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Contract Texts, Contract Teaching, Contract Law: Comment on Lawrence Cunningham, Contracts in the Real World

Brian H. Bix
University of Minnesota Law School, bixxx002@umn.edu

CONTRACT TEXTS, CONTRACT TEACHING, CONTRACT LAW: COMMENT ON LAWRENCE CUNNINGHAM, *CONTRACTS IN THE REAL WORLD*

Brian H. Bix*

Abstract: Lawrence Cunningham's *Contracts in the Real World* offers a good starting place for necessary conversations about how contract law should be taught, and, more generally, for when and how cases—in summary form or in longer excerpts—are useful in teaching the law. This Article tries to offer some reasons for thinking that their prevalence may reflect important truths about contract law in particular and law and legal education in general.

INTRODUCTION

Those of us who have been teaching law for a long time, and have been teaching contract law for a long time, are experts of a sort about teaching that subject. Just ask us—we'll tell you. We are also—most of us, anyway—complete amateurs. Few among us have done, for example, any empirical work about the relative benefits of different kinds of casebooks or different kinds of teaching styles. I belong to the general majority of law professors who can only offer armchair speculations. And like the general majority of law professors, I will not allow the lack of informed expertise to prevent me from expressing opinions—lots of them, and with unwarranted confidence.

In this article, I will use Lawrence Cunningham's wonderful book, *Contracts in the Real World*,[1] as the starting point for some reflections on contract law textbooks, teaching contract law, and contract law itself. Part I considers what one might learn from a broad overview of contract law texts. Part II offers a brief defense of using more full judicial opinions (or at least substantial excerpts), rather than case summaries or simply lists of doctrinal rules, in teaching contract law. Part III offers some reflections on the advantages and disadvantages of using cases

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota Law School. Many of my biases on both Contract Law and teaching Contract Law are on display in BRIAN H. BIX, CONTRACT LAW: RULES, THEORY AND CONTEXT (2012). I am grateful for the comments and suggestions of the editors of this journal.

1. LAWRENCE A. CUNNINGHAM, CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER (2012).

involving well-known persons and events in contract law texts.

I. CONTRACT TEXTS

In looking for texts on contract law, there are two major alternative categories. On one hand are the type of texts that have been used to teach contract law since contract law scholar and Harvard Law School Dean Christopher Columbus Langdell first put forward the basic theoretical and pedagogical idea over a century ago[2]: course-books that are basically *case*-books. Such texts are primarily lightly edited versions of reported judicial opinions, generally from appellate courts.[3] Because of the influence of the American legal realists, who criticized the belief that legal reasoning could or should rely entirely on the analysis of cases, we now have some discussions of policy and theory interspersed with the cases.[4] However, most of the pages in these course-books remain devoted to the texts of actual opinions.

On the other hand are treatises, where the text contains primarily declarations of the doctrinal rules.[5] To a varying extent, a treatise may also contain quick summaries of some of the more important or instructive cases. Study aids[6] tend to have the general structure of treatises, though on a smaller scale, focusing on declaring the rules, with occasional reference to case summaries.[7]

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2. For an overview of Langdell's approach to law and legal education see, for example, Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

3. *E.g.*, IAN AYRES & GREGORY KLASS, STUDIES IN CONTRACT LAW (8th ed. 2012); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE (4th ed. 2008); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS (8th ed. 2013); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (7th ed. 2012); CHRISTINA L. KUNZ & CAROL L. CHOMSKY, CONTRACTS: A CONTEMPORARY APPROACH (2d ed. 2013); DANIEL MARKOVITS, CONTRACT LAW AND LEGAL METHODS (2012); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY (5th ed. 2013).

4. *See, e.g.*, AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (giving excerpts from realist writers, indicating their views on legal realism, judging, legal education, and other topics); BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 193–204 (6th ed. 2012) (overview of legal realism).

5. *E.g.*, E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS (5th ed. 2011); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (6th ed. 2009).

