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Whose Deal Is It? Teaching about Structural Inequality by Teaching Contracts Transactionally

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INTRODUCTION

PRIOR to departing from Seattle for this AALS Annual Meeting, I was having one of those difficult parent-child conversations with my twelve-year-old son. No, it's not what you are thinking. We were not having one of *those* talks, nor was he asking me one of those unanswerable questions such as "where does the sky end?" Instead, we were discussing his upcoming basketball game and why I would not be present to coach the team that weekend. When I explained that I would be speaking on a panel at AALS, he naturally wanted to know what I would be talking about. "It's a panel on contract law," I told him, "and we've been asked to talk about using contracts to teach Contracts." His response was short, and came with a dose of attitude that only a pre-teen can muster: "Seems kind of obvious, but whatever," and off he went to practice his dribbling.

He has a point. Although Scott Burnham and others have urged the use of more contracts to teach Contracts for some time,[19] it is safe to say that the majority of Contracts courses in the United States do not put actual contracts front and center. While particular phrases or provisions surely are referenced in the steady diet of appellate decisions that comprise the first-year course, those decisions very rarely include the actual contract at issue for study. Moreover, in the increased compression of the first year course,[20] few professors believe they can justify the time for transactional exercises or simulations in the rush to cover the basic doctrines. A transactional approach to teaching Contracts is thus a simple but important idea that is still too much a rarity in the academy.

And so in praise of simple but important ideas, I want to make an additional one. In addition to all of the benefits that others in this issue have identified about using contracts to teach Contracts,[21] teaching contracts transactionally also provides the

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 Contact information: Seattle University School of Law, 900 Broadway, Seattle, WA 98122; (206) 398-4041 (w), 398-4077 (f); ktesty@seattleu.edu. This essay is an edited version of a panel presentation given at the AALS Annual Meeting, Contract Section (January 2003). I thank Peter Linzer for organizing the panel; Hazel Glen Beh for stepping in to moderate it on short notice; my co-panelists for an engaging discussion; Llewellyn Gibbons for organizing the publication of our remarks; the Toledo Law Review for their editorial work in producing this volume; and Dean Rudolph Hasl of the Seattle University School of Law for his support of my work.

19. SCOTT J. BURNHAM, DRAFTING CONTRACTS (2d ed. 1993); Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000); Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2003).

20. Many law schools have reduced the credits allocated for the first-year Contracts course from six to four. *See* Contracts Listserv Discussion, archived at http:\\www.aalscontracts.org.

21. Hazel Glenn Beh, *Teaching Contracts Transactionally*, 34 U. TOL. L. REV 687 (2003); David

opportunity to raise important issues of social location. That is, teaching Contracts transactionally highlights the importance of the context of the transaction, and thus opens the door to considerations of structural inequalities (including race, gender, class, sexuality (and their intersections)) implicated in that transaction. Rather than teaching about deals in the abstract, teaching Contracts transactionally enables more trained attention upon the issue of whose deal it is, and why that aspect of the context of the transaction must be addressed before much else can be profitably discussed.

Contracts, after all, are bargains between particular persons or entities, not free-floating bargains. Those identities matter in terms of the bargaining power of the parties and the kind of contract that they need to embody their deal. Accordingly, focus upon contractual transactions presents a prime opportunity to surface issues that influence bargaining power and client needs. What kinds of issues do that? Any issue that determines who has power in this society and who does not: race, gender, class, sexual orientation, and their many complex intersections are foremost among them.[22] Thus, in the process of learning much about contract drafting and negotiation, students also can learn much about these important social inequalities as well if simulations are structured to present these issues. It is not hard to do; remember, this paper is in praise of *simple* ideas. It is also important to do so, and below I discuss both the "why" and the "how" of focusing upon "whose deal is it?"

I. WHY INCORPORATE ISSUES OF STRUCTURAL INEQUALITY WHEN TEACHING CONTRACTS TRANSACTIONALLY?

Teaching is an educational pursuit, and thus the key reason that it is important to incorporate issues of structural inequality when teaching Contracts transactionally is that it is vital to gain a complete and intellectually sophisticated understanding of contract law Consider this: you can think up the best contractual term in the world, but it will not matter one bit if you do not have the power to get it in that contract. The lack of bargaining power means the deal is on their terms, not yours. Thus, if

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V Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year* 34 U. TOL. L. REV. 689 (2003); Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. TOL. L. REV. 705 (2003); Llewellyn J. Gibbons, *Teaching Intellectual Property Licensing Transactionally*, 34 U. TOL. L. REV 717 (2003); and Edith Warkentine, *Why Teach Contracts Transactionally?* 34 U. TOL. L. REV. 723 (2003).

22. The literature on structural inequality is vast. For inspiring discussions of law's complicity in material and structural inequality, see, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE 448 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV 1331 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV 1037 (1996); Mari J. Matsuda, *Beside My Sister Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

we are to teach our students about the full range of issues that arise in contract negotiation and drafting, a subtle understanding of bargaining power and its sources needs to be at the heart of that endeavor. Moreover, many of contract law's defenses turn on abuses of bargaining power. Addressing those defenses means understanding power dynamics sufficiently to either avoid or recover for those abuses.

