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REFLECTIONS ON *CONTRACTS IN THE REAL WORLD*: HISTORY, CURRENCY, CONTEXT, AND OTHER VALUES

Lawrence A. Cunningham*

*The beginner can often go better from the present to the past
than from the dim and uncertain past to the present.*¹

—Prof. Henry W. Ballantine (1922)

INTRODUCTION

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

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

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1. Henry W. Ballantine, Book Review, 31 YALE L.J. 569, 570 (1922).

2. On the cases commonly included in Contracts casebooks, see Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995).

3. See Umo O. Ironbar, *A Law Student's Viewpoint on Contracts in the Real World*, CONCURRING OPINIONS (Oct. 18, 2012, 2:00 PM), <http://www.concurringopinions.com/archives/2012/10/a-law-student%E2%80%99s-viewpoint-on-contracts-in-the-real-world.html>; Matthew Mantel, *Contract Law Can be Interesting!*, NOTA BENE (Apr. 15, 2013), <http://notabeneuh.blogspot.com/2013/04/contract-law-can-be-interesting.html>; L. Martucci, Response to *Symposium on Contracts in the Real World*, CONCURRING OPINIONS (Oct. 16, 2012), <http://www.concurringopinions.com/archives/2012/10/symposium-on-contracts-in-the-real-world.html>.

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

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

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

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

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

5. See, e.g., LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* 148–52 (2012) (poet Maya Angelou's Hallmark greeting card contract (formation in exclusive license deal)); *id.* at 21–24 (a lawyer's boasts on

mostly culled from the recent news, all pivot on the dusty/musty cases, but are more interesting, accessible, and relevant to students.⁶ A few stories in the book will be more familiar to veteran contracts teachers, as they already appear in several leading books.⁷

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

My narrative reflects and develops an understanding of how today's contract law bears on today's problems—showing how yesterday's contract law and yesterday's problems reappear in new guises. These stories identify the real world, contemporary social and business settings where ancient problems recur. These stories are about context, argument,

"Dateline NBC" (offers)); *id.* at 25–29 (whether corporate internet privacy policies are contracts (mutual assent)); *id.* at 66–70, 157–60 (effects of construction surprises in demolition of building damaged on 9/11 (duress/pre-existing duty rule)); *id.* at 172–76 (Kevin Costner's fight about sculptures for his Dunbar ranch (conditions)); *id.* at 66–70 (Donald Trump's effort to delay loan repayments due to financial crisis (impossibility)); *id.* at 59 (Bernie Madoff's Ponzi scheme's effect on divorce settlements (mutual mistake)); *id.* at 186–92 (Sandra Bullock's fight over construction of her Texas mansion (restitution)); *id.* at 94–99 (fan breaches of Washington Redskins season ticket contracts (damages)); *id.* at 84–94 (Paris Hilton's dispute about a hair product endorsement deal (consequential damages)); *id.* at 99–104 (whether cell phone service early termination fees are valid (liquidated damages)); *id.* at 194–98 (Walmart's defense against employees of foreign suppliers (third-party beneficiaries)).

6. Also appearing in the collection of forty-five stories are those involving the following characters or topics: *id.* at 147–52 (novelist Clive Cussler (good faith)); *id.* at 44–49 (rapper 50 Cent (palimony contract)); *id.* at 70–73 (child actor from "Malcolm in the Middle" (infancy doctrine)); *id.* at 73–78 (AIG's employee bonuses (excuses)); *id.* at 78–82 (Citigroup's naming of the New York Mets baseball field (termination)); *id.* at 126–30 (rapper Eminem (interpretation concerning digital music)); *id.* at 132–36 (Golden Globes (parol evidence rule concerning telecast rights)); *id.* at 136–40 (ownership of the L.A. Dodgers (scrivener's error)); *id.* at 162–67 (pop superstar Lady Gaga (accord and satisfaction)); *id.* at 177–86 (Charlie Sheen/Warner Brothers (conditions, performance, waiver)); *id.* at 118–22 ("The Sopranos" (novel ideas and restitution)); *id.* at 122–24 (Rod Stewart (restitution after cessation)); *id.* at 85, 167–70 (Conan O'Brien/"The Tonight Show" (various)).

