Canadian Contract Law Teaching and the Failure to Operationalize:
Theory & Practice, Realism & Formalism, and Aspiration & Reality in Contemporary Legal Education

by

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University of Toronto

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Abstract

This dissertation examines the attitudes, pedagogical practices, and teaching materials of Canadian contract law professors to better understand the relationship between theory and practice in legal education. Professors express a widespread aspiration to translate theory into practice – to incorporate theoretical and critical perspectives as a means of producing “better lawyers.” However, an analysis of the substantive theoretical attitudes about law reveals that this aspiration is imperfectly realized.

When professors describe their beliefs about law, they overwhelmingly express strong commitments to realist and critical ideas, drawn largely from American legal thought, that emphasize law’s contingency and indeterminacy, and that construe considerations of policy, context, and politics as central to an understanding of law. However, the attitudes about law reflected in key manifestations of “practice” reveal an apparently contradictory set of commitments. Professors describe and conceive of legal reasoning, which can be considered a foundational practice shared by legal professionals, in a way that foregrounds formalist attitudes of law. These conceptions treat judicial reasoning seriously, privilege the importance of doctrine, and emphasize the determination of relevance with reference to an internally coherent set of rules – all of which effectively marginalizes considerations of policy, politics, and context. Moreover, the way professors teach, how they formulate their learning objectives, the decisions they make about substance, and the materials they use all put into practice these formalist
ideas, rather than the realist and critical attitudes to which professors are purportedly committed. A similar tension arises as between critical introductory statements in Canadian contract law casebooks and the casebooks’ more conventional presentation of substance, as viewed through the remedies chapters.

These observations imply that Canadian legal thought may be characterized by theoretical eclecticism co-existing with methodological homogeneity, a failure to operationalize theoretical commitments. Moreover, the dynamics reveal a complex interplay between structure and agency in legal education in which professors participate affirmatively in reproducing the structures that condition them. This complex interplay partially accounts for the tenacity of conventional categories, concepts, and pedagogical formulae, and is a crucial factor to understand in the pursuit of any transformative vision for legal education.
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Chapter 1
Theory, Practice, Law, and Legal Reasoning in Legal Education

I. Introduction

Do the ideals we hold about law get translated into a workable vision of what it means to think like, and work as, a lawyer? This dissertation explores this question by examining the attitudes and teaching practices of first-year contract law teachers in Canada. Rather than positing my own normative account for what legal education should do, I seek to uncover the beliefs and attitudes contract law professors hold about law, and their attendant aspirations for their students as legal professionals. What I discover is an exciting and capacious aspiration on the part of contract law professors. The vast majority of professors express the idea that theory is important precisely because it produces better lawyers. At the same time, professors ascribe to a wide range of theories about law, many of them heavily influenced by the realist and critical schools of American legal thought of the twentieth century. Taking together the theoretical pluralism and the desire to translate theory into practice, the resulting aspiration is one in which students can develop an eclectic set of tools and deploy them in a wide range of areas of social activity.

The aspiration is, however, only one part of the picture. In this dissertation, I also endeavour to explore the extent to which this aspiration is realized. To what extent do these theories actually get translated into practice? I approach this question in two ways. The first is by exploring how contract law professors describe what “legal reasoning” or “thinking like a lawyer” is: I compare the attitudes professors claim to hold about law with the attitudes about law reflected in their description of legal reasoning. Second, I compare the attitudes professors claim to hold about law with the attitudes about law reflected by their teaching practices.

A. Attitudes About Law Reflected in the Practice of Legal Reasoning

One could study the relationship between theory and practice in different ways. For example, one could ask professors to describe and elaborate on their understanding of what lawyers actually do, and connect these visions of practice to professors’ theoretical ideas about law. Given the wide range of ways in which a legal professional might practice – courtroom advocacy, negotiation, technical drafting, mediation and reconciliation, policy formation, regulatory review, and legislative reform represent only a tiny proportion of the type of tasks that lawyers might perform – it could be revealing to detail how
legal educators actually conceive of what legal professionals do on a daily basis and relate these conceptions to professors’ theoretical attitudes about law and to their teaching approaches; we could additionally explore how law professors know what they claim to know about legal practice. Such a line of inquiry is not a central focus of this dissertation. The conversations I had with the participants in my study did not delve extensively into the topic of what practicing lawyers actually do. While (as I describe in Chapter 4) professors do talk about their desire to make better lawyers, and provide some details, they spoke less about the daily tasks of legal professionals than about what preparation students need to become (effective) legal professionals. Much more prevalent than discussions about the daily work of lawyers was the idea that whatever tasks a lawyer may eventually perform, he or she needs one core skill: legal reasoning. Accordingly, the central way that I explore how professors conceive of legal practice is by looking at what they say about legal reasoning.

Exploring attitudes about legal reasoning is a useful way of understanding attitudes about legal practice for a few reasons. First, we can speak sensibly about a practice of legal reasoning: thinking like a lawyer, as a mental “action” or “undertaking,” fits various dictionary definitions of practice. In another sense, the term legal reasoning – with its implication that there might, empirically, be something distinctively “legal” about it – is a term that describes the argumentative and discursive practices that all legal professionals share. In this second sense, legal reasoning is the lingua franca needed to participate

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1 A major thread throughout this dissertation is the emphasis on the adjudicative process, both by means of the case method of instruction and in the tendency to treat judicial reasoning seriously. As developed in Chapter 5, the focus on appellate judicial decisions has implications for the vision of legal reasoning that most professors prioritize: one that focuses on analogical reasoning and doctrinal rules. But the case method and the vision of legal reasoning also model a particular vision of legal professional practice, one that privileges the courtroom advocate and appellate judge. To a limited extent, I do discuss, especially in Chapter 3, the images of everyday practice that law professors imply or model. The point made above is not that everyday legal practice is absent from my study, but rather that explicit references to legal professional work do not figure prominently in my data, and are thus not the primary source of the insights and observations. The implicit prioritization of the adjudicative mode and the relatively limited range of professional practice that it models is, however, a recurrent theme.

2 The Oxford English Dictionary (online), sub vero “practice”, 2b (“An action, a deed; an undertaking, a proceeding”). It also seems to fit the definition of practice as a “habitual” or “customary” action (ibid, 3a (“The habitual doing or carrying on of something; usually, customary, or constant action or performance; conduct”).

3 In using legal reasoning as a central subject of analysis, it is important to distinguish between two different ways in which legal reasoning may be conceived of as distinctive. The “stronger” form of distinctiveness aligns with the idea that law is an autonomous form of discourse and thus that legal reasoning really is a special form of reasoning. For a seminal example, see Weinrib, infra note 5. As I expand upon in Chapter 5, some professors do indeed talk about legal reasoning’s distinctiveness in a way that evokes formalist values of coherence and autonomy. But, separate and apart from this particular attitude, there is a more common way in which “legal reasoning” is often understood. This is the almost universal reference to the idea that there is a lingua franca, or common set of professional tools, that lawyers share. This we may term a “weak” form of distinctiveness, for it
effectively in the legal profession, and it is the foundational source of expertise and authority for conducting a wide range of discrete legal professional tasks.

There is a third way in which legal reasoning relates to practice. This is the idea that legal reasoning may be thought to put into practice, or operationalize, particular theoretical ideas about law. This third sense, which accords with the OED’s second meaning of practice – the “actual application or use of an idea, belief, or method, as opposed to the theory or principles of it”4 – not only bolsters my
do not depend on a theory of law’s autonomy, but rather is more akin to an empirical observation about the actual work and professional consensus of lawyers. Sometimes, belief in a weak distinctiveness may be coupled with a commitment to the stronger form, and indeed it is the surprising prevalence of the strong form, even among professors who ascribe to realist attitudes about law, that emerges as a key discovery in Chapter 5, III(A). Nevertheless, the distinction is important to make, because the “weak” (or empirical) claim to distinctiveness is intimately tied up with an understanding of legal reasoning as a practice independent of the stronger claim.

For an elaboration of the “empirical” understanding of legal reasoning’s distinctiveness, see Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge, Mass: Harvard University Press, 2009) at 8, 11:

Once we understand that these admittedly common forms of reasoning and decision-making are nevertheless somewhat peculiar … we can understand as well that the substantial presence of these forms of reasoning in the legal system – more substantial, proportionately, than in the totality of our decision-making lives – can provide the foundation for a plausible claim that there is such a thing as legal reasoning. If these … are dominant in law but somewhat more exceptional elsewhere, then we might be able to conclude that there is such a thing as legal reasoning, that there is something we might label “thinking like a lawyer,” and that there is accordingly something that it is vitally important that lawyers and judges know how to do well and that law schools must teach their students … [I]f it turns out that there are indeed methods of reasoning that are found everywhere but that are particularly concentrated and dominant in legal argument and decision-making, then the claim that there is something called legal reasoning will turn out to be justified …

It is important to understand that the belief that there is a moderately distinct form of reasoning we can call “legal reasoning” is in the final analysis an empirical claim … the premise of this book is not only that legal reasoning does exist, even if it is not all that lawyers and judges do, but also that its actual existence is sufficiently widespread to say that there is, descriptively, something we can accurately characterize as “thinking like a lawyer.”

Other empirical research has shown how “[t]he one area that practitioners across the board agreed was important to practicing lawyers, and that they agreed was relatively well addressed by law school teaching, was legal reasoning” (Elizabeth Mertz, The Language of Law School: Learning to “Think Like a Lawyer” (New York: Oxford University Press, 2007) at 28, citing EG Gee & Donald Jackson, “Current Studies of Legal Education: Findings and Recommendations” (1982) 32 J Legal Ed 471, Bryant Garth & Joanne Martin, “Law Schools and the Construction of Competence” (1993) 43 J Legal Ed 469).

4 The Oxford English Dictionary (online), sub vero “practice”, 2a. The definition continues: “performance, execution, achievement; working; operation; activity or action considered as being the realization of or in contrast to theory. Cf. Praxis.” Praxis, in turn, receives its first definition as “the practice or exercise of a technical subject or
claim that attitudes about legal reasoning can serve as a proxy for attitudes about legal practice, but also signals a substantive contribution of this dissertation.

To say that legal reasoning puts into practice attitudes about law permits two distinct analytical moves. First, we may imagine how a given attitude about law might translate into specific manifestations of legal reasoning. For example, if one believes that law should treat everyone equally, then legal reasoning might involve developing rational ways of distinguishing cases when arriving at different legal results in similar circumstances. If one believes that law should take into account individual circumstances in order to be fair and compassionate, then legal reasoning might involve a careful determination of facts and situating events in their broader social context. If one believes that law should strive to distribute resources fairly, then legal reasoning might involve thinking about winners and losers and identifying distributive consequences of rules. If one believes that law is an instrument for achieving social ends, then legal reasoning might involve anticipating and comparing the consequences of different rules, and experimenting with different policy means to achieve a given end. If one believes that law is a manifestation of political preferences, then legal reasoning might involve thinking about the links between legal interpretation and the relative desirability of contested political visions, and arguing in favour of a particular end (and thus a particular interpretation). At a more conceptual level, those who believe that law is an autonomous discipline might conceive legal reasoning as a truly distinctive way of reasoning, whereas a more realistic or skeptical attitude about law might

art, as distinct from the theory of it; (also) accepted or habitual practice or custom,” and its second definition (in relation to Marxist and neo-Marxist thought) as “conscious, willed action … that through which theory or philosophy is transformed into practical social activity”) (The Oxford English Dictionary (online), sub vero “praxis”).

5 For a strong version of the claim that there is a distinctive form of reasoning in law, see eg. Ernest J Weinrib, “Can Law Survive Legal Education?” (2007) 60 Vanderbilt L Rev 401 at 419-20, 425-6:

[C]orrelativity marks the character of private law as a distinctive normative order ...

To the extent that they are coherent, the legal concepts relevant to any particular basis of liability also partake of this correlativity. Such concepts are the markers of a framework of normative reasoning ... The role of the concepts is to entrench the correlativity of the parties' situation into the reasoning and discourse of private law ...

University study ... imparts (or should impart) a sense of the intelligibility of private law as a whole. Its interest is not in particular legal materials but in the mode of thinking that has produced them. Or, more accurately, its interest is in particular legal materials not for the information that they convey but for their exemplification of a correlatively structured thinking, reasoning, and discourse ...
describe legal reasoning as the practices that legal professionals engage in, but qualitatively no different from other forms of reasoning.\textsuperscript{6}

Correlatively, we can examine a stated attitude about legal reasoning and infer the attitudes about law that it implies. A central comparison that I make in Chapter 5 is between professors’ stated attitudes about law and the attitudes about law implied by what they say about legal reasoning. The major, and perhaps surprising, discovery that this dissertation makes is that, much of the time, these two sets of attitudes about law do not match.

As I will expand upon throughout the dissertation, but particularly in Chapter 5, while the majority of Canadian contract law professors profess a set of realist beliefs about law that emphasize the contingency and indeterminacy of law and the importance of underlying policy factors and broader social and political context, they convey a much more circumscribed attitude about law through their descriptions of legal reasoning. Professors’ conceptions of legal reasoning tend to privilege the fixity and

\textsuperscript{6} A strong example of this last claim is given by Larry Alexander & Emily Sherwin, Demystifying Legal Reasoning (New York: Cambridge University Press, 2008) at 3:

[L]egal reasoning is ordinary reasoning applied to legal problems. Legal decision makers engage in open-ended moral reasoning, empirical reasoning, and deduction from authoritative rules. These are the same modes of reasoning that all actors use in deciding what to do. Popular descriptions of additional forms of reasoning special to law are, in our view, simply false. Past results cannot determine the outcomes of new disputes. Analogical reasoning, as such, is not possible. Legal principles are both logically incoherent and normatively unattractive (\textit{ibid}). This attitude may align with early realist expressions of intense skepticism about the importance of rules in determining outcomes. Early American realist writes such as Karl Llewellyn, who described rules as “pretty playthings,” or Jerome Frank, who emphasized the role of idiosyncratic judicial preference, imply such an attitude in their belief that judges primarily “reason backwards” from their preferred and predetermined outcome. See Schauer, \textit{supra} note 3 at 127-38, citing Karl N Llewellyn, \textit{The Bramble Bush: On Our Law and Its Study} (New York: Oceana, 1989) [Llewellyn, \textit{Bramble Bush}] and Jerome Frank, \textit{Law and the Modern Mind} (New York: Coward-McCann, 1949). Schauer summarizes the early Realist claim: “[T]he key to prediction of legal outcomes lies neither in the consultation of formal legal authorities nor in the internal understanding or self-reports of judges themselves [but rather] ... through the enterprise of discovering through systematic empirical (and external) study just what makes a difference in deciding cases” (\textit{ibid} at 134).
importance of rules, the centrality of courts, and the significance of the facial terms of judicial reasoning; and, they foreground the analytical task of determining relevance with reference to an internally coherent system of legal rules. What professors propositionally say they believe about law does not necessarily cohere with the attitudes about law implied by what they say about legal reasoning. To the extent that legal reasoning provides a window into the ways that professors conceive of legal practice, the result is a gap between theoretical commitments and a conception of practice. And to the extent that these conceptions inform how professors teach and model legal reasoning to their students, this gap suggests a failure on behalf of contract law teachers to operationalize the attitudes about law that they claim to hold.

### B. Attitudes About Law Reflected in Teaching

The second comparison I make is between professors' professed attitudes about law and the attitudes about law reflected in their teaching materials and teaching practices. To what extent do professors “put into practice” their avowed beliefs about law through their teaching? Again, in world in which “theory” and “practice” cohered, the professed attitudes about law would align with the attitudes about law communicated by the way they teach. But again, what I find – in how professors describe their teaching approaches and objectives, in the substance of the reading materials they assign, in how they present their course in written form, and in how they evaluate – is a significant gap.

Notwithstanding the widespread professed realist attitudes about law, contract law professors’ teaching methods, objectives, and materials tend to privilege the importance and solidity of doctrinal rules and to emphasize (largely by evaluating) a set of legal reasoning skills confined to analogical reasoning, modeled largely on the appellate judge or courtroom advocate. “Realist” pedagogies that expand the range of skills and vision of the legal professional surface, but they are firmly in the minority, inverting the order of priority as between realist and formalist attitudes about law that contract law teachers profess.

The body of this dissertation, and in particular Chapters 3 – 6, develops these points in some detail, rendering them more nuanced. As I will detail, not all professors espouse realist beliefs about law, and not all attitudes about legal reasoning, or teaching methods, convey an attitude about law that

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7 In my study, I do not conduct classroom observations, so I rely primarily on teachers’ accounts of their teaching practices and on documentary sources. I expand on methodology in section V, below.
contradicts the professed beliefs. Nevertheless, one overall trend is consistent with the sketch just provided: there is an aspiration to translate theory into practice, but there is also, simultaneously, a gap between professors’ theoretical commitments and the vision of law manifested in both how they describe legal reasoning and their teaching. The dissertation carefully examines the substantive attitudes about law, using the theoretical categories of realism and formalism\textsuperscript{8} to illuminate the ways in which, at present, Canadian contract law professors do not appear to fully realize their aspiration to translate theory into practice.

Before detailing the methodology of this project and the outline of the dissertation, I explore how the themes of theory and practice animate two important debates in the literature on legal education. I begin by showing how debates around the institutional jurisdiction over legal education illustrate competing tendencies to portray theory and practice as being either in opposition to one another or, alternatively, mutually reinforcing.\textsuperscript{9} Then, I explore how two competing accounts about legal reasoning, or (synonymously) “thinking like a lawyer,” can be understood as a disagreement as to whether legal reasoning succeeds at putting into practice realist and critical theories of law. Each of these sections reveals how the question of translating theory into practice is a matter of perennial contestation in the discourse on legal education, and sets the stage for the more granular study of Canadian contract law teaching that follows.

\textsuperscript{8} At the outset to Chapter 5, Part II, below, I expand on what I mean by “realism” and “formalism,” and how these terms are useful categories for organizing attitudes about law, even if the definitions of these terms can be imprecise and the boundary between the categories porous.

\textsuperscript{9} There is a philosophical sense in which describing theory and practice as lying in opposition is somewhat nonsensical: any version of practice necessarily relies on some implicit theory, and most theory is formulated with at least some reference point, however implicit, to the material world. For a philosophical treatment that would resist the idea that theory and practice are separate and isolatable concepts, see eg Karl Marx & Frederick Engels, \textit{The German Ideology}, R Pascal, ed (New York: International, 1947), Part I (A) (4) (“The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the mental intercourse of men, appear at this stage as the direct efflux of their material behaviour … Consciousness can never be anything else than conscious existence, and the existence of men is their actual life-process”). Nevertheless, however contestable the boundary between theory and practice may be on a purely principled level, the discourse on legal education does at times deploy theory and practice as if they can be meaningfully isolated and placed in opposition. The debate about how much “theory” to teach in law schools is one clear example of this tendency. See eg Jules L Coleman, “Legal Theory and Practice” (1995) 83 Geo LJ 2579 at 2579 (“my remarks are intended to defend the teaching of theory in the core of the law school curriculum”). Thus, in highlighting the distinction between “oppositional” and “integrative” accounts of theory and practice, below, I do not intend to assert that a conception of pure opposition is cogent, or even seriously defended by participants in the discourse. I simply mean to signal the opposition of theory and practice as a defining feature of the discourse, noting (but not resolving) here the problematic nature of that device.
II. The “Fierce” Debates: Institutional Jurisdiction and the Relationship Between Theory and Practice

A primary trope in legal education, in Canada and abroad, is that there is a fierce debate between law societies and universities over the jurisdiction and control over legal education. Contemporary debates manifest the tension in particularly sharp terms: commentators demand that law schools produce “practice ready” lawyers; law societies demand that law schools deliver students with defined “competencies.” These demands, while precipitated by contemporary disruptions to the market for legal services, are not new. In Ontario, they manifested in the dramatic resignation of the Osgoode Hall Law School faculty in 1949 to form the University of Toronto Faculty of Law 1957, and ultimately in the decision to move Osgoode Hall Law School to York University. As Harry Arthurs describes, what began as debates over who should control admission to practice developed into wide-ranging debates about the means and ends of legal education. These included questions of whether law faculties ought to provide a liberal education in law or occupational training for legal practice; about competing theories of pedagogy and how to implement them; about the critical challenge posed by legal scholarship to conventional views of law and legal institutions; and ultimately about whether replication of existing models of legal professionalism was in the best interests of the bar and public.

The conventional narrative, at least in Ontario, is that the universities’ victory over jurisdiction has permitted law faculties to pursue liberal, critical, and public-interested ends freed from the narrow demands of producing technically competent (“practice-ready”) lawyers. Recent requirements imposed

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12 C Ian Kyer & Jerome E Bickenbach, The Fiercest Debate: Cecil A Wright, the Benchers, and Legal Education in Ontario (Toronto: The Osgoode Society, 1987).

13 Arthurs, “Tree of Knowledge”, supra note 11 at 5.
on the curriculum by the Federation of Law Societies can be considered, in this regard, to “repudiate the
decades-long truce between the profession and the academy.”

Beyond Ontario, the theory/practice debate seems apt to characterize major developments in
the common law world. To take two historical examples, William Blackstone’s inauguration as Vinerian
Chair in 1758 at Oxford enabled him to centre legal education in a university. As Kyer & Bickenbach
write:

[Blackstone’s] *Commentaries on the Laws of England* ... was premised on the view that
English law was not merely a collection of disjointed rules, learnable only in practice, but
a rational and coherent whole that could be explained and studied as a university
subject ...

Blackstone’s views on the nature and aims of legal education formed the basic creed of
those who were to argue for the university law school for the next three centuries: law
can be systematically taught, not merely as a body of practical rules but as a science; as
a science, law can be taught only in a university setting surrounded by teachers and
students of the other sciences ... [And] legal education needed a literature, the product
of specialized legal scholars able to assess and recommend changes in the law.

In the US, the founding of Harvard Law School “reflected the novel notion that institutions of
higher learning had a role to play in the education of American lawyers.” The “English root” –
Blackstone’s idea of university education – had been transplanted and would flourish in the US, taking
firm hold with the widespread adoption of Christopher Columbus Langdell’s case method. Like
Blackstone, Langdell argued that “[s]ince law is a science, and since cases are the experimental data of
the science, legal education must be limited to the university.” The end of the 19th and beginning of
the 20th centuries were characterized by a conflict between university law schools and proprietary night

14 *Ibid* at 23. For a very recent example of Canadian law professors resisting pressure to produce “practice-ready”
graduates, see Benjamin Berger et al, “A Submission to the LSUC Dialogue on Licensing: A Response from Some
Ontario Law Professors” (2017) (on file with author) at Part V (“Our key concerns are to protect our law schools
from being converted into practical legal training programs and to resist the notion that our mission should be to
create so-called ‘practice-ready’ graduates”).

15 Kyer & Bickenbach, *supra* note 12 at 8-9 (citations omitted).

16 Andrew Porwancher, Book Review of *On the Battlefield of Merit: Harvard Law School, the First Century* by Daniel

schools run largely by practitioners; the former eventually triumphed and university legal education became, and remains, the predominant form of law study today.¹⁸

Despite this dominant narrative of debate and opposition, however, there is another, secondary narrative that acknowledges cooperation between the legal profession and the university, and that conceives of theory and practice as mutually reinforcing. At one level, this narrative is grounded in historical fact. Not every Canadian law school was born of conflict. The Manitoba Law School, for example, was founded in 1914 “as a joint undertaking of the University and Law Society,”¹⁹ its curriculum jointly agreed upon by faculty members and members from the profession, and jointly financed.²⁰ As one of its founding members stated, “We have always felt particularly happy about the cordial and close relationship between the University and Law Society, bodies which we believe should share in the responsibility for legal education – each having a different, but equally important function to fulfill.”²¹ Such an attitude of cooperation persisted into the 1960s, when a law society report described legal education as “an ideal blending of the vocational and academic.”²² To this day, a seat on the Robson Hall Faculty Council is reserved for a member of the Law Society of Manitoba.

At another, more conceptual level, some seminal writings on legal education express the aspiration that a liberal, academic study of law can make more effective and creative legal professionals and, correlative, that empirical examples from practice can enrich theory. The Canadian flagship 1983 Law and Learning report is one example. In it, Harry Arthurs characterizes Canadian legal education as aspiring toward “humane professionalism,” a term that itself integrates the goals of the university and the profession. Arthurs describes the relationship in the following way:

[W]hile the cultivated ability to stand at a distance from conventional wisdom, to view it critically, must be defended on its intrinsic merits as being the essence of education, it


²¹ Williams, ibid at 891 (“In 1915 legislation was obtained empowering the University and the Law Society to make mutual arrangements for legal education ... In 1928 the University Act was amended to provide for the election to the University Council (which became the Senate in 1936) of one representative by members of the Law Society who are graduates of the University”).

²² Quoted in GPR Tallin, “Legal Education in Manitoba” 15 (1964) UTLJ 433 at 434.
also has at least three important “practical” benefits. It enables lawyers to adapt to changes when they occur, to assist in bringing about such changes through law reform and other public activities, and to accomplish change themselves in the limited context of serving individual clients whose interests do not coincide with accepted solutions. From the student’s perspective, having to deal with both the intellectual and the practical at once generates a dialectic which, if it does not necessarily improve the end-product, at least contributes to the student’s tough-mindedness. This may help to explain why law schools, in their humane intellectual activities, may make a contribution to preparation for professional practice that is both vitally important and easily overlooked.  

Another way that the compatibility between theory and practice manifests is in attempts to integrate the public mission of university education with the professional-training objectives of law schools. Anthony Kronman effects such an integration through his ideal of the “lawyer-statesman,” developed at length in *The Lost Lawyer: Failing Ideals of the Legal Profession*. Kronman argues how an education that trains lawyers well also cultivates the ideals of deliberative wisdom and civic-mindedness, key traits of the statesman. Correlatively, the statesman’s virtues make excellent lawyers. Great advocates and counselors require deliberative wisdom to assist their clients in deliberating about ends, and require the civic-minded commitment to the intrinsic goods of the legal system to effectively

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25 The case method of teaching cultivates deliberative wisdom by developing “sympathetic detachment,” the ability to be simultaneously compassionate and detached:

> [B]y playing the roles of the original contestants or their lawyers, the case method forces [law students] to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity for sympathy by taxing it in unexpected ways. But it also works in the opposite direction. For the student who has been assigned a partisan position and required to defend it is likely to be asked a moment later for his view regarding the wisdom of the judge’s decision in the case. To answer, he must disengage himself from the sympathetic attachments he may have formed as a committed, if imaginary, participant and reexamine the case from a disinterested judicial point of view. The case method thus works simultaneously to strengthen both the student’s powers of sympathetic understanding and his ability to suppress all sympathies in favor of a judge’s scrupulous neutrality (*ibid* at 72, 98, 113).

