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CASES AND CONTROVERSIES: SOME THINGS TO DO WITH CONTRACTS CASES

Charles L. Knapp*

INTRODUCTION

Nearly a century and a half has passed since Christopher Columbus Langdell waded ashore at Harvard Law School, bringing to its benighted natives the civilizing influence of law study through the “case method.”¹ Like his namesake, Langdell has long since sailed on to a more distant shore, but his legacy remained at the heart of legal instruction throughout the twentieth century, and persists into the present day.

As a co-author of one of the two dozen or more currently-in-print Contracts casebooks,² I obviously have both a point of view about, and a personal stake in, the survival of this particular method of instruction. Whether the legal *casebook*—or any other book, in the form of bound sheets of paper—will remain a part of our academic culture much longer is clearly up for grabs, however. Electronic records have so many advantages over the printed page that, at least for many purposes, they will surely become the dominant form of preserving, retrieving, and transmitting information, if indeed they are not already. But through whatever medium, I hope that legal training will continue to retain the study of “cases” as an important component of a legal education. In this brief discussion I will ruminate a little about the various ways in which case study can contribute to law study—or at least to the study of contract law, the area with which I am most familiar.

Stretching back at least to Richard Danzig’s 1975 exploration³ of *Hadley v. Baxendale*,⁴ contracts scholars have engaged in what is

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1. See generally BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906*, at 140–60 (2009) (discussing case method).

2. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW* (7th ed. 2012).

3. Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

4. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

sometimes referred to as “legal archaeology.”⁵ They examine well-known contracts cases from a variety of angles—historical, sociological, economic, or what-have-you—to see what insights can be gleaned therefrom.⁶ Many cases familiar to several generations of law students have been subjected to this kind of inquiry, with interesting and sometimes surprising results. Besides *Hadley*, prominent cases given this sort of in-depth analysis include *Peevyhouse v. Garland Coal & Mining Co.*,⁷ *Alaska Packers’ Ass’n v. Domenico*,⁸ *Kirksey v. Kirksey*,⁹ *Mills v. Wyman*,¹⁰ *Williams v. Walker-Thomas Furniture Co.*,¹¹ and *Hoffman v. Red Owl Stores, Inc.*¹² I did a little digging in this ground myself, some years ago, with an exploration of *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*¹³ Even some unpublished studies in this genre have found their way into semi-circulation.¹⁴ These individual pieces have in turn spawned anthologies in which such case studies are collected for law students, teachers, and other interested parties.¹⁵

5. See Debora L. Threedy, *Unearthing Subversion with Legal Archaeology*, 13 TEX. J. WOMEN & L. 133, 135 (2003); see also Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1 (2009).

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

7. 382 P.2d 109 (Okla. 1962); see Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995).

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

9. 8 Ala. 131 (1845); see William R. Casto & Val D. Ricks, “*Dear Sister Antillico . . .*”: *The Story of Kirksey v. Kirksey*, 94 GEO. L.J. 321 (2006).

10. 20 Mass. (3 Pick.) 207 (1825); see Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997); see also Curtis W. Nyquist, *Contract Theory, Single Case Research, and the Massachusetts Archives*, 3 MASS. LEGAL HIST. 53 (1997).

11. 350 F.2d 445 (D.C. Cir. 1965); see Eben Colby, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625 (2002); Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89 (1994).

12. 133 N.W.2d 267 (Wis. 1965); see William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010).

13. 366 N.E.2d 1313 (N.Y. 1977); see Charles L. Knapp, *Judgment Call: Theoretical Approaches to Contract Decision-Making*, 1988 ANN. SURV. AM. L. 307.

14. In an unpublished manuscript, Professor Kellye Y. Testy has discussed the results of her research into the background of the dispute adjudicated in *Odorizzi v. Bloomfield School District*, 54 Cal. Rptr. 533 (Dist. Ct. App. 1966), which revealed facts very different from those alleged in the plaintiff’s complaint. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: TEACHER’S MANUAL 7–11 (6th ed. 2007).

15. *E.g.*, CONTRACTS STORIES (Douglas G. Baird ed., 2007); RICHARD DANZIG & GEOFFREY R. WATSON, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (2d ed. 2004).

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

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

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

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

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

17. See *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145; 9 Ex. 341.

18. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

19. *Webb v. McGowin*, 168 So. 196, 196 (Ala. Ct. App. 1935).

20. *Hamer v. Sidway*, 27 N.E. 256, 256 (N.Y. 1891).

21. See *Rockingham Cnty. v. Luten Bridge Co.*, 35 F.2d 301, 307 (4th Cir. 1929).

22. See *Hawkins v. McGee*, 146 A. 641, 641 (N.H. 1929).

23. *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256 (C.A.) (Eng.).

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

25. *Sherwood v. Walker*, 33 N.W. 919, 920 (Mich. 1887).

26. *Kirksey v. Kirksey*, 8 Ala. 131, 132 (1845).

they represent a kind of laziness on the part of casebook authors, and whether they are effective tools for actually teaching the principles they exemplify is questionable. What law student in fact does remember the *contract rule* illustrated by the broken mill-shaft, the wrong pipe, the falling block, and all the rest? These are the nursery rhymes of law study, the little vignettes that are part of the shared memory of us all. As with “Ring Around the Rosy,” however, we tend to remember the children’s game and forget the plague.²⁷

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

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

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

27. Whether “Ring around the Rosy” actually has anything to do with the Black Plague is a matter of dispute. See Ralph Slovenko, “When the Saints Go Marching In,” 28 J. PSYCHIATRY & L. 553, 554 n.3 (2000) (noting disagreement). The metaphor was irresistible, however.

28. *Raffles*, 159 Eng. Rep. 375; 2 Hurl. & C. 906.

29. 159 N.E. 173 (N.Y. 1927).

30. 146 A. 641 (N.H. 1929).

The following more or less random examples show how cases can add context to legal rules, and illustrate some property of the doctrine or rule at issue that might not be apparent just from its statement. In *Normile v. Miller*,³¹ would-be realty buyers learn that a counter-offer, like the original offer, can be freely revoked unless supported by consideration,³² and that those who “snooze” are apt to “lose.”³³ In *Dougherty v. Salt*,³⁴ a beloved nephew discovers that his late aunt’s generous monetary promise may not be enforceable even if made in what looks like a formal, “legal” document³⁵ (and incidentally, that gratuitous legal advice is apt to be worth its price³⁶). In *Plowman v. Indian Refining Co.*,³⁷ retired employees find that even if promises of pensions are made at the time of their discharge, those may not be enforceable absent some “consideration” received by their employer,³⁸ even if the court feels badly about that.³⁹ However, in *Harvey v. Dow*,⁴⁰ a father learns that an earlier generous promise to his daughter *may be* enforceable after all if it results in a substantial financial change of position on her part.⁴¹ Some of these rules are “technical,” while some are “equitable”; taken together they may seem confusing and contradictory. Encountering real people in real situations helps the student to see how and why the rules have developed as they have, and why they may apply in some situations but not in others.

