

## ENRICHING THE CONTRACTS COURSE

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I have already committed myself in print to the proposition that contract law is a rich subject.<sup>1</sup> In fact, I have gone so far as to say that contracts is “by far the best law school subject to teach and learn.”<sup>2</sup> Although the latter statement was mildly tongue-in-cheek, I have no doubt that the former proposition is true. Theoretical writing about contract law abounds, including promise, consent, relational, economic, psychological, historical, critical, empirical and sociological theory.<sup>3</sup> This should be no surprise. Contract law focuses on society’s most important questions, including how society should organize, how to create incentives that benefit society, and what promises the law should enforce and why.<sup>4</sup>

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<sup>1</sup> Robert A. Hillman, *The Richness of Contract Law* (Kluwer 1997).

<sup>2</sup> Robert A. Hillman and Robert S. Summers, *The Best Law School Subject*, 21 *Seattle U. L. Rev.* 735, 735 (1998).

<sup>3</sup> See generally Hillman, *supra* note 1 (discussing theories).

<sup>4</sup> *Id.*

Contract law is also a fertile field in which to study our legal process, including the texture and methods of the common law, the development and nature of statutory law, and the relationship between substantive rights and remedies.<sup>5</sup> For example, what better subject to illustrate that “there have never been two cases *exactly* alike,<sup>6</sup> and that a case’s equities supplement the legal rules?<sup>7</sup> Further, contract law is a wonderful vehicle for analyzing the role of lawyers as planners, drafters, counselors, and litigators.<sup>8</sup> In light of contract law’s profundity, the professor teaching it may feel a daunting challenge. The question is not so much whether the teacher should go beyond the nuts and bolts, but what should she select from the abundance of potential sources of enrichment.

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<sup>5</sup> Hillman and Summers, *supra* note 2, at 735.

<sup>6</sup> Compare *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935), with *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945).

<sup>7</sup> See Walter Oberer, *On Law, Lawyering & Law Professing: The Golden Sand*, 39 J. Legal Educ. 203, 203-05 (1989).

<sup>8</sup> See, e.g., Robert S. Summers & Robert A. Hillman, *Contract and Related Obligation* 5-25 (4<sup>th</sup> ed. 2001).

One viable strategy is to expose students to a smorgasbord of contract law concepts, theories, and principles, while emphasizing a few. But how to select those areas for more intensive study? To some measure, selection depends on what the contracts teacher wants to achieve in the course. For example, a longstanding controversy between the bar and academy is whether law schools, as professional schools, adequately train students for the practice of law.<sup>9</sup> If such training is a teacher's primary goal, exercises on planning transactions, drafting documents, and negotiating to avoid the kinds of breakdowns reported in the cases seem appropriate.<sup>10</sup> If a teacher views her primary goal as helping students understand the nature and function of exchange transactions in society, she may want to rely more heavily on insights from economics, philosophy, psychology or other disciplines. For me, however, this is a false dichotomy. Exposing students to legal theory cannot help but make them better lawyers by enhancing their understanding of human decision making, interaction, culture, and politics. Exploring practice skills cannot help but make students better theorists by alerting them to the many contexts of exchange interaction and exposing them to the formal and "informal and unwritten rules, customs and local legal cultures that exist in the formal legal system[]." <sup>11</sup> I'll have more to say about the relationship between practice and theory shortly.<sup>12</sup>

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<sup>9</sup> See generally American Bar Ass'n Section of Legal Educ. and Admission to the Bar, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (1992). For a recent perspective, see, e.g., Pauline A. Schneider, Is There A Disconnect Between the Academy and the Private Practice of Law? 35 Syllabus 1 (September 2003).

<sup>10</sup> See infra notes 13-25, and accompanying text.

<sup>11</sup> Andrea M. Seielstad, Unwritten Law and Customs, Local Legal Cultures, and Clinical Legal Education, 6 Clinical L. Rev. 127 (1999).

<sup>12</sup> See infra notes 13-25, and accompanying text.

At any rate, the question remains, how to select from the wealth of perspectives? My view is that a teacher should utilize what interests her and what she believes will be most successful in class. Usually, of course, the two will go hand in hand. Further, to make a wise decision, the teacher must have a grasp of extant theories and their potential for integration in the classroom. Symposia such as this one contribute by informing teachers about the range of perspectives, by presenting various methods of integrating these perspectives, and by emphasizing the potential insights of each illustrated theory.

In my contracts course, I dabble in economic, psychological and moral theory, among other things, but I also try to enrich the course with lessons from the law-practice perspective. In fact, because this symposium does not focus on lawyer skills as a source of enrichment, I'll conclude this introduction with a brief discussion of this subject. But I do not intend to wander from the theme of the importance of theory in teaching contract law. Professors can enrich skills teaching by presenting a theoretical framework for skills analysis.

Consider, for example, the inventory of roles of a lawyer engaged in contractual matters:

In a contract situation an attorney may be called up to (a) negotiate the terms of a proposed contractual relationship, (b) draft the contract, (c) assist the client to settle disputes arising during performance of the contract, and if a settlement cannot be reached, (d) advise the client concerning the hazards, costs and likely decision in event of litigation, and (e) represent the client in litigation whether before a trial or appellate court or an arbitrator or other alternative dispute resolution personnel.<sup>13</sup>

How to conceptualize the skills teaching of all of these tasks? Of course, a rich collection of articles and books discusses the purpose of lawyers.<sup>14</sup> One theory is that lawyers

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<sup>13</sup> Clark Byse, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. Rev. 59, 60-61 (1998).

<sup>14</sup> E.g., *The Ethics of Lawyers* (David Luban ed., NYU Press 1994), and articles therein; John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L.

