Chapter 1

INTRODUCTION

A. OVERVIEW OF LAW IN ACTION

This book takes a law in action approach to the study of contract law. This approach questions overemphasis on legal rules. Of course law students must learn legal doctrine, but they need to learn much more. Legal reasoning has a tendency to overclaim for the impact of law on human relations. Furthermore, most lawyers are not litigators but rather play an advisory role in the planning and adjusting of relationships. In law practice, contract doctrine is a tool, but it is often less important to a lawyer’s work than the ability to understand the business or other context, assess the goals and positions of parties, and find common interests and compromises.

The law in action approach stresses that very few disputes become lawsuits, let alone progress to an appeal that produces the appellate opinions typically studied in law schools. In most situations, legal rights serve as but a vague bargaining entitlement in a negotiation process. People settle differences in the shadow of the law. For example, the victim and an insurance adjuster who is not a lawyer settle most auto accident claims in a fairly routine way. Even in the small percentage of disputes where the victim hires a lawyer, that lawyer is likely to negotiate a settlement without bringing a lawsuit. In the tiny fraction of cases where a complaint is filed in court, lawyers usually settle before a trial begins. Of course, legal rules play a part in the outcome, but often a minor one. As a result, the liability rules discussed in law school classes often will not have the impact on behavior assumed in approaches such as legal realism or law and economics, discussed further below.

Moreover, we may err if we assume that appellate decisions are final resolutions of matters. The loser may battle on through administrative agencies or state and national legislatures to change the rules. And sometimes people win victories in these other law-making institutions so slighted in the first year of legal education. Furthermore, even where a plaintiff wins an appellate decision affirming a judgment for a large sum of damages, one must execute the judgment and turn it into money. However, the defendant may have no assets subject to execution in the jurisdiction. The defendant may file for bankruptcy or delay matters through a state creditor-debtor proceeding. One of the lessons of a law in action approach is that while rules and upper-level decisions are important, one has to look at the real options open to the parties. This approach insists that we look at the legal system from the bottom up as well as from the top down. Criminal law, for example, is both a matter of the statutory definitions of crimes as interpreted by appellate courts, and behavior as seen from the front seat of a police squad car.
The law in action approach reminds us of practical issues lawyers face, particularly in contract law. The approach emphasizes the gaps between stated policies of legal rules and their impact and the ways in which business norms and imperatives are often more powerful "law" than formal law on the books.

Use of "law stories," investigations of the background of cases, can help to bring out law in action insights. Your professor may choose to use another book with such material to provide detailed background about cases in this book. Furthermore, the notes in this book often contain background such as excerpts from trial transcripts and briefs and information from interviews of lawyers and parties about their motivations and what happened after the reported decision. While cases often announce elegant abstract principles, implementation is usually partial and messy. Lawsuits do not necessarily reveal truth or produce justice.

B. STUDYING LAW: WHAT AM I HERE FOR?

1. Classical Legal Education

Beginning law students often have difficulty understanding what they are supposed to learn. Students may bring expectations with them to law school that cause part of the problem. Some assume that being a law student is a larger version of learning the rules of the road in order to get a motor vehicle driver's license. Law is rules, and the best student is the one who knows the most rules. Some expect to be offered a cookbook approach to such things as how to write and probate a will, how to draft a contract, and how to transfer real estate. Others expect basic training in how to try a lawsuit, including how to trip up a lying witness by vigorous cross-examination. These students' model is learning golf or tennis from a pro — law is a game, and they want to know how to win. Most law schools — certainly those with the highest prestige — will disappoint all of these expectations. Legal education directs primary attention elsewhere. Memorizing rules alone will not get a student very far. Moreover, while students may get some exposure in law school to skills such as legal drafting and cross-examination techniques and questions of tactics and strategy, their skills will be greatly refined in practice once formal legal education is over.

The traditional style of law school teaching causes many law students to misunderstand the game they are called upon to play. In the old-fashioned style, a professor assigns a collection of legal raw materials — appellate opinions and occasionally statutes — for preparation before class. Then the professor questions students about them, pointing out flaws in their answers. If a student takes the plaintiff's side in discussing a case, the professor attacks with challenges supporting the defendant. But if another student offers support for the defendant's arguments, the professor neatly leaps to the other side and attacks the defendant's case. At the very least, students in such a class are supposed to learn to impose

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structure on what seems to be a jumble of cases, questions, fellow students’ attempts at answers, jokes, and perhaps professorial war stories. They are supposed to recognize that plausible arguments can be made by a lawyer for just about any proposition but that some arguments are easier to sell than others. Judicial opinions offer examples of formal legal argument and conventional assumptions of legal culture. Needless to say, students are misguided if they assume that studying involves only memorizing what a professor or textbook author states. Students who have firm, simple ideas of right and wrong may be disturbed by the apparent chaos and relativism of many law school classes.

Law professors often speak of class discussion, but this phrase suggests more equality between professor and student than usually exists. Students cannot remain passive note takers. They can be forced to participate and fear making fools of themselves. Moreover, the professor controls the agenda, grants and withholds permission to speak, and is armed with rhetorical ploys that few in the class will have mastered. Students learn to make cautious statements and recognize that the other side often has a good argument. Beginning law students can find themselves at the end of a limb arguing that a particular result is “just” or “fair.” After having the limb sawed off a few times, students learn to say something qualified.

Today, professors often want law students to learn both the classic approach to doctrine and several other ways of looking at cases and legal problems. In classic legal education, one learns the application of legal doctrine to various situations. For example, suppose the tort of X allows a plaintiff to recover damages from a defendant if the plaintiff can prove (1) defendant hit plaintiff, (2) defendant intended to hit plaintiff, and (3) plaintiff did not consent to being hit. A professor expects students to discover “the elements” (that is, factors (1), (2), and (3)) of the tort of X from reading one or more cases. Those elements are legal doctrine, but knowing them is only the start of the game.

A classic law professor would push students to unearth many difficult problems of definition lurking within this seemingly simple example. At the outset, what does “hit” mean? Suppose Defendant (hereafter D) tried to hit Plaintiff (hereafter P) but missed. However, as D’s fist swung past P’s chin, the sleeve of D’s jacket brushed the sleeve of P’s shirt. Did D “hit” P? And what does “intend” mean? Suppose D tried to hit Mr. A, but hit P instead when P jumped in the way trying to defend Mr. A. Suppose, alternatively, D intended to swing his fist at P but only to scare P, not to hit him. However, P moved into the path of D’s punch and took it on the chin. Suppose, to change the case again, D swung his fist at P but was

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2 See Elizabeth Merz, The Language of Law School: Learning to “Think Like a Lawyer” 51 (Oxford University Press 2007) (noting that forcing students to participate in classroom dialogue is in one sense authoritarian but in another empowering, because students “are pushed to remain in and master the dialogue. The law school professor is thus at once giving students no choice and telling them that they are capable of performing this genre.”). Merz’s study of legal education in the first-year contracts course is a work of anthropological linguistics. She concludes, at 219, that legal education insulates “methodological arrogance,” in which the main focus is examination of legal textual authority with great rigor, but “when it is time to discuss the assumptions about society and people that underlie the judicial decisions students read, law professors routinely invite speculation and anecdote.” The law in action approach attempts to bring more rigor to questions about the impact of legal rules on human relations and reduce reliance on supposition.
indifferent whether he hit P or came close enough to scare him. Suppose, finally, D testifies at trial that he actually intended only to make a broad gesture while arguing with P, but D’s fist came in contact with P’s chin by accident. X, Y, and Z, three reasonable people who watched the encounter, testify that D seemed to them to have intended to hit P. Does the definition of “intend” in the tort refer to some subjective inner state? Must actors in the legal system judge it objectively by outward appearances?

The next step would be to ask: what does “consent” mean? Few people who are not masochists would want others to hit them. Nevertheless, many do put themselves into situations where it is likely they will be hit. Does this constitute “consent” and thus a defense to the tort of X? Suppose that both P and D are professional football players for rival teams. In the course of a game, D hits P to block him so that a runner can advance the ball. Does P “consent” to D’s hitting him just by participating in the game of football? Or does consent require a formal act such as signing a written contract whereby P gives up his protection from being hit by D in exchange for the privilege of playing the game? Suppose that D’s block was illegal under the rules of football. Would P’s consent to being blocked in the game extend to being blocked illegally under the league rule? Would it matter if the rule were frequently broken or almost never broken? Suppose during a time-out, P took off his helmet, and D then punched P in the face. Does P’s consent to being hit during the course of a game extend to this kind of behavior that is not part of the contest?

Suppose, to shift the situation again, P and D are baseball players. P, a pitcher, threw a ball at D, a batter, that just missed him. D ran to the mound and hit P in the face. P knew that while this is not an everyday occurrence, it is not unheard-of. Did P consent to D’s retaliatory blow just by playing the game? Suppose that P is a spectator at a baseball game and a foul ball off D’s bat went into the stands, hitting P. Did P consent to being hit in this way just by attending the game? Suppose P is French, and this is the first time he has ever seen a baseball game. On the back of P’s ticket of admission to the game a number of sentences appear printed in tiny type. They say that anyone attending the game shall be deemed to have consented to being hit by foul balls coming into the stands. Is P bound by a contract whereby he gave up his rights as a result of accepting such a ticket and entering the stadium?

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3 The meaning of consent has become the focus of political controversy in the crime of rape. A man has not raped a woman who consented to sexual intercourse. Whatever the formal definition of consent, what is the folk definition of the term as imposed by jurors? One study suggests American jurors often rule that if the woman knew the man, if sexual intercourse took place in a social situation, and if no weapon was used, the woman will be deemed to have consented. Many feminists see the social definition of rape as a reflection of the sexism in society. Apart from the merits of their argument, the example suggests that consent is not a simple concept, and its definition often involves controversial normative choices.

4 Notice the interesting use of the term illegal. Can we say that the National Football League has its own “law”? If so, should lawyers, and law students, concern themselves with this kind of “private government”? Is this footnote an example of a digression from the main theme of the discussion? If so, is it unimportant? Can you just ignore these questions without fear of sanction?
It is possible to dream up hypothetical situations endlessly that test what seems to be a straightforward rule of law. This illustrates something about the nature of the words so often used to state legal rules such as "hit," "intend," and "consent." Constructing hypotheticals is itself an important lawyer's skill, often useful in argument. Could we avoid all of these problems of classification by drafting rules of law more carefully and using more precise terms? Drafters of legal rules pay a price when they try to anticipate most situations. Think of the Internal Revenue Code and the regulations drafted under it. They are exceedingly complex, and complexity creates work for accountants and tax lawyers.

How do we answer these endless questions? The classic law professor, by questions and body language, would push students toward several possible sources of answers. First, we could search for authority — cases, statutes, administrative regulations, and other sources of law dealing with some aspect of the problems we have posed. Suppose we add to one of our hypothetical cases that P played football for the Chicago Bears, and D played for the Green Bay Packers. D hit P in a game played in Green Bay. Thus, we can assume that the case is governed by the law of Wisconsin. Suppose, further, that the Supreme Court of Wisconsin decided in 1960 that professional football players consent, within the meaning of that term in the tort of X, to the common and ordinary hitting involved in the game by their participation in the sport. If we assume that the Wisconsin court would not overrule its 1960 decision (and this might be a large assumption), then we could answer some of the questions about the meaning of consent with a degree of assurance.

We could consider the implications of this decision by using the techniques of common law case analysis. This is the art of generating both broad holdings for cases, so that they may be applied beyond their intuitive scope, and narrow holdings, so that they will not apply where it seems they should. Most narrowly, a court could limit the 1960 decision to professional football and the particular facts of the case. More broadly, a court could read the decision as establishing that a player takes the risk of common and ordinary physical contact in any sport. Of course, we still would have to determine whether the particular hitting involved in our case would be deemed common and ordinary within the sport. We might expect that some hitting would clearly be part of football while other hitting clearly would be outside the ordinary risks assumed by anyone who played the game. Even so, we might expect to find a large range of cases in the middle where reasonable people might differ about how common and ordinary the type of hitting involved was. These would be the close and difficult cases where both P and D would have good arguments — the type of case likely to be posed on a law school examination. Even skilled and experienced lawyers would not be able to be certain of the outcome of these cases; at best, they could make informed judgments about the probabilities that P or D would win.

Law students must learn to "spot the issues" — that is, to identify ambiguities in rules, conflicts among rules, and gaps where particular situations fail to fit rules. Clearly, this 1960 decision does not answer all the questions we raised. For example, does it apply to baseball players as well as football players? The classic law professor would push his or her students to reason by analogy. One could say, for example, that the key idea in the 1960 decision was that professional athletes —
whatever the sport — can be assumed to understand the ordinary risks of the game. As a result, they can be deemed to choose to take those risks when they choose to play. In this sense, baseball is like (analogous to) football, although the precise risks assumed by baseball and football players would differ as the two sports differ. Of course, this judgment based on an analogy would be strengthened if we were to discover that the highest courts in 10 other states had decided just this way on these very grounds. Then we could combine an argument by analogy with an appeal to authority. While the decisions of the courts in other states would not bind the Wisconsin Supreme Court in interpreting its 1960 decision, it is likely that its members would find these other cases persuasive since, absent good reason to the contrary, uniformity among the states itself is an important value.