6. *E.g.*, MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (7th ed. 2013); ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW (2d ed. 2009); CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL (7th ed. 2010).

7. One can also find texts—especially among books devoted primarily to the *drafting* of contracts—that provide the sort of problem-based approach more commonly associated with business school courses. *E.g.*, SUE PAYNE, BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH (2011); DAVID ZARFES & MICHAEL L. BLOOM, CONTRACTS: A

That summaries of cases—and predominantly reported appellate cases—still dominate teaching texts in contract law (and most other first-year law school courses) is itself an interesting story. The standard progress story of the history of American legal thought[8] is that the legal realists showed: (1) that formalist approaches to legal reasoning and judicial reasoning were unsustainable—based inevitably on bias and pre-judgment; (2) that legal reasoning was not really autonomous; and (3) that even if legal reasoning *could be* autonomous, it would be better if supplemented by policy, science, and other forms of wisdom from outside of law.

The legal realist critique left its mark on legal education, though how large an impact it had can reasonably be debated. Is it an important change or a trivial one that our texts are no longer subtitled "Cases on Contracts," but now are subtitled "Cases and Materials on Contracts"?[9] As reflected in these texts, the vast majority of contract law courses go beyond mere close reading of the judicial opinions, adding some amount of economic analysis, contract theory, critical reflections, and whatever else might fit under the broad realist rubric of "policy." At the same time, most contract law course-books and most contract law courses continue to rely primarily on the close reading of judicial opinions, and primarily opinions from appellate courts.[10] Whatever "policy," theoretical, or inter-disciplinary content is present is marginal. At the same time, an observer sympathetic to the lessons of legal realism would note that it is a sign of realism's success that first-year law school courses now, almost universally, no longer focus *exclusively* on cases. The courses, as taught, now support the view that non-doctrinal arguments are proper subjects of study in a law school and that these extra-legal (non-doctrinal) arguments are both appropriate and, in the hardest cases, likely inescapable.

One can come at the same set of questions about the role of cases in understanding contract law from the other direction. Even (or especially) when we are not worried about the teaching of first-year law students, it is *still* hard to escape individual cases entirely. As mentioned, treatises

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TRANSACTIONAL APPROACH (2011). However, these approaches remain very much a small minority, especially in the texts used for first-year contract law courses.

8. I confess to being guilty of contributing to or reinforcing this narrative. *See* BIX, *supra* note 4, at 193–204.

9. *See, e.g.*, FARNSWORTH ET AL., *supra* note 3 ("Cases and Materials" in subtitle of textbook); KNAPP ET AL., *supra* note 3 (same).

10. In a growing number of courses the traditional focus on the close reading of cases is now supplemented by contract drafting exercises.

(and even most study aids) contain some case summaries, however condensed. It is worth considering why this role for cases (in full opinions, excerpted opinions, or summaries) remains so pervasive. Is it merely the residue of Langdellian formalism that we lack the energy or courage to finally shake off?

Perhaps the persistence of cases in course-books (including *Contracts in the Real World*) could be explained in terms of pedagogy. Even if one did not accept the Langdellian view, one still might believe that first-year law school courses are meant to teach not only the doctrinal rules of the courses in question, but also to teach certain basic skills: for example, how to read cases and how to argue within a precedential system (using prior cases as authority, or distinguishing prior cases, among other skills). *Contracts in the Real World* in fact takes the students through their paces this way in a fairly effective manner. For example, at one point the book offers the following question of analysis: how does a couple in a separation agreement making a mutual mistake about the value of shares of a not-yet-discovered Ponzi scheme fit into a line of cases involving mutual mistakes about whether a rare dime was forged, whether a violin was in fact a Stradivarius, and whether a cow was in fact barren?[11]

Accepting that one use for cases in course-books is to help train students in different kinds of case analysis, one suspects that the ubiquity of case excerpts and summaries in both course-books and treatises reflects something beyond pedagogical value for training students to "think like a lawyer." In part, the presence of cases may reflect a different aspect of teaching: that certain doctrines cannot be clearly explained without examples. Consider the following "black-letter rule," taken from the *Second Restatement*:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstance indicate the contrary.[12]

We can put aside for the moment that the text (like other provisions in the *Restatements* and the Uniform Commercial Code) looks like it was badly translated from the Latin.[13] How should such a rule be applied?

