

## CONTRACT LAW AND CONTRACT TEACHING: PAST, PRESENT, AND FUTURE†

LAWRENCE M. FRIEDMAN\* and STEWART MACAULAY\*\*

The winds of change are sweeping through some areas of teaching and research in law. Criminal justice is a case in point. The standard casebook was once organized as a catalogue of substantive crimes as defined and redefined in appellate case law. Research consisted chiefly of analysis of these cases in the conventional manner. Academic concern with criminal law has now broadened its horizons. Imaginative materials have been published. There is an impressive amount of new thought and new research (much of it empirical) on criminal law, its objectives, and the actual operation of its processes. But not all fields of law have responded to the call for reform in teaching and research. In contract law, teaching and research is unnecessarily fixated at a stage in the past. New direction is long overdue. We will describe some dominant approaches to contract teaching and research; explain them historically and evaluate them briefly; isolate what we consider some significant features of the past that are relevant to present and future teaching and research in the field of contract; and end with some general proposals.

### I. APPROACHES TO CONTRACT TEACHING AND RESEARCH

At least since the days of Langdell (and in discussing modern legal research and teaching there is rarely any need to go back further), two approaches to contract teaching and research have been dominant. The first—Langdell's approach—treated contract as what we might call *strict law*. Doctrine, as reflected and developed in carefully selected appellate cases, was the proper subject matter of study. Contract doctrine was refined and reduced to a set of concepts and propositions arranged in systematic order. Students were expected to grasp the underlying logic and interrelationship of these concepts and propositions. All else was extraneous—including statutes (except the Statute of Frauds, which had itself turned into a doctrine after two centuries of case law) and a fortiori nonlegal materials.

The strict law approach is associated, first, with Langdell, then with Samuel Williston and his followers. The first *Restatement*

† This paper was originally delivered as part of a panel discussion sponsored by the Association of American Law Schools at its December 1966 convention. Professor Ernest Jones of the University of Florida Law School, who served as panel chairman, devoted much time and effort to organizing the panel. We wish to thank him for his skill and zeal in seeing the project to completion and for his contributions to the ideas expressed in this paper.

\* Professor of Law, University of Wisconsin. B.A., 1948, J.D., 1951, LL.M., 1953, University of Chicago.

\*\* Professor of Law, University of Wisconsin. A.B., 1952, LL.B., 1954, Stanford University.

of *Contracts* is primarily (though not entirely) a product of this school. A major achievement of these scholars was to distill from the existing body of appellate case law a rational, coherent, and internally consistent set of propositions that they identified as the "true" law of contract. The order in which these concepts were arranged—in casebook, treatise, and *Restatement*—corresponded with the life history of a bargain from birth to death, beginning with offer and acceptance. Problems were analyzed because they fit this logical pattern, rather than because they were empirically determined to be socially or economically significant. Cases were labeled "correct" mainly if they were consistent with the logical pattern of contract doctrine.

Later, the legal realists took what we might call the *problem* approach to the law of contract. The proper subject of contract teaching and research was a set of problems. Awareness of these problems, however, was derived from the appellate cases collected in standard casebooks, so that the materials of research and study were not essentially different from those of the strict law method. The use made of these materials was in one sense new (the problem orientation), but in another sense it was old. It was old in the sense that the realists used Williston's classic problems, apparently without considering in depth whether those problems were important once the classic assumptions of Langdell and Williston about the nature of teaching and research were abandoned. Appellate cases were valued not so much for their doctrinal content as for their use as source material for cataloguing contract problems. The goal of teaching was to make students see these problems and understand the various ways in which they might be solved. The goal of research was to analyze case law in order to lay bare the various situations or problems reflected and to solve them by explicit use of principles of policy. "Policy" was generally derived from nothing higher than common sense. Some of the realists had policy positions that did rise to the status of a working philosophy of law, but these philosophies, though they made empirical assumptions, lacked an empirical research base.

The currently dominant approach is the *problem* approach. As we have indicated, it is associated with the legal realist movement, which began in earnest about 1920 and became more accepted in "advanced" legal circles by the 1930's. Present teaching and research basically follows the *problem* approach laced with heavy survivals of strict law. In the course of the last 40 years, the questions that Williston and Langdell asked have been completely rephrased. The realists argued that these questions were far too abstract to be valuable. Why ask whether a unilateral contract could be revoked by the offeror prior to full performance? Better to know who the parties were, the circumstances of the bargain, and any relevant background or consequence. Was it a consumer sale? A brokerage contract? A construction contract? Of what type?