If cases are helpful in understanding rules of common law, they seem well-nigh indispensable in understanding some complex statutory provisions, such as Uniform Commercial Code (UCC) section 2-207.⁴² Without the aid of one or more cases like *Brown Machine, Inc. v. Hercules, Inc.*,⁴³ this statutory rule is virtually impossible to comprehend or apply; with a concrete example, it takes on a little life of its own, and becomes potentially manageable. Somewhat the same could be said of

31. 326 S.E.2d 11 (N.C. 1985).

32. *See id.* at 18.

33. *See id.*

34. 125 N.E. 94 (N.Y. 1919).

35. *See id.* at 95.

36. *See id.* at 94.

37. 20 F. Supp. 1 (E.D. Ill. 1937).

38. *See id.* at 2, 4.

39. *See id.* at 5.

40. 962 A.2d 322 (Me. 2008).

41. *See id.* at 326.

42. U.C.C. § 2-207 (2002).

43. 770 S.W.2d 416 (Mo. Ct. App. 1989).

UCC section 2-201.⁴⁴ This provision is not nearly so complex or puzzling as section 2-207, but still, a case like *Buffaloe v. Hart*⁴⁵ can help the student understand not only how the statute does what it does, but why.

III. WHAT'S INSIDE THE BALLPARK? ALTERNATE SOLUTIONS

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

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

44. U.C.C. § 2-201.

45. 441 S.E.2d 172 (N.C. Ct. App. 1994).

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

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

In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,⁴⁶ the Iowa Supreme Court was faced with the defendant insurer's denial of coverage for a burglary from the plaintiff's office/warehouse.⁴⁷ The defendant based its denial of coverage on the absence of "marks" of "actual force and violence" on the "exterior of the premises," as required by the language of defendant insurer's policy⁴⁸—language presumably intended to avoid covering an "inside job."⁴⁹ There were such marks, in fact, but on an inside door to a chemical storage room, from which chemicals had been taken.⁵⁰ Since there apparently was little reason to think this had actually been an inside job, the defendant's stance seemed technically correct but substantively harsh. Reversing a judgment for the insurer,⁵¹ the court used the case as a vehicle for discussing generally the adhesive nature of insurance contracts and the appropriateness of using a "reasonable expectations" approach to cases like this one.⁵² Fair enough;

46. 227 N.W.2d 169 (Iowa 1975).

47. *Id.* at 171.

48. *Id.*

49. *See id.* at 172.

50. *Id.* at 171.

51. *Id.*

52. *See id.* at 176.

proponents of “modern contract law”⁵³ might well nod approvingly. But the court, in defending its wide-ranging and somewhat “legislative” approach to the case, suggested that conventional lawyering would have approached the case differently:

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

For the law student, here is a challenge: how might the plaintiff have prevailed on the basis of “familiar” and “long-accepted legal principles,” such as “ambiguity in language”?⁵⁵ One version involves stretching the meaning of “exterior” by adding a hypothetical fence around the plaintiff’s building, thus complicating the otherwise seemingly “plain meaning” of the word “exterior.”⁵⁶ Surely marks of forcible entry on the fence would then be sufficient to satisfy the policy’s terms, since the fence could be regarded as the “exterior” of the “premises.”⁵⁷ What if there were no marks on the fence, but there *were* marks on the door of the building: is the fence still the “exterior”—or is that now the door again? Another argument might involve questioning what should be seen as the “premises”: could a locked interior room be regarded as the premises, for this purpose?⁵⁸ Some arguments might be closer to the (metaphorical) fence than others, but still within the ballpark of being potentially persuasive.

The *C & J* case presents essentially a case of “interpretation,” leavened by “adhesion contract” concerns.⁵⁹ Other cases require the

53. I have elsewhere suggested using this phrase to describe mid-twentieth century contract law, “liberalized” by the influence of Realist commentators and the Uniform Commercial Code. Charles L. Knapp, *An Offer You Can’t Revoke*, 2004 WIS. L. REV. 309, 317–18.

54. *C & J Fertilizer*, 227 N.W.2d at 175.

55. *See id.*

56. *See id.* at 171.

57. *See id.*

58. *See id.*

59. *See id.* at 174–75.

examination and application of common-law doctrines, such as the distinction between “consideration,” the conventional basis for promise enforcement, and “promissory estoppel,” enforcement based on detrimental reliance. Are these concepts distinct, or do they overlap? How do you tell one from the other?

In *Katz v. Danny Dare, Inc.*,⁶⁰ plaintiff Katz, a former employee and sometime officer of defendant⁶¹ (which apparently made and sold clothing⁶²), sued to recover payments allegedly due to him under a promised pension plan.⁶³ Defendant had employed plaintiff in various capacities over the years, and for a time plaintiff had even been an officer of the company; he also happened to be the brother-in-law of defendant’s president, Harry Shopmaker.⁶⁴ When plaintiff’s health began to fail (due at least in part to an injury suffered in attempting to protect defendant’s property from a thief), Shopmaker tried to persuade him to retire.⁶⁵ Plaintiff was initially unwilling to do so, but finally agreed to retire only on the strength of a promise made by Shopmaker (and formally ratified by defendant’s board of directors) that defendant would pay him a monthly pension for life.⁶⁶ Defendant made the payments initially, but eventually ceased, and plaintiff sued to recover the amounts due.⁶⁷ Despite plaintiff’s invocation of earlier Missouri case law⁶⁸ and section 90 of the *Restatement of Contracts*⁶⁹ a Missouri trial court gave judgment for the defendant, accepting defendant’s argument that since plaintiff would have been fired anyway if he refused to voluntarily retire, he had suffered no actual “detriment” by quitting his job.⁷⁰ A Missouri court of appeals reversed, however, on the ground that Katz had indeed detrimentally relied by voluntarily retiring, and his case

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

61. *See id.* at 122.

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

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

64. *See id.* at 122.

65. *See id.* at 122–23.

66. *See id.* at 123.

67. *See id.*

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

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

70. *See Katz*, 610 S.W.2d at 123–24.

therefore came within the rule of section 90.⁷¹

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

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

71. *See id.* at 125–26.

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b.

73. *Katz*, 610 S.W.2d at 124.

74. *See id.* at 122 (Katz had held more responsible positions at Danny Dare during the course of his employment there; as noted above, he was the president's brother-in-law.).

75. *See id.* at 123.

76. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79(b) cmt. c.

77. *See generally*, Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010). Many similar cases have been collected by Professor Threedy. *See id.* at 753 n.23.

78. *See Syester v. Banta*, 133 N.W.2d 666, 669–71 (Iowa 1965).

disenchanted with the defendant and actually engaged a lawyer to sue, but agreed to settle in exchange for a partial refund of her payments.⁷⁹ Eventually, however, she did sue in tort on the basis of fraudulent misrepresentation.⁸⁰ This time she followed through, recovering compensatory and punitive damages substantially greater than the sum she had received in the earlier settlement.⁸¹ In *Syester v. Banta*,⁸² the jury at trial apparently believed the plaintiff's story that she had been told lies on which she relied, lies that were both fraudulent and material, which induced her to buy more dance lessons than she could conceivably benefit from, or even use.⁸³ Whether she could reasonably have believed those lies is of course a crucial issue under the law of torts, but an issue of fact that a jury could (and did) decide in her favor, given all the factors at play in the case.⁸⁴

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

79. *Id.* at 671–72.

80. *Id.* at 673.

81. *Id.* at 669, 673.