26 Judicial role-playing enables students, “through a process of transference,” to assume the public-spirited attitudes of the judge who is “concerned with the well-being of the larger community” via an “interest in the administration of justice, in the integrity or well-being of the legal system as a whole [and in] ... the responsiveness of doctrine to social and economic circumstances” (*ibid* at 119, 118).
predict judicial outcomes. Kronman’s vision thus integrates high public ideals with the legal professional role:

The outstanding lawyer ... is, to begin with, a devoted citizen. He cares about the public good and is prepared to sacrifice his own well-being for it ... He is distinguished ... by his special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it. The lawyer-statesman is a leader in the realm of public life, and other citizens look to him for guidance and advice, as do his private clients ...

The good lawyer does care about the soundness of the legal order ... [H]e shares the judge’s public-spirited devotion to it. This is in fact a condition for his being successful at his work. The good lawyer’s public-spiritedness is not, moreover, something tacked onto his professional skills, a kind of moralistic addendum to his craft. Rather, it is an essential component of that craft and cannot be separated from it.27

Like Kronman and Arthurs, each of whose integrative vision arguably contributes to the “redemption of legal professionalism,”28 the Carnegie Report of 2007 advocates an integration of the cognitive, practical, and professional-identity “apprenticeships” under the aegis of “civic professionalism.”29 As with the other two accounts, civic professionalism integrates the liberal, critical, and public-spirited values of the academy with the demands of the profession in a reciprocal fashion. Professionalism is directed not simply towards individual or client-focused ends, but rather to collective, public service:

To be a professional in the full sense is to understand oneself as claimed by a craft and a purpose in whose service to use that craft. Yet precisely because that purpose is a public one, directed toward others, professionals can also be conscious of the limits and specificity of their domain. With this awareness, professionals can appreciate other ways of living and contributing to the larger life of their times. They can be citizens as well as experts ...

27 Ibid at 14-15, 145.
It is because of their sense of who they are and how they understand themselves in the world that these professional skills become assets for everyone.30

And, as with humane professionalism and the lawyer-statesman, broader public values including integrity are essential for core legal skills such as exercising judgment:

In actual professional practice ... [a]t moments when judgment is at a premium, when the practitioner is called on to intervene or react with integrity for the values of the profession, it is the quality of the individual’s formation that is at issue. The holistic qualities count: the sense of intuitive engagement, of habitual disposition that enable the practitioner to perform reliably and artfully. Thinking about how to train these capacities inevitably calls up words such as integration and focus to describe deep engagement with the knowledge, skills, and defining loyalties of the profession.31

Accordingly, major debates about legal education tend to focus not only on the jurisdictional relationship between two key institutions – the academy and the profession – but on the relationship between the ideals for which these institutions stand as proxy. These are, on the one hand, the virtue of theoretical and critical inquiry and the goal of producing broad-minded, public-spirited citizens; and, on the other, the virtue of effective service to clients and the legal system. While the conventional story places these two sets of ideals in opposition, a significant secondary narrative aspirationally suggests that the intellectual and social inquiry of university study can support and cultivate a capacious and effective vision of legal practice (and, correlative, that training for the practice of law can cultivate broader public and civic virtues).32

III. Thinking Like a Lawyer

Another ubiquitous aspiration in legal education, pursued “the world over,” is to equip students to “think like lawyers.”33 This is a foundational exercise in epistemological training,34 a “threshold concept for the discipline of law” that is transformative, irreversible, integrative, and troublesome:

30 Ibid at 30-31 [emphasis added].
31 Ibid at 85 [emphasis added].
33 Schauer, supra note 3 at 1.
34 Mertz, supra note 3.
It is transformative and irreversible because being able to engage in legal reasoning provides students with a sense of self-identity as a lawyer which cannot be unlearned. It is integrative because it inculcates students into the integrated nature of the culture of legal argument and the importance of authority and evidence to the efficacy of legal argument. It is troublesome because it forces students to re-consider, and possibly to change, their preconceptions about what law is and what law can achieve.\(^{35}\)

The central importance of thinking like a lawyer, combined with the idea that legal reasoning operationalizes attitudes about law, makes it a central site for exploring the relationship between theory and practice. In this context, a salient issue is whether the insights and theories about law that have developed through and since the realist attack on classical legal thought can be integrated into what legal reasoning is; or, alternatively, whether these insights remain separate and apart from thinking like lawyer.\(^{36}\) Two recent important scholarly interventions in the US take different sides on this issue.


\(^{36}\) It is worth noting here that the question of whether legal reasoning can incorporate diverse theories of law is conceptually different from the more holistic question of whether academic and professional values can be fully integrated, as the Kronman/Carnegie/Arthurs accounts imagine. The projects of humane or civic professionalism, or the lawyer-statesman, conceive of a thoroughgoing interpenetration between public values and professional competence. Even the most “integrative” vision of legal reasoning need not go so far. There are distinctions both of ends and means. With regard to ends, there is no necessary reason why even the most expansive vision of legal reasoning would necessarily invite the type of humane or civic values professed by Kronman, Arthurs, or Carnegie. Legal reasoning can, conceptually, be cabinized to a species of technique – it need not serve civic or humane values to be a capacious vision of legal reasoning. At the same time, with regard to means, the resources that realist and critical insights potentially provide to legal reasoning do not extend to the Kronman-esque claim that commitment to public values also makes better lawyers. In this sense, the integrative visions of Kronman/Carnegie/Arthurs, but particularly of Kronman, emphasize the importance of public or civic virtues much more than the debate over legal reasoning simpliciter does. This is not to say that different visions of legal reasoning may not imply differentially broad or capacious visions of legal professional life: as discussed below in section III(D) with respect to Elizabeth Mertz’s findings, they can. However, it is important to draw this distinction because, as will become apparent, the bulk of this dissertation examines the extent to which legal reasoning is informed by realist and critical theories of law. The dissertation does not, in other words, explore the extent to which Canadian contract law professors thoroughly integrate theory and practice in the more civic, holistic sense of Kronman, Carnegie and Arthurs. This circumscription is a consequence of the empirical findings. The more holistic, civic visions of integration arose infrequently in my study (what little appears is detailed in Chapter 4, III(C)). Thus, the foregoing section on Kronman/Carnegie/Arthurs should be read mainly as evidencing how theory and practice are longstanding concerns in the debate on legal education, and less as foregrounding the particular focus of the empirical findings of the dissertation.
A. Kennedy and Fisher: Legal Reasoning Operationalizes Realist and Critical Legal Theories to Produce an “Eclectic Toolkit”

David Kennedy and William Fisher argue, in the Introduction to the *Canon of American Legal Thought*, that contemporary legal reasoning in the United States actually does incorporate the realist and critical scholarly attacks on classical legal thought.37

Kennedy and Fisher argue how the substantive messages of leading twentieth-century schools of thought are both constituted by critiques focusing on reasoning and, in turn, constitute a contemporary picture of thinking like a lawyer. Their first point is that:

[s]chools of thought emerge among people who are focused on a particular set of common methodological mistakes, and on the promise of a particular set of innovative reasoning moves. Schools of thought in American law are less cults of beliefs than congregations practicing a common set of critical and reconstructive methods.38

In particular, they emphasize the critical tone of these schools. The authors of the canonical works were “far more interested in criticizing modes of reasoning they found unpersuasive than in establishing their own dogmatic method.”39 They describe the progression of American legal thought as the “fall, rise, and fall of methodological consensus.”40 Their narrative includes Legal Realism’s “wholesale assault on [classical legal thought’s] jurisprudence of forms, concepts, and rules,”41 the rise of Legal Process (which “transform[ed] the paradigmatic activity of legal reasoning from distinguishing to balancing,”)42 and the “emergence of an array of methodologies associated variously with economics, sociology, liberal theory, and the work of critical studies scholars” that were “launched with fury, even contempt, for the common sense of the Legal Process Period.”43


38 Ibid at 7. See also ibid at 6-7 (“It is difficult to make sense of “schools of thought” in American law by reference to their beliefs or legal theories”).

39 Ibid at 6.

40 Ibid at 8.

41 Ibid at 10.

42 Ibid at 11 [emphasis omitted].

43 Ibid.
Kennedy and Fisher show how these developments in legal thought in turn helped to construct a vision of contemporary legal reasoning. That vision has at least two main features. First, in light of the revolutionary quality of the narrative,44 they write that thinking like a lawyer includes being “adept at criticizing the reasoning of other legal professionals.”45 Second, and perhaps more importantly for our purposes, they argue that contemporary legal reasoning is a composite of the various critical schools.

For example:

Fuller, Hart and Sacks, Coase, Calabresi, Galanter each proposed specific types of policy argument that have become routine methods of judicial reasoning. Law students are drilled in making Fullerian arguments about the “functions” of formal rules, and Hart and Sacksian arguments about “institutional competence.” They learn from Coase to attend to the reactions of market actors to background rules, which may well affect, even reverse, their impact. They learn to argue, alongside Macaulay and Galanter, in ways that foreground the gap between “law in the books and law in action,” and the different impact of legal norms on differently situated parties. And so on. Each new method of professional policy argument ... resolves the tension between deduction and policy reasoning differently – and each of their resolutions has found its way into the background consciousness of today’s legal professional.46

The Kennedy and Fisher account is a perfect example of the claim that attitudes about law become operationalized in legal reasoning. While they characterize the schools of thought not as theory per se, their main point is analogous to the idea that legal reasoning translates theory into practice. Their canon, inasmuch as it highlights the “specific arguments and analytic moves”47 of its authors, also contains seminal works that have been treated and read in a highly conceptual fashion.48 Accordingly, when they describe contemporary American legal reasoning as “an eclectic practice built from the methodological sediment laid down in successive projects of wholesale criticism and reform,”49 they are

44 Kennedy and Fisher write that American legal thought is characterized by “methodological rivalry and generational rebellion expressed with polemic force” (ibid at 3).

45 Ibid at 4-5.

46 Kennedy & Fisher, supra note 37 at 4 [emphasis added].

47 Ibid at 3.

48 See eg. Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form’” (2000) 100 Colum L Rev 94 at 97 [Kennedy, “From the Will Theory”] (“Fuller’s contribution in “Consideration and Form” was to the long-term project of moving from the will theory of contractual liability to our conflicting considerations model, by arguing persuasively that, even after the demise of the will theory, a ‘principle of private autonomy’ was and should be the key consideration in private law theory, to be harmonized with, and occasionally balanced against, a small number of counter-principles”) [emphasis added].

49 Kennedy & Fisher, supra note 37 at 3.
expressing how a highly complex series of ideas about law, developed by some of the United States’
most renown legal thinkers, are translated into practice and generate an “eclectic toolkit of
contemporary legal reasoning.”

B. Mertz: Legal Reasoning Marginalizes Policy and Context

Kennedy and Fisher’s claim about contemporary American legal reasoning encounters some
resistance from the findings of a major recent empirical study. Conducting close linguistic analysis of
eight first-year Contract Law classrooms in a diverse range of US law schools, Elizabeth Mertz’s 2007
study appears to show how Kennedy and Fisher’s claim, that legal reasoning is the “methodological
sediment” of the major schools of thought, is not reflected in the way that first-year contract law
teachers initiate students into the world of legal language, which, for Mertz, constitutes teaching
students to “think like lawyers.”

50 Ibid at 3. It is worth emphasizing here how the “eclecticism” story that Kennedy and Fisher tell is not the only
possible means by which attitudes about law may be operationalized. It is very possible that one particular theory
of law can be translated into a distinctive vision of legal reasoning without taking into consideration or including
alternative theories of law, and thus producing not an eclectic toolkit but rather a more tailored set of
argumentative and professional techniques. The leading example would be formalist theories of law that seek a
direct translation between claims about law’s coherence and law’s distinctive reasoning. See eg. Weinrib, “Can Law
Survive Legal Education”, supra note 5. But other schools of thought may aspire to communicate particular claims
about legal reasoning and particular legal professional desiderata, tailored to their theory. See eg. Karl E Klare,
[Klare, “Teaching Local 1330”] at 77-8 (describing the objectives of “critical legal pedagogy” as being, inter alia, to
“deconstruct the false claims of necessity which constitute so-called ‘legal reasoning,’” to “unearth and challenge
law’s dominant ideas about society, justice, and human possibility and to infuse legal rules and practices with
emancipatory and egalitarian content,” to “persuade students that legal discourses and practices comprise a
medium ... in which they can pursue moral and political projects and articulate alternative visions of social
organization and social justice,” and to train students “to argue professionally and respectably for the utopian and
the impossible”). As noted in respect of the more holistic visions of integration akin to Arthurs, Carnegie, and
Kronman (supra note 36), this study has not revealed a great number of such distinctive visions for legal reasoning
and legal practice tied to a particular theory of law. The vast majority of the aspirations align closely with the
“eclecticism” rationale, and so this figures prominently in my analysis. However, it is important at the outset to
signal that this is not the only possible way in which theories of law may be operationalized.

51 Mertz specifically argues how her methodology uses linguistic information to generate insight into the
epistemological formation of first year law students:

This book uses linguistic anthropological analysis to uncover the ways microlevel processes in
language embody and perpetuate powerful linguistic ideologies. These ideologies structure and
reflect the social uses of language and text in legal contexts, and thus, I argue, provide a key
foundation for “thinking like a lawyer.” In this sense, one thinks like a lawyer because one
speaks, writes, and reads like a lawyer. Some would associate thinking like a lawyer with superior
analytic skills in a neutral sense; I would instead characterize the acquisition of lawyerly
“thinking” as an initiation into a particular linguistic and textual tradition found in our society
(Mertz, supra note 3 at 3-4, footnotes omitted).
Contrary to claims that legal reasoning is an “eclectic toolkit” of argumentative strategies inherited from the various realist and critical schools, Mertz demonstrates that the process of initiating students into the “particular linguistic and textual tradition” of law actually marginalizes considerations of morality, policy, and social context. "Legal training," she writes, “focuses students’ attention away from a systematic or comprehensive consideration of social context and specificity.” With its focus on textual analysis, the legal reading taught in Contract Law classes conceals “the social roots of legal doctrines," the “injustices and power inequalities that are enacted in the system," and “avoid[s] examination of the ways that abstract categories, as they develop, privilege some aspects of conflicts and events over others.”

This “erasure of context” occurs largely through the emphasis placed on certain features of legal reading: discerning the appropriate hierarchy of legal authority, recontextualizing cases as precedents, delimiting what constitute the “facts” of a case, and applying law to facts in a process of “analogical parsing.” Together, these habits generate standards for “correct legal readings” and

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52 Ibid at 4, 212.
53 Ibid at 4.
54 Ibid at 5.
55 Ibid at 213.
56 Ibid at 5.
57 Ibid at 212.
58 Ibid at 61-2 (“[T]he dictates of a legal reading provide limits to the social power of any particular case law text, building a careful consideration of layers of legal and textual authority into the core reading habits of legal professionals” at 62).
59 Ibid at 63-4 (“[T]he approach of ‘lines’ of cases collapses historical time and context in the service of a new legal framework whose organizing principle is a genealogy of texts”).
60 Ibid at 67:

[A] combination of procedural and doctrinal or similar legal warrants delimits which versions of what occurred (and indeed, which aspects of the events in question) will be included in a set of legal facts ... This narrative is at once quite modest and highly authoritative as to epistemological certainty, and students must undergo a quiet but radical reorientation in their readings. In one sense, it really doesn’t matter what occurred, because all we can know is what the legal decision maker has accepted as fact for certain purposes. In another sense, an accurate reading of the facts ... gives students a new power. They now know how to construct versions of conflict stories that can be understood by legal authorities and given legal effect.

61 Ibid at 72.
62 Ibid at 76.
determine the “tight, technical center” of legal reasoning.\textsuperscript{63} The method conveys a conception of justice as one defined largely by the resolution of a duel between two opposing positions, and emphasizes “layers of textual authority as neutral sources for legal decision making.”\textsuperscript{64}

At the same time, contract law teaching casts to the periphery broader questions about justice, grouping them into a catch-all category of “policy.”\textsuperscript{65} These policy discussions, in contrast to the “carefully disciplined core focus”\textsuperscript{66} of legal reasoning, usually proceed on “anecdotal or speculative” grounds.\textsuperscript{67} They are used to retain the credibility of legal discussion by admitting some “flexibility and openness,”\textsuperscript{68} but the broadly painted backgrounds ... stand in marked contrast to the central legal discussion, marginal not only in terms of discursive structure, but also because these policy discussions never impart any real analytic standards for assessing one story against another ... When social context comes in the door, structure, standards, and rigor exit.\textsuperscript{69}

A number of implications flow from Mertz’s account. First, it suggests that the teachers of contract law in her study have failed to operationalize the realist consensus of American legal thought into a vision of legal reasoning that they communicate to their students. As I expand upon in Chapters 2, 3, and 5, the schools of legal realism and its intellectual heirs are typified by their commitment to the importance of policy and context – two features that Mertz describes as being marginalized by the linguistic and discursive practices that condition students to think like lawyers. Indeed, Mertz’s catch-all category of policy questions that are treated \textit{unseriously} in classroom discussions – “whether law operates in a just manner, whether certain legal decisions were motivated by class interests or other extralegal concerns, whether particular social conditions caused or resulted from specific legal decisions” – closely resembles the considerations of justice, class, politics, and social effects that

\textsuperscript{63} \textit{Ibid} at 77.
\textsuperscript{64} \textit{Ibid} at 5.
\textsuperscript{65} Such questions include “whether law operates in a just manner, whether certain legal decisions were motivated by class interests or other extralegal concerns, whether particular social conditions caused or resulted from specific legal decisions” (\textit{ibid} at 77).
\textsuperscript{66} \textit{Ibid} at 78.
\textsuperscript{67} \textit{Ibid} at 77.
\textsuperscript{68} \textit{Ibid} at 77.
\textsuperscript{69} \textit{Ibid} at 79.
Kennedy and Fisher write characterize the realist and critical schools of thought. Legal reasoning, as Mertz portrays it as being taught, looks much less like the “methodological sediment” of the various critical schools than it does the distillate of “pure” legal reason.

Second, this restrained vision of legal reasoning also communicates to the law student a diminished vision of legal judgment:

From a world in which normative judgment is circumscribed by a rich sense of social context – who someone was, the full depth of feelings and motives that inspired certain actions, the circumstances that conspired to push events in one way or another, personal histories, social inequalities, and more – law students are moved into a new world, in which legal judgment is circumscribed by linguistic norms, texts and the arguments they permit, and layers of authoritative language.

By constraining what it means to think like a lawyer, teaching law can also therefore produce a funneling effect, redirecting students’ expansive understandings of law and justice to a much narrower

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70 The terms “context,” “policy,” and “politics” – but particularly “policy” – receive different definitions throughout the literature. In Chapter 5, I use the data from my study to show how the attitudes of contract law professors can provide these terms with some specificity. Mertz’s use of policy as a catch-all term is paralleled in Kennedy and Fisher’s account:

Law students struggle to understand the relationship between “the rules” and the vague arguments that lawyers call “policy.” Should “policy” begin only in the exception – when legal deduction runs out – or should it be a routine part of legal analysis? If the latter, how should lawyers reason about policy? What should go into reasoning about “policy” – how much ethics, how much empiricism, how much economics? Which of the arguments laypeople use count as professionally acceptable arguments of “policy” and which do not? Which mark one as naïve, an outsider to the professional consensus? What is it about policy argument that makes it seem more professional, more analytical, more persuasive, than talking about “mere politics”? (supra note 37 at 4).

71 By “pure” legal reason, I mean to invoke the various metaphors that have been used to describe law as a domain shorn of social context or of normativity from outside formal legal authorities. “Pure” legal reasoning would entail disciplinary distinctive reasoning that scrupulously avoids consideration of “extraneous” social context or normative influences. Cf. Hans Kelsen, Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law, translated by Bonnie Litschewski Paulson & Stanley I Paulson (New York: Oxford University Press, 1997), c 2 (upholding the distinction between law and justice and between law and morality); Lawrence Friedman, Contract Law In America (New Orleans, LA: Quid Pro Books, 2011) at 14-15:

[T]he “pure” law of contract is an area of what we can call abstract relationships. “Pure” contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. In the law of contract it does not matter whether the subject of the contract is a goat, a horse, a carload or lumber, a stock certificate, or a shoe. As soon as it matters ... we are in one sense no longer talking pure contract.

72 Mertz, supra note 3 at 216.
conception. When law is remote from social context, legal decision-making becomes “alienat[ed]” from ethics, and lawyers become alienated from “socially shared values.” It is not a far cry to imagine the law student becoming alienated from his or her full range of possibilities of feeling, thinking, and judgment. The legal self the law student gradually inhabits is, in this vision, a partial version of him- or herself, constrained and bound by adherence to established patterns of thinking, reading, writing, and relating with authority.

It is, moreover, reasonable to think that this transformation affects the ways in which students conceive of their role as legal professionals. The epistemological transformation that first-year students experience may coincide and intermingle with other transformations, such as the tendency for students to transition from a more symbolic or ethical vision of law toward an instrumental one, and from a vocational understanding of career to a professional one. Mertz’s discoveries and analysis evoke other empirical studies that have explored how the development of students’ legal consciousness has contributed toward cynicism, and a narrowing of professional aspirations captured by the term “public interest drift.” The Mertz study thus (1) shows how some US contract law professors operationalize a much narrower set of attitudes about law in how they teach legal reasoning than the eclectic series of

73 Ibid at 220.


[T]he legal consciousness Harvard Law students formulate in the course of their training produces widespread cynicism about law and legal practice. While students became adept at arguing, justifying their position, and seeing the indeterminacy of law, they developed a view of law that compared its practice to a game. These students adopted a cynical view of law and practice that tended to undermine erstwhile idealist convictions about doing public interest work.

ideas that Kennedy and Fisher identify, and (2) highlights how the attendant attitudes about legal professionalism are more constrained than, and thus remote from, the integrative vision of public values into legal professionalism imagined by the *Arthurs Report*, the *Carnegie Report*, and, especially, Kronman’s *The Lost Lawyer*.

IV. Messages about Law, Legal Reasoning, and Legal Practice in Canadian Contract Law Teaching

My study engages with the first of these two questions – the attitudes about law implicit in how professors conceive of legal reasoning and how they teach – in the context of Canadian contract law teaching. In examining professors’ descriptions of legal reasoning and their teaching practices, one question I ask is which vision – Kennedy and Fisher’s incorporation of “eclecticism,” or Mertz’s portrayal of “marginalization” – best captures the attitudes and practices of Canadian contract law teachers. My study in inspired by Mertz’s, desiring to take an empirical approach to understanding the extent to which concepts such as policy and context are “operationalized” into understandings of legal reasoning and reflected in teaching practices. But I also, in engaging meaningfully with the substantive theoretical ideas from the American legal canon, endeavour to respond to Kennedy and Fisher’s invitation to engage in comparative legal thought.

78 See *supra* note 36 for a discussion on why my study focuses on this question and not on the more holistic question of integration from the Arthurs/Carnegie/Kronman line of scholarship.

79 I formulate this as “one” question among others because I also look to see what attitudes about law are reflected in teaching materials, pedagogical choices, and evaluation methods, which can at times be a separate question than the one about legal reasoning. For example, most professors disaggregate their goals into teaching “substance” and teaching “legal reasoning.” Thus, in addition to analyzing how professors conceive, teach, and model legal reasoning, I also make the point, in Chapter 5, that an emphasis on substance conveys a seriousness about rules that would seem to contradict the widespread professions about law’s indeterminacy.

80 Kennedy & Fisher, *supra* note 37 at 15 (“Work on comparative legal thought has only recently begun. Perhaps the availability of this Canon will be a spur to further work exploring the history of influences ... of American legal thought on other legal regimes”). I focus on the impact of American ideas cognizant of the risks that such a focus has of reflecting a sense of “intellectual colonization.” See Roderick A Macdonald & Thomas B McMorrow, “Decolonizing Law School” (2014) 51:4 Alta L Rev 719 at 720-22 (“The several rich Canadian intellectual offerings that are not mere derivatives of foreign jurisprudential productions have remained largely marginal in Canadian legal theory” at 721). Again, this choice flows largely from the empirical data themselves: a significant majority of references to intellectual influences, both in print (casebooks, syllabi, and reading lists) and in interview refer to American authors. There are some notable exceptions, for example the fairly frequently cited work of Ernest Weinrib or the occasional references to British realists such as Patrick Atiyah, but the American influence is by far the most prevalent. The dissertation does not significantly explore the reasons for the disproportionate US influence, although it does explore in Chapter 3 the influence of Harvard, and in particular Lon Fuller, on one casebook editor, James Milner. A full exploration of the factors leading to US influences is beyond the scope of this
Methodologically, my study differs from Mertz’s in a few ways. Mertz deployed methodologies from anthropological linguistics and sociolinguistics, which enabled her to conduct a granular analysis of the language spoken by professors and students, and to analyze how the treatment of language conveyed privileged messages about legal reading and reasoning.81 My data sources, and thereby my focal points of analysis, are dramatically different. Instead of classroom observations, I conducted individual interviews with first-year Contract Law professors. Thus, my participants are limited to professors, and do not include students as the Mertz study did. I also primarily rely on the conscious and explicit statements of my participants, rather than on observations about utterances and other linguistic turns. And unlike Mertz, because most of my information about teaching practices comes from professors’ accounts of their teaching, I resort to documentary materials – course syllabi, teaching aids, examination scripts, and course readings – to provide some measure of objective information about teaching.82


study. Nevertheless, using a framework of American legal thought does not necessarily signal an intellectually colonized field of Canadian contract law study or a colonized dissertation. One of the contributions this dissertation attempts to make is to highlight the distinctive ways that Canadians have interpreted, translated, and put to their own uses these seminal American ideas.

81 Mertz describes her study design as follows:

In addition to observing and interacting in the settings they study, anthropological linguists concerned with the details of language-in-use frequently tape interactions and then transcribe them to provide a basis for more exacting linguistic analysis. This method permits careful scrutiny of the ways that minute aspects of language operate to shape ongoing interactions and to enact social structures. In addition, sociolinguists have for some time used quantitative methods to track overall patterns in speech, counting and measuring salient features of discourse. Finally, scholars from these and other disciplines have combined other methods with the use of interviews to obtain better information about how the participants themselves make sense of what is going on. I drew on all of these methods in developing an understanding of law school classroom dynamics. This study, then, employed a combination of in-class observation, ethnography, transcript analysis, quantitative coding, and interviews. We observed and taped an entire semester of classes to get a fuller picture of classroom dynamics and to avoid capturing only one part of a semester-long process. We worked in eight different schools in an effort to catch differences that might exist across the status hierarchy of law schools (supra note 3 at 31-2).