Classical legal thought refers to the ordinary meaning of language as a second major source of answers to the questions we raised earlier. This approach might ask whether most people (which unfortunately might mean most educated people, or most members of the same socioeconomic class as the legal elite) understand “hit,” “intend,” or “consent” to include or exclude the cases presented. On occasion, judges, lawyers, and law professors look to dictionary definitions, raising the vexing questions whether words have fixed meanings apart from context and whether dictionaries capture meanings accurately. Resort is sometimes made to “common sense,” but different people may have different views of easily accepted common norms.

2. Criticism of Classical Legal Thought: Other Perspectives

**Legal realism:** Beginning just before the First World War, a group of American law professors attacked the kinds of approaches we have just described. Their movement, traceable to the pragmatism of Oliver Wendell Holmes Jr., was called “legal realism,” and its leading figure was Karl Llewellyn, later the chief architect of the Uniform Commercial Code. It is far easier to describe what the legal realists were against than what they were for. One idea common to the group was that judges do not “find” the law in the clouds or by manipulating techniques of distinguishing cases. Rather, judges “make” the law by normative choices. And if this is true, the realists told us that we would get better decisions and more predictable law if judges openly recognized their role and candidly explained how they arrived at their choices. Many realists relied on the teachings that came to be known as general semantics to attack definitional approaches. Words such as “hit,” “intend,” and “consent” have many meanings in ordinary speech, and definitions serve better to rule out extreme cases than to decide close ones. Since past decisions almost never involve the identical situation now brought before the court, cases almost always can be distinguished if a judge wants to do so. Thus, appeals to authority may affect judgment but they do not compel one result rather than another.

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5 Oliver Wendell Holmes Jr., The Common Law 1 (1881) (“The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”).
Analogies, too, are suspect. For example, baseball and football are both professional sports, and those who play them are likely to be aware of certain risks of being hit by another player that are just part of the game. But football is supposed to be a contact sport while baseball is not. We could say that a football player has less need of the deterrent of the law of torts than a baseball player because of the nature of his athletic equipment and the opportunity to retaliate. Or one could argue that football needs the support of tort law more than baseball because it is necessary to control the violence inherent in the sport. Whatever the merit of these arguments, they illustrate that the very nature of an analogy is that the things being viewed are both like one another in some respects and not like one another in others. The problem is to decide if the common factors are more important than the uncommon ones. However, this is a judgment that rests on values, facts, and predictions about the consequences of decisions each way. Analogy may be a step in the process of decision, but it does not end the discussion.

A law professor who embraced realism would ask a student to argue in terms of the goals to be served by one decision or another. For example, a student might argue for a consent rule in professional sports that turned on the likely reaction of fans viewing the event. A player should be deemed to consent to the normal risks of the game, even including blows that violate its rules, but those blows that would likely incite fans to violence should be deterred by all means available, including tort liability. This, the student might argue, would aid in crowd control — a worldwide problem at sporting events — and, in the long run, in the continuation of professional sports. Another student might disagree, arguing that the private government of professional sports has enough internal sanctions to control the behavior of competitors so that we need not incur the costs of trying lawsuits between athletes. She might remind us that players in any sport, from golf to boxing, who hit others outside the rules of the game can be suspended or thrown out of the game for good. Those who violate the working norms of competitors are subject to a variety of sanctions ranging from attacks on their reputations in the form of gossip to ostracism and even physical retaliation. We should have evidence that more is needed before we waste the time of over-crowded judicial machinery on such cases.

Whatever the merit of these arguments, they accept that the term “consent” could be interpreted to include or exclude the behavior in question, and they attempt to influence the choice of a meaning in a particular situation on the basis of some impact on behavior that the advocate thinks good or bad. Definitions and analogies only offer a number of possibilities. Choices must be made on the basis of normative evaluation of statements of the rule or predictions about its consequences. This being the case, one must argue policy just as if one were trying to convince a legislator to vote for passage or defeat of a statute.

Realism, of course, relies on wise judges to make policy choices. How, then, does law differ from politics? Republican governors appoint one group of judges while Democratic governors appoint another. These political backgrounds might play important roles in forming attitudes and coming to decisions. In its extreme form, realism might see each judge as having a roving commission to do good as he or she sees fit. Many find this unsatisfactory and in fact an abandonment of the rule of law.
“Neutral principles,” or “legal process”: By the 1950s, most law professors accepted many of the teachings of realism. Predictably, there was a reaction, sometimes known as the “legal process” or “neutral principles” school of thought. This view holds that judges should leave major policy decisions to legislatures because the courts lack the capacity to make such decisions well or to implement them. This approach, which advocates legal craft and procedure to restrain judicial innovation to an incremental, step-by-step approach, is subject to the criticism that it favors the status quo and thus is inherently conservative rather than apolitical. Furthermore, particularly when it comes to common law such as contracts and torts, made by judges without the necessity of legislative intervention, it is the traditional role of the courts to review and adapt the law to current needs and norms.

Law and Economics: An influential school of thought derived from legal realism is the law and economics approach, which has become popular in many American law schools and among some judges. The founding fathers of the movement are identified with the University of Chicago and its tradition in economics. Realism tells judges and other decision-makers to make normative choices openly, but offers little advice about how to choose among possible normative positions. Legal process thinking imposes a requirement of due process on almost every important decision but accepts whatever substantive choices emerge from formally fair procedures. Law and economics, in contrast, generally favors efficient allocation of resources; if one wants to seek some other goal, at least one should be aware of the costs.

For example, we must pay a price if we insist that all decisions be taken only after procedures that comply with due process. Sometimes the cost will be outweighed by the benefits, but sometimes not. The position teaches a powerful lesson overlooked in much of legal realism or legal proceduralism — sometimes the lesson is summarized as “there is no such thing as a free lunch.” In the 1960s and 1970s, Congress decided to regulate the safety of automobile design, environmental pollution caused by automotive exhaust, and the fuel consumption of cars. The law and economics approach emphasizes that such regulation is not free, and the cost of these changes in the design of vehicles raises prices for cars. This, in turn, is likely to have many consequences, some of which may be hard to see at first. On the one hand, the regulation reduces externalities — costs imposed on third parties in the form of impact on habitats and on human health from pollution and safety risks. On the other hand, less transportation may be available to the poor if higher prices cause middle-class owners to drive their cars longer so there is less usable life left when they trade in their cars. The total market for automobiles may contract as prices increase, and this limits the number of available jobs connected with automobile manufacturing, servicing, tourism and so on. People may be willing to accept these costs of regulation as the price for what they see as real benefits. Nonetheless, we cannot pretend that there is no cost or that costs just come out of the pocket of wealthy corporations in some magical fashion. This approach reminds us that law is not free.

The law and economics approach also suggests that, absent transaction costs, it makes no difference where legislatures and courts place liability for accidental
injuries and deaths. Suppose we have a rule that says car buyers must pay for repairs to their vehicles whatever the cause of damage. A court or legislature changes the rule to place the burden of certain repairs on car sellers. We then can expect sellers to raise prices or to make contracts shifting the burden of repairs back to buyers. In either event, buyers will still pay for repairs.

Many who advocate the law and economics approach see it as value-neutral. If we care about efficiency, we should try to predict the economic consequences of proposed changes in legal rules. Moreover, we can explain much of what courts have done since the Industrial Revolution in terms of seeking efficiency. Many proponents of law and economics tell us that it does not deal with the justice or fairness of the present distribution of wealth, status, privilege, or power in the society. Law and economics, however, has much to say about the costs of measures designed to change such distributions.

Critics of the approach see it as a highly successful effort to legitimate the position of the well-off in society. Law and economics just ignores law's role in symbolizing values and morals. Often the message of the approach is that reform is impossible or unwise, and if only government would go away, all would be as good as it can be. Some law and economics scholars hold as an article of faith that competition and free markets solve all problems, and they deny that there can be any private power unchecked by the market apart from advantages granted by government.

Critics also point out that the law and economics approach is highly abstract and based on logical deduction from doubtful assumptions. A great deal of law and economics assumes a world without transaction costs, but that is not the world in which we live. Too little attention is given to implementation of rules — writers sometimes treat people as if they were puppets tied by strings to legal rules that control their behavior. That the formal statement of a legal rule can be rationalized in efficiency terms does not necessarily indicate that the rule promotes efficiency in practice. Of course one could take a law and economics approach to the law in action, looking at whether social relations are efficient. It just has not been done often.

In recent decades, behavioral economics has complicated the earlier assumptions of law and economics. Neoclassical economics assumed, with elegant parsimony but some sacrifice in accuracy, that humans act rationally in their own self-interest. Behavioral economics complicates this assumption and emphasizes that humans have bounded rationality and bounded willpower. People sometimes systematically fail to predict accurately their future behavior because they do not fully understand their own desires and risks. People may think they will always

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6 See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). It is sometimes lost on those who cite the “Coase theorem” (which refers to the idea that allocation of resources is independent of default legal rules if transaction costs are zero) that Coase was not arguing that transaction costs (typically are zero. Rather, transaction costs of changing a background rule of law, for example by entering into a contract, are often high, so it very much does matter what the background rule is. See Coase, The Problem of Social Cost: The Citations, 71 Calif. L. Rev. 809 (1983) (noting many more citations for the “Coase Theorem” than for the reciprocal point).

7 See Lawrence Friedman, Two Faces of Law, 1064 Wis. L. Rev. 13.
pay credit card bills on time and avoid interest charges and thus not pay attention to interest rates. They may underestimate the bad things that could happen to them, such as getting sick or losing their jobs, events that would make it hard or even impossible to pay on time. They may engage in impulse purchases and regret them later. This behavior is more problematic for big purchases than small ones, where people can learn over time to make better decisions without suffering large losses.

In addition, buyers typically act under limited information, not the perfect information of simple economic models. It is time-consuming to shop for the best deal, and some deals are very complicated, so that looking into competitors’ terms on many points is virtually impossible. Cellphone contracts are a good example of consumer contracts with very complex terms. In theory a small number of shoppers might introduce competition in such terms, but the terms of competitors often look the same. Furthermore, sellers may be able to segment the small number of shoppers into better deals, while giving poorer deals to those who do not shop. In other words, markets do not work perfectly for a multitude of reasons. Onerous terms may be suggestive of market failure. Behavioral economics and attention to market failures can lead to very different conclusions about how to design legal rules than a more simple law and economics approach.

*Critical Legal Studies and its variants:* In the 1970s, legal realism developed a more radical branch known as “critical legal studies.” From this perspective, the existing distribution of wealth, status, privilege, and power is central, and legal doctrine is mystification, legitimating the status quo. For example, in the 19th century lawyers and judges came to see the business corporation as a legal person with all the rights of real individuals. More generally, there is great inequality in wealth and power between a large business such as Microsoft and an individual. In theory, if Microsoft breaches a contract, an individual consumer could sue and recover damages as compensation. But all of this is ideology that ignores the advantages Microsoft has over any individual who attempts to assert legal rights against it. Lawyers are both necessary and expensive. Wealth has an impact on the outcome of litigation. People and organizations with wealth can better afford the long delays that so characterize our legal system. Moreover, organizations that engage in repeated standardized transactions can plan these relationships to their advantage. Individuals who deal with them sign standard form contracts that serve to ward off most unwanted liability from the large organization. Most individuals are not aware of what they are giving away when they sign. Even if they were aware, one could say they have little real choice but to sign away their rights.

Scholars associated with the Conference on Critical Legal Studies (CLS) examined the assumptions hidden within legal doctrine concerning what is necessary, tolerable, and just. What do those who make and work with our law take as “common sense”? Which groups in society benefit from these tacit assumptions in our law and which are disadvantaged by them? Critical scholars see American legal consciousness as favoring wealth and privilege. Some of these scholars find American law characterized by contradictory principles. They hope that by

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showing underdeveloped but long established counterthemes in our law, they can open the way to a new conception of rights more consistent with a less competitive and more cooperative society.

Critical feminists and critical race theorists have challenged the white male law professors who made up most of CLS. They have charged them with insensitivity to the benefits of a rule of law. While rights may be flawed weapons, women and people of color can use them both as symbols and as instruments to better their position. Moreover, when we look at any body of law, including contracts, from the perspective of gender or race, we recognize easily overlooked and debatable assumptions. For example, the alleged neutrality of contract ideas served well the institution of slavery in the United States until the Civil War — humans bought and sold other people under a law that claims to be one of the foundations of liberty. People of color are almost entirely absent from contracts casebooks, suggesting that this body of law deals with power as much as it deals with questions of free choice. A leading critical feminist wrote an analysis of how a popular contracts casebook treated women either as sex objects or as the subject of paternal care.

Radical lawyers sometimes see all varieties of critical legal thinkers as trying to bring about a revolution from within the academy rather than taking risks and fighting the battle on the front lines. Critical scholars respond that it is better to change ideas about what could be, than to win court victories seeking rights: lawyers championing the “have-nots” can implement rights only marginally in legal institutions controlled by the powerful. When workers, people of color, women, or other less powerful groups threaten to win significant victories through the assertion of rights, the system tends to adjust to support the status quo. Statutes are construed narrowly, procedural rules are put in place to minimize the chances of success, the costs of asserting rights are raised to limit their use, jurors reject valid claims as something they do not wish to believe, and businesses use standard form terms mandating arbitration to prevent their customers from going to court, restricting them to a private forum chosen by the contract drafter.