7. See, e.g., *id.* at 12–16 (MLK and BU (bargain or gift, reliance)); *id.* at 16–21 (Pepsi and the Harrier jet (offers, jests)); *id.* at 41–44 (Michael Jordan paternity case (formation, consideration, fraud)); *id.* at 96–97 (Michael Jordan product endorsement case (lost volume seller)); *id.* at 52–57 (Baby M (valid or illegal bargains)).

possibilities, limits, and alternatives; they deal with things people know about today (celebrity personalities, electronic transactions, internet exchange, cell phones, personal lifestyle choices) and dwell less on the archaic materials necessary to break through the ancient cases (transport and milling at the dawn of the industrial revolution; nineteenth century navigation technology; communications by handout; and antiquated attitudes toward paternity, homosexuality, mental illness, gambling, drinking, and the treatment of animals).

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

Finally, Part IV offers thoughts about the sequence and themes that appear in my book's organization of the subject, which contrasts with motifs manifest in both traditional casebooks and many strands of contract law scholarship. *Contracts in the Real World* regales readers with stories I wrote rather than providing primary legal materials for study. The positive reception to *Contracts in the Real World*⁸ prompted me to begin preparing a course book consisting of cases and materials based on its pedagogy, content, and architecture.⁹

I. HISTORICAL GROUNDING

To situate my book and this essay, I start with a brisk journey across a century and a half of contracts casebooks, highlighting the changes that have occurred in the seven generations since C.C. Langdell first published his contracts casebook in 1871.¹⁰ The survey, drawing on scholarly reviews of such books, facilitates reflection upon the scores of

8. See, e.g., *Symposium (Contracts Real World)*, CONCURRING OPINIONS (Oct. 16–18, 2013), <http://www.concurringopinions.com/archives/category/symposium-contracts-real-world>.

9. My partner in this endeavor is Miriam Cherry, who has also produced a review of the book. See Miriam A. Cherry, *Learning Contracts Through Current Events: Lawrence Cunningham's Contracts in the Real World: Stories of Popular Contracts and Why They Matter*, 35 U. HAW. L. REV. 129 (2013) (book review).

10. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

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

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

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

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

11. *Id.*

12. Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997) (providing an overview of the various methods used to teach law).

13. ARTHUR L. CORBIN, *CASES ON THE LAW OF CONTRACTS: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* (William R. Vance ed., 1921).

14. SAMUEL WILLISTON, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1922).

15. David Werner Amram, Book Review, 70 U. PA. L. REV. 373, 373 (1922) ("That we are at the beginning of a new era of development in our philosophy of social relations is a generally accepted truism.").

16. WILLIAM A. KEENER, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1898).

the arrival of Edwin Patterson's two-volume contracts casebook in 1935.¹⁷ This was championed as "the product of a new generation," featuring "new points of view," and "reveal[ing] a tendency to inject into the study economic and sociological data."¹⁸ Others celebrated the achievement as reflecting the scientific advances of the period, especially concerning psychiatry and mental capacity to contract.¹⁹ This was an achievement and the beginning of a shift, but adding scientific perspectives was hardly a new paradigm.

The tendency of the case method's proponents to meet complaints with incremental adaptation is magnificently displayed in Lon Fuller's innovative 1947 casebook.²⁰ Fuller's book not only included cases for serial examination but also extensive notes, problems, and drafting exercises, together with probing questions about the nature of law. Moreover, Fuller replaced the familiar framework of the contracts course with a new organization by starting the book with contract remedies instead of contract formation. Contemporaries beheld the result as a masterstroke, blending the case method tradition with new approaches of notable originality. As Malcolm Sharp wrote reviewing the volume, this was "more than a case book."²¹ In fact, Fuller's book, rather than Langdell's fossil, is best seen as the true forerunner of contemporary casebooks.