82 Cf. Mertz, ibid at 31 (“Being an anthropologist, I begin with a preference for actually observing what people are doing, rather than relying solely on their reports of what they do”). An analogy can be drawn to the literature on consumer preferences, in which the “stated preferences” on utility are contrasted with the “revealed preferences” of consumer behaviour. The locus classicus is PA Samuelson, “A Note on the Pure Theory of Consumer’s Behaviour” (1938) 5 Economica 61 (“develop[ing] the theory of consumer’s behaviour freed form any vestigial traces of the utility concept” at 71).
This means that my analysis focuses on the content of the words and ideas expressed by those words rather than on the performative act of speaking. My starting point is that the words professors speak to me may be treated as texts for me to interpret in similar ways that one might interpret a written text.\textsuperscript{83} This is, however, not to say that I take everything that professors say at face value. As will become apparent, some of the most interesting sources of information are the instances in which a professor’s words in one part of the interview lie in tension with what he or she says in other parts of the interview. But the point is that it is the content of the utterances, rather than their form or interplay with other utterances or linguistic turns, that form my focal point.

The choice of relying on different empirical data than Mertz does leads to a different type of analysis. The interviews I conduct are semi-structured, following the thread of a conversation, with most questions primarily designed to get professors to answer a clear and direct question or to elaborate on a statement they have just made. My participants are in comfortable territory, because the subject matter is familiar, they are in a congenial environment as private as they wish (either their office or another locale of their choosing), and law teachers are accustomed to speaking about their work. The result is an interview transcript with well elaborated, articulate answers, many of which make direct reference to scholarly thinkers or specific events.\textsuperscript{84} Accordingly, the interview transcripts lend themselves to an analysis that relates participant data to scholarly literature much more directly than a linguistic approach might. Accordingly, much of my analysis serves to tease out how my participants’ words and ideas relate to the ideas expressed in the scholarly literature. The fact that these two types of texts speak together so well is highlighted by the fact that many of my participants have actually published in the fields of contract law and legal education from whose literature I draw.

The documentary sources of teaching materials also enable me to engage with the words that my participants have written. The numerous teaching artifacts I have compiled – course syllabi, exam questions, slides and other teaching materials – therefore enable me not only to triangulate professors’ subjective self-descriptions of teaching with these more objective sources, but they also provide a rich source of information about attitudes about law in their own right. This type of textual analysis – interpreting written words for their implicit and explicit attitudes about law – finds its greatest

\textsuperscript{83} For an example from another discipline that treats interview transcripts in the same way, see Elizabeth Ben-Ishai, “Responding to Vulnerability: The Case of Injection Drug Use” (2012) 5 Intl J Feminist Approaches to Bioethics 39.

\textsuperscript{84} I provide a sample interview transcript in Appendix A.
expression in Chapter 3, where I conduct a lengthy and critical analysis of the Canadian contract law casebooks. Casebooks play four notionally different roles: they are artifacts produced by my participants, some of whom are the casebook editors themselves; they are published, scholarly texts amenable to interpretation, analysis, and critique; they are tools used in the classroom; and they are historical documents that change over time according to events, intellectual currents, and the identities of their editors. As I do when I analyze my interview data, I weave into my analysis of the casebooks substantive ideas from the literature on contract law, legal thought, and legal education. Unlike another recent doctoral dissertation that focuses on teaching methods in Canadian legal education, my study focuses very much on the “what” of legal education, and to the extent that I discusses the “how,” I do so primarily to explore what the teaching methods say about substantive attitudes about law, legal reasoning, and legal practice. This dissertation focuses, therefore, neither on language or pedagogy per se, but explores both pedagogical choices and spoken and written language to discern the substantive ideas communicated about law, legal reasoning, and the relationship between theory and practice.

Another difference relates to sample size and the relationship between breadth and depth. Mertz’s study engaged at an incredibly “minute” level of detail with an uncharacteristically large sample size for that type of research. Her team conducted semester-long classroom observations for eight schools, where the norm in such linguistic ethnographies might be one or two. In my case, restricting the in-person qualitative data to interviews enabled me to reach a much larger sample size. Indeed, whereas Mertz’s site selection was driven by a desire to be representative (“to maximize diversity of school status and professor profiles”), I endeavoured to be comprehensive, an aspiration that would not be remotely attainable in the comparatively large universe of US contract law teaching. As I detail below, I approached all individuals who were teaching first-year Contract Law at seventeen Canadian law schools in the academic years 2013-14, 2014-15, and 2015-16, some of the 2016-17 instructors, as well as selected former teachers. The relatively high participation rate allows me to make some generalizations

85 For confidentiality reasons I do not identify the editors who participated in my study. The one exception appears in Chapter 6, II(A).

86 Annie Rochette, Teaching and Learning in Canadian Legal Education: An Empirical Exploration (DCL Thesis, McGill University Faculty of Law, 2010) [unpublished].

87 Mertz, supra note 3 at 32.

88 Ibid at 33. As of June 15, 2017, the “dynamic database” of the American Association of Law Schools lists 1,180 “tenured, tenure-track, long-term contract, deans, and emeritus faculty” as teaching Contract Law (Keeley Kerrins, American Association of Law Schools, email correspondence with author, 15 June 2017).
about the big picture of contract law teaching in Canada. While the study was not designed to be a quantitative study, and therefore lacks the proper design to generate statistical results with calculated levels of confidence and error, the size of my sample allows me to make some suggestive claims about Canadian contract law teaching as a whole.

V. Study Design, Research Methodology, and Philosophy

A. Interpretivist Paradigm and Grounded Theory

The study is grounded in the “interpretive paradigm” of qualitative research, whose goals “involve empathetic understanding of participants’ day-to-day experiences and an increased awareness of the multiple meanings given to the routine and problematic events by those in the setting.” My primary aim at the outset of the study was to discover what “meanings, symbols, beliefs, ideas, and feelings” professors hold or adopt about law, legal reasoning, legal practice, and legal education; and, to compare these attitudes with certain practices to determine the degree of fit between aspiration and reality. I hoped that a study of one core course, first-year Contract Law, could generate insights applicable to Canadian legal education as a whole.

I situate my own legal theoretical commitments within the tradition of critical legal pluralism. But while the deeper motivation for this project lies in helping to realize legal education’s human and social potential, the methodological aims of the study are decidedly interpretive, not “critical.” My main desire has been to understand the complex phenomenon of contract law teaching.

90 Ibid.
91 As the study progressed, I discovered quite rapidly that the interesting comparisons to make were not only between attitudes and practices, but between the professed attitudes about law, and professed attitudes about legal reasoning and legal pedagogy.
93 Methodologically, this study does not take “a macro approach to research.” I focus more on the individual participants in legal education than I do the institutional or structural approaches of legal education. I also do not “study[] a setting and its participants from a particular critical stance, such as feminism and Marxism” or focus particularly on “historical, social, and cultural events that extend beyond the setting” (Bailey, supra note 89 at 56). Compare Harry W Arthurs, “The Political Economy of Canadian Legal Education” (1998) 25 J L & Soc 14.
Accordingly, I have deployed techniques from grounded theory, aiming to develop insight from the data themselves, coding for themes and relating these codes at increasingly higher levels of abstraction until a theory emerges. The insights I have generated about the relationship between theory and practice, between law and legal reasoning, and about Canadian legal thought therefore emerged from my process of analysis and were not predetermined. In the later stages of analysis, I was able to discover deep relationships between the themes in my data and the Kennedy and Fisher framework, but methodologically speaking, these parallels are more of a happy accident than a product of deliberate design.

B. Study Design

My first decision was to conduct an empirical study as opposed to a purely theoretical one. This was motivated not only by my interpretivist proclivities but also because my literature review suggested a gap in empirical legal research in Canadian legal education. A 2012 entry on legal education in the *Oxford Handbook of Empirical Legal Research*, for example, identified only a few Canadian studies: Harry Arthurs’ 1983 *Law and Learning* report (with its related commissioned studies), and a 2001 article on course selection at UBC. While that international review no doubt missed some then-recent works, such as a 2007 study on “outsider” course selections, an ethnography of law school coffee houses, and Annie Rochette’s unpublished 2009 dissertation, *Teaching and Learning in Canadian Legal Education*, the vast bulk of published material on Canadian legal education did seem to consist largely

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99 Supra note 86.
of critical commentary,\textsuperscript{100} literature reviews,\textsuperscript{101} or first-person accounts of actual experiences.\textsuperscript{102} This stood in contrast to the comparatively well-developed tradition of empirical legal education research in the US.\textsuperscript{103} I felt that a broader, more systematic look at Canadian legal education, viewed through a more substantive lens, could help understand broader trends and more widely occurring practices, and could inform the existing rich and self-reflective discourse about legal education in Canada. Since beginning this study, other empirical studies have been completed\textsuperscript{104} and initiated,\textsuperscript{105} signaling, perhaps, an emergence of a new genre in Canada, one that would fit well into an apparently increasing international taste for empirical research in legal education.\textsuperscript{106}

I wanted to explore legal education through the lens of a substantive course in order to break down a perceived schism between legal scholarly literature and the literature on legal education. A premise of the study is that the substantive messages communicated to students through their courses play an important role in constructing understandings about law, legal reasoning, and legal practice. Notwithstanding the importance of the \textit{hidden} curriculum,\textsuperscript{107} I wanted to explore the impact of the

\textsuperscript{100} See eg. Harry W Arthurs, “Poor Canadian Legal Education: So Near to Wall Street, So Far From God” (2000) 38 Osgoode Hall LJ 381.


\textsuperscript{103} See Cownie, \textit{supra} note 95 at 858 (“In contrast to other jurisdictions, there has been a large quantity of empirical research focused on legal pedagogy in the United States, much of it published in the \textit{Journal of Legal Education}, as well as in monographs”).


\textsuperscript{105} Michelle Leering, doctoral candidate in law at Queen’s University, is conducting an empirical project on “reflective practice” in Canadian and Australian law schools. For a conceptual account of her framework, see Michelle Leering, “Conceptualizing Reflective Practice for Legal Professionals” (2014) 23 J L Soc Policy 1. Adrien Habermacher, doctoral candidate in law at McGill University, is conducting a study on “The Role of Institutional Cultures at Select Canadian Law Faculties.”

\textsuperscript{106} See eg. Meera Deo, Mindie Lazarus-Black & Elizabeth Mertz, eds, \textit{Legal Education Across Boundaries} (Routledge, forthcoming in 2018). This collection will bring together the contributions of attendees at a conference hosted by the American Bar Foundation and the National Science Foundation, “Legal Education in Crisis? Bringing Researchers and Resources Together to Generate New Scientific Insights” (March 3-4, 2017, Chicago IL). Participants at that conference came from England, Canada, Australia, France, Argentina, and the US.

explicit and direct messages about law portrayed through the formal curriculum. I felt, moreover, that it was important to select a course that is part of the putative core curriculum, on the premise that privileged categories and structures tend to attract students’ and professors’ attention and energy. A focus on the privileged locale of a “core” course helps understand the preoccupations of this collectively invested energy. Correlatively, I believe that any transformational vision of legal education must at least understand, and probably deploy, these privileged categories.

Contract Law proved to be an ideal course to study for a number of reasons. It is part of every first-year common law curriculum in Canada, and has been for a very long time.\(^\text{108}\) The course figures prominently in law school lore.\(^\text{109}\) Contract law was the subject of the seminal casebook, Christopher Columbus Langdell’s *A Selection of Cases on the Law of Contracts*,\(^\text{110}\) and is thus perennially associated with the case method and thinking like a lawyer. It was also the subject focus of Mertz’s study, permitting a greater degree of comparison.\(^\text{111}\) There is also a significant literature (largely US) on the teaching of contract law.\(^\text{112}\)

But most importantly, the subject matter of contract law is specifically well suited to studies about the substantive messages about law and legal reasoning for two related reasons. Contract law, first, is amenable to a wide range of philosophies about law. To cite just one example, its philosophical foundations can be said to track a transformation from Aristotelian virtues of promise-keeping,  

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\(^{108}\) In Alfred Reed’s empirical study of Canadian and US Law schools in the 1920s, Contracts was the only course that *every single* law school offered in first year (Alfred Z Reed, *Present-Day Law Schools in the United States and Canada*, Carnegie Foundation Bulletin No 21 (Boston: Merrymount Press, 1928) at 256). In the US, Contract Law is an “immutable pillar of the first-year curriculum of every law school” (Friedman, *supra* note 71 at 18).


\(^{111}\) Mertz does not directly attribute the subject matter of the Contract Law course to her decision to choose that course, except that as a mandatory course that was taught in the first semester of first year, it enabled the study to “avoid possible variation by subject matter” and “to catch the socialization process at a critical moment; it is during this first semester that students receive their primary initiation into distinctively legal language and thought” (*supra* note 3 at 34).

liberality, and commutative justice to liberal values of autonomy, freedom, and individualism. Second, while contract law is amenable to diverse theories about law, it has also been a vehicle by which eclectic visions of legal reasoning have been developed and advanced. Most of the major schools that Kennedy and Fisher identify as constituting the major developments in American legal thought have important instantiations in contract law scholarship. One goal of Chapter 2 is to illustrate how the development of American legal thought could be told using examples from contract law scholarship. Being representative of these schools of thought, mainstream contract law scholarship exemplifies the eclectic series of ideas that are said by Kennedy and Fisher to constitute contemporary legal reasoning. Contract Law would thus seem to be a natural course in which to introduce students to these diverse attitudes about law and, to the extent that the course also functions as a forum for initiating students into the world of legal language (as Mertz has shown), it is as good a candidate as any for investigating the extent to which legal reasoning is, and can be, taught as an eclectic and capacious practice.

Finally, I have chosen to focus on interviews with individual contract law professors for a number of reasons. I wanted to give professors the opportunity to express their aspirations for legal education. My hope was to tease out goals and purposes of legal education as imagined by professors in the best possible light. One goal was to identify the most expansive possibilities for legal education and to understand the range of aspirations that professors might hold. It was by understanding and viewing these aspirations together that I hoped to discover what was both exciting and potentially limiting about how professors conceive of legal education. As the study progressed, I also came to realize the value

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115 Drawing on professors’ subjective descriptions in this context shines a light on the potential advantages of foregrounding “stated” preferences in empirical research. As Edward Fischer writes, while revealed preferences are “highly sensitive to contextual and structural constraints, [and disclose] a necessary and pragmatic concern with what is possible,” stated preferences are “less bounded by the practicalities of time horizons and collective action problems. They are able to consider ‘what if’ possibilities: what kind of person one would like to be, what sort of world one would like to live in” (Edward Fischer, *The Good Life: Aspiration, Dignity, and the Anthropology of Wellbeing* (Stanford: Stanford University Press, 2014) at 64). See also supra note 82.
of professors’ stated attitudes and beliefs about law and legal reasoning. As Chapter 5 demonstrates, analyzing these attitudes is a major pillar of my study. I have been able to identify important tensions and contradictions between what professors say they believe about law (and legal education), and what they say about legal reasoning and contract law teaching. A focus on the subjective descriptions, combined with a probing but curious method of semi-structured interviewing, has enabled me to get deep into the minds of professors and thereby generate insights about professors’ legal consciousness.

At the same time, I asked professors not only about their aspirations and attitudes, but about their actual practices, in order to compare, to a limited extent, their articulated hopes and intentions with what they do. I was interested to compare their aspirations with the reality of their teaching. However, as a trade-off against my broad sample size, I have foregone conducting systemic classroom observations or collecting information about students’ experiences. Thus, my study can say little reliably about what actually goes on in classrooms, and even less about what messages about law and legal reasoning students actually receive. These are, no doubt, avenues for future study. Nevertheless, by gathering some written artifacts of teaching the course from participants in my study, I am able to make some observations about actual practices.

My focus on individual instructors grew not only out of the desire to assemble a picture of the immanent possibilities and virtues of legal education, but out of a feeling that research at an individual scale, as opposed to a macro scale, could provide novel insights. Much scholarship analyzes legal education from a macro perspective. This is true of “structural” scholarship that attempts to identify broad trends in legal education,117 of normative scholarship that attempts to defend the “academic” vision of legal education,118 of reports emphasizing the role of market forces,119 and of interventions

116 I did experiment with this type of data collection on a pilot level at the University of Toronto Faculty of Law. Governed by my Research Ethics Board Protocol, I conducted multiple classroom observations, administered a survey to students, and conducted one student interview. This experiment showed preliminary promise, but because of time and resource constraints I did not replicate it at any other institution. In part because this data would be too focused on one institution, and in part because I have not continued to iterate and develop the survey methodology in order to accord with the themes emerging from my interview and documentary data, as the grounded theory approach would recommend, I have not included the survey data obtained from those experiments in the dissertation.


118 See eg. Arthurs, “Tree of Knowledge,” supra note 11.

119 See eg. ABA Report, supra note 10.
from the profession,\textsuperscript{120} the academy,\textsuperscript{121} and third party research institutes\textsuperscript{122} on the topic of curricular reform and design. Theoretical\textsuperscript{123} or polemic\textsuperscript{124} interventions about legal education’s mission also tend to be pitched at a higher level of generality. This “bird’s-eye view” can produce an image of legal education akin to a territorial map, in which borders are clearly defined, factions coloured-in and homogenous. But, just as in research about law, where “the choice of ... scale of analysis is a technical, methodological decision that, despite its apparent objectivity, is not neutral,”\textsuperscript{125} the focus on macro scale may predispose researchers and commentators to focus on categories that may not necessarily be determinative of the lived experience of participants in legal education. Getting many individual professors to speak freely in their own words opens up insights that might not obtain with a more macro focus on institutions, curricula, or markets. The methodology also permits us to hear from professors other than the self-selected subset who write and publish on legal education.

That said, while operating at a more granular scale, a focus on professors’ accounts of their own teaching is also quite abstract, in the same way that scholarly arguments are. Professors’ accounts make sense of – represent – an activity, law teaching, which itself is a marriage of two highly abstract endeavours, law and education. It is precisely because law professors are articulate and self-reflective enough to be able to discuss their objectives and goals so clearly that their words can converse directly with the scholarship. The information discovered are not discrete data points as in other major investigations\textsuperscript{126} but rather rich, thick, and layered testimonies. These directly inform the themes about legal education, but they are also subject to further meta-analysis and amenable to broader

\textsuperscript{120} See eg. FLSC Report, supra note 11; ABA Report, ibid.
\textsuperscript{122} See eg. Carnegie Report, supra note 29.
\textsuperscript{123} See eg. Kronman, The Lost Lawyer, supra note 24.
generalizations. In the same vein, the review of the casebooks permits me to conduct an in-depth analysis of the books that most professors use in their class, to closely analyze and probe their implicit and explicit attitudes about law. As it happens, my analysis of these books reveals a tension between the introductory expressions about law, and the attitudes about law reflected in the more granular treatment of substance in the remedies chapter, that parallels the observations made about individual contract law teachers. This parallel enables me to make somewhat broader claims about Canadian legal thought than had I focused exclusively on individual teachers.

C. Participant Selection and Outreach

My study focused on instructors at Canadian law schools where a significant part of the first-year Contract Law course in the main program (JD or LLB) was taught in the common law tradition. In effect, this included all Canadian common law faculties, plus the Faculty of Law at McGill University, for a total of 17 institutions. I included in my list of potential participants all professors who were teaching first-year Contract Law at these Canadian institutions in the academic years 2013-14, 2014-15, 2015-16, as well as some teaching in 2016-17, and selected former teachers of contract law, including retired professors and working professors who were no longer teaching contract law. I had two categories of participants: interview participants, and written-materials-only participants. In total, I invited 99 professors to participate in an interview. I invited my interview participants to share written materials for analysis, and I also invited 9 participants solely to participate by submitting materials (I was approaching these participants later in the study when it was too late to incorporate interview data).

127 These included The Schulich School of Law at Dalhousie University, the University of New Brunswick Faculty of Law, the University of Moncton Faculty of Law, the McGill University Faculty of Law, the Faculty of Law – Common Law Section, University of Ottawa, the Faculty of Law, Queen’s University, the University of Toronto Faculty of Law, Osgoode Hall Law School, the Faculty of Law, Western University, the Faculty of Law, University of Windsor, the Bora Laskin Faculty of Law at Lakehead University, Robson Hall, Faculty of Law, University of Manitoba, the College of Law, University of Saskatchewan, the Faculty of Law, University of Alberta, the Faculty of Law, University of Calgary, the Peter A Allard School of Law, University of British Columbia, and the Faculty of Law, University of Victoria.

128 Under the same Research Ethics Board Protocol, I conducted seven in-person interviews with US contract law professors. I largely do not draw on these interviews in this dissertation. The one exception is a short reference to a comment made by Douglas Baird (attributed with permission) in Chapter 5, II(A)(ii), below.
In total, I conducted 67 interviews of Canadian contract law professors, for a participation rate of 68%.\textsuperscript{129} I had at least one interview participant from each of the 17 institutions. I had 8 written-materials-only participants. Amongst both interview and written-materials-only participants, I received written materials from 62 participants (of which 54 were interview participants), for a global participation rate of written materials of 58%.\textsuperscript{130}

I received a Research Ethics Board approval from the University of Toronto on July 3, 2012.\textsuperscript{131} Pursuant to that approval, I agreed to protect the confidentiality of participants’ names by default, but provided an option for participants to waive confidentiality at their discretion. Twenty-two participants elected to waive confidentiality, and six participants requested additional protections beyond the default agreement.\textsuperscript{132} Written-materials-only participants were not provided with the opportunity to waive confidentiality. While there were differential degrees of confidentiality protections in place, I have decided to protect the identity of all participants equally in this study, with some minor exceptions. Where a given quotation discloses information that is likely to reveal the participant’s identity, I generally redact it, unless that information is materially relevant to a point being made and that participant has waived confidentiality. In only one case (in Chapter 6) do I attribute a quotation to a named Canadian participant; this is done by permission and in an instance where I feel it is materially

\begin{flushleft}
\textsuperscript{129} I actually invited 100 people to participate in an interview and conducted 68 interviews, but it became apparent in one interview that that individual had not taught Contract Law in Canada, so I have excluded that individual from the total count. One individual requested that their gender not be revealed. Appendix C identifies the gender and range of years teaching of each participant who agreed this information could be disclosed.

\textsuperscript{130} The main reason why the participation rate is lower for written materials participation than interview participation is that a number of interview participants simply did not respond when I followed up after the interview about sending written materials. I generally asked for written materials in interviews, and only one participant specifically refused (“I don’t think an outline would be very exciting to you. It’s basically just the casebook” ([006], Interview, lines 988-9)). I attribute this lack of response largely to benign neglect – participants simply not getting around to it.

\textsuperscript{131} Protocol #27807. The protocol was extended on an annual basis until 2 July 2017. On 11 July 2017 the protocol was officially closed in good standing.

\textsuperscript{132} The default terms of the informed consent agreement stipulated that the following identifying characteristics could be disclosed in the study, although by individual agreement some participants requested that some of these be removed: Gender, Institution, Position, Research Areas, Courses Taught, and level of experience teaching. I include a sample default agreement in Appendix D.
\end{flushleft}
important to the point being made to disclose this person’s identity. Otherwise, I refer to participants by numbers, which I have randomly assigned.

D. Participant Characteristics

Most participants consented to disclosing their gender and level of experience teaching. Among my interview participants, 48 presented as male and 18 as female (See Figure 1). The number of years teaching law, grouped into bands, is outlined in Figure 2. To determine this number, I calculated the difference in years between the date of interview and the first year of full-time teaching (not counting sessional lecturing or fellowships), which I determined either by the participant’s online profile or from the interview itself. Appendix C contains a table that attributes the gender and number of years teaching to each numbered participant.

Figure 1. Interview Participants: Gender

133 When I am concerned that cross-referencing the same quote by the same individual may provide enough information to disclose the identity of the participant, I redact the participant number, substituting a letter (e.g., Professor X), as an additional measure of protection. This occurs infrequently.
Wherever possible, I conducted interviews in person. I traveled to 14 of the 17 institutions, and conducted a total of 54 in-person interviews and 13 interviews by phone or videoconference. I held my first interview on 26 February 2013 and my final interview on 1 February 2017. Most interviews were held in the participant’s university office, although I conducted interviews at other locales: law or work office (2), restaurant (1), hotel lobby (1), private home (1), faculty conference room (1), private room at the University of Toronto Faculty of Law (2), and an outdoor bench on another university campus (1). Two interviews were conducted in French, and the remainder in English.

Interviews were semi-structured and lasted on average an hour. Since the purpose of the interviews was to tease out the subjective attitudes about law, legal reasoning, and legal education, questions were heavily tailored to the conversation in progress. I did not have standard or required questions. Nevertheless, a few regular questions did come up. These included variations of the following:

- How long have you been teaching Contract Law?
- Do you like teaching the course? What do you like about it?
- What are your goals in teaching the course?

The average length was sixty-three minutes. The shortest interview was 33 minutes and the longest was 107 minutes. There were four interviews under 45 minutes and eight interviews over 75 minutes.
• Why are those goals important?
• How do you structure the course?
• What reading materials do you assign?
• How do you evaluate your students?
• What do the best exam answers do?
• Where did you study law?
• How do you (or did you) prepare for your class?
• Are there any particular influences on your approach to the subject matter or the course?

These questions, largely phrased as questions about pedagogy, inevitably led to answers that included references to scholarly authors, mentors, specific cases or other examples from the course, philosophical ideas, and so on. It was these references that I tried to pursue and expand upon in subsequent questions, so what started out as easy, comfortable questions about teaching approach gradually transitioned into a more probing and intellectually demanding conversation about the nature of law, legal reasoning, and legal education. In a typical interview, one of the above questions would begin a chain of answers and follow-up questions that could last for ten to twenty minutes, and it was only after that train had run its course that I would come back to another of the questions above. Rarely did I ask direct a question about a participant’s attitudes about law or legal reasoning that wasn’t a follow up to something already said.135 In other words, I tried to avoid leading the conversation toward predetermined subject matters. I include a sample transcript in Appendix A.

The above description is a retrospective account of how interviews proceeded. I did not generally prepare specific questions in advance, nor did I refer to the interview questionnaire that I had drafted in preparation for my first interview. I asked the questions I did, and picked up on the words and themes that I did, following my intuition about what would yield the most lively and rich conversation. This intuitive and organic approach to interviewing manifested my engagement with grounded theory, in which “data gathering and data analysis are simultaneous.”136 The questions I asked and the themes I

135 One notable exception was that I relatively frequently asked the standalone question, “Does politics come up in your course?” because I found that it elicited some interesting contrasts, both between how different professors chose to define politics, and also between those who said that politics “absolutely” came into the course, and those who said it “never” did. See Chapter 5, III(A)(ii)(c)(2.1), below.