We could debate most of these assertions. Nonetheless, all varieties of critical legal thought invite students to consider how the legal system works in practice and what kinds of people benefit. Seemingly neutral legal rules may privilege certain positions. Whatever the statement of legal ideals, law on the books may differ from law in action, and the differences may not be random or neutral.

Law in action: The law in action approach, also known as the law and society approach, can be seen as another branch of legal realism, along with law and economics and critical approaches. Its particular concern is with how human relationships actually play out in the shadow of the law. This approach is not

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11 Anatole France once wryly noted that “the law in its majestic egalitarianism, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” LEX LEGEND, Ch. 7 (1894).
opposed to pursuing policy goals through law, but it is highly skeptical of claims that particular policies will be easily implemented by adopting legal rules. Read again the opening pages of this introduction for an overview of law in action. As for criticism of this approach, its dependence on empirical examination of the impact of law may make it focus on things that are easy to study empirically rather than on bigger justice concerns. Furthermore, law and society research is not always up to the most rigorous standards of the social sciences, although sophisticated empirical study of the impact of law has been gaining favor in the legal academy in recent decades.

3. Law School Examinations

Part of the “what am I here for” topic concerns law school exams and how the skills tested on exams relate to preparing for the practice of law. Once a student masters the blend of approaches demanded by his or her professor, the student still must pass an exam. Typically, a student will be confronted with a story (often called a ‘fact pattern’) and asked to play the role of judge or that of a lawyer for plaintiff or defendant. To take a very simple example, suppose the question set out the story of P and D, two professional baseball players employed by rival teams. P, a pitcher, threw a ball that just missed hitting D, who was batting. D ran to the mound and threw a punch at P. However, D hit U, the first base umpire. U had come to the mound to try to prevent a fight. You are U’s lawyer. Make the best case you can to justify recovery of a judgment against D.

In an exam, the student’s job is often to identify the relevant legal doctrines and the elements of those doctrines that are debatable (debatable elements raise “legal issues,” which must be “spotted” and then discussed) and then bring policy considerations to bear to develop opposing arguments. Arguments about legal issues are typically more important than “answers.”

Your first task would be to try to fit the facts into some legal category. You recognize that it is worth considering the tort of X. There is no question that D hit U, and so the first element of the tort seems to be present, a point you should mention. However, unless you can persuade a judge and jury to interpret the word “intent” very broadly, you face trouble establishing the second element of the tort. Moreover, you should at least recognize the possibility that D’s lawyer is going to argue that just by being an umpire U “consented” to the risks of getting hit in a fight between players. (The process of fitting facts into legal categories is “spotting the issues,” the first step in legal analysis. Most of those who get low grades do so because they fail to see that they should discuss the tort of X or that there would be difficulty in establishing that D “intended” to hit U or that U did not consent.)

How would you argue that it was enough that D intended to hit someone and that the tort of X does not, or should not, require that he have intended to hit his actual victim, your client U? You could turn to whatever authority had been discussed in your course. You probably would not have a case directly deciding the question. You would have to draw analogies to those decisions that adopted a broader definition of “intent” in other contexts. You would do what you could with the ordinary understanding of the word “intent.” Perhaps you could argue that in common speech we assume that one “intends” the ordinary consequences of one’s
actions, and one consequence of throwing a punch is missing the intended target and hitting something else. You would make policy arguments that would justify an expanded definition of the term so that the rule would include third parties such as U. You would deal with D's likely arguments that changes in liability rules are properly the task of a legislature and that such broader liability is economically inefficient. You might consider whether all a new rule would do is prompt disclaimer clauses in umpires' contracts. You might consider a distributional argument concerning highly paid players striking lesser paid employees of organized baseball such as umpires.

Then after all of this analysis concerning "intent," you would turn to the consent issue. Do umpires assume the risk of injury in fights between players just by being umpires? Again, you would make all the types of arguments we've catalogued. You would anticipate those arguments your opponent is likely to make and respond to them as best as you could.

Once you had dealt with the tort of X, you would then consider whether D's conduct came within the tort of Y. It applies to unintentional but "negligent" hitting of others. Why not start with tort Y and avoid all the difficult problems with the idea of "inten" in tort X? Because, as you should state in your answer, U might be able to get punitive damages in addition to compensation for his actual injuries if the hitting were deemed intentional. He could recover only actual compensatory damages for negligence. Indeed, this possibility might affect arguments about how a court should define intent for purposes of tort — in essence, you would assert that D's conduct warranted strong punishment so both he and others would be deterred in the future and therefore the word "intent" should be defined broadly to achieve this goal. D's lawyer, of course, would argue that D's conduct did not warrant such punishment. This may seem to be arguing backwards. Logically, one might expect a determination of whether D has committed tort X and then the remedies would just follow if he had. Here, we begin by asking what remedy makes sense in light of D's conduct. You will find that many of your courses reflect this concern with the bottom line. This is another example of the realists' point that deciding cases involves policy choices and not just definitions and deductions.

Yet, you might ask, what am I here for? What does all this have to do with becoming a lawyer? You did not come to law school to become an expert in taking examinations. Examinations are supposed to be a means to the end of becoming a lawyer. The theory is that those who can write good exam answers will be able to evaluate and make persuasive arguments to legal decision-makers. Lawyers who are good at evaluating arguments will know what cases to accept from potential clients and what to do with those they do take. When a lawyer has a strong legal argument — assuming all other things are equal — he or she can demand far more as the price of a settlement than when he or she has a weaker legal position. Furthermore, lawyers who can anticipate legal arguments can also write contracts to address them directly and perhaps create greater predictability for their clients. They will be better planners.

Notice that here we arrive at an explanation for legal education's emphasis on arguments rather than answers. A lawyer who can fashion a plausible argument, even one involving creative new theories, usually is in a better bargaining position
in settlement negotiations or when drafting a contract than a lawyer who can do little more than blunder through a cookbook approach to practice. A lawyer who can anticipate arguments can rearrange the relationship at the outset to minimize the risk that those arguments will be successful. All lawyers are equal only in the yellow pages of the telephone directory; savvy, well-prepared, creative lawyers do better than foolish, ill-prepared ones who proceed by rote. Of course, creative theories must fall within the range of arguments acceptable within legal culture. Whatever the merit of Marxist theories about American law, one would be a fool to offer them so labeled to most American judges. There are fashions in ideas acceptable to the courts. Certain views are “in the air” at one time but not another. A wise lawyer would not make the same arguments before the present Supreme Court of the United States as she made when Earl Warren was Chief Justice. Consumer protection was far more popular in the early 1970s than in the early 1980s. Also, some judges delight in technical lawyering while others are annoyed by nice distinctions among cases and clever readings of statutes.

Indeed, the law of nearly every state as applied in its cities, towns, and villages will reflect the state’s diversity and is likely to differ substantially around a common core found in the state’s statutes, administrative regulations, and appellate cases. Knowing what is likely to sell before the judges who would decide a case is also part of a lawyer’s skill. Of course, a sociologist of law would remind us that bargaining power flows from far more than legal arguments and so settlements may turn on other factors. One party may need money now while the other is able to await a final decision after several appeals, and this fact is likely to affect how they settle a case. This, too, is part of our subject matter.

In a sense, good lawyers never cease being law students. The practice of law is far more than knowing a body of formal statements of rules. Of course, learning certain rules and a vocabulary is an essential step in the process of becoming a lawyer. However, it is but one step. Moreover, many of the rules one must learn to practice are not what one normally thinks of as laws. Lawyers who represent those injured in auto accidents and lawyers who represent insurance companies know the going rate for various kinds of accidents. They know how much it will take to settle a rear end collision where the police gave neither driver a traffic ticket and where the plaintiff has suffered damage to his car and personal injuries. While all this is true, a great deal of law practice also involves judgments about probabilities in light of specialized knowledge. Lawyers must cope with the knowledge that they cannot be certain: a court or legislature may change the rule, there are good arguments for alternative interpretations of the rule as applied in the present situation, and what one knows and what one can prove in court are very different things. Legal education aims to provide part of the basis for making such informed judgments in the practice of law.

While legal education could always do a better job in preparing students for practice, it is impossible to mint finished lawyers in only three years at a university. “Lawyer” is a label applied to many distinct professions, and faculty and students cannot predict whether certain students will go to Wall Street or Main Street, work in governmental agencies, or enter politics. Formal legal education is just the beginning of a career-long process of learning. This is why law, like medicine, is known as a “learned profession.”
C. CONTRACTS COURSES

1. The Goals of the Law-in-Action Approach to the Contracts Course

Almost all law students in what was once the British Empire begin their study with a course called “contracts.” Students naturally assume that the course deals with an important part of law practice. However, in recent years many law professors and others have questioned this conventional view. They point out that there are large gaps between the law school law of contract, what happens in courts, and what practicing lawyers do. Contracts: Law in Action reflects our doubts about the traditional course.

Professors and students long assumed that contract rules were fundamental to the practice of law. While this may or may not be the case, contract doctrine clearly is only part of what lawyers need to understand to serve their clients. Lawyers are involved in the planning and structuring of business relationships. Producing a successful contract involves, first, an assessment of the goals and positions of the parties. What a lawyer proposes must be acceptable so that the parties can make a deal. Second, success involves planning a relationship so that both sides will be satisfied with the performance of the contract. Thus, the lawyer must understand business and social relationships, the techniques of planning and writing, and many bodies of law so that the arrangement will have desired legal consequences. Clearly, a good deal more is involved than a knowledge of contract doctrine.

Lawyers also perform an important advisory role in managing ongoing contractual relationships. For example, the parties may disagree about their obligations under a contract. One party may come close to performing but not quite make it. Is a miss as good as a mile or must a client accept substantial but not complete performance? Or the seller may fall far short of full performance, but the buyer may need the defective performance so badly that she takes it. Once the need has passed, can the buyer assert the original obligation or has she modified the contract by accepting the defective performance? Or the seller’s failure to live up to the letter of the contract may have been caused by an unexpected event such as a fire, a strike, or a flood. To what extent, if at all, do such contingencies constitute excuses from contractual duties? Finally, once relationships are wrecked, lawyers may face questions of salvage. Can one turn to the legal system to force the other party to assume some or all of the losses caused by the breach of the contract? Again, contract doctrine speaks to all these questions, but lawyers and clients often must make difficult business judgments that are more important than legal arguments.

Lawyers do play a part in planning contracts, carrying them out, and clearing away the wreckage of those that fail, but business people are often able to handle these problems themselves without legal advice, and real estate brokers, land developers, investment bankers, sales people, engineers, and accountants all compete with lawyers to offer this kind of advice. Nevertheless, complicated contracts problems do arise in many contexts — not just in business — and their solution may require the services of someone who understands the law of contract. However, lawyers are more likely to face some questions than others. All lawyers
must recognize the important contracts issues, but exposing every law student to all the classic contracts puzzles is an inefficient use of law school time and resources.

Contract ideas are indirectly relevant to most lawyers' practices. Contract ideas form part of the ideology\textsuperscript{12} of capitalism, and this ideology affects many branches of the law and many lawyers' tasks. The ideology is familiar to us all. Many writers see contract as the solution to the conflict between individualism and community. In a society based on command, rulers order people to perform tasks. In a free society, individuals make choices about what they will and will not do. There are, however, ends that cannot be achieved without social interaction that is only possible by coordinating individual choices. By exchanging some measure of our freedom or property for what we value, our choices serve to allocate resources to desired uses. Contract thus enables people to unlock the value of their labor and the tangible and intangible things they control. I want your money more than I want my Chevrolet. You want a car more than you want your money. By making an exchange we are both better off. Neither of us can take advantage of the other in a perfect market (which involves a lot of assumptions, including perfect information). Others will offer you cars and others will offer me money for my car. These alternative potential contracts serve to limit our bargain so that we exchange the automobile at a price within the range of many similar choices by willing sellers and buyers. Self-interest, in this way, is channeled into a tool for cooperation in collective action.

Many theorists see contract law in capitalist societies as providing needed security of transactions. Any bargain where people exchange goods and money at the same time is almost self-policing. This is not true, however, when the exchange involves complex performances that take place over time. Suppose I am to paint your house and you are to pay me when I finish. Until I complete the job, you risk losing opportunities to hire someone else who might do the job more quickly and better. I risk your willingness and ability to pay me when I finish. Of course, many nonlegal sanctions give both of us incentives to perform. For example, we both may want to be known as people who carry out commitments. We may want to deal again, and I must worry that what I do under this contract will affect your willingness to enter new ones in the future. Members of my family may work for members of yours and depend on their good will for their economic success. You might badmouth me to other potential customers if I do not perform. Nonetheless, those who write about law see a need for official sanctions to reinforce nonlegal ones that support the making and performance of contracts.

