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## FOREWORD; FORWARD!

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The rather odd title of this brief Essay is meant to convey its three goals: (1) to provide a foreword to this Symposium issue of the *Temple Law Review*, *The (Un)Quiet Realist: Reflecting and Building on the Work of Bill Whitford*, sketching very briefly Whitford's career<sup>1</sup>; (2) to summarize a few highlights from the many stellar contributions in this issue, with an emphasis on their use of Whitford's work and the larger "Wisconsin" tradition of which it is a part (the state's motto is "Forward!"); and (3) to touch on what proved to be Whitford's forward-thinking methodological contributions to empirical legal scholarship.

### I. THE SYMPOSIUM AND ITS SUBJECT

Those reading this Symposium issue probably do not need an introduction to its contributors: all are stars in their fields. That they set aside time and energy from their otherwise overcommitted schedules to prepare and present papers building on Whitford's work is a testament to the magnitude of his contributions in several fields and a boon to the *Temple Law Review*. Never have so many leading scholars—from Douglas Baird (Chicago) to Robert Hillman (Cornell) to Jean Braucher (Arizona) to Stewart Macaulay (Wisconsin) to David Skeel (Penn) to Jay Westbrook (Texas)—appeared together in these pages.<sup>2</sup> That

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\* Harold E. Kohn Professor of Law, Temple University—Beasley School of Law. It is dedicated to the memory of Professor Jean Braucher (1950–2014), my collaborator in organizing this Symposium, a coauthor (with Bill Whitford et al.) of *Contracts Law in Action*, and a friend and mentor to more of us than I could possibly name. Like Whitford, she was a quiet force to be reckoned with. Her absence is deeply felt.

1. We have collected most of Whitford's significant works at *Symposium: A Compilation of Bill Whitford's Contributions to Legal Scholarship*, TEMP. L. REV. (Sept. 7, 2014), <http://sites.temple.edu/lawreview/2014/09/07/tlr-symposium-presents-a-compilation-of-bill-whitfords-contributions-to-legal-scholarship/>. Because much of this work did not appear in law review articles that would appear in conventional search systems (e.g., Westlaw), we thought it important that this work be made available electronically to as large an audience as possible.

2. They are: Douglas G. Baird, *Chapter 11's Expanding Universe*, 87 TEMP. L. REV. 973 (2015); Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807 (2015); Robert A. Hillman, *Precedent in Contract Cases and the Importance(?) of the Whole Story*, 87 TEMP. L. REV. 759 (2015); Melissa B. Jacoby, *Superdelegation and Extreme Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875 (2015); Robert M. Lawless, *What Empirical Legal Scholars Do Best*, 87 TEMP. L. REV. 711 (2015); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773 (2015); Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895 (2015); Lynn M. LoPucki, *Changes in Chapter 11 Success Levels Since 1980*, 87 TEMP. L. REV. 989 (2015); Stewart Macaulay, *Bill Whitford: A New Legal Realist Seeking to Understand Law Outside the Law School's Doors*, 87 TEMP. L. REV. 725 (2015); Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 TEMP. L. REV. 793 (2015); Iain Ramsay, *U.S. Exceptionalism, Historical Institutionalism, and the Comparative*

Senator Elizabeth Warren (D–Mass. and formerly a law professor in Cambridge, Massachusetts) offered her own testimonial is celebrity icing on the cake.

For those who don't know, Bill Whitford taught contracts, bankruptcy, secured credit, tax, and a number of other related subjects at the University of Wisconsin from 1965 to 2013.<sup>3</sup> Along with Macaulay, Whitford was a pathbreaking scholar, leading the “law and society” movement—an effort to better understand the complex interactions between formal law and other social forces reflected in and refracted by law. The influence of law and society (or, as they like to call it in Wisconsin, “law in action”) cannot be overstated. Along with law and economics (housed just southeast of Madison, at the University of Chicago), law and society is one of the most important advances in legal scholarship since World War II.

Consciously or not, most legal academics today engage both the concerns and methods of law and society. As Professor Lynn LoPucki (UCLA), a contributor to this Symposium, observed, it seeks to learn law's “impact at the point of delivery,”<sup>4</sup> which may be the courtroom, the courthouse steps, the lawyer's office, or virtually any other place where people think that law (however defined) matters. To be sure, law and society and law and economics differ considerably from one another across categories—from their *a priori* assumptions to their methods and goals—and yet it is perhaps a testament to Whitford's capacity to defy categories that this Symposium brought together leading voices in both schools of thought.

Academics are rarely lauded for their capacity to make connections beyond their disciplines or dogmas. Whitford did both, as reflected in the diversity of the Symposium topics and participants. This then presents a question: How and why did he do this? While there are likely many answers, Professor Robert Lawless (Illinois) offers a pragmatic one: “Whitford was a scholar just doing studies to figure out how the world worked . . . .”<sup>5</sup> And yet, the trick—the hard part—is that, because we are part of the world we seek to describe, we inevitably carry our biases into our observations.<sup>6</sup> Thus, as Professor Skeel (Penn) observes, Whitford's deeper contribution was one compelled by intellectual integrity—“to pursue the truth of the matter, wherever that might lead.”<sup>7</sup>

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*Study of Consumer Bankruptcy Law*, 87 TEMP. L. REV. 947 (2015); David A. Skeel, Jr., *Rediscovering Corporate Governance in Bankruptcy*, 87 TEMP. L. REV. 1015 (2015); Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739 (2015).

