

## AN EMPIRICAL VIEW OF CONTRACT

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Professor Stewart Macaulay reflects on his 1963 article *Non-Contractual Relations in Business* and assesses its current significance. Analysis of the gap between contract doctrine and the daily functioning of the business and commercial world has proven to be a fruitful source of theoretical insight into the social functions of law. While the teaching of doctrine remains a central element of legal education and even predominates, the theoretical potential of an empirical approach to legal education remains vast.

### I. INTRODUCTION

When Grant Gilmore called his lectures "The Death of Contract,"<sup>1</sup> he gave a name to a body of work that includes some of mine. He called me the "Lord High Executioner" of the "Contract is Dead" movement. However, Gilmore was not very interested in my empirical description of contract. He said this kind of work lacked theoretical relevance. I must credit him with an attention catching title. Nevertheless, he failed to see that the very limited practical role of what professors call contract law poses significant theoretical problems that we are only beginning to confront.

In a way, Gilmore's title is misleading. Contract as a living institution is very much with us. In the day-to-day flow of dealings, vast numbers of significant transactions take place to the reasonable satisfaction of all concerned. People and organizations bargain, they write documents, and they avoid, suppress, and resolve disputes little influenced by academic contract law. Some cases are taken to court and the formal process begun, although lawyers settle most of them before courts reach final decisions. There are even opinions by judges relying on traditional contract law, but they are relatively rare.<sup>2</sup>

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\* Malcolm Pitman Sharp Professor, University of Wisconsin-Madison. This paper was given on October 24, 1984 at the University of Amsterdam. I want to thank Professor André Hoekema for inviting me to speak and for being such a gracious host. A revised version was given on May 20, 1985 in Copenhagen. Professor Britt-Mari Blegvad arranged an enjoyable conference in her delightful city. Dr. Jacqueline Macaulay read the manuscript critically and, as always, made it much better.

1. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

2. See Trubek, Sarat, Felstiner, Kritzer and Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 87 (1983).

Furthermore, contract within the academy is still very much alive. Every morning in law schools all over the United States beginning law students struggle with offer, acceptance, and consideration. I never argued that contract law died. Rather, academic contract law is not now and never was a descriptively accurate reflection of the institution in operation. Moreover, this inaccuracy matters in many ways.

At the end of September in 1984, there was a conference in Madison marking the 21st birthday of the publication in the *American Sociological Review* of my article on non-contractual relations in business.<sup>3</sup> I am pleased that the article has had a long shelf-life and people still find something in it. After listening to others at the conference consider long-term continuing relationships, it is a good time for me to reflect on developments over the past two decades. We must remember that my article reports research done when Dwight Eisenhower was President of the United States, and I wrote it when John Kennedy was in office. Both the business executives and lawyers interviewed and the author were living in the United States before the decline and fall of the American empire. Indeed, any article that uses Studebaker taxis as an example was written in the pre-word processor age. A great deal has happened in 21 years. We also know much more about the American legal system in operation today than anyone did when I wrote the article.

To reconsider what I wrote, I will summarize the argument of my 1963 article, including some of my later research as well. Then I will note what I would add were I to write the article today. Finally, I will consider what difference all of this makes to those interested in contracts and law and society research. I will talk about developments in the United States, not because I think them more important but only because I know my own society best.<sup>4</sup>

## II. THE 1963 ARTICLE AS SUPPLEMENTED BY TWO DECADES OF WORK IN DISPUTE PROCESSING RESEARCH

The 1963 article challenges a model of contract law's functions, explicit or implicit in the work of contracts scholars and social theorists. This model makes contract law far more central than its actual role in society.<sup>5</sup> One version of the model suggests that in a state of nature we

3. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter cited as Macaulay, *Non-Contractual Relations*].

4. Compare Lewis, *Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry*, 9 J. LAW & SOC'Y 153 (1982).

5. I am indebted to Professor Anthony Kronman of the Yale Law School and Professor Robert Gordon of the Stanford Law School for some of the ideas in this paragraph. I sketched the implicit academic model of contract in Macaulay, *Elegant Models, Empirical Pictures, and the*

are all selfish. Law supports needed interdependence by coercing us to honor obligations to others. The historical story is that we begin with trading within real communities. Capitalism breaks this up, and we become alienated strangers. Then the legal system supplies a kind of synthetic community based on rights and duties enforced by courts.<sup>6</sup> A variant of the story is that market capitalism changes all personal relations into autonomous market trades<sup>7</sup>—capitalism replaces a spirit of interdependence by “what’s in it for me?” Contract law supplies the needed glue to hold individualists to their bargains.