The judge had to operate, consciously or unconsciously, as a policy-maker. Cases were "correct" or "incorrect" in terms of their relationship to policy goals, not in terms of their logical consistency. Some scholars focused less upon criticizing the case law for its failure to perceive policy issues than upon showing the real regularities that underlay the language of the courts and that in fact achieved results denied by theory. Corbin, for example, frequently pointed out that doctrine itself was more policy-oriented in result than classical tradition would admit or understand.

Some realists were more explicit than others in laying bare their criteria for decision. One of the greatest of the realists, Karl Llewellyn, was heavily concerned with the role of contract as an instrument to facilitate business transactions. Yet, though he was one of the most influential voices calling for the use of social science methods, neither he nor other contracts men systematically studied business practice. Knowledge of business practice remained at an impressionistic level; at best, a very few contracts teachers and writers (including Llewellyn himself) brought a rich if unrigorous experience to bear upon the solution of contract problems. Other goals were simply borrowed, unexamined, from the larger society; and, in any event, the instrumental value of case law in furthering these goals was left largely to guesswork and hunch.

Another approach to contract has been much less common but deserves some mention. A few scholar-teachers have interested themselves in contract law as the expression of *political philosophy*. Specifically, contractual bargaining is looked upon as a vital institution of a free economy, and the cases are seen as reflecting the struggle of freedom against social control. Much teaching and research is geared to examining how the assumptions underlying contract law relate to this fundamental issue. This general approach has been one of the themes in the writing of Malcolm Sharp, and it is one of the organizing principles of the casebook he edited jointly with Friedrich Kessler.<sup>1</sup> This concern has historically important roots. The realist generation grew up in the shadow of a long, arduous constitutional struggle over the validity of government regulation of economic affairs—a struggle in which the concept of "freedom of contract" played an important role in constitutional litigation. The most influential achievement of those who saw contract law and teaching in this light was to demonstrate how the issue was reflected and refracted in the appellate cases. "Correctness" of decisions was enriched by one more dimension: the impact of appellate decisions upon the timeless issue of freedom and control. Here, too, though the emphasis in classroom discussion and scholarly writing differs from the emphasis of Williston and Corbin, the materials on which discussion rests are still the

<sup>1</sup> F. KESSLER & M. SHARP, *CONTRACTS, CASES AND MATERIALS* (1953).

classic appellate cases of contract law.

A fourth approach has often been talked about but seldom attempted. This approach takes as the domain of contract teaching and research what we might call contract *behavior*. Its subject matter is the economic order or the business world as it actually functions, and its method is empirical. It makes limited use of appellate decisions. This approach, then, differs sharply from the other three not only in the goals it assigns to teaching and research but also in the manner in which it selects appropriate data for study. This approach has so far had a relatively small impact on contract law as it is taught and on the research activities of those teachers who define their field as "contract."

The major post-realist concerns have all been heavily influenced by legal realism. Post-realist scholars still operate largely in its shadow. They are still heavily oriented toward problem situations that can be identified through appellate litigation. Some major recent themes of contract research and teaching are as follows.

1. The realists have been intent on identifying and solving legal problems, and they want to solve them with more precise tools than were available to Williston's generation. They are not unduly interested in the traditional boundaries of doctrine. Therefore, they have expanded their interests to include closer attention to the law of restitution, damages, and remedies—since, as they convincingly argue, doctrine makes little difference as a problem-solving tool without accurate knowledge of the *results* of litigation. Lon Fuller and others began pioneering work on damages in the 1930's;<sup>2</sup> some of the most notable contemporary work in the realist tradition (e.g., John Dawson's) concerns restitution, remedies, and damages.

2. The realists never shared the excessive veneration of Langdell and Williston for the pure, undefiled, and uncoded common law. As reformers, they have been interested in drafting and explaining legislation. Probably the most important product of post-realist effort is the Uniform Commercial Code; Karl Llewellyn was a vital force in its creation. The Code has strong common-law roots, however. To a great extent, the problems to be solved by the Code were isolated by examining and criticizing, in the realist mode, existing problems contained in the appellate caselaw that formed the basis of academic law study. The Code seeks to reinstate the merchant as the main arbiter of commercial law; its golden age is the age of Lord Mansfield and his merchantmen-juries. In a sense, the Code recreates (or seeks to recreate) this institution. Without a formal panel of merchants, the Code nonetheless insists that objectified commercial practice is the norm of decision in

commercial cases; the judge acts as a wise, open-minded arbiter and sifter of the evidence on custom. In another sense, the Code is the realist's version of the *Restatement*. It seeks to restate the whole of an area of law, but its version of the true common law is based on the attitudes of the assumed golden age, before the law was distorted by conceptualist error. The draftsmen were far more willing than the first Restatesmen to change existing law in the direction of mercantile practice, at least as they perceived it. The *Restatement (Second) of Contracts*, it should be noted, reflects a good deal of the realist revolution and the spirit of the Code; it makes an effort to take account of relevant statutes.

