there is much more work to be done.

2. *The Costs of Law*

Perhaps the greatest deviation between contract remedies on the books and “in action” is also the most basic. Contract law’s fundamental remedial policy objective is to make the injured party as well off with damages as she would have been with full performance. This is embodied in UCC §1-106, which solemnly declares that the “remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.” But every lawyer knows that contract damages are a far distant second to full performance. They also know that, in smaller transactions, the cost of getting the remedy will exceed recoverable damages. As an instructional matter, any new lawyer who doesn’t know these basic facts will be in for a big surprise the first time she encounters a contract problem in her law practice. For the theorist, the question is whether these basic facts are, more or less, beside the point or whether the costs of law must be taken account of when thinking about contract remedies theory itself. Most contracts casebooks and many contracts theorists proceed as if these damages policy goals are in fact being met, when of course, they are not.²³ CLA places this question near the center of its coverage of contract remedies.

The tendency among some theorists to assume that contract remedies deliver a full money equivalent of the lost performance is most evident in the notion of “efficient breach.” The idea here is that *because* contract remedies deliver a full measure of money damages to the injured party, the breacher *ought* to breach the contract if a breach will result in enough profit to pay the contract measure of damages and have profit left over.²⁴ No one, the story goes, will be worse off, and someone (the breacher) will be better

23. Contract law requires “foreseeability” of consequential damages and requires that damages be proved with reasonable certainty. Both limit the plaintiff’s ability to show where she would have been but for the breach. But more than that, contract cases are inevitably complex—each conversation about performance or payment has potential relevance to both liability and damages. This makes litigation of contracts cases more complex than negligence cases of comparable size and may account for the fact that few plaintiffs’ lawyers will take contract cases on a contingency-fee basis. Once we take account of the plaintiff’s expenses in bringing even the simplest contracts case, it becomes very difficult to believe that the goals of the contracts remedies system are being met except, perhaps, in extremely large cases where the damages dwarf the costs of getting them.

24. One reader said this sentence was too strong and that the theory merely permits the breacher to breach the contract but is neutral on whether she *should*. The theory of efficient breach seems stronger than that. If some action will cause the general economic welfare to increase, this theory would call for us to encourage it, not merely tolerate it. The prospect of making a “profit” from the breach gives the economically motivated breacher the incentive the theory requires.

off. This “theory” can support the present system’s preference for money damages over compelled performance (Posner 1992, 117–19), uphold the present system’s refusal to enforce penalty clauses,²⁵ and condemn the tort of interference with contract (Perlman 1982).

Of course, like much else in this field, the theory of efficient breach is just too simple to be true. The legal system has considerable slippage in assessing damages and rejects some kinds of damages entirely, partly because of difficulties in judging made so clear in the book’s materials on the *Parker* case. Slippage inevitably operates against the party with the burden of proof, usually the victim of the breach. But more important than the difference between the law’s aspiration and its actual delivery of contract damages, “law is not free” (1 CLA, p. 35). The claimant usually has to pay a lawyer to get the damages and that payment comes out of whatever damages, the law ultimately awards. CLA introduces students to this basic fact of contracts practice very early with an excerpt from Mark Galanter’s *Why the Haves Come Out Ahead* (1974; 1 CLA, p. 11), and the authors develop and strengthen this observation throughout the book.

The authors also present their readers directly with a corollary: the party holding the money (i.e., usually the defendant) has inevitable advantage or leverage. This version of the grade-school adage “possession is nine-tenths of the law” is given great initial force through an excerpt from *Class Struggle Is the Name of the Game*, a book that describes the experiences of a political science professor who invented a board game, contracted for its manufacture, and when it didn’t sell as expected, couldn’t pay for it (1 CLA, p. 160). The reading describes a meeting where the inventors found a small defect in the 50,000 already-manufactured game boards for which they owed \$95,000. Instead of throwing in the towel, the buyers parlayed the tiny defects into leverage for a settlement, which turned out to be, by far, the cheapest way out for the manufacturer (1 CLA, p. 161).

CLA teaches, as fundamental, baseline facts, that contract remedies don’t deliver what they promise, and that the leverage of the status quo is important. It shows throughout that the influence of money and power, through the cost and quality of lawyers and the leverage of simple size, has a tremendous influence over what one winds up with following a breach of contract. If the case is a “small case,” the costs of litigation will foreclose it unless, of course, the claimant is big and can afford an occasional small case to teach a lesson or establish a precedent. What might be the implications for contract theory?

Many have suggested that if the system is serious about making the nonbreacher as well off as performance would have, expanded specific per-

25. Judge Richard Posner, an early advocate of efficient breach theory, advances, then rejects, the efficient breach argument in *Lake River Corp. v. Carborundum Co.* (1985; 1 CLA, p. 98).

formance may be the solution.²⁶ This has long been the rule in civil law systems, and their economic systems function perfectly well with it in place. Related to enforcement by specific performance in civil law countries is their general validation of penalty clauses, subject to judicial revision in extreme cases.²⁷ In fairly negotiated contracts,²⁸ an expansion of penalty-clause enforcement might get us closer to the ideal of replicating through damages the breacher's full performance.²⁹ To redress the "small case" problem, an expansion of attorney fee shifting might be in order, at least in those cases where it would not chill access of citizens to courts.³⁰

Once students recognize the high cost of law, they also recognize the more general point that one's rights depend in no small measure on one's ability to get enforcement. That ability is directly linked to one's access to legal services, which in turn, has a very high correlation to wealth. "Equal justice under law" is surely not a descriptive phrase in our culture, given the costs of law and the correlation between access to lawyers and one's wealth. Indeed, measured by recent societal trends in reducing our commitment to delivery of free legal services to those who cannot afford lawyers, the phrase seems barely aspirational.³¹ The empirical materials the authors assemble make a compelling (but politically unpopular) case for an expansion of affordable legal services for the poor, the near poor, and even the middle class. They also point to a less politically loaded need to develop cheap,

26. An early example is Linzer 1981.

27. Section 343 of the German Civil Code provides, in part, that "if a penalty due is disproportionately high, the court may upon the obligor's request reduce it to an appropriate amount. In determining the question of what is appropriate, every legitimate interest of the obligee, not only financial interest, has to be considered" (see generally Von Mehren and Gordley 1977, 819).

28. A broader validation of liquidated damages clauses also exposes those without negotiating power—consumers, small businesses, employees, and others—to further disadvantage when such clauses begin to show up in adhesion contracts. This is one of many places where the law should divide adhesion contracts from others and design separate rules for each. The tendency in the Article 2 redrafting process has been to treat adhesion and fully negotiated contracts with the same rules and, instead, divide contracts into "consumer" and "nonconsumer" contracts.

29. American scholars have advocated broader enforcement of penalty clauses, often on the theory that the parties know best and that courts should therefore not interfere. Compare Goetz and Scott 1977. Alan Schwartz (1990) has advanced the idea that they should be enforced because the fear that one party will gouge the other on the basis of their initial bargaining positions is unwarranted. The individualist logic of these positions would leave the policing of liquidated damages clauses to "the market" and foreclose direct civil-law-style judicial supervision.

30. Awarding attorney fees to successful plaintiffs ("one-way fee shifting") is a feature of much consumer legislation. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 *et seq.* But fee shifting is the exception to the more general rule that one must pay one's own lawyer, no matter how small the case.

31. The principal federal vehicle for delivery of legal services to the poor, the Legal Services Corporation (LSC), has been under attack since its creation. In 1996, LSC received a 25% cut in federal funding, from \$400 million to \$227 million. Federal legislation also restricted the ability of entities funded by LSC to deliver a full range of available legal services to the poor.

affordable complaint-processing mechanisms to redress the claims that are too small to pay for themselves.

B. Social Control of Contracting "in Action"

The book's chapter on social control addresses those parts of contract law that separate modern contract law from the law of the jungle. We don't enforce contracts to commit crimes. We don't enforce contracts made with persons of diminished capacity, formed under duress, or based on misrepresentations. More modernly, we don't enforce contracts that we characterize as "unconscionable." This cluster of issues is an important part of any contracts course because it develops sophistication with the regulatory side of the contracting process (Braucher 1990). Ours is a system that often espouses "party autonomy" as its ideology. A contract course's material on social control teaches that party autonomy, when it exists, is not unlimited and that its existence is often questionable as well. Any set of contracts teaching materials must address this cluster of problems.

CLA uses the material for the traditional purposes. But the authors also use this material as a principal vehicle for developing the relationship between contract law and ideology. Once again, it is the nonappellate case material that makes this possible.

Neoclassic contract continues to be dominated by a paradigm transaction that scarcely exists. Two well-informed strangers come together, propose clear, quantifiable terms, freely agree, and either perform their obligations or breach. The paradigm is highly individualistic and within the liberal tradition. The paradigm projects a deal that may be fully understood (and adjudicated) by third parties and is fully thought out at the beginning. It projects parties who are essentially selfish, fully able to look after their own interests, and not responsible in any sense for the welfare of each other. Pressed further, the paradigm suggests that the deal is nobody's business but the parties' and that the courts' job is simply to be an umpire: decide what the parties agreed to and enforce it, if necessary. Under no circumstances should a court second-guess the substance of the parties' agreement: people can look out for themselves and nobody can know what a party's interest is as well as the party.