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11. CUNNINGHAM, *supra* note 1, at 59–66.

12. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

13. I do not mean to be *too* critical. As someone who has worked as a Reporter on a proposed uniform law (the Uniform Premarital and Marital Agreement Act), this author knows only too well

What is meant by "impracticable" and an event's non-occurrence being "a basic assumption on which [a] contract is made"? The doctrine begins to take clearer shape when we see a case in which the doctrine was held *inapplicable* to a situation where a Fortune 500 company was losing two million dollars a day.[14] And the *Restatement* itself is a document that understands the need for, or at least the value of, examples, as almost every *Restatement* section is followed by short "illustrations" (the impracticability section just quoted is followed by six "comments" and sixteen "illustrations").

Additionally, I would speculate that the prevalence of case summaries likely reflects a number of considerations, including an uncertainty or flexibility intrinsic, if not to all law all of the time, at least to certain areas of law. The great cases contain rich facts that ground conflicting moral principles and intuitions. Sometimes these cases are open to different interpretations that would justify quite different ways of applying the "rule" of that case to subsequent cases. At other times, it is not that the meaning of the case is uncertain so much as the clash of interests, values, and arguments is so nicely poised in the case, and the conflict so well-handled in the opinion, that the case repays frequent re-reading.[15] It is not an accident that cases like *Hadley v. Baxendale*,[16] *Jacob & Youngs v. Kent*,[17] *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,[18] and *Nanakuli Paving & Rock Co. v. Shell Oil Co.*[19] appear in almost every contract law course-book and treatise, almost always with extensive quotations from the opinion, or at least an

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how hard it is to draft language that is both precise and understandable; and, in legal documents, it is usually the clarity that gets sacrificed first (and properly so).

14. Karl Wendt Farm Equip. Co. v. Int'l Harvester Co., 931 F.2d 1112, 1117 (6th Cir. 1991). And it may round out the complexities of the doctrine further to note that in the case both the trial court and a dissenting judge on appeal thought that the doctrine *was* in principle *applicable* to those facts. *Id.* at 1124 (Ryan, J., dissenting). This case is used by a number of contract law course-books. *See, e.g.*, KNAPP ET AL., *supra* note 3, at 691–700.

15. From the point of view of law professors, who often teach the same cases, year after year, over the course of decades, there is obvious value to cases that do not become stale upon the 20th reading and public discussion. (One knows the uncharitable excuse for frequent new editions of course-books—that they are meant to force students to buy new books rather than used copies—but new editions may also be an unintended mercy for the teachers, who might otherwise be unable to bring any interest or energy to lesser cases that have been taught too many times before. Changing many "second-tier" cases every few years, through the revised editions, helps veteran teachers make it through a few more repetitions of the same course.)

16. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

17. 129 N.E. 889 (N.Y. 1921).

18. 190 F. Supp. 116 (S.D.N.Y. 1960).

19. 664 F.2d 772 (9th Cir. 1981).

extensive paraphrase of the case's facts. These are cases that both students and contract law scholars can argue about endlessly, without reaching any consensus either about the rightness of the result or about the "lessons" that should be drawn from the cases. There is a sense that there are subtleties and nuances and uncertainties within the law that cannot be reduced to clear and clean descriptions of a "black-letter" rule.

That there may be a point to having *some* reference to the facts of *some* cases is, of course, a great distance from concluding that contract law courses should be made up *primarily* of the close reading of case opinions. Perhaps contract law courses could track treatises, and mostly describe the doctrinal rules—for my taste, also adding in some attention to how the doctrine developed historically[20]—but discussing only those cases that display in distinctive ways the complexity or uncertainty of the rules.

