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## THE DEVELOPMENT OF *CONTRACTS: LAW IN ACTION*

*Stewart Macaulay & William C. Whitford\**

We are two of the four authors of *Contracts: Law in Action*, a law school casebook now in its third edition.<sup>1</sup> It is an innovative casebook.<sup>2</sup> Most basically it reflects, more completely than other casebooks, our view that you cannot fashion meaningful theories about the role of contract law in society or best train law students without considering context. You must read appellate reports and statutes, but you also must look outside the doors of the law school. Traditional law school materials tell only part of the story about contract law and its part in the lives of transaction-planning lawyers, business people, consumers, and all of the others potentially affected by this institution that our culture seems to consider fundamental and vital.

In this short Article we recount the development of this casebook<sup>3</sup> over our long careers teaching contracts at Wisconsin Law School—Macaulay for fifty-seven and Whitford for forty-nine years. We accepted Wisconsin’s long-standing law in action tradition. We also built on insights about what are now called relational contracts—the idea that most contracts occur in the context of a continuing relationship in which a particular contract is but one of many occurrences between the parties—that were being developed in the academic literature from near the beginning of our careers. We worked cooperatively with the large group of scholars who have taught contracts at Wisconsin since 1957, as well as others who have used (and still use) our book elsewhere. We comment briefly on the benefits of working collaboratively.

### I. WHAT WE FOUND WHEN WE CAME

Macaulay joined the Wisconsin faculty in 1957 and was assigned to teach a section of contracts. Those who taught contracts used the Fuller casebook.<sup>4</sup> The

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1. STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, *CONTRACTS: LAW IN ACTION* (3d ed. 2010) [hereinafter *LAW IN ACTION*].

2. Some might say “eccentric,” in parts. The Oxford English Dictionary defines “eccentric” as “unconventional and slightly strange.” *OXFORD ENGLISH DICTIONARY* 62 (2d ed. 1989).

3. For a more extensive account of the development of the casebook and its many innovations, see *LAW IN ACTION*, *supra* note 1, at 15–29.

4. LON L. FULLER, *BASIC CONTRACT LAW* (1947). The second edition was published in 1964, with Robert Braucher as coeditor.

contracts curriculum at the time required first-year students to take two successive three-credit courses, in the fall and spring semesters of the first year. Within a few years Macaulay had become the senior contracts professor and changed the casebook to Kessler and Sharp.<sup>5</sup> This book highlighted the inconsistencies in contract law, suggesting that there were factors other than doctrine guiding results in this area of law. One of their section headings, for example, was “The Rule: Pacta Sunt Servanda,” and the next section heading was “The Counterrule: Frustration of Purpose.”<sup>6</sup> This suggested, as the legal realists had emphasized, that there was more to a court decision than the analytical implications of established precedent.

When Whitford joined the faculty in 1965, and was assigned contracts as a teaching obligation, he found his contracts colleagues—Macaulay and Arlen Christenson—absorbed with integrating the newly enacted Uniform Commercial Code (UCC) into the contracts course,<sup>7</sup> as well as incorporating some of the material previously taught in a formerly required course in restitution. Equally important, they were also trying to incorporate some of the remarkable findings that Macaulay had published in his article, *Non-Contractual Relations in Business*,<sup>8</sup> one of the foundational articles in what we now call relational contracts. We began to create what was to become known as the Wisconsin Supplement, containing some mimeographed summaries of Macaulay’s interviews with businessmen that had been the basis for his famous article.

## II. THE DEVELOPMENT OF THE MATERIALS

In the development, chronologically, of what we now call the Wisconsin Contracts Materials, the next important step was the adoption of materials that explicitly took a relational contract perspective. Macaulay was already identified as one of the leading proponents/theorists of relational contracts. The other leading proponent/theorist at the time was Professor Ian Macneil.<sup>9</sup> By 1969 a

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

6. *Id.* at 416, 429.

7. Wisconsin stopped teaching sales as a separate course in 1963. Ever since, contracts has carried a primary responsibility for covering important sections of Article 2 of the Uniform Commercial Code (UCC). The Kessler and Sharp casebook had reprinted some sections of the 1952 version of Article 2. Those sections were offered as new ways of dealing with the problems lumped under doctrinal headings such as offer, acceptance, and consideration in more traditional books. The Kessler and Sharp book focused on specific problems and offered various doctrines that might be invoked by lawyers and courts to fashion solutions. The Wisconsin materials go even further in this direction.

8. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

9. For an excellent introduction to the work of Ian Macneil, including an account of the chronological development of his relational contract theory, see IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 3–58 (David Campbell ed., 2001). See also James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 3, 7–23 (2003) (discussing Ian Macneil’s seminal work as the “founder” of relational contract theory).

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prepublication draft of Ian Macneil's first United States contracts casebook<sup>10</sup> was ready for use in the classroom, and the contracts teachers at Wisconsin decided to give it a test run. We continued to use a prepublication draft of the materials in the following year and then adopted the Macneil casebook when it was first published in 1971.<sup>11</sup>

The Wisconsin Supplement, which began as summaries of Macaulay's interviews with businessmen about contracting practices, continued to be used as we adopted the Macneil materials, and it kept getting bigger, as we added material related to Wisconsin particularly. Within a few years we began adding materials to the Wisconsin Supplement that we now call the "law in action." We contextualized cases, by gathering information about how the dispute got to litigation, and what happened to the dispute and the parties after the decision in the casebook.<sup>12</sup> We also included other information, drawn from secondary sources to a great extent, on how law is implemented "on the ground."

At some point, around 1980, the supplement to Macneil's casebook had become so large, and such a big proportion of the assigned materials, that we decided to prepare our own materials. We were enabled in this decision by the efficiency of the copy shop at Wisconsin Law School, and a few years later by the advent of word processing. To create a whole casebook, initially we used many of the cases that Macneil had chosen (and with which we were familiar). Doctrinally, for "Contracts 1" we began with remedies (as we still do). Macneil emphasized remedies in the first part of his materials, though not to the extent we do. We then moved on to a fairly cursory treatment of a variety of formation of contracts topics (offer, acceptance, consideration, promissory estoppel, statute of frauds), and ended the course with consideration of a variety of regulatory problems and doctrines (e.g., duress, misrepresentation, unconscionability, mandated warranties, standard form contracts). We saved mostly for Wisconsin's second semester course, called "Contracts 2," such issues as interpretation, which incorporates the parol evidence rule and textualism, contractual modifications, mistake, and frustration of purpose.<sup>13</sup> From a law in action perspective, Contracts 1 included (and still includes) many cases involving contracts between two businesses, but also a good deal of material of contracts in a family context

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10. Purely by chance, in 1967 Whitford succeeded Macneil as the contracts professor at the new law school at the University of Dar es Salaam, Tanzania. Macneil had just published his first contracts casebook, explicitly designed for use in East Africa, and Whitford became the first person (and perhaps only person) to have used these published materials. At the time Whitford was in Tanzania, Macneil was teaching at Cornell Law School and developing his American casebook emphasizing a relational contracts perspective.

11. IAN R. MACNEIL, *CASES AND MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS* (Lon L. Fuller et al. eds., 1971).

12. In 1978, Richard Danzig published a book designed to supplement contracts casebooks, which contextualized some leading contracts cases. RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* (1978). We quickly adopted Danzig as a supplement to our casebook, but in the Wisconsin Supplement we collected information to contextualize many other cases as well, especially the Wisconsin cases that we used.

13. There is more on remedies, especially the role of conditions, in Contracts 2 as well. At Wisconsin, Contracts 2 is an elective course, open to 1Ls in the spring semester.

(a classic relational contract), in the employment context, and in a consumer context. The course concludes with a great deal of emphasis on special problems introduced by the ubiquity of standard form contracts. Contracts 2 emphasizes more exclusively contracts between two businesses.

Throughout the 1980s we changed the materials annually. Many faculty who used the materials during this period contributed items for the materials. We found new cases to substitute for the cases Macneil had used, or because they illustrated new wrinkles in the developing law, and we developed new topics, though always within the basic organizational framework we first devised when we began creating our own materials. In the early 1990s we decided to publish the materials commercially. From among several offers we accepted an offer to publish from a small publisher, the Michie Company,<sup>14</sup> because they offered greater copyediting assistance. The first edition was published in 1995, with a second edition published in 2003, and a third edition in 2010.<sup>15</sup> All three editions are published in two volumes, tracking Wisconsin's two courses called Contracts 1 and 2, as described above.<sup>16</sup>