Taken to the extreme, this paradigm would exclude judicial oversight of the contracting process in all but a handful of cases. The law is, of course, more invasive than that; across the doctrines, the debate is about the appropriate degree of social control over the process. While even the staunchest ideologue might concede that a contract formed at gunpoint ought to be avoided on account of duress, lesser forms of pressure would yield a robust

debate about whether the victim ought to have been stronger.³² The book underscores just how difficult and value laden this debate can be and shows how contract law mirrors modern politics. How self-reliant can we expect people to be? Is it appropriate for the law to protect people from consenting to their own victimization (1 CLA, p. 623, quoting Gordon 1985)? In what sense are they really “consenting” when they sign a boilerplate contract prepared, tested, and perfected over many years by its drafter?

The debate about whether real choice is involved in making contracts finds its greatest contemporary expression in form contracts, either when exchanged by businesses that do business with one another, or when used by businesses to structure their business relationships with others (such as consumers and small businesses) that don't have their own forms. Since before the 1930s, we have recognized that the form contract is a different species of “contract” altogether (Kessler 1943; Llewellyn 1939a), and since then we have been of two minds about them.³³ Like other mass-produced items, we like the form contract because it delivers economies of scale and low per-item expense. Businesses structure their dealings with their form contracts, and it is difficult to conceive of businesses doing business without them. But with the form contract comes the absence of negotiation. And because the drafter is the quintessential “repeat player” with its form (cf. Galanter 1974), there is a substantial disparity in understanding the terms of the deal. This “asymmetry of information,” as economists would call it, makes it impossible to fit this kind of contract to the old negotiation-among-equals paradigm that underlies both the classical contract paradigm and basic economic theory. Nonetheless, American law is dogged in attempting to fit the form contract into the free bargain, individualistic paradigm.

A different approach would be to subject adhesion contracts to direct social control. A business drafting a nonnegotiable form is creating a “law” to govern its relationship with someone else. We might, therefore, analogize form contracts to private legislation by businesses and directly supervise the private “legislators” (Kessler 1943, 640). Continental legal systems do this by providing that “surprising terms” found in form contracts do not become part of the bargain of the parties.³⁴ This analysis takes the pretense of free

32. With *Selmer Co. v. Blakeslee-Midwest Co.* (1 CLA, p. 613), the authors use an economic duress case, together with other materials, to do three things at once. First, they give readers a modern vision of duress from law and economics guru Judge Richard Posner who wrote the opinion. Second, they give students a lesson in law and economics by adding material about Posner and his approach to problems (1 CLA, p. 616). Finally, by preceding *Selmer* with Wisconsin duress decisions, they raise procedure questions. The case was subject to Wisconsin law, and federal courts were bound to follow it. Yet, in federal court, Posner deploys an entirely different analysis than would Wisconsin courts to decide it. Can he do that? What is the “law of Wisconsin” once this federal judge is through with it?

33. The term “adhesion contract” was brought to us by Edwin Patterson (1919) in an article with the provocative title “The Delivery of a Life-Insurance Policy.”

34. The UNIDROIT Principles of International Commercial Contracts, Art. 2.20, provides, in part that no term “contained in standard terms which is of such a character that the

agreement out of the mix but, in its place, injects direct social control by courts. It also implies that a measure of social responsibility is expected of the form-drafting "legislators." This social responsibility is at odds with a rigorously individualistic model where self interest is all that is important.

In the United States, we have begun to recognize that nondrafters do not agree to every term in a form that accompanies their dealings with a business (1 CLA, p. 16). Evidence of our recognition is federal legislation such as the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 et seq. [1998]), which regulates consumer warranties, parts of the Uniform Commercial Code (e.g., UCC § 2-316), and judicial decisions.³⁵ CLA offers us excerpts from scholars who have advocated simple, direct regulation of the form contract and the elimination of any pretense that bargain is involved (Leff 1969 [1 CLA, p. 768]; Macneil 1984 [1 CLA, p. 683]). But this growing awareness that form contracts are different is by no means universal.

In 1991, the United States Supreme Court decided *Carnival Cruise Lines v. Shute* (1991). Given good eyesight and plenty of time, the careful reader could find, in the eighth of 25 boilerplate paragraphs of the cruise line's form contract, a provision specifying Florida as the forum for disputes arising from a cruise the Washington state couple was taking off the West Coast. After Mrs. Shute suffered personal injury on the cruise and sued the cruise line in Washington, the trial court granted the cruise line summary judgment on the basis of the contract's clause. The Shutes' appeal challenged the constitutionality of depriving them of a convenient forum through such an adhesion contract. Over Justice Stevens's powerful dissent challenging the proposition that the Shutes "agreed" to the forum-selection clause, the majority slid over the "agreement" issue and enforced the forum-selection clause in the contract.³⁶ We find similar action in the courts concerning arbitration clauses consumers find (usually after the fact) in their form contracts.³⁷ In two bankruptcy cases (*Pate v. Melvin Williams Manufac-*

other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party."

35. The judicial fountainhead may have been *Henningsen v. Bloomfield Motors* (1960), which held that an automobile industry's standard disclaimer of liability for personal injury damages, buried in boilerplate in a new-car purchase agreement, was unenforceable as against the public policy of New Jersey. As is typical, CLA's authors add that Mrs. Henningsen's lawyer made no such argument (1 CLA, p. 678).

36. Contract has superseded older views of jurisdiction in this respect. In *Professional Ins. Corp. v. Sutherland* (1997), the Alabama Supreme Court rejected its older approach of invalidating forum selection clauses. Its earlier approach had viewed such bargains as violative of public policy in that the private parties were attempting to confer or limit a court's jurisdiction, which they had no business doing. Following the U.S. Supreme Court, the Alabama court chose instead to generally uphold them. In the process, that court opined that there is "recognition that it is neither unfair nor unreasonable under the circumstances to hold the parties to their bargain to litigate in the chosen forum."

37. In *Hill v. Gateway 2000, Inc.* (1997), the arbitration clause came after what most observers would call "the sale." It came after delivery and payment, being located in the documentation packed in a box containing a computer, cables, instructional manuals, and

tured Homes, Inc. [1996]; *Truckenbrodt v. First Alliance Mortgage Co.* [1996]), for example, the courts upheld arbitration clauses in consumer contracts despite claims of unconscionability and lack of mutuality. The Supreme Court has sustained challenges to state legislation purporting to limit the enforceability of arbitration clauses in consumer form contracts because the state legislation conflicts with the Federal Arbitration Act (*Doctor's Associates v. Casarotto* [1996]; Federal Arbitration Act, 9 U.S.C. §2 [1998]; David Schwartz 1997).³⁸

Using "free agreement" as a reference point clouds the policy choices in these areas. Perhaps it is sound policy to enforce forum selection or arbitration clauses for reasons other than asserted "real agreement." But if that is the case, the clauses should come under legislative scrutiny so that fairness parameters might be set directly.³⁹ The notion either that self-reliant customers will police businesses' predatory conduct by refusing to agree or, put differently, that "the market" will control predatory conduct, is illusory⁴⁰ (but see Schwartz and Wilde 1979, quoted at 1 CLA, p. 695). As if to make my point, a recent client newsletter from a large law firm trumpeted the bankruptcy court arbitration cases mentioned above. The short discussion concluded this way: "If you are interested in adding an arbitration clause to your consumer loan documentation, please contact [x, Esq.]." Nothing in the newsletter suggested one iota of risk that consumers might reject an

software ordered by mail. The form documentation purported to change the time the contract was formed until after delivery, by instructing the customers to pack up and return the new computer, and all its accompanying paraphernalia, within 30 days if they didn't like the terms. The trial court had concluded that the "present record is insufficient to support a finding of a valid arbitration agreement between the parties or that plaintiffs were given adequate notice of the arbitration clause" (1997, 1148). Nonetheless, in neo-Willistonian style, Chief Judge Easterbrook looked beyond substance to form and held that by "keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause" (1997, 1150).

38. An extensive discussion of a reactionary trend in contracts decisions by courts in the Western states is detailed in Mooney 1995.

39. Uncharacteristically, the Uniform Commercial Code has inched in the direction of direct regulation in this instance. Section 2A-106 limits choice of law and forum in consumer leases. The drafting of Article 2B, governing software and other licensing, goes in the opposite direction by explicitly validating broad choice of law and forum clauses with very narrow limits even for consumers. See UCC §§ 2B-107, 2B-108, April 1998 draft. See also *infra* note 81.

40. Businesses have a wealth of empirical data on the effect of small-print, risk-shifting terms within the boilerplate in their form contracts. It would be foolhardy to draft a form purporting to control a sale without considering what influence the new form will have on sales generally. In the same way that the tobacco companies carefully watched their sales volume as health warnings began to appear on cigarette packs, many businesses no doubt track the influence of new, risk-shifting terms on their sales. Such information, if revealed, could begin to settle once and for all the debate between those who believe the market will control the terms in form contracts and others who believe that claim to be invalid.

The access businesses have to such information suggests, first, that researchers should attempt to gain access to that information either from the businesses directly or from plaintiffs who have compelled its production through discovery in litigation or otherwise. Second, until the empirical information is revealed by those who own it, policymakers should presume, as an empirical matter, that the market does not control such terms.

approved loan if they managed to uncover and understand an arbitration clause within the "loan documentation."⁴¹

The basic tension in form contracts comes down to this: how do we preserve the efficiencies that come with form contracts and, at the same time, preserve our underlying theory that contractual obligation ultimately rests on the actual, free agreement of the contracting parties. This same sort of tension is manifest when we consider form contracts from a basic economic perspective.