A further reason that supports raising issues of race, gender, class, sexuality and their intersections in transactions is that it combats contract law's problematic tendency toward abstraction. That tendency is revealed in many aspects of traditional contract law doctrine and teaching, and many students find this abstraction quite off-putting. In addition to causing some students to "tune out," abstraction also ill serves the clients for which those students will soon be responsible. If clients are always abstract and disembodied, students will be ill-prepared to deal with real clients in practice. Real clients have genders, races, classes, religions, and other social locations that are often important to the successful resolution of their legal matters.

There are many forces that push contract law toward abstraction, and many writers have noted those issues elsewhere,[23] so I will mention just a few in brief summary. First, of course, is that contract law has an objective theory at its core that tends to reduce its transactors to "reasonable" persons without races, genders, or economic classes. There are no reasonable or unreasonable people without these identity categories: all persons have these identity markers and in this society those are significant determinants of bargaining power. Thus, attention to issues of social location makes the reasonable person a real one.

Second, judicial language can often be very abstract in the sense of talking about parties by categories rather than by name or other more specific marker. Parties are plaintiffs and defendants, appellants and appellees, without so much as a "Mr. or "Ms." attached for guidance. Many contracts teachers and scholars have sought to address this aspect of abstraction and to bring the cases "alive" for students. For instance, Richard Danzig's book, *The Capability Problem*, has provided significant background context on many key contracts cases.[24] I and other scholars, including Judith Maute and Geoffrey Watson, have employed the Danzig approach to illuminate other cases central to the standard first-year Contracts course.[25] Hazel Beh's practice of asking her class at the end of the year to thank the persons whose contract "wrecks" have created their opportunities for learning is a brilliant idea that does much to make the parties real. All that said, I remain concerned that especially with some of the tried and true cases that we talk about and teach about so often

23. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 15 (1974); Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000).

24. RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW (1978).

25. Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995); Geoffrey R. Watson, *In the Tribunal of Conscience:* Mills v. Wyman *Reconsidered*, 71 TUL. L. REV. 1749 (1997); Kellye Y Testy, An Ode to Odorizzi (manuscript on file with author), portion published *in* RANDY BARNETT, CASES AND MATERIALS ON CONTRACTS 1003 (3d ed. 2003).

(e.g., *Hamer v. Sidway*[26]) that those parties have become mythical characters over the years, and thus remain abstract even if famous.

Similarly, the Restatement (Second) of Contracts, which is so influential and so widely cited in contracts texts, is abstract as well. Though full of examples, the parties are all "As" and "Bs." These are markers for convenience; they do little to evoke any serious concern over the clients and potential clients behind them.

A final abstraction in contract law that bears mention is the way that we talk about "the contract" itself. It takes on a life of its own, separate from the parties' deal that it embodies. We call it "THE contract"—not the parties' agreement! And rarely do I hear contracts teachers refer specifically to named parties' when talking about the contract.

In sum, we need a more explicit and sustained focus on whose deal we are talking about when we talk about contract transactions. Good pedagogy requires this explicit attention to context. It combats abstraction, which makes transactional simulations not only more realistic, but also more fun. Who can get very excited over a "plaintiff" or a "party C"? Real people evoke our interest, our empathy, and our care. Embodied characters evoke the kinds of skills and values we should be seeking to inculcate in our students, including attention to the perspective of the subordinated in society. This concern for issues of social justice is a concern we should make a place for in all of our courses, particularly those in the first year where students' formation is so critical. Moreover, for those who may find the prospect of engaging issues of social justice (including issues of race, gender, class, sexuality, and religion) intimidating, doing it in the context of transactions is significantly less "heavy-handed" than other alternatives. Thus, even reticent students respond very well, and thus learn much more than they otherwise would. That in turn, better serves them, their clients, the legal profession and society

II. HOW TO INCORPORATE ISSUES OF STRUCTURAL INEQUALITY WHEN TEACHING CONTRACTS TRANSACTIONALLY?

For those persuaded by the "why," let me turn to the "how" Again, I want to emphasize that this paper is in praise of *simple* ideas. Once you have the goal in mind of raising issues of structural inequality in teaching Contracts, it is not at all difficult to do so. Indeed, I have come to think that it is more difficult *not* to do so! Before turning to the specific issue at hand of teaching Contracts more transactionally, let me recall that there are also a host of non-transactional methods of doing so as well.[27] Teachers can use cases, simply making sure not to erase the entire context of the situation, including the races, genders, and other identity categories of the parties. The increasing availability of the additional background information on many cases makes it all the easier to do this.[28] Moreover, the problem method of teaching Contracts is gaining increased prominence, and can be an excellent vehicle to raise contextual issues more directly Adding additional readings to supplement the casebook can also assist with this mission. Those