82. 133 N.W.2d 666.

83. *See id.* at 674.

84. *See id.* at 673.

85. Plaintiff Syester was a widow, of advanced age, and apparently not in affluent circumstances, given that she worked as “coffee girl” in a cafeteria. *See id.* at 669. On the other hand, as Professor Threedy has pointed out, she was able to come up with some substantial amounts of cash for her dancing lessons. Threedy, *supra* note 77, at 768 n.94 and accompanying text. Professor Threedy has questioned the tendency to see cases like this one through lenses of gender, perhaps of gender bias. *See generally* Threedy, *supra* note 77.

86. *Syester*, 133 N.W.2d at 672.

87. *See id.* at 673; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).

88. *See Syester*, 133 N.W.2d at 670–72.

a second time? What happened to that bit of folk wisdom, “Fool me once, shame on you; fool me twice, shame on me”?

A possible answer lies in an alternate characterization of the plaintiff’s case for rescission, one that the *Syester* court did not consider: perhaps the settlement agreement was procured not merely by fraudulent misrepresentations, but by “undue influence.” This defensive doctrine can apply when the parties are in a distinctly unequal position—one dominant, psychologically at least, and the other subservient—and the former takes unfair and unreasonable advantage of that fact.⁸⁹ This may happen when the parties are in a formal fiduciary relationship, but the doctrine can also apply when there is a de facto relation of dependence that the dominant party is aware of, and exploits.⁹⁰ Mrs. Syester’s former dance instructor testified eloquently, if somewhat ungrammatically, about the campaign of persuasion that he engaged in to get plaintiff to abandon her claim.⁹¹ The combination of factors in the case makes it almost a poster child—or perhaps, literally, a “textbook case”—for the employment of an undue influence rationale.

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

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

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

89. See RESTATEMENT (SECOND) OF CONTRACTS § 177.

90. *E.g.*, *Broomfield v. Kosow*, 212 N.E.2d 556 (Mass. 1965).

91. See *Syester*, 133 N.W.2d at 671–72.

92. 366 N.E.2d 1313 (N.Y. 1977).

notice of its intention to exercise an option to renew a lease on restaurant premises could be excusable on equitable grounds, allowing the tenant to retain its leasehold.⁹³ The seven judges split 4–3 in favor of the tenant,⁹⁴ after three lower courts had divided over the issue.⁹⁵ Even without a dissent, Judge Wachtler’s majority opinion would be interesting for its structure: the opinion first marshals considerable authority—New York case law, treatises, the *Restatement (Second) of Contracts*—for the proposition that a notice exercising an option must be given within the time specified in order to be effective.⁹⁶ “Thus,” the court continued, “the tenant had no legal right to exercise the option when it did, but to say that is simply to pose the issue; it does not resolve it. Of course the tenant would not be asking for equitable relief if it could establish its rights at law.”⁹⁷

For the present-day student, probably used to encountering the distinction between law and equity only in the context of procedural rules (if at all), this may come as something of a surprise. The majority opinion then proceeds to point out various equitable factors in the case: the tenant made valuable improvements (some apparently after the deadline for renewal had passed); the landlord was aware both of the tenant’s improvements and of its apparent ignorance of the notice requirement (ignorance which the landlord made no effort to dispel); and there may well have been negligence but there was no bad faith on the tenant’s part.⁹⁸ Conceding the danger that a tenant in some later case could opportunistically delay giving notice and then claim that its lateness was merely excusable negligence, the majority nevertheless concluded that *this* tenant should not be denied equitable relief merely because some later tenant might be found to have acted in bad faith: “[b]y its nature equitable relief must always depend on the facts of the particular case and not on hypotheticals.”⁹⁹

Writing in dissent, Chief Judge Breitel countered by stressing the need for a “reliable” rule, to avoid the “instability and uncertainty” that would allow for “*ad hoc* dispensations in particular cases.”¹⁰⁰ This is an area, he asserted, where “opportunities for distortion and manipulation

93. *See id.* at 1316.

94. *Id.* at 1318, 1322.

95. *See id.* at 1314.

96. *See id.* at 1316.

97. *Id.*

98. *See id.* at 1315, 1317–18.

99. *Id.* at 1318.

100. *Id.* at 1321 (Breitel, C.J., dissenting).

are . . . great.”¹⁰¹ Whichever argument one agrees with, the opposing opinions force the reader to face squarely the conflicting policies at stake and illustrate the difference in perspective between “law” and “equity.”

Another example of dueling opinions that nicely frame the issues is found in *Sherrodd, Inc. v. Morrison-Knudsen Co.*¹⁰² In that case, a subcontractor claimed he was deceived by the general contractor into signing a written excavation contract for a lump-sum price he already knew to be unreasonably low, because the subcontractor had begun the work and he feared not getting paid for the work already done.¹⁰³ He claimed to have agreed to sign only on the strength of a promise that he would be fairly treated despite the existence of the writing.¹⁰⁴ Despite clearly stated allegations of fraud (and more than a suggestion of wrongful duress, on the facts), a majority of the Montana Supreme Court agreed with Chief Justice Turnage’s opinion that the parol evidence rule barred consideration of the plaintiff’s claim.¹⁰⁵ Despite that rule’s traditional exception for fraud, the Court relied on a narrow “exception to the exception,” finding that because the asserted fraudulent promise directly contradicted the writing, it could not be proven.¹⁰⁶ Parties to a contract must be able to rely on its express terms without fear that the law will later permit the other party to change those terms, the court asserted, otherwise “commercial stability” will be destroyed.¹⁰⁷

Writing for a two-person minority, Justice Trieweiler argued that the majority applied a legally dubious precedent with a potential for “terrible injustice.”¹⁰⁸ Alluding to the majority’s concern for “reliance” on contracts,¹⁰⁹ the dissent countered that “general contractors who induce subcontractors to enter into a written agreement by fraudulent representations should find no security in the piece of paper which resulted from their culpable conduct.”¹¹⁰ Again, whichever side one ultimately agrees with, the judges themselves have presented the arguments that each side must address.

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

101. *Id.* For further discussion of the *J.N.A.* decision, see Knapp, *supra* note 13.

102. 815 P.2d 1135 (Mont. 1991).

103. *See id.* at 1136.

104. *Id.*

105. *See id.* at 1136–37.

106. *See id.* at 1137.

107. *Id.* at 1137 (quoting *Baker v. Bailey*, 782 P.2d 1286, 1288 (Mont. 1989)).

108. *Id.* at 1139 (Trieweiler, J., dissenting).

109. *See id.* at 1137 (majority opinion).