136 Oktay, supra note 94 at 14.
picked up on were informed not only by my in situ analysis of the present conversation, but by my preliminary analysis of previous interviews.

F. Data Collection and Analysis

Sixty-six of 67 interview participants agreed to having their interviews audio recorded. A professional transcriber transcribed the audio recordings, generating approximately 1,500 single-spaced pages of transcript data. Professors also emailed copies of their course materials, and occasionally provided hard copies during our interview or by mail. I wrote to some participants at several times throughout the study to get updated versions of course syllabi. In total, I received 263 written materials from 54 interview participants and 8 written-materials-only participants. Of these, 60 provided at least one course syllabus. I received 86 course syllabi (called by some participants a “course outline”), 47 slides or handouts, 24 final examination scripts, 11 assignments, 34 reading lists, 8 instructions, criteria, or grading memos for assignments or examinations, 8 problem exercises, 3 sample examinations or assignments completed by students, 9 practice examinations, 9 sample or complete course readings, 20 class notes, course notes, or annotated syllabi, and 4 miscellaneous documents. These course materials, plus the interview transcripts and typed or handwritten notes of two untranscribed interviews, constituted my data for analysis. I provide a table of participant characteristics and data in Appendix C.

Conceptually, I followed the general approach of grounded theory, although my analysis mitigated the rigours of leading grounded theory approaches in two respects. First, with respect to coding my data, I did not systematically deploy the detailed “coding families” framework that Strauss and Corbin recommend – I, like many others, found their description somewhat cumbersome. I also did not begin formally coding my data until all my interviews were completed and transcribed.

137 The final interview I conducted (with Professor 71), while audio-recorded, was not professionally transcribed. For data analysis of this interview, I relied on my contemporaneously typed notes of our conversation. For Professor 67, who did not consent to audio recording, I relied on my handwritten notes.

138 See Oktay, supra note 94 at 19-20.

139 Cf. ibid at 54:

Grounded theory also differs from other qualitative methods in that data gathering and data analysis are integrated in the grounded theory method. Grounded theory involves a multistage process, and data analysis is incorporated into even the earliest stages of the study. The reverse is also true—that is, data gathering continues until very late in the study, in multiple cycles of data gathering and data analysis (theory building and theory testing). I am sometimes approached by researchers who have already completed their data gathering (e.g., interviews) who ask me how to analyze the data using the grounded theory method. This question indicates
Nevertheless, throughout the process I was generating ideas and coding categories for my completed interviews, producing memos and journals about the emerging ideas, and modifying my interviews according to these reflections. Also, I was “constantly comparing” the coded excerpts, the codes, and the individual participants in my study in a way that enabled me to gradually develop more abstract theories about my data.\textsuperscript{140}

I did the bulk of my theory building through manual coding of hard copies, using a highlighter to mark relevant passages and a series of stacks of index cards, each stack corresponding to a code, to record pinpoints (line number references) from the transcripts. At the end of the coding process, a stack would have anywhere between 6 and 50 index cards, each card with approximately 5-10 references. As I went along, I would consult and review the references already placed on index cards to make constant comparisons and iteratively develop my codes, sometimes producing a new code (i.e., stack of index cards). These cards were white. I also periodically wrote down, on orange cards, emerging thoughts and ideas about the bigger picture of the project and included these in the relevant stacks. This stage of open coding was the most time intensive and took approximately three months of full-time work.

In the next stage of my analysis, I would assemble all the cards (including the orange ones)\textsuperscript{141} from a series of related stacks and identify narrower categories, and at the same time, try to see

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\textsuperscript{140} See \textit{ibid} at 16.

\textsuperscript{141} The process of including my own notes and memos (the orange cards) as part of the data to be analyzed at the composite-producing stage reflects the collapsing, in grounded theory, of data analysis and data gathering. The idea that a researcher’s own notes can serve as material to be analyzed is also the key idea of “system closure,” around which one leading qualitative software program, NVivo, was designed. See Tom Richards, “An Intellectual History of NUD*IST and NVivo” (2002) 5 J Social Research Methodology 199 at 201, 203:

[Q]ualitative research is typically characterized by a lack of distinction between the data and the results or output. Much qualitative research is an interaction between the researcher and text, in which ideas form and change, perceptions evolve, and insights and conclusions become the bases for further study, for further insights and conclusions, in a revolving process that need never stop …

Since the results of a node search are passages of text, that is to say the text referenced by certain coding, we can characterize the results of a node search as being coding, and hence store it at a node. Thus, “original” coding of the “raw data” and results of searches on it, have exactly the same format – coding at a node. This captures, in the underlying logic on NUD*IST 1, the idea of the equivalence of data and results, and the revolving process of analysis building upon itself.
broader patterns emerging (using handwritten notes and diagrams). Once I saw a pattern emerging, I would scan and print the index cards, and physically cut (with scissors) the references on index cards and assemble them into new, smaller categories, and tape these small strips of paper to broad (11”x17”’) sheets according to the new categories. These produced “composite” broad sheets that largely mapped out the key elements of my theories, and I began writing with these composites in front of me. I used these composites to help write Chapters 4, 5, and 6. There were 8, 27, and 12 composites respectively for each chapter. I provide an image of a sample composite, with identifying information redacted, in Appendix B.

I found that this manual and paper method had numerous advantages. First, it made the initial open coding process more efficient and enjoyable; rather than endless clicking of a mouse to identify passages in a text and assign them to codes, I could work with highlighter, paper, and pen, and felt that my engagement with the material was deeper and more intimate. The process of paraphrasing engaged me intellectually with each passage that I considered relevant – often, I would try to capture a passage of many lines into one line of paraphrased text. This, crucially, made theory building more manageable and robust. To build theories and see patterns, I was working with one-line descriptions of complex ideas, which enabled me to see more of them in my visual field than had I been dealing with lengthy excerpts. At least two other major recent empirical studies in legal education with large data sets of transcriptions also opted for manual and paper coding.

I did use computer software for qualitative analysis for some tasks. After considerable research and experimentation with two leading programs, Atlas.ti and NVivo, I opted for NVivo, and specifically for NVivo 11 Pro on Windows. In part, I gravitated toward the paper method of open coding because I

Following terminology in mathematics and systems theory, we dubbed this logical feature of giving results the same format as data and accessible by the same tools, system closure ... System closure was probably the core idea in NUD*IST 1. [NUD*IST is a precursor to NVivo.]

142 “Manual” coding can refer to the idea that the researcher is assigning text to codes, as opposed to a computer “auto-coding.” One can do manual coding using computer software or using hard copies.


144 The choice of operating system is significant as the functionality is different as between Windows and Mac.
had experimented with coding data on NVivo when preparing Chapter 3. For that chapter, I wanted to supplement my textual and historical analysis of the casebooks with a review of how participants in my study spoke about the casebooks. NVivo was helpful in this regard as it enabled me to efficiently retrieve all instances in which the casebooks were discussed, according to less thematic and more functional codes (e.g., “switching casebooks,” “selecting casebooks,” “Waddams”). The theory building for that chapter had happened manually outside of the NVivo ecosystem – I read the casebooks, casebook reviews, and related academic writings by casebook editors, and took notes on a word processor, and used these notes to develop my theories and write my analysis in a more conventional academic method. The theory having been built, however, NVivo was helpful in retrieving participant data about the casebooks. That said, the experience of coding in NVivo for Chapter 3 was time intensive and screen-intensive, which also impelled me to use the paper method of open coding for Chapters 4, 5, and 6. Nevertheless, once I was at the writing stage for Chapters 3–6, I also used NVivo to find additional examples using the very helpful text query function, which enabled me to perform a global search of all my transcription data.

Finally, a word on the casebook chapter. My process of analyzing the casebooks conceptually resembled grounded theory, in the sense that I set out to generate insight about the casebooks with an open mind. It differed in that I was able to draw on considerable secondary material, and so the themes and theories in Chapter 3 were informed not only by the interplay between researcher and the subject of analysis, but also by the insights of third-party commentators. I focused, in that chapter, on the three major commercial casebooks in Canada, Swan, Waddams, and Ben-Ishai & Percy, and one historical predecessor to Waddams, Milner. I read the introductions and prefaces of each edition of all books, as well as the remedies chapters in the newest edition of the three contemporary books. I also read all available published reviews of the books and selected writings (and reviews thereof) by casebook editors. I obtained confidential sales data from the three publishers and confidential data from the National Committee of Accreditation about the number of annual contract law examinations. As mentioned, I incorporated perspectives on the casebooks by my participants, and also reviewed syllabi in order to determine adoption rates. I took notes on all of this, wrote a first draft using a chronological and historical framing, and revised the chapter for publication using a more theoretical framing. This

145 Detailed citations for the editions reviewed appear in Chapter 3.
theoretical framing greatly informed the coding and writing process for Chapter 5, whose main findings are conceptually aligned with my analysis of the casebooks.

G. A Note on Quotations and Citations

References to the participants’ words are, with the exception of Professors 67 and 71, to the professionally produced transcripts of my interviews. The English transcriber indicated verbal emphasis using italics in the transcription. Therefore, italics that appear, unless otherwise noted, represent this verbal emphasis. I have at times removed the transcriber’s italization. In occasions where I wish to add emphasis, I use italics if there are no other italics in the quotation, and indicate in the footnote that emphasis has been added. If there are italics in the transcription, then I add emphasis using underlining.

I have removed one-word linguistic fillers (e.g., “uh”, “like”, “um”) for ease of reading. Linguistic fillers of two or more words (e.g., “sort of”, “kind of”, “you know”) I have removed but replaced with an ellipsis. I have also deleted the transcriber’s notation of wordless speech acts (e.g., “laughs,” “coughs,” “chuckles,” “sighs”), and “pauses”, except in rare instances where I have felt they were relevant. I have also changed certain common linguistic reductions to their proper written form (e.g., “gonna” becomes “going to”, “wanna” becomes “want to”). When I quote an exchange between me and a participant, my words are preceded by “[R]” (R stands for Researcher). When I cite course syllabi, I use the term “Syllabus” uniformly in the footnote citation, regardless of the title of the original document (e.g., “course outline”, “course syllabus”, “syllabus”). Other teaching materials reproduce the title of the original (e.g., “reading list”, “A Note on the Course”, etc.).

VI. Overview of the Dissertation

In Chapter 2, I explore how contract law scholarship serves to develop some of the major schools of thought identified in Kennedy and Fisher’s canon. The purpose here is to show how the

146 See David Sandomierski, “Tension and Reconciliation in Canadian Contract Law Casebooks” (2017) 54:4 Osgoode Hall LJ 1183. Chapter 5 reproduces some excerpts of the published version, heavily supplemented with historical material written at the first-draft stage. Some excerpts from the published article also appear in Chapter 6, Part II(A).

147 In the sample transcript provided in Appendix A, “P” stands for Participant. In the body of the dissertation, when there are exchanges between me and the participant, I identify the participant by number (e.g., “Professor 5”).
Contract Law course, to the extent that it incorporates mainstream scholarship in the area, is naturally predisposed to model the substantive and methodological insights of American Legal Realism and its intellectual heirs – Critical Legal Studies, Law and Economics, and Law and Society. The purpose is not only to survey the literature but also to detail how contract law scholarship gives rise to an eclectic picture of legal reasoning and, by extension, a capacious vision of legal practice.

Chapter 3 conducts a comprehensive, historical, and comparative review of the Canadian commercial common law contract law casebooks. I show how the ideas about law from American Legal Realism and its heirs have figured prominently in the Canadian casebooks over the course of their history. The ideas that law is contingent on social and historical factors and that underlying factors account for judicial decisions appear to motivate the core philosophy of all the editors to some extent, and later schools also figure explicitly in the books’ introductory chapters.

However, despite the apparent influence of the American canonical schools and their “wholesale assault on the jurisprudence of forms, concepts, and rules,”148 the vision of law that most editors present through their treatment of one substantive topic tells a very different story. In the two most frequently used casebooks in Canada, representing approximately 90% of the market, the teaching of remedies portrays a vision of law and legal reasoning that has a close kinship with the classical attitudes purportedly rejected. Their focus on rules and cases reveals an underlying commitment to the formalist values of internal coherence and doctrinal consistency, and a view of legal reasoning that privileges analogical reasoning and marginalizes policy. The casebooks, therefore, fail to fully operationalize their realist attitudes about law into their treatment of substance and legal reasoning. Thus, editors’ propositional commitments to eclecticism remain suspended at the level of theory; legal methodology is overwhelmingly homogenous and formalist. This stands in contrast to at least one recent US contract law casebook that explicitly attempts to embody methodological pluralism.149

Chapters 4 and 5 delve into my participant data to explore the extent to which this disjuncture between theory and practice surfaces among Canadian contract law professors. Chapter 4 treats the issue of theory and practice generally. My data reveal that the vast majority of professors, when they talk about their teaching, endeavour to incorporate theoretical and critical perspectives into their

148 Kennedy & Fisher, supra note 37 at 10.
courses. However, when asked to explain the value of theory and critique, they usually do not say that theory and critique matter for their own sake. Instead, contract law professors overwhelmingly emphasize the instrumental and practical virtues of theory and critique: they make “better lawyers.”

At the same time, a near consensus about integration would be an incomplete picture, for things change when professors begin talking about their role or mission, or that of the law school, in general terms. In these instances, professors are much more likely to reproduce the oppositional construct of academy and profession. Some professors describe role or mission in terms of balance or integration, but these remain in the minority. Instead, the trends suggested by my data are that professors aspire, through their teaching, to integrate theory and practice, but they also still construct the academy and profession in tension with one another, suggesting a residual disjuncture between theory and practice.

Chapter 5 explores the extent to which professors’ aspirations to integrate theory and practice are borne out by the attitudes about law reflected in their conceptions of legal reasoning and in their teaching practices and materials. Are the gaps witnessed in the contract law casebooks – between realist attitudes about law and formalist attitudes about legal reasoning; between an embrace of eclectic theories and a monolithic conception of methodology; between aspiration and reality – reproduced among contract law professors? Or, do professors’ stated aspirations to teach theory and critique as a means to making better lawyers result in a conception of legal reasoning and series of teaching practices that operationalize the attitudes, theories, and beliefs about law that contract law professors hold?

The overwhelming impression is that, by and large, the disjuncture identified in the casebooks resurfaces in the attitudes and teaching practices of contract law professors and that, accordingly, the desire to translate theory into practice is largely aspirational, and not a demonstrated reality, in Canadian contract law teaching. In Chapter 5, I detail how a similar series of realist attitudes about law figure prominently in professors’ expressions of their attitudes about law. Like the casebook editors, a majority of contract law professors overwhelmingly pledge allegiance to the importance of policy, politics, and context in understanding law, and emphasize law’s contingency and indeterminacy. Only a minority champion the formalist value of coherence, the importance of rules, and analogical reasoning, on which they claim the rule-of-law value of equal treatment depends. Like the casebooks, however, the majority of professors describe legal reasoning as the determination of relevant similarities with reference to an internally coherent system of rules, treating the judicial formulation of doctrinal rules
seriously, so as to reflect in their conception of legal reasoning formalist attitudes about law instead of the realist ideas to which they are purportedly committed. Pedagogical choices about how to teach and evaluate students, as well as the substance in course readings and explicit signals in course syllabi, reveal that professors largely operationalize these formalist commitments in their teaching. As a result, Canadian contract law teaching evidences a widespread commitment to an eclectic suite of realist and critical theories, but a largely homogenous vision of legal reasoning that fails to put these theories into practice. The resulting picture is one closer to Mertz’s than to Kennedy and Fisher’s.

Chapter 6 explores some factors that might account for the gap between aspiration and reality in Canadian contract law teaching. I explore three factors, each through the words of my participants. The first is the possibility that the realist and formalist commitments that surface simultaneously among teachers and casebook editors might be reconciled at a conceptual level. Second, I explore whether the rationale of pedagogical effectiveness might explain the disjuncture. Each of these accounts has its shortcomings, and in the final section of the dissertation I depart from the implicit premise of the entire project – that the exercise of individual agency alone (expressed, as it has been, through theoretical commitments and pedagogical choices) yields a complete understanding of legal education. I therefore explore the complex interplay between structure and agency in legal education, drawing from my participants’ words the various ways in which they are constrained or conditioned by structural factors such as institutional culture, incentives, administrative constraints, and pressure from colleagues and students. I suggest that, in the end, it is by understanding the interplay between structure and agency that one might begin to forge a path towards the full realization of beliefs about law and aspirations for legal education.
Chapter 2
Eclectic Visions of Law, Legal Reasoning, and Legal Practice in Contract Law Scholarship

I. Introduction

In a world completely unconstrained by past practices or tradition, a course that brings together the concepts of “contract” and “law” could lead to nearly infinite permutations of approaches. “Contract” connotes ideas as diverse as The Social Contract (the primordial consent to be governed), complex commercial agreements, marriage, clicking “I Accept,” and unspoken arrangements between family members. “Law,” on at least the pluralist hypothesis, inhabits multiple sites and is expressed in multiple modes through various combinations of its formal, explicit, informal, and implicit character. To think about the confluence of all the ways in which human beings “project[] exchange into the future” and “govern” themselves according to “rules,” to select just a few examples of many possible expansive formulations, is to invite an astoundingly capacious set of inquiries about the nature of law, the nature of human relations, and their interrelation.

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Even a positivist and centralist conception of law can admit the claim that private law is an important constitutive element of a society.\textsuperscript{155} Private law determines the conditions under which the state will impose liability between parties. These conditions not only determine the rules and standards by which legal officials adjudicate disputes, they form the background conditions against which private associational activity occurs.\textsuperscript{156} Since the permutations of existing and prospective relationships are almost infinite, private law is potentially applicable everywhere. A private law course like Contract Law could therefore be a launching pad for inquiries into the desired ends of the entire political community, and legal reasoning a capacious toolkit of means to achieve those ends.

Of course, no contract law teacher finds him- or herself with a tabula rasa. An old tradition conceives of contract law as the collection of mainly abstract rules, paradigmatically targeted toward discrete transactions in the commercial sphere, articulated in the decisions of appellate judges. Around these rules and decisions has grown an entire field of contract law scholarship, from treatises that purport\textsuperscript{157} to summarize and classify these rules, to critical scholarship that deploys judicial decisions as a means of making broader claims about society. These cases and scholarship make first-year Contract Law largely a slate onto which much has already been etched.\textsuperscript{158} This chapter details how major elements of American contract law scholarship of the twentieth century provide an expansive opportunity for exposing students to a wide variety of attitudes about law and legal reasoning.

\textsuperscript{155} An explicit instantiation of this fact lies in the recognition that the Civil Code of Québec “lays down the juc commune” (Preliminary Provision). That private law is an important element for the construction of a political community is reflected in the allocation of “property and civil rights” to provincial levels of jurisdiction. See Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s. 92(13); Quebec Act, 1774 (UK), 14 Geo III, c 83.

\textsuperscript{156} For one example of the influence that formal private law rules has on private behaviour, see Robert H Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale LJ 950 (“We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities” at 950).

\textsuperscript{157} I say “purport” to summarize and classify, because the act of writing a treatise may have the effect, and possibly the intention, of forming and moulding the common law by privileging certain decisions over others. See eg. Stephen Waddams, “Nineteenth-Century Treatises on English Contract Law” in Angela Fernandez & Markus Dirk Dubber, eds, Law Books In Action: Essays on the Anglo-American Legal Treatise (Oxford: Hart, 2012) 127.

\textsuperscript{158} Rod Macdonald’s words to me near the beginning of dissertation are apposite: “Even a blank slate imposes its limits – you need a slate and you need chalk; you have limited space before you have to erase and start over; and your primary mode of communication will be words, not pictures or actions” (Roderick A Macdonald, email correspondence with author, 9 July 2013). In Chapter 6 I explore in greater depth the series of structures and conventions that Canadian contract law teachers inherit.
One reason why Mertz’s discovery about the erasure of context, marginalization of policy, and bounded notions of legal reasoning in first-year Contract Law classes is so shocking is that the subject matter of that course would seem to so thoroughly mitigate against such erasure. The critiques of American Legal Realists and their heirs – through the field of contract law scholarship – overwhelmingly emphasize the importance of policy,\textsuperscript{159} context,\textsuperscript{160} and politics\textsuperscript{161} for understanding judicial behaviour, and for evaluating law. They systematically attack the image of law as a set of internally consistent rules, autonomous from the social phenomena to which they purportedly apply. They also demonstrate that a vision of legal reasoning that relies on the judicially articulated principles as part of an internally coherent system – the “jurisprudence of forms, concepts, and rules” – is inadequate, in part because it does not take into account the “real” factors that lead to legal results. In its place, they endow legal reasoning with the eclectic methodological sediment that Kennedy and Fisher describe. This eclecticism implies a much broader vision of legal reasoning and, by implication, a much broader sense of the range of activities and purposes of legal professional activity, than Mertz describes is communicated in the Contract Law classes she studied.

In this chapter, I aim to accomplish three goals. First, I illustrate how mainstream contract law scholarship tracks the development of American legal thought, and how accordingly a course in contract law is a natural forum in which to expose students to the realist and critical ideas explored in that scholarship. Second, I aim to acquaint the reader with the substance and details of some of these schools of thought, whose canonical status can sometimes lend its ideas to generalization and

\textsuperscript{159} See sections III(C), and V(B), below, on the influence of policy in, respectively, legal realism and law and economics.

\textsuperscript{160} See Jay Feinman, “The Reception of Ian Macneil’s Work on Contract in the USA” in Ian R Macneil, The Relational Theory of Contract: Selected Works of Ian Macneil (David Campbell, ed) (London: Sweet & Maxwell, 2001) 59 at 60 (“The essence of the criticism and reconstruction through several generations was contextualization”); Robert W Gordon, “Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law” [1985] Wisc L Rev 565 at 566-7 [Gordon, “Macaulay, Macneil”]. But see Kronman, The Lost Lawyer, supra note 24 at 225-264 (emphasizing the “scientific” pedigree, and to a certain extent formality, of law-and-economics and critical legal studies – as distinguished from the “prudential” tradition); \textit{ibid} at 245-6 (the crits and law-and-economic scholars “insist ... that the categories of the law are too muddled and confused, too much concerned with the particular case, too unsystematic to provide a basis for understanding the deep structure of the law and what it is ‘really’ about. For that, they all agree, some far simply and more comprehensive set of abstractions is required”).

\textsuperscript{161} See Part IV, below, on Critical Legal Studies.
caricature.\textsuperscript{162} As will be shown in Chapters 3 and 5, these American ideas figure prominently in Canadian contract law casebooks and the ideas of Canadian contract law professors; a close look at the seminal works here helps better understand the scholarly antecedents to the attitudes that appear to significantly inform Canadian contract law teaching. Third, I hope to elucidate how contract law scholarship in each of the schools canvassed contributes to a broader vision of legal reasoning and legal practice.

I begin by exploring some elements of classical thought against which the subsequent schools rebelled. I then explore how contract law scholarship has figured prominently in four of the schools of thought that Kennedy and Fisher detail in their canon: Legal Realism, Critical Legal Studies, Law and Economics, and Law and Society (or sociolegal studies). I elucidate these schools’ commitment to the centrality of policy, context, and politics, and explore how they contribute to an expanded vision of legal reasoning and practice.

II. Classical Legal Thought, Legal Science, and Legal Formalism

The critique that legal education insufficiently incorporates context and policy essentially amounts to the claim that the modes and messages of classical legal thought persist in the contemporary Contract Law classroom. This section briefly describes the premises of classical contract law and articulates some of its implicit messages. It then modestly complicates the portrayal by suggesting that even in classical legal thought’s conceptions of legal science and legal formalism, context is not entirely absent. This analysis then gives way in subsequent chapters to the movements that reacted against classical legal thought.

A. Legal Science and Abstraction

The classical law of contract reveled in abstraction. It was a period in which the rules of contract decided by courts were abstracted into “pure” contract doctrine. As Lawrence Friedman has described it:

\begin{quote}
[T]he “pure” law of contract is an area of ... abstract relationships. “Pure” contract doctrine is blind to details of subject matter and person. It does not ask who buys and
\end{quote}

\textsuperscript{162} Legal realism is both the subject of famous generalizations – “We are all realist now” – and caricatures – “what the judge ate for breakfast.” See Joseph William Singer, “Legal Realism Now”, Review Essay of Legal Realism at Yale: 1927–1960 by Laura Kalman, (1988) 76 Cal L Rev 465; Schauer, supra note 3 at 129.
who sells, and what is bought and sold ... Contract law is abstraction – what is left in the law relating to agreements when all particularities of person and subject-matter are removed.163

Although numerous treatises participated in this abstracting and rationalizing process, the work that instilled this idea of abstraction into legal education more than any other was Christopher Columbus Langdell’s 1870 casebook, *A Selection of Cases on the Law of Contracts* – the first such casebook ever written.164

Langdell is famous for inventing the case method, a method that relied on two pillars of legal science. The first pillar was inductive reasoning. Langdell sought to “compel”165 his students to discern the relevant principles of contract law by reading the raw cases in which the doctrine was “embodied.”166 In this, his science resembled the empirical method of the natural sciences: like the “laboratories” for the chemist, the “museum of natural history” for geologists, and the “botanical garden” for botanists, the law library was the “proper workshop” of professors and students.167

The other pillar was deductive reasoning. Having discerned the relatively few “essential doctrines”168 in which the law consisted, these rules could be applied to future situations to deduce results. In 1879 Langdell produced a “summary of topics covered by the cases,” in which he sought to

163 Friedman, *supra* note 71 at 20.

164 See Bruce Kimball, “Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature” (2007) 25 Law & Hist Rev 345 at n 8 and accompanying text [Kimball, “Langdell on Contracts”). The first half was published in 1870, with the remainder in 1871. A second edition was published in 1879. See also Karl E Klare, “Contracts Jurisprudence and the First-Year Casebook”, Book Review of *Problems in Contract Law: Cases and Materials* by Charles L Knapp, (1979) 54 NYU L Rev 876 at 878 (“The origins of th[e] conceptualist-deductive approach can be traced to the very first casebook by Christopher Columbus Langdell ... [which] exemplified a way of thinking about contracts as abstract relationships, analyzable apart from social context”) [footnotes omitted].


166 See Langdell, *Selection of Cases* (1879), *supra* note 110, Preface to the First Edition at viii (“Each of these doctrines has arrived at its present state by slow degrees ... This growth is to be traced in the main by a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied”). See also Kimball, *ibid* at 348-9.