More particularly, writers assume a number of things about the institution of contract. First, there is careful planning of relationships in light of legal requirements and the possibilities of nonperformance. We must spell out everything because parties will perform only to the letter of a contract, if they go that far.<sup>8</sup> Second, contract law is a body of clear rules so that it can facilitate planning. It provides formal channels so that we know the right way to proceed to produce desired legal consequences.<sup>9</sup> Finally, contract litigation is a primary means of deterring breach and directly and indirectly resolving disputes. Without contract law and the state’s monopoly of the legitimate use of force, performance of contracts would be highly uncertain.<sup>10</sup>

However, all of these assumptions about history and about human relationships are just wrong or so greatly overstated as to be seriously misleading. Contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships. There are business cultures defining the risks assumed in bargains, and what should be done when things go wrong. People perform disadvantageous contracts today because often this gains credit that they can draw on in the future. People often renegotiate deals that have turned out badly for one or both sides. They

*Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977) [hereinafter cited as Macaulay, *Elegant Models*].

6. Gordon, *Macaulay, MacNeil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565.

7. *Id.* at 568-69.

8. Macaulay, *Elegant Models*, *supra* note 5, at 508.

9. *Id.* at 509.

10. *Id.* at 509-10, discussing M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (1954) and M. Jensen & W. Meckling, Can the Corporation Survive? (1976) (University of Rochester, Graduate School of Management, Center for Research in Government Policy and Business, Public Policy Working Paper Series PPS-76-4).

recognize a range of excuses much broader than those accepted in most legal systems.<sup>11</sup>

There are relatively few contracts cases litigated, and those that are have special characteristics. Few of those cases litigated produce anything like adequate compensation for the injuries caused. Frequently, limitations on liability in written contracts block remedies based on the reasonable expectations of the party who did not draft the instrument. At best, formal legal procedures usually are but a step in a larger process of negotiation. Filing a complaint and pre-trial procedure can be tactics in settlement bargaining; appeals often prompt reversals and remands, leaving the parties to settle or face continuing what seems to be an endless process. When final judgments are won, often they cannot be executed because of insolvency.<sup>12</sup>

How do we explain this gap between the academic model and an empirical description of the system of contract law in action? Academic writers often make individualistic assumptions. Their theories rest on worlds of discrete transactions where people respond to calculations of short-term advantage. However, people engaged in business often find that they do not need contract planning and contract law because of relational sanctions. There are effective private governments and social fields, affected but seldom controlled by the formal legal system.<sup>13</sup> Even discrete transactions take place within a setting of continuing relationships and interdependence. The value of these relationships means that all involved must work to satisfy each other. Potential disputes are suppressed, ignored, or compromised in the service of keeping the relationship alive.

While we often read that increasing bureaucratic organization has made the world impersonal, this is not always the case. Social fields cutting across formal lines exist within bureaucracies, creating rich sanction systems. Individuals occupying formal roles ignore organizational boundaries as they seek to overcome formal rationality to achieve goals, gain rewards, and avoid sanctions. Social networks serve as communications systems. People gossip, and this creates reputational sanctions.<sup>14</sup>

11. See Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983); Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265 (1984).

12. See Macaulay, *Elegant Models*, *supra* note 5, at 511 n.3.

13. See S. Macaulay, *Private Government* (1983) (Disputes Processing Research Program, Madison, Wisconsin, Working Paper 1983-6).

14. See Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691 (1983).

Power, exploitation, and dependence also are significant. Continuing relationships are not necessarily nice. The value of arrangements locks some people into dependent positions.<sup>15</sup> They can only take orders. The actual lines of a bureaucratic structure may be much more extensive than formal ones. Seemingly independent actors may have little real freedom and discretion in light of the costs of offending dominant parties. Once they face sunk costs and comfortable patterns, the possibility of command rather than negotiation increases. In some situations parties may see relational sanctions as inadequate in view of the risks involved. However, instead of contract law, they usually turn to other techniques to provide security, ranging from collateral to vertical integration.<sup>16</sup>

Furthermore, contract law as delivered is a misrepresented product. American doctrine is not clear and easy to apply. Rather it is contradictory, uncertain, and offers arguments rather than answers.<sup>17</sup> This is particularly true of the Uniform Commercial Code's Article II, governing transactions in goods. I often tell my classes that if lawyers of equal ability represent clients with equal resources and willingness to invest them in a case falling under Article II, the case will end in a tie.<sup>18</sup> If one side wins and the other loses, it is not because of the power of legal doctrine. I can match any argument you make with one equally as good. Also, courts have interpreted the Code's rules concerning failure to perform so that settlements and compromises are promoted, and those who would vindicate their rights are punished.<sup>19</sup>

American contract remedies are limited and reflect a fear of awarding too much. Our courts rarely order specific performance of contracts. One must prove one's damages with reasonable certainty, and in most states the injured party cannot recover the lost anticipated profits of "a new business."<sup>20</sup> The rule of *Hadley v. Baxendale*<sup>21</sup> further limits recovery to damages that were reasonably foreseeable at the time of breach. Courts frequently refuse to award the cost of repairing a defec-

15. See Macaulay, *The Standardized Contracts of United States Automobile Manufacturers*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3-21 (1973).