Our free market economic theory depends on traders evaluating (pricing) their exchanges as accurately as possible so that, eventually, desired goods and services will be produced and undesired goods and services will not be produced. Because contract terms allocate risk, they form part of the information on which buyers make decisions about what goods or services to buy. Ideally, then, we want those buyers to fully understand the terms of their deals so they will arrive at the "correct" pricing and send the "correct" message about what they value to the ultimate producers.⁴² An obscure risk-shifting contract term can result in a "wrong" buyer assessment of value and, therefore, in the "wrong" signal being sent to the producers.⁴³ All of this argues for an approach to contracting that gives us confidence that those

41. Some recipients of form contracts actually do read and understand even the terms that would be obscure to most readers. What is to be done with those cases? A classical or neoclassical contract approach would hold such informed recipients to the obscure provisions in their form contracts, even if most people would not understand the terms of the form they were being handed (Meyerson 1993). Such an approach is founded on real agreement—the form recipient knew what the form drafter intended—and therefore implies a mechanism that will discriminate between those few who understand and assent to the form and the far larger number who do not (e.g., Meyerson 1993, 1299). The alternative, suggested by torts scholar (and now Judge) Robert E. Keeton, is far more regulatory: to deny enforcement across the board, even for those who actually agreed to the obscure terms (Keeton 1971, 358 6.3[b]).

Apart from inconsistent judicial interpretations of exactly the same form, an agreement-centered approach in this context implies high costs to separate the knowing recipients from the unknowing. Those costs have differential impact on the parties to the dispute. Consumers and small businesses have less capacity than a big business to absorb any given dollar costs of litigation, and therefore, costly rules affect their rights more than they do those of large businesses. The mere possibility of the recipient's knowing agreement inserts a question of fact into all form contract cases and, unlike a more regulatory approach, makes such cases not easily susceptible to summary judgment.

Preventing the "windfall" that would accrue to the few who *actually* understand does not, in my view, justify inflicting the costs of fact-sensitive, individualized adjudication on everyone. In a different context, Grant Gilmore makes much the same point when describing the merits of the objective approach to contract, which he describes as arriving about a century ago (1974, 42).

42. This general analysis is basic to an understanding of conventional economics and is found early in economics texts. See, e.g., Mansfield and Behraves (1986).

43. Producers are economically motivated not to showcase risk-shifting terms in their form contracts. Buyers, for example, should pay less for goods sold with no warranties than they pay for goods sold with warranties. But if a producer can successfully disclaim warranties without its buyers noticing it, it can charge more for what it sells than a competitor less adept at obscuring a disclaimer of warranty. Obviously, from a larger economic perspective, it would be undesirable to so reward contracting activity that tended to reduce the likely information in exchanges.

purchasing through form contracts either purchased with actual knowledge of the risk implications of the contract terms or actually accepted the risks that the otherwise unknown terms might present. Obviously, at this level, the economic analysis nicely tracks the "freedom" analysis at the core of contract theory.

The situation looks a little different, of course, from the producer's standpoint. If achievable at all, full buyer understanding of contract terms is extraordinarily expensive, whether measured at the point of contracting or at the point where a contract dispute arises. Businesses need to price their standard goods and services accurately, and the contract risks they take in selling are important components of their pricing decisions. A business's economic planning depends on those contract terms being enforced; producer planning would be nearly impossible if the contracts through which products are distributed could easily be revised after the fact. Moreover, the immediate savings in transaction costs that come with mass-produced form contracts would be lost if distributors had to worry about a buyer's actual understanding of terms in discrete transactions.

The basic problem, then, is that both general economic theory and our liberal traditions of free agreement push us toward a policy of ensuring true, knowing agreement. Yet business planning and transactional efficiency press in the opposite direction, toward an approach that does not look too closely for actual agreement. We want to rely substantially on individual self-interest (and relatively less on government regulation) to protect against unscrupulous merchants who slip an obscure disclaimer into the form so they can charge the same money for less. Yet we want to give businesses some ascertainable, outward sign, not dependent on *real* agreement, that the deal they conclude via their form will hold up. As long as we continue to analyze these issues as if they are predicated on some version of real agreement, the irresolvable tension will remain.

There is perhaps no better contemporary example of this tension than is manifest in the ongoing process of redrafting the Uniform Commercial Code.⁴⁴ This quasi-legislative process involving academics and lawyers ultimately produces final drafts of legislation that are then taken to individual state legislatures for uniform enactment.⁴⁵ In the redrafting of Article 2, the article governing sales of goods, the tension has shown up in the term "manifest assent," a statutory expression connoting the appearance of agreement on which a form drafter can rely.

44. The redrafting process is sponsored by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. Drafts can be found on the NCCUSL Home Page, <http://www.law.upenn.edu/library/ulc/ulc.htm>. The drafting committees welcome comments about the drafts or the ongoing process generally.

45. The process has been subjected to considerable criticism. Examples include Schwartz and Scott 1995 and Scott 1994.

What will constitute the “manifest[ing] of assent” has been the bone of contention. Form drafters, of course, want some objective sign of “agreement” on which they can rely that will foreclose later buyer challenges to the carefully developed terms in the form. Those on the other side of the debate want a chosen signal that seems likely to reflect actual agreement (or a conscious acceptance that something bad may lurk in the unread form) in a reasonable percentage of cases.

The Article 2 drafting committee has ridden a pendulum swinging from an emphasis on real “agreement” to an emphasis on bureaucratic efficiency. At one point, the draft provided that “a signature or other conduct” would, absent unconscionability, manifest assent in a nonconsumer contract, apparently without regard to the content or length of the form, the circumstances of signing, or the recipient’s actual knowledge of the form’s content.⁴⁶ Owing, no doubt, to the recent involvement of “consumer representatives” in the redrafting process,⁴⁷ consumer contracts were to get different treatment, something resembling the civil law’s “surprising terms” approach.⁴⁸

In a matter of months, the pendulum swung back in the direction of real agreement. At that point, the drafters devoted an entire provision to the question of what would suffice to “manifest assent” (revised UCC § 2-103, November 1996 draft). The provision told us that one would “manifest assent” by signing an unread form, but added the important qualifier that the nondrafter must have had an opportunity to decline to sign before signing, a small statutory push in the direction of real agreement.

46. The section provided that such a term “becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form” (Draft, March 1996).

47. The new arrival of “consumer representatives” in the UCC drafting processes, is a byproduct of a recent academic outcry over the lack of consumer sensitivity during a recently completed process of revising Articles of the UCC dealing with banking transactions. See, for example, Budnitz 1992, King 1992, Cooper 1993, Hillebrand 1994, Miller 1994, Rosmarin 1994. The new presence of consumer representatives has, predictably, blunted some of the efforts to bureaucratize the form contract area; but (perhaps predictably) the tendency has been to carve out consumer contracts for special treatment. Of course, consumers are not the only ones who fall prey to terms hidden in the boilerplate of form contracts. Small businesses, in particular, are at a serious disadvantage when handed a small-print form loaded with obscure provisions favoring the vendor in a small transaction. Unfortunately, small businesses’ interests are far more diffuse and less organized than are consumers’. Their interests have few representatives in the UCC redrafting effort, and the tendency thus far is to assume that they have the same bargaining power, sophistication, and self-reliance when purchasing on others’ forms as the Microsoft’s and Bank of America’s. In Woodward 1997c, I argue that the presence of consumer representatives has polarized our thinking about form contracts into consumer/nonconsumer contracts, whereas the reality calls for an analysis and set of rules that carve up form contracts based on the economic realities of the transaction. One would predict that the interests of small businesses will suffer in the redrafting process from provisions such as the parol evidence rule provision described later in the text.

48. Terms that a consumer “could not reasonably have expected” were not included in the contract, even with a signature, unless “the consumer expressly agrees to the term.” Compare the text of the UNIDROIT Principles quoted above in note 34.

As might have been predicted by the conceptual irreconcilability of the views, the drafters either gave up or reached impasse. Later drafts have simply dropped the effort to define what would "manifest assent" in non-consumer contracts;⁴⁹ unless something new is added, it will apparently be up to the courts to decide case by case under myriad facts, whether a signature is "some," "presumptive," or "conclusive" evidence that the recipient agreed to the boilerplate.⁵⁰

The conceptual rift reappears in the redrafting process in connection with the parol evidence rule, a staple of the law school contracts course and necessary component to efficient mass-produced contracts.

If a carefully drafted form is to control the relationship, it is critical that the nondrafter be unable to bring to court statements allegedly made by the drafter's agents in the course of making the contract. For if the other party can attempt to prove in court the salesperson's (allegedly) grandiose statements about the product, the form will cease to control, and (gasp!) the other party might even succeed in expanding the business's commitment from what was planned at headquarters to what the salesman/agent may have committed to in the field. If the law will rule the sales pitch inadmissible, other methods of controlling a sales force (such as better training or compensation that is less tightly tied to sales) become less necessary.