### III. COOPERATION IN A MULTI-SECTIONED FIRST-YEAR LAW COURSE

Throughout our careers at Wisconsin, it has been the practice, with rare exception, that all the teachers of multiple sections of contracts have used the same teaching materials. This practice did not develop as a result of formal rule of the faculty, but as the result of the individual decisions of the many faculty assigned to teach this course.<sup>17</sup> The benefits of this custom have been many for us. Certainly the casebook is much improved because of the many suggestions, and direct contributions, that we<sup>18</sup> have received over the years from our co-teachers. Our constant collaboration about how to teach these materials has improved our performance in the classroom. And the use of common materials has enabled our students to consult and study with students from other sections, to their mutual benefit. Our collaborative experiences have been so favorable that it leads us to recommend that legal education generally give greater

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14. Michie was later taken over by Alpine, which in turn was acquired by LexisNexis. LexisNexis has been the publisher of the second and third editions.

15. Macaulay, Kidwell, and Whitford have been coeditors of all three editions. Marc Galanter was a coeditor of the first edition, before his retirement. Jean Braucher, of Arizona Law School, was added as a coeditor of the third edition. Both Kidwell and Braucher have since passed away. Kathryn Hendley (Wisconsin) and Jonathan Lipson (Temple) have been added as editors for the fourth edition. Both have used the casebook for many years.

16. See *supra* notes 9–15 and accompanying text. At the publisher's insistence, we also published a "concise" one-volume edition, which was somewhat abridged and designed for schools which offered only one four-credit course in contracts. A concise edition was also published for the second edition, but because it never had many adoptions, a concise edition was dropped for the third edition.

17. Thirty-five different faculty members have taught Contracts 1 or 2 since Stewart Macaulay first joined the faculty in 1957.

18. John Kidwell was a full partner in the development of the casebook from its beginnings through the publication of the third edition. Very unfortunately, John passed away in 2012. We have no doubt that he would have joined us in the comments in this Article.

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consideration to encouraging the common use of materials in multi-sectioned first-year courses. To be sure, the American tradition of allowing each faculty member to choose materials is long honored, and it is rooted in ideas of academic freedom. It has its benefits. But faculty members should be encouraged to consider the collective benefits of common use of materials, which in our experience have been many. Sometimes the benefits of an idiosyncratic casebook choice are individual to the professor concerned (for whom it may save preparation time, for example), while the costs of that idiosyncratic choice affect all students as well as the other professors teaching that course, who cannot benefit as much from discussions among themselves of their common experiences.

We have also collaborated with many teachers at other schools who have used the book.<sup>19</sup> Several have written detailed suggestions that covered most of the book. Others have focused more particularly on problems such as how we treat employment at will or promises between husband and wife. On several occasions, we used the royalties from sales of our casebook to gather those who used the book, and a few others, in Madison to talk about its further development. This provoked discussion and disagreement, and in a number of instances brought home to the editors choices that had to be made. We have valued this collaboration as well.

#### IV. PHILOSOPHIES REFLECTED IN THE MATERIALS

Our casebook—*Contracts: Law in Action*—and what is often called the “Wisconsin approach” to contracts, is viewed as distinctive by many, perhaps most, contracts teachers. In our opinion what accounts for that distinctiveness is mostly its emphasis on what we call “law in action” and on relational contracts. We briefly describe these ideas and how our casebook pursues them, but first we briefly discuss a couple of other decisions important to the structure of the casebook.

##### A. *Incorporating UCC Article 2 into a Contracts Course*

This decision was made at Wisconsin along with the widespread enactment of the UCC in the 1960s, and long before our casebook began its development. In our opinion the most important reason to include Article 2 in the contracts course is that it allows us to expose our students to a more accurate picture of law. Statutes are so pervasive that no subject matter field, including contracts, can these days be viewed as strictly a common law subject. Because contract law is mostly state law, however, it is difficult in a so-called “national” law school to know what statutes to incorporate into the materials. Article 2 is a natural choice

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19. At the time of this writing, we are aware of the casebook being used by one or more contracts teachers at twelve law schools other than Wisconsin: BYU, Denver, Fordham, Miami, Northeastern, Oregon, Quinnipiac, Rutgers-Newark, Rutgers-Camden, Seton Hall, Santa Clara, and Temple. The materials have been used at a number of other law schools as well in the interim since first publication.