Of course, Fuller's book did not accomplish a revolution either, and there was much left to do. The next milestone was Sharp's 1953 book with Friedrich Kessler, another impressive combination of tradition and innovation.²² It presented all the great cases along with detailed notes on them. But instead of implying that they formed a coherent doctrine, Sharp and Kessler revealed glaring tensions, doctrinal contradictions, and the dissolution of the Langdellians' revered ideas and categories, such as the distinction between contracts and torts.²³

Sharp and Kessler's monumental achievement was incompletely

17. EDWIN W. PATTERSON, *CASES AND MATERIALS ON CONTRACTS II* (1935).

18. Harold C. Havighurst, *Cases on Contracts*, 21 *IOWA L. REV.* 661, 662 (1936) (book review).

19. Judson A. Crane, Book Review, 49 *HARV. L. REV.* 512, 513-14 (1936) ("In an era of experimentation and change in society at large, and even in law schools, it seems that the entire subject matter of these volumes deserves a place in the curriculum.")

20. LON L. FULLER, *BASIC CONTRACT LAW* (Warren A. Seavey ed., 1947).

21. Malcolm Sharp, Book Review, 15 *CHI. L. REV.* 795, 795 (1948).

22. FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, *CONTRACTS: CASES AND MATERIALS* (1953).

23. Benjamin Kaplan, Book Review, 63 *YALE L.J.* 1039 (1954).

realized, however, though a generation later it remained aptly extolled as a “reorganization of the subject” and “a radical and enormously creative innovation.”²⁴ It was left for a future co-editor of the book, Grant Gilmore, to draw out the work’s implications in its 1970 edition.²⁵ These included the expansion of liability in America, the further blurring of the distinction between torts and contracts, and the socialization of contracts that Gilmore depicted in his famous text, *The Death of Contract*.²⁶

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

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

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

24. Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 886 (1979) (book review).

25. FRIEDRICH KESSLER & GRANT GILMORE, *CONTRACTS: CASES AND MATERIALS* (2d ed. 1970).

26. GRANT GILMORE, *THE DEATH OF CONTRACT* 87–103 (1974).

27. CHARLES L. KNAPP, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (1976).

28. See Klare, *supra* note 24, at 895.

29. STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1995).

30. *Id.* at v.

31. *Id.* at 22–23.

familiar doctrinal pattern.³² Though impressive, this was not entirely novel either, as contract materials had been so arranged as early as 1950 in Harold Havighurst's casebook.³³ By developing and extending these earlier efforts, moreover, Macaulay joined critics of the case method who debunked the practice of teaching contracts using common law appellate opinions, saying that was akin to teaching zoology by focusing on unicorns and dodos.³⁴

Macaulay's book was influential in altering the contracts course, but it did not transform it. Books today increasingly concentrate on materials other than appellate opinions, but the casebook still dominates the classroom, and aging common law appellate opinions remain the mainstay of the contracts course.³⁵ *Contracts in the Real World* departs from that approach in the spirit of currency and context, spotlighted next.

II. CURRENCY AND CONTEXT

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

A. Currency

A big selling point of any course book, from Langdell to today, is currency: the appeal of fresh materials, including new cases. The first edition of Arthur Corbin's contracts casebook³⁶ in 1921 set the record.³⁷

32. *Id.* at ix–xvii.

33. See Kaplan, *supra* note 23, at 1039 (discussing HAROLD C. HAVIGHURST, *CASES AND MATERIALS ON THE LAW OF CONTRACTS* (2d ed. 1950)) (Havighurst's book "goes immediately to various groups of contracts such as employment contracts, contracts for building and construction, and so forth.").

34. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 25 (1965).

35. One thing that has changed, and is part of a revolution, is the use of the masculine pronoun. Before 1975, all casebooks and all reviews of them used the masculine pronoun exclusively. That simply reflected the reality of the worlds of business and law; worlds dominated by men with women out of sight. See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985). Professor Klare applauded a 1975 effort of the Knapp casebook: "Another attractive feature of the book is its modest but noteworthy effort to respond to the pervasive sexism of American legal culture." Klare, *supra* note 24, at 896.