American contract law has traditionally limited evidence of discussions that preceded the moment of contract formation with its parol evidence rule.⁵¹ The rule provides, essentially, that *if* the parties are in agreement on the question, a court will enforce their desire to exclude evidence of pre-contract negotiations and statements, and focus most of its search for meaning on the writing itself. While the rule is a quagmire of exceptions and

49. The 1 March 1998 draft deals solely with "consumer contracts" (Revised UCC § 2-206, 1 March 1998 draft).

50. The UCC revision process is structurally incapable of resolving strong policy disagreements. Because its final product must be enacted without substantial amendments by all the states, the drafters eschew anything controversial lest an interest group makes good its threat to block the legislation in influential states. See generally Janger 1997; Woodward 1997b.

51. The parol evidence rule and the statute of frauds are both critical components in our contract system, which envisions the parties foreseeing and planning all details of their future relationship and committing them to writing in unambiguous words accessible to third-party decision makers. Both emphasize the central importance of the "moment" of contract formation, before which there was nothing and after which is a fully developed and planned relationship. In Japan, the approach to contracting comes much closer to the "relational contract" that has been making at least theoretical headway in the United States. In Japan, the moment of contract formation is far less crucial; rather, the idea is to begin a skeletal relationship of trust that envisions give and take as the relationship matures. Both the statute of frauds and the parol evidence rule are out of place in that system. See generally Kuzuhara 1996.

views,⁵² it no doubt serves a useful purpose in some fully negotiated contract settings.⁵³

To make a form contract effective, a drafter will naturally insert in the form a term stating that the form consists of the parties' entire agreement and that nothing that preceded the form is operative. Even courts taking a "liberal view" of the rule⁵⁴ have pointed to such "merger clauses"⁵⁵ as important evidence of the parties' intent to exclude evidence of preformation discussions.⁵⁶ The statutory drafting question is another version of the tension seen earlier: how binding should a boilerplate merger clause be on the nondrafter?

Through successive drafts of Article 2, the approach for nonconsumers swung from no mention of the merger clause,⁵⁷ to giving a merger clause

52. An excerpt (Calamari and Perillo 1967) that summarizes the complexity and principle tensions within the rule appears at 2 CLA, p. 292.

53. One place where one does not typically find an intent to exclude what came before the writing is in collective-bargaining agreements between unions and employers. I learned from Clyde Summers that such contracts are often recognized by management and labor to be organic and are meant to change with the changing relationship between labor and management. The process of revisiting what was said or done earlier may even serve a therapeutic purpose as the parties work through conflict by including the past in their discussions. Collective-bargaining agreements, despite their apparent formality, are in this context an illustration of "relational contracts," which are not fixed for all time at the outset but which grow and change with the parties' relationship.

A discussion in which grievance processes under collective-bargaining agreements are contrasted with the approach to employee disputes in at-will contracts begins at 1 CLA, p. 440.

54. The principal battleground on the parol evidence question is this: how will a court determine the parties' intent on the question of exclusion of pre-contract evidence—from testimony about what came before the writing, or from the writing itself? The more modern approach, espoused by contract law giant Arthur Corbin (1944), puts real agreement in the ascendancy. A court following that premise would conclude that the complex question of intent cannot be derived from the face of a document; evidence on the question should be taken. Justice Roger Traynor took this approach in *Masterson v. Sine* (1968; 2 CLA, p. 317) and a series of cases that followed it. The conservative view, long associated with Samuel Williston, is bureaucratic, "objective," and thought more certain: oral testimony even on that intent question makes the writing too uncertain in its effect, eviscerates the parol evidence rule, and ought to be excluded. This was the approach of *Mitchell v. Lath* (1928; 2 CLA, p. 309).

55. A merger clause is simply a contract term stating the parties' intent that the writing controls and that prior discussions, commitments, and so on, are superseded (or "merged") in the writing. In a form contract, the merger clause is simply another boilerplate term. Despite the fact that its effect can be to abrogate express "warranties" made by the exuberant salesperson, there is no current statutory requirement that the merger clause be "conspicuous," in "plain language," or otherwise understandable.

56. In Justice Roger Traynor's opinion in *Masterson v. Sine* (1968; 2 CLA, p. 317), he noted that the contract in question "does not explicitly provide that it contains the complete agreement" (2 CLA, p. 319).

57. The July 1996 draft of section 2-202 of the UCC contained nothing about merger clauses. It stated that the core issue of intent to integrate would be determined from all relevant evidence "including evidence of a previous agreement or representation or of a contemporaneous oral agreement or representation." The full text read, "In determining whether the parties intended a writing or record to be final or complete and exclusive with respect to some or all of the terms, the court shall consider all evidence relevant to intention to integrate the

"presumptive" validity (i.e., allowing the nondrafter to try to show it did not reflect true agreement),⁵⁸ to giving it "conclusive" validity.⁵⁹ Perhaps, again, conceding the irreconcilability of the policy goals, better heads may have prevailed more recently. The March 1998 draft dropped mention of merger clauses from the text altogether.⁶⁰

If we are going to use "agreement" as the foundation for liability and its limits in the form contract area, we have to focus on discrete transactions and ensure that something resembling a true agreement actually takes place in a reasonable number of transactions. As a matter of transactional process, this would demand increased interaction between the parties at the point of agreement, an interaction that would be particularly time-consuming given the disparity in sophistication and understanding that often accompanies contracting through a vendor's form. Neither the vendors nor the vendees are likely to find this a useful expenditure of time and, from the larger perspective, such point-of-sale interaction would have a broad, strongly negative economic impact in the form of increased transaction costs across millions of transactions. But if real agreement in the mass-produced transaction is, as is likely, impossible (and perhaps undesirable), then on what basis do we saddle the recipient of the form with whatever happens to be in the form? And how do we limit the natural tendency of businesses to include in their forms risk-shifting terms that they know will be unread and therefore will have little influence on the vendee's decision to buy?

Enforcing the form contract based on hypothesized real agreement permits us to believe or assert that the form recipients will reject the form if they don't like the boilerplate terms. It allows us to duck the far harder questions of what regulatory limits ought to be set in place to limit overreaching through the form. Perhaps the UCC redrafting process has simply come to recognize that real agreement is impossible in these cases and, when confronted with the question "then what?" has simply tossed the im-

document, including evidence of a previous agreement or representation or of a contemporaneous oral agreement or representation" (revised UCC § 2-202[b], May 1996 draft).

58. This iteration provided as follows: "Except in a consumer contract, a contractual term indicating that the record completely embodies the agreement of the parties is *presumed* to state the intention of the parties on the issue" (revised UCC § 2-202[b][2], November 1996 draft [emphasis added]).

59. This one provided (again, for a nonconsumer) "a contractual term indicating that the record is a complete and exclusive statement of the agreement of the parties is *conclusive* evidence of the intention of the parties" (revised UCC § 2-202[b], May 1997 Draft [emphasis supplied]).

60. Often the result of enforcing a merger clause is to deny effect to a commitment made prior to the contract by the salesman. One can thus think of merger clauses as disclaiming "express warranties" that were made by the business's sales force. But unlike disclaimers, which by their nature may be understandable to form recipients, merger clauses are within the lawyer's province, and when they operate as disclaimers, it is far less obvious. Yet, in contrast to the UCC provision regulating disclaimers of implied warranties, there are no statutory requirements that merger clauses be "conspicuous" or otherwise understandable to the person reading the form. Compare UCC § 2-316.

possible reconciliation to the courts. Ultimately, this is a “win” for the form drafters because our ideology of free contract will persuade nearly all victims of onerous terms in a form that “it’s in the contract and you agreed to it.” This is free-market ideology working at the individual level with a vengeance.

This free market ideology may explain the staying power of party autonomy and the horse-trade vision in the redrafting effort. If we can tell ourselves and our citizens that the parties are setting their own terms, making up their own minds, or protecting their own interests, our free-market engine will work optimally. We then don’t need governmental regulation.

CLA showcases the limits of such ideas in its materials on unconscionability and the low-income consumer. The basic principle, “unconscionable contracts will not be enforced,” became a firm part of our contract law through section 2-302 of the Uniform Commercial Code that was completed in 1958. Ever since, there has been a debate about what it means, principally on whether the appropriate focus ought to be the process of making a contract or whether the substance is fair game as well (1 CLA, p. 769). This traditional question is difficult: as hard as it may be for judges and the litigation system to assess what actually happened between the parties, it is yet more difficult for them to assess whether the exchange was “fair.” CLA includes both an extensive excerpt from a 1968 Federal Trade Commission study of retailing and credit practices in Washington, D.C. (1 CLA, p. 737), and a study of the low-income retailing practices of Walker Thomas Furniture (1 CLA, p. 744). Contrary to the assumptions one might make when reading only appellate opinions in this area, the empirical evidence sketches a decidedly mixed picture of low-income retailing, a picture that included benefits for the poor that arguably offset some of the more-well-known harsh practices. Together, the materials confirm the difficulty of assessing the “fairness” of any exchange, no matter how lopsided it might seem initially.

The authors’ larger agenda is to add to the issues already on the table an understanding of how large and basic the problems of low-income retailing are, and to reiterate the limits of the case-by-case litigation system in addressing them. An unconscionability case brought by an individual against a business is, from the individual’s perspective, a fact-intensive, expensive undertaking with a very uncertain outcome; from the perspective of the defendant business, it is at most, a small nuisance. An excerpt from a classic Arthur Leff work on this question hammers the point home (Leff 1969; 1 CLA, p. 768). The very limited solutions to this aspect of the problem include attempting to get punitive damages for unconscionable conduct (1 CLA, p. 780), enlisting the help of state attorneys general to carry the litigation burden (1 CLA, pp. 785, 794), statutory damages, or class actions (1 CLA, pp. 784–85).

