The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules

Stewart Macaulay*

Assume that contract law matters, at least in some subset of all the situations where people consider making or do make contracts. Also assume that contract law should rest to a large extent on choice or responsibility for misleading others about one's choices. Making these assumptions, we must be concerned with how the legal system deals with the expectations of the parties. One approach is formal. Judges can limit themselves to dealing with only the formal expressions of the parties - the paper deal. They need ask only whether the parties signed or accepted a document, and if they did, what is the 'plain meaning' of the words they used. Sometimes, writings labeled 'contract' do capture many if not most of the expectations of those who sign them.

Often, however, the paper deal will not reflect the real deal: a writing can be inconsistent with the actual expectations of the parties. Courts frequently have sought to protect such actual expectations despite the presence of a writing that does not mention them or even one that is inconsistent with them. However,
However, there are objections to writing contract law in the qualitative fashion that seems necessary that are so well known that we can call them classic. Furthermore, there are also classic responses to these objections. In this paper I will ask whether we can do more than just reprise these old songs and hear one group of scholars, judges and lawyers sing one song while another group whistles the other. We can clarify our choices by examining each from a law and society perspective - that is, by asking how the law in action appears from the point of view of business people and their lawyers. Moreover, we can gain a little ground in at least one limited subset of contract cases if we focus on judges in such disputes serving as agents of settlement. With all of its flaws, such coerced cooperation may be the least bad solution in many situations.

I will review briefly some of the reasons that the paper deal often does not reflect the real deal or the implicit dimension of contract. I will consider the somewhat chaotic responses American courts have given to the problem. I will look at what relational contract theory suggests courts should do and what a concern about the rule of law offers. My conclusion is not startling: we cannot have our cake and eat it too. There are costs and benefits flowing from focusing on the paper deal and from focusing on the real deal. The twentieth century history of American contract law and scholarship reflects cycles of privileging one judgment about those costs and benefits and then rejecting it and adopting another. Finally, I will suggest that in a limited subset of all contract cases, we should be content with almost any approach that leads to settlements that give expression, more or less, to plodgional norms and values.
context, background assumptions, our experiences, and, too often, our bias, ignorance and stupidities.\(^5\) A law is ... provide that X will write or accept a flat, unqualified contract clause but assume that there are exceptions or qualifications that are not worth the effort to spell out in advance. In short, there are many reasons that the paper deal will fail to capture the real deal.
Sometimes, of course, implied conditions and strange readings rationalize a judge’s refusal to enforce the bargain that the parties made.

Lawrence Friedman pointed out that American contract law in the late Nineteenth and early Twentieth Centuries was grounded in abstraction; it offered rules assumed to be applicable whether the parties were rich or poor and without regard to the subject matter of the transaction. The rules purported to be unchanging over time. However, when faced with the demands of a developing economy, American courts used tools such as waiver and estoppel and construction of language to bend specific rules into conforming with standards of higher generality. Often careful study would reveal that contract law featured a rule opposed by a counter rule with no principled way of knowing when one or the other would apply. American law, for example, tells us that it is not duress to threaten to do what you have a legal right to do. Yet a wrongful although not illegal threat can be duress. These two statements of the law do not live together happily.

The legal realists had a fine time dropping bombs on ideas about plain meaning and abstraction. The more you know about language, the less comfortable you are with ideas that any collection of words has but one complete and clear meaning. 

In conclusion, Professor Corbin would reduce doctrine judging. Judges working in the grand style did not apply rules mindlessly. Rather, drawing on their situation sense, rules served only as guides to judgment.

However, the Code is not pure Llewellyn but a compromise between the legal realism of the academics who produced the first drafts and the traditional views of the commercial lawyers who forced revisions. Llewellyn was not free to innovate at will. He had to obtain the blessing of the American Law Institute and the National Conference of Commissioners on Uniform State Law. Moreover, the Code had to be passed by state legislatures, most of which had many members who were lawyers trained in the conventional wisdom. Article 2 has, for example, a parol evidence rule and a Statute of Frauds. In the hands of a judge holding traditional views, there are ways to read the Code that can serve as a road back to the familiar territory of the common law of contracts. In making this move, it helps to ignore the definitional sections of the statute. As a result, Article 2 often preserves aspects of the classic common law approaches but seeks to change the common law enough to deal with modern conditions. It can be considered an example of ‘neo-classical contract.’ In short, many of the tools needed to seek the implicit dimensions of contract are in Article 2, but even judges who read statutes carefully do not have to use these tools.
uniform results. In its contextual approach, every case is different. Llewellyn had

Scott's conclusions are not surprising. Insofar as geography...
Scott acknowledges that "[o]ne who argues for a return to acontextual modes of interpretation has to concede, and I do, that there are real costs to a return to the common law approach." This is well said. Yet there is another point: I am still enough of a legal realist to doubt whether courts would or could abandon a contextual approach to giving meaning to language and behavior. Just as some writers are skeptical about whether courts can apply a realist approach, we can be equally skeptical about whether courts can be truly formal and close their eyes to everything but the words on a piece of paper. Even the classic formalist parol evidence rule allowed contextual evidence if terms were 'ambiguous.' In the hands of many judges, this opens the door to a case-by-case policy approach. Would the advocates of near-certainty abandon this exception? Could they abandon it if they wanted to do so without reducing contract interpretation to an empty ritual? Or