3. William Whitford, U. WIS. L. SCH., <http://www.law.wisc.edu/profiles/wcwhitfo> (last visited Sept. 15, 2015).

4. Lynn M. LoPucki, *Bringing Realism to the Classroom—A Review of Warren and Westbrook's The Law of Debtors and Creditors*, 1987 WIS. L. REV. 641, 641 (book review).

5. Lawless, *supra* note 2, at 712.

6. See, e.g., Daniel A. Farber Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 855, n.156 (1993) (citing, among others, JOHN A. BRIM & DAVID H. SPAIN, RESEARCH DESIGN IN ANTHROPOLOGY: PARADIGMS AND PRAGMATICS IN THE TESTING OF HYPOTHESES 91 (1974) (discussing risks of observer bias in anthropological studies)).

7. Skeel, *supra* note 2, at 1020.

Whitford has long had the capacity and integrity to cross academic aisles, but this was not for want of strong opinions. Often (though not always) these may have been perceived as politically “left,” as when he advocated stronger consumer protection initiatives. More generally, though, he came to hold a host of views developed through rigorous empirical analyses. This dovetailed nicely with his tendency to recognize that any legal choice involves costs and benefits, and both must be accounted for in any position one takes. Because he had no ideological ax to grind, he had integrity across domains. He was frank about where he was coming from, but always open to the possibility that there were places to go that he had not yet anticipated.

Thus, the Symposium was a mix, emphasizing Whitford’s major contributions to scholarship on corporate bankruptcy, consumer protection and bankruptcy, and the study and teaching of contracts. While we doubtless missed important fields—one of my colleagues pointed out that Whitford made important contributions to the development of “critical tax theory”<sup>8</sup>—these three certainly reflect major aspects of his legacy, and ways in which he enriched our understanding of the legal system and its interactions with larger components of society.

## II. SYMPOSIUM HIGHLIGHTS

### A. *Corporate Reorganization Under Chapter 11 of the Bankruptcy Code*

Whitford is well-known as one of the founders of the project that led to the creation of the Bankruptcy Research Database (BRD), now housed at UCLA and maintained by his coauthor on the five papers that jump-started the project, Lynn LoPucki (UCLA).<sup>9</sup> These early studies of what was then a new approach to corporate reorganization set the agenda for much of what was to follow, including deep skepticism about conventional wisdom regarding corporate reorganization and equal concern about the winners and losers in the system Congress created. As scholars and practitioners know, the BRD has become the go-to source for critical, authoritative information about how bankruptcy law actually works “in action.” Papers by leading corporate bankruptcy scholars Douglas Baird, Robert Lawless, David Skeel, and, of course, LoPucki, help us understand the lasting contribution of the BRD and Whitford’s work in making sense of the world of corporate bankruptcy.

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8. See, e.g., Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; William C. Whitford, *Remarkable*, 76 N.C. L. REV. 1639 (1998).

9. Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity’s Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 138 U. PA. L. REV. 125 (1990) [hereinafter LoPucki & Whitford, *Bargaining*]; Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993); Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 [hereinafter LoPucki & Whitford, *Venue Choice and Forum Shopping*].

Corporate reorganization under Chapter 11 of the Bankruptcy Code was new when Whitford and LoPucki began their study. It operated in what Douglas Baird has aptly characterized as a “closed universe in which a relatively small handful of lawyers develop[ed] practices largely invisible to outsiders.”<sup>10</sup> Whitford and LoPucki set out both to catalogue the observable data (later housed in the BRD) and to reveal some of that which was largely inchoate, through interviews with lawyers and other system participants. Among other things, their research “dramatically alter[ed] much of the conventional wisdom about the role of managers, the treatment of shareholders, and other issues in the biggest reorganization cases,” David Skeel observes.<sup>11</sup>

The drama was perhaps best reflected by two myths debunked by their findings. First, until their studies, scholars were deeply concerned that Chapter 11 might permit nonconsensual deviations from “absolute priority.” The notion of “absolute priority”—embedded in the “fair and equitable” test under section 1129(b) of the Bankruptcy Code—has been (contested) dogma since at least 1939, when fully articulated by Justice Douglas in *Case v. Los Angeles Lumber*.<sup>12</sup> The contest reflects the fear that junior stakeholders (e.g., shareholders) may under a plan of reorganization receive or retain property despite the dissent of senior (e.g., general creditor) classes. To permit this defies the fundamental priority norm that senior classes must be paid in full before juniors receive anything—unless the seniors agree otherwise. Yet, as David Skeel reminds us, the early Whitford and LoPucki studies revealed that while juniors (shareholders) did receive payouts in many big cases, the payouts were small relative to total assets, and “the widespread lament that distributions to shareholders were seriously undermining ordinary priority rules was . . . ‘a tempest in a teapot.’”<sup>13</sup>

Second, and perhaps more important (if also more controversial), was the fact that the BRD made possible a reality-based discussion about how to measure “success” in the presence of failure (axiomatically the condition we face in Chapter 11). While scholars have long disagreed about how to define success in this context, the data Whitford and LoPucki gathered (and LoPucki has expanded) help to “chip away” at differences among scholars’ views of success, and “clarify the choices” available in the real world.<sup>14</sup>

Revisiting nine measures of “success” on which Whitford and LoPucki reported in their original studies, LoPucki today, over twenty years later, finds that Chapter 11 “has become less successful” because “courts confirm plans in a significantly smaller proportion of cases, a significantly smaller proportion of companies survive, and a significantly smaller proportion of CEOs are

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10. Baird, *supra* note 2, at 975–76.