Much of this evidence has apparently escaped the attention of those engaged in the UCC redrafting process. At the same time they embrace bureaucratic certainty and "safe harbors"⁶¹ in the form-contract arena, the drafters seem content to rely on nonbureaucratic, uncertain, and costly "unconscionability" to protect those who might otherwise be victimized by the unscrupulous in business.⁶² These materials will prompt those evaluating the "unless it is unconscionable" language of the redrafted UCC⁶³ to consider how powerful such an exception can be, when its use depends on an individual paying to hire a lawyer to present the fact-intensive case the concept implies.⁶⁴

Finally, the chapter on social control looks at the role of inequality within our contract and larger economic system. Another excerpt from Arthur Leff (1979; 1 CLA, p. 775) instructs that the difficulty with social control of contracting comes from our actual embrace of inequality in information and bargaining power as the fuel that drives our economic system. It is attempted advantage taking that makes the free market work. As Leff says:

Our problem is that we want *simultaneously* to produce and protect market efficiency *and* to achieve non-exploitive market results. But (given individual differences among people, and innocently achieved superior information, market power, and pure luck) *we cannot have both at the same time*. . . . In effect, we want to have the world so arranged that everyone will be motivated to get as good a deal for himself as possible by being as informed and efficient as he can be, but that no one will have to get a bad deal in the process. But the payoff for the

61. "Safe harbor" is a term those in the drafting process use to connote a clear rule on which those affected can rely. An example is found in UCC § 2-316(3)(a) providing, in essence, that the use of "as is" will exclude implied warranties. Drafters can use other words, but if they use the words "as is," they are reasonably certain to get the legal effect they want.

62. Dean Robert Scott (1994) analyzes the UCC revision process and predicts that when it has been "captured" by an interest group, bright-line rules will emerge favoring that group. If there is no clear interest-group dominance, the emerging rule may be "a vague and nondirective compromise that appears to accomplish something" (1994, 1821). While Scott was focused on Article 9 of the UCC, the article governing secured credit, interest-group participation may explain the bright-line rule that emerged at one point for nonconsumers on parol evidence and the near-complete absence of bright-line rules prohibiting various kinds of provisions in form contracts more generally.

63. The clause is pervasive in the redraft. Curiously, however, business lawyers have strenuously resisted the inclusion of an unconscionability provision in UCC Article 1 (the article stating the general principles that govern all contracting under the UCC) generally on the ground that it would result in too much uncertainty in contracting. Only half in jest, one business lawyer went so far as to say it would "invalidate practically every lending contract under (UCC) Article 9."

64. The long excerpt from an Arthur Leff article (1969; 1 CLA, p. 768) is the most forceful expression of this point. His basic point is that the litigation model of social control is far too cumbersome, slow, and expensive to be the least bit effective and that direct regulation, even if politically difficult to achieve, would be far better. Leff even suggests that unconscionability might be worse than no provision at all: "It kind of depends on whether facile devices like [unconscionability] will stall the hard thinking and lobbying that has to be done."

former necessitates, indeed entails, the latter. Hence, doing both is not a technical problem—how do you define unconscionability, how do you specify unfairness in a short statute—but a cultural one: we cannot have perfect freedom and perfect fairness at once. What we have, instead, is “unconscionability,” a legal device that allows us, inconsistently and with only symbolic impact, an occasional bow in the direction of our incoherent hearts desires. (1 CLA, pp. 777–78, emphasis in the original)

The connection that CLA’s materials suggest between contract law and the larger political and cultural tensions from which it emerges is one of the central strengths of the book.

II. CONTINUING RELATIONS “IN ACTION”

In their chapter called “Contract and Continuing Relations,” the authors take their readers for a 300-page tour of the world of real-life personal and business relationships, sometimes referred to as “relational contracts.” If the book as a whole presents a dichotomy between the law on the books and the law in action through the inclusion of noncase materials, here we find an emphasis on the dichotomy between theory and reality at a completely different level. It is here that the authors make the sharpest break with tradition and raise issues that go to the very core of the subject.

The authors began developing the materials that eventually became CLA in the early 1970s. One form the project took in that long development was as a supplement to relational contract pioneer Ian Macneil’s 1971 casebook (Macneil 1977). The influence of Macneil’s book is evident in CLA’s early, orienting use of materials on continuing relations to acquaint students with the complexity of contracting. Macneil’s own description of the relational contract shows how far it is from the horse-trade paradigm that tends to dominate neoclassical contract law:

The relations are of significant duration (for example, franchising). Close whole person relations form an integral part of the relation (employment). The object of exchange typically includes both easily measured quantities (wages) and quantities not easily measured (the projection of personality by an airline stewardess). Many individuals with individual and collective poles of interest are involved in the relation (industrial relations). Future cooperative behavior is anticipated (the players and management of the New York Yankees). The benefits and burdens of the relation are to be shared rather than entirely divided and allocated (a law partnership). The entangling strings of friendship, reputation, interdependence, morality, and altruistic desires are integral parts of the relation (a theatrical agent and his clients, a corporate management team). Trouble is expected as a matter of course

(a collective bargaining agreement). Finally, the participants never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior to grow and vary with events in a largely unforeseeable future (a marriage; a family business). (Macneil 1977, 13)⁶⁵

In many ways, the CLA authors' focus on the relational contract is a natural outgrowth of their inclusion of so much noncase law material that develops the authors' theme that "things are not as they seem." Once we begin to understand the complexity of familiar family and employment relationships, we can't help but wonder whether most contracts resemble the indeterminate, complex, relational contract or its antithesis, the horse-trade. Like Macneil, the authors locate these materials close to the beginning and thereby suggest that the horse trade is an inappropriate or hopelessly narrow paradigm for understanding exchange relationships. Their inclusion of both franchise and employment materials also exposes students to subject areas governed by contract law not often encountered in the first-year offering.

Perhaps the most familiar of interpersonal relationships are those involving loved ones. These nonbusiness relationships beg the question: how do we fit a marriage or cohabitation "contract" into the horse-trade paradigm? When, *exactly*, does such a "deal" come into existence? What, *exactly*, are the terms? We all know, of course, that "personal" relationships such as these gradually develop, have great subtlety, are probably always changing, and are probably not susceptible to third-party adjudication. How then does the contract law system, based on the horse-trade paradigm, grapple with such a problem if confronted with one?

Sometimes the legal system will simply punt. One way to do that is to conclude that agreements made within a marriage are "outside the realm of contracts altogether" as did the court in *Balfour v. Balfour* (1 CLA, p. 251), a famous case involving a husband's breached promise to send his wife money each month they were apart. In *Miller v. Miller* (1 CLA, p. 255), the parties agreed "to refrain from scolding, fault-finding, and anger"; Mrs. Miller agreed to "keep her home and family in a comfortable and reasonably good condition"; and Mr. Miller agreed to pay his wife \$200 a year. Mrs. Miller sued when the money stopped, but the court, refusing to wade into the "dismal swamp" of judging whether she kept her side of the bargain, refused relief. An excerpt from a famous article by Zechariah Chafee introduced readers to the "dismal swamp," a situation involving a relationship that "has its own unique history, specialized vocabulary, power hierarchies, personal animosities, and implicit understandings," all of which make it very difficult for an outsider to adequately understand it (Chafee 1930; 1

65. Compare Macneil's description of the horse trade quoted above in note 8.

CLA, p. 248). *Balfour* and *Miller* leave us with the difficult question of whether a refusal to intervene is a better choice than a judicial dip in the swamp. Students are forced to recognize this difficult but important question, which goes largely unasked by traditional materials.

We find a less wary judicial approach in the book's extensive materials on the famous California cohabitation case of *Marvin v. Marvin*. Michelle Marvin claimed an oral agreement that she and actor Lee Marvin would pool their efforts and earnings and share the fruits of this enterprise. She then gave up her job as a minor entertainer and moved in with Lee to perform household and other duties. When Lee put her out, some six years later, she sued for breach of both express and implied contracts. The California Supreme Court reversed the dismissal of her complaint and sustained her claims on both express and implied contract bases against Lee. This "victory" was hardly what it seemed once the authors develop the wider context: Michelle still had to make her case on the facts.

This proved more difficult, in part because she had to fit her case into the horse-trade approach that characterizes our law. The oral agreement, "What I have is yours, and what you have is mine," was, under the circumstances, too flimsy to be contractual. "The [trial] judge pointed out that it was not clear what they were to share over what period" (1 CLA, p. 279) and that, besides, she had been supported in a nice house with a nice lifestyle and therefore "such services as she has rendered would appear to have been compensated." The trial court ultimately awarded \$104,000 for her "rehabilitation" but that was reversed on appeal as without legal foundation (1 CLA, p. 280).

As is typical for these materials, we discover that Lee Marvin regarded his case as a "cause," that he learned from it "how little truth there is in court" (1 CLA, p. 281), and that Michelle was living with Dick Van Dyke in 1986. We are told that Michelle's lawyer, Marvin Mitchelson became famous, wrote a book, and seems to be "the major beneficiary" of *Marvin v. Marvin* (1 CLA, p. 282). Perhaps tongue in cheek, the authors ask us whether Michelle deserves a share of *his* profits under the precedent-setting case of *Marvin v. Marvin*, on the theory that together she and Mitchelson engaged in a joint enterprise for law reform and financial gain (1 CLA, p. 282). *Marvin* is followed by a long excerpt from *Hewett v. Hewett* (1979), a case where the Illinois court refused to wade in the same swamp and explained its decision as enforcing a legislatively determined preference for legal marriage (1 CLA, p. 284).