3. Since the realists insisted that their main concern was public policy, some recent scholars have shown great sensitivity to points where contract law touches on such problems as consumer protection. A great flurry of interest was evoked by the *Henningsen*<sup>3</sup> case; by the concept of the unconscionable contract;<sup>4</sup> by the dangers inherent in form contracts and "contracts of adhesion" in general; by the general concept of inequality of bargaining power; and, to a lesser extent, by problems of exploitation of the poor. Here too, however, problems generally reach the threshold of scholarly consciousness by appearing in one or more appellate cases.

4. Contract teaching and research are influenced by general jurisprudential trends. The realist movement wished to set the judge free from the confines of abstract legal concepts and make him aware that he had discretion to solve problems in accordance with policy goals. In legal scholarship in general, there are some signs of counterrevolution, a return to purity in craftsmanship and isolation and restriction to narrow bounds of the policy role of the judge. There is a renewed search for the "proper" or "ideal" role of the judge in seeking public consensus about values to implement. Contract law theory is not immune to these currents of thought.

All of the approaches discussed—except the behavioral approach—and all of the major post-realist concerns mentioned, whatever their differences, remain wedded to appellate case law. (A possible exception is the spate of articles glossing the Uniform Commercial Code.) Empirical research—the search for and the use of new data—is a relatively new phenomenon in legal education in general; and in contract law, it lags far behind many other fields. The research of Underhill Moore and his followers was in a related area, commercial law; but their influence waned before affecting the study of contract. Empirical research on subjects relevant to traditional contract law has been rare. Only a few law schools actively encourage it, even today. Schultz's study of the firm offer

<sup>2</sup> Fuller & Perdue, *The Reliance Element in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937).

<sup>3</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>4</sup> UNIFORM COMMERCIAL CODE § 2-302.

was published in the early 1950's.<sup>5</sup> Quite recently, some studies of business behavior have been initiated, and the work of legal institutions in molding contract law has been, in a few instances, studied from an empirical standpoint. Considering the size of the corps of contract teachers, the output is small indeed.

## II. THE ORIGINS OF THE APPROACHES

The evolution of concerns of contract teachers and researchers is, naturally, not haphazard, nor is it the product of entirely self-contained legal-philosophical forces. Contract concerns reflect larger concerns. Langdell was very much a creature of his times; he admired scientific aims and methods as he understood them, and he took great pains to develop law into a science. The natural sciences and mathematics were models upon which his version of legal science was to be built. If law were arranged logically and systematically, something like the textbooks of Euclidean geometry, it would approximate a science. Moreover, science was grounded on "principles," and these principles were universal; they did not vary with time and place. There was no small element of chauvinism in Langdell's worship of the common law. Yet the common law he worshipped was not taken to be narrow and time-bound; it was the distillate of a deep and universal wisdom that took on subtle changes with the passage of time, though at all times reflecting an unchanging essence at its heart. Practically speaking, the consequences of this view of law was to strip taught law and studied law of all that, in his view, were nonessentials. All statutory materials, all local variations, all deviations from the main (and correct) line of development, were to be ignored or decried and discarded. Moreover, the prestige of profession and school demanded that only highly abstract, nonstatutory, and "national" law should be taught, law removed as far as possible from local practice and practice-oriented material; these suited only the lower orders of the profession and the lower orders of esteem.

But whatever its historical origins, how could Langdell's system of professional education survive if, as we insist, it was radically isolated from the practical needs of the profession—not to mention the demands of the modern world of scholarship in the social sciences? The defenders of the establishment commonly answer the criticism of the training function of classical legal education by pointing out that mastery of concepts is in the highest sense practical; it trains brilliant, lawyerly minds. Perhaps this is so. The defenders further point out that the practicalities of law are either trivial or (essentially) unteachable. Narrow, practice-oriented legal education may not be necessary to the profession. A brilliant legal profession developed in the United States in the

days of Marshall, Hamilton, and Jefferson despite the most rudimentary sort of legal education; a fortiori a brilliant profession can survive (or feed upon) three years of Socratic meanderings. Moreover, the most Langdellian of the law schools were, and still are, the most prestigious. Thus, they attract the best students, and, consequently, their degrees are great tickets to success. Since so many good and successful lawyers, judges, and teachers emerge from this training, it seems to follow logically that this training must be highly suitable for producing good lawyers, judges, and teachers. The system thus indulges in a chain of self-fulfilling prophecies.