16. See O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND THE ANTITRUST IMPLICATIONS* (1975).

17. See, e.g., Macaulay, *Private Legislation and the Duty to Read—Business by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966) [hereinafter cited as Macaulay, *The Duty to Read*].

18. I have been accused of exaggerating every now and then to make a point.

19. See, e.g., *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *Solar Kinetics Corp. v. Joseph T. Ryerson & Son, Inc.*, 488 F. Supp. 1237 (D.C. Conn. 1980).

20. See *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127-28 (5th Cir. 1974).

21. 9 Ex. 341, 156 Eng. Rep. 145 (1854). See U.C.C. § 2-715(2) (1978) for a modern statement of the rule.

tive performance. Instead, they limit the remedy to the difference in value between the contract as performed and as it should have been had there been no breach.<sup>22</sup> While this sounds reasonable, the burden of proof usually confines diminution in value to a token remedy.<sup>23</sup> Limiting remedies can benefit a weaker party, making breach of contract less burdensome. However, often it benefits stronger parties. They have less need for legal remedies to achieve their ends because they have other-than-legal leverage. Limited remedies allow stronger parties to walk away from burdensome obligations at low or no cost. Courts frequently find that a stronger has breached a contract, but so limit the remedy awarded the weaker that the victory is hollow.

Even when contract law might offer a remedy, the legal system in operation promotes giving up or settling rather than adjudicating to vindicate rights. One must pay for one's own lawyer, and one must win enough to offset all the costs of the endeavor.<sup>24</sup> Thus, using the legal process always is a gamble. Furthermore, crafty lawyers use delay and procedural technicality for advantage. Galanter has discussed what he calls "megawlaw."<sup>25</sup> Those who can afford to play invest in the skills of large law firms. They play the litigation game by expanding procedural complexity to draw out the process. Others who cannot afford to invest as much must drop out. This kind of power is not distributed equally. In another famous article, Galanter tells us "why the 'haves' come out ahead."<sup>26</sup> The "haves" are repeat players who can spread the costs of litigation over many similar transactions. They can afford to play for rules and treat disputes as test cases which may help them in the future. They can run up the costs of a particular case in order to reinforce their reputation as difficult defendants to sue.

Technical complexity and delay gain greater impact in a legal system marked by overload. While America has more lawyers per person

22. See, e.g., *Plante v. Jacobs*, 10 Wis.2d 567, 103 N.W.2d 296 (1960); *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

23. See *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963). The problem is discussed in Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1155-65 (1984).

24. A plaintiff may be able to recover reasonable attorneys fees from the defendant in cases falling under various consumer protection statutes. See, e.g., Wis. Stats. § 425.308 (1983-84). Even when this is true, a consumer must win to get an award of fees. These statutes change the nature of the wager, but litigation remains a game of chance. Moreover, lawyers are limited to reasonable fees. Usually this means they cannot win enough in one case to offset those cases where they lose. Thus, these statutes do not work as contingent fees in personal injury litigation.

25. See Galanter, *Mega-Law and Mega-Lawyer in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152 (1983).

26. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

than any Western nation, the number of judges is relatively small.<sup>27</sup> Many factors have contributed to the rise in recent years of judges who coerce parties to settle rather than try cases that will take time in court. Our judges have long done this, but recently they have brought the role out into the open.<sup>28</sup> They are proud of their efforts, and they are teaching each other how best to force parties to settle rather than litigate.<sup>29</sup> Of course, legal rights matter in settlement negotiations, but such considerations as the immediate need for money also play an important part.

### III. IN 1984, WHAT SHOULD BE ADDED TO THIS PICTURE?

The original article does not rest on naive functionalist assumptions of harmony.<sup>30</sup> Nevertheless, today I would stress that relational sanctions do not always produce cooperation or happy situations. Trust can be misplaced. There are always failures to perform and mistakes. Usually, business people take an insurance approach. They write off these incidents as long as there are not too many or one of them does not involve too much money.<sup>31</sup> Business scandals always have been with us, and they prompt attempts to use care and countermeasures. By and large, the contracting system works well enough. However, even large famous business corporations can suffer major losses as the result of incomplete planning and trusting the wrong people.<sup>32</sup>

When long-term continuing relationships do collapse, those disadvantaged often turn to contract law and legal action.<sup>33</sup> We have seen

27. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 52, 55 (1983) ("The ratio of lawyers to judges in the United States is . . . one of [the] highest anywhere; the private sector of the law industry is very large relative to the public institutional sector.").

28. See, e.g., *Matter of Westinghouse Elec. Corp.*, 517 F. Supp. 440 (E.D. Va. 1981).

29. Galanter, " . . . A Settlement Judge, not a Trial Judge: " *Judicial Mediation in the United States*, 12 J. LAW & SOC'Y 1 (1985); M. Galanter, *The Emergence of the Judge as a Mediator in Civil Cases* (1984) (Disputes Processing Research Program, Madison, Wisconsin, Working Paper 1984-5).