This analysis also leaves open the question of how the content of a course—cases, rules, policy, drafting, negotiation, and so on—should be taught. For many of us, what is taught and how it is taught are linked by the simple truths of tradition and inertia: we teach the way we were taught, and the way that most of our colleagues teach. And for many of us that means using some version of the Socratic Method, with variations on how much we rely on volunteers rather than "cold calling" and the harshness of the responses to unprepared students and bad answers.

A small but growing number of scholars argue that the Socratic Method is actually, contrary to what is generally believed, an *ineffective* way of teaching the law.[21] This claim is often combined with the observation that the uniqueness of this approach to legal education is an argument against it, not for it (noting that even when the best universities teach their undergraduates and graduate students about Socrates, they do not use the "Socratic Method" to do so).[22] As the argument often continues, we unenlightened law teachers stay with the Socratic Method because we are captured by a myth of its effectiveness,

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20. For an argument by example of how such historical material helps us better to understand some contract law doctrines, see BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 4–11, 32–34 (2012).

21. *E.g.*, Brian Leiter, *The "Socratic Method": The Scandal of American Legal Education*, LEITER REPORTS: A PHILOSOPHY BLOG (Oct. 20, 2003, 12:15 PM), http://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html; *cf.* Andrea P. Goldin et al., *From Ancient Greece to Modern Education: Universality and Lack of Generalization of the Socratic Dialogue*, 5 MIND, BRAIN & EDUC. 180 (2011) (in experiment, Socratic Method failed as method of teaching mathematical truth that had been used in Plato's *Meno*).

22. *See, e.g.*, Leiter, *supra* note 21.

or perhaps just too timid to try something different from the way we were taught in law school and different from the way most of our colleagues teach. Most of us have had experience with the pushback, and sometimes negative student evaluations, that can come with doing *anything* in one's teaching significantly different from the way students in the other sections or even at other universities are being taught.

The idea behind the Socratic Method is relatively straight-forward, at least for those who use the method to teach—rather than primarily to intimidate, to use fear of embarrassment to encourage class preparation, to obscure simple truths, or to fill out sixty minutes of class with ten minutes of material. The positive justification for this Method is that students will remember answers better if they reason to them on their own, and will get better at (legal) reasoning if they practice the process publicly while in class. On the other hand, if students become preoccupied with avoiding being called on, or with minimizing their embarrassment when they are called on (or when they participate voluntarily), this may deflect from learning rather than encourage it. In any event, I must leave it to others to offer empirical evidence on the effectiveness of this method of teaching, with the hope that many of us would be willing to change our course if we were shown sufficient evidence that other approaches were clearly superior.

Contracts in the Real World helps us to think through what it is we are trying to do as law professors when we teach first-year contract law classes, and whether we are going about it the right way. Why do we teach through cases rather than simply giving the doctrinal rules, and does it really benefit the students for us to try to pretend to be Socrates in the Platonic dialogues?

II. THE BENEFITS OF FULL OPINIONS

I am not a classical formalist who believes that all that law students need to learn can be taught through reading judicial opinions. The addition of contract drafting exercises, negotiation exercises, complaint drafting work, and so on, to contract law courses clearly reflects skills that would be valuable to most, if not all, would-be lawyers. At the same time, I *do* believe that there are benefits from the close reading of judicial opinions.[23]

There are a variety of benefits to reading full judicial opinions or

23. These opinions should be both at the trial court and appellate court level; I think the continued predominance of appellate court opinions in course-books—likely a residue of the Langdellian approach—is a mistake.

significant excerpts; I will mention only a few. One matter that I emphasize to my contract law students is the importance of the procedural posture of a case. There are different standards a court applies in responding to a motion to dismiss, a motion for summary judgment, a motion for a directed verdict, and a motion for judgment notwithstanding the verdict (JNOV). Similarly, an appellate court hearing an appeal will apply different standards of review depending on at which stage of the litigation the case was resolved below. These are basic points, but I have found that even high-ranked graduates of very good law schools seem to miss these basic procedural points in figuring out (for example) how to argue a case on appeal. Matters of procedural posture are most easily investigated in full opinions, or at least opinions where the procedural posture and standards of review have not been edited out.[24]