110. *Id.* at 1139 (Trieweiler, J., dissenting).

in cases that raise similar issues but decide them differently. A pair of familiar “chestnut” cases¹¹¹ that have this quality is *Mills v. Wyman*¹¹² and *Webb v. McGowin*.¹¹³ (Some casebook editors add a third: *Harrington v. Taylor*.¹¹⁴) Without recounting here a set of stories which most contracts teachers already know well, suffice it to say that both factually and doctrinally these are cases that, particularly when taken together, are challenging and (potentially at least) pedagogically useful. Substantially more significant in terms of policy issues are the opinions of Federal Court of Appeals Judge Learned Hand and California Supreme Court Justice Roger Traynor in the classic pair of cases, *James Baird Co. v. Gimbel Bros., Inc.*¹¹⁵ and *Drennan v. Star Paving Co.*¹¹⁶ Although decided a quarter-century later, Traynor’s application of promissory estoppel in a withdrawn-bid case has been seen as a direct response to Hand’s earlier attempt to confine that doctrine to non-commercial situations,¹¹⁷ and contracts casebooks have traditionally presented these decisions as a contrasted pair.¹¹⁸ Traynor’s view may have prevailed in that particular line of cases,¹¹⁹ but strong differences of opinion remain among judges and commentators about the proper place of promissory estoppel in general contract law.¹²⁰

V. HOW’RE THEY DOING? LAWYERS AT WORK

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

111. See *supra* Part I.

112. 20 Mass. (3 Pick.) 207 (1825).

113. 168 So. 196 (Ala. Ct. App. 1935).

114. 36 S.E.2d 227 (N.C. 1945).

115. 64 F.2d 344 (2d Cir. 1933).

116. 333 P.2d 757 (Cal. 1958).

117. See Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 56 U. CIN. L. REV. 1169 (1997).

118. E.g., IAN AYRES & GREGORY KLASS, *STUDIES IN CONTRACT LAW* 292, 295 (8th ed. 2012); KNAPP ET AL., *supra* note 2, at 248, 251.

119. See KNAPP ET AL., *supra* note 2, at 256.

120. See e.g., Victor P. Goldberg, *Traynor (Drennan) v. Hand (Baird): Much Ado About (Almost) Nothing*, 3 J. LEGAL ANALYSIS 539 (2011).

case reports are not always detailed enough for that—at least issues can be raised, and sometimes the answers seem clear.

In *Wartzman v. Hightower Productions, Ltd.*,¹²¹ a group of entrepreneurs hatched a plan to create and exploit a “flagpole sitting” champion—to be given the nom de pole of “Woody Hightower”¹²²—to appear at various venues such as “concerts, state fairs and shopping centers.”¹²³ They engaged attorney Wartzman to advise them in incorporating their venture and in raising money through the sale of stock to investors.¹²⁴ After the entrepreneurs formed the corporation, raised substantial money, and began operations (including the selection of a young man to be their Woody),¹²⁵ Wartzman informed his clients that no more stock could be sold because the corporation was “structured wrong,” which apparently meant that the state’s securities law had not been complied with.¹²⁶ To remedy the problem, he recommended that they consult with a “securities specialist”¹²⁷—something that Wartzman clearly was not. They asked Wartzman to foot the bill (an estimated cost of \$10,000–\$15,000), but he refused.¹²⁸ Faced with the prospect of substantial additional legal fees and an indefinite delay in using funds already raised, they ran Woody back down the flagpole.¹²⁹ Their corporation sued Wartzman’s law firm for breach of contract and negligence.¹³⁰ A trial court awarded the corporation damages for the amounts it lost in promoting the aborted venture, and the Maryland appellate court affirmed.¹³¹

Wartzman’s firm argued that the plaintiff should have been denied recovery because of a failure to “mitigate” its damages,¹³² but this met with a stony judicial response: the plaintiff did not have the money to continue paying legal expenses, and could not have raised more money because of the defendant’s lack of competence.¹³³ Defendant might have

121. 456 A.2d 82 (Md. Ct. Spec. App. 1983).

122. *Id.* at 84.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 84–85.

127. *Id.* at 84.

128. *Id.* at 85.

129. *See id.*

130. *Id.*

131. *Id.* at 87, 89.

132. *Id.* at 85.

133. *Id.* at 88–89.

avoided liability by showing that the plaintiff's venture would have failed anyway, the court suggested,¹³⁴ but it had the opportunity to prove that at trial, and failed to do so.¹³⁵ Plaintiff's inability to prove its likelihood of success precluded any recovery of expectation damages for lost profits; conversely, defendant's inability to prove the likelihood of plaintiff's *failure* left the defendant open to liability for plaintiff's "reliance damages."¹³⁶ However, had the defendant been willing to assume the burden of paying to have the needed additional legal services performed by someone else, then Woody could have resumed his perch atop the pole, and the plaintiff's venture could have gone ahead. In that case the defendant would have had to swallow that cost, but it would probably have avoided the far greater liability ultimately imposed in this lawsuit, either because the venture succeeded (in which event the plaintiff wouldn't have incurred those losses after all), or it failed, enabling the defendant to meet its burden of proof on that crucial issue. Either way, future lawyers wouldn't still be reading, a generation later, the cautionary tale of *Woody v. Wartzman*.

A somewhat better exhibition of lawyering—on both sides—can be found in *Sackett v. Spindler*,¹³⁷ a 1967 case involving the sale of a local newspaper in a small California town.¹³⁸ The contract of sale provided for a series of advance payments by the buyer, followed by a final payment in exchange for delivery to the buyer of all the stock in the publishing corporation.¹³⁹ The buyer made the first three payments more or less as scheduled, but when it came time for the final payment, his check bounced.¹⁴⁰ The seller in the meantime had placed the stock certificates in escrow, reclaiming them when the buyer's check failed to clear.¹⁴¹ The buyer by this time was apparently dealing not only with health problems of an unspecified nature, but also with divorce proceedings.¹⁴² Neither of those factors provided him with a legal excuse for nonperformance under the contract, but they may in fact have made it difficult for him to perform as promised, as well as quite probably diminishing his enthusiasm for embarking on this publishing venture.

134. *Id.* at 88.

135. *Id.*

136. *Id.* at 86–88. See RESTATEMENT (SECOND) OF CONTRACTS § 349 cmt. a (1981).

137. 56 Cal. Rptr. 435 (Ct. App. 1967).

138. *Id.* at 438.

139. *Id.*

140. *Id.* at 439.

141. *Id.* at 438.

142. *Id.* at 439.

Over the next several weeks the buyer kept proclaiming his intention to (eventually) pay, while the seller continued to assert his right to immediate payment.¹⁴³ In the meantime the value of the newspaper as a going enterprise sank lower and lower.¹⁴⁴ At one point the seller declared that he would treat the buyer as being in total breach, but shortly retreated from that position.¹⁴⁵ Eventually, though, the seller did sell the shares to someone else—at a price well below what this buyer had promised to pay¹⁴⁶—and sued the buyer for the conventional remedy of expectation damages: the difference between the promised contract price and the lower price for which the property was eventually sold to another.¹⁴⁷

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

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

143. *Id.* at 438–39.

144. *Id.* at 433.

145. *Id.* at 441–42.

146. *Id.* at 442–43.

147. *Id.* at 445–46.

148. *See id.* at 440–41.

point repudiating the contract, which would have put him immediately in total breach. And the buyer did not too quickly assert his right to treat the contract as terminated. Eventually the seller did make himself whole, except for the cost of a lawsuit, making the best of what turned out to be a bad deal. Possibly with hindsight the buyer should have tried to buy his way out of the deal once his ability (or willingness) to go through with it had been undermined.

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

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

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

149. See RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981).

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

favorable final outcome, or one that is at least final enough to prompt the losing side to settle rather than prolong the litigation.

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

VII. WHO ELSE IS INVOLVED HERE? WIDENING OUR PERSPECTIVE

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

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

151. 694 F. Supp. 2d 1302 (S.D. Fla. 2010).