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because it has been enacted in all states (except Louisiana). Furthermore Article 2 applies to all sales of tangible, moveable property, an extremely important category of transactions covered by any contracts course.

Including statutory material allows us to teach a broader range of “legal method” skills in a first semester course, as well as giving students a more accurate picture of what law is like. We are able to introduce some initial lessons in techniques of statutory interpretation, to show how courts sometimes ignore the plain meaning of a statute when they believe the literal interpretation would be bad policy or inconsistent with what was probably intended,<sup>20</sup> and how the enactment of an important statute like the UCC can influence case law development in areas not governed by the UCC.<sup>21</sup> We also illustrate how sometimes statutes are drafted in very open-ended terms, with the apparent intent of ducking the tough policy issues, leaving those choices to case law development but in the guise of statutory interpretation rather than common law development.

### B. Remedies First

Contracts casebooks are divided between those which begin the course with an in-depth exploration of remedies and those that start in-depth coverage with the set of formation issues (offer, acceptance, consideration, promissory estoppel).<sup>22</sup> The idea to start contracts courses by exploring remedies was introduced by Professor Lon Fuller, who published his first casebook in the 1940s.<sup>23</sup> The idea quickly took hold and there was a time when a majority of casebooks, and almost all casebooks with editors from the “top” law schools, began with remedies. In the past two decades there has been some return to the formation-first organizational scheme, but we remain firmly in the remedies-first camp.

We have many reasons for starting with remedies. We will describe three. First, from a law in action perspective (described below), one of the big questions we want to explore is how case decisions impact the parties to the case, and how legal rules influence parties to contracts in their practices, including their activities in the formation and performance of contracts (*ex ante*, in the parlance of some contemporary contract theorists). It is almost impossible to consider those issues from a law in action perspective without appreciation of the limited remedies ever afforded to the victor in contracts litigation. Second, studying remedies before considering other doctrinal problems opens up the

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20. Intended by whom is also always an issue, especially difficult when considering the UCC. But further exposition on this topic is beyond the scope of this Article.

21. For example, the principle of unconscionability is now considered to apply to virtually all contracts, even though Article 2, which largely introduced the term, applies only to sale-of-goods transactions.

22. A number of casebooks begin with a brief overall look at contracts, or perhaps just of remedies, before turning to in-depth coverage of a particular subject. The Kessler and Sharp book followed this pattern. See *KESSLER & SHARP*, *supra* note 5, at vii.

23. FULLER, *supra* note 4.

specter of what we call “in between” solutions when there are important values clashes, as courts have a variety of remedy options between full protection of the expectation interest (including specific performance) and no remedy. This makes possible a richer analysis when we get to other fundamental areas of contract law, including formation, interpretation, and regulation. Third, a study of remedies provides an effective window for looking at some of the most fundamental policy or theoretical issues underlying contract law, including most importantly the fundamental question of why the law chooses to enforce totally executory (i.e., unperformed) contracts. This inquiry in turn requires contemplation of the role of economic efficiency as a policy concern, as well as the role of moral philosophy and fairness, particularly in our consideration of restitution as a remedy for contractual breach.<sup>24</sup>

### C. *Law in Action*

This term means different things to different people. To us, as we use it in connection with contract law, it 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. The emphasis is on what happens on the ground, empirically, not on what some theorists postulate should or probably would happen if certain assumptions are true.<sup>25</sup>

Many contracts courses are now paying attention to some of what we call law in action issues, though none as extensively as our materials. Traditionally, contracts classes focused on the rules themselves (as you might be asked about them on a bar exam) and on the policies conventionally assigned as the reason for the rules. An interest in a somewhat broader range of issues is evidenced by

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24. We acknowledge that a formation-first approach provides a better window for exploration of another fundamental contract law question—how we interpret communications and what we mean by consent. No one approach has all the advantages, of course.

25. Macaulay reported:

Professor David Nelkin untangles some confusion between Professor Roscoe Pound’s idea of “the law in action” and Ehrlich’s “living law.” “Law in action,” for Pound, focuses on the gap between the law in the books and the actual practices of legal officials and the public in cases of disputes. The “living law” refers mainly to the “norms recognised as obligatory by citizens in their capacity as members of associations.” Law in action pushes us toward studies of gaps between what we teach in law schools and what goes on in the world. Living law would take us toward the norms, sanction systems, and institutions that actually exist in the various groups in society. . . . Many of us who began work at the University of Wisconsin Law School in the late 1950s and early 1960s took the phrase “law in action” to include both the gaps between the law on the books and what happened in legal institutions, and, the way problems were avoided, suppressed, and dealt with apart from official public norms, sanctions, and institutions.

Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”*, 2005 WIS. L. REV. 365, 385–86, 387 (footnotes omitted) (quoting David Nelken, *Law in Action or Living Law? Back to the Beginning Sociology of Law*, 4 J. LEGAL STUD. 157, 165 (1984)).

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the commercially successful publication of Richard Danzig's book contextualizing some leading cases commonly included in contracts casebooks,<sup>26</sup> and the later publication of a similar book edited by Douglas Baird.<sup>27</sup> The Wisconsin materials contain many contextualizations of additional cases we study, but they also include accounts of how statutes get enacted, how decisions to litigate a dispute are made (as well as consideration to alternative dispute resolution mechanisms), and many accounts of how contracts come to be formed and performed in the management of people's affairs. The materials are sometimes reports of systematic studies that provide evidence of practices and sometimes anecdotes, which may be suggestive of a practice though not evidence of one as such.

We defend the inclusion of such a vast array of law in action materials in a first-year law course on various grounds. We readily concede that many of them are not needed to prepare for a bar exam, but we think one of the goals, even responsibilities, of a leading law school is to do more than prepare its students for a bar exam. Certainly any intellectual (or sociological, if you will) understanding of the role of contracts and of contract law in society requires consideration of the law in action. But we also believe studying the law in action is a very important preparation for the practice of law, as discussed further in the next Section.<sup>28</sup>

#### D. *Relational Contracts*

People can mean many different things by the term "relational contracts," or "relational contracts theory," and we won't try to resolve all these terminological disputes here. In our materials we do not even use the term much. But we do emphasize pervasively throughout the materials that what is conventionally called a contract is normally formed and performed in a context in which it is only one aspect of the relationship between the parties. Other aspects of the relationship very commonly include other-than-legal norms and sanctions that the parties respect, at least sometimes, and they must be understood in order to understand the parties' behaviors. Very rarely do contracts take place between strangers, and when they do, they are often accompanied with a hope by one or both parties that this contract is simply the beginning of a longer-term relationship.

The implications of these relational insights for contracts law in action are many. They explain, for example, why so few disputes in performance lead to litigation. They provide explanations for why contractual parties do not usually want to work out all the details of their contract at the time of formation—they may expect to be able to work out difficulties as they arise, or they may fear that drafting a legally binding contract providing for many contingencies signals a lack of trust. Relational contract thinking also has important implications for

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26. DANZIG, *supra* note 12.

27. CONTRACTS STORIES (Douglas G. Baird ed., 2007).

28. See *infra* Section V for a discussion of the benefits of taking a law in action approach.



doctrine. In the area of interpretation, for example, there is often reason to believe that there are many implicit understandings, not stated in the writing, that the parties developed over the course of performance of the contract at issue or in other prior cooperative activities.

*E. Contracts Are Everywhere*

Some contracts teachers choose to focus on contracts between businesses that are negotiated and drafted by lawyers. The emphasis in discussing any case is whether the issue that arose could have been avoided by better drafting.<sup>29</sup> We have nothing against asking such a question in a particular case,<sup>30</sup> though we also think that it is at least as interesting to ask why the parties to negotiated business contracts did not devote the resources necessary to create a less ambiguous contract.

We do not think, however, that a Contracts 1 course should be limited to negotiated business contracts. Even in business-to-business contracts, the norm is the use of forms rather than terms prepared specially for the occasion. Our materials place considerable emphasis on the special problems presented by form contracts, both when used in a contract between two businesses and in other contexts. For us, forms are the norm, not the exception requiring some special rule that deviates from basic principle. Further, agreements are pervasive in all walks of life, and mostly they are reached in situations in which perhaps neither party, and certainly not both, consult lawyers. In all these areas, contract ideas, and sometimes contract law, play a role. Consistent with this outlook, our casebook explores the use of contracts and contract law in a wide variety of settings, including agreements in a family context (both nuclear and extended), a wide variety of employment contexts, and agreements between businesses and consumers.