In fact, however, law is not a science in the sense Langdell thought it was. There are not and cannot be any "discoveries" that *require* a reorientation of legal education. Chemistry courses teach modern chemistry in order to train chemists in their field. Law schools, paradoxically, do *not* in a sense teach law even though modern law is a subject matter of vast bulk. The law schools specifically deny teaching law; they teach legal method. Consequently, they do not produce fully-trained lawyers. The profession is aware of this, and some members of the bar are heard to grumble. Any change emanating from the profession is resisted by the law schools, however, and properly so, since as the law schools see it, the pressures from the bar are apt to lead in the direction of anti-intellectuality, triviality, and loss of standards. But demands for change from the academic community come slowly and are even less likely to be listened to.

The most dangerous by-product of the Langdell revolution was that it sealed the isolation of legal scholarship from general scholarship. By imitating what it took to be science, it definitively turned its back upon science. In 1870 this was perhaps excusable; the social sciences (nowadays our preferred model for legal scholarship) were in a relatively rudimentary state. In the 1960's, interdisciplinary habits are imperative.

As a "fundamental" field, as a staple introductory course, contract law suffered from all the ills of law teaching and research, only more so. More than most fields, it was and is less committed to imparting understanding of operational principles than to inculcating generalized legal skills. The first of the casebooks was Langdell's; the subject was contracts. At its best, contract teaching and research has added to an understanding of questions of jurisprudence and has trained professors and students to grasp certain economic and constitutional issues of freedom and social control. At its worst, it has been mindless casuistry. And in general, contract teaching and research have felt little obligation to respond to actual problems arising from actual events underlying typical bargains. The isolation of the law school course in contracts is strengthened emphatically by the general characteristics

<sup>5</sup> Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

of legal education—in particular, the intensity of the law school experience. Law schools approximate far more the model of a “total institution” than do many other graduate departments of universities. They not only demand a full-time commitment to legal study, they also discourage adherence to past techniques and ideas out of college (part of teaching people to “think like lawyers”); they seek out structural characteristics to encourage total immersion in the study of law such as special dormitories, requirements of full-time loads, rules against taking courses outside of law school, and so on. Law school is indeed a jealous mistress; unreasonably so. And few students bring much by way of firsthand experience in contracts problems to law school. In what sense, if any, have these facts of legal education been harmful, particularly in the case of contract teaching and research?

### III. CRITICISM OF OUR TRADITION

The aim of education is to teach significantly. But contract doctrine, and the problems this doctrine is concerned with, are arguably not significant in a number of senses. The problems themselves are not *empirically* significant. They do not concern many parties or mean much to the social order. In some instances, the problems are rare in occurrence or litigation (e.g., the problem whether an acceptance to an offer is irrevocable when dropped in a mailbox). Or the problem is only “common” if posed in terms highly abstract; while in terms of concrete situations, the problem is too complex to be solved by general principles. Or the problems are not in fact solved through the use of contract; that is, actual case law uses contract doctrine only as rationalization, or (even more significant) parties typically or almost invariably use means other than contract doctrine to work out difficulties that occur during bargaining or during the life cycle of a contract. We will explore all of these matters in some detail.

Perhaps lack of significance is inherent in the traditionally-conceived sphere of contract law. Insofar as the subject matter of contracts is the governance of economic exchanges in the business world, when problems become socially significant enough to be litigated with any frequency, they tend to be “removed” to new areas of the law where contract doctrine is either irrelevant or plays a minor role. No contracts problem in a *concrete* sense—one that is frequently litigated and which deals with one specific type-situation—lasts more than two generations. The fundamental concepts of traditional contract law—offer, acceptance, consideration, and the like—are instruments far too general and abstract to regulate current, socially significant business problems. When problems reach the threshold of public or general business concern, they are solved or at least coped with by other means—by legislation, for example. Thus insurance statutes, labor laws, and anti-trust legislation cover vital aspects of transactions once fully or

largely within the ancient domain of contract. Other problems simply die out or are drafted out of existence by organized business interests. Contracts casebooks, for example, lovingly preserve many construction-contract cases that, whatever “fundamental” issues they may raise, are obsolete as *construction-contract cases* because the construction business is no longer conducted that way. Standardized forms and modes of transacting business have made it impossible for many great contract cases to recur in their precise, contextual form—yet it is context which breathes life into law. Without context, what remain are puzzles in dead languages.

Even where contract doctrine has not been displaced, it plays a very restricted role in governing business transactions<sup>6</sup> as compared with its press notices. This body of law is said to support the exchange operations of our economy because without it reliance on promises, plans about the future, and rational allocations of the costs of uncertainty would be all but impossible. This sounds important, and it would be if contract doctrine served such a function. But the case is overstated.