30. See Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 78-79 (1984).

31. Macaulay, *Non-Contractual Relations*, supra note 3, at 63.

32. See, e.g., J. STEWART, *THE PARTNERS* 152-200 (1983); Eagan, *The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 AM. BUS. L.J. 281, 282-83 (1980); Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977); Parisi, *Westinghouse Faces Hefty Financial Losses While the Case Puts Gulf Oil's Reputation in Peril*, N.Y. Times, July 9, 1978, § 3, at 1, col. 1.

33. The text that follows is based on an unsystematic but extensive reading of reported appellate litigation over the past two decades as part of editing materials for a contracts course. In addition, I have read the briefs, and often the record, in almost all of the cases from this period that we used in the materials. I want to thank Ms. Cynthia May of the Wisconsin Law Library for heroic efforts to obtain this material. We have followed the business press and collected accounts

litigation prompted by major shocks to the world economic system.<sup>34</sup> OPEC and the energy crises of the 1970s provoked many cases where contracts had rested on relational sanctions and assumptions about the costs of energy.<sup>35</sup> Relational considerations gave way to the large amounts of money that businesses would have lost had they performed their commitments. Westinghouse, for example, promised electric utilities buying its nuclear reactors that it would guarantee the price of fuel.<sup>36</sup> A world cartel sent the price soaring far beyond the price Westinghouse had guaranteed. Westinghouse found a plausible excuse in the Uniform Commercial Code<sup>37</sup> and announced that it would not perform. After elaborate rituals before the courts, the cases were settled. Westinghouse injured its reputation, but the alternative might have been the destruction of a major multinational corporation. Contract doctrine played a part in the resolution of this dispute, but it would be hard to call it the principal actor.

The decline of the American industrial economy produced other controversies about how to spread the costs throughout society. Employment security provides a good example. Unlike Europe,<sup>38</sup> the United States does not have laws regulating job security of most workers. We did not see such laws as needed as long as we had a growing economy and a strong ideology of competition and rewarding merit. Events have shaken our assumptions. It is not easy for even the upper part of the working class or middle class white collar workers to move to comparable employment today.<sup>39</sup> Many older middle managers

of the state of contract in commercial society. Finally, we have interviewed or written many lawyers about these cases.

34. See, e.g., *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783.

35. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979), cert. denied 444 U.S. 865 (1979).

36. See J. STEWART, *THE PARTNERS* 152-200 (1983); Macaulay, *Elegant Models*, *supra* note 5, at 515 for the story of the Westinghouse case.

37. Westinghouse relied on U.C.C. § 2-615(a) (1978) which provides an excuse "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . ."

38. See, e.g., Dickens, Hart, Jones & Weekes, *The British Experience Under a Statute Prohibiting Unfair Dismissal*, 37 INDUS. AND LAB. REL. REV. 497 (1984).

39. See Drucker, *The Job as Property Right*, Wall St. J., Mar. 4, 1980, at 24, col. 4. ("For companies to be able to dismiss even the most senile and decrepit oldster, they will have to develop impersonal standards of performance and systematic personnel procedures for employees of all ages.")

have been fired to save their higher salaries, medical benefits, and pensions.<sup>40</sup> The women's movement has made sexual harassment salient.<sup>41</sup>

These developments plus the great reductions in the workforce have provoked atrocity stories that have come before the courts. The traditional American rule is that non-unionized employees of a private corporation could be fired for good reason, bad reason, or no reason unless they had enforceable employment contracts for a specified duration—and only a few highly valued employees had these.<sup>42</sup> Lawyers brought cases to court involving outrageous terminations of employees at will, and some judges responded.<sup>43</sup> At first, courts fashioned rather sweeping doctrines that would have offered a great deal of employment security.<sup>44</sup> As American attitudes have shifted to the right, the courts have become concerned with going too far. Later cases have qualified what had seemed to be a growing trend.<sup>45</sup> Many writers say we need a statute, but most agree that those who would benefit from such a statute lack the power to promote one.<sup>46</sup>

Other cases have been provoked by the shift to new technologies that industry has mastered imperfectly. This has left a wide gap between expectations and what manufacturers have been able to deliver. Traditionally, American manufacturers of complex machines promised products that would produce certain results. They did their best while containing costs and keeping up production. Often the product sent

40. Greenberger, *Fired Employees in 40s Filing More Bias Suits*, Wall St. J., Oct. 8, 1981, at 31, col. 3.

41. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

42. See, e.g., *Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894 (1938) (court held that worker who alleged he was fired because of his wife's refusal of his supervisor's sexual advances, failed to state a cause of action).

43. See, e.g., *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (court reversed the dismissal of a complaint where employee alleged he was fired because he refused to commit perjury before a legislative investigating committee); *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (a salesman who had worked twenty five years for the company was fired a day after he placed a customer order that would have entitled him to a large bonus); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (assembly line night shift worker was told by her foreman that if she were "nice" to him he would promote her. She refused and then was denied overtime, ridiculed and ultimately fired).

44. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (where discharge violates a fundamental public policy, employee has a tort action); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (there is an implied covenant of good faith and fair dealing in employment contracts, breach of which entitles employee to damages).

45. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

46. See Greenan, *The Problems of Wrongful Termination*, 4 CAL. LAW. 29 (Aug. 1984); Marrinan, *Employment At-Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155, 197-99 (1984); Perritt, *Employee Dismissals: An Opportunity for Legal Simplification*, 35 LAB. L.J. 407, 412-13 (1984).

was a first draft. Engineers from the seller and those from the buyer then would work something out by trial and error.<sup>47</sup>

In the computer age, the expectations created by manufacturers' promises have been unrealistic, and the "working out" approach has often failed.<sup>48</sup> This has led to litigation testing the contract drafting of elite lawyers.<sup>49</sup> Even experienced business people are tricked by a sales person's assurances that are contradicted by a lawyer-drafted standard form contract. Courts often enforce these standardized documents to aid deception and fraud<sup>50</sup> or to help large bureaucracies control their street-level personnel. It is fascinating to watch the doublethink when they explain these decisions on the basis of the victim's consent and choice. Usually a major question is whether a court will honor the various warranty disclaimers, remedy limitations, and other evasions of responsibility hidden in fine print. Some courts have seen these clauses as just part of the business game;<sup>51</sup> others have recognized that form contracts can be licenses for sales people to trick customers and evade responsibility when things go wrong.<sup>52</sup>

Another body of reported litigation involves those in dependent relationships such as dealerships and franchises trying to fight to defend their assumptions about continuing their business. All kinds of contract and tort doctrines have been mobilized, and these groups have organized to lobby statutes through the various state legislatures.<sup>53</sup> Dealers have won some notable victories. However, in recent years, bureaucratic rationality and flexibility in the face of changed marketing conditions have won out over the interests of the dependent.

47. See, e.g., *Fairchild Stratos Corp. v. Lear Siegler, Inc.*, 337 F.2d 785 (4th Cir. 1964); *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969).

48. See, e.g., *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. 1976); *Burroughs Corp. v. United States*, 634 F.2d 516 (Ct. Cl. 1980).

49. See, e.g., *Binks Mfg. Co. v. Nat'l Presto Industries, Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Chatlos Systems, Inc. v. Nat'l Cash Register Corp.*, 670 F.2d 1304 (3d Cir. 1982), cert. denied, 457 U.S. 1112 (1982); *Wilson v. Marquette Elec., Inc.*, 630 F.2d 575 (8th Cir. 1980); *Badger Bearing Co. v. Burroughs Corp.*, 444 F.Supp. 919, (E.D. Wis. 1977), *aff'd mem.*, 588 F.2d 838 (7th Cir. 1978).

50. I think judges, just as most Americans, have conflicting views about deception. Fraud may be bad, but a sharp operator evokes a smile and admiration. Sometimes our judges confuse the loveable con man of fiction and film with a Fortune 500 company.

51. See, e.g., *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 619 P.2d 1055 (Ariz. Ct. App. 1980).

52. See, e.g., *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980). The problem is discussed in Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984).

53. I have told this story in some detail in S. MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966); Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 536-40 (1982) [hereinafter cited as Macaulay, *Law Schools*]. See also Jordan, *Unconscionability at the Gas Station*, 62 MINN. L. REV. 813 (1978).

While our court reports have registered a great deal of contracts litigation in recent years, all of these attempts to use contract law have revealed that the second part of my 1963 critique still has force. The legal system in operation simply fails to vindicate rights or offer much to those who seek redress from the courts. Often it offers only symbolic victories, probably producing great frustration. For example, as I have mentioned, we have enacted statutes granting rights to dealers who hold franchises to sell automobiles, gasoline, and the like. Members of the trade associations that worked to pass this legislation saw enactment as a great victory. Yet again and again the courts have read these statutes narrowly so that franchisors escape real harm.<sup>54</sup> The statutes may have had indirect impact. Franchisors may have modified the behavior of their agents to avoid atrocity cases that might prompt courts to interpret the new rights broadly, but this is only supposition.<sup>55</sup>

Usually, contract litigation becomes an elaborate, drawn out morality play affecting only back stage negotiations. Gottlieb points out "[i]n sustained and inextricable relations a principal use of contracts is to provide a basis for renegotiations once a defective performance occurs."<sup>56</sup> For example, many scholars have discussed *Aluminum Company of America v. Essex Group, Inc.*<sup>57</sup> In that case, increases in the price of fuel made a long-term contract very unprofitable for ALCOA, the supplier. The written contract contained a price escalator clause which failed to take into account great increases in energy costs. ALCOA stood to lose millions of dollars if a court enforced the contract as written. A federal trial judge rewrote the contract to produce a pricing arrangement that he thought fairly reflected the risks actually assumed by the parties. In light of all the declarations by American courts that they will not rewrite contracts to reflect the bargain the parties ought to have made, the opinion seems surprising. Perhaps, it symbolizes a very different role for courts.