152. *Id.* at 1307.

153. *Id.* at 1308–09.

154. *See id.* at 1318–21.

155. *Id.* at 1329.

156. *Id.*

157. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011).

upon which stood a three-unit apartment building.¹⁵⁸ The Messerlys had previously bought this property from a Mr. Bloom, who had installed on it a septic tank that was (unknown to the Messerlys) in violation of the local health code.¹⁵⁹ The Messerlys operated the property as an income-producing rental for a few years, then sold it to another couple, the Barneses.¹⁶⁰ After a few years, the Barneses defaulted on their purchase and deeded the property back to the Messerlys, after which the Pickleses made their contract of purchase.¹⁶¹ Almost immediately afterward the septic tank problem came (literally) to light when sewage began visibly seeping from the ground on the property.¹⁶² The Board of Health commenced a proceeding against the Messerlys and the Pickleses to enjoin habitation of the property until the violation was removed,¹⁶³ thus giving this case its rubric, *Lenawee County Board of Health v. Messerly*.

The Messerlys in turn sued the Pickleses for foreclosure and a deficiency judgment, whereupon the Pickleses counter-sued the Messerlys—for fraud and rescission—and also sued the Barneses—for fraud and misrepresentation.¹⁶⁴ At the trial level the Board of Health got its injunction, and withdrew from the case,¹⁶⁵ after which the court found as a fact that there had been no fraud or misrepresentation by either the Barneses or the Messerlys and dismissed the Pickleses' actions against both couples.¹⁶⁶ The Pickleses appealed the trial court's judgment in denying rescission as against the Messerlys, and an intermediate appellate court agreed with the Pickleses, ruling that since both buyers and sellers had in fact been ignorant of the unlawful and unhealthy condition of the property, there had been a mutual mistake of fact sufficient to justify granting rescission in their favor.¹⁶⁷ The case then went up to the Michigan Supreme Court, which reversed again, on the basis of an "as is" clause in the buyers' contract.¹⁶⁸

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

158. *Lenawee Cnty. Bd. of Health v. Messerly*, 331 N.W.2d 203, 205 (Mich. 1982).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 205–06.

165. *Id.* at 206.

166. *Id.*

167. *Lenawee Cnty. Bd. of Health v. Messerly*, 295 N.W.2d 903, 908–09 (Mich. Ct. App. 1980).

168. *Lenawee Cnty.*, 331 N.W.2d at 210–11.

famous “pregnant cow” case, *Sherwood v. Walker*,¹⁶⁹ without having to do a full-scale analysis of that case in all its aspects.¹⁷⁰ In reviewing the lower court’s grant of rescission based on mutual mistake, the appellate court addressed the *Sherwood* decision, in which Michigan’s high court had applied the doctrine of mutual mistake to relieve the seller of a contract where “the very nature of the thing” being sold was different than the parties had believed it to be.¹⁷¹ In *Sherwood* the issue was whether the cow in question was thought by both parties to be incapable of breeding at the time of sale;¹⁷² it was later discovered to be pregnant.¹⁷³ The court held that if this was truly a mutual mistake, it could be a basis for rescission by the seller.¹⁷⁴ Expressing some doubt as to the outcome of that case,¹⁷⁵ the Michigan Supreme Court in any event chose to abandon *Sherwood*’s rhetoric in favor of the *Restatement (Second) of Contracts*’ “balancing of factors” approach,¹⁷⁶ and concluded that the mistake was both “mutual” in fact and also “material” enough under the *Restatement*’s approach to justify rescission.¹⁷⁷ However, the court also went on to rely on the *Restatement* for the proposition that the parties might, by appropriate language in their contract, assign the risk of mistake to one party or the other.¹⁷⁸ These parties had done that, the court ruled, by providing in their contract that the buyer would accept the property “as is.”¹⁷⁹

Aside from the court’s somewhat problematic (in my view) reliance on the contract’s language, it is instructive to ask how—in the absence of that language—a court should decide this case under the *Restatement*’s “allocation of risk” rule of “reasonableness.”¹⁸⁰ Two

169. 33 N.W. 919 (Mich. 1887).

170. As mentioned above, *Sherwood* would clearly be on anyone’s list of classic contracts “chestnuts.” See *supra* note 25 and accompanying text.

171. *Lenawee Cnty.*, 331 N.W.2d at 208 (quoting *Sherwood*, 33 N.W. at 923).

172. 33 N.W. at 919–20.

173. *Id.* at 920.

174. *Id.* at 923–24.

175. After opining that the *Sherwood* decision did not provide a “satisfactory analysis” and depended on an “inexact and confusing distinction,” the *Lenawee County* court, while not overruling that decision, asserted that *Sherwood*’s holding in the future would be limited to its facts—awaiting application, presumably, to the next pregnant cow case that comes along. See *Lenawee Cnty.*, 331 N.W.2d at 209.

176. *Lenawee Cnty.*, 331 N.W.2d at 209–10; see also RESTATEMENT (SECOND) OF CONTRACTS § 152, 154 (1981).

177. *Lenawee Cnty.*, 331 N.W.2d at 209–10.

178. *Id.* at 210–11 (citing RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. a).

179. See *Lenawee Cnty.*, 331 N.W.2d at 211.

180. See RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. c.

potentially relevant factors are apparent from the court's opinion, although neither is emphasized. The first is that Bloom—who was not a party to the case, and whose whereabouts the court never discussed—is the one initially responsible for the whole problem.¹⁸¹ If Bloom had not installed a non-conforming (and apparently improperly functioning, at least eventually) septic system, the problem would not have arisen.¹⁸² The second factor is that during the period of the Barneses' ownership, they requested and received from the Messerlys permission to sell off an acre of land that was originally part of the parcel.¹⁸³ If that acre of land had been retained, it would have been possible to preserve the residential character of the property by installing an appropriate (much larger) septic field.¹⁸⁴ As it was, the amount of land remaining would not support that corrective action, making the property in its reduced state useless for residential purposes, and essentially valueless.¹⁸⁵ If this remedial measure indeed is no longer feasible, then we have here an unavoidable loss of value. And assuming the trial court's findings of fact are correct, none of the parties to the lawsuit was guilty of knowing the true facts and misrepresenting or wrongfully concealing them.

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

181. *Lenawee Cnty.*, 331 N.W.2d at 206.

182. *See id.*

183. *Id.* at 205, 207.

184. *Id.* at 207.

185. *Id.*

been passed backward to end up ultimately on Bloom, but that appears not to have been possible, either practically or legally.