Contract law tells those who would plan and take risks how to make legally binding commitments. One who follows the accepted formula can know that she has made a contract. Contract law provides standardized interpretations of forms of language — it is a kind of authoritative dictionary. Contract law fills in gaps in agreements so that it is unnecessary to plan everything in each contract. Economists call legal rules that can be changed by contract “default rules.” Most gap-filling terms are default rules, but there are some mandatory rules that cannot

\textsuperscript{12} We use the term \textit{ideology} rather than \textit{political philosophy} because ideology connotes a system accepted and assumed, rather than a thought-out view.
be changed. Contract law also offers remedies for breach, and these are mostly
default rules. While these remedies may provide some salvage of wrecked bargains,
perhaps their most important function is to deter breach in the first place. One who
would default must consider the threat that contract law will cause trouble. It costs
money to defend oneself, even if one is successful. Moreover, contract law
symbolizes the importance of commitments. Society spends resources supporting
performance of bargains, and this itself is a statement of what is right.

There is a vast literature debating the assumptions we have sketched. If one
truly believes in freedom, why say that a person loses it by making a promise? To
reject the freedom to change one's mind, one must look to policies other than
choice. Suppose, for example, College makes a five-year contract with Coach to
guide its football team. Two years later, State University offers Coach twice the
salary to coach its team. Why should he not be free to change his mind and take the
offer? Suppose Manufacturer Corporation orders parts from Supplier Corporation
but then finds that the sales of the product in which it used these parts are very
disappointing. Why should it not be free to cancel the order? If we look at customs
in the football and manufacturing industries, we find that coaches and industrial
buyers do feel free to cancel their commitments, whatever contract law says. Both
universities and suppliers often accept cancellations without too much objection.
And we should note that the law of contracts seldom, if ever, would tell judges to
order either Coach or Manufacturer Corporation to perform or send them to jail
for breach. Both could buy their way out by paying damages if either College or
Supplier Corporation did not release them. Thus, the law itself suggests there may
be reasons to allow people to break promises at not too great a price. Capitalist law
does not seem to find absolute security of transactions an overriding value.

Some writers argue that free choice never really exists anyway, except in
theorists' ivory towers. Suppose a robber with a gun sticks it in the back of a man
walking past and says, "Your money or your life!" The victim cannot say "None of
the above"; he is being given a choice between unpleasant alternatives. In the
example about buying a car, your real preference might have been a better car for
a lower price, but people are always constrained by their circumstances. The line
between a choice we deem free and one we call coerced usually is difficult to draw.
It is a normative evaluation rather than a description. The distribution of
advantages in society affects freedom of choice in important ways. Perhaps seeing
all but a few choices as free and not the product of coercion is a useful working
assumption, but it cannot be confused with an empirical description.

Furthermore, the theorists' model is that of a negotiated deal, in which the
parties give and take and are aware of the terms or accept the risks of incomplete
knowledge. While this may describe some transactions involving expert buyers and
sellers, it is a poor representation of many bargains. It is hard for most consumers
to appraise products before they buy them. Few consumers understand that the
form contracts they sign drastically limit their ability to do anything about
unsatisfactory purchases. Of course, other-than-legal sanctions operate in this
area, and many consumers' complaints will prompt real efforts by sellers to
produce a remedy. However, the power of these sanctions is not equally distributed
across society. Mercedes-Benz buyers are likely to have more attention paid to
their complaints than Chevrolet buyers, and buyers of new Chevrolets will do better than buyers of used ones.

When you examine contract law closely, you will discover that it reflects competing tendencies. Scholars have fashioned an abstract system of rules that appear relatively clear and suitable for use for almost any purpose by anyone. Courts have used some parts of this system at various times and places. Nonetheless, if we look carefully in area after area within the body of contract doctrine, we find counterrules and approaches that seek substantive justice at the expense of predictable abstraction. While skilled lawyers can predict the results of cases with some degree of accuracy, they must draw on information outside the rules of law to do this.

It is a mistake, then, to assume that your professors are going to hand you a beautifully worked out, consistent, and coherent system called “contract law.” We doubt that such a system could exist without great changes in American society. Instead, we hope to show you the contradictions within contract law and how to use this imperfect language to accomplish your clients’ goals. This is what the good contracts lawyer must take from a law school class, rather than details of doctrinal refinements. First, you should understand the rhetoric of contract with all of its ambiguities and inconsistencies. Whatever the doctrinal area, you will find that certain basic but inconsistent themes appear again and again. Lawyers have to learn to speak contract rhetoric because it will be the accepted vocabulary in negotiation as well as before trial and appellate courts.

Second, you must understand that contract law is a tool that you can use to try to solve your client’s problems, rather than a set of answers to all your questions. Instead of offering certainty and predictability, it often offers good arguments for all concerned. Lawyers are people who know how things work and how to get things done. They spend a good deal of their time coping with uncertainty and risk. They may turn to drafting contract provisions that define what the law has left unclear. They may use uncertainty about the meaning of rules or about proving facts as bargaining tools and not as legal arguments before decision makers — for example, a client’s uncertain chance of winning at trial is something you can sell to the other side for a price; that’s called a settlement.

Lawyers often turn out to be policy makers. The actual jobs of lawyers often surprise law students. Rather than spending all their time in trial or appellate courtrooms, many lawyers act politically, both directly and indirectly. They are in the business of making deals with both public officials and representatives of private organizations. Contract often provides a vocabulary for negotiations in all kinds of settings. Furthermore, lawyers are elected to legislatures at all levels of government and even more often serve on legislative staffs. Much legislation of the past century has involved withdrawing areas from the domain of contract and

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13 Details of doctrinal refinements might prove important sometime in your practice. However, there is not time to teach everything in three years of law school. Furthermore, contracts doctrine, as all law, has a short shelf life; details learned today may be out of date tomorrow. Fortunately, there is an impressive literature in contract law to help you exhaust the refinements of any nice point of doctrine. This course certainly should acquaint you with enough of the conventional wisdom in the field so that you will recognize a problem and understand what you read in treatises and journal articles.
creating specialized bodies of law. However, when we shift to these new areas, we do not leave contract assumptions behind. They continue to color thought, particularly in labor law, real estate transactions, business organizations, commercial law, family law, trusts and estates, and regulation of specific areas. For example, since the 1960s, consumer advocates have made effective use of phrases such as “inequality of bargaining power” and “unconscionability” that have long been a countertheme in contract. In the 1980s, ideas about consumers’ needs for protection began to change. Once again there was talk of self-reliance, efficiency, and the power of the market to impose all the discipline needed. In the 1970s through the 1990s, the debate was about where we should draw the boundaries of free contract and social control, and much of it was carried on in contract rhetoric. In the wake of the worldwide financial crisis that began in 2007, re-regulation became an important theme. Of course, we must be sensitive to the possibility that the terms of debate can get in the way of seeing what really is at stake, but that, too, is on our agenda.

2. The Law-in-Action Course in Historical Perspective

The classic course from about 1900 until World War II followed a life history of contract. Materials were considered in what seemed a simple, logical order: (1) the parties formed a contract by indicating agreement or by doing certain things that courts deemed to constitute concluding a bargain; (2) the contract was interpreted so that the obligations of each party could be established; (3) the performances of the parties were appraised, both as to whether one had fallen short of what had been promised and the importance of the degree of nonperformance involved; and (4) appropriate remedies for breach would be given. In short, a lawyer did not think about performance or remedies until she established that the parties had made a contract in the first place.

The course followed a blend of several scholarly positions. Samuel Williston, Harvard’s great authority on the subject, developed in the first decades of the last century a system of contract based on relatively few principles. Professor Williston saw contract law as largely formal and abstract. One system of concepts, with but few exceptions, should govern formation, performance, and remedies for insurance, employment, sales of goods, building construction, and all other kinds of contracts. The law was the same even if one party was rich and the other poor, or skilled lawyers advised one while the other was uneducated and lacked legal advice, or one party had behaved according to usual expectations but had failed to comply with all the rules. Contract law was objective. It depended on outward

14 Samuel Williston, a famous professor at Harvard Law School, lived from 1861 to 1953. He taught contracts to several generations of American law teachers, influential lawyers, and judges, and wrote the classic American treatises on contracts (published in 1920 and in 1936) and sales of goods. He edited leading casebooks in contracts, sales, and bankruptcy and drafted several uniform commercial statutes passed by many states. Justice Felix Frankfurter of the Supreme Court of the United States, a former student of Williston’s, said, “While Williston enchanted by his charm and wit, he elevated and stimulated by those moral qualities which were ingrained in the man. . . . And upon each of us he left not only the happy memory of having seen the greatest artist in teaching, but the indelible impress of having had aroused in us the ambition to approach and reflect his moral qualities.” Felix Frankfurter, Samuel Williston: An Inadequate Tribute to a Beloved Teacher, 76 Harv. L. Rev. 1321, 1323 (1963).
appearances rather than subjective intentions and hopes. One applied the rules and accepted the result. One did not ask whether the outcome was fair as judged by some standard apart from contract law.

Professor Lon Fuller, in a 1939 essay criticizing Williston, comments:  

Turning to Professor Williston's legal method, if we ask at what point he gives up the attempt to shape the law by direct reference to social interests, I think the answer will have to be, at the very outset. What may be called the bases of contract liability, notions like consideration, the necessity for offer and acceptance, and the like, are nowhere in his work critically examined in the light of the social interests they serve. These things are accepted on faith. This neglect to refer to underlying social desiderata cannot properly be called "logic." It is simply an acceptance of what is conceived to be received legal tradition. . . .

It seems reasonably clear that our American law has been going through a positivistic phase during the last seventy-five years, and that it is this positivistic philosophy which has been the predominant influence in shaping Professor Williston's legal method. He believes that there exists in the cases "a law of contract," and that it must be sufficiently simple and consistent with itself to be capable of intelligible statement. Believing this, he fears the intrusion of vague ethical and philosophical considerations, even in the interpretation of existing law, because their corruptive and dissolving influence threatens to make impossible the very task which the positivist sets for himself, that of stating what "the law" is.

Arthur Corbin, who lived from 1874 to 1967, was Yale's great contracts scholar. He published an influential casebook in 1921, and revised it in 1933 and 1947. His eight-volume treatise on the subject appeared in 1950. While later writers often use the two men as symbols of opposing approaches to the subject, Williston and Corbin were good friends. Corbin wrote that he viewed Williston as "an older brother." He said that Williston was his chief teacher in contracts. "As a beginning instructor in that subject at Yale, sixty years ago, it was to his articles and his edition of Pollock that I had to go for instruction."  

However, Williston's and Corbin's approaches to the subject differed. Corbin edited an edition of Anson on Contracts in 1919. In the preface he said that students should be warned that the law does not consist of a series of unchangeable rules or principles. . . . Every system of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law can be observed the birth and death of legal principles. . . . The law is merely a part of our changing civilization. The history of law is the history of man and society. Legal principles represent the prevailing mores of the time, and with the mores they must necessarily be born, survive for the appointed season, and perish.

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15 Lon L. Fuller, Williston on Contracts, 18 N.C. L. Rev. 1 (1939).
Corbin called his great treatise “a Comprehensive Treatise on the Working Rules of Contract Law.” He explained that “all rules of law and human society are no more than tentative working rules, based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life.” Compared to Williston, Corbin makes a more direct use of the purposes and policies behind specific legal rules in order to analyze how they are likely to be applied to specific instances.

American legal realists saw Professor Williston’s work as a symbol of what was wrong with traditional legal thought. Arthur Corbin was an inspiration to the realists. Kari Llewellyn and Harold Havighurst developed a very different view of contract in the 1920s and 1930s. They argued that no one simple set of rules could govern transactions as distinct as dealings among family members, sales of goods in business, real estate transfers, and employment relations. Moreover, they pointed out that Professor Williston’s system failed to take into account large bodies of both American and British contract law inconsistent with Williston’s assumptions. They called for a contract law that sought substantive rather than formal justice. Everything was to depend upon the particulars of each case. Rules were to be based on general standards such as “good faith,” “reasonableness,” and “risk assumption” that called for judges to make choices. The realists dealt in a new way with what Williston had seen as the important problems in the field. However, they did not challenge his view about what the important problems were. Moreover, with a few exceptions, they accepted the traditional assumption that appellate cases were the only appropriate subject for analysis.

In the decade following World War II, two contracts casebooks appeared that changed the very definition of the field. The first, Professor Lon Fuller’s Basic Contract Law, was published in 1947. The most obvious innovation was that the course began with contract remedies. Students considered most of the other topics in light of Fuller’s concern with remedial theory. By now, this part of Fuller’s revolution is recognized way to begin a course.

There are several justifications for beginning a contracts course with remedies. Fuller argued that decisions in the chain of reasoning about formation and performance of contracts were affected by their remedial consequences. One cannot understand judicial decisions about contract formation or performance without understanding what difference they make. Fuller insisted that courts did not decide abstract questions of whether there had been an offer and an acceptance so that a legally enforceable contract had been formed. He suggested that the real problem was whether the parties’ conduct justified awarding a remedy to one of them or whether the court should just leave both parties where they were after their transaction had failed.

There are other good reasons to start with remedies. The subject is a good introduction to the conflicting goals of this body of law. There is a large gap between announced policy and the likely impact of the rules. Moreover, the material is

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difficult to learn on your own. If we put it at the end of the course, we will teach it hurriedly if at all. Indeed, if we begin at the beginning of a relationship — asking whether a contract has been formed — we are likely to spend most of our time on problems of least practical and theoretical importance.