11. Skeel, *supra* note 2, at 1015.

12. 308 U.S. 106 (1939); *see* 11 U.S.C. § 1129(b) (2012).

13. Skeel, *supra* note 2, at 1021 (quoting LoPucki & Whitford, *Bargaining*, *supra* note 9, at 126).

14. LoPucki, *supra* note 2, at 991. My own recent effort to use and build on these data studies the relationship between “success” and the use (or not) of Chapter 11 examiners. *See* Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. (forthcoming 2016).

replaced.”<sup>15</sup> Extending their tradition of myth-busting, LoPucki finds that even though asset sales in bankruptcy are lauded for their “efficiency,” these cases—an alternative to reorganization “in place”—are “considerably longer” either than plan confirmation or case dismissal.<sup>16</sup> Like much of Whitford’s work, here LoPucki uses evidence to challenge our assumptions about the operation and outcomes of the reorganization system—including that it is operating reasonably well.<sup>17</sup>

*B. Consumer Protection—in Bankruptcy and Beyond*

Long before the LoPucki-Whitford papers that transformed the study of Chapter 11, Whitford had already made his mark “as one of the founding scholars of consumer protection law,” Jean Braucher and Angie Littwin (Texas) tell us.<sup>18</sup> Nearly forty years ago, Littwin reminds us, Whitford (with Spencer Kimball) published a pathbreaking study of the processing of consumer complaints in the insurance industry, *Why Process Consumer Complaints?*<sup>19</sup> These and similar studies focused on the law in action as it applied to consumers seeking redress for harms caused by businesses. As Littwin notes, the framework Whitford and Kimball developed in the 1970s focused the question: Why would an agency bother to respond effectively to consumer complaints? The answer, they found through characteristic Wisconsin diligence—including interviews with system stakeholders—was to settle consumer disputes, inform the agency’s regulatory activities, and to generate goodwill for the agency. Littwin, Braucher, Iain Ramsay (Kent), and Melissa Jacoby (North Carolina), all leading consumer law (and consumer bankruptcy) scholars, use Whitford’s studies of consumer protection and consumer bankruptcy as launch points to make important contributions of their own in this Symposium.

Littwin, for example, uses Whitford’s 1974 study of Wisconsin’s insurance commission as the framework to study the approach the new Consumer Financial Protection Bureau is taking to consumer complaints. Created as part of the Dodd-Frank financial services reforms in the wake of the 2008 crisis, Littwin observes that “[t]he CFPB is the most important recent development in consumer law.”<sup>20</sup> Littwin finds that “the CFPB has mixed success in providing an

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15. LoPucki, *supra* note 2, at 992. In one measure, companies today do better: they emerge with a large proportion of the pre-filing asset-size. In three other measures (leverage, income and refiling), LoPucki finds no significant change. *Id.*

16. *Id.* at 997.

17. *Id.* at 1012 (“The principal finding of the instant study is that, since the period covered by the LoPucki-Whitford study, Chapter 11 has been generally less successful. . . . [T]he Chapter 11 process seems to be in a long-term decline with respect to the reorganization of large public companies.”).

18. Braucher & Littwin, *supra* note 2, at 809.

19. Littwin, *supra* note 2, at 895 (citing William C. Whitford & Spencer L. Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 WIS. L. REV. 639).

20. *Id.*

alternative dispute resolution forum.”<sup>21</sup> On one hand, there is reason to worry that CFPB data may contradict “a rosy dispute settlement narrative that has been developing,” or that the CFPB seems especially concerned with developing and maintaining consumer goodwill.<sup>22</sup> On the other hand, she finds that the CFPB makes “significant use of complaint data in its regulatory roles and evinces a commitment to ensuring that companies are handling complaints well,” which may, in turn, have the effect of legitimizing companies’ complaint resolution procedures.<sup>23</sup> Littwin’s study is an early and important contribution to understanding how this new and important agency functions.

Jean Braucher, a long-time collaborator with Whitford and leading voice in consumer protection law, also developed an important study of the CFPB for this Symposium, although was unable to complete it due to her untimely passing in November 2014. Thus, Professor Littwin completed *Examination as a Method of Consumer Protection*, which focuses on a particularly important aspect of the CFPB’s work—its role in examining consumer financial services firms’ own practices. Like Littwin’s solo contribution, this joint effort by Braucher and Littwin uses one of Whitford’s pathbreaking studies of consumer protection as a reference-point, here the 1981 article, *Structuring Consumer Protection Legislation to Maximize Effectiveness*.<sup>24</sup> Whitford’s 1981 article set forth a general framework for considering consumer protection from the perspective of the subjects of supervision—the businesses that contract with consumers. He predicted that compliance would be determined by such factors as the specificity of law (greater specificity increasing the likelihood of compliance), the costs of compliance (including indirect costs, such as “losses” from prohibitions on illegal but profitable activities), and, most important, the internal commitment of the regulator to enforce consumer protection law.<sup>25</sup> Lack of commitment would erode firms’ incentive to comply with consumer protection law.