54. See, e.g., *Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co.*, 539 F.Supp. 1357 (W.D. Wis. 1982), *aff'd*, 761 F.2d 345 (7th Cir. 1985).

55. Franchisors have attacked franchise protection statutes, and this may indicate that the statutes have some effect. For example,

A spokesman for a Madison pizza firm told a Senate committee . . . that Wisconsin's Fair Dealership Law was inhibiting the company's expansion through franchising. Wayne Mosely, co-owner of Rocky Rococo Corp., said the law overrode specific behavior by a franchise, agreed to in a contract, so that a firm like his risked lawsuits if it didn't renew the contract under the same terms as the original. . . .

Marc A. Aprea, representing Mosely and the International Franchise Association, said the Legislature should "take steps to unshackle franchisors from this overregulation."

The Capital Times (Madison), Aug. 31, 1983, at 8, col. 1.

56. Gottlieb, *supra* note 11, at 572-73.

57. 499 F.Supp. 53 (W.D. Pa. 1980).

However, the trial judge's decision never went into effect as the case was settled. The parties renegotiated their arrangement. During the oral argument on appeal, a federal appellate court managed to convey to the parties its doubts about the innovative decision that favored ALCOA. After a huge investment in lawyers, expert witnesses, court costs and the like, the reaction of the appellate court prompted ALCOA to offer a settlement to Essex Group that was too good to refuse.<sup>58</sup> What remains is an opinion by the district court for scholars to write about.<sup>59</sup> However, while most of these articles are excellent, most of the authors write as if they were unaware that the innovative, and perhaps offensive, judicial revision never was put into effect.<sup>60</sup> Many of these articles discuss judges imposing their views on the parties and rewriting contracts. That did not happen in the ALCOA case, and it probably would not happen in many cases even if *Aluminum Company of America v. Essex Group, Inc.* were recognized as the law everywhere. The District Judge's opinion and the uncertain result of the appeal changed the balance of bargaining power, but it did not impose a final result on the parties. The decision plus the appellate process worked as a form of coercive mediation. Faced with the situation, the parties worked out their own solution. The chance that a judge might rework a written contract after circumstances had changed also could affect bargaining situations. Perhaps this kind of coercion toward settlement is a good way to handle contracts that have gone on the rocks; perhaps it is a terrible way. Nevertheless, it is hard to evaluate a process without describing it accurately.

Other contracts disputes that provoke written opinions end in token settlements because almost always American contract law awards only money damages. However, a major reason that relational sanctions fail and contracts are breached is that the defaulting party is in or on the borders of bankruptcy.<sup>61</sup> As some lawyers put it, a judgment

58. The statement in the text is based on interviews with lawyers for the parties in the ALCOA case. See also, Wisconsin Contracts II Materials 925 (unpublished manuscript 1984).

59. See, e.g., Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984); Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U.L. REV. 1039 (1983); Speidel, *The New Spirit of Contract*, 2 J. LAW & COM. 193 (1982); Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 595 (1983); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 500-506 (1985); Comment, *Relief From Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 MO. L. REV. 79 (1982); Comment, *Equitable Reformation of Long-Term Contracts—The "New Spirit" of ALCOA*, 1982 UTAH L. REV. 985.

60. Both Dawson and Speidel are well aware of the settlement. Most of what I know about it comes from following up what Dick Speidel told me about the case.

61. Macaulay, *Elegant Models*, *supra* note 5, at 512-13.

against a bankrupt plus 65 cents will buy a bus ride in Madison, Wisconsin (of course, 65 cents alone will do the same thing). The threat of bankruptcy often is a potent weapon in settlement negotiations; it is a form of strength through weakness.

#### IV. WHAT DIFFERENCE DOES ALL THIS MAKE AND TO WHOM?

What should we make of this gap between the academic model of contract law and the system as it works? At minimum, we need a complex model of contract law in operation if we wish to be descriptively accurate. Contract law operates at the margins of major systems of private government through institutionalized social structures and less formal social fields. We must establish rather than assume the actual influence of this doctrine. Contract law as discussed by scholars frequently is but a rhetorical ploy in a much larger struggle. Lawyers may use its vocabulary in the process of dealing with a dispute. Often, however, the real issue between the parties is transformed to fit a law school model far removed from the transaction. As such, classic doctrine may affect negotiations, but not in the way assumed by most scholars. Perhaps lawyers skilled in playing the contract game do better for their clients, but defenders of orthodoxy must prove this. Perhaps bargaining in the shadow of the law<sup>62</sup> implements those values explicit or implicit in contract doctrine to some degree. This cannot be assumed but must be established by investigation.