Fuller also included excerpts from classics in political philosophy and jurisprudence relevant to issues of individualism and altruism, freedom and regulation, and the nature of the process of judging. He offered materials that compared American and British approaches to those found in continental legal systems. He also introduced a few selections dealing with the way American businesses used contract. For example, he included provisions of the Worth Street Rules. These are the practical law of the cotton grey goods industry, a form of private government that codified norms and resolved disputes by arbitration apart from the public legal system.

In spite of Fuller's then-radical innovations, his work was recognizable as a contracts casebook and enjoyed great success from the start. The classic Willistonian problems were all there plus many of the familiar cases. Also, during the preceding decade Fuller had written two great articles. They enabled law teachers to see what he was trying to get across by the arrangement of materials in his book. One of those articles — *The Reliance Interest in Contracts Damages* — is now part of the conventional wisdom of any contracts course — though it has recently come under attack.

The second post-World War II book that broke out of the classic mold was by Friedrich Kessler and Malcolm Sharp. The influence of their innovative contract materials was more subtle and indirect. Relatively few teachers used this book because it looked too hard and too different. The book's message spread more widely when Grant Gilmore became Kessler's co-author for the second edition after Sharp declined to participate further. Kessler and Sharp, and later Kessler and Gilmore, saw contracts as an expression of the political philosophy and ideological struggles of this nation. On one hand, there was an ideal of free contract and a minimal limited state. This was rationalized in the name of freedom and unleashing creative energies. On the other hand, there was always a countertheme calling for regulation in various forms seeking substantive justice. Kessler and Sharp saw American contract law as expressing theme and countertheme, overgeneralizations and overcorrections. In short, they saw it as contradictory. Contract doctrine reflected deeper, more basic, but inconsistent themes in the national consciousness. Furthermore, these themes could be traced back to classic views about law, government, markets, and justice.

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20 A third edition was revised by Professors Kessler and Anthony Kronman of Yale Law School.

21 Karl Klare, after praising the book's innovations, offers the following criticism of Kessler and Sharp:

The book does not suggest a theory to explain why an advanced capitalist society must
Although Kessler and Sharp devoted most of their attention to the traditional problems of law school contracts, the first cases in their book were an overview of the underlying policy themes running throughout the course. Then a last section looked at modern commercial problems expressing the tension between free contract and regulation. For example, they described the struggle between automobile manufacturers and dealers over the balance of power in their relationship. Kessler and Sharp saw contract law as but one of many tools for coping with these larger social problems. In this section, their focus was on important problems, rather than the logic of doctrine. They saw law in the mid-20th century as involving statutes and administrative regulations rather than common law cases. Although it was not emphasized in their book, both Kessler and Sharp were interested in the relationship of business practice to contract law, and such issues were raised easily at many places in their course.

In the late 1960s, Ian Macneil published his contracts materials. He began with contract remedies, and he also saw contracts as expressing fundamental philosophical conflicts. His distinct contribution was a relational approach. Macneil argued that underlying contract law was the assumption of a single discrete transaction between strangers. However, Macneil pointed out that the reality of most modern business is the long-term continuing relationship. Sometimes lawyers formally structure business relationships in a requirements contract (in which the buyer commits to buy all its requirements from a particular seller) or a blanket order system (in which any order is subject to agreed terms). Often, however, X Corporation just views Y Corporation as a valued long-term customer. While no formal contract may exist, officials of both organizations feel there are rights against and duties to one another, although they may be imprecisely defined. Obviously, such relationships have their own norms and sanctions. Do contract law continually reproduce the conflict between private autonomy and state regulation. The resulting impression, perhaps contrary to Kessler and Sharp's intentions, is that the dichotomy of individualism and social control is a necessary and unresolvable conflict in all modes of social organization. Autonomy and community ultimately become reified "first principles" or "fundamental values" to be, as though by some inevitable process, "balanced." The possibility that personal autonomy and communal need are not, in principle, in conflict and that, indeed, autonomy and community might support and enhance each other in a different, noncapitalist mode of social organization is not explored. One of the central ideological missions of law in advanced capitalism is to legitimate state regulation of private economic activity while upholding private enterprise as the proper system of ownership and control. Kessler and Sharp, perhaps unwittingly, contribute to this ideological mission. No matter how vital Kessler and Sharp's historical, antiformalist emphasis, in the end key categories such as individual autonomy and social control become for them abstractions cut off from their historical roots. Kessler and Sharp thereby not only revitalize conceptualism, but, ironically, by suggesting that freedom of contract and state regulation of private behavior can be comfortably balanced within our institutional framework, they obscure the fundamental contradictions of our mode of social organization which they must have intended to illuminate.


Consider the degree to which Klare's criticism of Kessler and Sharp applies to these contracts materials. Insofar as it does, in what "different, noncapitalist mode of social organization" would "autonomy and community support and enhance each other"? In terms of the schools of thought discussed above, Klare's criticism is an example of what approach to legal scholarship?

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and the legal system offer anything to the management of these relationships? Or is the law necessarily limited to performing a salvage function at the time of a divorce?

Macneil's large body of writing on the subject and his casebook seek to develop the implications of a relational contract law. Some of these issues relate to contract law's call for careful and specific definition of obligations. This call conflicts with custom in many business relationships. People leave things to be worked out as a long-term transaction progresses. They want flexibility to deal with changed circumstances. Some issues relate to whether the parties have overriding duties requiring them to attempt to keep the relationship alive and beneficial to both in the long run. He emphasizes that parties in relational contracts frequently temper wealth maximization goals with other objectives:

Macneil believes the legal system needs to take radically different approaches to relational contracts than it traditionally has. In dealing with disputes, he favors greater reliance on procedures oriented towards mediation and less emphasis on adversary processes looking towards adjudication. In regulating contracts, he counsels greater reliance on proactive administrative agencies that can take account of the many third-party interests at stake and less reliance on courts able to apply regulatory rules only when a disadvantaged party initiates a court procedure.23

Professor Jay Feinman describes Macneil's approach to deciding contracts cases. First, a court must decide whether a transaction involves a discrete or a relational contract. Discrete transactions call for enforcing the agreement struck by the parties when they entered the deal. However, in a relational contract,

the court would consider how . . . [norms of flexibility and contractual solidarity] are manifest in the parties' action, the community's actions and understanding, the broader society's values, and the legal system's principles. That inquiry suggests the choices to be made: not what would the parties have done, but what kind of relationship is most desirable in this setting. What the parties would have done is but one element that goes into that assessment. Finally, the effect of legal intervention in support of these norms must be considered. . . . [T]he resort to law may upset the operation of several of the most important values of the relation; imposing a norm of flexibility may cause parties to be more precise in specifying the terms of their contracts and therefore less flexible.24

So much for a brief history of American contracts scholarship as it has been translated into teaching materials. When you read works by legal scholars, opinions by judges, and statutes passed by legislatures you must recall that they were written by people who were influenced by the kinds of people they were and the times in which they lived. To make matters more complicated, legal writers of a later generation often construct their own picture of a scholar who wrote at an earlier

time, the meaning of an earlier case, or the purposes of a statute passed in response to a particular now-forgotten crisis. Often these later understandings are little better than caricature or parody. For examples, the names Williston and Corbin today have each come to stand for ideas and assumptions that seem oversimplified in light of what they actually wrote.  

3. Law in Action — Building on this History

These materials, *Contracts: Law in Action*, offer a blend of all these approaches plus their own features. Following Fuller, we begin with remedies. Following Kessler and Snapp, we look at issues of freedom and regulation, and we highlight the contradictions and inconsistencies found in contract doctrine. Following Maclure, we emphasize long-term continuing relationships. We adopt a law and society perspective. We examine the gap between the law on the books and the law in action. We emphasize both the virtues and vices of symbolic law that declares ideals but hides a reality that is less pleasing. We stress the functions of contract law as delivered to its ultimate consumers. We see contract doctrine as but one of many tools with which lawyers and others attempt to cope with individual and larger social problems.

We try to put contract law into its full context. We stress such things as the costs of using courts and bringing appeals. We see lawyers playing active roles reflecting both their clients’ and their own interests. We see litigation and appeals as only part of a much larger social process. The chance that one might sue plays an important part in negotiation. Processes such as mediation and arbitration are supported by tacit threats of what might happen if one party declines to participate. Lawyers themselves often judge the merits of both sides’ claims and attempt to work out problems in acceptable ways. We also try to keep students well aware that modern law involves legislation and administrative regulation. We see our course as helping beginning law students learn to be lawyers rather than just masters of the fine points of legal doctrine. At the same time, legal craft demands that lawyers recognize the conflicting goals of the field. Good lawyers understand the ways things work whether or not they work as they should.

Students have mixed reactions to the course. Some find to their surprise that our contracts course is not as dull as they feared the subject would be. It is, after all, about very real problems. Other students, however, sometimes find it hard to

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28 Williston had a formalist streak (note, for example, his use of the phrase “correct results” in the quote below), but he was also a progressive, as indicated in this excerpt from his treatise:

> When it is now said that courts “will neither make nor modify contracts, nor dispense with their performance,” if it be meant that such power will not be exercised except in accordance with legal principles, the statement is sound; but if the meaning is that parties to contracts are always liable in accordance with their terms, it is far too narrow a limitation of the functions of the common law, and a court which insists upon such a statement obliges itself in various situations to use the confusing language of fiction in order to achieve correct results. Under the name of implied contracts (quasi-contracts) courts have wisely imposed obligations on parties to contracts which they never agreed to assume; and because of fraud, mistake, duress, impossibility, and illegality, have modified contracts or dispensed with their performance, simply because justice required it.

understand what we are driving at and may think we are “hiding the ball.”

Doctrinal structure can be comforting, as Elizabeth 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,
having misguided. Perhaps much Willsonian 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.

This demand for structure reminds us of a statement printed on a bookbag carried
by one of our former students. It said, “I have given up the search for truth. Now
all I want is a good fantasy.” We understand our students' desire for simple answers
and structure. Students, particularly beginners, assume there are clear rules and
seek to master them. Commercial publishers play to that demand and offer outlines
and books aimed at students. They may assist some students in their struggle with
the basic issues of a topic. However, professors hope to encourage students to go
beyond the comforting half-truths of doctrinal knowledge.

In addition, the approach taken in these materials questions many things some
students want to hold dear. Macaulay suggests:

The classical model of contract...appeals to many legal professionals
(and law students) because it seems to offer those without political or
economic power the possibility of overturning the structures of the
powerful in the society. Judges are supposed to respond to reasoned
argument, and if their decisions importantly affect behavior, then a single
skilled advocate or author of a law review article, armed only with reason,
could right wrongs by persuading judges. Not only would the powerless
win, but the legal professional who championed their cause would need to
do only honorable and enjoyable things in order to help them. The
champion works through appeals to reason and intelligence, and talks of
economic and social norms, the "findings of science," efficiency, or some
other highly valued body of thought. Problems of politics, interest, power,
and dominance need not be faced because they do not appear to be relevant
in the world of doctrine, where it is assumed that right ideas will be
crystallized into rules that are self-enforcing... But many of those who
examine the legal process in operation today find it difficult to retain their
faith that the key to the good society resides in appellate judges, adminis-
trative agencies exercising discretion, pluralism, the morality of adjudica-
tion, or economic theory. Instead of justice, the empiricists describe a
system of bargaining where “the haves come out ahead.”

One major theme of the course is that things are not as they seem. But debunking
can be upsetting. It can lead to a resigned cynicism that undercuts any effort toward

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27 Stewart Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract, 11 Law
28 See Galanter, supra note 8.
bettering the world. It is true that naive idealism may seriously mislead those whose goal is to effect change. However, legal rules do often matter. Lawyers for various causes have won remarkable victories, and reform efforts have affected life in the United States over the past half-century or more. We think good lawyers are skeptical idealists, aware of how the system works but unwilling to retreat into an easy cynicism.

The authors of these materials organized them to emphasize what they see as important problems. In many places this calls for something other than a doctrinal arrangement. Indeed, often a doctrinal arrangement would distort our thinking. For example, Professor David Trubek argues that the behavioral system related to processing particular types of disputes — including the relevant doctrine — “not only transforms the various individual conflicts: in so doing it ‘transforms,’ so to speak, a raw conflict of interest into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out.”29 We want to avoid these limitations on what we can see. Nonetheless, we make a major effort to explain the ins and outs of the doctrines and traditional approaches. We accept the point that as silly as some may be, they influence the vocabulary and expectations of lawyers. We have struggled to explain the logical structure of, say, the consideration doctrine without allowing it to set boundaries around our thought.

In sum, these materials are challenging, but they only reflect the difficulty in both the claims of contract law and its actual role in social life in this country. Those who find the materials disorganized are looking for something other than the organization that is there. We have signaled where we are going and why.

These materials, divided into two volumes, were designed for two courses: Contracts I, a required course that meets four hours a week for the first semester, and Contracts II, an elective that meets three hours a week in the second semester. Contracts I deals with a background we think useful to everyone. Contracts II is a course designed for those with particular interest in the field. Contracts I introduces ideas that Contracts II develops in much greater detail. However, the more basic notions found in Contracts I also find expression in many other law school courses and areas of practice.