26. 27 N.E. 256 (1891).
27 *See, e.g.*, Kellye Y Testy, *Intention in Tension*, 20 SEATTLE U. L. REV 319 (1997).
28. *See supra* notes 24-25 and accompanying text.

materials can run the gamut from increased theoretical perspectives on contract law such as that provided in the well-known Linzer anthology,[29] to more specific readings drawn from the burgeoning and creative literature critiquing law on the basis of race, gender, class, sexual orientation, and their intersections.[30]

Turning more directly to the issue of teaching Contracts transactionally, it is not at all difficult to make sure that the structure of one's simulations and transactional work includes issues of structural inequality. These deals need parties to create them—and all those parties have identity categories. The only challenge is to make sure you do not erase them. Let me give some specific examples of projects that have worked very well in this regard.

First, when I ask my students to write a contract, I like to bring actual people into the exercise. Thus, I have someone come into the room to be interviewed in order for my students to determine the kind of contract that they need to have drafted. For instance, I recently structured a case around a man named Jack Reynolds. Jack, born a biological female but in the process of transitioning to a male identity, was going to become an employee of an accounting firm, Anderson & Company, C.P.A.s. Both sides had particular goals and concerns in entering into the employment relationship that they wanted their contract to address. Some students interviewed Jack; others interviewed Anderson's manager, Kathy Thomas. Both were assigned the project of drafting a contract and reaching agreement on terms with the other side. In the process of learning a great deal about employment contracts, negotiation, and contract drafting, my students also gained tremendous insight into the issues that transgendered persons face in basic aspects of everyday life, such as employment relationships.

A second example is tied more closely to putting issues of gender, race and their intersections in front of students. This exercise involves Gabrielle Rodriguez, a Latina Doctor of Theology, who wishes to have a contract drafted for work she was engaged in with United World Vision (UWV). The consulting work included lecturing and conducting trainings world-wide on issues of social justice. Students were asked to interview Dr. Rodriguez and then draft the contract, working from a form agreement that UWV had supplied her. In addition to drafting issues, other key contracts issues raised were performance, conditions, and consideration. During the course of the exercise, it becomes clear to the students that Dr. Rodriguez is very concerned about being "taken advantage of" due to past experiences, and thus often unwilling to agree to terms that the students consider "standard." The context that she brings forth for the students education is the fact that there are very few Latina Ph.D.s in this country, and how that affects the way she approaches this deal and the worries she has over how it will be structured. Again, in the process of learning more about contract doctrine and drafting skills, my students also learn about structural inequality and some of its complex effects.

A third example of an exercise that students really enjoy is one involving clients named Cheri Orcutt and Scott Robert Thomas. In this simulation, Orcutt and Thomas approach a lawyer (my students) and ask the lawyer to draft a contract for them that will embody a deal they have struck regarding the parenting of a child.

29. PETER LINZER, A CONTRACTS ANTHOLOGY (2d ed. 1995).

30. *See, e.g.*, sources cited in *supra* note 22.

Through an alternative insemination process, Orcutt is to carry the child of Thomas, who agrees to then relinquish all parental rights so that Orcutt's female partner could proceed with a second-parent adoption. The students' task was to interview the clients and then draft a contract that would represent the terms the parties had agreed to. In addition to drafting issues, other key contracts issues raised included consideration and public policy defenses. Moreover, difficult conflict of interest issues were presented, given the potential and actual disparate interests of Orcutt and Thomas.

All of the above examples come from outside the usual materials that are in the casebook. There are, however, a number of places, if one prefers to stick more closely with the text, where more attention to contracts can be had in teaching Contracts. For instance, I have myself been very interested in *Odorizzi v. Bloomfield School District*,[31] the undue influence case involving a teacher who was pressured into resigning after he had been arrested for "homosexual conduct." One of the exercises that I have asked my students to do with that case is to have them write a contract of resignation that Don could have offered as an alternative to the one he signed. Through this exercise, one of the key issues that arise is the possibility of drafting a term that would allow him to keep his job if the criminal charges against him were quickly dismissed (as they were).[32]

CONCLUSION

Many similar exercises can be easily added on to other cases already on the professor's syllabus, or added to the syllabus to enhance it. The key point is that it is not at all difficult to think up these ideas once it is in the teacher's consciousness that it is important to do so. Adding context that includes attention to issues of structural inequality, including gender, race, sexuality, class (and their intersections), will not only enhance students' interest in Contracts, it also will assure that they are become more competent lawyers overall. We need to move beyond teaching about "deals" in the abstract to paying attention to "whose deal is it" and how much that often matters. That it is so easy to do so in teaching Contracts transactionally is yet another reason why more of our courses should move toward that pedagogical method of instruction. Whose deal is it now? It's yours. Make the most of it.

[Applause]

31. 54 Cal. Rptr. 533 (Dist. Ct. App. 1966).
32. *See* Testy, *supra* note 25.