Braucher and Littwin look for evidence of the CFPB’s commitment to consumer protection through an assessment of its “examination” function. Under Dodd-Frank, the CFPB has explicit authority to examine consumer financial firms’ compliance with the requirements of federal consumer protection law—something for which no single regulator had previously had authority.<sup>26</sup> To do so, the CFPB has hired “hundreds of examiners, and establish[ed] a commissioning program to train them.”<sup>27</sup> Using examiners, the CFPB is able to “establish[] a spectrum of enforcement that enables it to tailor its remedies to the

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21. *Id.* at 896.

22. *Id.*

23. *Id.* at 896–97.

24. Braucher & Littwin, *supra* note 2, at 807 (citing William C. Whitford, *Structuring Corporate Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018).

25. *Id.* at 816–20 (outlining Whitford’s framework for analyzing the effectiveness of consumer protection legislation).

26. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) §§ 1024(b)(1)(A)–(B), 1025(b)(1)(A)–(B), 12 U.S.C. §§ 5514(b)(1)(A)–(B), 5515(b)(1)(A)–(B) (2012).

27. Braucher & Littwin, *supra* note 2, at 812.

context of the legal violation.”<sup>28</sup> They offer a detailed and nuanced look at a fundamentally different approach to consumer protection from the fragmented one that previously prevailed, one that may have the capacity to create lasting change in consumer financial practices.

Whitford’s work here recognized that consumer protection was not limited to domestic administrative interventions. Thus, he also pioneered work in both international consumer law and in the development of Chapter 13 of the Bankruptcy Code, a controversial mechanism for resolving consumer financial distress. As to the former, Iain Ramsay, one of the world’s leading authorities on comparative consumer insolvency, reminds us that a 2003 project by Whitford, Ramsay, and Johanna Niemi-Kiesiläinen was the first effort to compare consumer insolvency regimes across national borders.<sup>29</sup>

Historically, European nations had little appetite for a U.S.-style consumer discharge—the debtor’s goal in U.S. bankruptcy—although there were also significant variations among systems. Scholars often attributed these variations to differences in local cultures, but Ramsay’s contribution to this Symposium advances our understanding of the development of these systems through “historical institutionalism,” which “conceptualizes policy change resulting from both exogenous (societal changes) and endogenous (institutional changes) forces and thus steers a middle path between views of law either as an autonomous institution or an unrefined functionalism.”<sup>30</sup> This enables Ramsay to offer a rich account of the development of the consumer bankruptcy laws of England, France, Sweden, and the United States as case studies of the many factors that contribute to change and repose in consumer bankruptcy law.<sup>31</sup>

Within the U.S. consumer bankruptcy system, one of the more controversial mechanisms has been the Chapter 13 “wage earner” plan, a subject on which Whitford was an early and important voice.<sup>32</sup> Professor Melissa Jacoby, a leading bankruptcy scholar, explores the question of “superdelegation” by bankruptcy judges in these cases.<sup>33</sup> “Superdelegation” refers to her observation that some

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28. *Id.*

29. See Ramsay, *supra* note 2, at 949 (“Twenty years ago an academic book about consumer bankruptcy systems around the world would not have been possible.” (quoting Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford, *Introduction to CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 1* (Johanna Niemi-Kiesiläinen et al. eds. 2003))).

30. *Id.* at 952.

31. Nor is this the only tribute to the international aspects of Whitford’s work. Professor Westbrook’s thoughtful assessment of interpretive challenges in the Model Law on Cross-Border Insolvency complements Whitford’s contributions to bankruptcy, comparative, and contract law. See Westbrook, *supra* note 2.

32. William C. Whitford, *Has the Time Come to Repeal Chapter 13*, 65 IND. L.J. 85 (1989) [hereinafter Whitford, *Has the Time Come*]; William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143 [hereinafter Whitford, *A History of the Automobile Lender Provisions*]; William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy and Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994); William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOODE HALL L.J. 339 (1999).

33. Jacoby, *supra* note 2.

bankruptcy judges delegate significant portions of their work to Chapter 13 trustees, hand[ing] over their courtrooms to Chapter 13 trustees, who then supervise plan confirmation hearings in the courtroom without a judge present.”<sup>34</sup> The “super” aspect of the delegation reflects its inter-branch nature: while bankruptcy judges are appointed under Article I of the Constitution, Chapter 13 trustees are appointed by the Office of the United States Trustee, a part of the Department of Justice.<sup>35</sup> Professor Jacoby builds on Professor Whitford’s skepticism about the operation of Chapter 13 by giving direct insight into seemingly problematic abdications of judicial authority. This then creates the possibility that scholars in other fields, such as administrative law and federal courts, might recognize and study this important and underappreciated component of their fields.<sup>36</sup>

### C. *Contracts and Interpretation*

In many ways, Whitford is foremost a contracts scholar. Although much of his academic writing involved bankruptcy and consumer law, as discussed above, his greatest impact—measured in numbers of lawyers and law students affected—may have come through the teaching materials that he and Professor Macaulay (along with Professors Braucher and Kidwell) developed at the University of Wisconsin, *Contracts: Law in Action*<sup>37</sup> (CLA), as well as the articles he wrote on contracts.