We divide Contracts I into three parts. First, we consider contracts remedies, looking at many of the difficulties involved in announced goals and means to implement them. Then, in the second part, we turn to the long-term continuing relationship. Here we look at problems in applying the contracts remedies system to these common and important situations. We also look at alternatives to the formal legal system, considering both their merits and flaws when applied to various kinds of relationships. In the course of this second part, we also address the rudiments of the law of contract formation. Finally, in the third part, we look at attempts to regulate the bargaining process in various ways. On the one hand, this material raises all of the tensions between freedom and regulation and the conflicting

principles found in American contract law. On the other hand, it stresses the limits of various kinds of legal action.

This structure emphasizes what we see as important problems. Examination of the materials reveals we do cover most of the important contract doctrines associated with traditional courses. Offer, acceptance, consideration, the parol evidence rule, and conditions all appear on stage as do the expectation, reliance, and restitution interests. Wise students will master the rules as they would have if they attended law school in 1935. However, this knowledge is necessary but not sufficient. We show these doctrines playing their parts in dealing with real problems. Abstract rules of contract could govern any kind of relationship, but each of these rules is likely to come into play only in particular situations. We see doctrine as a means and not as an end. We seek not only to understand the internal logic and political or philosophical positions the statement of these rules reflect but also their likely impact on different kinds of people.

Contracts II is a more technical course building on Contracts I. Here we try to select some of the issues of offer, acceptance, mistake, and interpretation that are very much alive in modern business transactions. We give major emphasis, however, to issues of performance and excuse both at common law and under the Uniform Commercial Code, issues that seem to matter most to modern business. Moreover, we do what we can to put those cases into context so that students can understand the real disputes that brought the parties into the legal process rather than turning to some other means of resolution. Just as in Contracts I, there is great emphasis on cost barriers to use of the legal process and on the roles played by lawyers.

These materials accept that messy reality provokes messy answers to difficult questions. The discussion in class flowing from the materials may push you to the boundaries of your Republican, Democratic, independent, reactionary, or radical beliefs. You should expect this, for most of the fights about the good, the true, and the beautiful lurk just beneath the surface of the law of contracts. Contract law mirrors the conflicting visions that many of us accept as just common sense. Whether you find satisfying answers will depend in large part on your vision of the society in which you live and your definition of social justice. In good liberal fashion, we have not written the materials to indoctrinate students with any political point of view. During the late 1960s and early 1970s, those teaching from the earliest versions questioned students from somewhat to the right of the accepted wisdom of the vocal members of the class. In the 1990s, many students had moved toward the right, and our challenges seemed to come from the left. It may be that another shift in student perspective has occurred too recently to accurately identify it. Whatever your perspective, we strive to test ideas and assumptions and see this as a valuable experience for those learning to be lawyers.

After many years of exploring the area, those who have contributed to these materials still find the subject fascinating and find something new each trip through them. The process of learning anything worth learning probably must involve a degree of frustration. Everything is related to everything else, and it seems impossible to understand anything without understanding everything. Moreover, many Americans, including entering law students, expect law to be clear and consistent with simple ideas of right and wrong. Whatever the merit of that idea,
students learn that the law embraces complexity and reflects a view that concepts of right and wrong are anything but simple. We hope that you will share our interest in contracts as a way of learning about life in this country and considering possibilities for stability and change.
Chapter 2

REMEDIES FOR BREACH OF CONTRACT

We begin with contract remedies, the “so what?” of the subject. Suppose Williston makes a contract to supply goods to Corbin at an agreed price. Williston fails to deliver the goods and has no excuse that the law recognizes. What can Corbin do? He is likely to talk with Williston to try to persuade him to perform. If that fails, Corbin can buy from someone else and resolve never to deal with Williston again. Corbin can gossip at a trade show, telling atrocity stories about Williston that will make it harder for Williston to make contracts with other potential customers. Corbin might decide to consult a lawyer to see whether it makes sense to seek legal relief against Williston.

What would the lawyer tell Corbin? He would state facts and opinions about what the law might offer, what it might cost to get a remedy, and the chances of winning. Law school courses too seldom stress the costs and risks involved in delivering law to its consumers, but lawyers and clients must confront these factors. We will continually remind you that law is not free. Keeping this in mind, what has the legal system to offer someone when another party has breached his or her contract? In a famous article, Professor Lon Fuller and William Perdue tell us that the law could protect the expectation interest, the reliance interest, or the restitution interest, or some combination of them. While there are problems with Fuller and Perdue’s classification system since the categories overlap, one must master it because these terms have become part of the vocabulary of the contracts field. This chapter of Contracts: Law in Action will take up the expectation, the reliance, and the restitution interests and then turn to some difficult problems drawing on aspects of all of them.

A. PROTECTING THE EXPECTATION INTEREST

From the middle of the 19th century to today, judges and legal writers have told us that the primary goal of contract remedies is to protect what Fuller and Perdue call the “expectation interest.” The Uniform Commercial Code announces in § 1-205(4):3

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3 In this book, unless otherwise indicated, we cite to Revised Article 1. Revised Article 1 has been generally adopted, as will be explained later in the text.
The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but... penal damages may [not] be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.

While the Code does not apply to all contracts cases, it shares this statement of goals with all the other bodies of contract law. Thus, the law says that it will attempt to put aggrieved parties where they expected to be as the result of performance. The ordinary objective is to approximate a hypothetical state — where the aggrieved party would have been had the contract been performed — and not to punish breach or put the aggrieved party in a better position than would have resulted from performance.

The goal is easy enough to state, but it ought to provoke questions. Why seek this objective? What function does it serve? And what about the means to the end? We have no contract police to watch those who enter into contracts. One who threatens breach or does not perform is not arrested. Such an approach might encourage performance, but few of us would be willing to pay to have contract police to ensure performance. We have balanced the ends and costs of alternative ways to respond to breach collectively chosen to protect the “expectation interest” — hoping this will achieve an optimal level of performance at an acceptable cost.

But what do we mean by the phrase “the expectation interest”? What are the likely actual consequences of the compromises embodied in our contracts damages norms when they are filtered through the legal system in operation? How far is the law of contract remedies actually an instrument designed to produce changes in behavior, and how far is it an exercise in political and cultural symbolism and ideology? This is the agenda for our first body of material.

1. A Long, But Necessary, Digression: Of Two Codes, Reading Statutes, and the Application of Article 2 of the Uniform Commercial Code

We want to begin with some simple examples of how the Uniform Commercial Code (UCC) attempts to put aggrieved buyers and sellers of goods in as good a position as they would have been had the contract been performed, and why the law dealing with sales of goods adopts this as a goal. We will also examine the assumptions and compromises involved in the techniques that the UCC uses to protect the expectation interest. Then we can turn to examples of the expectation interest in areas not covered by the Code.

However, before beginning students can embark on this enterprise, they have to learn a little about what the Uniform Commercial Code is, techniques of reading statutes, and, since Article 2 of the Code does not apply to all contracts, when they can use its provisions. We will also (very briefly) mention another important codification of commercial law — the United Nations Convention on Contracts for the International Sale of Goods (CISG). We will refer to its provisions from time to time in these materials.
The Uniform Commercial Code: A great deal of this course will involve learning about the Uniform Commercial Code. It is a lengthy statute that has been the law in all but one state since the late 1960s. However, it is not all of commercial law. It does not cover taxation, bankruptcy, government contracts, patents and copyrights, consumer protection, environmental protection, cooperatives, antitrust and the protection of competitive markets, the regulation of banks and securities markets, and a lot more.

What does the Code deal with? It has nine articles or major sections: Article 1 covers the purposes of the Code, definitions, and a few provisions that apply to all the other articles. Article 2 deals with transactions in goods — roughly, buying and selling cars, chairs, cows, crowbars, and other movable things. Article 3 covers the law of commercial paper — checks and promissory notes, for example. Article 4 concerns bank deposits and collections. Article 5 governs letters of credit. Article 6 regulates bulk transfers. Article 7 covers warehouse receipts, bills of lading, and other documents of title. Article 8 deals with some aspects of investment securities, and Article 9 has provisions relating to secured transactions (buying a car “on time,” for example), sales of accounts and chattel paper. We will be concerned in Contracts almost entirely with Articles 1 and 2. The rest of the Code is the turf of upper-level courses in commercial law.

Uniform laws attempt to deal with some of the costs of federalism. The United States has 50 states, as well as districts and territories, all with power to make laws affecting transactions within their borders. However, the economy of this country does not respect national or state lines. It would be difficult for General Motors to sell cars under 50 different state laws, and it would be even harder for smaller companies that could not afford to hire a staff of lawyers to keep things straight. The Congress of the United States could pass national legislation, but commercial law has traditionally been and remains the states’ responsibility.

The UCC is the product of a collaboration between the Uniform Law Commission (ULC) and the American Law Institute (ALI). Both are examples of the odd mixture of public and private functions so often found in this country. ULC, formerly the National Conference of Commissioners on Uniform State Laws (NCCUSL), promotes uniform laws. It is largely funded by state governments, which appoint its members, but it has no official powers. It supervises experts who draft proposed uniform laws to submit to the state legislatures. Sometimes legislatures pass these model laws as written; sometimes they tinker with them; sometimes they ignore them. Between 1896 and 1933, the Commissioners proposed seven different uniform laws dealing with negotiable instruments, sales, warehouse receipts, stock transfers, bills of lading, conditional sales, and trust receipts. They had mixed success. The UCC was more successful; every state has enacted most of it. Forty-nine states (all but Louisiana) have enacted Article 2.

The American Law Institute (ULC’s collaborator in creating the UCC) is a private group performing what we might see as public functions. It has attempted to distill, organize, and state precisely the judge-made common law developed by state appellate courts. In a sense, the ALI’s “restatements of the law” are proposals to judges, who may or may not choose to follow the version of a common law rule put forward. However, these restatements are influential for many
reasons. They are the product of drafting by experts and careful review by committees of elite judges, lawyers, and law professors.

The Uniform Commercial Code did not appear by magic on the pages of statute books. People with thought-out positions, biases, and human failings drafted proposed versions, which committees reviewed and interest groups tried to change. These committees and groups insisted on and got revisions. Then the final product had to be sold to 50 legislatures. While the proponents of the Code tried to claim that it was the work of neutral experts and expressed a consensus of those who understood the area, opposition developed. In the late 1950s, many thought the whole project was dead and would never become law. The Code you will study reflects the process of drafting, editing, fighting, and compromising that produced it.

In the late 1930s, many commercial lawyers thought that the Uniform Sales Act was out of date. Professor Karl Llewellyn, who then taught at the Columbia Law School, sought radical reform of commercial law. Llewellyn was a member of NCCUSL. He maneuvered to take the leading role in a reform effort. Zipporah Wiseman tells us:

In “five weeks’ work by the clock, and uninterrupted,” Llewellyn wrote an 88-page draft of a “Uniform Sales Act 1940.” . . .

Llewellyn’s vision of sales law, reflected in that 1940 draft and in his earlier writings and subsequent revisions of the draft, was no mere update of [the Uniform Sales Act]. . . . Obsolescence in general was an important starting point, but modernization was not Llewellyn’s only end. Llewellyn’s objective was to reformulate sales law in light of his normative vision of both merchant practice and judicial decision making.

Of course, as Wiseman chronicles, Llewellyn and his allies had to battle for a long time before the UCC ultimately assumed its final form. As a result, it is filled with compromises.

Professor (and later Justice) Robert Braucher was an insider who took part in this long process that led to the adoption of the Code. He taught contracts and sales at the Harvard Law School, and participated in many activities of both the National Conference of Commissioners on Uniform State Laws and the American Law Institute. He also served as a justice of the Supreme Judicial Court of Massachusetts. The following excerpt from his article speaks to the history of the statute.

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Robert Braucher, *Legislative History of the Uniform Commercial Code*

58 Colum. L. Rev. 798 (1958)\(^5\)

The Code itself began with the address of President William A. Schnader to the fiftieth annual meeting of the [National] Conference of Commissioners on Uniform State Laws. . . . In 1942 the American Law Institute agreed to participate, and the Uniform Revised Sales Act was approved by the Conference in 1943 and by the Institute in 1944. Professor Llewellyn was the reporter and . . . Soia Mentschikoff was the assistant reporter in this first part of the project; they later became chief reporter and associate chief reporter for the Code as a whole.\(^6\)

The comprehensive joint project officially got under way on January 1, 1945. Supervision of the Code was the responsibility of a five-man editorial board, under the chairmanship of Judge Herbert F. Goodrich. The method of operation, described in the initial comment to the Code, followed in outline the Institute’s procedure in work on the various Restatements. A draft prepared by one of the reporters was reviewed by a small group of “advisers,” then by the Council of the Institute and the Conference, often at a joint meeting. By May 1949 the Code had reached the stage of an integrated draft of nine articles with notes and comments. . . .

As the Code neared completion, published references to it increased in volume. A judicial opinion stated that provisions of the Code “which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship.” People who had participated in the drafting wrote explanatory articles in legal periodicals. . . . Later the American Law Institute published a series of monographs on the Code, and new casebooks in fields covered by the Code were spattered with Code references.