The personal relationship materials are followed by sections that show how similar problems occur in the business context of franchise and employment contracts. The authors conclude the chapter with a wide range of materials on long-term commercial relationships, in which, again, similar

problems are likely to come up. As later materials continue to explore the subject, relational contracts form the benchmark.

A major lesson that emerges from *Marvin* and the relational contract materials more generally is a sense of how difficult it is to fit a relationship of this kind into our horse-trade model. It seems extremely unlikely that two persons who move in with one another actually sit down at the outset and map out even the financial terms of their relationship. More likely, their relationship would develop gradually, aspects of it would be difficult to value, and the anticipation would be that most of it will be worked out as the parties go along.⁶⁶ Naturally, this sort of relationship would make it difficult for a trial court to find something "contractual" in the horse-trade sense. As suggested by the trial court's decision to award retraining damages, however, there was *some* commitment implicit in the relationship. As shown by the appellate court reversal of that decision, contract law was too rigid to recognize it.

A. Implications and Extensions of Relational Insights

The chapter on relational contracts shows the rigidity and simplicity of our neoclassical contract law, and how those characteristics of the law limit it when dealing with complex problems. This simplicity and rigidity—and concomitant inadequacy—of the law form a predominant theme that runs through the materials.

We might think of our contract law as having a peculiarly "binary" character.⁶⁷ It takes an "offer," its "acceptance," and "consideration" to make a contract. Traditional analysis makes the presence of each of these a yes-or-no proposition. In this simple system, things are black or white with few half-way measures. The system provides very limited alternatives: either there is a contract (and we know when it began) or there is not; either there is a breach or there is not; either there are full contract damages or there is nothing. Both the parol evidence rule and the statute of frauds emphasize and reinforce this approach by locating, elevating, and enshrining a writing that, at the outset, is thought to map the entire future for the parties (see Kuzuhara 1996).

But while businesses might want the certainty and determinacy that such a simple system suggests, they very often do business in complex ways that bear little resemblance to the horse trade that this system contemplates. As shown throughout CLA's noncase law materials, ambiguity and

66. Macneil (1977, 14) has a very helpful chart showing the differences between his paradigm relational contract and his paradigm horse trade. He first published a version of the chart in his famous article, *The Many Futures of Contract* (1974).

67. Much of our law generally has a binary character (cf. Menkel-Meadow 1991, 7). Contract law seems to have a good deal more of it than other large areas such as torts.

compromise, rather than clarity and rigidity, characterize much of business "in action." The authors offer many examples of attempts to solve complex, ambiguous problems with our binary tools of contract doctrine. In the process, they lay squarely on the table the question "what do we make of a doctrinal system that seems so incompetent in dealing with (what may be) routine business problems?"⁶⁸

The legal system's reaction to the disjuncture between the horse trade and reality is to "cope,"⁶⁹ and we can see this at the individual case level in CLA. One reaction of a decision maker to the limits of binary choices is to create some form of compromise and a rationale to support it. Thus, in our system, one might view attempted compromises as symptomatic of the inadequacy of available choices. The *Marvin* trial court had to find either that there was a promise to share everything (which seemed unlikely), or that there was "no contract" (and find for Lee). Its escape from the binary straight jacket came via its compromise award of the \$104,000 in retraining expenses for Michelle, expenses that the appellate court found had no support at law (1 CLA, p. 280). The *Peevyhouse* jury did much the same thing when it awarded the Peevyhouses \$5,000 (1 CLA, p. 199), an amount between the binary alternatives of \$29,000 to actually fill in the strip pit and the \$300 difference in land value the strip pit represented.

We find the same coping phenomenon writ large in promissory estoppel, the contract doctrine that awards a plaintiff a recovery if she reasonably relied to her detriment on what the promisor said. The twentieth-century growth of promissory estoppel's focus on the promisee's reliance interest, rather than the promisor's voluntary commitment, was a central focus in Grant Gilmore's *The Death of Contract*. It set up his thesis that "contract," based on "promise" was being gobbled up by "reliance," based on tortlike notions of redressing harm inflicted by others.

Reliance is one solution to contract law's rigid approach to contract formation. While this rigidity has been softened a little for sales-of-goods cases under the UCC,⁷⁰ traditional contract law envisions a "moment" when a contract pops into existence. In binary fashion, before that moment, there is nothing. After it, there are full expectation damages. This binary approach, in turn, begets an entire legal category of "pre-contractual liability" based on a multitude of theories.

68. The book deals with employment relations, but it does less than it could with collective-bargaining agreements. Although separating the contractual issues from the complexities of labor law might be a neat trick for a first-year contracts text, such contracts are quintessentially relational in character. See note 53, *supra*.

69. Perhaps Arthur Leff should be credited with the idea that common law courts simply "cope": "Remember, the idea [in policing bad retailing conduct] is to change as many nasty forms and practices as possible, not merely to add to the glorious common law tradition of eventually coping" (Leff 1969, 357; 1 CLA, p. 774).

70. UCC § 2-204(2) provides, for example, that a sales agreement can be found "even though the moment of its making is undetermined."

Although a ceremonial "closing" may occur, many (most?) real-life business relationships probably develop gradually as mutual commitment deepens. When those developing relations are severed during this gradual process, but before the "moment," the law sometimes looks to reliance for a midway solution. We find that happening in *Hoffman v. Red Owl Stores, Inc* (1 CLA, p. 403). In awarding a reliance recovery for what amounted to defendant's precontract harmful negotiating misconduct, the court candidly stated that it "would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action" (1 CLA, p. 409). In its fluidity with damages and doctrine, *Hoffman* is more tort-like than it is contractual.

Pennzoil v. Texaco (2 CLA, p. 175) deals with the same problem but, ironically, *Pennzoil*, a tort case, seems more contractual. There, Getty pulled out of an alleged agreement to sell its assets to Pennzoil and sold them to Texaco instead. Getty did this before the Pennzoil-Getty deal formally closed but after the parties had uncorked champagne and reported the deal to the newspapers (2 CLA, p. 176). Pennzoil's response was a tort suit against Texaco for interference with its "contract." Applicable doctrine required "a contract" before there could be an interference case. In binary fashion, then, liability depended on whether the Pennzoil-Getty contract had formed before Getty broke off the relationship: if it had formed, Texaco was liable for full tort damages, measured in part, by the value of Getty's promise. If the contract had not formed, Texaco was liable for nothing. The question of contract formation, a predicate to the interference claim, went to a Texas jury that returned a \$10.53 billion verdict, the largest civil judgment at that point in our history.⁷¹ The possibilities that the contract and commitments represented by the contract formed gradually, or that the harm inflicted on Pennzoil might have been less than the value of the deal, were foreclosed by contract doctrine working within this tort. We have no concept of "half-contract" nor do we think of contract loss as other than "what was promised."

Tort law, always considerably more fluid and flexible than contract law, took a similar binary approach with contributory negligence, the doctrine that barred 100% of a plaintiff's negligence claim against a defendant if the plaintiff were found to be negligent at all (see generally Keeton 1984, § 65).⁷² Many legislatures have largely changed this to comparative negligence by statute (Keeton 1984, § 67) and have thereby both recognized that responsibility for an accident may be shared, and implied that courts and juries are capable of deciding complex nonblack and white questions.

71. I discuss the tort of interference with contract and the individualistic critiques marshaled to condemn it in Woodward 1996.

72. Perhaps it is no coincidence that the idea of contributory negligence is thought to spring from the same "individualistic attitude of the common law" (Keeton 1971, 452) as underlies classical contract.

Nothing of comparable scope has developed in the contract system, and we find the difficulties that our simple yes-or-no approach gives us in case after case. *Bethlehem Steel v. Litton Industries* (2 CLA, p. 101) raised the question of whether Bethlehem had exercised an option it had purportedly received via a two-page letter prepared on the spot during the closing of a related contract. If it had, damages were \$95 million; if it had not, it would receive zero. There were no other doctrinal possibilities. We learn from noncase materials that 11 appellate judges ultimately considered the case and that they split 6 to 5 in favor of the trial court's judgment of zero. Toward the end of the book, we find judges in very large cases cutting the baby in half rather than choosing one of two bad options.⁷³

As Gilmore made so clear with his promissory estoppel example, as courts wrestle with unsavory binary choices, modern neoclassical contract doctrine itself develops ways to mediate. "Material breach" is one of the oldest mediating doctrines. Since at least the eighteenth century (*Kingston v. Preston* [1773]), contract performances have been interrelated and dependent or "conditional" on one another. Given the interrelationship, logic would seem to dictate that if one side doesn't get what was promised, it need not deliver what it promised either. The drafter can make explicit in a contract that her side's entire performance is conditional on receipt of every single thing promised by the other side. Then, if the other side deviates even slightly, the condition would, logically, excuse the drafter from all performance.⁷⁴

The situation will, of course, come up where one side has expended resources in reliance on the contract yet committed only a tiny breach, and it is evident that the other side will enjoy a windfall if freed from its own reciprocal obligation to perform. The "logical" choices are to find for the breacher by denying that the breach exists at all, or to find for the non-breacher and award her an unearned windfall. The Hobson's choice of full-expectation-damages liability or no liability begs for a solution.