36. CORBIN, *supra* note 13.

37. Clarke B. Whittier, Book Review, 31 YALE L.J. 220, 220 (1921).

Corbin's motivation in the book, for students, teachers, and practitioners alike, was the forward-looking goal of enabling earnest thinking about "What are our American courts going to decide to-morrow?"³⁸ Reviewers noted with approval that nearly half the cases in the book were decided since 1900—within twenty years and thus during the lives of the law students who would use the book in the next several years.³⁹ Corbin's creativity was the talk of faculty lounges.⁴⁰ Samuel Williston followed in lockstep, with his second edition of the same period featuring more than sixty new cases.⁴¹

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

The appeal of the latest cases invites reflections about production capability, which has improved dramatically in recent years. Historically, casebook editors would keep a physical file of new developments as days go by. At year-end, they would compile the file into a printed teachers' update; this often was developed into a printed supplement to the main text released every year or two, and culminated

38. *Id.*

39. *Id.*

40. Grover C. Grismore, Book Review, 20 MICH. L. REV. 373 (1922); Herman Oliphant, Book Review, 16 ILL. L. REV. 645, 645 (1922).

41. Amram, *supra* note 15, at 373.

42. Crane, *supra* note 19, at 512.

43. D.W. Woodbridge, Book Review, 24 VA. L. REV. 824, 824 (1938); *see also* I. Maurice Wormser, Book Review, 3 J. LEGAL EDUC. 145, 145 (1950) ("[S]tudents are always clamoring for the most recent cases[.]").

44. *See, e.g.*, Woodbridge, *supra* note 43, at 825 (lamenting that *Foakes v. Beer*, [1884] H.L. 1, was demoted from a principal case).

45. *See, e.g.*, Charles L. Knapp, *Cases and Controversies: Some Things to do with Contract Cases*, 88 WASH. L. REV. 1357 (2013).

in publication of a new edition of the book itself after a number of years. Current events were left to classroom teachers. Retrieving relevant material was difficult and the production process took time. The result: current events or deeper exploration of popular stories were essentially off limits. No longer.

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

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

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

46. Teachers may face such situations whenever drawing on pending cases in class. A court may decide a case the class is studying, thereby cutting class discussion short. The class may prove correct and others incorrect. Lessons abound. I had done such a thing with a case later discussed in *Contracts in the Real World* (*Simkin v. Blank*, 19 N.Y.3d 46 (N.Y. 2012) concerning mistake and the Madoff Ponzi scheme). The text endorses an intermediate appellate court opinion that was, post-publication, reversed on appeal. I will have to update the point in the book's next edition. See CUNNINGHAM, *supra* note 5, at 59–60.

whether discussion centers on a classic pair of vexing cases from the 1870s or 1920s or a pair of cases from last week. But student engagement and stimulation may be markedly different between cases set in the alien settings of old and those involving the known reality in which students live. Spotting cases featuring a hogshead of tobacco,⁴⁷ primitive shipping practices,⁴⁸ and itinerant farming,⁴⁹ imposes a cognitive tax on developing students' legal skills that disappears when discussing cell phone early termination fees,⁵⁰ internet ticket sales,⁵¹ or a Pepsi television commercial involving a Harrier jet.⁵²

B. Context

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

Lon Fuller in 1947 rendered the note feature into the form recognized today. No longer footnotes, these rich analytical materials followed the cases and appeared throughout the book with equal prominence.⁵³ Many gave supplementary facts about the case or provided historical perspective, some presented comparative law contrasts, and others explained the business and economic context of an exchange.⁵⁴

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

47. *Laidlaw v. Organ*, 15 U.S. 178 (1817).

48. *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch.); 2 Hurl. & C. 906.

49. *Britton v. Turner*, 6 N.H. 481 (1834).

50. *Ayyad v. Sprint Spectrum, L.P.*, No. A121948, 2009 WL 4048035 (Cal. Ct. App. Nov. 23, 2009).

51. *NPS LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) (Plaintiff is the New England Patriots NFL team.).

52. *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

53. See Harold Shepherd, Book Review, 1 J. LEGAL EDUC. 151 (1948) (reviewing LON L. FULLER, *BASIC CONTRACT LAW* (1947)).

54. *Id.* at 153 ("The first year is not too soon to learn that the whole story may not appear in the reported opinion.").

prevented students from missing the forest for the trees—something teachers in earlier generations had difficulty doing when assigning books consisting wholly or mostly of case after case, sans context. Those earlier teachers had to provide by lecture the essential material that went beyond the inherent limits of an appellate decision; now the text provided it.