167 Langdell, speech to the Harvard Law School Association, 1886, reprinted in Grant Gilmore, *Death of Contract* (Columbus, Ohio: Ohio State University Press, 1974), note 22. Langdell considered his casebook as a library in miniature, bringing the cases together in order to save the law library and its law reports wear and tear. See Kimball, “Langdell on Contracts,” *supra* note 164 at 348.

“develop fully all the important principles involved in the cases.” The summary was published as a stand-alone book in 1880 and has been described as the first “general theory of Contract.” Whether or not this claim is entirely accurate, Langdell is probably unique for the “parsimony” with which he selected the principles of contract law, identifying the most “salient, abstract dimensions” of the multifarious categories that previous treatise writers had employed.

This two-part process – abstraction into rules and application of abstract rules to determine future results, typified the formalist approach in classical legal thought. The abstract propositions were “operative” – used to “provide solutions to problems” – as opposed to being merely descriptive or classificatory. Moreover, the “rationalistic ordering” of the rules implied an internal


170 Grant Gilmore, Death of Contract, supra note 167 at 12.

171 Morton Horwitz disputes the claim, arguing that the will theory of the early 19th century is an equally plausible candidate (Book Review of Death of Contract by Grant Gilmore, (1975) 42 U Chi L Rev 787 At 795). Moreover, the move toward a conceptualization of contract has been additionally attributed to several of Langdell’s contemporaries – Anson, Pollock, and Holmes. See Kimball, “Langdell on Contracts,” supra note 164 at 43; Stephen Waddams, “Nineteenth-Century Treatises on English Contract Law”, supra note 157 at 141 (noting that Pollock changed the title of his treatises from “Law of Contracts” to “Law of Contract” in 1876, and Anson did so in 1879). James Gordley in turn takes issue with the will theory, suggesting that a much earlier general theory could be found in the medieval “synthesis” between Aristotelian and Thomistic thought (supra note 113). Gordley argues that though contract law became “systematic” in the US with Pollock, he “did not enlist larger philosophical, political, or economic principles in support of his theory” (ibid at 216); that the Anglo-American, French, and German jurists of the 19th century “wished to escape philosophical or political commitments” (ibid at 227); and that “the will theorists did not succeed [at making sense of contract]. They never managed to make their doctrines work without the older Aristotelian concepts they had thrown away” (ibid at 230).

172 Kimball, ibid at 356. Kimball is comparing Langdell’s work to the treatises by William Wetmore Story and Theophilus Parsons. On the latter, Langdell had worked so diligently as a research assistant that other assistants commented that the treatise appeared to be “mainly the work of Langdell.” See Kimball, ibid at n 13 and accompanying text. Langdell wrote, in his casebook, that the number of essential doctrines was “much less than commonly supposed” (Selection of Cases (1879), supra note 110 at viii).

173 See Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought In America, 1850-1940” (1980) 3 Research in Law and Sociology 3 at 8 [Kennedy, “Toward an Historical Understanding”]; Kennedy, “Form and Substance”, supra note 114 at 1729; Morton Horwitz, “The Rise of Legal Formalism” (1975) Am J Legal Hist 251; G Blaine Baker, “Introduction: Quebec and the Canadas, 1760–1867: A Legal Historiography” in G Blaine Baker & Donald Fyson, eds, Quebec and the Canadas (Toronto: University of Toronto Press, 2013) 3 at 36 (“The legal treatise is a distinctive form of literature insofar as each deal with a branch of law that is thought to have internal unity, and does so through the empirical collection of case law and inductive generalization from those raw materials to broad principles. Judicial decision-makers can then reason deductively from that abstract and Spartan framework to tangible results in future litigation”).

174 See Kennedy, “Toward an Historical Understanding,” ibid at 19, 21; Thomas C Grey, “Langdell’s Orthodoxy” (1983) 45:1 U Pitt L Rev 1 at 9 (distinguishing “classificatory categories” and “operative concepts” (emphasis omitted).
consistency or coherence that could be used to determine the validity of other rules. Just as geometrical theorems must be consistent with axioms and postulates in Euclidean geometry, legal rules (such as the mailbox rule) could be plainly “wrong” if they were not consistent with the relatively few essential principles. Classical contract law was to be “judged by its logical symmetry.” In all, the “heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order.”

Langdellian legal science and classical legal thought have a number of implications for legal reasoning. The focus on law as an internally self-sufficient system implies the idea that legal reasoning is a wholly internal mental process of ratiocinaton, which is both solitary and linear. It assumes that the words of judges can be taken at face value, and that judicially described principles of law are the determining factors in legal decision-making. It makes distinguishing between similar cases an important intellectual activity on the grounds that a coherent system ought to provide rational justifications for arriving at different results in similar cases. And, it suggests that the standards for determining the acceptability of law are contained within the internal system of judicial reasons and that recourse to external considerations is unnecessary.

175 See Kennedy, “Toward an Historical Understanding,” ibid at 3.
176 On Langdell’s tendency to make declarative, even dogmatic statements, see Grey, supra note 174 at 14; Gilmore, Death of Contract, supra note 167 at 13. On Langdell’s treatment of the mailbox rule, see Grey, ibid at 3-5. On the analogy with geometry, see ibid at 16.
177 Friedman, supra note 71 at 212.
178 Grey, supra note 174 at 11.
179 In Chapter 5, s III (A) I expand on the characteristics of legal reasoning that flow from a formalist or classical conception of law.
180 See Oliver Wendel Holmes, Review of A Selection of Cases on the Law of Contracts, With a Summary of the Topics Covered by the Cases Christopher Columbus Langdell, (1880) 14 Am L Rev 233 at 234 [Holmes, Review] (“[T]he life of the law has not been logic; it has been experience”). Holmes wrote this famous line in response to a quotation by Langdell in the casebook in which he had written that the “purposes of substantive justice and the interests of the contracting parties” are “irrelevant” in the context of the mailbox rule (cited in ibid.). See also Kimball, “Langdell on Contracts,” supra note 164 at 376. On acceptability, see Grey, supra note 174 at 10 (“A legal system in acceptable to the extent that it fulfills the ideals and desires of those under its jurisdiction”). Cf. Ernest Weinrib, The Idea of Private Law, revised ed (Oxford: Oxford University Press, 2012) at 45-6:

In the formalist view, the central question for private law is not whether a given exercise of state power is desirable on its merits, but whether the justificatory consideration that supports it coheres with the considerations that support the other features of the relationship. An argument
B. Complicating Formalism’s Relationship With Context

Langdell’s wholehearted commitment to abstraction has been tempered by other observations about his writing. One scholar has noted that Langdell, despite at one point saying how “purposes of substantive justice and the interests of the contracting parties” were “irrelevant,” made a number of references throughout his writings to justice and policy. Bruce Kimball, author of a major work on Langdell, argues that Langdell’s thought was “actually three-dimensional, exhibiting a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of justice and policy.” Kimball notes that Langdell introduced considerations of geography and history into the study of case law, emphasizing where cases were decided by elaborating in the style of cause the jurisdiction details that had previously been “normally” omitted, and chronologically arranging

of coherence does not affirm the goodness of any feature of a legal relationship; it only affirms the connection between that feature and other features … What is paramount to the formalist is not the substantive desirability of any legal arrangement, but the coherence of the justificatory considerations that support its component features.

For Weinrib, that value is corrective justice, including the equality of plaintiff and defendant in the context of a given transaction (ibid at 57-66). But serving coherence could be consistent with other rule-of-law values, such as equality under the law, or due process. See eg. AV Dicey, Introduction to the Study of the Law of the Constitution (4th ed London 1893) at 173-84. Similarly, Mertz’s findings about abstraction relate to her finding that the conception of justice conveyed in contract law is highly procedural. See Mertz, supra note 3 at 5 (“students are urged to pay attention to more abstract categories and legal (rather than social) contexts, reflecting ... the idea that justice will emerge from a process that is heavily dependent on linguistic exchange or dueling, which moves back and forth between at least two positions”).

181 Cited in Holmes, Review, ibid.

182 See e.g. Grey, supra note 174 at 14; Kimball, “Langdell on Contracts,” supra note 164 at 382-6.


184 Kimball, “Langdell on Contracts,” supra note 164 at 347. Kimball describes the three dimensions of Langdell’s thought in the following way:

In one dimension, he extensively examined authority on the problem ... In a second dimension, his inductions from authority led to reasoning about principle ... The third dimension ... was to consider justice and policy through a contradictory sequence of steps: denying the relevance of acceptability, considering fairness and convenience anyway, examining the interests of both parties, declaring acceptability indeterminate because those interests balance each other out, and finally indicating that acceptability preponderates in favor of one party (ibid at 390-1).

185 Ibid at 350-1.
cases to emphasize that it is the “growth” of the doctrines over time that matters, a growth that could be “traced” through a series of cases. Cases therefore not only stood for abstract propositions but served as marking posts for a gradual evolution with a corresponding emphasis on historical context.

As this interpretation suggests, the granular reality of Langdell’s thought does not match the generalized, perhaps “caricatured” image of Langdell as a pure legal formalist. This gap, between what Langdell has come to stand for, and what Langdell actually believed, is reminiscent of critics who make the point that what cases have come to stand for is different from – simplified, reformulated, at times contradictory to – the cases themselves. Nevertheless, the fact that Kimball felt the need to “address the traditional criticism” of Langdell, defending against the ways in which Langdell had been “pilloried in the standard historical account of American legal theory,” serves to highlight the importance of the ideas of classical legal thought, however imperfect an exemplar of them that Langdell might actually be.

The remainder of this chapter details the ways in which subsequent scholars of contract law have participated in the pillorying of Langdell and classical legal thought. The increasing skepticism about legal rules and principles and the increasing importance of policy, context, and politics in legal

186 Langdell, Selection of Cases (1879), supra note 110 at viii.
188 But see Grey, supra note 174 at 15 (arguing that that formal conceptual order was primary for Langdell and that “[c]onsiderations of justice and convenience were relevant, but only insofar as they were embodied in principles - abstract yet precise norms that were consistent with the other fundamental principles of the system”). On the ultimate failure of nineteenth century writers to draw a sharp distinction between “principle” and considerations of policy, see SM Waddams, Principle and Policy in Contract Law: Competing or Complementary Concepts? (Cambridge: Cambridge University Press, 2011) at 15 [Waddams, Principle and Policy]; Waddams, “Nineteenth-Century Treatises on English Contract Law,” supra note 157 at 144.
190 See eg. Grant Gilmore, Death of Contract, supra note 167 at 22-28 (discussing how the “case of Stilk v Myrick was transmuted into the ‘rule’ of Stilk v Myrick” at 27-28); Waddams, “Nineteenth Century Treatises on English Contract Law,” supra note 157 (describing Pollock and Anson’s “marginalization” of equity (at 137-41) and arguing that those two writers were “to some degree responsible for the oversimplification of English Contract Law” (at 144)).
reasoning are the hallmarks of this transformation. While a similar story could be told by looking at judicial language, this chapter focuses on scholars, whose words and ideas, it will become apparent in Chapters 3 and 5, have heavily influenced Canadian contract law casebook editors and teachers.

III. Legal Realism

As Morton Horwitz writes, “Legal Realism is the culmination of the early-twentieth-century attack on the claims of ... Classical Legal Thought to have produced an autonomous and self-executing system of legal discourse.” Legal realism peeled back the veil of formal rationality to reveal a series of political, psychological, policy, and contextual factors that accounted for judicial decisions. This scholarship, conducted significantly through contract law, transformed the intellectual preoccupations of legal study. In place of ratiocination within an internally consistent system came the search for extrinsic, contextual factors. Skepticism about the words and concepts of formal doctrine overtook classification. Legal realism opened the door to talking about, devising, and caring about policy; laid bare political preferences; and opened the field of legal inquiry to include social relations.

While legal realism is often denied the status of a cohesive movement, its influences have left an indelible mark on contemporary legal education. So much so that Laura Kalman has written that the phrase “We are all legal realists now” is used “so frequently that it has become a truism to refer to it as

192 See eg. Friedman, supra note 71 at 215 (by the 1950’s, the Supreme Court of Wisconsin “paid ever more attention to the particularities of the situations before it – thus more attention to ‘fairness,’ less heed to general principles”); PS Atiyah, The Rise and Fall of Freedom of Contract, supra note 113 at 649-80 (describing the shift from “principles to pragmatism” and the rise in judicial discretion); PS Atiyah, “From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law” (Oxford: Clarendon Press, 1978) at 5:

A decision on principle is a decision determined by the hortatory effect which the Court wishes its decision to have in the future; a pragmatic decision is a decision designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future ... In the first half of the nineteenth century ... the Courts were inclined to resolve the conflict by adhering to principle ... In modern times, by contrast ... the Courts have become highly pragmatic [emphasis added].


194 See ibid at 169 (“Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.”); Karl N Llewellyn, “Some Realism About Realism – Responding to Dean Pound” (1931) 44 Harv L Rev 1222 at 1233-34; Grant Gilmore, “Legal Realism: Its Cause and Cure” (1961) 70 Yale LJ 1037 at 1038.
a truism.” Early examples of legal realism still figure prominently in legal education today, and so do legal realism’s “heirs” – Critical Legal Studies, Law and Economics, and sociolegal studies. This section focuses on the early realists and explores how they introduced the notions of policy and context into law and legal reasoning.

A. Functionalism Overtakes Formalism

Legal realists attacked classical legal thought in large part by attacking formalism. They rejected the ideal of abstract legal rules – what Felix Cohen derisively referred to as “transcendental nonsense.” Realists argued that legal outcomes could never be determined mechanistically via the process of deduction. Rather, a number of factors suggested that all legal decision-making was the product of indeterminate factors: judicial psychology, competing interpretations of vague and ambiguous concepts, and discretionary interpretations of what the “holdings” of cases were.

The so-called objective and abstract rules, rather, “concealed” a range of political, ethical, and moral factors that judges actually relied upon. The legal realists thus attempted to expose these factors and to demonstrate that law in reality was not divorced from policy considerations. A key insight of legal realism was to show that law was not discovered, but made: “Legal principles are not

195 Laura Kalman, *Legal Realism at Yale 1927–1960* (Chapel Hill: University of North Carolina Press, 1986) at 229 (“The statement has been made so frequently that it has become a truism to refer to it as a truism”). See also Singer, “Legal Realism Now”, supra note 162 at 465.

196 For example, in 2013-2014, first year law students at the University of Toronto were asked to read Karl Llewellyn’s *Bramble Bush*, supra note 6 at the beginning of the year.

197 Singer, “Legal Realism Now”, supra note 162 at 503 (the schools are “a reaction to, and a version of, legal realism”).


inherent in some universal, timeless logical system; they are social constructs.”204 In the famous words of Karl Llewellyn, the law is not the rules, but what legal officials actually do.205 Most legal realists were thus committed to functionalism,206 a concern with “effects,”207 or “actual experience.”208

In the field of contracts, Fuller and Perdue typified this approach in their two-part exposé, in the *Yale Law Journal*,209 of the prevalent tendency of judges to recognize the reliance interest despite the fact that prevailing doctrine took a narrower and more categorical approach to damages.210 Fuller and Perdue identified the “judicial impulses” that led to the awarding of the reliance interest,211 arguing that the bright-line rule of all-or-nothing recovery in the field of contract was not only undesirable, but itself subject to the whims and uncertainties of judicial psychology.212 They conclude, exemplifying the realist predilection for functionalism, with an appeal for a more “flexible scheme of legal sanctions” that would recognize “the need for compensating reliance ... on its own account.”213 They also argued that breaking down the “ancient categories” of contract and tort would make it “possible to analyse the general problem of the legal sanction to be given expectancies created by words or conduct in terms of the policies involved.”214 Five years later, in 1941, Fuller provided an analogous analysis in “Consideration and Form.” In that article, which Duncan Kennedy describes as ushering in a “conflicting considerations” paradigm into American legal consciousness,215 Fuller “define[s] consideration in terms of its underlying

204 Singer, “Legal Realism Now”, supra note 162 at 474.
205 Llewellyn, *Bramble Bush*, supra note 6 at 3 (“What these official do about disputes is, to my mind, the law itself”).
206 Kalman, supra note 195 at 29.
207 Karl Llewellyn, “Some Realism About Realism – Responding to Dean Pound,” supra note 194 at 1222.
210 Fuller & Perdue, “Reliance Interest 2,” *ibid* at 401-6, 411, 418. The authors write against both “textbook” writers – Williston is the most frequent target – and the drafters of the Restatement.
211 *Ibid* at 376.
212 *Ibid* at 419.
213 *Ibid* at 419, 420.
214 *Ibid* at 419 [emphasis added].
policies,” underscoring both three distinct functions (evidentiary, cautionary, and channeling) of the formal basis for consideration, and the “principle of private autonomy” as its substantive basis.

The concern with policy reflected a desire that law be conceived of as a “purposive ordering of human affairs” in contrast to the mechanical, categorical, and deductive mental processes championed by legal science. The Fuller & Perdue articles, which Morton Horwitz has called “perhaps the single most influential piece of Realist doctrinal work,” deployed an anti-formalist critical spirit ... against one of the dominant formalist paradigms of the old order – that remedies logically flow from the nature of rights ... [The] strategy of disaggregating and contextualizing the question of contract damages, as well as the consequentialist policy orientation, ... were part of a generational revolt against formalism.

This attack on formalism, in large part an attack on writers such as Williston (Chief Reporter of the Restatement on Contracts, proponent of Holmes’ objective theory of contract, and admirer of Langdell), had begun several decades earlier in Arthur Corbin’s law review writings. These ideas eventually received full treatment in his massive treatise on contracts – what Grant Gilmore has called “the greatest law book ever written.”

\[\text{216} \text{Lon L Fuller, “Consideration and Form”, supra note 114.}\]
\[\text{217} \text{Ibid at 800-803, 806-810.}\]
\[\text{218} \text{“Reliance Interest 1,” supra note 209 at 52.}\]
\[\text{219} \text{Transformation of American Law, supra note 182 at 184.}\]
\[\text{220} \text{Ibid.}\]
\[\text{221} \text{See Grant Gilmore, Death of Contract, supra note 167 at 14-17, 43-44.}\]
\[\text{222} \text{In his Preface to the First edition of his 1903 treatise, Williston wrote that his “indebtedness” to Langdell was “greater than that which every worker owes to the pioneer in his chosen field,” and he “freely availed” himself of Langdell’s permission to borrow his “selection and arrangement” of the cases (Samuel Williston, ed, A Selection of Cases on the Law of Contracts (Boston: Little, Brown, 1903), vol 1 at iii-iv)).}\]
\[\text{223} \text{See Gilmore, Death of Contract, supra note 167 at 57-58, Horwitz, Transformation of American Law, supra note 193 at 49-50.}\]
\[\text{225} \text{Gilmore, Death of Contract, supra note 167 at 57.}\]
Corbin distrusted abstract doctrine, emphasizing that all rules of law were “working rules,” rules that “represent past human transactions and influence those that are to come.” When a writer, judge, or legislator initially states a rule, he or she does so as an “experiment,” to see “how it will work and whether it will work at all.” If the rule has been shown to work – as scholarship and experience can determine – it can help “direct our steps, to avoid pain and loss, and to live in some degree of peace and comfort.” If law and legal scholarship did not aim at discovering working rules, Corbin wrote, the enterprise would be meaningless.

This pragmatic approach to understanding legal rules led Corbin to conduct careful, historical reviews of cases, focusing on the “operative facts,” undermining the idea that “doctrines can be used mechanically, and that there are correct and unchangeable definitions.” As contrasted with the faith in the external manifestation of the parties’ will, Corbin emphasized that judicial decisions in contracts “depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious,” undermining, as Fuller and Perdue would 20 years later, the Holmesian bright-line distinction between contract and tort. Corbin was also responsible for undermining the restrictive effects of the Holmesian “bargain theory” of consideration in the Restatement of Contracts: by finding and demonstrating hundreds of cases in which judges (including, notably, Justice Cardozo) had in fact granted relief where Holmesian consideration was not present, Corbin convinced the editors of the Restatement to introduce section 90, an estoppel rule that dramatically expanded contractual liability.

226 Corbin on Contracts, supra note 224, vol. 1 at IV-V.
227 Ibid at V.
228 Ibid.
229 Ibid (“[If we cannot] discover and construct working rules that have in fact worked and that will continue to work[,] it would indeed be well to hang the lawyers, close the law schools, burn the libraries, abolish the courts, and … [e]specially … to read no further in … the law of contracts”).
230 Ibid at 346, s 109. See also Gilmore, Death of Contract, supra note 167 at 58.
232 See Horwitz, ibid at 50. Gilmore argues for a unified approach to teaching contracts and torts, called “Contorts” (Death of Contract, supra note 167 at 90).
233 See Gilmore, ibid at 61-7.
The legal realists’ attack on formalism, conducted in part through the field of contracts, thus incorporated an emphasis on the actual decisions made by officials, as opposed to the rules themselves; a concern with the operative facts and judicial psychology; a focus on what the purpose of rules were and how they actually operated in practice; and an attention to the policy implications of legal decisions. With these new concerns, they rejected the abstractions of contract doctrine championed by Langdell, Williston, and the Restatement, shedding a light on real life – the real people, the real effects, and the function of legal rules.

B. The Normativity and Politics of Legal Realism

Whether the functionalism of the realists was descriptive or prescriptive – whether it was designed to argue for particular social policies and inflected with a political valence, or, instead, neutral – is a matter of debate. Some, like Laura Kalman, argue that the functionalism that undergirded the legal realists aspired to objectivity, was relativistic in its attention to particularity and, as a result, was primarily non-normative.\(^{234}\) That some legal realists, albeit a minority, conducted serious empirical studies of law,\(^{235}\) and that the desire to classify persisted (no longer according to principles, but according to facts\(^ {236}\) or “situation types”),\(^ {237}\) might suggest that legal realism turned toward a value-free social science.\(^ {238}\) This “standard” interpretation of the realist work (which Horwitz ascribes to Llewellyn’s choice to identify primarily “social science” legal realists in his influential 1931 article)\(^ {239}\) has, however, come under attack. Critical legal scholars such as Singer, Horwitz, and Schlegel argue that legal realism

\(^{234}\) Kalman, supra note 195 at 36-7.


\(^{236}\) Kalman, supra note 195 at 29 (“Within each field of law, functionalism classified by facts instead of by legal principles … Classification according to facts could bring order out of chaos”).

\(^{237}\) Singer, “Legal Realism Now”, supra note 162 at 474. Not all realists agreed that classification was even a possibility. Frank, for example, felt that judicial psychology was too complex to systematize. See Kronman, The Lost Lawyer, supra note 6 at 192 (attributing to Frank the following perspective: “The external factors that determine adjudication are … highly idiosyncratic … [a judge’s biases] tend to be so personal in character that their effects cannot be fit into a pattern”).

\(^{238}\) See Horwitz, The Transformation of American Law, supra note 182 at 181-2.

\(^{239}\) Horwitz argues that Llewellyn’s list of realists in his 1931 article “Some Realism About Realism – Responding to Dean Pound,” supra note 183 placed a disproportionate emphasis on the realists who were “deeply involved in the relationship between law and social sciences” (Transformation of American Law, ibid at 181). This has produced a “standard picture” with an “exaggerated” emphasis on social science has “smothered” the “critical thrust” of realism (ibid at 181-2).
was anything but value-neutral, that it embodied an inherent critique of market neutrality and that legal realist writers deployed their work – even their empirical social-science-like work\(^ {240} \) – to advance particular political convictions.

Morton Horwitz argues that “Realism is a continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought to create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical.”\(^ {241} \) Singer, simpatico with Horwitz, unpacks how the realist attack on freedom of contract deployed its market critique. Singer writes, “[A] major goal of the legal realists was to undermine laissez-faire ideology by attacking the idea of a self-regulating market system based on free contract, which operated largely outside state influence and control.”\(^ {242} \) Singer recounts how realist scholars argued that the state was intimately involved in the regulation of private activity: by enforcing contracts, contract law became public, not private, and the rules and conditions under which they were enforced implemented particular decisions about the “moral character of market relations and the fair distribution of power in the market.”\(^ {243} \)

The realists underscored that the decision on whether to enforce contracts implemented the social policy of encouraging market transactions.\(^ {244} \) By declaring certain contracts (such as social agreements, political arrangements, or religious matters) outside the bounds of contract law, the state is implementing social decisions about which contracts to enforce. The state’s role in regulating the substantive terms of contracts through legislation effects this social policy even more explicitly. And

\(^{240}\) See Schlegel, supra note 235 at 8 (legal realists did “attempt to do some empirical legal research and to turn their policy preferences into law”).

\(^{241}\) See Horwitz, Transformation of American Law, supra note 193 at 170.

\(^{242}\) “Legal Realism Now”, supra note 162 at 477. Cf. Friedman, supra note 71 at 20 (“The abstraction of classical contract law ... is a deliberate relinquishment of the temptation to restrict untrammeled individual autonomy or the completely free market in the name of social policy. The law of contract is, therefore, roughly coextensive with the free market”). See also Horwitz, ibid at 33 (“The contract law doctrine of the classical period constituted the “legal expression of free market principles”); Friedrich Kessler, “Contracts of Adhesion – Some Thoughts About Freedom of Contract” (1943) 43 Colum L Rev 629 at 630 (“our legal lore of contract reflects a proud spirit of individualism and of laissez faire”).

\(^{243}\) Ibid at 483.

\(^{244}\) Singer, ibid at 483-4 (summarizing Morris R Cohen, “The Basis of Contract” (1933) 46 Harv L Rev 553 and PS Atiyah, Essays on Contract (Oxford: Clarendon Press, 1986) 29). Specifically, the decision to enforce contracts “protect[s] the expectations of the promisee by curtailing the liberty of market participants to change their minds,” “subordinating the freedom to change one’s mind to the right to rely on promises” (Singer, ibid).
finally, in the interpretation of contracts, especially in gap-filling, the court is making value and public policy judgments about which customary practices to refer to.\textsuperscript{245}

The realists also critiqued the idea of market neutrality by looking at the substance of the private law rules themselves, quite apart from their argument that contract law as a whole has a public element. Contract doctrine itself, in other words, “inescapably engages courts in making moral and public policy decisions about the legitimate distribution and use of power in the market place.”\textsuperscript{246} Doctrines of duress, mistake, or undue influence could not be thought of as value-less rules, but rather as manifestations of a deliberate decision to accept a certain degree of coercion or to resolve the inequality of bargaining power in a particular way.\textsuperscript{247} The market could not be neutral because, according to Robert Hale, it was “permeated with coercive restrictions … out of conformity with any formula of ‘equal opportunity’ or of ‘preserving the equal rights of others.’”\textsuperscript{248} A legal system of contract that served to perpetuate this market, therefore, could not be neutral but was necessarily infused with political valence.