V. SO WHAT? WHAT DO WE GAIN BY TAKING A LAW IN ACTION APPROACH?

Some lawyers may remember their contracts course as a trip through old cases involving offer, acceptance, and consideration. Willard Hurst once called the course that he took from Samuel Williston at Harvard a kind of geometry based on deductions from a few simple common sense principles.<sup>31</sup> Students learned what Williston thought the common law ought to be if the implications of a logical system were carried out. Decisions which were inconsistent with Williston's theories were just wrong and dismissed or ignored. More commonly today, those teaching contracts subject the late nineteenth century doctrines to a

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29. The perspective was urged recently in Marvin Chirelstein, *Teaching Contracts*, 63 J. LEGAL EDUC. 429, 430 (2014).

30. In many places we do reproduce contemporary standard form provisions dealing with the issue raised in the case. For example, when we offer *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Ex. Ch.), we note a modern Federal Express contract provision that deals with the same damages problem. LAW IN ACTION, *supra* note 1, at 117–18.

31. Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1, 8 (2000).

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legal realist critique. Instead of formalism, students are taught to look for the policies underlying the rules. At some schools, the key policy to be sought is efficiency and avoidance of transaction costs. Contract doctrine provides default rules—the law that governs when the parties fail to agree about an issue. The defaults should be selected to provide incentives for efficient behavior.

There is much more to the Wisconsin contracts course than is offered in many casebooks. Whatever you might want to say about our course, it is not oversimplified, and it deals with real and important problems. Moreover, it focuses on the inconsistent goals found in the modern contract law, considered broadly. This includes consumer protection legislation, Article 2 of the UCC, and legislation applicable to specific types of contracts—such as those involving deals between husbands and wives, franchisors and franchisees, and employers and employees. One is bound by the contracts she appears to make, except when she isn't.

We approach these functional areas, as we have said, from a law in action perspective. We look at problems and specific cases with a contextual approach. We offer details about the litigants' biographies, the history of their dispute, or what happened after the case. In some instances, we look at the judges and how they got to the bench. We look to how the side that lost the case coped with the problem. Sometimes standard form contract provisions are adopted, and sometimes organized interests seek a statute to overturn an unwanted decision. In the twenty-first century, at least some parts of contract law involves power and politics.

A. *What Does Putting Contracts Problems in Context Gain for Us?*

First, our approach makes central the problem of the costs of generating an appellate opinion and damage award—costs in money, time, frustration, and lost opportunities to do something else. Our students should never forget that “expectation damages” is only a sum that must be offset by the costs of getting it. In one of our very first cases, we reprint the words of the highest court in New York telling us that, absent a special statute, the party who wins a lawsuit is not entitled to make the other side pay the winner's lawyer's fees.<sup>32</sup> Moreover, much of contract law is qualitative, calling for judgments about such things as whether a breach “substantially impairs the value of the whole contract,”<sup>33</sup> a lack of “good faith,”<sup>34</sup> the “occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made,”<sup>35</sup> or lost anticipated profits have been proven with “reasonable certainty.”<sup>36</sup> Except in situations at the extreme, decisions on issues such as these are uncertain. Thus, the decision to

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32. *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 315 (N.Y. 1972); see *LAW IN ACTION*, *supra* note 1, at 65–68.

33. U.C.C. § 2-612(3) (2012).

34. *Id.* § 1-304 (rev. ed.); *id.* § 2-103(1)(b).

35. *Id.* § 2-615(a).

36. *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1365 (7th Cir. 1996).

sue involves assessing the costs and the risks of spending the money and getting little or nothing.

Second, our students are asked to look at the whole legal process and not just the appellate opinion. The relational approach associated with the work of Ian Macneil emphasizes that most contracts are part of long-term continuing relationships and are not just discrete events.<sup>37</sup> Such relationships have their own norms and sanctions, which serve to avoid disputes or quickly resolve those that occur as long as the parties value their relationship. Even an indirect threat to sue can affect relational norms and sanctions. Modern trial courts exert great effort to push parties to settle the case; indeed, there is a whole body of literature on “the vanishing trial.”<sup>38</sup> Thus, the fact that we are reading an appellate case should provoke reflection about why the dispute got to this stage and wasn’t solved before it reached the formal legal process. Moreover, when we look to the briefs and record in almost any case, we will discover that the facts are uncertain and not as clear as they are stated in the formal opinion of the court. Furthermore, often the losing argument is much more persuasive in that party’s brief than it is as stated in the court’s opinion. Professor Robert Gordon has argued that “opinions are carefully constructed artifacts. [The Wisconsin] book tries to show that everyone engaged in the process is an independent architect of reality . . . .”<sup>39</sup>