Another case where a non-party appears to have played a crucial role is *Morin Building Products Co. v. Baystone Construction, Inc.*,¹⁸⁶ a federal case that arose in Indiana and reached the Seventh Circuit Court of Appeals in 1983.¹⁸⁷ On its face a simple construction dispute, the case is notable for three things: (1) an interesting legal issue, (2) the participation of Circuit Judge Richard Posner, and (3) the brooding omnipresence of General Motors, Inc. Plaintiff Morin, a subcontractor, had contracted with defendant Baystone, a general contractor, to erect the aluminum walls called for as part of the defendant's performance of its general contract to build an addition onto one of GM's Chevrolet plants in Muncie, Indiana.¹⁸⁸ Incorporating language from the general contract as well as adding some of its own, the Morin/Baystone subcontract essentially called for the finish on the new aluminum walls to match the finish on the walls of the already existing building, to a degree satisfactory to GM's authorized agent.¹⁸⁹ When the work was done, GM's representative declared it unacceptable, and rejected it, so Baystone refused to pay Morin, and instead hired another contractor to redo the work.¹⁹⁰ Morin sued Baystone to collect the contract price for the work it had done.¹⁹¹ Morin prevailed in the trial court, which held that because the evidence showed plaintiff's performance to have been objectively acceptable to a reasonable person, it should not have been rejected.¹⁹²

On appeal, Judge Posner was clearly torn between the apparent strength of contract language that gave GM unfettered discretion in granting or withholding its approval, and the well-established common law rule that such conditions of "satisfaction" should, if at all possible, be construed to require only "objective" (reasonable-person) satisfaction.¹⁹³ This is particularly so where the performance at issue is one calling principally for commercial utility, rather than the expression

186. 717 F.2d 413 (7th Cir. 1983).

187. *Id.* at 413.

188. *Id.* at 414-17.

189. *Id.* at 414.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 414-15 (discussing the approach stated in RESTATEMENT (SECOND) OF CONTRACTS § 228 (1979)).

of “personal aesthetics” or the achievement of “artistic effect.”¹⁹⁴ After a lengthy opinion in which he strove mightily to find some wiggle-room in the contract language, Judge Posner threw in the towel and said, essentially: “We’re a federal court here, we have to follow state contract law, and the district court judge is an experienced Indiana lawyer, so there you have it; no paternalism here, for heaven’s sake.”¹⁹⁵ The “foundations of freedom of contract,” he concluded, happily remain intact.¹⁹⁶ In other words, General Motors, as the party with the power, is still free to do whatever it wants, to whomever it wants—except the Morin Building Products Co.

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

Sometimes the person in the wings, although not a party to the lawsuit we are reading, is nevertheless a party to one or more related suits. An example can be found in the 1997 case of *Locke v. Warner Bros., Inc.*¹⁹⁷ Here the off-stage (or in this case, off-screen) person was movie actor/director Clint Eastwood, who bore somewhat the same relationship to defendant movie production company Warner Brothers as GM did to defendant Baystone in *Morin*. Eastwood had previously ended a long-term personal and professional relationship with actress and aspiring director Sondra Locke, an event which precipitated “palimony” litigation that eventually culminated (at least temporarily) in a settlement agreement.¹⁹⁸ The settlement agreement involved not only substantial

194. *See id.* at 415–16.

195. *See id.* at 415–17.

196. *See id.* at 417.

197. 66 Cal. Rptr. 2d 921 (Ct. App. 1997).

198. *See id.* at 922.

payments by Eastwood to Locke, in money and real property, but also Eastwood's agreement to cause Warner Brothers to enter into a "development deal" with Locke—an arrangement that would guarantee substantial payments to her from Warner over a three-year period, plus the possibility of additional payoff (both financial and professional) should Warner accept for production one or more of her projects or employ her as a director.¹⁹⁹

Time passed and Locke received from Warner her guaranteed payment, but nothing more; no project of hers was chosen by Warner for further development nor was she employed to direct any film.²⁰⁰ She then sued Warner for fraud and breach of contract, claiming that Warner from the beginning had intended not to accept any of her projects, pursuant to an agreement to that effect with Eastwood²⁰¹ (who in fact had indirectly reimbursed Warner for the payments it made to her²⁰²). There was some evidence of this in communications between Warner executives.²⁰³ A California trial court granted Warner summary judgment on all of Locke's claims, however, ruling that Warner had no contractual duty to actually approve any of her projects, because under their contract it had non-reviewable discretion to make such artistic judgments of her work, pro and con.²⁰⁴

On appeal, a California court of appeal reversed for trial, declaring that while the implied covenant of good faith did not require Warner to actually accept any of her projects, it might at least require that Warner consider them in good faith and use its honest judgment in assessing their merits, rather than categorically declining even to consider them.²⁰⁵ If Locke's story was true, Eastwood—like GM, above²⁰⁶—had manipulated the defendant to behave in a way that violated the rights of the plaintiff in this lawsuit. Unlike GM, however, which may have paid no price for its actions, Eastwood was also sued by Locke for fraud (in procuring her agreement to the Locke-Warner contract); that suit was

199. *Id.* Her contract with Warner guaranteed Locke a total of \$750,000 over a three-year period. *Id.*

200. *Id.*

201. *See id.* at 922–23.

202. *Id.* at 922.

203. *Id.* at 923.

204. *Id.* at 923–24.

205. *Id.* at 926–27.

206. *See supra* text accompanying notes 186–95.

apparently settled at the last minute, when jury deliberations had actually begun.²⁰⁷

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

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

*Berryman v. Kmoch*²⁰⁸ provides one example of this genre. In that case, a Colorado real estate developer claimed that he had an enforceable 120-day written option to buy certain Kansas farmland, which the farmer/seller breached by selling to another buyer before the 120 days had expired.²⁰⁹ The buyer, Kmoch, claimed that he had requested that amount of time to consider his purchase because he would need to find investors to participate in the venture before going ahead.²¹⁰ Eventually, after the buyer had attempted to enforce the agreement, the seller, Berryman (who by this time had sold to another buyer) sued for a declaratory judgment that the option was not enforceable.²¹¹ The court analyzed the transaction both for the presence of consideration and the possible application of promissory estoppel, and concluded that neither would apply to prevent the seller's revocation of his offer to sell.²¹²

But along the way, in the course of telling this story, the court writes as follows: "Berryman called Kmoch by telephone and asked to be released from the option agreement. *Nothing definite was worked out between them.*"²¹³ This call was some five weeks or so after the initial transaction, and we know from the facts that the buyer really hoped that this deal would go through, while by this time the seller did not.²¹⁴ Even if an option is not legally enforceable and the offer is therefore a

207. See KNAPP ET AL., *supra* note 2, at 497–98.

208. 559 P.2d 790 (Kan. 1977).

209. *Id.* at 792–93.

210. *Id.* at 794.

211. *Id.* at 792–93.

212. *Id.* at 793–95.

213. *Id.* at 793 (emphasis added).

214. See *id.* at 792.

revocable one, there might still be a claim that the offer was actually accepted before it was revoked. So a material issue here could be: was the offer revoked during that conversation? Ordinarily, we would assume that when an offeror communicates his intention not to perform, this in effect amounts to a revocation of his offer. But here we are told that the seller “asked to be released.”²¹⁵ That suggests he may have considered himself bound—legally, or at least morally—to keep the offer open. Did he nevertheless revoke?

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

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

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

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

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

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

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

215. *Id.* at 793.

216. 650 N.E.2d 347 (Ind. Ct. App. 1995).

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

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

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

217. *Id.* at 347–48.

218. *Id.* at 348.

219. *Id.*

220. *Id.*

221. *Id.* at 348.

222. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

223. 168 So. 196 (Ala. Ct. App. 1935). See *supra* note 113 and accompanying text.