The attack on formalism thus, on this interpretation, not only attacked a way of thinking – via categorical, deductive rationality – it identified and subsequently attacked the political commitments to laissez-faire ideology implicit in the legal system’s support of a free-market economy. And even if one brackets the “critical,” “progressive” interpretation of the legal realism – say, on the thesis that not all legal realists shared these convictions, or on the historical assertion that legal realism’s legacy has transcended a Left political position – these insights generate a new focus for legal reasoning – the emphasis on policy.

\textsuperscript{245} Singer, \textit{ibid} at 485.

\textsuperscript{246} \textit{Ibid} at 486.


\textsuperscript{248} Hale, “Coercion and Distribution in a Supposedly Noncoercive State”, \textit{ibid} at 470.
C. Legal Realism’s Legacies for Legal Reasoning: Context, Policy, and Politics

The functionalist concern of legal realism manifests when law professors ask students to reflect on the policies that underlie legal rules, when they ask students what the “real effects” of judicial decisions are, or when they ask students to articulate, critique, or recommend new rules from a policy rationale. A functionalist concern makes it impossible to remain gratified by the elegance or internal coherence of a system; it dispels the idea that legal rules can determine the resolution of social problems and instead compels students to think both about outcomes and the means to arrive at those outcomes.

The functionalist attitude implies a few novel strategies for legal reasoning. In the first instance, it encourages thinking about how law effects policy decisions, which implies a series of different analytical tasks. First, to the extent that it imagines legal decisions as being motivated by policy considerations, it trains students to speak in the language of policy, which is conceptually distinct from speaking in terms of rules and principles, even if there is some overlap in the way judges have treated those terms in the past.249 Cultivating a policy literacy as part of learning to reason persuasively before judges thus adds to the toolkit of advocacy strategies. By adding to the set of acceptable types of legal argumentation, it also modifies what is considered to be in the legal vernacular, and hence redefines the shared set of understandings that constitute a legal consciousness.250

In encouraging students to speak in terms of policy, legal realism also encourages students to think about how law may serve ends through different means. In this lie the seeds of the Legal Process school, which shines a light on the distinct competencies that different institutions have for addressing

249 Waddams, Principle and Policy, supra note 188.

250 Cf. Kennedy, “Toward an Historical Understanding,” supra note 173 at 4 (consciousness is a “set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest”); ibid at 6 (“The notion behind legal consciousness is that people can ... share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind”); ibid at 23:

Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and theories about the world and self ... The main particularity of [legal consciousness] is that it contains a vast number of legal rules, arguments, and theories, and a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.
social problems, or even of Fuller’s idea of eunomics, the “science, theory, or study of good order and workable social arrangements” that is concerned with the “means aspect of the means-end relation.” These schools, one canonical and the other not, imply a different set of skills than parsing judicial reasoning. They might include technical skills related to other legal processes – such as statutory interpretation or drafting – or more holistic design oriented skills that require lawyers to reason about likely consequences of particular policy decisions, and to iterate these projections into the design of different legal regimes.

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251 See generally Henry M Hart, Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY: Foundation Press, 1994). I do not pursue the role of Legal Process more fully in this chapter, as I have opted to pursue the more direct lineage between legal reasoning and critical legal studies, law and economics, and sociolegal studies. See eg. Kronman, *The Lost Lawyer*, supra note 24 at 225-64; Singer, “Legal Realism Now”, supra note 162. In Chapter 3, I discuss the role that Legal Process thought has played in the *Milner* casebook. While Milner seemed heavily influenced by Fuller’s legal-process writings about legal education, those ideas largely withered on the vine when Milner met his untimely death and Stephen Waddams took over his casebook. Given the overwhelming emphasis on adjudication in both the casebooks (Chapter 3) and in contract law teaching (Chapter 5), Legal Process ideas do not seem to occur as prominently in Canadian contract law teaching as do the realist considerations of policy, politics, and context.

Moreover, while Kennedy & Fisher, * supra* note 37 place Fuller’s “Consideration and Form”, * supra* note 113 in the school of Legal Process, and while I acknowledge Fuller’s insight that the underlying policies one might identify in respect of “private acts” (contracts) can also be applied to legislative act (* ibid* at 806-807, 809), my own reading of “Consideration and Form” prioritizes its contribution to policy thinking, which, while it may include more than “the use of analogous policy arguments across legal issues” (Kennedy, “From the Will Theory”, *supra* note 48 at 104), is nonetheless better conceived of as a type of policy analysis than it is an extension of questions of institutional competence. See Kennedy, * ibid* at 105 (conflicting considerations analysis “selects from the continuum of normative possibilities the one that best accommodates (balances, maximizes, mini-maxes, or whatever) the conflicting considerations as they play out more or less strongly in the fact situation of which the case is an instance”). Conflicting considerations and policy analysis are broader, structural approaches to legal reasoning that might be applied to the substantive considerations of institutional competence. See Kennedy, * ibid* at 173 (“contract doctrine was the site ... [of a] debate using the full repertoire of formal arguments, substantive arguments, including rights, morality, and efficiency, and institutional competence arguments about the appropriate role of judges, administrators and legislatures. And the criterion for decision was balancing. Conflicting considerations had won the day”).


253 The full range of Fuller’s eunomics project was not made apparent until Kenneth Winston recovered Fuller’s collection of essays as his literary executor, and *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford: Hart) in 2001.

254 These might be particularly relevant in a field like contract law where most fields of human endeavour are governed by legislation, not the common law See Friedman, * supra* note 71 at 14.

255 A good historical example is Lon L Fuller & Melvin Aron Eisenberg, *Basic Contract Law*, 3d ed (St. Paul, Minn: West, 1972) at 93-7. A contemporary example, detailed in Chapter 3, is Angela Swan’s focus on the solicitor’s approach in her casebook.
An emphasis in policy also shines the light on the importance of ends, which can imply two other things for legal reasoning. First, it suggests that ability to evaluate the effects of a given policy can be admitted into the range of acceptable legal argumentation, a view that would encourage the ability to discover and assess social scientific data, including from economics. Second is the worthiness of deliberating about ends, and the importance of identifying a conflict between ends in legal argument. This concern is further developed and refined by scholars in the Critical Legal Studies movement, the subject of the next section.

D. Summary

Legal realism seizes on contextual factors to pierce the veil of formal rationality offered by classical legal thought. Political and policy-based inquiries necessarily require data – such as actual judicial outcomes or the social effects of legal rules – and perspectives – such as the critique of free markets – that are exogenous to legal doctrine; legal realists demonstrate how these data and perspectives are not apart, but rather constitutive, of legal reasoning. In this sense legal realism contributed to an internalization of context within contract law scholarship. The following sections explore three heirs of legal realism. Critical Legal Studies expands on the idea that law is “political.” Law and Economics represents the most enduring example in contract law scholarship of sustained policy-based legal inquiry. And the sociolegal studies school ruptures the premises of all the other traditions to posit social context at the forefront of legal analysis.

IV. Critical Legal Studies

The authors and teachers who comprised the Critical Legal Studies (CLS) movement of the 1970s and early 1980s built on many of the legal realist insights in the service of a particular political project – the desire to create a “more humane, egalitarian, and democratic society.” The movement’s impact on legal education has been considerable, and has transmitted some key messages to generations of law

256 The Brandeis brief is one early tangible example of social scientific evidence being incorporated into legal argumentation. See Martha Minow, “Foreword: Justice Engendered” (1987) 101 Harv L Rev 10 at 88-9 (“the famous "Brandeis brief in Muller v Oregon, 208 US 412 (1908)" marked a creative shift for the Court, introducing the use of vivid, factual detail as a way to break out of the formalist categories dominating the analysis”). For a view challenging the novelty of the Brandeis brief, and the idea that formalism was absent from the brief, see Noga Morag-Levine, “Facts, Formalism, and the Brandeis Brief: The Origins of a Myth” [2013] U Ill L Rev 59.

students.\textsuperscript{258} Primary among these is the insistence that “law is politics.”\textsuperscript{259} CLS authors continued the work of the legal realists in trying to uncover the political values contained within legal doctrine. They inflect this project, however, with a left-wing political valence, and accordingly highlight ideological oppositions, identifying “conservative hegemony” in law in order to reject it.\textsuperscript{260} The structural view in turns gives rise to an aspiration for a “utopian” re-imagination of the legal order. CLS scholars assert that legal education is a key instrument for facilitating the revolutionary project implied by its critique.\textsuperscript{261} As with legal realism, much of the theoretical groundwork is conducted through the field of private law, including contract law.

\textbf{A. Binary Opposition and Political Combat: Individualism and Altruism}

A common enterprise among CLS authors is the desire to illuminate two opposing value systems that underlie legal decision-making.\textsuperscript{262} These values – alternatively described as individualism/altruism,\textsuperscript{263} individualism/collectivism,\textsuperscript{264} or self-regarding/other-regarding,\textsuperscript{265} describe an underlying structure of the law, both the content of rules and the process of legal reasoning itself.

\textsuperscript{258} Duncan Kennedy’s role in leadership of the SJD program at Harvard is one example of how the lessons of CLS have become disseminated throughout the legal academy. On the “imperialism” of the ideas emanating from Ivy League US Law Schools, see Bryant Garth, “Legal Education Reform: Legal Globalization and Empire” (Presentation to the Canadian Association of Law Teachers, Victoria, BC, June 2013).


\textsuperscript{260} David Kairys, “Introduction” in Kairys, \textit{ibid} 1 at 3.

\textsuperscript{261} Cf. Kennedy, “Legal Education and the Reproduction of Hierarchy”, \textit{supra} note 124 at 610 (“The strategy I am advocating is that of building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society”).

\textsuperscript{262} See Kennedy, “Form and Substance”, \textit{supra} note 114 at 1712-13, 1723 (“The method ... might be called, in a loose sense, dialectical or structural or historicist or even the method of contractions” at 1712). Cf. Jay M Feinman, “Critical Approaches to Contract Law” (1983) 30 UCLA L Rev 829 at 854 (“contract law ... actually is only a recast, idealized form of the underlying illegitimate socioeconomic order”); Jay M Feinman & Peter Gabel, “Contract Law As Ideology” in David Kairys, \textit{supra} note 259, 373.

\textsuperscript{263} Kennedy, \textit{ibid}.

\textsuperscript{264} Feinman, “Critical Approaches to Contract Law,” \textit{supra} note 262 at 838, 839-44.

Acknowledging the presence of both opposing values within law serves to “break down the sense that legal argument is autonomous from moral, economic, and political discourse in general.”

While other formulations are common, Kennedy’s use of individualism and altruism is probably the most common articulation of the opposing “attitudes that manifest themselves in the debates about the content of private law rules.” For Kennedy, individualism entails making a “sharp distinction between one’s interests and those of others.” Individualists do not “engage in a discussion of ends or values” or acknowledge any interdependence “as moral beings.” Individualism conceives of freedom as “negative, alienated, and arbitrary,” placing no restraints on the choice of ends, and has “no moral content whatsoever.”

Altruism, by contrast, rejects the distinction between self-interest and the interests of others. Altruism implies that one “ought not to indulge a sharp preference for one’s own interest.” It enjoins individuals to sacrifice for and share with one another, to make themselves vulnerable to non-reciprocity. Altruist justice is collective – it seeks order according to “shared ends,” ends that can only be shared once “we surmount our alienation from one another.” In pursuit of this “universal ideal of human brotherhood,” discussion about values is “the highest form of discourse” in which the contingency of ends “provides occasions for ingenuity but never dispute.”

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266 The CLS authors give evidence for the presence of both altruistic and individualistic policies in existing positive law. See eg. Kennedy, “Form and Substance”, supra note 114 at 1719, 1721 (examples of altruism in law).

267 Ibid at 1724.

268 Ibid at 1713.

269 Ibid. For Kennedy, individualism accepts that self-conduct in pursuit of self-interest is legitimate, but also that certain ground rules are also legitimate in order to permit coexistence with other self-interested people (ibid).

270 Ibid at 1768.

271 Ibid at 1774.

272 Ibid at 1717.

273 Ibid at 1771.

274 Ibid.

275 Ibid at 1772.

276 Ibid at 1771.
B. The Politics of Legal Reasoning

It is not just the content of rules that can be alternatively described as individualist or altruistic. Rather, a major claim CLS scholars make is that particular forms of legal discourse are correlated with each value.

In “Form and Substance in Private Law Adjudication,” Kennedy argues that “altruist views on substantive private law issues lead to willingness to resort to standards in administration, while individualism seems to harmonize with an insistence on rigid rules rigidly applied.” Kennedy primarily uses contract law doctrine to advance the argument, stating that his article “abstracts to private law” the main point of Stewart Macaulay’s article on credit cards, “Private Legislation and the Duty to Read.” While Kennedy actually appears to be doing much more than that, his claim of correspondence between form and substance is rooted in contract law, and it probes deeply the interconnectedness between the form of legal argument and political values.

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277 Ibid at 1685.
279 While Macaulay’s work is similar in that it attempts to “make explicit” policy considerations involved in whether to hold credit cardholders liable for charges not made by them (ibid at 1056), Macaulay’s analysis differs from Kennedy’s in at least three ways. First, Macaulay does not suggest that either rules or standards are more amenable than the other to market- or non-market goals. Macaulay categorizes substantive policies using a quadrant created by two axes: “market” vs “non-market” goals, and “case-by-case” vs “rules” (ibid at 1057). He labels each quadrant (“market functioning,” “transactional policy,” “social (or economic) planning,” and “relief-of-hardship policy”) and then shows how each of these are expressed in the case law and legislation about the duty of cardholders to read the notice provisions in their credit card companies (ibid). Whereas this approach identifies a convergence of the “rules/standards” choice and the “market/ non-market” choice, it does not propose any distinct relation between each of the two types of choices. In fact, by using a symmetrical quadrant, he implies that rules or standards are equally compatible with market and non-market choices.

Second, Macaulay separates his discussion of substantive policies from the policies “related to the proper or efficient operation of the legal system” (ibid at 1056). He examines how these system policies (“Pressure on the Docket,” “Accurate Fact Finding,” “Efficacy and Efficiency,” and “Democratic Ideals as to Who Makes Policy and How” (ibid at 1067)) play out in the duty to read law in a separate section from his discussion of substantive policies, with minimal overlap (ibid at 1056, 1065-7). Kennedy, by contrast, probes the interrelationship between such factors as institutional choice and substantive political argument (“Form and Substance”, supra note 113 at 1751ff).

Third, Macaulay expresses a preference for transactional policy as a default choice (ibid at 1069). This market-based choice would run both contrary to Kennedy’s preference for altruism and, because it represents the intersection of a case-by-case approach and the market approach, appears not to anticipate Kennedy’s argument of non-correlation between the two.
i. Correspondence Between Legal Method and Ideology

Kennedy identifies three types of “correspondence” between rules and individualism, on the one hand, and standards and altruism, on the other. He describes the moral correspondence as being grounded in the ethic of self-reliance.280 Formally realizable rules put contracting parties on notice of their obligations. Any adverse effects are “deserved” and “those who suffer have no one to blame but themselves.”281 By contrast, Kennedy argues that standards relax the rigidity of formal rules, enable particular factors to be taken into account, and thereby mitigate the perils of over- or under-inclusion. The result, according to Kennedy, is to compel the party who would have benefitted from the bright line rule to forego their advantage. This maps perfectly onto the altruist concern with mercy, sharing and sacrifice.282

The economic correspondence consists of both an “abstract” and “historical” argument. The abstract argument identifies three principles where individualism and a preference for rules enjoy an “exact correspondence.”283 These are the preference for non-interventionism,284 the “sanction of abandonment,”285 and the idea that “both rules and the substantive reduction of altruistic duty will encourage transaction in general.”286 Historically, economic individualism and a preference for rules merged in classical laissez-faire economic theory.287 The altruist critique of classical laissez-faire, by contrast, argued that public interest would be better served by considering the particularities of the

280 Kennedy, ibid at 1738.
281 Ibid at 1739.
282 Ibid at 1740.
283 Ibid at 1745.
284 This is the idea that the individualist prefers to reach results indirectly, by influencing activity “without pretensions to full realization of the underlying purpose.” Similarly, rules by their nature accept some over- and under-inclusion, implying a greater range for choice. Both rules and individualism accept that a “total ordering” of legislative purpose may be counterproductive (ibid at 1741).
285 This is the idea that if left to their own devices (under, say, the threat of starvation), people will accomplish more than if they are forced to share. Starvation in the economic realm is analogized to rules in contract law that refuse to adjust legal intervention for particularities: the sanction of nullity, the rule to alert victims of danger (such as caveat emptor), and the refusal of the duty to disgorge benefits (ibid at 1742-3).
286 Ibid at 1743-4. This view, paralleled in a preference for security of transaction, reflects individualism in its understanding that “communitarian objectives are less important than secular economic growth” (ibid) at 1745.
287 Ibid at 1746 (The idea that the “natural” economic order was that in which private parties were left to their own devices fit perfectly with the notion that the state’s role was to create clear rules which could be mechanically applied).
situation. Thus, the “altruist substantive and formal arguments are identical ... The economic argument for standards is the formal version of the ... proposition ... that we can sometimes enforce our substantive values in particular cases ... without the disastrous consequences the individualist predicts.”

Kennedy highlights the political correspondence by identifying and critiquing two “gambits” that have been used to argue that judges should do “nothing but formulate and apply formally realizable general rules.” The “institutional competence” gambit asserts that judges, unlike legislatures, do not have the resources to conduct the wide-ranging factual inquiries they would need to do to determine the consequences of their decisions. Accordingly, they should leave result orientation to the legislature and confine themselves to general prescriptions. The “political question” gambit asserts that judges should refrain from employing standards, because standards involve “value judgments,” which are only legitimately engaged in by an elected majority. Judges should restrict themselves to fact-finding, a rational and objective enterprise.

Kennedy argues how these arguments in favour of rule-based adjudication are “‘essentially’ individualist.” By enjoining the judge from performing legislative functions – from considering “result[s],” “implement[ing] the community’s substantive purposes,” “behav[ing] politically,” introducing “new principles” of law, or “creating” doctrines – those who advance these arguments compel the judge to adhere to the “three-tiered” conception of legal activity that defers to private power, legitimates existing power disparities, and effects a “quintessentially individualist program.”

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288 Ibid at 1751.
289 Ibid at 1752.
290 Ibid.
291 Ibid.
292 Ibid at 1753.
293 Ibid at 1760-61.
294 Kennedy describes the three tiers as follows: “First, the private parties interact, and someone acquires a grievance. Second, the judge applies the system of Classical individualist common law rules, and either grants or denies a remedy. Third, the legislature, if it wishes, but not the judge, imposes altruistic duties that go beyond the common law system of remedies” (ibid at 1761).
295 Ibid at 1761.
Thus, for Kennedy, substance and form are intertwined, playing out a timeless, structural opposition between individualism and altruism. Other critical authors have performed variations on this theme. Jay Feinman argues for the relationship between individualism and “formal adjudication,” on one hand, and between collectivism and “purposive adjudication,” on the other, identifying many of the similar overlaps as Kennedy. Clare Dalton identifies a similar interconnectedness.

ii. Form, Substance, and Legal Reasoning

The relationship of form to substance deepens the relationship between law and politics by suggesting that not only substantive rules, but legal rationality itself, is political. Different reasoning strategies embody different ideological values, such as altruism or individualism. The relationship of form to substance signals to students that the choice of what type of legal argument to adopt entails a commitment to a particular ideology. In this way, it challenges the naturalness of legal reasoning that focuses on adjudication and disclaims responsibility for distributive effects. Moreover, by identifying moral, economic, and political implications of rule- and standard-based reasoning – by connecting legal rationality to historical, social, and cultural phenomena – CLS, like legal realism, places the legal discipline on the same plane as other modes of disciplinary thought, thereby breaking down the barrier between “legal” and other modes of reasoning.

C. Deconstruction: The Self/Other Split Underlying Contract Doctrine

Clare Dalton, in her “Essay on the Deconstruction of Contract Law Doctrine,” also employs the notion of dualities. Like Kennedy and Feinman, Dalton seeks to examine how a “split” between “self and other, subject and object … structures our contract doctrine.” Yet Dalton introduces new elements to

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296 “Critical Approaches to Contract Law,” supra note 262 at 847:

Both the individualist and the formal arguments are grounded in a belief in individual responsibility, while the collectivist and purposive positions demonstrate concern for the person caught in a hard situation … Both collectivist principles and purposive adjudication contemplate particularized adjustments by judges to take care of gaps or inconsistencies. Individualism and formal adjudication both adopt an indirect strategy of legal nonintervention, relying on private actions to achieve social goals, while both collectivism and purposive adjudication are result-oriented, favoring direct use of state authority to further the policies underlying the legal system.

297 “An Essay in the Deconstruction of Contract Doctrine,” supra note 247 at 1026 (“We are incapable of identifying form, let alone distinguishing the proper from the defective form, without recourse to the very substance we were hoping to escape”).

298 Ibid at 1000. Such calling to consciousness is performed throughout, and signaled in her epigraph, a citation of Friedrich Kessler’s essay on contracts of adhesion: “[A]pparently the realization of deepgoing antimonies in the
critical analysis of contract law doctrine. Whereas most of Kennedy’s and Feinman’s critiques serve to build a case for opposing ideologies – a work arguably of construction – Dalton deconstructs conventional dualities within contract law. She does so by insisting on the indeterminacy of doctrine and by highlighting new underlying concepts: knowledge and power. She introduces a feminist analysis by showing how opinions about women are a suitable alternative category to addressing the issues of knowledge and power.

i. Dichotomies Dissolve, Indeterminacy Abounds

Dalton problematizes three traditional doctrinal dichotomies – between the public and the private, between the objective and the subjective, and between form and substance. “In these manifold guises,” she writes, “contract law promises that the source of our deepest anxiety, between self and other, can be bridged.”\(^{299}\) In privileging one pole of each dichotomy over the other, contract law has historically performed a disservice by displacing the real problems of power and knowledge.\(^{300}\) Moreover, this privileging is inaccurate because it ignores the important “supplemental” role that the disfavoured pole plays, and fails to show how each pole is constituted and entailed by the other. She writes that “the terms of our polarities are empty … The doctrinal scheme provides us with no way to fill these empty vessels.”\(^{301}\) As a result, the “reassurance” that contract doctrine purports to provide – contract doctrine “talks as if our problems of power and of knowledge could be resolved in all but the ‘hard case’” – is illusory.\(^{302}\) Dalton uses traditional areas of contract law – implied contracts, duress, unconscionability, intent, consideration – to show the inconsistency of the doctrines and indeterminacy of legal argumentation.\(^{303}\)

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\(^{299}\) Dalton, *ibid* at 1002.

\(^{300}\) *Ibid* at 1000-1001 (“[W]hile the method of hierarchy in duality allows our doctrinal rhetoric to avoid the underlying problems of power and knowledge, it is an avoidance that is also a confession: the problems are only displaced, not overcome”).

\(^{301}\) *Ibid* at 1002.

\(^{302}\) *Ibid*.

\(^{303}\) *Ibid* at 1007.
a. The Public/Private Dichotomy

A major concern of contract doctrine, she writes, “has been to suppress ‘publicness’”304 by both artificially conflating public and private or artificially separating the two.305 Two examples serve to “dissolve” the public/private dichotomy.306 First is the doctrinal distinction between quasi-contract and contract implied-in-fact. Dalton argues that the traditional distinction between the former as public and the latter as private “does not and cannot hold.”307 She concludes that “public concerns necessarily inform the judicial decision to impose contractual obligations [i.e., to find a contract implied-in-fact],” and that the “quasi-contractual obligation depends on prior understandings of the private relationships of the parties.”308 Such unsuccessful distinctions suggest that the doctrine is “wrest[ling] with knowledge,”309 where knowledge of public requires knowledge of private, and vice versa.310

Duress and unconscionability provide further grounds for undermining the public/private distinction, this time “[w]restling with the problem of power.”311 The two doctrines are “self-consciously ‘public’ insofar as they are designed to police the limits of a fair bargain,”312 but the doctrinal devices “suppress the public aspect” by denying that “these questions can be answered only by recourse to non-neutral and non-consensual choices.”313 By diverting attention from the public question of power to the

304 Ibid at 1010.
305 Ibid at 1011.
306 Ibid at 1024.
307 Ibid at 1015.
308 Ibid at 1024. See also ibid at 1018-9.
309 Ibid at 1014.
310 Ibid at 1022 (“Divining intention in order to find an implied-in-fact contract depends on understanding the societal background against which a relationship is formed: A knowledge of private thus requires a knowledge of public. Deciding that a social relationship requires the imposition of a quasi-contract depends on knowing which relationship the parties have entered: A knowledge of public thus requires a knowledge of private”).
311 Ibid at 1024.
312 Ibid.
313 Ibid at 1026. They do so by conflating public and private, by shifting attention away from the favoured party to the disfavoured party; by “policing process, not substance,” and by confining the applicability of the public doctrines to extreme cases (ibid).
private aspects of agreement, both the case law and the Restatement “forestall”\textsuperscript{314} or “distract ... from”\textsuperscript{315} the overtly political question of drawing lines for the legitimate use of power.

b. The Objective/Subjective Dichotomy

Dalton explores the indeterminacy of rules around manifestation and intent to explore the “subversive”\textsuperscript{316} supplementary role that subjective intent plays in contract doctrine.\textsuperscript{317} She argues that subjective will remained an important source of obligation even in the Holmesian objective theory of contract.\textsuperscript{318} She shows how the resort to formal hierarchies for determining contractual intent had to revert to subjective intent to retain legitimacy,\textsuperscript{319} even though the doctrine was unable to “identify intention in any reliable way.”\textsuperscript{320} And she shows how standards of responsibility add “yet another layer of indeterminacy to the decisionmaking process” by introducing contradictory criteria for decision-making.\textsuperscript{321}

All this indeterminacy exposes the question of knowledge yet leaves it unresolved, suggesting that contract doctrine provides no reliable basis on which to justify contract as a system of voluntary obligation. Yet doctrine equally fails to articulate the norms on which an alternative public system of obligation would rest. Accordingly, “the interaction of the problems of power and knowledge ... leaves these areas of doctrine without a determinate basis for resolving contractual disputes.”\textsuperscript{322}

c. The Form/Substance Dichotomy

Dalton examines consideration doctrine to demonstrate that form and substance are necessarily intertwined. She complicates the dominant “story” that consideration is exclusively a question of form,

\textsuperscript{314} Ibid at 1037.
\textsuperscript{315} Ibid at 1038.
\textsuperscript{316} Ibid at 1041-2.
\textsuperscript{317} Ibid at 1040 (“our legal culture has explicitly opted to favor objective over subjective, form over substance, and manifestation over intent ... Yet the suppressed subjective constantly erupts to threaten the priority accorded, is subdued, and erupts again”).
\textsuperscript{318} Ibid at 1042-4.
\textsuperscript{319} Ibid at 1050.
\textsuperscript{320} Ibid at 1052.
\textsuperscript{321} Ibid at 1063.
\textsuperscript{322} Ibid at 1066.
arguing that the formal theory inevitably makes reference to two alternative notions of substance: subjective intent or objective value. She shows how substance plays an important role in the Holmesian “bargain theory” (tracing that idea forward to sections 71 and 81 of the *Second Restatement*, and modern case law), but also in the reliance theory. She argues further that case law has maintained the bargain/reliance distinction only by recourse to substance. 