As Macaulay and Whitford explain in their collective contribution to this Symposium, CLA was meant to advance the “law in action” approach developed at the University of Wisconsin.<sup>38</sup> “To us,” they write, “law in action”

expresses a widespread interest of how in fact, as opposed to in theory, statutory law and case precedent come into being; how people and businesses use contracts to manage their lives; how disputes in the performance of contracts arise and are settled, and how the resolution of disputes affects the parties to the disputes and influences future parties to contracts.<sup>39</sup>

This bottom-up approach to the study of contracts eschews theories that may be elegant in isolation but bear little connection to actual human behavior, which is often quite “messy,” in the words of Robert Hillman, also a leading contracts scholar.<sup>40</sup> It seeks to discover “the rest of the story”<sup>41</sup>—or as much as is

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34. *Id.* at 876.

35. 11 U.S.C. § 1302 (2012). The United States Trustee does not appoint Chapter 13 trustees in Alabama or North Carolina. Jacoby, *supra* note 2, at 887.

36. Jacoby, *supra* note 2, at 877 (“Thus, this little-studied convention [of superdelegation] and its variations should be of interest to administrative law and federal courts scholars as well as to the bankruptcy world.”).

37. STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM C. WHITFORD, *CONTRACTS: LAW IN ACTION* (3d ed. 2010).

38. Macaulay & Whitford, *supra* note 2.

39. *Id.* at 799.

40. See Hillman, *supra* note 2, at 760 (quoting Macaulay & Whitford, *supra* note 2, at 806).



discoverable—behind a case in order to understand the real impact the legal system had on those portrayed in published judicial opinions, and vice versa.

Perhaps reflecting his deep roots as a badger,<sup>42</sup> Whitford (sometimes with Macaulay) has thus delved behind two famous (or infamous) Wisconsin cases, *Hoffman v. Red Owl Stores*<sup>43</sup> and *ProCD v. Zeidenberg*.<sup>44</sup> In *Hoffman*, the Wisconsin Supreme Court found the Red Owl Stores liable for Hoffmann's "precontractual reliance" on a promissory estoppel theory.<sup>45</sup> In *ProCD*, the Seventh Circuit Court of Appeals applied Wisconsin law to hold that the purchaser of shrink-wrapped software was bound by terms inside the box ("pay now, terms later"). In both cases, Whitford interviewed the parties and (in some cases) their counsel in order to understand the real record better. Much of that analysis makes its way into *Contracts: Law in Action*. "Only the least inquisitive students would want to ignore these rich materials,"<sup>46</sup> notes Hillman, who himself coauthors a successful (competing) contracts casebook.<sup>47</sup>

Like any methodological choice, "law in action" has both benefits and costs. The benefits are that the depiction of the legal system is likely to be more faithful to the lived experience of those affected by "iconic" cases contracts students frequently read. In principle, this better prepares them for the reality that appellate opinions are not necessarily especially accurate depictions of the "law" or the "facts" of a given case, no matter how faithful to precedent and the record judges may wish to be. Moreover, disputes in the real world are often un- (or under) litigated for a host of reasons, and cases that reach the high courts are unlikely to represent the cases that most lawyers encounter most of the time. The costs include the risk of misinterpreting evidence outside the formal record and uncertainty about the status we should accord such findings.

To illustrate, Hillman summarizes a debate between Whitford and Macaulay, on one hand, and Robert Scott, another leading contracts scholar, on the other, on the propriety of the *Hoffman* decision.<sup>48</sup> Scott had read the trial

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41. See William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores*, *The Rest of the Story*, 61 HASTINGS L.J. 801 (2010) [hereinafter Whitford & Macaulay, *The Rest of the Story*].

42. The badger is the Wisconsin state and university mascot. The term initially referred not to the animal (in the family *mustelidae*), but instead to lead miners in Wisconsin in the 1820s who had to live "like badgers" in cold months. *Bucky Badger Bio*, WIS. SPIRIT SQUAD, <http://www.uwbadgers.com/spiritsquad/bucky-badger.html> (last visited Sept. 15, 2015). "Bucky Badger" became the official mascot of the University of Wisconsin in 1940. *Id.*

43. 133 N.W.2d 267 (Wis. 1967).

44. 86 F.3d 1447 (7th Cir. 1996).

45. *Hoffman*, 133 N.W.2d at 273–77. "The debaters reverted to the actual spelling of Hoffman, which has an additional *n* at the end. Apparently the court simply was mistaken as to the spelling." Hillman, *supra* note 2, at 762 n.23.

46. Hillman, *supra* note 2, at 761.

47. ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* (6th ed. 2010).

48. The debate is set forth in Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L. J. 859 (2009) [hereinafter Scott, *Legal Method*]; Robert E. Scott, *Hoffman v. Red Owl Stores and The Myth of Precontractual Reliance*, 68 OHIO ST. L. J. 71 (2007) [hereinafter Scott, *Myth*]; Whitford & Macaulay, *The Rest of the Story*, *supra* note 41.

transcript in *Hoffman*, and concluded that the Wisconsin Supreme Court erred in sustaining an award based on precontractual reliance because the plaintiff (Hoffmann) knew that the defendant's agent (Lukowitz) lacked authority to bind the defendant.<sup>49</sup> Thus, Professor Scott concluded, precontractual reliance on Red Owl's many assurances could not have been "reasonable" under the doctrine of promissory estoppel.<sup>50</sup>