Another element that can be missed when one has summarized cases rather than full-text opinions is a sense of the struggles of the court, working both within and, in a sense, against the existing doctrinal rules. For this purpose, the well-known case of *Webb v. McGowan*[25] is a classic example. In *Webb*, an employee had saved his employer from death or grievous injury by using his own body to push away a heavy falling object, and in the process the employee suffered a significant injury. In gratitude, the employer promised the employee regular payments until the employee died, and the employer kept that promise until his own death, at which point his executor refused to make further payments.[26] The employee sued to enforce the promise, but the problem was that there did not appear to be valid consideration for the employer's promise; the consideration of saving the employer's life came before the

24. Of course, in principle one *could* include the procedural posture of the case and the statement of the standard of appellate review even in a brief summary—but once all of that was included, the summary would no longer seem so brief, and any benefit in brevity relative to an opinion excerpt would likely be lost.

25. 168 So. 196 (Ala. Ct. App. 1935). The case is also summarized in *Contracts in the Real World*, CUNNINGHAM, *supra* note 1, at 117–18, but I think that much of its richness is lost in the short summary offered.

26. Of course, students ought also to be told why their cases are full of executors, testatrixes, and the like, seemingly always refusing payment on what seem to be legally, or at least morally, strong claims. The reason is that executors of estates and trustees of trusts, etc., may be personally liable to other beneficiaries if they pay out on claims that are not legally well-grounded. This could lead to discussions of whether it would be better to impose liability under a looser standard—for example, removing liability where decisions are made in good faith or when claims have a strong moral basis even if not legally enforceable. This could take discussion far afield, but that is always a danger with contract law courses—they can quickly turn into courses on trusts and estates law, family law, employment law, etc.

promise rather than at the same time. Contract law was later changed, establishing a limited exception to the requirement of contemporaneous consideration, to cover cases whose facts were very similar to *Webb v. McGowan*.[27] However, that justification was not available to the *Webb* court, which nonetheless struggled to find a way to enforce the promise. What makes *Webb* a great teaching case in my view is that it presents an opportunity for students to follow that struggle through the reasoning of the court, a struggle that would not be displayed in short summaries of the case.

The *Webb* court begins its analysis by noting that there is existing case law holding that where a person cares for another's property, this can be sufficient to ground a subsequent promise to compensate another for the care.[28] It then notes that human life similarly has a value, as indicated by life insurance and other forms of insurance.[29] Within legal analysis, one sometimes must deal with legal categories and precedent by using analogy and indirection: (1) promises to compensate for earlier care for property are enforceable; (2) caring for another person's health and life are like caring for property in that both can have a monetary value—as shown by insurance policies; and (3) therefore, promises to pay for prior care for another person's health or life should be enforceable. However, the strangest part of the opinion was still to come.

The *Webb* court notes that there was some disagreement regarding whether or when a prior or existing moral obligation would be sufficient consideration to make a promise enforceable, with many courts and commentators having held that there must be some existing legal or equitable obligation that was for some reason unenforceable.[30] The court continues:

> [W]here the promisor, having received a material benefit from

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27. At least in the *Restatement*, *see* RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) ("Promise for Benefit Received"), and followed in many jurisdictions.

28. *Webb*, 168 So. at 197. The analysis could have gone in a slightly different direction, and noted that emergency care for either person or property has been held to justify actions for restitution, even without any subsequent promise to pay. This long-standing principle appears in the recent *Restatement (Third) of Restitution and Unjust Enrichment* as Sections 20 and 21. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (2011). However, that would have been a more indirect route to showing what needed to be shown here: the enforceability of the employer's promise.