Accordingly, the “conventional” need to view consideration as form, therefore, cannot stand: we are unable to “recognize form without reference to substance, or to recognize substance without its embodiment in some form.” Since consideration-as-form and consideration-as-substance operate at cross-purposes, the result is indeterminacy. Moreover, the failure of the substance/form dichotomy suggests that consideration cannot avoid its status as a “mechanism for policing the adequacy of exchange,” which is a question of power.

ii. Images of Women as an Alternative, Albeit Equally Indeterminate, Account

Dalton then shows how the case law on cohabitation agreements is beset by indeterminacy by its reliance on the problematic dichotomies. That case law shows how doctrine “blind[s] us to some

323 *Ibid* at 1069-83.
324 *Ibid* at 1087 (the relationship between sections 71 (bargain) and 90 (reliance) of the *Second Restatement* “replicates the internal structure of consideration doctrine;” a distinct bargain theory is impossible “unless reinforced by renegade notions of substance;” a distinct reliance theory requires finding the absence of such substance).
325 *Ibid* at 1087-92. She also argues that substance is equally required in the cognate sections of the *Second Restatement* on unilateral contract, sections 45 and 87 (*ibid* at 1092-4).
326 *Ibid* at 1094.
327 *Ibid*.
328 *Ibid* at 1066 (“[T]he problem of power is the central problem of both consideration doctrine and the related doctrine of reliance”). Dalton goes on to emphasize the interconnectedness of the three dichotomies identified. The move from form to substance draws in the notion of subjective intent, for whose search, as outlined in the previous section on manifestation and intent, “partakes of precisely those public aspects from which consideration doctrine hoped to extricate itself.” The dichotomies of form/substance and subjective/objective “are but particular expressions of our inability to resolve the tension between public and private, self and other” (*ibid* at 1094)
329 The doctrinal category of express and implied agreements invites arguments of both privateness (that a cohabitation agreement is too private to enforce) and publicness (that judges should defer to regulation), but do not yield determinate outcomes because they can make possible “virtually any decision” and lead to contradictions and inconsistencies (*ibid* at 1098-1102). Doctrines of manifestation and intent “seem to depend quite openly on their views” of policy or morality; this transition from private to public is objectionable because it
aspects of what the disputes are actually about,”330 “denies the complexities, and ambiguities, of human relationships,”331 “distances us from our lived experience,”332 and offers “false assurance that our concerns can be met – that public can be reconciled with private, manifestation with intent, from with substance.”333

In the face of these multiple failures of doctrine, Dalton proposes an alternative category to “illuminate[] the decisionmaking process.”334 These are the “nightmarish” images of women in the cases.335 These, it turns out, are as “internally contradictory” as the contract doctrine, but since they involve the “same perceived divide between self and other,” they are “as deserving of attention as any other dimension.” They “influence how judges frame rule-talk and policy-talk”336 and can help us “understand[]... this particular set of cases.”337

is done “un-self-consciously (ibid at 1102-104). And judges inevitably employ concerns of substantive intent or objective value in determining whether sexual or domestic services may constitute consideration. The doctrinal treatment generally “ignore[s] issues of fairness or power,” even though these issues are inevitably present in cohabitation situations (ibid at 1104-108).

330 Ibid at 1095.
331 Ibid.
332 Ibid at 1108-1109.
333 Ibid at 1109.
334 Ibid at 1110.
335 One pair of contradictory images is that of woman as angel/ woman as whore. As angel, the woman “ministers to her male partner out of noble emotions ... with no thought of personal gain;” as whore, she “lures the man ... with the bait of her sexuality.” Either way, the woman is portrayed as a “provider, not a partner” in [sexual] enjoyment. Were sex viewed as a “mutually satisfying element,” by contrast, it could be separated out of, and not seen to “contaminate,” the agreement as it does in the case law. Marriage is similarly portrayed in contrasting ways – either as the only way that men and women express continuing commitment, or as a fragile institution that relies for its survival on “unwavering support by the state.” The former image can imply that men intend to avoid responsibility for their wives, and that women “bear the burden of protecting themselves by avoiding the irregular relationship;” the latter that “men and women would not choose to enter relationships of caring without pressure from the state” (ibid at 1110-3).
336 Ibid at 1110.
337 Ibid at 1113.
iii. Indeterminacy and Alternative Accounts in Legal Education

The implications for law and legal reasoning are threefold. First, Dalton’s account highlights the role of indeterminacy of law, casting doubt on the otherwise solid doctrinal foundations of legal reasoning. As will be shown in Chapter 5, underscoring law’s indeterminacy is a core objective of many law teachers, and any approach that seeks to show how rules do not generate results in a simple fashion draws on the idea. The type of analysis Dalton provides is a primary legitimating source for an approach that communicates that law is not certain and that rules do not determine outcomes. Dalton’s work is even more relevant to the core of contract law study because it directly attacks foundational concepts. Her target is the rules of the mainstream Contract Law class: if they are indeterminate, then the indeterminacy is potentially everywhere.

A second implication is the idea that underlying fundamental interests may do more work in arriving at legal results than the doctrinal categories do. This is an extension of the approach that Fuller took in identifying reliance, in one case, or “private autonomy,” in another, as the foundation for legal decisions. But the concepts of “knowledge” and “power” are more abstract, far-reaching, and broadly social. Dalton’s work thus might encourage those teaching legal reasoning to look for deep, structural ideas well beneath the surface, and that these ideas may also lie on the same plane as other frameworks for social critique.

Third, by proposing the alternative category of “opinions about women,” Dalton demonstrates four distinct ideas for legal education. First is the attitude of experimentation and nonlinear thinking. If a purported exogenous-to-law consideration such as opinions about women can be considered as useful as conventional doctrinal categories for analyzing judicial decisions, the implication is that such categories might one day come to be just as useful more making arguments and influencing legal decisions. Thus, she models how to generate new tools for the eclectic toolkit. Second, it implies that these tools might very well draw on other disciplines, thus breaking down the barrier between legal and

338 Ibid at 1003 (“In part because the thinking that has gone into this piece began and continues in the classroom, my selected texts are familiar classroom materials”).
340 Cf. Dalton, supra note 247 at 1003 (“clear[ing] the way for ... new inquiries into how and why cases get decided the way they do”).
“other” discourses. Third, she claims a place for the “concrete aspects of social life” into the core of law, showing how the social context of legal decisions is as constitutive of legal reasoning as are the traditional abstract terms of doctrine. Finally, she shows how the specific social critique of feminism is not exogenous but rather integral (“as deserving of attention as any other dimension”) to legal analysis and expanding legal discourse.

D. Critique Leads to Re-Imagination, Revolution, Utopia

In the CLS imaginary, therefore, politics runs throughout law: as an account of the policies motivating judicial decision-making, in the form of legal reasoning itself, and as deeper issues (like power and knowledge) that underlie the doctrine. These elements, stated on their own, portray the image of a diagnostic or descriptive project; but in fact the project extends to something more active. Numerous authors speak of the “utopian” or “revolutionary” possibilities of contract law. Identifying the substructures of the doctrine and the modes of reasoning are thus but one step towards a more aspirational project. CLS thinking urges a view of legal education that invites students to not only understand the structures underlying the law, but to resist and reimagine the socioeconomic inequities that these structures reflect and sustain.

Feinman writes, “Thinking about utopian contract law involves imagining new structures of law and society which do not embody unfairness, that either confront or transcend the self/other dichotomy. “Every contracts case” has the potential for lawyers to “transform ordinary situations into extraordinary occasions.” He shows, for example, how Judge Lambros’ suggestion in a pre-trial

341 Dalton endeavours to “rais[e] … to consciousness” women’s these issues, whose parallels lie in psychological, psychoanalytic, and feminist theory, as well as in myth and history (ibid at 1112-3).

342 Ibid at 1003.

343 This is suggested by the formulation that the concrete aspects of social life “create the disputes and shape their resolution,” and are “covertly translated” into doctrine (ibid at 1003).

344 Ibid at 1110.


346 See eg. Feinman, ibid at 857, 858.

347 Ibid at 857.

348 Ibid at 858.
hearing in *Local 1330*—that the longstanding presence of a steel mill in the community may have created a property right in the people—contains the seeds of such transformative vision. Although the court eventually rejected this idea, Feinman argues that a critical and utopian approach to studying contract law shows how such a “retreat to established doctrine” was not “compelled.” Karl Klare uses the same case, *Local 1330*, to train his students to construct novel arguments in favour of social justice. His vision of “critical legal pedagogy” aims to “empower” students to participate, “as lawyers in transformative social movements,” to view their professional life as an opportunity to “infuse legal rules and practices with emancipatory and egalitarian content,” and to argue “professionally and respectably for the utopian and the possible.”

Through critique of contract law, whether by illuminating structural oppositions, deconstructing existing dualities in doctrine, or inviting students to think creatively, scholars in the Critical Legal Studies school intimately connect the study and practice of law with politics. This happens by highlighting the political elements of doctrine and legal reasoning, by modeling new and creative ways of reimagining legal reasoning, by encouraging lawyers to deliberate about ends, and, finally, by connecting the practice of law to a political agenda and utopian vision. Students learn that they can “pursue moral and political projects and articulate visions of social organization and social justice” through the “medium” of “legal discourse,” a discourse that is infused with considerations of context. This context includes both the granular appreciation of “concrete social reality” and the more general context of opposing ideologies. By emphasizing that politics is inseparable from law and that legal analysis is inseparable from context, CLS thus complicates and enriches the notion of both legal reasoning and legal practice.

V. Law and Economics

The Law and Economics movement inherited from the legal realist tradition, as did CLS, the inclination to look beyond the words of judicial decisions to determine other factors that account for

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349 *Local 1330, United Steel Workers v United State Steel Corp*, 631 F.2d 1264 (6th Cir. 1980) [*Local 1330*].


351 *Ibid* at 858.

352 Klare, “Teaching *Local 1330,*” *supra* note 50 at 77 [emphasis in original].

353 *Ibid* at 78.

them. Like the authors studied so far, law-and-economics scholars argued that concepts from “outside” law are internal to, and operative on, legal reasoning. Law and economics, despite its numerous differences with CLS, likewise emphasizes social and economic context over text. It also continues the legal realist tradition of encouraging students to speak, do, and care about policy. Given law and economics’ influence on the field of contract law, it reinforces the claim that teaching contract law is an opportunity to cultivate a broad contextual understanding of law and proposes additional legal reasoning techniques for the lawyer’s eclectic toolkit.

A. Efficiency: The Retreat from Politics

In contrast to CLS, law and economics retreats from politics in at least two ways. First, whereas CLS encourages a debate among values, law and economics forecloses any such debate by positing efficiency as a totalizing standard for analyzing and understanding law. Rigorous studies about means (typified by cost-benefit analyses) eclipse political debate about desired social ends.

Second, and relatedly, whereas distributional outcomes are a central preoccupation of CLS, they are often a secondary concern in the economic analysis of law. Economists are generally interested more in the “size of the pie” as opposed to how it is sliced. A primary example is the powerful influence the Coase theorem has had on the economic analysis of law. Ronald Coase demonstrated that, under certain assumptions (including zero transaction costs and wealth effects), legal liability is immaterial to the allocation of resources. An efficient result will be obtained regardless of the rights

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355 Numerous scholars have argued that it is almost impossible to teach contract law without considering law and economics. See eg. Frank H Stephen, The Economics of the Law (Brighton: Wheatsheaf Books, 1988).


conferred; the right only affects distribution of profits as between people.\textsuperscript{361} Since transaction costs are never zero, much subsequent analysis has focused on what conditions will maximize efficiency.\textsuperscript{362} The minor role that distribution plays in the Coase theorem reflects the broad tendency in economic analysis for efficiency concerns to predominate over distributional ones.\textsuperscript{363}

Another way this preference for efficiency over distributional concerns arises is in law and economics’ preference for forward-looking planning (“ex ante” concerns) over after-the-fact distribution (“ex post”). The law and economics scholar is generally concerned with how legal rules will affect future instances of initial behaviour, not how damages will be awarded after the fact.\textsuperscript{364} Forward looking, and guided by the measuring stick of Kaldor-Hicks efficiency (which posits only a hypothetical

\textsuperscript{361} See also Posner, \textit{Economic Analysis of Law}, supra note 356 at 49-53.

\textsuperscript{362} See eg. Posner, \textit{ibid} at 52 (arguing that “efficiency is promoted by assigning the legal right to the person who would buy it ... if it were assigned initially to the other party”). On the influence of the Coase theorem on legal scholarship, see e.g. Posner, \textit{ibid} at 22 (the Coase theorem opened up a “vast field of legal doctrine to fruitful economic analysis”); Robert Cooter & Thomas Ulen, \textit{Law and Economics}, 6th ed (Boston: Pearson Education, 2012) at 1, n 2.


http://wps.aw.com/aw_cooterulen_lawecon_6/178/45815/11728880.cw/index.html. Polinsky also argues that the tax system is preferable to doctrinal rules for redistributive purposes (\textit{supra} note 358 at 119-6).

\textsuperscript{364} See eg. Richard A Posner & Andrew M Rosenfield, “Impossibility and Related Doctrines in Contract Law: An Economic Analysis” (1977) 6 J Legal Studies 83 at 113 (the 50-50 loss-sharing approach in cases of impossibility “result[s] from a misplaced emphasis on ex post loss distribution rather than ex ante risk bearing”); Stephen S Ashley, “The Economic Implications of the Doctrine of Impossibility” (1975) 26 Hastings LJ 1251 at 1251. Posner illustrates the dichotomy between the (backward-looking) lawyer and (forward-looking) economist thus:

The economist is not (one might think) interested in the one question that concerns the victim and his lawyer: Who should bear the costs of this accident? To the economist, the accident is a closed chapter. The costs that it inflicted are sunk. The economist is interested in methods of preventing future accidents that are not cost-justified ... but the parties to the litigation have no interest in the future. Their concern is limited to the financial consequences of a past accident (\textit{Economic Analysis of Law}, supra note 345 at 24).

Although Posner concedes that the dichotomy is “overstated” \textit{ibid} it usefully highlights the point that the consequences of the past are generally not of concern to the economist.
law and economics thus self-consciously avoids the question of “politics,” to the extent that politics is understood either as being a contest about ends or a concern with distributional consequences. Indeed, even when law and economics scholars consider distributional justice, they may do so using the yardstick of efficiency.

B. The Primacy of Policy

In place of politics, law and economics emphasizes an inquiry into means – what “policy” would best accomplish a given end. Accordingly, a major influence on legal reasoning is to cultivate a policy mind – the ability to infer the consequential effects of existing legal rules and, correspondingly, to consider how different rules may be employed to effect social change. Like classical legal thought, legal realism, and CLS, law and economics uses doctrine as a sort of laboratory. In this case, the student seeks to understand economic policies that may have accounted for legal decisions. It is then a short step to evaluate judicial decisions on economic grounds and, ultimately, to pivot into a more creative mode in which students are asked to reflect on the efficacy of certain legal rules and devise recommendations.

A brief selection of law-and-economics scholarship in the field of contract law is illustrative of how economic analysis employs policy-based reasoning. Economic analysis can provide a standard for determining “instrument” choice, suggesting, for example, that the costs of a judicial unconscionability standard outweigh the benefits, and that legislative intervention would therefore be preferable. Economic analysis can recommend “policy expedients” to, in the case of procedural unconscionability, attain a “socially optimal” level of information produced by the supply side of the market. It can

365 See Stephen, supra note 355 at 57-8.
367 See eg. Cooter & Ulen, supra note 362 at 9 (“Economics conceives of laws as incentives for changing behavior (implicit prices) and as instruments for policy objectives (efficiency and distribution”).
368 See eg. Richard A Epstein, “Unconscionability: A Critical Reappraisal” (1975) 18 J Law & Econ 293 at 303, 305 (“The difficult question with unconscionability is not whether it works towards a legitimate end, but whether its application comes at too great a price;” “the unconscionability doctrine functions at best as a very blunt instrument ... it is better to adopt some legislative solution to the problem”). See also Donald N Dewees & Michael J Trebilcock, “Judicial Control of Standard Form Contracts” in Paul Burrows & Cento G Veljanovski, eds, The Economic Approach to Law (London: Butterworths, 1981).
assess the “effects” of doctrine, using the Coase theorem to determine that liability rules in the case of substantive unfairness (in a songwriter’s contract) are unlikely to affect the ultimate disparity in bargaining power.\textsuperscript{370} It can prescribe efficiency-based recommendations to courts, for example, to impose “risk on the better information-gatherer” in cases of mistake\textsuperscript{371} or to recommend discharge in the case of impossibility based on whether the promisee or promisor is the superior risk-bearer.\textsuperscript{372} It can measure whether cases are “correctly” decided from an economic perspective,\textsuperscript{373} or assess – using ex ante considerations – whether a given test (such as the uniqueness requirement for awarding the remedy of specific performance) is “economically rational.”\textsuperscript{374}

All of these examples suggest that economic analysis can help students participate in the “design of optimal legal policy.”\textsuperscript{375} In most of these examples, the method is to assume an end goal (greater efficiency) and then assess both the substance of the rules and the appropriate rule-maker against this end. The student seeped in this tradition (or taught by someone so steeped) thus may (as with legal realism) develop a policy literacy, aptitude, and concern.

C. Efficiency and Economic Science

Law and economics has another mode that operates at a higher level of abstraction. This resides in the idea that the rules “taken as a whole, tend to look as though they were chosen with a view to maximizing social wealth”\textsuperscript{376} – the claim that the common law more generally is motivated by questions of efficiency. This more macro perspective provides an overarching explanatory account for the

\textsuperscript{370} Ibid at 382-3.
\textsuperscript{372} Posner & Rosenfield, supra note 364 at 90.
\textsuperscript{373} See eg. ibid at 102, 105.
\textsuperscript{375} Anthony T Kronman & Richard A Posner, the Economics of Contract Law (Boston: Little, Brown, 1979) at 153 (notes and questions to the chapter on Mistake and Impossibility).
\textsuperscript{376} Frank I Michelman, “A Comment on Some Uses and Abuses of Economics in Law” (1979) 46 U Chi L Rev 307 at 308. Michelman argues that Posner “misdescribes his own theory by calling it ‘the hypothesis that common law rules and institutions tend to promote economic efficiency’” (citing Richard Posner, “Some Uses and Abuses of Economics in Law” (1979) 46 U Chi L Rev 281). Interestingly, by 1992 in his textbook Economic Analysis of Law, Posner adopts a formulation closer to that of Michelman: “The theory is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society” (supra note 345 at 23). See also Stephen, supra note 355 at 195ff (providing a synthetic literature review on “the efficiency of the common law”).
common law. In this respect, it is akin to CLS, whose individualist/collectivist lens also provides a structural explanation (the presence of the duality between individualism/altruism).377 This similarity led Kronman to describe both as coexisting under the broader category of “scientific realism.”378 Both traditions seek to uncover a “latent order” beneath the chaotic surface of disperse decisions,379 employ the use of abstract arguments to identify this order, and look in the direction of a “simple” or “comprehensive” account of the basic legal structure.380

This external perspective, like in CLS, constitutes a preoccupation with context extrinsic to law. This manifests in law and economics’ resort to economic science, which provides a set of distinctive methods to apply to areas of public and private law.381 Unlike Langdellian legal science, which used empirical inductive methods to discover the principles that were immanent in case law, law and economics considers legal doctrine as a more pliable, less authoritative subject of analysis.382 Rather than viewing judicial reasoning as constitutive of the principles, the operating principle (efficiency) is derived from outside the law. Legal discourse can accordingly be discounted as “rhetoric” that “conceals, rather than illuminate[s]” the “true grounds of legal decision”; legal doctrines may be no more than “inarticulate gropings toward efficiency.”383

377 That is, at least until some crits “recant[ed]” of the structural centrality (Peter Gabel & Duncan Kennedy, “Roll Over Beethoven” (1984) 36 Stan L Rev 1 at 15-16). Despite Kennedy’s renunciation of the “fundamental contradiction” (ibid at 15), Kronman writes that “many other authors in the critical legal studies movement have followed [Kennedy] in his original assumptions, taking the argument of ‘Form and Substance’ as a model” (Kronman, The Lost Lawyer, supra note 24 at 246, n 135 (citing such authors as Allan Hutchison, Patrick Monahan, Robert Gordon, and Steven Winter)).

378 Kronman, The Lost Lawyer, ibid at 245-6.

379 Ibid at 226.

380 Ibid at 246. Kronman also writes that “[t]he special premise of economics as a descriptive social science is to be explained by the sparseness and universality of its most basic principles” (ibid at 227).

381 See Posner, Economic Analysis of Law, supra note 356 at 17-18 (“abstraction is of the essence of scientific inquiry, and economic aspires to be scientific.” Posner recounts three tests of a scientific theory – its explanatory power, its predictive power, and “its ability to underwrite effective interventions in the world of action”).

382 Law and economics in this regard is also different from CLS writings. These, while they may attack doctrinal concepts as surface phenomena, nevertheless conceive of the legal rules as somewhat constitutive of the underlying tensions: the rules not only reflect the individual/altruist divide, they also perpetuate it.

383 Posner, Economic Analysis of Law, supra note 356 at 23. See also Henry Hansmann, “The Current State of Law-and-Economics Scholarship” (1983) 33 J Legal Educ 217 at 226-7 (arguing that Kronman’s economic work on mistake (“Mistake, Disclosure, Information, and the Law of Contracts,” supra note 371) provided “coherence to a subject that was previously analyzed in terms of distinctions that were largely arbitrary”).
This view of legal education arguably takes a derisive stance towards the actual words and terms of law. For Posner, legal education “consists primarily of learning to dig beneath the rhetorical surface to find [economic] grounds.”\textsuperscript{384} In the field of contracts, he illustrates this approach, distinguishing cases where “legal” reasoning alone is inconclusive,\textsuperscript{385} “explain[ing]” case outcomes and “translating” from legal into economic terms,\textsuperscript{386} and analyzing cases to illustrate “how the courts can arrive at an economically efficient result yet disguise it as an apparently meaningless semantic distinction.”\textsuperscript{387} This approach may encourage skepticism about legal reasoning. This is not so much the skepticism that law conceals political bias (as realist and CLS writings encourage) or that law is primarily an instrument for a selection of policy tools (compatible with realism, CLS, and law and economics), but rather the deeper skepticism about law as a distinct reasoning process— that is its own stand-alone discipline.\textsuperscript{388} By identifying a primary scientific Archimedean point, it further implies that even if economics were not one’s chosen lens, some other lens would be needed to make sense of legal reasoning.\textsuperscript{389} The endeavour of understanding law, even critiquing legal reasoning, on its own terms, might then seem naïve without the scientific standards of a distinctive discipline.

The importance of law and economics may be a bridge toward a broader ethos of interdisciplinarity. For example, the University of Chicago, the epicenter of law and economics, embodies a robustly interdisciplinary approach to the study of law, making it administratively easy for

\textsuperscript{384} Ibid.

\textsuperscript{385} See eg. Richard A Posner, “Gratuitous Promises in Economics and Law” (1977) 6 J Legal Studies 411, reprinted in Kronman & Posner, supra note 375, 46 at 57 (distinguishing two modification-of-contract cases on the ground that one, Goebel v Linn, 47 Mich 489, 11 NW 284 (1882), conferred a real benefit on a promisee whereas the other, Alaska Packers’ Ass’n v Domenico, 117 Fed 99 (9th Cir 1902), was “merely a strategic ploy designed to exploit a monopoly position” (at 75)).

\textsuperscript{386} Ibid at 59-60 (using the notion of transaction costs to explain why courts are willing to find an implied contract between a physician and a stranger in distress, but not between a violinist playing outside a stranger’s window. This concept, he argues, explains the reasoning better than the concept of unjust enrichment).

\textsuperscript{387} Posner & Rosenfield, supra note 364 at 106.

\textsuperscript{388} Contra Weinrib, “Can Law Survive Legal Education?", supra note 5.

\textsuperscript{389} Cf. George Priest, “Social Science Theory and Legal Education: The Law School As a University” (1983) 33 J Legal Educ 437 (the social sciences “deny the importance of law as a subject”: “As a legal scholar becomes serious about some behavioral science and sophisticated in its practice, he is pulled away from the law as a distinct subject and even as an interesting subject” at 437-8).
students to take courses “across the midway” from the law school, in all sorts of disciplines. The emphasis on economics as a distinct discipline may have the effect of raising the esteem of interdisciplinarity as a core part of legal study – that is, rather than emphasizing the negative (law is not a discipline; legal reasoning means nothing on its face), it could alternatively incite reflection about the disciplinary character of knowledge, both within legal discourse and in other fields. Thus law and economics, being a well-developed application of an exogenous discipline to law, could encourage embracing other disciplines while at the same time prompt reflection about what, if anything, makes law distinctive. And this may be answered both at the level of methodology or reasoning (cutting against the law-and-economics skepticism), or at the level of values (such as justice, fairness, etc.) whose relationship with efficiency could then be explored.

D. The Normativity of Law and Economics

Law-and-economics scholars take pains to distinguish between whether their arguments are normative (arguing for efficiency), positive (assessing whether law attains efficiency), or prescriptive. Some authors point out, however, that simply asserting this distinction does not establish it. Indeed, as Hansmann argues, much law-and-economics scholarship advertised as being strictly positive “has a distinctly normative edge.” He cites Posner’s efficiency analyses of the common law as an example: “the authors leave no doubt that they feel that the decision calculus they propose is, as a matter of policy, the one that they think the law ought to apply … They set up standards by which the law is to be evaluated, and they judge current doctrine according to those standards.”