Whitford and Macaulay dove deeper, interviewing Hoffmann and others. They reasoned that "a jury could have found that Hoffmann was told that the 'only hitch' holding up award of a franchise was selling the bakery, and that Hoffmann relied on this statement."<sup>51</sup> Moreover, Hoffmann reasonably relied on the Red Owl agent, Lukowitz, who made this statement.<sup>52</sup> Thus, they concluded that the case was decided correctly and that "justice was done."<sup>53</sup>

Hillman recognizes that beneath the surface lies an important methodological question: Who wins and who loses from this sort of ex post investigation? It is at once fascinating and fraught. Fascinating because, as he rightly observes, it provides context that is valuable to lawyers and law students seeking to understand transactional and litigation strategies in the presence of uncertain doctrine. At the same time, he worries that, regardless of the merits of *Hoffman* qua precedent, this sort of legal archaeology presents "issues . . . if a court contemplates using the facts derived from the record but missing from the official report of a previous decision either to support its conclusion in the current case or to distinguish the earlier case."<sup>54</sup> This is so because "[c]ombing a record to find additional facts may be unreliable. Researchers may reach different conclusions on the facts and on their meaning."<sup>55</sup> The debate between Whitford and Macaulay, on one hand, and Scott on the other, shows exactly how indeterminate such inquiries can be. Thus, Hillman concludes that this sort of historical inquiry "helps clarify the appropriate place" for various doctrines (in this case, promissory estoppel), "but courts, in a system of stare decisis, should ordinarily be reluctant to rely on it."<sup>56</sup> This will be an increasingly important

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49. Scott, *Myth*, *supra* note 48, at 95.

50. The *Hoffman* court relied on section 90 of the Restatement of Contracts, which provides in pertinent part, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932). The *Hoffman* court held that the record "discloses a number of promises and assurances given to Hoffmann by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment." *Hoffman*, 133 N.W.2d at 274.

51. Whitford & Macaulay, *The Rest of the Story*, *supra* note 41, at 850.

52. *Id.* at 849.

53. *Id.* at 801; *see also id.* at 806.

54. Hillman, *supra* note 2, at 769.

55. *Id.*

56. *Id.* at 771.

issue, as Judge Posner recently demonstrated with his apparently on-bench Internet searches to challenge evidentiary claims in *Rowe v. Gibson*.<sup>57</sup>

It is easy to assume that Whitford's deep commitment to modern realism means that he is indifferent to doctrine. That, however, would misconstrue the law in action project. Doctrine in the law in action tradition is a starting point not, as often happens in case law and case books, an end point. Yet, it is imperative to understand doctrine, and Ethan Leib and Steve Thel (Fordham) use Whitford's study of the role of the jury (and the fact/law distinction) in contract interpretation to launch an important and fascinating study of the "*contra proferentem*" doctrine.<sup>58</sup> This doctrine provides that ambiguities in contracts may be construed "against the drafter."<sup>59</sup> It has historically been a "first principle of insurance law," and many presume that it applies in more general contract law.<sup>60</sup> Leib and Thel test this presumption, looking in particular at how the doctrine interacts with the use of juries to resolve ambiguous contract terms.

As is well known, courts will generally interpret unambiguous contract provisions. If, however, a court determines that a contract is ambiguous, the ambiguity creates a factual question for juries to resolve. Recalling Whitford's 2001 finding that juries decide more contract cases than many appreciate, Leib and Thel study whether the *contra proferentem* rule—an ambiguity-resolution mechanism—is itself one applied by courts or juries. Not surprisingly, they find mixed evidence, with some judges reserving the rule to themselves, and others giving it to juries to decide.<sup>61</sup> They don't just tell us about the division of labor, either. They also offer rich insights into the nature of the rule, and whether it should be understood as a default or mandatory rule.

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57. 798 F.3d 622 (7th Cir. 2015). In *Rowe*, an inmate sued the prison on grounds that he was harmed due to a medically improper prescription of Zantac. The state, acting for the prison, presented expert testimony that the prescription was appropriate. Judge Posner was skeptical, and conducted his own Internet research to determine whether, at summary judgment, the state's expert eliminated any "material fact" in dispute. Based on this research, he concluded that the state failed: "We are not," he wrote, "deeming the Internet evidence cited in this opinion conclusive or even certifying it as being probably correct, though it may well be correct since it is drawn from reputable medical websites. We use it only to underscore the existence of a genuine dispute of material fact created in the district court proceedings by entirely conventional evidence, namely Rowe's reported pain." *Id.* at 629. In dissent, Judge Hamilton worried that "[o]n that claim, the reversal is unprecedented, clearly based on 'evidence' this appellate court has found by its own internet research. The majority has pieced together information found on several medical websites that seems to contradict the only expert evidence actually in the summary judgment record. With that information, the majority finds a genuine issue of material fact on whether the timing of Rowe's Zantac doses amounted to deliberate indifference to a serious health need, and reverses summary judgment." *Id.* at 636 (Hamilton, J., dissenting). This may not be the "whole story," in law in action terms, but it bespeaks vividly Professor Hillman's concerns.

58. Leib & Thel, *supra* note 2, at 773 (citing William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction in the Interpretation of Written Contracts)*, 2001 WIS. L. REV. 931).

59. *Id.* at 773–74 (describing doctrine).

60. *Id.* at 774 (footnote and citations omitted).

61. *Id.* at 784.