73. Volume 2, chapter 6 contains cases and related situations arising under modern doctrines of mistake, frustration of purpose, and commercial impracticability. The chapter both develops those doctrinal areas and reinforces the theme that contract doctrine is far too simple and offers far too few—and too rigid—options to offer much rational help in cases like this.

74. It should come as no surprise that landlord-tenant law was historically to the contrary: the tenant could not refuse to pay rent on account of the landlord's material breach of his obligations to maintain the premises (Casner 1952, 1:§ 3.11). The covenants were said to be "independent" of one another so that the breach of one had nothing to do with the obligations to perform the other. This has largely been abrogated by statute or common law decision. In *Reste Realty Corp. v. Cooper* (1969), for example, the defendant abandoned the premises over two years before the expiration of the lease because of constant flooding that wasn't remedied. When the landlord sued for the rent, the court found that the defendant was entitled to a covenant of quiet enjoyment and that the landlord's failure to remedy the situation amounted to a constructive eviction.

Since at least the early twentieth century, modern contract law has mitigated the harshness of conditional performances by limiting one's "exit" from the contract to situations in which the other side has "materially" breached. Absent a "material breach," the injured party cannot withdraw from the contract and withhold her remaining performance. Rather, she must fully perform and will receive in exchange the other side's performance (diminished by the immaterial breach) plus contract damages to make up the difference.⁷⁵ While partial performance plus damages is different from "what the nonbreacher bargained for," the solution breaks the binary logic of conditions and injects flexibility and, arguably, fairness into the liability decision.⁷⁶

But there are detractors from even this limited doctrinal concession to flexibility. The problem is that "material breach" is fact laden and indeterminate—a "dismal swamp." If one exits in response to an "immaterial breach," the exit itself becomes a "material breach" and subjects the departing party to full liability for breach of contract. The businessperson cannot know for sure when she can simply withhold performance and walk away without liability, and the business lawyer cannot give clear advice that will help with that binary decision. What is worse, a decision about how to respond to the other side's breach must be made quickly, and a failure to exit in response to a material breach could suggest either a waiver of rights or a modification of the underlying agreement.

The indeterminacy problems become even more acute once the law recognizes that one can "repudiate" a contract before one's performance is due. Now courts can be confronted with the question of whether *talk* amounted to a material repudiation that excused the other side from walking away from its commitments.⁷⁷ In the worst of cases, continuing one's performance following the other side's repudiation subjects one to the charge that her damages were self-inflicted and, hence, not recoverable.⁷⁸

75. "Substantial performance" and "material breach" express the same idea. The former grew up in cases involving construction contracts and was perhaps best articulated by Judge Benjamin Cardozo in *Jacob and Youngs v. Kent* (1921; 2 CLA, p. 441). We find "material breach" most often in cases not involving building contracts.

76. CLA's authors show repeatedly and pervasively that courts achieve flexibility in many situations by going entirely out of the contract system into the restitution system, a body of law that will require one side or the other to return benefits if they are characterized as "unjust enrichment." If restitution were unavailable to insert flexibility, we would no doubt have a very different looking contract system. We can say the same of other related liability systems. The coexistence of the bankruptcy system alongside the contracts system, for example, permits the latter to maintain the image and doctrine of absolute liability—a deal is a deal—while providing flexibility and relief (through bankruptcy) in situations that require it (see Warren 1987).

77. A good example is *Bill's Coal Co., Inc. v. Board of Public Utilities of Springfield, Mo.* (1982; 2 CLA, p. 565).

78. In *Rockingham County v. Luten Bridge* (1929), a contractor continued building a bridge after the county voted to terminate the contract, and was ultimately barred from recovering damages following the county's repudiation. The contractor's decision about what to do

The tension between the “dismal swamp” of real-life facts, and the rigidity—but apparent predictability—of our binary contract system is physically replicated in Article 2 of the UCC. In a nod to simple answers and apparent certainty and predictability, it showcases a simple “perfect tender” rule in its first remedial section, section 2-601, by proclaiming (in essence) that *any* breach in a seller’s delivery can justify the buyer’s walking away from the deal (rejection). Then, to the frustration of thousands of law students, it quietly bows to fairness and reason when it undercuts the simple rule elsewhere with complicated swamp rules that will keep the buyer in the contract despite the seller’s breach (e.g., UCC §§ 2-508, 2-608, 2-612).⁷⁹

We would like relatively objective certainty *and* fair and reasonable decisions in all cases. As both Gilmore and Leff so forcefully suggested, we can’t have both. The tension created from these conflicting desires eventually produces modern doctrines such as promissory estoppel and material breach, and is similar and related to that created by our conflicting demands for certainty and free choice, discussed above. These and other irresolvable conflicts in what we want from contract law may partially account first for the initial simplicity and rigidity of the dominant horse-trade paradigm (when “certainty” had the upper hand) and, later, for the increasing complexity in neoclassical contract law, as “real agreement” took hold and mitigating and mediating doctrines were piled onto the horse-trade model.

While CLA makes a near-overwhelming case that contemporary contract doctrine, still based on the horse-trade model, is ill-suited to the realities of relational contracting, it doesn’t clearly point the reader in the direction of more discretionary and flexible contract rules. From the *Parker* case at the very beginning, many of its cases and readings suggest that the adjudication system is part of the problem and that courts’ access to fully textured facts via the litigation system is likely to be distorted and inadequate.⁸⁰ This leaves a very uneasy feeling about both the structure and the capabilities of the current system. True to the casebook genre, the authors present readers with the problem and the available tools but offer us little advice about what we should do next.

following the repudiation was difficult because the county was engaged in a political struggle and the decision to repudiate, although ultimately found valid, had questionable legal authority at the time the county communicated it to the contractor. Had the contractor left the job following an *invalid* county decision, the contractor would have been liable to the county for damages for breach of contract.

79. CLA underscores the resulting complexity and shows how courts add to it by manipulating the notion of “acceptance” to produce results they regard as fair. (2 CLA, pp. 459–70).

80. This theme is emphasized in the CLA’s chapter on social control (e.g., pp. 539–41) and is given final force by showing courts struggling to reach fair results in impenetrably complex commercial impracticability cases. An example of the latter is the British Parliament’s legislative loss-splitting solution to a general contracts problem and Judge Goff’s difficulties with it in *B. P. Exploration Co. v. Hunt* (1979), explored through text notes (2 CLA, p. 647).

III. THE FUTURE

Stewart Macaulay began his empirical investigations into contracts in the late 1950s. Ian Macneil first advanced the relational contract idea in the 1960s. Since that time, law students of the University of Wisconsin have used CLA's predecessor materials. A good deal of scholarship has developed relational contract ideas, and there has been an increase in the incidence of empirical research in the literature. Nonetheless, it is fair to say that we continue to be bound to the same general paradigm and ideas about contracts. Indeed, parts of the contemporary scene might even suggest that our thinking has been moving in the opposite direction, back to our earlier, simpler ideas of contracting, amplified by a new confidence in individualism.

The horse-trade paradigm based on the hypothesis of individual freedom and self-interest has great power in contemporary politics and law reform. Despite incessant criticism of their oversimplified model, many law and economics scholars continue to offer normative recommendations predicated on the fully informed individual being offered legal incentives to do this or that. "Party autonomy" has become a mantra in the Uniform Commercial Code reform process. Under that banner march proposals to permit parties to choose any law they please to govern (and regulate) their contract,⁸¹ and to agree to litigate their cases in any jurisdiction they please (e.g., UCC § 2B-108 [April 1998 draft]).⁸² The Supreme Court's incredible assumptions about consumer contracting in *Carnival Cruise Lines*, mentioned earlier, and its decisions and those of lower courts tending to sustain arbitration in form-contract settings, are further evidence that the old paradigm and assumptions are alive and well. One could interpret all this as a signal of a broader return to the Willistonian idea of simple doctrine and

81. The idea appeared in the drafts of UCC § 1-302 (September 1997 draft) and art. 2B-107 (April 1998 draft). Both make it clear that the intent is that the parties can select even "mandatory law" (law that one is, under usual circumstances, stuck with) despite their having no connection with it. The art. 2B draft clearly contemplates "agreement" taking place via vendor-drafted form contracts. Consumers have been included in some versions, excluded in others. The consumer provision in draft art. 2B reads as follows: "The parties in their agreement may choose the applicable law. However, in a consumer transaction, the choice is not enforceable to the extent it varies a consumer protection rule that which cannot be varied by agreement under the law of the jurisdiction whose law would apply in the absence of the agreement" (UCC § 2B-107[a], April 1998 draft). Presumably, an enacting legislature will be giving software vendors and others governed by art. 2B the extraordinary power to choose their way out of otherwise-applicable state law rules that cannot be varied by agreement (maximum interest rates, limitations on self-help, plain language rules, etc., etc.) in non-consumer transactions. The extraterritorial effect of one state's enactment of this rule could be absolutely stunning.