The result was that groups that had not previously taken part in the project came to examine it critically. In addition to a great volume of favorable discussion, there appeared some highly critical academic comment on particular provisions of the Code. Professor Frederick Beutel of the University of Nebraska announced his all-out hostility, branding the Code as “the Lawyers and Bankers Relief Act,” involving “a deliberate sell-out of the American Law Institute and the Commission-

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\(^6\) [Eds. note: Llewellyn married Soia Mentschikoff during the early stages of drafting the Uniform Commercial Code (she lived from 1915 to 1984). She was one of the first women to become a partner in a Wall Street law firm and then became a visiting professor at Harvard Law School. In the 1940s and 1950s, most universities prohibited married couples from serving on the faculties of the same department. The University of Chicago had the same rule, but its Law School appointed Llewellyn as a professor of law and Mentschikoff as a “professorial lecturer with tenure.” This seemed to satisfy the University, Karl, and Soia. Mentschikoff contributed a great deal to the drafting and lobbying for the enactment of the Uniform Commercial Code. She had a distinguished career apart from her professional and personal relationship with Llewellyn. She was Dean of the University of Miami Law School from 1974 to 1984.]
ers of Uniform Laws to the bank lobby.” The other principal opponent, Emmett F. Smith, house counsel to the Chase National Bank of New York, was in strange contrast. Late in 1952 he began a one-man campaign to defeat the Code, circulating far and wide over the nation two mimeographed memoranda of forty-odd pages each. Far more effective than the Beutel attacks, the Smith memoranda provoked a printed reply from the Conference. Opposition by other groups seems to be traceable at least in part to the Smith memoranda, and it seems a fair guess that Smith was largely responsible for the fact that no state except Pennsylvania enacted the Code before 1957.

[Beginning in 1953 the Code was the subject of review by Massachusetts, New York, and Pennsylvania — with the New York study being watched with particular care]. . . . Finally, after three years of work and the expenditure of some $300,000, the [New York Law Revision Commission] early in 1956 rendered its report. The report’s major conclusions may be summarized as follows:

(1) The “preponderance” of the arguments for or against codification “is in favor of careful and foresighted codification of all or major parts of commercial law.”

(2) Such a commercial code “would be of greater value to the public and the legal profession than the enactment, even with revisions, of separate uniform laws.”

(3) Such a code “is attainable with a reasonable amount of effort and within a reasonable amount of time.”

(4) The Uniform Commercial Code “is not satisfactory in its present form.”

(5) The Uniform Commercial Code “cannot be made satisfactory without comprehensive re-examination and revision in light of all critical comment obtainable.”

Following publication of the New York report, the subcommittees of the editorial board reviewed their previously formulated tentative recommendations and made final reports to the editorial board. The sponsoring organizations authorized the publication of a revised edition of the Code, and by November 1956 the board had completed action on a revised statutory text. . . . The subcommittees also prepared revised official comments during the spring of 1957, but publication was withheld to await developments in the 1957 legislative sessions in Massachusetts and Pennsylvania. A complete revised text and comments edition was finally published early in 1958.

At the time Braucher wrote, only Pennsylvania, Massachusetts, and Kentucky had passed the Uniform Commercial Code. The judgment of the Law Revision Commission in New York was a blow to the hopes of the proponents, and the editorial board made revisions to meet some of its objections. Many academics who taught commercial law participated in a lobbying movement, reassuring legislators that the Code was a progressive reform.
A. PROTECTING THE EXPECTATION INTEREST

It is unlikely that many state legislators read and understood the Code. In most states, scholars prepared lengthy section-by-section commentaries discussing the impact of the Code's provisions on the law of the state. A few legislators may have looked at these efforts, but their length and complexity suggest that most legislators had to take the Code on faith or rely on the opinions of those they trusted. By 1962, fourteen states had passed the UCC, including important commercial states such as Illinois and New Jersey. By 1967 it was the law in 49 states, the District of Columbia, and the Virgin Islands. Louisiana, with its French Civil Code tradition, was the lone exception. Finally, in 1974, Louisiana passed all of the Code's articles but 2 and 6. Guam also adopted the entire UCC in 1977. Many of the states passed the statute with their own amendments here and there so that the result is not complete uniformity.

The Uniform Commercial Code has a style that many lawyers dislike. Professor Karl Llewellyn, its Chief Reporter, was a famous jurisprudential scholar. He thought that the common law tradition was one of the important inventions of English-speaking people. Llewellyn argued that American courts had engaged in three styles of reasoning since 1800. The “Grand Style” typified 1800 to 1850. This was a creative and flexible approach. Judges looked back to precedent but also forward to prospective consequences and prospective future problems. “[P]recedent is carefully regarded, but if it does not make sense it is ordinarily re-explored; ‘policy’ is explicitly invoked into; alleged ‘principle’ must make for wisdom as well as for order i’t it is to qualify as such. . . .” He contrasted this Grand Style with a “Formal Style” that predominated from 1850 to 1920. This approach was formal and logical, but remote from life. Formal style opinions ignored or concealed change and growth in the law. Llewellyn said that since the mid-1920s, courts had attempted to recapture the Grand Style of an earlier time. Judges, he wrote, had a sense of the situation that helped them find sensible results in particular cases, whatever the quality of the reasoning in opinions explaining what they had done. Rather than attempting to spell out precise rules in detail, lawmakers should attempt to help judges by giving guidance as to factors to consider. Thus, the Code often speaks qualitatively, using terms such as “good faith,” “unconscionable,” “commercial reasonableness,” and the like. The Code does not purport to offer a solution for all possible problems.

Article 2 of the UCC is not pure Llewellyn. While he wrote the first draft in 1940, by 1958 many cooks had had a hand in making the broth. Zipporah Wiseman has studied Llewellyn's original papers, and she details how much of Llewellyn's original vision was lost in the process of building coalitions and making compromises. Llewellyn, himself, said:9

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I am ashamed of [the UCC] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.

Whatever Llewellyn’s views about grand-style judging, the UCC still is a statute with its own logic and vocabulary. You must master them if you are to do a technically adequate job. Seldom, for example, can one read a phrase or a section in isolation and understand the Code’s meaning. One must understand the structure, or architecture, of the Code before one can understand any particular provision.

While all states have passed a major part of the Code, there is a real gap between its text and the living law. The Code is not easy to understand. At the most elementary level, it lacks an index compiled by its authors, and the cross-references in the Official Comments often are incomplete. Some lawyers fight its underlying philosophy; they would be happier with a statute that provided more answers. Whatever your ultimate judgment about the UCC, it is the law. Command of its logic and vocabulary is an important skill for lawyers who encounter the subjects it deals with in their practice.

**Revising Articles 1 and 2 and drafting UCITA:** By the late 1980s, serious questions had arisen about some of the Code’s provisions, and many were concerned about its ability to deal with new technologies. An ambitious (but controversial) revision process was initiated. Revisions of some articles, such as Article 1 on definitions and general provisions and Article 9 on secured transactions, were very successful. Almost all states have enacted Revised Article 1, and all have adopted Revised Article 9. The Article 2 revision process, however, broke down and was abandoned in 1999. This effort was replaced by a substantially more modest effort to amend Article 2, as well as an ambitious proposal for a freestanding Uniform Computer Information Transactions Act (UCITA) — not part of the UCC because the ALI refused to endorse it — to deal with contracts involving software, databases, and other computer-related transactions. Ultimately, no state enacted the Article 2 amendments, which have now been “withdrawn” by their sponsors, the ULC and the ALI. UCITA has only been enacted in two states, Maryland and Virginia, and it seems very unlikely it will be enacted by others. The courts have for the most part adapted by applying the existing Article 2 to software transactions even if they are labeled “licenses.” In *Micro Data Base Systems, Inc. v. Dharma Systems, Inc.*, 148 F.3d 649, 651–54 (7th Cir. 1998), the court applied Article 2 to a transaction in customized software under an agreement involving a “license fee.” The opinion by Judge Richard Posner notes that this approach represents “the weight of authority” and reaches “the right result — for we can think of no reason why the UCC is not suitable to govern disputes arising from the sale of custom software.” But as Professor Jean Braucher explains in the following excerpt, this was not the result favored by the software industry.

Overall, the [Article 2] study group’s report did not identify any major reason for the revision project; instead, it surveyed a series of minor issues that might be addressed. With twenty-twenty hindsight, one can see that the project was doomed from the start because the study committee did not envision any significant efficiency gain that could justify the transition costs to businesses of many changes in statutory language. Despite the lack of a compelling reason to pursue the project, the Revised Article 2 drafting project began after the study committee report was published.

The issue of whether to cover software remained in limbo in the early years of the Revised Article 2 project. In 1995, the Article 2 drafting committee experimented with a draft covering both sales of goods and licenses of software (a development that might have supplied the missing rationale for the project), but later that year NCCUSL [now renamed the ULC] decided to go forward with a separate UCC article, Article 2B, on licenses of “computer information.” The two projects then proceeded in tandem, with separate drafting committees, although there were periodic efforts to harmonize sections dealing with the same issues in the two projects.

The politics of the two committees were quite different. The majority of the Article 2B drafting committee consistently voted for positions favored by software producers, while the Revised Article 2 drafting committee was more balanced in its treatment of sellers and buyers. The Article 2 revision project ultimately faltered when NCCUSL sided with strong seller interests and pulled the project from final consideration in 1999. The original Article 2 reporters resigned and a new, more seller-oriented drafting committee was appointed. The project was scaled back somewhat, from a revision to a set of amendments. The ALI membership narrowly approved proposed Amended Article 2 in May 2003, following final approval by NCCUSL in August 2002. . . . [Eds. note: Amended Article 2 has now been withdrawn, having failed to be adopted by any state.]

In an unsuccessful effort to minimize controversy, proposed Amended Article 2 punted on the issue of the coverage of software and other digital products. . . . [The article then explains detailed provisions that had the effect of leaving various issues to judicial discretion, without statutory guidance.] Overall, as applied to software transactions, the amendments would be a step backwards, further confusing rather than clarifying the law.

The bias of the Article 2B project in favor of the software industry ultimately doomed it. In 1999, the ALI pulled out of the Article 2B project, ending its status as a UCC Article. The major reasons included amorphous scope, complex and unclear drafting, overreaching into issues best left to intellectual property law, and

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a failure to require pre-transaction presentation of terms even in Internet transactions.

NCCUSL then decided to proceed alone with the Article 2B project, turning it into a freestanding uniform law and renaming it the Uniform Computer Information Transactions Act, or UCITA. NCCUSL first approved UCITA in 2000. After two quick enactments in Maryland and Virginia, the opposition effectively organized. Since then . . . opponents of UCITA have succeeded in defeating it in every jurisdiction where it has been promoted.

**ALI's Principles of the Law of Software Contracts:** ALI went forward with its own independent project concerning the law of software, called Principles of the Law of Software Contracts, which was approved by the membership in May 2009 and published in 2010. This is a more modest project in that it is not a proposed statute, but rather an attempt to influence common law decisions. It is called a “principles” project, rather than a restatement, to reflect the less settled nature of the law in this area.

**United Nations Convention on Contracts for the International Sale of Goods, and the UNIDROIT Principles:** The development of trade across state boundaries led to the need for a code of commercial law which was more or less uniform from one state to another — hence the UCC. Similarly, growth of international trade led to a perceived need for a code which would govern international sales of goods — hence the Convention on Contracts for the International Sale of Goods (CISG). The Convention was approved by a Diplomatic Conference in Vienna in 1980, and the process of adoption by individual countries began immediately. As of 2014, 83 nations, including the United States, Australia, Canada, China, France, Germany, Israel, Italy, Japan, Mexico, the Russian Federation, and Sweden had subscribed to the Convention. Contracts for the international sale of goods that are entered into by parties in at least two different countries, both of which have ratified the convention, are subject to CISG unless the contract for sale explicitly designates another law (such as the UCC) as the governing law. Many of the rules of the Convention are the same as those of the U.S. common law, or the UCC, but there are important differences. We will, on occasion, call your attention to the Convention when we think it would be useful or interesting to do so; we do not intend, however, to provide an exhaustive summary of the Convention's rules. It is important that you know that the Convention provides the presumptive standards for international sales of goods involving parties from participating nations, and that the rules may be different from those you might otherwise expect to apply.

Another body of norms of increasing significance can be found in the “UNIDROIT Principles.” UNIDROIT is the commonly used name for the International Institute for the Unification of Private Law, an organization that was formed to prepare uniform international rules of contract law. Delegates from 58 countries, including the United States, make up the organization's membership. In 1994 UNIDROIT produced the UNIDROIT Principles, which constitute a set of general rules for international commercial contracts. These Principles were revised and updated in 2004 and 2010. They are applied primarily when parties agree to make them the governing rules, but they can also serve to supplement other
international uniform law instruments, as well as providing a resource for general legal principles. The Principles address issues of formation, validity, interpretation, content, performance, and non-performance (including remedies). The Principles generally embody rules similar to those found in the Restatement (Second) of Contracts and the Uniform Commercial Code, though there are important differences. The Principles specifically address contract problems that are especially important in international transactions, such as contracts written in multiple languages and currency-related problems. The Principles also contain rules addressing requirements of good faith and fair dealing, gross disparity in bargaining power, and hardship as a ground for relief from a contract, or as a ground for re-negotiation, which may be different in important ways from the Restatement or the UCC.\footnote{For the principles themselves, go to www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010.}

**Reading statutes:** While in many ways the Uniform Commercial Code is an unusual statute, still it is a statute. Lawyers have techniques for reading and applying words passed by legislatures. Law students, professors, judges, and lawyers often forget an obvious and simple one: you must read the statute. When Section 10 refers to Section 7, and both use terms defined in Section 1, you must read all three sections and put them together in some plausible way. English may be a terribly imprecise language, far better suited to poetry than lawmaking, but this does not justify neglect of what precision it does have.