Despite this innovation, cautions against excess were voiced then and endure now.⁵⁵ Law teachers have long argued about the proper pedagogical balance between spoon-feeding students the law and Socratic interrogation more reliant on the technique of “hiding-the-ball.” In his 1948 review, Harold Shepherd observed about notes in Fuller’s book: “[O]ne need not fear an overdose of spoon-feeding, for there is still enough of orthodox case material and problems to satisfy the most ardent case-method teacher.”⁵⁶ That debate, though it continues, is less pronounced than in earlier eras.⁵⁷ Hard core Socratic law teaching is a fading relic while lecture and print materials increasingly attune to giving context. There are many ways to do so; providing stories of popular cases and controversies is an effective one.

III. PURPOSE AND PLACE

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

A. *Theory-Practice*

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

55. Sidney W. DeLong, *An Agnostic’s Bible*, 20 SEATTLE U. L. REV. 295 (1997) (book review).

56. Shepherd, *supra* note 53, at 153–54.

57. See, e.g., MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* (2009) (innovative casebook loaded with tutorials about technique, including how to read a case, marginal annotations highlighting important points in a case, tips on preparing for class, formulas for writing legal analysis, and graphical maps of the doctrinal structure of contract law and the book).

transfer of information) or the development of ability (specifically analytical reasoning). Langdell not only created the casebook, he ensconced the law school in a graduate level university program, leaving law teachers to debate endlessly whether legal education is professional training or academic exploration. In fact, it is both in different measures.

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

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

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

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

58. [Oliver Wendell Holmes, Jr.], Book Notices, 14 AM. L. REV. 233, 234 (1880).

59. Ballantine, *supra* note 1, at 570 (“[M]ore problem material should be included in our case-books . . .”).

60. *Id.*

problems throughout to train students in lawyering skills.⁶¹ In two chapters towards the end of the book the exercises intensified, focusing on the dynamic context of conditions, and devoting “attention [to] problems of draftsmanship” and “problems of counseling and negotiation which may arise when a condition has not been fulfilled or when the other party has defaulted.”⁶² The Fuller book was innovative in its time, and these features that made a “stimulating contribution” to “training in lawyers’ skills” show how truly modern it is.⁶³

In 1975, two generations later and two generations ago, Charles Knapp’s book contributed similarly valuable materials to build lawyering skills. As described by Karl Klare, Knapp’s “doctrinal exposition is organized around a series of skillfully drafted hypotheticals, posing difficult counseling issues.”⁶⁴ After expressing enthusiastic approval of this approach, Klare opined: “[T]he problem-solving and counseling emphasis is further confirmation of the coming demise of the casebook method of instruction.”⁶⁵ That prediction overlooked how the problem method and the casebook are not antithetical but complements—true at least since Fuller’s 1947 book. The Knapp book remains such a complementary combination of cases, materials, and problems, through its current edition.

Many are amazed that standard contracts courses in American law schools do not necessarily involve presenting an actual contract to the class, although fragments may appear via the cases.⁶⁶ Of course, many casebooks do present contracts and many teachers supply them separately. Drafting exercises even occur. But an interest in the more extensive use of transactional materials has emerged in the past generation, building to a widespread movement today. To be sure, this is also not exactly something new under the sun, as William O. Douglas pioneered this approach as early as the 1930s.⁶⁷ Many books today lend themselves to a pedagogic approach that presents the lawyer as counselor, adviser, and deal coordinator, rather than merely as litigator.⁶⁸

61. Sharp, *supra* note 21, at 795.

62. *Id.*

63. *Id.*

64. Klare, *supra* note 24, at 897.

65. *Id.* at 898.

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

67. Sheppard, *supra* note 12, at 626.

68. See DeLong, *supra* note 55, at 304.

To put students in the position of advocates for purposes of training, it is likely advantageous to provide a contemporary context, one that exists today and in which students can expect to be placed tomorrow. It may be instructive to reenact the courtroom scenes transcribed in reported classics (say, *Kingston v. Preston*,⁶⁹ *Hadley v. Baxendale*,⁷⁰ and *Krell v. Henry*⁷¹).⁷² But such exercises probably yield more historical insight than practice guidance. To put students on stages like those where they will soon act, have them emulate the lawyers developing arguments for Charlie Sheen versus Warner Brothers or the steps in the dispute between Dick Clark's production company and the sponsors of the Golden Globe Awards.⁷³

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

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

69. (1773) 99 Eng. Rep. 436 (K.B.).

70. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

71. (1903) 2 K.B. 740 (Eng.).

72. Reports of classic cases, including these, often are fragmented, consisting of partial transcripts of oral arguments and hearings. Such forms pose a modest cognitive tax on the modern reader when reported cases take the form of stylized judicial opinions and courtroom dialogue is found in other records.

73. See CUNNINGHAM, *supra* note 5 (discussing these cases).

74. See Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405 (2002).

75. Shepherd, *supra* note 53, at 153.

B. *Scholarship-Teaching*

The contextual approach may thus offer to revive the scholarly status once accorded to the production of teaching materials. Professors of earlier generations, especially from the 1920s to the 1950s and perhaps as recently as the 1970s, seemed to prize the value of casebooks as scholarship along with their value as teaching materials.⁷⁶ They invested considerable effort to producing books that would organize or reconceptualize a field. Famous casebook editors were all recognized in various ways as providing intellectual discoveries such as Kessler/Sharp's stunning demonstration of doctrinal contradictions through matching pairs of conflicting cases. Charles Knapp's selections were credited as "distinctive" in teasing out the emergence of new trends and themes in the case law through the mid-1970s, especially the roles of reliance and good faith.⁷⁷

The days of treating casebooks as a vehicle for such scholarly pursuits—to organize or reconceptualize a field or reveal newly discovered relations—may seem numbered, but they need not be.⁷⁸ Editors of today's popular casebooks deserve credit for scholarly discoveries in their casebook work, including Allan Farnsworth and William Young, who demonstrated the value of a casebook in establishing connections between doctrines, and Robert Hillman and Robert Summers, who presented a layer of general theories of obligation (bargain, reliance, restitution, statute, and so on) as an organizing theme.⁷⁹ Although such efforts to rethink, reorganize, and reshape occur increasingly in articles and scholarly books, there is room for doing so via teaching books, attested by the recent example of stories of outsider voices and taking a more literary or feminist turn.⁸⁰ I consider *Contracts in the Real World* to be a work of scholarship as well as an exercise in pedagogy, as the next section will elaborate.

76. See Klare, *supra* note 24, at 876.

77. *Id.* at 889.

78. E. Allan Farnsworth & W.F. Young, *A Casebook for All Seasons? Another Casebook Review*, 21 SEATTLE U. L. REV. 725, 725 (1998).

79. See ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE*, at xvii, 48–235 (6th ed. 2011).

80. See Lenora Ledwon, *Storytelling and Contracts*, 13 YALE J.L. & FEMINISM 117, 129 (2001) (reviewing AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* (2d ed. 2000)).

IV. SEQUENCE AND THEMES

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

The earliest contracts casebooks sequenced material historically, showing how case law evolved. Arthur Corbin took a transactional approach, presenting materials in the order that they occurred in contracting, from formation to discharge. Lon Fuller's 1947 book⁸¹ made the radical move to put remedies first, on the grounds that the stakes in contracts revealed by remedies pervade the entire course.⁸² An even bolder reorganization of doctrine appeared in Kessler and Sharp's 1953 book.⁸³ Doctrines were not isolated into sections for serial examination but woven pervasively, with several topics—such as consideration, excuses, and restitution—reappearing throughout.⁸⁴ Likewise, Ian Macneil's approach of ordering materials according to contract type presented issues more in their social and business context than in legal categories.⁸⁵

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

81. FULLER, *supra* note 20.

82. Sharp, *supra* note 21, at 795; Shepherd, *supra* note 53, at 152.

83. KESSLER & SHARP, *supra* note 22.

84. John P. Dawson, Book Review, 6 J. LEGAL EDUC. 405, 405–06 (1954) (reviewing KESSLER & SHARP, *supra* note 22).

85. Perhaps some of this matters little for practical purposes, since teachers can assign the casebook's materials in a different sequence to suit their needs or tastes. As Douglas Leslie quipped about Fuller's leadership, anyone can start with remedies using any book: "Just begin the course with Chapter Nine." Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 1289, 1300 (2000). On the other hand, a well-designed book often builds knowledge cumulatively. Such books cannot readily be assigned in different orders without sacrificing that design value.