January 2003]  

in application. For example, suppose the parties failed to provide for the time of performance. I accept that it might be very useful to know for sure whether the seller would have to perform a day, a week or a month after the contract was signed. Nonetheless, can we imagine being satisfied with a rule that provided that all contracts made without a fixed date for delivery had to be performed within a week after they were signed? The rule would look certain, but there is not much more that could be said for it. Courts could gain certainty by refusing to enforce any contract that did not specify a date for performance. Yet this would make many bargains unenforceable even when it was clear that a seller's failure to deliver had continued far beyond any reasonable time for performance. I would find this too much to pay for whatever benefits near certainty would bring.
end-game would only disappoint expectations created during the process of attempting to maintain a relationship. Courts had good reasons for fashioning the

are many roads to a judgeship, but some judges will have some background in business as a result of their practice before they took the bench. In many cases, the practice of law itself involves participating in a small business, and this report

[Vol. 66]

The Modern Law Review

January 2003]

The Real and the Paper Deal
various types of business transactions in detail before we make judgments about the need for greater certainty and clarity, the power of relational norms and sanctions and the costs of a flexible judicial approach. The problem is to avoid over generalization.

we have seen, some legal scholars seek to increase the predictability of what courts will do with contract disputes.

The formal classical model of contract law has an illustrious history. We find traces of this version of the rule of law in Shakespeare’s The Merchant of Venice.
wealth. In fact, Weber suggested that completely formal thought may be impossible.

Many scholars have been critical of the approaches to development championed by the World Bank and the International Monetary Fund, which have included the rule of law as a key component. The larger criticisms focus on the presumption that private actors in markets unchecked by regulation produce the greatest good. As Silbey remarks, "[l]aw is relegated to ... [a] ... subordinate role as a background figure providing context but little determinative action ... [T]he market narrative is a parable about lowering expectations about what collectivities can or should do. It

out in an acceptable fashion. When Americans make a contract, it is not certain that it be performed to the letter of its text or performed at all. Yet, it is a good bet that the parties will perform acceptably.

In my 1963 study of business practices related to contract, I note that 'business units are organised to perform commitments ...' Most simply, someone in the seller's organisation must have a reason to stop goods that have been ordered from being delivered to the buyer. Someone in the buyer's organisation must have a reason to stop the standard procedure for paying bills. In an absence of a reason to the contrary, commitments are honored as a matter of
Second, it provides a fairly comprehensive set of parameters for the parties' regular - or irregular - dealings and discussions. If problems arise, say on a matter like quality, the LTC offers a series of elements - price, quantity, shipping, etc - which, at least at the beginning of the negotiation are fixed points of reference …

Third, and most important, the LTC creates a privileged trading relationship between the parties, which is of great importance in times of difficult markets, of glut or scarcity, in the sense that it reinforces, by rendering unambiguous, each party's claim to remain in business relations with the other. It thus gives better, but not absolute, security to the trading position of each party.61

All in all, I doubt that courts seeking the implicit dimensions of contract would...
flexibility and qualitative norms in many areas of business. Such a law is not wildly uncertain. As Llewellyn said,

For the fact is that the work of our appellate courts all over the country is reckonable. It is reckonable, first, and on a relative scale, far beyond what any sane man has any business complex ways by sanction systems. Most simply, if parties are to continue the relationship, this may call for many adjustments of rights and duties over time. The risk of losing the relationship usually is a powerful sanction. Insofar as contract law rests on reasonable expectations and reliance, the relational nature of
organisations. There are costs to imposing norms by formal legal means, capability problems and high-cost barriers stand before putting on a case to be
that there is a problem in a type of case such as those involving consumers, we should advocate flat rules for those kinds of situations.

January 2003]

We can notice several things about the Oglebay Norton case. The reasonable rate was not a thing that existed in the world that could be just picked up and plugged into the contract. The reasonable rate was a concept that had to be determined by the court based on the facts of the case.
When issued, the court's order to negotiate and mediate seemed reasonable enough. After just a few years, the changes at Armco seemed to have meant that Armco no longer had as many requirements for carrying ore on the Great Lakes. But this was a risk that Oglebay Norton assumed when it made a requirements contract. If our speculation is right, the court's order made sense as long as a requirements contract made sense. The court could not change the decline of the American steel industry.

approaches fail, letters can be written on an attorney's letterhead in order to make an implicit threat. Complaints may be filed in court, and negotiations may be commenced if summary judgment is not granted. Sometimes, however, cases involving large sums of money may proceed far down the path to a final judgment affirmed on appeal and still be settled. Furthermore, sometimes the settlement provokes the parties to resume their relationship, although often with a modified balance of power. This may be a way, if not the most common way, that the ideas of relational contract are implemented in the American legal system.
uranium from FP&L's holding ponds into which the rods were placed. Westinghouse had planned to recycle these rods, but no commercial recycling was the large number of parties who faced governmental regulation. For many reasons, no utility wanted to get a settlement that was clearly less favorable than
Dean Scott clearly recognises that most cases are settled, but he argues that clear rules will promote more settlements. He argues that categorical binary contract rules are unpleasant. Business people must turn over a large measure of control to lawyers, and many resist this. Even the threat of having a lawyer for the other side takes a