At the outset, what do we mean when we talk about contract law? Professors of contract law usually are concerned with the following kinds of apparently significant problems:

- (1) Defining the point of formation of a contract, that point at which one cannot back out of an arrangement without being liable for damages;
- (2) Establishing criteria by which one party may invoke legal sanctions, or prevent the other party from invoking them, in ways that will prompt bargains to be made so that their content is socially desirable as measured by some standard;
- (3) Aiding the performance of contracts by defining obligations through interpretation and gap-filling and by providing incentives to perform through the potential availability of a cause of action for damages; and
- (4) Compensating one who has suffered injury, as defined by the law of contract remedies.

This is what goes on in law schools. But what goes on in business offices, in lawyers' offices, and in the courts? Most businessmen in most industries plan transactions and settle disputes in

<sup>6</sup> Contract law serves other functions, such as undercutting, or filling the gaps in the law of intergenerational transfers of wealth and of allocations of wealth and obligations within families. These functions have not been the center of our research and teaching. Moreover, reciprocity serves many social functions other than pure exchanges of wealth or services. See, e.g., G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961). Perhaps meaningful legal research could be organized around such processes as exchanges of prestige, esteem, or enlightenment. However, this is far from contract law as we know it in law schools. In this paper we are content to argue that given the function of facilitating and channeling exchanges of wealth, contracts teaching and research are inadequate.

ways that make these classic functions of contract law largely irrelevant.<sup>7</sup> In most kinds of transactions, businessmen are very unlikely to worry about whether the contract they are negotiating is cast in proper form to make it legally enforceable. Thus, they are not often interested in the point of formation or the criteria for gaining legal sanctions, two of our favorite law school problems. For example, if the contract is to last over any period of time, businessmen are likely to clutter up the arrangement with clauses that leave matters "to be equitably agreed upon" later. They are likely to be extremely vague about whether they are making "offers" in a legal sense. Moreover, they are very likely to start performing before all of the necessary contract "formalities" are complied with. Finally, many businessmen assume they have the right to cancel a contract before significant, tangible reliance has occurred, and many assume that replacement, repair, or reliance damages are, or ought to be, the limit of liability; one who would seek consequential damages is asking for something he has not yet earned.

If a lawyer is invited to the negotiations, he is unlikely to let his client begin work with no more than an agreement to agree or on the basis of an oral side promise adding to and modifying a written contract. However, very frequently a lawyer will not be invited to the party. Modern purchasing agents and sales managers feel quite able to dispense with the annoyance of legalistic advice, as do many other business officials who conduct negotiations and commit their organizations. By and large, the lawyer is called in only if businessmen foresee potential antitrust or tax problems, if they need a title examined, or if they perceive the lawyer as skilled in the use of language. Even when the lawyer is asked to look over a contract that has been worked out by businessmen, often he must approve one that may not be legally enforceable. His client and the other party may *want* to leave a vital contingency "to be equitably agreed." To force them to work out all allocations of risk at the outset might expose some of the strains in the relationship that the process of negotiation had hidden. As a result, the client might lose the deal, and usually this risk is too high a price to pay for the few benefits of a legally enforceable contract. Also, at times, lawyers whose clients wield great economic power work hard to keep contracts from being legally enforceable in order to be sure that the other party gets no rights against their client. The automobile manufacturers specialize in this kind of arrangement.<sup>8</sup>

While this lack of concern about contract law is probably more

<sup>7</sup> The analysis of the role of contract law that follows is adapted from Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 198-202 (1965).

<sup>8</sup> See S. MACAULAY, *LAW AND THE BALANCE OF POWER* 23-26, 79-80 (1966).

common in planning sales of shelf goods than in elaborate financing arrangements between a group of lenders and a borrower of large sums, the lack of concern about contract very frequently can be seen in all kinds of transactions at the stage of performance and settlement of disputes. Even when much expensive legal work has gone into drafting an elaborate and legally enforceable contract, the document is very often buried in a forgotten file folder while the businessmen, brokers, bankers, agents, and others "work things out" on the telephone, in conferences, or on the golf course. One important businessman said in the course of an interview, "if something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business *because one must behave decently.*"

Typically, lawyers are brought into the dispute settlement process only as a last resort. And this is true even in large corporations where legal advice is readily available at no extra cost. The house counsel and the business lawyer in private practice spend time on taxation, antitrust, fair trade, and the Robinson-Patman Act, not on offer and acceptance or constructive conditions. Thus most businessmen, and many business lawyers also, are not very concerned about gap-filling and remedies for breach of contract—the other two problems of orthodox contract teaching and research.