Carrying the question of interpretation one step further, Jay Westbrook, a leading scholar of bankruptcy and international law, discusses both in his assessment of a problematic trend in English courts' interpretation of the Model Law on Cross-Border Insolvency (Model Law) promulgated by the United Nations Commission on International Trade Law (UNCITRAL).<sup>62</sup> Westbrook starts from Whitford's observation that "British courts interpret contracts in a rather different way than courts in the United States."<sup>63</sup> He finds the same to be true of English courts' interpretation of the Model Law, even though England adopted it in largely the same form as the United States.<sup>64</sup>

Westbrook was instrumental in drafting the Model Law,<sup>65</sup> which has been adopted by twenty-two nations, including the United Kingdom, the United States, and Canada.<sup>66</sup> His views about it are thus especially valuable. One of the key goals of the Model Law has been to advance a "universalist" (or "modified universalist") approach to cross-border insolvency.<sup>67</sup> To do so requires courts to cooperate on a variety of matters, and to take a fairly consistent approach to deciding whether the court's own (host) law should apply to a dispute, or that of another nation (e.g., where the corporate debtor is incorporated) should apply, instead.

This can quickly become quite technical and complex. But Professor Westbrook takes us straight to the heart of the problem: while U.S. and Canadian courts have largely embraced the universalist aspirations of the Model Law, recent interpretations by the Supreme Court of the United Kingdom in *Rubin v. Eurofinance SA*<sup>68</sup> and *Fibria Celulose S/A v. Pan Ocean Co.*<sup>69</sup> defy the logic and spirit of this goal. They use formalist interpretative techniques<sup>70</sup> to insulate English subjects from the impact of cross-border insolvency laws whose validity is not in dispute.

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62. See Westbrook, *supra* note 2.

63. *Id.* at 740 (citing William C. Whitford, *A Comparison of British and American Attitudes Towards the Exercise of judicial Discretion in Contract Law*, in *IMPLICIT DIMENSIONS OF CONTRACTS* (Hugh Collins & David Campbell, eds., 2003)).

64. *Id.* (noting "the recent hostility of the United Kingdom courts to the Model Law, an attitude reflected in their candid rejection of the developing case law in the courts of North America and elsewhere").

65. He was co-head (along with the Honorable Harold Burman) of the U.S. delegation to the United Nations for the project that produced the Model Law. See *id.* at 741–42 n.7.

66. The Model Law became Chapter 15 of the Bankruptcy Code in the United States in 2005, sections 44–61 of the Companies Creditors Arrangements Act and sections 267–284 of the Bankruptcy and Insolvency Act in Canada in 2009, and the Cross-Border Insolvency Regulations in the United Kingdom in 2006. See *id.* at 742.

67. See *id.* ("[A]doption of the Model Law represents the adoption of universalism in insolvency matters.").

68. [2012] UKSC 46.

69. [2014] EWHC (Ch) 2124 (Eng.).

70. This approach "represent[s] the highest and best nineteenth century jurisprudence," Professor Westbrook tells us, tongue only partly in cheek. See Westbrook, *supra* note 2, at 746–47.

The problem with these decisions is not merely that they are “annoying,”<sup>71</sup> but that they defeat the systemic approach to universalism reflected in the Model Law—an approach adopted by various other commercial nations. Westbrook thus laments the “complete failure of the Supreme Court of the United Kingdom in *Rubin* to give any attention to the effect of its ruling on the international system that the Model Law sought to create, a goal necessarily adopted by the British Parliament in enacting the Model Law.”<sup>72</sup> This failure results from apparent indifference to the “systemic” characteristics and goals of the Model Law and the problems of cross-border insolvency. Professor Westbrook argues that courts should instead

interpret international system instruments according to an international interpretive rule that goes well beyond uniformity to include careful consideration of the needs of the international system that the local legislature has adopted via the treaty or model law that applies to a particular case. It is important that that consideration reflect an attitude of cooperation and development of the system that has been adopted and that the needs of that system be put explicitly in the balance against claims of other local law, however strong.<sup>73</sup>

C. *Forward! The Wisconsin Idea*

Binding the many excellent contributions to this Symposium is an appreciation for, or use of, the methods of the “law in action.” “Law in action” is, in turn, the legal iteration of the broader “Wisconsin Idea,” the view that “the university should improve people’s lives beyond the classroom.”<sup>74</sup> This, Adlai Stevenson said, implied that research should reflect “faith in the application of intelligence and reason to the problems of society.”<sup>75</sup> It is progressive in the sense that it believes in the power of scholarship to better society. It maps fully onto the Wisconsin motto, “Forward!”<sup>76</sup> Whitford is, of course, both a product and producer of this tradition (in addition to teaching there, he went to the University of Wisconsin as an undergraduate; his father taught there). It is thus not surprising that his methods proved to be prescient—forward—in their approach.

As Professor Lawless reminds us, the legal academy’s self-conscious move toward “empirical legal studies” is often cast as a recent phenomenon—a sign of progress.<sup>77</sup> The empirical turn in legal scholarship is increasingly quantitative, no

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71. *See id.* at 750.

72. *See id.* at 755.

73. *See id.* at 757.

74. *See The Wisconsin Idea*, UNIV. WIS.-MADISON, <http://wisconsinidea.wisc.edu> (last visited Sept. 15, 2015).