29. *Webb*, 168 So. at 197–98. There are also lessons to be learned from the efforts the *Webb* court feels it needs to exert to get to what would seem an obvious point: that life is valuable, value potentially expressible in monetary terms, and that contract law should be as willing to enforce promises to compensate for benefits to life and health as it should be to enforce promises to compensate for benefits to property.

30. *Id.* at 198.

> the promisee, [that promisor] is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made . . . . McGowin's express promise to pay [the employee] for the services rendered [that is, saving the employer's life] was an affirmance or ratification of what [the employee] had done, raising the presumption that the services had been rendered at [the employer's] request.[31]

The *Webb* court thus seems to be telling us that because of the employer's promise to pay, we should presume that there had been a remarkably quick and detailed discussion between the employer and employee *while the heavy object was falling*, negotiating the terms of compensation for the rescue that was in the process of occurring. This is, of course, absurd, but it is an example of a category that all of us who read a lot of cases come across regularly: a court using a "legal fiction"[32] or formalistic reasoning to come to a result that the court (and most readers) finds to be right or just. Whether such outcome-determinative practices by judges is a good thing or a bad thing (or only seems like a good thing when the judge reaches an outcome we like) is obviously another topic worth discussing with students in any law school course.[33] All of this comes from requiring students to read the actual opinion, and question why the court made the arguments it did.

Complete or nearly complete excerpts of cases also allow the teacher to emphasize many other matters: for example, the wonderful brevity of Judge Cardozo (as he then was) in *Jacob & Youngs v. Kent*,[34] *Wood v. Lucy, Lady Duff-Gordon*,[35] and other cases, where every sentence displays (or hides) an important step in a packed analysis and argument, where doctrine, policy, "common sense," and rhetoric intermingle freely; an example is given in the footnote below.[36] There are

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31. *Id.*

32. On the nature, value, and uses of legal fictions, see LON L. FULLER, LEGAL FICTIONS (1967); Frederick Schauer, Legal Fictions Revisited (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904555.

33. As indicated throughout this article, there are many important topics that could, and perhaps should, be raised in a first-year Contract Law course, but there are the countervailing pressures of how hard it is to cover the substantive law now that most of us must squeeze the contract law course into three or four credits, rather than six credits.

34. 129 N.E. 889 (N.Y. 1921).

35. 118 N.E. 214 (N.Y. 1917).

36. One of the questions in *Jacob & Youngs* is whether the builder was to lose all right to sue on

comparable virtues from the more recent Richard Posner opinions, which are now starting to populate Contract Law casebooks with almost as great a frequency as Cardozo opinions.[37]

One last small matter: full opinions allow the teacher to point out to the student how every case requires the judge to construct a narrative, first and foremost a narrative of what happened (the facts), and that it is no coincidence that almost all the factual narratives in judicial opinions display the actions underlying the case solely or primarily from the point of view of the party that ultimately prevails in that court. The choice of point of view is likely not conscious, but it is still important. To narrate from the point of view of one party is a natural way to increase the reader's sympathy for that "protagonist."

III. CELEBRITY CASES

I have mixed feelings about the use of cases involving celebrities, television shows, and other well-known recent events, as *Contracts in the Real World* does to a great extent, but many course-books do to some extent.[38] On the positive side, one should not lightly dismiss a strategy that could increase interest in a topic many law students find dry and dreary. Cases involving actors, athletes, and politicians that students recognize may very well increase students' willingness to pay attention to the cases they are required to read.

One problem is that the fame of the party could distract from the doctrinal lesson—that students might be so caught up in liking or hating

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the construction contract (for building a mansion) upon any breach, however small in importance or value relative to the remainder of the contract (what would become the doctrine of "substantial performance," in contrast to the "perfect tender" in sale of goods contracts). Cardozo writes:

> From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiæ without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Jacob & Youngs, 129 N.E. at 891. A modern judge or commentator would likely unpack those few sentences into an argument that went on for many pages. Students accustomed to the lengthier form of analysis often get tripped up when trying to work through analysis as compact as Cardozo's.