And why is contract doctrine not central to business exchanges? Briefly put, private, between-the-parties sanctions usually exist, work, and do not involve the costs of using contract law either in litigation or as a ploy in negotiations. To begin with, business relationships rarely generate the kinds of problems considered by academic contract law. There is a constant pressure to standardize business and reduce recurring patterns to a routine. Routine and form create widely shared expectations so that people can understand who is to do what, quite apart from the words of a formal contract. Then, too, business units are organized to carry out their commitments. An executive must stop a whole organization if he wants to breach an agreement, and many members of that organization will have reasons of their own to want to perform. For example, sales employees, who must deal with purchasing agents on a face-to-face basis, represent the interests of the customer within the seller's organization; financial employees represent the bankers who have loaned it money.

Businesses of all kinds have tended to develop stable economic relationships. Therefore, the two businesses involved in any kind of deal are likely to be interlocked beyond the fact of a particular contract. No one disagreement would justify jeopardizing a total relationship. Personal relationships may exist across all levels of the two organizations involved. Executives, for example, are



likely to know each other socially: one behaves differently with friends than with strangers. Today, if not in the past, most people in most kinds of businesses share a norm of honoring commitments unless there is an extraordinary reason not to. And most importantly, there are relatively few one-shot, but significant, deals. A businessman usually cares about his reputation. He wants to do business again with the man he is dealing with and with others. He will have a harder time getting business if he is known as a "chiseler," one who will not keep his word, or even one who always demands the letter of his rights and will not "work things out." And reputations have a way of becoming known: business has an effective intelligence system.

Not only is contract law not needed in many situations, its use may have, or may be thought to have, highly undesirable consequences. Detailed and carefully planned arrangements may create undesirable exchange relationships. A businessman often wants to create a kind of partnership for a limited purpose, with a great deal of sharing of losses and joint responsibility for problems hard to foresee. He will leave gaps in his contract, since an attempt to make an airtight contract at the negotiation stage may encourage the other party to be equally a stickler for the letter of the bargain rather than a member of the team. Use of contract doctrine may be a positive liability in maintaining an ongoing relationship. Coercion (and even a tacit threat to sue is coercive) is inconsistent with an atmosphere of trust and cooperation in the face of adverse circumstances.

Once there is a serious dispute, most businessmen are eager to cut their losses and move on to the next transaction. A salvage operation will not interest them unless they are convinced that it will offer a good return on the necessary investment in it. Unfortunately for contracts teachers, this is not often the case. Moreover, in situations where disputes are fairly frequent, substitutes for contract litigation tend to appear—modes of arbitration or mediation, either formally or informally fostered by trade associations, the good offices of various governmental agencies, or even by the efforts of financial institutions with interests in both parties.

While it is important to see that contract law very frequently plays no real role in business for all of the reasons we have just discussed, it is also important to see that the role it does play is not the one usually emphasized in contracts courses or research. On the one hand, doctrine often becomes something to draft around, so its impact is avoided in those types of transactions where an attorney is allowed to be in on the planning stages. Frequently this is done through the drafting of business forms, such as the American Institute of Architects' forms for residential building construction or the new purchase orders and acknowledg-

ments that attempt to repeal much of the Uniform Commercial Code. On the other hand, sometimes contract law may support private informal means of solving problems. In some situations the chance that one party might sue for breach of contract or that he might win such a suit may be part of the total picture of diplomacy, bluff, and leverage leading to a settlement. In other situations, contract doctrine may serve the loophole function. One party can assert a technical doctrinal argument as part of his effort to undercut his obligation and defeat the expectations of the other. We have very little systematically gathered knowledge about such functions of contract. What evidence we do have indicates that these roles are not common. The costs to one's reputation and business relationships of threatening to sue or using a loophole are extremely high. If supporting private means of solving problems is the real function of contract doctrine, as some seem to have asserted, much more needs to be known: How does the process work? What effect does contract doctrine have in what kinds of situations? What is the significance of the many situations where contract doctrine plays no such role? The burden of going forward with the evidence now rests on those who would stand on this justification for the traditional approach to contracts teaching and research.