75. Jack Stark, *The Wisconsin Idea: The University’s Service to the State*, in STATE OF WISCONSIN BLUE BOOK 1995-1996, at 101 (Lawrence S. Barish ed., 1995), available at <http://images.library.wisc.edu/WI/EFacs/WIBlueBks/BlueBks/WIBlueBk1995/reference/wi.wibluebk1995.i0009.pdf>.

76. WIS. STAT. § 1.07 (2014).

77. Lawless, *supra* note 2.

doubt a reflection of the ready availability of big data, powerful statistical packages, and law professors with degrees in social (or other) sciences. Epstein and King, leaders of modern empirical legal studies, argue that quantitative methods are often superior to qualitative methods, because they are “scientific.”<sup>78</sup> These alone can produce falsifiable hypotheses and replicable results, they would tell us.

Yet, as Professors Macaulay and Lawless note in their contributions to the Symposium, many observations that are highly salient to understanding the legal system cannot be captured in quantitative data. “[T]hose who rely on already assembled large data sets,” Macaulay warns, “run real risks of just getting it wrong, particularly when they seek to explain the patterns that they find.”<sup>79</sup> Thus, Lawless notes, many nonlegal scholars engaged in empirical studies of corporate reorganization reported “alarmingly high incidences of violations of absolute priority”<sup>80</sup> because they lacked a real understanding of the legal process, and a recognition that in fact (as Whitford and LoPucki later showed) true violations of priority were quite rare. The risk that data blind us to reality is one that empirical legal scholars willing to use a broad tool kit that includes qualitative methods can minimize because they “possess . . . an understanding of fine-grained institutional detail in the legal system.”<sup>81</sup>

Although Whitford is not known as a methodologist, he in fact knew and acted on these insights long before it was fashionable. Macaulay explains that Whitford’s work

vividly shows us that there are research questions that only can be answered by qualitative methods. He conducted a series of studies on the impact of various aspects of consumer law. For example, he published a case study of automobile warranties. He wrote about the functions of disclosure regulation in consumer transactions. He sought to determine the impact of denying self-help repossessions of automobiles and the requirements of the Wisconsin Consumer Act.<sup>82</sup>

In this sense, Whitford was forward—that is, forward-thinking—because he understood that we should look for answers wherever the evidence might take us, wary of being overdetermined by allegiance to methodological orthodoxy. While he is, as discussed above, directly responsible for helping to assemble the leading database on corporate bankruptcy, he also retained an abiding faith in qualitative methods. He did not just count noses; long before (most) others thought it appropriate, he picked up the phone, called participants in the system,

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78. Lee Epstein & Gary King, *The Rule of Inference*, 69 U. CHI. L. REV. 1 (2002).

79. Macaulay, *supra* note 2, at 726.

80. Lawless, *supra* note 2, at 715.

81. *Id.*

82. Macaulay, *supra* note 2, at 726–27 (internal footnotes omitted) (citing William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400; William C. Whitford & Harold Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607; William C. Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006).

and sought to understand their actions, motivations, and the systems in which they operated.<sup>83</sup>

#### CONCLUSION

The title of this Symposium is perhaps as odd as that of this Foreword: What does it mean to say that someone is an “(un)quiet realist”? Most of us understand the “realist” part, but what of “(un)quiet”? Why the parenthetical “(un)”?

The answers lie partly in Whitford’s temperament and partly in his impact. David Skeel, formerly of Temple (and briefly, Wisconsin), and now at the University of Pennsylvania Law School, opens his contribution to this Symposium by recalling that his “first exposure to Bill Whitford’s work was an anxious one.”<sup>84</sup> I share this sentiment, for I was a student in Whitford’s Contracts class in the fall of 1987. There, I found his deep reserves of reticence—his “quiet”—wholly unsettling. He was not the Socratic stalker of popular imagination—he clearly wanted us to understand something—and yet he was very careful with his words, cautious and soft-spoken. This was, to say the least, unsettling given the high-frequency freak-out that is the first-year of law school.

Whitford was quiet not only in decibel but also in self-promotion. Legal scholars often seem to feel that we must loudly and frequently remind the world that *ours* is the most important work one can imagine. We aggressively forward drafts and off-prints to respected elders in the hopes of being noticed. We post comments on blogs, appear on panels or in the media, secretly “ego surf” the Internet to see whether anyone has noticed. While I can’t say that Whitford engaged in none of these activities, it is well known that he let his work speak for itself. Sometimes, this meant that it could take years, decades, before his suggestions might have impact (see, e.g., the Consumer Financial Protection Bureau, discussed above). But, he was not the type to engage in mass emails of his new publications to every person in his address book.

Despite his seemingly quiet demeanor—and this is the “(un)” part—I found, and continue to find, a man of deep conviction and integrity. Unwilling to accept orthodoxies—even his own—Whitford demanded by example a level of integrity to which I and thousands of his students have aspired over the years, even if we (or at least I) rarely measure up. Despite, or perhaps because of, his quiet, Whitford has had tremendous impact, which this Symposium has only begun to reveal.

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83. See, e.g., Whitford, *Has the Time Come*, *supra* note 32; Whitford, *A History of the Automobile Lender Provisions*, *supra* note 32; Whitford & Laufer, *supra* note 82; Whitford & Macaulay, *The Rest of the Story*, *supra* note 41.

84. Skeel, *supra* note 2, at 1015.