Third, a law in action approach raises the problem of power in civil society. Much of contract theory depends on a picture of consensual uncoerced transactions. Even “the objective theory” of contract<sup>40</sup> turns on the idea of a responsibility for leading another to think that a choice had been made. Nonetheless, we live in a world of printed form contracts of adhesion that large organizations impose on suppliers, customers, employees, and even patients in hospitals. Those who draft these contracts know full well that the other party seldom will read or understand what is in fact the statute of a private government. Sometimes, in the name of efficiency, parties are bound to what they sign or accept without objection.<sup>41</sup> Sometimes, in some states, courts or

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37. See MACNEIL, *supra* note 9, at 18; William C. Whitford, *Ian Macneil’s Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 550–52.

38. See, e.g., Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004).

39. Memorandum from Robert W. Gordon to Wisconsin Contracts Grp. (on file with authors). Or in Llewellyn’s words: “[T]he raw events as they happened are not before judge or jury; there has been a straining process. The plaintiff’s lawyer has, with an eye to *legal* relevance, and with an eye to winning, done some selection.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 31 (Quid Pro Quo Books 2012) (1930).

40. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 210–14 (2006).

41. For a discussion of Judge Easterbrook’s opinions in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), see Stewart Macaulay,

legislatures will take steps at least said to be designed to protect choice—the California statute on husband-wife prenuptial contracts<sup>42</sup> or the Wisconsin cases on disclaiming liability for negligence causing personal injury,<sup>43</sup> for example. Nonetheless, looked at over time, in Galanter’s words, “the haves come out ahead.”<sup>44</sup> Even if someone changes the rules to his or her disfavor, frequently the well organized can change the game back again.<sup>45</sup>

*B. Are There Costs to the Wisconsin Approach?*

Students want clear answers, and we suggest that an empirical look at the legal system in action shows it to be, at best, messy. Some may just tune out and read a hornbook. Some may abandon an idealism that brought them to law school for a realist cynicism. We ask whether a client is likely to get what she wants even if her lawyer makes a brilliant doctrinal argument that would get an “A” in most contracts courses. All we can answer is that her odds are better in such a case. We can point out that a brilliant doctrinal argument is more likely to be one factor provoking a settlement offer.<sup>46</sup> A law in action approach is very practical. Lawyers must cope with the system with all of its shortcomings and irrationalities. We do students no favors by hiding the world in which they must practice.

Professor Stanley Henderson argues:

That each beginning law course carries a designated title confirms the existence of an established body of learning, organized and subdivided into fields. In presenting one of these fields to students we are space-

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*Freedom from Contract: Solutions in Search of a Problem* 2004 WIS. L. REV. 777, 802–19. Whatever you want to say about the Judge’s opinions, it is hard to square them with objective theory. In neither case did the consumer do anything that could mislead the seller’s officials into thinking that the consumer understood and consented to the provisions in the form contract.

42. CAL. FAM. CODE § 1615 (West 2015).

43. See *Atkins v. Swimwest Family Fitness Ctr.*, 691 N.W.2d 334 (Wis. 2005); *Yauger v. Skiing Enters.*, 557 N.W.2d 60 (Wis. 1996).

44. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

45. We look at the various consumer protection statutes that were the product of the “Ralph Nader era.” Then we consider responses of the powerful. They can, for example, avoid these statutes by imposing arbitration clauses with a “kangaroo court” arbitrator in their standard form contracts. Conservative judges can construe statutes designed to benefit consumers so that any protections given are extremely limited. See e.g., *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514 (Mich. 2007) (narrowly construing MICH. COMP. LAWS ANN. § 445.903); *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28 (Mich. 1999) (same). For discussions of offsetting the gains of the 1970s consumer movements, see Jay M. Feinman & Stephen R. Brill, *Is an Advertisement an Offer? Why It Is, and Why It Matters*, 58 HASTINGS L.J. 61, 83–86 (2006); Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575 (1989). See also David Ashenfelter, *Dream Purchases Turn to Nightmares: From a Pieced-Together Car to a Money-Pit Home, Mich. Consumers Find Little Refuge in Gutted Law*, DETROIT FREE PRESS, May 3, 2009, at A4.