37. *See, e.g.*, Morin Bldg. Prods. Co. v. Baystone Constr. Inc., 717 F.2d 413 (7th Cir. 1983) (Posner, J.) (affirming a trial court decision that contract provisions that seem to indicate a subjective satisfaction test should in fact be read as imposing an objective satisfaction test), excerpted in KNAPP ET AL., *supra* note 3, at 484–87. For an excellent discussion of the influence and contrasting themes of Cardozo and Posner, see Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM & MARY L. REV. 1379 (1995).

38. *See, e.g.*, KNAPP ET AL., *supra* note 3, at 219–24, 1000–09 (cases involving Martin Luther King, Jr., and former Minnesota Governor and professional wrestler, Jesse Ventura).

Charlie Sheen,[39] in wanting him to win or lose the case, that they become less able to focus on the intricate questions of conditions involved in Sheen's case. Additionally, today's celebrity may be an obscurity in a short time. It may not be that long before students need the help of an internet search engine to figure out who Sheen, Sandra Bullock,[40] Eminem,[41] Kevin Costner,[42] or Vanessa Redgrave[43] are (we are likely already there for some of those figures).

The other risk of working to be up to date and relevant is that the book's narrative may be overtaken by events. For example, as already noted, *Contracts in the Real World* features a case where a separation agreement was challenged because of the parties being mutually mistaken about the value of shares in a Madoff Ponzi scheme fund. The book characterizes the appellate court as getting the outcome right; however, that decision was reversed after the book was finished.[44] (Of course, being reversed does not mean that the appellate court was necessarily wrong, but it does indicate that there were significant arguments for a different outcome.)[45]

CONCLUSION

Lawrence Cunningham's *Contracts in the Real World* is not only a wonderful book about contract law and an excellent teaching tool for contract law courses, it is also a good starting place for necessary

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39. *See* CUNNINGHAM, *supra* note 1, at 176–79, 181–86 (discussing case involving Sheen).

40. *See id.* at 186–92 (discussing case involving Bullock).

41. *See id.* at 126–30 (discussing case involving Eminem).

42. *See id.* at 172–76 (discussing case involving Costner).

43. *See id.* at 87–88 (discussing case involving Redgrave).

44. *See id.* at 59–60, 66 (discussing Simkin v. Blank, 915 N.Y.S.2d 47 (N.Y. App. Div. 2011), *rev'd*, 968 N.E.2d 459 (N.Y. 2012)). It should also be noted that the text's comment that the property the married couple were dividing in their separation agreement was "virtually all . . . considered jointly owned because it was obtained during their lengthy marriage," CUNNINGHAM, *supra* note 1, at 60, misstates the relevant family law principle. In a common law property state like New York, which divides property "equitably" upon divorce, each spouse may have a claim on an equitable portion of all property obtained during the marriage, but it is not the case that all such property was "jointly owned." *See, e.g.*, BRIAN H. BIX, FAMILY LAW 153–69 (2013) (chapter on property division). One other important family law correction: the famous "palimony" case of *Marvin v. Marvin* was decided by the California Supreme Court in 1976, not 1966, as the book states. *Compare* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), *with* CUNNINGHAM, *supra* note 1, at 47, 223 n.23 (giving the date as 1966).

45. While the text indicates that the best argument against the outcome in the appellate court was the special nature of separation agreements, the decision reversing the appellate court in fact relied primarily on a general analysis of contract law mistake doctrine. *Compare* CUNNINGHAM, *supra* note 1, at 66, *with Simkin*, 968 N.E.2d at 462–65.

conversations about how contract law should be taught, and, more generally, for when and how cases—in summary form or in longer excerpts—are useful in teaching the law. Perhaps the use of full judicial opinions (or long excerpts) in course-books is just a practice left over from the bad old days of formalism, but this article has tried to offer some reasons for thinking that their prevalence may reflect important truths about contract law in particular and law and legal education in general.