The contract process in action seldom is a neutral application of abstract rationality. The party with the best argument as judged by a contracts professor will not necessarily win the case. An opponent with a plausible argument, little need to settle, and resources to play the lawyering game is unlikely to bow to arguments favored by law professors at elite schools. Indeed, all an attorney may need are arguments that seem more or less plausible to judges and other lawyers. Even those disliked by scholars such as "unilateral contract" and "the meeting of the minds" often will do in the actual dispute resolution process.

We cannot be sure what functions orthodox contract doctrine serves. However, what we know so far suggests that contract doctrine incorporates major conflicting strands of political philosophy. It does not stand apart from the cross currents of political debate over time. At a particular time, one conception is emphasized. Later, as times change, another view takes its turn. In areas such as the parol evidence rule, the Statute of Frauds and misrepresentation, we find decisions in a single

62. See Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).



state bouncing from one position to the other. This makes contract law contradictory.<sup>63</sup>

At the most basic level, contract law promises to remedy breaches of contract and provide security of expectations. It does this only indirectly and imperfectly. It helps reassure us about the stability of an ever changing and frightening world. It deters breach by those unaware that counterrules neatly match most contract rules or that most contract rules are qualitative and open-ended. Much of law operates under the Wizard of Oz principle of jurisprudence—you will recall that the Great Oz was a magnificent and wonderful wizard until Dorothy's dog knocked over the screen so all could see that the Wizard was a charlatan.

Nonetheless, contract law curbs power to some degree. Those who can command may not want to appear arbitrary and all powerful. It is good public relations to channel their actions into the forms of contract to gain the symbolism of bargain and free choice. Even this modest effort offers a degree of leverage for limiting the exercise of power. Scholarly notions of free contract are a frail defense against those with power seeking to achieve illegitimate ends. Nonetheless, there are few other defenses short of revolution.<sup>64</sup>

Perhaps classic contracts scholarship can safely ignore the way the contract system works. This scholarship may be irrelevant to most of practice, and so it does not matter how articles are written. However, this scholarship has influence in some instances, and this leaves us with a puzzle. In the face of many studies challenging its descriptive accuracy, many scholars and theorists continue to paint a simple instrumental picture. What purposes are being served by all this traditional scholarly effort? Perhaps it is a form of denial. The formal contract system claims to be neutral and autonomous and to rest on simple rationality. A descriptively accurate model of the process challenges these assumptions. We must remember that long-term continuing relations are not always nice situations for those short of power. Instead of free individuals making informed choices, many are dependent and must choose between unpleasant options. Courts seldom come close to putting aggrieved parties in the position they would have been had the contract been performed. Cases are often won by lawyer ploys and the strategic and tactical advantages flowing from greater wealth. Instead of vindicating rights, our legal system offers deals. As a result, often one party feels cheated while the other thinks he got away with something.

63. See Macaulay, *The Duty to Read*, *supra* note 17.

64. See Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 176-7 (1984) [hereinafter cited as Macaulay, *Is There any There There?*].

At least in the United States, we want to believe that a lawyer, armed only with reason, can champion the weak and overcome the powerful. This myth drew many of us to law school, and it is hard to give up. A descriptive model reduces many lawyers to little more than captive intellectuals serving those who control significant resources in society. In short, classical contracts scholarship allows us to maintain a comforting image of what it is that typical lawyers do. A system of individual rights prompts higher thought. Descriptive accuracy requires us to confront the dark side of the society and its legal system. Many find it easier to ignore reality than to cope with it. In Fitzpatrick's words:

[L]aw sets and maintains an autonomy for opposing social forms, keeping them apart from itself and purporting to exercise an overall control. Yet this control is merely occasional and marginal. In such instances, the balance between autonomy and control is most often struck by law's intervention being comprehensive in terms but limited in operation. . . . In the limited nature of its involvement with other social forms, law accepts the integrity of that which it controls. . . . Indeed, the (common) law is not "a brooding omnipresence in the sky," but law's operatives have to view it so because of the dangers of confronting law's terrestrial connections. Law cannot bear very much reality.<sup>65</sup>

Some academics also find fashioning theories useful to the powerful to be rewarding both financially and in terms of status in academic circles. Consulting for those who can pay the fees has become a significant part of many legal scholars' jobs. Instead of gaining status by publication of research, some seek reputation in terms of the fame of the corporations that hire them as consultants. Consulting scholars may be able to affect the practices of those hiring them for the better. Consulting scholars may learn something of how things are done. However, it is hard to avoid championing the position of the interest that has bought its professor. Furthermore, we can ask why so little of this consulting has prompted scholarly writing about the way things are done in executive suits. Perhaps descriptively accurate theories confronting the dark side of our legal system would interfere with the opportunities to consult. Perhaps the consulting takes so much time that these professors forget to do their job.<sup>66</sup>

65. Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115, 126-27 (1984).