224. *Webb*, 168 So. at 196–97.

process.²²⁵ The trial court sustained defendant's demurrer on the ground of lack of consideration, because the alleged promise occurred only after the plaintiff's heroic act had been performed.²²⁶ "Past consideration is not consideration," as the legal maxim has it.²²⁷ But the appellate court held that in cases such as this "the subsequent promise to pay is an affirmation or ratification of the services rendered carrying it with the presumption that a previous request for the service was made."²²⁸

So what the court wanted to see was a previous request from McGowin? Well, what if, as the plaintiff stood poised on the edge of the opening above McGowin's head, McGowin had looked up, perceived his danger, and cried out "Help!!" If Webb replies, "What's it worth to you?" and McGowin answers, "Fifteen dollars every other week for the rest of your life!," after which Webb takes the fall, then the court has the actual bargained-for exchange it seems to want, instead of merely a "presumed" one. Of course, as students immediately perceive, it also has a probable case of duress.²²⁹ What *Webb* really presents is a case where the doctrine of consideration is not adequate to get the court to where it wants to go.²³⁰ Instead of a problematic legal fiction of bargain, based on a non-existent preliminary request, the court should simply declare that this is an appropriate case for recognizing the enforceability of a promise made for a benefit already received.²³¹

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

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

We have already seen in *Katz v. Danny Dare*²³² a case where what

225. *Id.*

226. *Id.* at 197.

227. JOSEPH M. PERILLO, CALAMARI & PERILLO'S CONTRACTS § 5.2 (6th ed. 2009).

228. *Webb*, 168 So. at 198.

229. This assumes that Webb had sufficient control over the block that he could either let it hit McGowin or not. (Although seemingly a stretch, this is essentially what Webb alleged in his complaint.) In that case, Webb would appear to have obtained McGowin's promise by (in effect) an improper threat, amounting to duress. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

230. This is what the concurring judge in effect admits. *See Webb*, 168 So. at 199.

231. As the *Restatement (Second) of Contracts* does, in section 86. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt d, illus. 7 (1981) (based on *Webb* case).

232. 610 S.W.2d 121 (Mo. Ct. App. 1980); *see supra* text accompanying notes 60–76.

otherwise might have seemed an irrational act is revealed as not only rational, but all too human: the president of the defendant corporation was willing to promise plaintiff Katz a lifetime pension if he would retire voluntarily, even though as an at-will employee he could simply have been fired, because Katz was the president's brother-in-law, and considerations of love, loyalty, and family/marital harmony were collectively stronger than mere efficiency.²³³

If the plaintiff retirees were to be believed, similar promises were made in *Plowman v. Indian Refining Co.*²³⁴ to a group of senior employees who also could simply have been fired outright.²³⁵ The defendant's agent offered no explanation, other than possible altruism on the company's part.²³⁶ In that case, however, a more plausible motive for defendant's seeming generosity could have been found in the desire to preserve a different kind of harmony: the defendant may have wanted to cut its labor costs while at the same time keeping its remaining work force together and happy until the proposed sale of the company had been accomplished.²³⁷

Intra-family tensions also might have been at work in *Ray v. William G. Eurice & Bros.*,²³⁸ a 1952 Maryland case. Defendant construction firm, owned and operated by two brothers, entered into a written contract to build a home for the plaintiffs, a married couple, only to later repudiate that contract angrily and declare unwillingness to perform.²³⁹ Although somewhat complex facts involving several draft versions of the contract enabled the defendant's officers to plausibly (at least to the trial court) claim that they had actually not intended to sign the particular document in question,²⁴⁰ a more believable explanation lies in the relative roles of the two brothers. One, John, appears to have handled the business side; the other, Henry, managed the construction process.²⁴¹ The latter brother took little or no part in the negotiation of the contract,

233. *Katz*, 610 S.W.2d at 122–23.

234. 20 F. Supp. 1 (E.D. Ill. 1937).

235. *Id.* at 2.

236. *See id.*

237. The promises that defendant Indian Refining made to the plaintiff retirees all required them to come to the plant and pick up their checks at the office, presumably when the other employees would be picking up theirs. *See id.* at 3. Assuming the plaintiffs truly were promised lifetime pensions, the prospect of selling its business could also explain why the defendant was willing to make that part of its promises orally but not in writing.

238. 93 A.2d 272 (Md. 1952).

239. *Id.* at 274–75.

240. *Id.* at 275.

241. *See id.* at 275–76.

but complained violently about some of its terms once he eventually focused on the details.²⁴² This shouldn't change the outcome of the case—the appellate court later reversed the trial court and held the brothers' firm liable for breach of contract²⁴³—but it does provide an explanation for otherwise seemingly irrational behavior on Henry's part.

X. WHAT'S GOING ON HERE? THE WORLD OUTSIDE THE COURTROOM

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

The *Plowman*²⁴⁴ case, for instance, takes place against the background of the Great Depression of the 1930s. That context may account for the behavior of the defendant employer, trying to keep its business afloat, and points up the predicament of the plaintiff employees, discharged at a time when they were unlikely to find other employment. The social setting is also reflected in the *Plowman* court's lengthy discussion of society's responsibility to provide for the needs of retiring workers,²⁴⁵ a responsibility that was, at that point, still unmet—Social Security came later.

Another case perhaps reflective of its time and place is *Alaska Packers' Ass'n v. Domenico*,²⁴⁶ the well-known 1902 case involving a dispute between a salmon cannery and the men it had hired to fish for a season in Alaskan waters.²⁴⁷ The plaintiffs claimed that the defendant had agreed to their demands for an increase in their rate of compensation, following a dispute about working conditions.²⁴⁸ A trial court found a lack of consideration for the asserted promise, but enforced it anyway;²⁴⁹ the appellate court agreed as to lack of consideration, but held that fatal to plaintiffs' claim.²⁵⁰ Like *Plowman*, the *Alaska Packers'* case was actually decided on the narrow,

242. *Id.* at 276.

243. *Id.* at 280.

244. *Plowman v. Indian Ref. Co.*, 20 F. Supp. 1 (E.D. Ill. 1937).

245. *See id.* at 5.

246. 117 F. 99 (9th Cir. 1902).

247. *See id.* at 555.

248. *Id.*

249. *Domenico v. Alaska Packers' Ass'n*, 112 F. 554, 556–57 (N. D. Cal. 1901).

250. *Alaska Packers' Ass'n*, 117 F. at 102–05.

“technical” basis of lack of consideration, but some have seen it as a paradigm example of duress at work.²⁵¹ Others, perhaps more sympathetic to the workers’ side of things, may see it not just as a “contract” case, but as a “strike”—a labor dispute, decided at a time when most courts did not look favorably on the efforts of workers to organize and bargain collectively.²⁵²

Other cases arise or are decided against a backdrop of national or even world events, sometimes reflected in the court’s opinion, sometimes not. A dramatic example is the 1949 decision in *Batsakis v. Demotsis*,²⁵³ in which a Texas appellate court enforced a 1942 agreement made between two Greek nationals (written in Greek, and made in Greece).²⁵⁴ In that agreement, defendant Eugenia Demotsis promised to repay to plaintiff George Batsakis \$2,000 American, with interest, after the end of “the present war” (World War II).²⁵⁵ The defendant argued that what she really received from the plaintiff was not in fact 2,000 American dollars but 500,000 Greek drachmae, worth far less.²⁵⁶ Although the lower court had substantially reduced the plaintiff’s recovery on the strength of that defense,²⁵⁷ the appellate court enforced the entire \$2,000 obligation, using the rhetoric of consideration doctrine, which does not require a balanced or “even” exchange.²⁵⁸ The court itself never mentions the surrounding circumstances of the case, including the fact that Greece was at the time in the grip of Axis occupation, famine, and runaway inflation. Whether these background facts should matter to the decision is a matter for speculation—duress, fraud, and undue influence are some of the possibilities, depending on one’s assumption of additional facts²⁵⁹—but none of that seems to have occurred to the court.