Of course, we recognize that in some kinds of situations classic contract doctrine does serve to solve problems that matter to the parties. And one must concede that frequency is not the sole criterion of significance. However, frequency is an important one. Surveys of the typical kinds of cases in which contract doctrine solves such problems prompt us to ask whether or not these problems are important enough to call for the investment of all the intellectual effort that has gone into refining contract doctrine in the abstract. The evidence we have indicates that the common kinds of appellate cases are: atypical or freak business transactions; economically marginal deals both in terms of the type of transaction and amounts involved; high-stake, zero-sum speculations; deals where there is an outsider interest that does not allow compromise; and family economic transactions. Clearly the cases in the reports today seldom fit the model either of the horse trade or the modern bureaucratic transaction. Romanticized versions of the functions of contract law seem to fit the facts poorly. Moreover, the legal response called for by actual litigation usually has little or nothing to do with the concepts of offer and acceptance, impossibility, conditions, or the other categories typically thought to be part of "contracts" as we see it in law school. Rather, these cases call for interpretation of language and rational or ethical allocations of losses. A sense of fairness and meticulous attention to the particular facts of the case, rather than concern with "general principles of contract law," are the guiding stars of decision.

So much for the restricted role of contract. Yet even in those

few areas where contract doctrine or contract problems are clearly or potentially significant, legal education and research do not now provide relevant theory and satisfactory solutions to current problems. This is inevitable in the light of our minimal commitment to discovering the actual consequences of the operation of the legal system. For example, Uniform Commercial Code section 2-207 attempts to solve the problem of the "battle of the forms"; it requires that sellers read all orders carefully or, in effect, grant full warranties subject to a liability for consequential damages. This is a warranty that industrial sellers almost never give voluntarily. To avoid section 2-207, business would have to train a large staff to read an immense volume of small print. No wonder many house counsel find this Code provision bizarre. The section was apparently drafted without assessing costs and without balancing against them the advantages the section might afford. A related sin, prompted at least partially by our traditions of legal education and research, is that we overlook problems—even socially important problems—until they are embalmed in an appellate case. It was traditional case law<sup>9</sup> that made the draftsmen of the Code feel they had to do something about the battle of the forms. Conversely, case law orientation has led to the neglect of the whole range of consumer problems. Our categories make it difficult for us to consider the actual operations of the large modern business corporation when it offers its wares in the market. Of course, we all know that corporations use contract doctrines in order to legislate unilaterally. Most of us know about such "contracts of adhesion," at least since Professor Kessler's excellent article,<sup>10</sup> but where are the studies of the patterns actually used and the careful analysis of the desirability or undesirability of each?<sup>11</sup> For example, consumer warranty disclaimers in small print existed long before the now famous *Henningsen* case;<sup>12</sup> they are still widely used in the sale of products other than automobiles. Even after that landmark decision has been immortalized in many of the casebooks, there is yet to be published a study of the actual impact of the case on auto safety, injured consumers, car prices, or the practices of manufacturers.<sup>13</sup> It also seems likely that the parol evidence rule and the procedural and practical re-

<sup>9</sup> E.g., *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915).

<sup>10</sup> Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>11</sup> For one such analysis, see Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

<sup>12</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>13</sup> Professor William C. Whitford of the University of Wisconsin Law School is presently conducting a study that deals with some of these questions. His investigation indicates that the *Henningsen* case has had a far different impact than has been assumed in articles and casebooks by contracts teachers.

strictions on the law of fraud support the exploitation of the poor by certain kinds of businessmen; conversely, certain tricks of offer and acceptance often can be used to bail a legal aid client out of a contract for pots and pans. Yet where is the research into this kind of practice? Where are the proposals for reform based on a realistic assessment of potential gains and costs? Or their rebuttals? What casebook really devotes any effort to this kind of problem?

#### IV. SIGNIFICANCE AND CONCLUSIONS

What is the significance of these observations for contracts teaching and research? Most basically, we need to identify our goals and define the best possible "mix" of them. This involves identifying the appropriate subject matter of contracts and making some informed choices. The major difficulty is an uncritical acceptance of the problems of Langdell and Williston as the important ones and of the methods of the late 1920's and 1930's as the appropriate ones, all in isolation from the facts of modern business.

Even if we would be satisfied to do no more than solve these traditional problems better by the methods of realistic jurisprudence, we need to know a lot more about them. We need to understand the total situation to be sure that our traditional problem really is a problem. After all, it may be handled now by another area of law, by draftsmanship and the use of standard clauses, by insurance, and by a cluster of private sanctions, or it may have disappeared because of a change in business practices over time. We also need to know the situation so that we do not unnecessarily tamper with an existing balance of legal and other-than-legal sanctions that in practice accomplish results we like. Knowledge of the total situation would also increase our chances of effectively changing practices we do not like. Of course, this means we must see the alternatives that are realistically possible and evaluate the gains against the costs of each as best we can.