“assist in the formulation of wise and informed decisions . . . .”<sup>15</sup> Although obviously quite general, this may be a useful unifying theme for contracts teachers. Not only must a lawyer explain legal rules, principles, and background facts to help her client make informed decisions,<sup>16</sup> she also must assist her client in making *wise* ones.

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Rev. 1485 (1966).

<sup>15</sup> Noonan, *supra* note 14, at 1488.

<sup>16</sup> See Byse, *supra* note 13, at 61.

As behavioral decision theorists tell us (this genre is represented by Russell Korobkin's contribution to this symposium), people have a limited ability to gather and process information, often utilize "mental shortcuts" to reach decisions, and frequently make biased or emotional decisions.<sup>17</sup> For example, people generally are too confident and do not believe low-probability risks will occur.<sup>18</sup> People also oversimplify their information processing by believing that easily-recalled events are more likely to occur than vague memories.<sup>19</sup> In addition, people do not like ambiguity and make choices to avoid it.<sup>20</sup> And people allow their emotions to control decisions.<sup>21</sup> Clients are, of course, people, and left to their own devices, often would make bad decisions or at least sub-optimal ones. One theory of contract lawyering, then, is that the lawyer's role, beyond educating the client, is to correct for her client's cognitive deficiencies.

So, if a client is too optimistic that a proposed exchange will go smoothly, and therefore fails, for example, to study a proposed liquidated damages provision, the lawyer's job is to bring the client down to earth.<sup>22</sup> If a client-purchaser of goods believes she must suspend performance because she has reasonable grounds for insecurity,<sup>23</sup> the lawyer must establish whether the purchaser bases her concerns illogically on a recently publicized failure of a different supplier. If a client's aversion to ambiguity motivates her to demand that a proposed contract list all of the events that would constitute a default, the lawyer must alert the client to the problem of unanticipated or unforeseeable defaults.

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<sup>17</sup> See generally Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 *Cornell L. Rev.* 717 (2000) (discussing cognitive biases and heuristics).

<sup>18</sup> *Id.* at 723-24.

<sup>19</sup> This is called the "availability heuristic." See *id.* at 721.

<sup>20</sup> *Id.* at 724.

<sup>21</sup> Robert A. Prentice and Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 *Cornell L. Rev.* 583, 606 (2003) ("[R]esearch . . . points to the central role of emotion in decision making. In fact, research shows that even anticipated emotions appear to impact decision making."); Peter Brandon Bayer, *Not Interaction but Melding--The "Russian Dressing" Theory of Emotions An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 *Mercer L. Rev.* 1033, 1039 (2001) ("Because human beings are incapable of ascribing meaning and significance without recourse to emotions--thus legal decision making simply cannot be performed absent emotion--any theory allowing legal decision makers to imagine the contrary profoundly distorts the reality of the process . . .").

<sup>22</sup> Hillman, *supra* note 17, at 729.

<sup>23</sup> See UCC § 2-609 (1989).

The lawyer's greatest challenge may be in assisting a client to make a wise decision when emotions get in the client's way. One of my favorite examples, which illustrates the limits of a lawyer's effectiveness in this regard, involves the dispute in *White v. Benkowski*.<sup>24</sup> The Benkowskis agreed to supply water to their neighbors, the Whites, through a well on the Benkowskis' property. The Whites claimed that the Benkowskis maliciously withheld water, and brought a lawsuit against them. The Whites prevailed on their substantive claim, but could not prove serious damages. What is important for present purposes is that the parties became downright hostile, as revealed in a transcript of the trial:

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<sup>24</sup> 155 N.W.2d 74 (Wis. 1967).

Gwynneth [White] testified that the relationship of the families was good until . . . the Whites' daughter picked an apple in the Benkowskis' yard. Ruth Benkowski then called the daughter an "S.O.B." Gwynneth told Ruth that "she didn't like this." Later, Ruth called Gwynneth "a redheaded bitch." Virgil White stated that Paul Benkowski lodged a complaint with Virgil's superior that Virgil had tried to run over Paul's child. The district attorney's investigation absolved Virgil. Paul Benkowski also complained to the police chief that Virgil . . . had wild parties at home. Virgil was again absolved of any wrongdoing."<sup>25</sup>

The Benkowskis obviously came to despise the Whites, which impeded the Benkowskis from making rational decisions. But a lawyer probably could not have dissuaded them from turning off the water. Further, I doubt that if the Whites had hired a lawyer to draft the agreement with the Benkowskis, the lawyer would have had much success drafting an agreement that would have deterred the Benkowskis from turning off the water. To pursue the latter theme, I ask my class whether they would have included a liquidated damages clause in the agreement and if they thought it would have done any good. Students usually exhibit a great deal of skepticism.

Of course, cognitive deficiencies and emotions may also impede a lawyer's decision. Teachers can discuss the kinds of legal training that may help lawyers avoid these problems, at least when advising clients.<sup>26</sup> An obvious example is a bombardment of case reports revealing things that have gone wrong, so that future lawyers do not assume that nothing will go wrong. Students seem especially appreciative of training that improves their future legal advice.

### *Conclusion*

There are many ways to enrich the contracts course. This symposium consists of some excellent examples. Teachers should find some helpful hints herein and the symposium is worth reading for this reason alone. More important, however, reading these articles hopefully will convince teachers of the merits of using *some* form of enrichment to get beyond the holdings and rules.

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<sup>25</sup> Summers and Hillman, *supra* note 8, at 17.

<sup>26</sup> But see Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777, 783 (2001) ("Even lawyers fall prey to cognitive illusions."). For a discussion of how to improve judicial judgment, see *id.* at 822-826