251. *E.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* § 4.22, at 273 n.15 (4th ed. 2004) (“particularly outrageous threats”); *see also Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (Judge Richard Posner stating that a breach of contract may be considered wrongful duress, as exemplified by *Alaska Packers’* case).

252. The case is examined in detail in Professor Debora Threedy’s article, *A Fish Story: Alaska Packers’ Ass’n v. Domenico*, 2000 UTAH L. REV. 185, 218–20.

253. 226 S.W.2d 673 (Tex. Civ. App. 1949).

254. *Id.* at 673–75.

255. *Id.* at 673–74.

256. *Id.* at 674.

257. *Id.*

258. *Id.* at 675.

259. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. e (1981) (noting that extreme imbalance of a bargain suggests the possible presence of other defects such as mistake, fraud, duress, or under influence).

Our changing sexual mores have often been the focus of litigation, sometimes in disputes involving contract law. In *Odorizzi v. Bloomfield School District*,²⁶⁰ in 1966, a California appellate court upheld (at least in theory—the decision reversed a judgment for defendant on demurrer²⁶¹) the plaintiff's attempt to rescind his resignation from an elementary school teaching position.²⁶² He had been arrested for homosexual conduct (then a criminal offense) and subjected to pressure from the defendant employer that ultimately persuaded him to resign.²⁶³ The appellate court held that the plaintiff's complaint did allege facts sufficient to amount to undue influence, potentially a basis for rescission, and reversed for trial.²⁶⁴ Though the court's opinion has a few examples of the kind of casual sexism about the respective roles of men and women that were typical of the time,²⁶⁵ on the issue of homosexual conduct, the court seems to transcend completely the homophobic attitudes of the day. It never suggested that if the plaintiff were indeed homosexual, this should somehow disqualify him from the law's protection. Ironically, however, a decision that most contracts students are taught to regard as a victory for the plaintiff appears to have been a Pyrrhic one at best, benefitting the plaintiff not at all. In fact he never did regain his teaching license, and was unable to return to the classroom (according to investigations conducted by Professor Kellye Testy,²⁶⁶ the case is one of many whose true facts were very different from those alleged, but since the case was never tried this is not reflected in the legal record.²⁶⁷).

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

260. 54 Cal. Rptr. 533 (Dist. Ct. App. 1966).

261. *Id.* at 537.

262. *Id.* at 538.

263. *See id.* at 537.

264. *Id.* at 543.

265. *See id.* at 541.

266. CHARLES L. KNAPP, ET AL, *supra* note 14, at 7–11.

267. Other examples include *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825), and *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935).

268. 405 N.W.2d 303 (Wis. 1987).

partner's wealth on a number of theories—express contract, contract implied in fact, restitution.²⁶⁹ Again, the theoretical arguments in the case take on added weight when they arise from the context of an actual case. Whatever one's feelings about the public policy of encouraging marriage, it's hard not to sympathize with a female plaintiff who appears to have been so thoroughly exploited by her partner as was Sue Ann Watts. Ms. Watts, in addition to “cleaning, cooking, laundering, shopping, running errands” and “contribut[ing] personal property” to the relationship, was allowed by Mr. James Watts to “maintain[] the grounds surrounding the parties' home,” despite the fact that he was the operator of a landscaping business.²⁷⁰ As they say, you can't make this stuff up.

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

Finally, one thing that study of judicial opinions can do is to illustrate graphically the differences in judicial style. The differences can be seen in more than just language style, although Justice Cardozo's flowery and convoluted rhetoric²⁷¹ is very different from Judge Posner's direct,

269. *Id.* at 305, 309, 313, 315–16.

270. *Id.* at 306. Besides her wifely-type performance, Ms. Watts performed services for Mr. Watts's business, as receptionist, typist, and bookkeeper. *Id.* at 306–07.

271. Here is my favorite example of Cardozo's style. It's long, because brevity is not the hallmark of Cardozo's judicial prose:

The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. The distinction is akin to that between dependent and independent promises, or between promises and conditions. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a 'skyscraper.' There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890–91 (N.Y. 1921) (citations omitted).

almost conversational tone.²⁷² It is commonly asserted that there was a shift in contract law over the course of the twentieth century, from a “classical” rule-based approach to a more “modern,” contextual one. This shift can be explored through excerpts from commentators who have discussed this evolutionary process,²⁷³ but it is also instructive to actually compare two opinions that exhibit these contrasting traits.

Thus, in *Walker v. Keith*,²⁷⁴ a Kentucky appellate court, reversing the court below, held in 1964, as a matter of law, that a tenant’s lease-renewal option could not be enforced because the parties in the lease had neither specified the amount of the renewal rent nor supplied a formula for its determination.²⁷⁵ This made it necessary, the court asserted, for it to make an agreement for the parties if the option was to be enforced, and this would be a “paternalistic” task that a court should not have to undertake.²⁷⁶ The court glosses over the fact that the court below in fact had apparently no difficulty in fixing a “reasonable” rent in the circumstances, and also that the apparent intent of the parties (at least when the lease was agreed to) was to create an “option”—an enforceable right of renewal for the tenant. The appellate court also conveys absolutely no information about—nor does it even show any interest in—the use to which the tenant had put the property, the reason why he wanted to renew, or the reason why the landlord wanted to get rid of him. This willingness to decide on the basis of rules alone in an almost fact-free analysis seems in harmony with the “classical” mode of contract decision-making.

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

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

Morin Bldg. Prods. Co. v. Baystone Constr., Inc., 717 F.2d 413, 415 (7th Cir. 1983).

273. See the discussion in Charles L. Knapp, *An Offer You Can’t Revoke*, 2004 WIS. L. REV. 309, 316–19, and authorities there cited and discussed.

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

275. *Id.* at 205.

276. *Id.* at 204.

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

CONCLUSION? NOT REALLY

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

277. 664 F.2d 772 (9th Cir. 1981).

278. *Id.* at 778.

279. The relevant language in the agreement provided the price was to be “Shell’s Posted Price at time of delivery.” *Id.*

280. The court actually upheld the jury’s verdict on either of the alternate grounds submitted, breach of contract (based on evidence of course of dealing and trade usage) and breach of the implied covenant of good faith. *See Nanakuli*, 664 F.2d at 805 (Kennedy, J., concurring).

281. A similar contrast is afforded by another pair of cases discussed earlier, *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933), and *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). *See supra* text accompanying notes 115–20.

since much of present-day “contracting” seems aimed at preventing any enforcement whatsoever against the drafting party.²⁸²

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

282. My views on this general topic have been earlier expressed in Charles L. Knapp, *Opting out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95 (2006).