If we would turn our attention from the traditional contracts problems to the most socially pressing problems of business law and behavior, we add another dimension to those just mentioned. We must adopt some criterion of social importance and then look for what is happening in the world rather than what is reported in West's publications long after the event. If we would focus on lawyers' skills, either to teach our students better or to understand the role of the total legal system in society, we must turn to studying those skills, and this will carry us not only into litigation and appeals but also into negotiation and the architecture of successful transactions as well. Sociological theory and study of the interrelationships of organizations might provide us with a starting place for our own thinking, and it seems likely that these matters will be jurisprudentially significant. Finally, if we would explore



the problems of political economy, even here some data would help both in terms of solutions and identifying more helpful categories than Willistonian left-overs. If we wish to discuss power relationships in a capitalist society (or whatever one calls our society), actual materials drawn from the private legislation of large bureaucratic organizations in the form of contract, might be more challenging and relevant than placing sole reliance on old cases on the law of consideration.

Many academic specialists in the law of contracts will insist that their present teaching materials and methods as well as their present research interests in fact pay attention to the empirical, economic, and social policy concerns argued for here. Undoubtedly in some cases this is true. It is our impression, however, judging from the output of casebooks and law review articles, that the core teaching and research concerns remain highly traditional, that the efforts made to modernize contract teaching and research are peripheral and largely consist of a kind of a gloss or embroidery on the received faith. For example, contracts teachers once talked about the acceptance-when-mailed rule in terms of what was thought to be a logically necessary solution. Then, influenced by an infusion of realism, they asked whether or not the many different situations thought to be covered by that rule did not call for different rules and sought the answer in terms of the consequences of having one or several rules. But the knowledge of the consequences was based on speculation, and no one asked whether or not the acceptance-when-mailed rule was or had ever been an important living problem worth worrying about. In short, a sharper break with our past traditions is needed.

We contend an empirical basis for teaching and research is essential, given any of the goals of contract teaching and research discussed up to now—unless one views the function of contract as no more than that of teaching a logically closed system, its implications, and some ideas about legal method, a limited aim that most contracts teachers would probably reject. Some may see the role of first-year contracts as one of training students in keen legal reasoning, in swiftness and accuracy of mind—a role (it is said) which the casebook cases suit regardless of their empirical relevance. Of course, one might ask why system, method, and skills could not be taught with live problems, a proposal that would require some data about what problems are alive. To this, a defender of orthodoxy might in turn respond that the contracts system exists, is highly polished, and is well presented in many casebooks and treatises, while other techniques for teaching system, method, and skills are untested and would require an unwarranted amount of additional work to create and verify. Perhaps some may find this objection persuasive. But if the argument is accepted, there is a real problem of disclosure to the consumer. Law students taught this way should not be allowed

to leave first-year contracts thinking that they know much about the role of law in exchange transactions in the business world.

One other thing ought to be made absolutely clear. What is proposed here is empirical research, not "empiricism" in the sense of a naive faith that the data to be collected will contain principles, values, goals, and ideals in themselves. Collecting facts is no substitute for making such judgments—no more than thinking about nonproblems and speculating or making unexamined assumptions about the consequences of legal action merit the name "realism."

Finally, the need for data presents great difficulties. Who is going to do the dirty work? when? what do we do until it gets done? Perhaps most importantly, and in the meantime, contracts teachers could at least recognize empirical issues. Even when using a conventional casebook, they could ask at every point what the current relevance is of the materials being discussed, what difference it would make in practice if the case were decided differently, and how likely it is that the decisions reported will reach and affect the behavior of those to whom they are ostensibly directed. In answering these questions they could remember that law is but a part of the total sanction system in any society and that using law typically has high costs. They could attempt to think about the realities of the operations of large corporations when the problem involves that kind of business unit: General Motors does not act like the ordinary individual in the market place. Where the problem involves consumers or nonbusiness transactions, we ought to remember how late in the game lawyers are called in and how little these transactions are molded by an awareness of law or thinking about contingencies. In addition, law teachers could supplement traditional materials with an imaginative use of the present stock of legal and nonlegal studies bearing on contract behavior and problems. In areas of particular interest to the instructor, but where research done by others as yet has not penetrated, he could do some simple explorations on his own—by making judicious use of letters, telephone calls to friends in practice or in business, and even interviews and questionnaires when appropriate.<sup>14</sup> Or he could encourage his students to do so. We do not need the resources required for the University of Chicago's jury project or sophisticated social science methodology to make significant advances over our present research practices. In critical areas, major field studies in partnership with social scientists eventually may be necessary, but at present we still have the pilot studies to do before elaborate efforts are required. Perhaps most significantly, we need to challenge our tradition and stop taking it as axiomatic.

<sup>14</sup> For a good example, see Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1476-82 (1967).