(7) performing; (8) hedging; and (9) third parties.⁸⁶ In formal terms, those headings address: (1) formation; (2) unenforceable bargains; (3) excuses and termination; (4) remedies; (5) restitution and unjust enrichment; (6) interpretation, parol evidence, and the statute of frauds; (7) duties, modification, and good faith; (8) conditions; and (9) third party beneficiaries and society.⁸⁷

Among the striking features of this arrangement, remedies is neither first nor last but about in the middle—a novel placement for contracts texts. Unenforceable bargains come on the heels of formation to establish boundaries and are followed by excuses to delineate the scope of binding bargains within them. Contract remedies are followed directly by restitution, as a remedy and a theory of liability. The rest of the sequence fans out logically to explore the rest of contract's doctrinal machinery.

Nor may the contextual approach automatically produce given themes. But again the approach that I took revealed themes that likewise are novel compared to existing and historical books and much scholarship. Since the 1950s, there have been a few casebooks with a particular interdisciplinary bent, such as realism (then called functionalism) or economics.⁸⁸ Today's examples not only include such interdisciplinary perspectives but also critical theories and viewpoints, especially race, class, sexuality, and gender. These perspectives can even displace doctrine or law as a book's organizing principle. The law and economics perspective seems to have become sufficiently mature to sustain this role.

Critics lament excessive reliance on such perspectives because they can unduly complicate a book.⁸⁹ Many teachers today long for a return to the purer casebook, one consisting primarily or exclusively of cases. Opposing such nostalgia is the continued press for new perspectives, with stern reminders of the ahistorical, thin, insular flavor of the case-only approach, and championing instead a rich interdisciplinary approach thick with “details of lived human experience.”⁹⁰

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

86. CUNNINGHAM, *supra* note 5, at vii–x.

87. *Id.*

88. Dawson, *supra* note 84 (noting how Havighurst and Mueller concentrated their recent books “on function or economic ‘context’”).

89. See Michael B. Kelly, *Reflections on Barnett's Contracts, Cases and Doctrine*, 20 SEATTLE U. L. REV. 343 (1997) (book review).

90. Ledwon, *supra* note 80, at 120.

classic cases, I found a milder middle ground. What I found in reflecting on contracts from a contemporary perspective—stressing context and currency—began with common misconceptions about contracts and extended through the field’s apolitical proclivity.

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

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

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

91. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1015 (2010).

92. *Id.*

93. STEVIE WONDER, *Signed, Sealed, Delivered I’m Yours*, on SIGNED, SEALED & DELIVERED (Tamla Records 1970).

94. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 6–7 (2002); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997).

95. Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1552 (2009); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 710 & n.2 (2007).

96. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003); Robert E. Scott, *Rethinking the Default Rule Project*, 6 VA. J. 84, 85 (2003).

satisfaction of empathy. Despite allure, *Contracts in the Real World* illustrates how the settled doctrines of contract law have long served our widely accepted social and business goals. It shows how this body of ideas holds a sensible center against both extreme political positions and misguided populist intuitions.

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

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

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

As portrayed in *Contracts in the Real World*, contract law in the United States reflects neither extreme. U.S. citizens may be conservative or liberal, Republican or Democrat, even libertarian or socialist. But the country, as a whole, is none of those things and neither is its contract law. The country’s practices are capitalist and democratic, capacious notions stressing both entrepreneurship and responsibility. The nation’s contract law gives enormous but not unlimited space for freedom of contract. Of course, contract law is dynamic, adapting as society and the

economy change. And the philosophies of particular judges in individual cases affect their analysis and sometimes the resolution of a dispute. But contract law's evolution and its application by particular judges have vacillated within stable, practical boundaries.

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

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

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

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

commitment to supplying familiar context to traditional doctrine.⁹⁷

CONCLUSION

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

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

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

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

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