We cannot forget that the reader of anything written must create its meaning. Judges often write of seeking the "plain meaning" of legislation. Many legal scholars, borrowing the teaching of those who study language, have attacked the idea that documents can have a plain meaning. Words take on meaning for me as I interpret them in light of context and my experiences. However, the meaning I create by this active process may not be the one you create because we are different people. Undoubtedly, the scholars' attack on the concept that interpretation is a mechanical translation of a code available to everyone was a valuable corrective to the "plain meaning" position.

However, lawyers have a professional interest in asserting that there is some possibility of communication among people. Someone who decides to interpret "yes" to mean "no," "stop" to mean "go," "up" to mean "down," "right" to mean "left," and "I promise" to mean "I will if I feel like it" is likely to experience a good deal of difficulty in interaction with others. Most lawyers share a culture, and they have some success in predicting how others might react if they translate words one way or another. The more you understand that culture, the better you will be able to predict how lawyers are likely to interpret language. To restate the first rule of statutory construction: read the statute, but read it intelligently.

Judges also say that when the language of a statute is "ambiguous," then they may use various extrinsic aids to give it meaning. Ambiguity is a matter of degree. When the words in a statute seem to draw on the meanings common to lawyers, probably it is not worth wasting a judge's time by asking him or her to consider other plausible meanings. It is a good idea to hold legislators to using words with
something like the meaning expected in legal culture. But at some point, even words
taken in context may leave most lawyers uncertain. Then materials other than the
text of a statute should be consulted.

Often judges say that the goal of statutory construction is the "intention" of the
legislature. At first glance, you might find this a strange idea. A legislature, after all,
is not a person but a collective body. Representative A votes for the Good Works Act
because the director of a political action committee that contributes to A's reelection
campaign tells him to do so. Representative B has studied the matter and reached
a reasoned conclusion that the Good Works Act best balances the competing
interests of all the affected public. Representative C relies on Representative B's
judgments on such matters while she specializes in other legislative issues. And so
on. Furthermore, a great deal of the work of modern legislatures is done by
members of the legislative staff who, in turn, may draw on suggestions from
lobbyists, the governor's staff, people in administrative agencies, and professors.
Given the workload and the complexity of the issues coming before a legislature,
there must be a great division of labor, and representatives must often rely on
others. Intention, then, often means no more than that members of the legislature
had a chance to read the committee reports explaining the bill, though few did.

Returning to the Uniform Commercial Code, the problem of determining the
legislature's intention in the face of textual ambiguity is even more difficult. The
Code is technically state legislation, but it was not drafted in any particular state.
Any meaningful effort to ascertain the intention of a section has to take into account
the intentions of the experts who drafted the Code, as described in the excerpt from
Professor Robert Braucher's article, supra. But these experts (professors and elite
lawyers) are not legislators in any state, and it is not clear why their views should
be considered authoritative. Could it be argued that the members of the state
legislatures that enacted the Code had studied and embraced the views of these
experts?

In practice, when faced with ambiguity in the provisions of the Code, especially
Article 2, courts often refer to the Official Comments to each section. However, you
should be aware that the text of the Code was enacted as law by legislatures; in most
states, the Comments were not. The Comments were drafted by the same
committees that drafted the text to the Code, as Professor Robert Braucher
described, supra. It is unlikely that the Comments (which may themselves be
ambiguous) were considered as carefully as the text (if at all) by the enacting
legislatures. Courts sometimes feel free to ignore the import of a Comment in
interpreting a Code provision.

Applicability of Article 2 of the UCC: Article 2 of the Uniform Commercial Code
governs many but not all contracts. It is important that you use Article 2 when it is
clearly applicable. Before you turn to particular sections in Article 2, you always
must give some thought to whether you have an Article 2 transaction. Obviously, in
many situations it will not matter whether a case fits into Article 2 because its rules
and those of general contract law are the same. The problem comes when Article 2
has provisions that favor your client but which are not found in other bodies of law.
We will explore some of these differences in due course. Appellate courts have had
to wrestle with the scope of Article 2 in a surprising number of cases.
At this point you should read §§ 2-102, 2-105(1), and 2-107(1) and (2) of the Uniform Commercial Code and the related Comments. Then consider the following questions (some of these are quite difficult and complicated):

(1) Owner buys a wooded hillside lot located at 123 N. Main Street for $20,000 from the Subdivision Development Corporation. Would Article 2 of the UCC apply to this transaction? See §§ 2-102, 2-105(1), 2-107. If not, does this mean that their contract is not legally enforceable? See § 1-106(b).

(2) Owner hires Woodsman to cut the trees and remove the stumps from the wooded hillside lot. Under the contract, Woodsman is to trim the felled trees to create marketable logs, stack the logs neatly, and transport the stumps and non-marketable small branches to the municipal dump. Is this transaction between Owner and Woodsman within Article 2 of the UCC? See § 2-105(1). If Owner later sells the stacked logs to Lumber Mill for an agreed price, is this transaction within Article 2?

(3) Businessperson leases an automobile for one day from Rent-A-Car. Is this transaction within Article 2 of the Code? See §§ 2-102, 2-106(1).  

(4) Owner buys components for a music system from StereoLand. Consider two variations:

(a) Owner receives cartons containing components at the store, and she assembles the system at her house. Is this transaction within Article 2 of the UCC?

(b) The contract calls for a StereoLand employee to go to Owner’s house and set up the system. Does it matter whether the dispute is about the quality of the goods before installation, whether the installation was done right, or whether there is a writing to make the transaction enforceable under § 2-201?

(5) Owner makes a contract with Engineer to produce a specially designed automobile. Engineer is to supply the design, labor, and parts and deliver a completed automobile to Owner. Is this transaction within Article 2 of the UCC? See § 2-105(1); cf. § 2-704(2). What about a case in which Client consults Lawyer, and Lawyer prepares a will reflecting Client’s wishes for the disposition of his property after his death? Lawyer produces a 10-page typewritten document on expensive paper with a fancy cover. This is handed to Client, who pays Lawyer’s fee. Does this transaction fall within the boundaries of Article 2? If you have any question about the application of Article 2 here, how does the transaction differ from the production of a specially designed automobile?

In Donebrake v. Cox, 14 the court said,

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13 This is a bit of a trick question. Article 2A, Leases, was proposed for adoption in 1967 to resolve the special issues involved in leasing goods. All states except Louisiana have now adopted it. The Article applies to short-term rentals of automobiles or do-it-yourself equipment by consumers, on the one hand, and to commercial leases of such items as aircraft and industrial machinery, on the other. Under Article 2A, you do not have to worry about the question we asked in the text.

14 499 F.2d 961, 969 (8th Cir. 1974).
The test for inclusion or exclusion [in Article 2 of the UCC] is not whether they goods and services] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (installation of a water heater in a bathroom).

Do you find that this test helps you solve these problems? Another approach sometimes used by the courts is to look at the "gravamen of the action," that is, the aspect of the transaction in dispute. If the dispute in a mixed transaction is about the goods aspect of the transaction, Article 2 will apply, but if it is about the services element, it will not.

(6) Owner makes a contract with General Contractor to build a house on Owner's lot. General Contractor is to supply labor and materials. Is this transaction within Article 2 of the UCC? See §§ 2-105, 2-107, and 2-501(1)(a) and (b).

(7) After the house is built, Owner sells it to Buyer. Is this transaction within Article 2 of the UCC? Does it matter whether Owner sells only the house or sells the house and the lot on which it is built? See § 2-107(2).

(8) Local Fast Food enters a dealer franchise agreement with National Chain. Under this agreement, Local leases from National the land and building constituting the local restaurant; agrees to provide various services such as keeping the restaurant open during certain hours, keeping records in certain forms, and running the restaurant; and agrees to buy various food products and cleaning supplies from National. The franchise agreement provides that National can cancel the arrangement upon giving 60 days' notice, and National exercises this right. Local's lawyer wants to argue that National's action violated the obligation of "good faith" imposed by the Code under §§ 1-304 and 2-103(1)(b). National's lawyer argues that the UCC is not applicable to this transaction, and that the general contract law of the particular jurisdiction imposes no such obligation. The courts have had a great deal of trouble with this problem. Do you see why?15

(9) Lawyer buys a software package for her law office for billing, tracking documents, and so forth. A dispute arises with the seller with respect to whether the software has performed as promised. Should the UCC apply? In Maryland and Virginia, where UCTA has been enacted, that statute would govern. In other states, most courts have applied Article 2 to software transactions, even involving custom software.

Article 2 of the UCC applies to "transactions in goods." These problems have shown that application of this rather simple phrase yields considerable uncertainty in a variety of situations. You may find this troubling. If you do, you might find solace in suggestions by Ludwig Wittgenstein (1889-1951) in his Philosophical Investigations, an enigmatic landmark in 20th-century philosophy. Wittgenstein

15 As we will see later, Local may have rights under federal and state franchise protection statutes passed in the 1950s and 1970s, but those statutes do not cover all situations involving franchisees. Furthermore, the general contract law of many jurisdictions will impose a duty of good faith and fair dealing, making the applicability of the Code of little importance in this circumstance. See Restatement (Second) of Contracts § 205 (1981).
suggests a radical defect in a long tradition in philosophy that says one knows what a thing is (for example, a “game” or a “transaction in goods”) only if one knows some property or set of properties that all things, and only things, of that type have.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS
(G.E.M. Anscombe, trans., Macmillan 3d ed. 1972)\textsuperscript{16}

66. Consider for example the proceedings that we call “games.” I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? — Don’t say: “There must be something in common, or they would not be called ‘games’” — but look and see whether there is anything common to all. — For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look! — Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost. — Are they all ‘amusing’? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-rosies; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear.

And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.

67. I can think of no better expression to characterize these similarities than “family resemblances”; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way. — And I shall say: ‘games’ form a family.

69. How shall we explain to someone what a game is? I imagine that we should describe games to him, and we might add: “This and similar things are called ‘games.’” And do we know any more about it ourselves? Is it only other people whom we cannot tell exactly what a game is? — But this is not ignorance. We do not know the boundaries because none have been drawn. To repeat, we can draw a boundary — for a special purpose. Does it take that to make the concept usable? Not at all! (Except for that special purpose.) No more than it took the definition: one pace = 75 centimeters, to make the measure of length ‘one pace’ usable. And if you want to say “But still, before that it wasn’t an exact measure,” then I reply: very well, it was an inexact one. — Though you still owe me a definition of exactness.

70. “But if the concept ‘game’ is uncircumscribed like that, you don’t really know what you mean by a ‘game.’” — When I give the description: “The ground was quite covered with plants” — do you want to say I don’t know what I am talking about until I can give a definition of a plant? . . .

71. One might say that the concept ‘game’ is a concept with blurred edges. — “But is a blurred concept a concept at all?” — Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? Isn’t the indistinct one often exactly what we need?

Wittgenstein’s notion of “family resemblances” may be an incomplete solution to the problem he raises, but it does provide a provocative backdrop against which to think about the problem under discussion. For our purposes, it is especially useful to reflect upon the questions raised in § 71 of Wittgenstein’s text. Why would it be an advantage for the UCC to employ an indistinct or blurred concept of “transaction in goods?” What disadvantages can you see?

Our long march through this digression ends at last. Now you are ready to begin by reading some Uniform Commercial Code sections and applying them to problems dealing with the expectation interest.

2. The Expectation Interest: The Substitute Contract as the Preferred Means to the End

Contract remedies generally are based on encouraging the aggrieved party to enter a substitute contract and then awarding damages to make up any loss remaining. Suppose Seller promises to sell 100 shares of Hot Property Software Corporation stock to Buyer for $10 a share. Seller breaches the contract. Buyer then immediately purchases 100 shares of this stock from someone else for $12 a share. Had the Seller/Buyer contract been performed, Buyer would have paid $1000 for 100 shares of stock. Because of the breach, Buyer had to pay $1200. A court would award Buyer damages of $200. Assuming no transaction costs, Buyer then will have paid $1000 ($1200 - 200 = $1000) for the 100 shares — that is, Buyer will be where he or she would have been had the contract been performed. The expectation interest is protected.

We will illustrate this principle in more detail by a series of examples of how the Uniform Commercial Code has codified this simple approach. As so often is the case, complexity lurks at the margins of a seemingly simple idea. In each instance, ask yourself not only what is the proper answer under the applicable statutes, but whether it is a sensible answer. First, read §§ 2-703, 2-706, and 2-708 of the Uniform Commercial Code as well as the relevant Official Comments. Then answer the following questions:17

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17 The dollar amounts in these problems keep the math simple, but probably make a lawsuit impractical because of the cost of litigation. In such circumstances it is unclear to what extent legal analysis will affect any dispute resolution by the parties. However, if the contract were for 100,000 cases of apples, a threat of litigation could be credible, and in that case, predicting how a court would resolve any litigation would likely have an impact on any settlement discussions between the parties.