82. Here again the intent is to permit "agreement" to be found on vendor-drafted forms. The provision currently provides only that the "parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust." Presumably, it will be up to the consumer or small business sued in the "chosen" distant forum to establish before that court that the choice was "unreasonable and unjust."

simple, yet unresponsive, answers to multitextured, subtle problems. Might this be an “unlikely resurrection” of classical contract Gilmore hinted at? (1974, 103; Mooney 1995, 1207). If it is, the odds seem good that it will be short-lived.

Several developments come to mind that have laid groundwork for basic, fundamental change from the rigid way we have thought about contract law to something far more flexible, nuanced, and responsive to the way business and other relationships seem to work.

First, we might expect courts to continue developing an expanded view of their own capabilities in adjudicating disputes. During the past 20 years, comparative negligence has become a fundamental part of the torts system, replacing the binary contributory-negligence regime that preceded it. This system permits liability decisions at many more points than the more primitive liability/no-liability system, and lawyers, judges, and scholars have grown comfortable with this more modern system. Similarly, since *Brown v. Board of Education* (1955), courts have made much greater use of injunctions to address a broad range of social problems. This is another development from outside the contracts system that calls for half-way, gradual measures and tailors the relief to the underlying facts. To the extent that the contracts system’s binary character stems from the wider legal system’s own binary characteristics, we can expect those core attributes of the contracts system to be softened as confidence and facility with less polar decision making and predicting develops.⁸³

This development may be a mixed blessing. As CLA’s materials suggest, the litigation system is notoriously ineffective in presenting courts with all they need to know in order to formulate sound, responsive decisions, even simple binary ones. If courts recognize more decisional options, they could make more mistakes. But it is the complexity and nuance of the facts that are the problem, and that complexity will not change with a more flexible range of decisions. Indeed, with a larger range of available decisions, the inevitable resulting judicial errors might well be smaller and distributed more broadly across litigants.⁸⁴

More flexibility with outcome may, in turn, lead to more negotiation and compromise of disputes that formerly would have gone to trial for an all-or-nothing decision. This too may not be all positive. While consensual dispute resolution is commonly thought superior to court-imposed solutions

83. In a speech at the 1997 annual meeting of the Association of American Law Schools, Judge (and former Dean) Guido Calabresi identified comparative negligence and the move in tort law away from yes-or-no decision making as a singular development that would have profound effects on the law.

84. Needless to say, the litigation system will always be plagued by the differences in resources and access of those who come before it. Whether those differences will be magnified or mitigated in a more flexible system is a matter of speculation.

for a variety of reasons,⁸⁵ negotiations between those of disparate power can reproduce the power imbalance in the negotiated outcome.⁸⁶

Second, in the past 10 years, there has been a dramatic increase in the use of contractual, court-ordered, and voluntary mediation to resolve disputes that otherwise might go to adjudication (Holden 1997). The reasons for this increase are varied. Court backlogs surely account for some of the increase.⁸⁷ Yet if court backlogs have fueled the development, the result has been the rise of a very broad, general acceptance of this form of alternative dispute resolution. For our purposes, the parties to a mediation must cooperate for the process to succeed, and it is not the zero-sum game that litigation often is. Successful mediation requires that each side understand the other's point of view and develop creativity in accommodating it. Increased exposure of lawyers to mediation will eventually prompt lawyers to think differently and more creatively about disputes. As mediation becomes more pervasive, we might expect parties and their lawyers to begin thinking differently about their relationships before they encounter disputes and to design their relationships to include mechanisms to permit them to have the flexibility and growth that relational contract ideas contemplate.⁸⁸ This will further untie lawyers from their traditional way of thinking about contracts.⁸⁹

Mediation, too, is a two-edged sword, however, because mediation can reproduce the power imbalances of those who participate in it.⁹⁰ Courts can

85. Menkel-Meadow refers to both efficiency and quality-of-justice reasons commonly advanced to support claims settlement (1991, 6).

86. The point has been made repeatedly in the alternative dispute resolution (ADR) literature. A lawyer who had experience contracting in Japan brought this home to me in a conversation several years ago. He confirmed my impression that Japanese law is far more "relational" than is American contract law, preferring to begin a relationship with trust and work things out as issues arise during the relationship (Cf. Kuzuhara 1996). This essentially relational approach had always seemed preferable to the American horse trade, at least for long-term, complex relationships. But this lawyer reminded me of what is now the obvious: in the inevitable negotiations that follow the broad relational outline, the stronger party always tends to "win." In the American system, if one gets lucky and strikes a deal that does not reflect the preexisting power structure, one at least has a chance of breaking out of that power structure. The Japanese system seems more likely than ours to perpetuate power imbalances.

87. The promise of caseload reduction for large corporations may well have propelled ADR into the mainstream (Cf. Menkel-Meadow 1991, 8-9). Yet surely some of the increase is attributable to the attention scholars have given mediation as a more relational, humane approach to solving problems.

88. Thomas Palay (1986) describes these sorts of mechanisms.

89. Whether connected to the rise in mediation or not, the massive influx of women into the legal profession in the past 30 years will continue to push contract law in a relational direction. Although there is some evidence that the law school experience has a corrosive influence on women (Janoff 1991), it seems likely that most will emerge from the experience with some of their relational instincts intact. The more recent entry of women lawyers into business law areas should increase the rate of change in the way we approach contracting and contract disputes. In 1998, 10,060 women (about 20%) were in the 49,070 member Section of Business Law of the American Bar Association.

90. The point has been made by many including Martha Fineman (1988) and the late Trina Grillo (1991). Authorities are gathered and summarized in Menkel-Meadow 1991, 11.

compensate for perceived power differences in their decisions, and the law often contains power balancing doctrines. In voluntary mediation,⁹¹ mediators make no decisions through which they might compensate for imbalance, and the law does not even purport to control the outcome.

Third, we might expect the internationalization of business to influence our individualistic, horse-trade, contract-law paradigm and the binary thinking that comes with it. CLA suggests that European Civil Law may have more flexibility than ours with both mistake and precontractual liability. In preferring specific performance to damages, and enforcing penalty clauses, civil law is far more willing to keep a relationship together than it is to permit one side to calculate the other's damages and walk away if it is profitable. Americans, accustomed to "light[ing] out for the territory" to escape undesirable relationships (Twain 1884, 281), will no doubt press for their individualistic law in the international marketplace but may wind up paying a price for it. As we become more comfortable with the less individualistic law of others, we may be less tenacious in holding on to our own old ways.

Finally, and most obviously, the dramatic increase in scholarship that goes outside the law library for information to help us better understand the law "in action" is bound to press us in new directions. It scarcely needs saying that evolving business practice offers near infinite opportunities for scholarly study and analysis. But while scholars recognized "commercial practice" in the 1930s and made it a cornerstone of the UCC, legal scholars did not systematically begin to look at how businesses actually used law until Stewart Macaulay began his work in the 1950s.

Macaulay's kind of work has made steady progress in finding its way into law schools. Thirty years ago, a law professor conducting empirical or sociological research into the law was taking substantial academic risks and 20 years ago the situation was not much different. Today, by contrast, one can find law professors publishing empirical studies of business contracting in the *Harvard Law Review* (e.g., Mann, 1996). The recent rise in this kind of scholarship within the law schools has been dramatic and we can probably expect this trend of expansion in scholarship about commercial law to continue. As more law faculty members move to conduct their own empirical work, they will more naturally embrace others' work coming from outside the law schools.⁹²

For the law of contracts, their insights suggest that mediation has its best chances of *real* success where it is not mandatory and where the participants have relatively even bargaining power.

91. Mandatory mediation programs have sometimes included the filing of a report by the mediator with the court. This form of mediation can actually exacerbate the problems of power imbalance (Grillo 1991).

92. In his president's message for August 1997, Association of American Law Schools President John Sexton lists "to connect law studies more coherently with the studies of the other human sciences" as first on the agenda of "unfinished business" for law schools.

CLA and books like it will play an important role in the likely transformation of contract law from its individualist character to something different. With pressure from the Bar to better prepare students for actual law practice, we can expect more of this "nontraditional" material to work its way into law school classrooms and affect, in fundamental ways, the thinking of a new generation of lawyers, judges, and scholars.

Two classes of my students who used this book have now graduated from law school. During their second and third years, I taught enough of them to conclude that they thought about contracts differently than did their more traditionally educated peers. With this book, law students began their thinking about the subject on a completely different set of premises. The consequences of their very different education is likely to be the book's most important legacy. In the shorter run, students' orientation to how the law will actually affect the lives and businesses of their clients will immediately make them more responsive to client needs.

But what is more significant is that these students have never been intellectually confined by the individualist, predominantly binary features of modern contract law. True, the authors themselves don't replace Gilmore's "dead" contract law with something different or better.⁹³ But the very process of putting the torch to Gilmore's grand contract law may have cleared an area for scholars with less inhibited imaginations to sow and cultivate something different and more useful. I'm hopeful that the different intellectual orientation of the teachers and students who use this book will empower some of us, finally, to develop a contract law that is better suited to the complex world in which it will operate.

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93. The authors are conscious of the potential criticism that the materials do not teach enough "law" (1 CLA, pp. 28-33) and that they might demoralize students, or that they are too freewheeling and don't teach enough hard-edged analysis. Evidence of this latter awareness comes from quoted critiques of Danzig's book (1 CLA, pp. 113-14) that, of course, could just as easily apply to theirs. In my experience, students are as likely to emerge from these materials with excitement and curiosity about the subject and the legal practice that goes with it as with cynicism about the whole system.

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