46. Sometimes even when a large organization wins a case, being challenged has positive consequences. The fact of litigation and appeals may put the problem on the desk of someone with power to make changes so that the problem won’t come up again.

bound by received classifications; there is a language to be learned and a culture to be passed on. And because our task is to prepare lawyers who will advise and represent clients and persuade decisionmakers, there is an intellectual discipline that is central to the common enterprise.<sup>47</sup>

We do not disagree with Henderson. There is a contracts culture that lawyers need to know. However, the question is one of emphasis. We cannot present the law of the British Industrial Revolution and classic opinions by judges such as Cardozo and Hand and stop there. The modern subject of contracts must include today's not-always-consistent common law developments, statutes and administrative regulations, and the language of contract clauses commonly found in today's business transactions that add to, change, or qualify the results reached by the classic law. Some parts of the contracts field are an alive subject of political struggle on many fronts. Others are just changed by rewriting standard form contract clauses—the rules of private governments, such as sellers like the major automobile manufacturers and buyers like Walmart, Walgreen's, Best Buy, and other large firms that can dictate what are in effect "the laws" of dealing with them.<sup>48</sup> Much of this will never appear on bar examinations. Nonetheless, a transaction-planning lawyer or a litigator facing a possible contract dispute cannot rely only on Professor Williston's contracts law even adding the realists' challenges to it. We may bargain in the shadow of the law,<sup>49</sup> but that shadow is cast by the perceptions of the parties and their lawyers about today's law in action. Part of this involves recent cases, statutes, and

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47. Stanley D. Henderson, *Some Thoughts on Teaching Ordinary Contract*, 124 U. PA. L. REV. 1468, 1475 (1976) (reviewing CURTIS R. REITZ, *CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW* (1975)).

48. Most contracts courses, for example, teach *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Ex. Ch.), where the damages a carrier of goods had to pay one of its customers were limited by the court. Our casebook includes the modern Federal Express clause that limits its customers' remedies even more. LAW IN ACTION, *supra* note 1, at 117–18. Contracts courses usually offer materials on impossibility and frustration. *See, e.g.*, U.C.C. § 2-615 (2012). We offer, in addition, a discussion of relatively short "Act of God" clauses and much longer ones that attempt to offer excuses for impressive lists of disasters and misfortunes. Requirements contracts and Article 2's treatment of them are another part of the tradition. *See id.* § 2-306. Modern buyers with bargaining power avoid the regulation found in that statute. They offer detailed printed forms that drastically limit their legally binding commitment to their sellers but that seek to ward off any claim that such sellers might want to assert. These buyers get their requirements filled because of the value to suppliers of long-term continuing relationships with these customers. Losing such a relationship is a sanction threat far greater than anything the law has to offer. These buyers do demand that their suppliers furnish a certificate showing that they carry products liability insurance. Moreover, they have an elaborate system of allowing the buyer to make specified deductions from the amount due the seller to cover defective goods and defective packaging. Students can see that lawyers cope with rules and decisions that might burden their powerful clients.

49. Samuel G. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996); Lynn M. Lopucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1412 (2000) ("Even if the 'merits' should ever reach a decisionmaker, it will be a decisionmaker identified by the game, and the 'merits' will reach that decisionmaker in a form determined by the game."); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

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regulations; part involves such things as cost barriers, delay, and relational sanctions such as a loss of reputation flowing from a public process.

If we are to train lawyers for a world of long-term continuing relationships and the disharmony of a federal system as it actually functions, we must not confuse them with misleading pictures of a tidy, neat existence. The legal sociologists Maureen Cain and Janet Fitch point out that “‘facts’ . . . kick.”<sup>50</sup> Most contracts scholarship rests on assumptions about how the legal system and other social systems work. If these assumptions are wrong or incomplete, the conclusions of that scholarship are threatened. The law in action is messy, but understanding this is an important step toward being able to cope with the working American legal system.

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50. Maureen Cain & Janet Finch, *Towards a Rehabilitation of Data*, in PRACTICE AND PROGRESS: BRITISH SOCIOLOGY 1950–1980 105, 115 (Philip Abrams et al. eds., 1981) (“The ‘facts’ themselves speak with a political voice and kick with a political boot.”).