66. Hacker makes a strong attack on consulting by law professors: It is a law school tradition that students do not approach professors. . . . While this may encourage self-reliance, it also means the professors only have to show up several



Perhaps many academics ignore the functioning legal system for a much simpler reason. Looking at it makes things messy. As Betty Mensch notes:

Viewed in retrospect, Williston's majestic doctrinal structure may have been silly, but . . . appeals to reasonableness and justice appear sloppy and formless by comparison. Williston's structure was, at least, a real structure, however misguided. Perhaps much Willistonian dogma survives simply because it provides a challenging intellectual game to learn and teach in law school—more fun than the close attention to commercial detail required by thorough-going realism.<sup>67</sup>

#### V. A NOT TOTALLY PESSIMISTIC CONCLUSION.

Having said all this, I must note that I still teach contracts to beginning law students.<sup>68</sup> (Of course, I am not sure that many American teachers would accept that what I teach is true contracts material.) I try to blend study of rhetoric and doctrine with a portrait of the system in operation. There are at least two reasons for doing this. One is to train lawyers better. Students must understand a game to learn to play it well. The other is that the approach raises major questions about law and society. Put most simply, why does American society promise so much more than it delivers? Or, looking at the situation another way, what functions does the system as it actually operates serve and for whom?

However, I try to teach a not entirely negative lesson and guard against cynicism. There is enough truth in the image of law as rationality above politics and power so that a few lawyers representing a few clients can make their society a little less hostile place. I think visions of a better future are important, but in the here and now lawyers can make a contribution to smoothing rough edges from the society. I would rather teach my students some ideal of law than leave the impression that practice can be no more than just selling advocacy to the highest bidder.

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hours a week. A few do some research; but many don't do even that. The number of law professors with national reputations is meager. A lot spend their spare time in part-time practice, augmenting their already generous salaries, which are second only to the medical faculty on most university payrolls.

Hacker, *The Shame of Professional Schools: How Not to Educate an Elite*, HARPERS, Oct. 1981, at 22, 27. While his point has merit, I think it overstated. But I may not know how much consulting takes place nor its influence on positions taken in class and in publications.

67. Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 769 (1981).

68. See Macaulay, *Law Schools*, *supra* note 53.

My colleague, Marc Galanter, says that if we demystify the nature of dispute processing and paint an empirically accurate picture, we must face the challenge of:

devising new ways of measuring the performance of legal institutions and new ways of redesigning those institutions to facilitate interchange with a more alert public. To get there from here, we need a new generation of research about what law means in people's lives; what gives it its hold, its influence, its attraction; why it repels or frightens; whether it is dependent upon illusions about its character. . . .<sup>69</sup>

This is an optimistic statement. Those who see law as but one of many cloaks for power and privilege may object. We can expect them to argue that an accurate view of law in operation would violate so many legitimating assumptions that a new normative justification would be impossible. Bargaining and negotiation are not examples of disinterested application of apolitical norms—they necessarily take into account all sources of power. The nice guys do not always win. Indeed, they may have to be content with token settlements. We can ask whether citizens in modern welfare states can face the nature of their legal system? Do they need to believe in a rule of law? In absolute rights and wrongs? In a wholly autonomous legal system? Can they accept both the virtues and costs of bargaining in the shadow of the law?

Perhaps citizens need an idealized picture of their legal system. Perhaps it is what most of us want to believe. However, before we discard the possibility of working toward new rationalizations for modern legal systems as they operate, we must remember that the public is somewhat informed, often cynically aware of the true nature of law in action. Indeed, the citizens' recognition that the legal system's claims are belied by its day-to-day performance may produce that cynical awareness. Understanding the system as it is might reduce some of the cynicism. Perhaps, however, attempts to justify law as delivered might force us to consider a number of reforms which some would see as threatening to their position and privileges. If awareness provokes debate, it would be healthy.

Perhaps the only people fooled by classic images of law are law professors and social theorists misled by legal scholars.<sup>70</sup> On the other hand, perhaps a few professors are playing a cynical game. Scholars can

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69. Galanter, *Knowledge Transcends Pessimism About the Law*, Legal Times, Sept. 24, 1984, at 6, col. 1.

70. See Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103 (1984); Schlegel, *Langdell's Legacy Or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1532 (1984) ("The legal academic . . . is committed to

gain grants and support by fashioning their work to serve the interests of those who provide pleasant lives for academics. Most, however, are just more comfortable with a traditional structure that provides focus and coherence rather than an indeterminate empirical picture, whatever its accuracy.

The challenge is to find a way to avoid cynicism, recognize the values of classic views of law, and rationalize a dispute processing system that does not turn on litigation and doctrine. All of this must be done without becoming a pet intellectual for those who can pay. Perhaps it would be easier to square the circle or turn lead into gold than bring this off. Nonetheless, this is the challenge of an empirical perspective on law.<sup>71</sup>

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scholarship dominated by the notion of law as rule and yet at the same time such scholarship is both a largely completed task and an intellectual anachronism").

71. Compare Macaulay, *Is There Any There There?*, *supra* note 64.