If there is a normative bias, it may be because some scholars consider having a “clear and strong normative principle” to be a particularly appealing aspect of law and economics – it may seem like a

390 See Martha Nussbaum, “Crossing the Midway, By and By” (7 February 2013), The Record (Alumni Magazine of the University of Chicago Law School), online: <http://www.law.uchicago.edu/alumni/magazine/spring13/crossing>.

391 Posner hints at this complex relationship when he writes that “there is more to justice than economics ... Always, however, economics can provide value clarification by showing the society what it must give up to achieve a noneconomic ideal of justice” (Economic Analysis of Law, supra note 356 at 27).

392 See Stephen, supra note 355 at 23.

393 Hansmann, supra note 383 at 233.

394 Ibid at 233-34 (emphasis in original). Hansmann is referring, in part, to Posner’s contracts work in Posner & Rosenfield, supra note 364. The tendency to blur positive and normative is not confined to Posner’s work: Hansmann confesses to some “minor guilt [himself] in this respect” (ibid at 233, n 46).
“breath of fresh air for legal scholars who have been seeking to cope for so long from the moral nihilism since legal realism.” Law and economics on this view provides clarity and direction in an otherwise chaotic and relativistic field. Efficiency – more specifically the Kaldor-Hicks criterion of wealth maximization – derives its normative force from a number of factors. It highlights individual preferences, to the extent that the value being maximized is the subjectively defined individual preference for a particular good; it is founded upon the liberal notion of consent; and it reflects the commonsense view that waste is undesirable.

Thus, teaching in the law-and-economics mode may function as a type of advocacy to law students in spite of its avowed capacity to simply describe or predict. Implicit in using efficiency as a universal measuring stick is the message that efficiency is desirable, even primary. This may entail the substantively political point that redistribution is a secondary concern in the design of policy. It also leads to the secondary conclusion that redistribution is more “costly” (thus less preferable) if done through legal doctrine than legislatively through the tax-and-transfer system. Such reasoning reprises the claim (critiqued by Kennedy) that “politics” is the domain of the legislator and not the judge. Thus the primacy of efficiency may be doubly political, both recommending a particular normative end but

395 Hansmann, ibid at 232. Cf. Roger C Cramton, “The Place of Economics in Legal Education” (1983) 33 J Legal Ed 183 (“The aftermath of the corrosive acid of legal realism is a search for explanation and prediction that will provide some order for the chaos that otherwise prevails” at 183).
396 See Stephen, supra note 355 at 58 (calling the Kaldor-Hicks criterion a criterion of wealth-maximization); Posner, Economic Analysis of Law, supra note 356 at 14 (distinguishing Pareto and Kaldor-Hicks efficiency and arguing that Kaldor-Hicks is the most commonly used standard in law and economics).
397 Posner, ibid at 12-13. See also Ernest Gellhorn & Glen O Robinson, “The Role of Economic Analysis in Legal Education” (1983) 33 J Legal Ed 247 at 249 (The assumption of utility-maximizing behaviour is one “of human purposiveness that postulates behavior can be explained by assuming that people generally act rationally to fulfill personal objectives”).
399 See Cooter & Ulen, supra note 362 at 9; Posner, Economic Analysis of Law, supra note 356 at 27.
400 See eg. Cooter & Ulen, ibid at 7-9.
401 Polinsky, supra note 358, c 15 (Efficiency and Equity Reconsidered).
402 See Chapter 3, IV(B)(i), above.
also policing the bounds of appropriate considerations for the development of the common law, shunting “politics” to the domain of the legislator.403

E. The Paradigm Challenged

Another critique of law and economics is the partial impression it gives of human nature and society. Baker, for example, argues that “market model” of Posner’s work is incapable of considering “social value,” which he describes as “any experience or state of affairs whose definition makes essential reference to reciprocal states of awareness among two or more persons.”404 Macneil argues, similarly, that the market model is ineffectual for analyzing contractual relations.405 Michelman argues that the paradigm of the individual want-maximizer communicates an incomplete vision of people. To mistake an “organizing construct for a structural reality ... limits vision and deadens will.” Efficiency and its corresponding concepts such as “commodity,” “conditions,” “cost,” and “marginal trade-off” convey only “one side of the story of what people ... are and can be like.” Viewed as totalizing concepts, they can, worse, conceal the “distinguishing and contingent features of our own thought processes.”406

F. Summary

Law and economics, a major feature of American contract law scholarship, adopts the practices and premises of economic science, positing efficiency as a primary metric against which to measure legal rules. Judicial decisions are viewed as social facts or phenomena to which the extrinsic analysis is

403 Kennedy, it is no surprise, takes issue with this implication. He argues that efficiency is an indeterminate concept and that it cannot provide determinate answers without recourse ultimately to political value judgments. See Kennedy, “Cost-Benefit Analysis of Entitlement Problems: A Critique,” supra note 357 at 388 (“If we wish to use economic analysis to generate a determinate private law regime, we have to make a series of value judgments that are more controversial, because more overtly political, than that involved in saying that we should make changes whose benefits to the gainers exceed the costs to the losers”). Elsewhere, Kennedy calls the claim that economics is an apolitical policy science a sham. See Duncan Kennedy, The New Palgrave Dictionary of Economics and the Law, ed Peter Newman (Macmillan Reference Limited, 1998) sub vero “law-and-economics from the perspective of critical legal studies” 465 at 471, (“legal economists prefer to pursue their political projects with respect to the economy by manipulating the apparently value neutral, technocratic discourse of efficiency to support their preferred outcomes, rather than by arguing on more overtly distributive or justice oriented grounds, that is, on the ideological grounds that half-consciously motivate them”).


applied, suggesting that the supposed internal rationality of the common law is not only secondary but potentially mere rhetoric. Unlike CLS, however, which looks beneath the surface of judicial reasoning to lay bare ideological debate, law and economics tends to evade political considerations. This is evident in its emphasis on allocation over distribution and in its claim that distributional concerns are more efficiently dealt with through the tax-and-transfer system. Having posited efficiency as the social end to be determined, the inquiry becomes a means-focused exercise in policy development. The implication is to undermine the idea that there is a distinctively legal way of reasoning and instead to emphasize more “functional” thinking.407 The student learns to critique judicial reasons as to whether they are “correctly” decided, inferring the effects of rules on ex ante choices, and prospectively guessing about aggregate consequential future behaviour. This process of inference invites students to suggest or prescribe alternative rules that would have “optimal” effects on efficiency.

While the desired end – efficiency – is not posited as a matter of debate (in the way that CLS encourages debate over desired ends), the law student is encouraged to care about the consequences of legal rules and to venture creative, forward-looking policy solutions. By considering legal rules as instruments of a universal standard for analyzing social and economic context, economic analysis inserts law into the social fabric, breaking down the barrier between law and policy, law and society. Also, by questioning whether the terms of legal discourse provide intelligible and operative standards for decision-making, law and economics also encourages students to consider the methods of other disciplines, not only expanding their toolkit, but incidentally introducing them to other premises, values, and subject matter for inquiry.

VI. Sociolegal Studies and Relational Contract Theory

A rich tradition has sought to break out of the confines of traditional contract doctrine. Even as legal realism sought to disturb the clear waters of classical legal thought, as much as it, CLS, and Law and Economics sought to uncover the underlying policy or politics of law, these traditions shared with classical legal thought a commitment to at least two premises. These were, first, that the primary source

407 Hansmann, supra note 383 at 226 (“Metaphor, analogy, and simile have heretofore been the primary analytic tools of the lawyer. Law students are taught to be good at making, and defeating, arguments to the effect that one fact situation looks like another and therefore should be treated similarly ... Positive economic analysis has had the salutary effect of replacing such analogical reasoning with a reasoning of a more functional sort”).
of law was the state and, second, that the discrete contract was a sufficient starting point for analysis. The focus, in both CLS and law and economics, on judicial decisions as the primary subject of analysis illustrates these commitments. The work of Stewart Macaulay and Ian Macneil rejected these premises and forged radically new directions in the study of contract law, deploying methods that more closely intertwined law and society, and developing a “relational” theory of contract law. Of all these traditions, relational contract law may incorporate context to the greatest extent, deploying empirical studies of human relations to radically reformulate the concepts and questions of contract law.

A. Stewart Macaulay

Stewart Macaulay’s groundbreaking article, “Non-Contractual Relations in Business: A Preliminary Study,” undermined one of the foundational premises of contract law: that it matters at all. The article concludes, on the basis of empirical investigation, that the role of detailed planning and legal sanctions in many business exchanges is small. Macaulay provides a number of tentative explanations for this. Contract may not be necessary because other devices such as custom and non-legal sanctions serve equivalent functions. Such non-legal sanctions derive from commercial norms.

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408 Cf. Robert W Gordon, “Macaulay, Macneil,” supra note 160 at 565-7 (“Macaulay-Macneil ‘relationalism’ [is] a continuation of two scholarly projects [critique of classical contract law and reconstruction on empirical grounds] embraced, but then prematurely abandoned, by the Legal Realists of the 1920s and 1930s … This kind of work … was quite modest in its methods: it stuck to appellate contracts cases, and drew its contextual data from the facts as related in those cases”).


410 The article opens with the line “What good is contract law? who uses it? when and how?” (Macaulay, “Non-Contractual Relations”, supra note 114). See also Robert W Gordon, “Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction” in Revisiting the Contract Law Scholarship of Stewart Macaulay, ibid, 49 [Gordon, “Macaulay Scrambles the Public-Private Distinction”] at 59 (“For lawyers, its – most unwelcome, and for 25 years after its publication mostly ignored – main implication seemed to be that contract law was very nearly irrelevant to a good deal of actual business contracting”).

411 Macaulay conducted interviews with “68 businessmen and lawyers representing 43 companies and six large firms” in the manufacturing sector (Macaulay, ibid at 55).

412 Ibid at 62-3.

413 Such norms include the notion that commitments are to be honoured, or that one should “produce a good product and stand behind it” (ibid at 63).
the existence of personal relationships, and a desire to continue doing business in the future. Contract may also produce undesirable effects on business relationships or impede flexibility; costs of litigation or its threat may outweigh benefits. Correlatively, businesses may elect to use contract when the gains exceed the costs, occasionally according to “irrational” factors, or perhaps depending on the identity of the decision maker.

Macaulay’s piece is relational in the sense that it tries to understand the forces that sustain, and the role that law plays in, long-term business relationships. One underlying assumption is that ongoing relationships are desirable (or at minimum, as a matter of fact, are deemed by the economic actors at play to be desirable). “Non-Contractual Relations in Business” led to numerous relational law and economics studies exploring how businesses “solved relational problems without the ex post intervention of courts,” findings that included the point that many firms often did not act

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414 Personal relationships between members of both exchange partners may “exert pressures for conformity to expectations” (ibid).

415 Ibid at 63-4.

416 Detailed contracts may “get in the way of creating good exchange relationship” or “create undesirable business relationships” (ibid at 64).

417 Ibid at 64-5. Costs include the deterioration of the relationship, actual costs of litigation (including having executives travel and diverting their energies), causing an exchange relationship to end in “divorce,” upsetting executives by cross-examining them in public or having them “los[e] control” to lawyers (ibid).

418 This may occur when “planning serves the internal needs” of the organization, when it is likely that significant problems will arise, or when other devices will not work (for example, if a relationship has already ended, as in the case of a terminated franchise) (ibid at 65).

419 Such irrational factors includes a desire to “get even” for having been made to look foolish or to retaliate for being the subject of fraud or bad faith (ibid at 66).

420 Macaulay suggests that salespeople are least likely to want to pursue the contractual route while financial officers are more inclined; the house lawyers are “more difficult to classify” (ibid at 66). Regarding the inside counsel, Macaulay writes:

He is likely to have some sympathy with a more contractual method of dealing. He shares the outside lawyer’s ‘craft urge’ to see exchange transactions neat and tidy from a legal standpoint ... Yet the house counsel is more a part of the organization and more aware of its goals and subject to its internal sanctions. If the potential risks are not too great, he may hesitate to suggest a more contractual procedure to the sales department. He must sell his services to the other operating departments, and he must hoard what power he has, expending it on only what he sees as significant issues (ibid.).


422 Scott, “Promise and Peril”, supra note 409.
opportunistically and that there was a widespread taste for reciprocity.\textsuperscript{423} One recent study uses a similar methodology to Macaulay’s, illustrating how commercial parties use formal contracts to coordinate expectations and sustain informal relationships.\textsuperscript{424}

Macaulay’s article, and his broader work, also paved the way for sociological relationalism, with a set of commitments that contrast with those of relational law and economics. One such contrast was sociological relationalism’s focus on power relations. Such scholars shifted attention away from business-business relationships and toward relationships of less equal bargaining power, including franchise relationships, adhesion contracts, consumer contracts, and bankruptcy.\textsuperscript{425} Another “point of contention” was the sociological realists’ preference for “context” over textual interpretation: given the rich informal normative forces at play between individuals, it was argued that courts should give this exogenous content force in the interpretation of formal doctrines. Whether the parol evidence rule should be strictly enforced, as in New York, or whether there should be more exceptions to enable extrinsic contextual information to be considered, as in California, is a good proxy for the debate.\textsuperscript{426} Llewellyn’s formulation in Article 2 of the Uniform Commercial Code, in which agreement was defined as the “bargain of the parties in fact as found in their language or by implication of other circumstances” is another example of such a context-led standard.\textsuperscript{427}

\textsuperscript{423} See ibid at 110-13, 121-22 (recounting the influence of “Non-Contractual Relations in Business”, supra note 114 on relational law and economics theory and the latter’s allegiance to \textit{ex ante} reasoning). Scott makes the point that one offshoot of the resulting scholarship led to a new legal formalism. Upon the discovery that formal norms often “crowd out” informal norms, scholars have demonstrated that firms prefer clear, transparent rules and a corresponding textualist interpretation (ibid at 112), and have argued that such rules are less likely to “damage the delicate ecology of trust relations” (Gordon, “Macaulay Scrambles the Public-Private Distinction,” supra note 410 at 66 (paraphrasing R Scott, “The Death of Contract Law” (2004) 54 UTLJ 369 at 386-9)).


\textsuperscript{425} See Scott, “Promise and Peril”, supra note 409 at 113-4. Macaulay himself wrote, reflecting on “Non-Contractual Relations in Business”, supra note 114 twenty-one years after its publication, that “power, exploitation and dependence are also significant factors ... continuing relationship are not necessarily nice” (“An Empirical View of Contract” [1985] Wisc L Rev 465 at 469 (cited in Scott, ibid at 113). That said, “Non-Contractual Relations in Business” was originally critiqued, in the comment immediately following its publication, as not giving “sufficient weight” to the difference in relative bargaining position and power of the parties (William M Evan, “Comment” (1963) 28 Am Soc Rev 67 at 67.

\textsuperscript{426} See Scott, ibid at 120.

\textsuperscript{427} Cited in Macaulay, “The Real Deal and the Paper Deal,” supra note 421 at 48. Macaulay details the countervailing pressures in the drafting of Article 2 between Llewellyn (and his preference for “situation sense”) and the more textualist practicing lawyers on the drafting committee. In “The Real Deal and the Paper Deal,” ibid, Macaulay argues in favour of a such a context-based standard of interpretation (“[T]here is a text between the
Another influence “Non-Contractual Relations in Business” has had is on the development of legal pluralism. To the extent that actual behaviour becomes the focus of empirical study, awareness of alternative, “informal” normative orders increases. Thus the empirical work in “Non-Contractual Relations in Business” has expanded to various other sites and relationships, leading to a larger subset of normative orders, extending, arguably, to the existence of “everyday law.” Macaulay, Gordon writes:

paints a richly variegated landscape of “interpenetrated rather than distinct entities,” a variety – in ascending order of degree of formal organization – of networks, “semi-autonomous social fields,” and private governments; all of them lawmakers in the sense of generating norms and rules and imposing sanctions on those subject to them, creating a de facto society of “legal pluralism.”

“Non-Contractual Relations in Business” was a thirteen-page article published outside the law review system; yet it has become among the most-cited articles on contract law ever. It impugned the notion that “contract-law-as-taught-in-law-schools” is a foundational element of market behaviour and suggested that informal relationships effectively predominate. To a certain degree, the article continued the themes integral to both law and economics and CLS – cost-benefit analysis and power relationships, to name but two. But relational theory probes these questions while attacking the premises on which mainstream theory rests – that contract doctrine matters to people, and that the lines of most contracts, and if we do not attempt to implement this implicit text, we are denying reasonable expectation” at 79), though recognizes that “there are costs and benefits flowing from focusing on the paper deal and from focusing on the real deal” (at 45). Scott takes the cost-benefit rationale one step further and argues for a “unified” relational contracts theory in which there are “different rules for different contexts,” which would include a regulatory regime for adhesion contracts, and a differentiated regime among sophisticated parties depending on the degree of uncertainty (ibid at 126-135). Macaulay also notes that Ian Macneil “would accept that in some situations courts should treat what are in fact relational transactions as if they were discrete” (“The Real and the Paper Deal,” ibid at 66).


Gordon, ibid at 61.
rules of the state are the pre-eminent site of law.\footnote{Cf. Gordon, \textit{ibid} at 63-4 (Macaulay’s “is a picture of legal pluralism, not legal centrism”).} Stewart Macaulay made these contributions without working as a self-styled theorist.\footnote{See Scott, “Promise and Peril”, \textit{supra} note 409 at 113.} The implications of relational theory were fleshed out by another great scholar, Ian Macneil. His ideas also represent a radical attack on the orthodoxy of contract law, injecting the idea of context into its very essence.

B. Ian Macneil

Informed by Macaulay’s early work, Ian Macneil developed a rich theoretical construct called the relational theory of contract. Macneil deployed the term “relational” in two senses: first, to describe a type of contract (the “relational contract”), distinguished from the “discrete” contract; and second, to describe a set of properties (“the relational aspects”) that applied to all contracts, including discrete contracts.\footnote{See Jay Feinman, “The Reception of Ian Macneil’s Work on Contract in the USA,” \textit{supra} note 160 at 61-2.} Macneil rejects the classical premise that the discrete contract between economically self-maximizing individuals is an appropriate model for understanding contracting behaviour. In its place he offers an iconoclastic revisioning, drawing from and devising a broader theory of exchange.\footnote{For a non-reductive overview of Macneil’s work, see David Campbell, “Ian Macneil and the Relational Theory of Contract,” \textit{supra} note 433. Cf. Feinman, \textit{ibid} at 60 (In the “mainstream view, the core assertions of relational contract theory are that the dominant form of contract, relational contract, ‘occurs over time through continuous interactions between parties,’ so that ‘one must investigate the social conditions that form the foundation of the parties’ bargains in order to comprehend the relational norms and hence to understand contract’ (citing RA Hillman, “The Crisis in Modern Contract Theory” (1988) 67 Texas L Rev)). Feinman’s main point in reproducing this quote is to argue that ‘Macneil’s relational contract theory is different and much richer than the mainstream interpretation of it’ (\textit{ibid} at 61).} This theory not only provides new categories for analysis, it gives rise to norms that further account for contract.\footnote{Cf. Campbell, \textit{ibid} at 9 (Macneil “has sought to reveal the shortcomings of the philosophy articulated by the classical law that produces incoherence and empirical irrelevance. By doing so, he has attempted to construct a coherent and relevant rival law of contract”).}

Any short summary of Macneil’s work will undoubtedly be reductive given his vast, rich, at times ambiguous, and extremely prolific scholarship.\footnote{For a non-reductive overview of Macneil’s work, see David Campbell, “Ian Macneil and the Relational Theory of Contract,” \textit{supra} note 433. Cf. Feinman, \textit{ibid} at 60 (In the “mainstream view, the core assertions of relational contract theory are that the dominant form of contract, relational contract, ‘occurs over time through continuous interactions between parties,’ so that ‘one must investigate the social conditions that form the foundation of the parties’ bargains in order to comprehend the relational norms and hence to understand contract’ (citing RA Hillman, “The Crisis in Modern Contract Theory” (1988) 67 Texas L Rev)). Feinman’s main point in reproducing this quote is to argue that ‘Macneil’s relational contract theory is different and much richer than the mainstream interpretation of it’ (\textit{ibid} at 61).} Despite this caveat, a few salient features of his work exemplify his approach to legal scholarship and legal education. Throughout his theory he challenges, rejects, or completely reorients the existing frame around which contract can be understood.
he does this is by distinguishing the model-type of classical contract law – the “discrete” contract – from a new class of relational contracts. He does this using a complex and novel series of categories. In “The Many Futures of Contract,” for example, he shows how transactional or relational contracts differentially treat twelve distinct concepts, ranging from “overall relation-type,” to planning, duration, “obligations undertaken,” and “participant views.”

He also, essentially, rejects the premises of classical contract law. One way he does so is by showing how the two main norms of classical contract law – discreteness and presentation (the “bringing of the future into the present”), are “impossible” to achieve. He argues that there is almost no contract in which “no relation exists between the parties apart from the simple exchange of goods.” Rather, there is a “prevalence of relation in the post-industrial socioeconomic world,” and “every contract is necessarily partially a relational contract, that is, one involving relations other than a discrete exchange.”

Macneil also bases his theory on fundamental concepts that couldn’t be more remote from the animating concepts of will, autonomy, and economic self-interest that undergird classical (or neoclassical) contract law. Macneil’s “primal roots” of contract include the specialization of labour and the capacious understanding of exchange it entails, a sense of choice, and conscious awareness of

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437 (1974) 47 S Cal L Rev 691 at 738-40 (providing a table of this taxonomy).

438 The New Social Contract, supra note 142 at 60.


440 The New Social Contract, supra note 142 at 10. Campbell identifies an ambiguity in Macneil’s work: whereas he often claims that no contract could be accurately characterized as discrete, he does appear to admit the theoretical possibility of a discrete contract as a theoretically limiting case (supra note 433 at 20-26).


443 Ibid at 72 (“Neoclassical contract law is founded in theory and organization on the discrete transaction, but with many a relational concession”). Macneil gives the example from the Battle-of-the-Forms section of UCC-2-207, which modifies the previous binary rule about whether consent existed in favour of a provision that can make “‘we accept, but do not accept’ a contract” (ibid at 73). See also “Contracts: Adjustment of Long-Term Economic Relations,” supra note 428 at 873-6 (discussing the neoclassical response to the “conflict between specific planning and needs for flexibility”).

444 Exchange can “happen in countless ways other than measured reciprocal exchange” (The New Social Contract, ibid at 3); “[i]n particular it does not necessarily require measurement of reciprocity or individual consciousness of reciprocity or conscious desires to gain by exchange ... Nor is payment [in money] necessarily involved ...
the future, all of which are “embedded and intertwined in a society,”445 or depend upon a “social matrix.”446

Equally iconoclastic is his definition of contract, in particular his emphasis on “non-promissory exchange projectors.” By contract, Macneil means “no more and no less than the relations among parties to the process of projecting exchange.”447 While promise may be a familiar and “extraordinarily powerful mechanism for projecting exchange into the future,”448 it is not necessarily the most effective or important. Rather, a range of nonpromissory mechanisms “cause exchange to occur in certain patterns.”449 The most important among these are “expectations that future exchange and other future motivations arising out of dependence on ongoing relations,”450 and the “most hidden projector … is any production or other securing of goods for future sale in a market.”451

These radically different starting points in turn imply452 norms that are more complex and relational than those in classical contract law. Macneil lists nine norms that are common to discrete and relational contracts, albeit in different degrees,453 two discrete norms (discreteness and presentation),


446 “The Many Futures of Contract,” supra note 437 at 710. Macneil sets out these primal roots in detail in ibid at 692-712, and in more abridged form in The New Social Contract, ibid at 1-4. The New Social Contract opens with the following sentences: “We shall start at the beginning. In the beginning was society. And ever since has been society.” Later on the same page: “Contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without language is impossible; and contract without social structure and stability is quite literally – unthinkable” (at 1).


449 ibid at 715-6.

450 ibid at 715.

451 ibid at 716.

452 Macneil writes that they “emerge from the patterns of basic contractual behaviour” he described earlier in The New Social Contract (ibid at 39).

453 These include role integrity, mutuality, implementation of planning, effectuation of consent, flexibility, contractual solidarity, the “linking” norms of restitution, reliance, and expectation interests, creation and restraint of power, and harmonization with the social matrix (ibid at 40-59).
and four “especially relational” norms. These norms contribute to Macneil’s “‘rich classificatory apparatus’ for the analysis of contracts,” but they are especially important because of the substantive messages they convey about human relations. Macneil’s “major achievement” is to reveal relational contracts as a class of contracts in which “conscious co-operation” predominantly guides parties’ action. Wealth maximization, quite in contrast to the central role it plays in the classical conception of the discrete contract, drastically recedes in importance in the relational contract. The fact that the “common norms” include such norms as contractual solidarity and mutuality emphasize the centrality that the notion of solidarity plays in his thinking.

C. Relationalism and Legal Education

The paradigm of contractual relations introduces into legal education new stories about human and economic relations and new stories about law. The empirical and theoretical work of Macaulay and Macneil suggest that “organic solidarity,” as opposed to narrow self-interested transactionalism, typifies contract behaviour. This is not just a message of aspiration. It is a fully theorized account of social and economic relations that demonstrates “how economic purposes and actions are deeply embedded in social fields, in densely woven webs of local customs, conventional morals, bonds of loyalty and entrenched hierarchies.” It is furthermore backed up by fact, in the numerous empirical studies that show that contracting parties do behave this way. Relationalism suggests that norms and sanctions of the state play but a marginal role in contracting behaviour, and that among the state norms that do

454 Ibid at 65, 66, 70. These latter four are role integrity (“keeping the [complex] role together in a coherent piece,” preservation of the relation, harmonization of conflict, and “supracontractual” social and political norms).
456 Campbell, supra note 433 at 18.
460 Ibid at 574.
461 See Macaulay, “The Real Deal and the Paper Deal,” supra note 421, n 69 for a list of such empirical studies.
matter, the common law rules are much less relevant than their prominent place in legal education would suggest.\footnote{See Gordon, “Macaulay, Macneil,” supra note 160 at 573 (“Macneil points out that from the relational perspective, any body of law that helps to structure contracting behavior ought to be considered as part of contract law: this would include corporation law and labor law, for example”).}

A Contract Law course inspired by relationalism would incorporate a number of distinctive features. As the discrete transaction recedes as the subject of analysis, the doctrinal canon loses its relevance: consent becomes less important than society;\footnote{See \textit{ibid} at 573-4 (“Contracts scholarship rests upon the essentially liberal premise that the terms of social interaction ought to be, and in our society mostly are, instituted by consent … Macneil and Macaulay imported a new element into contracts discourse, the element of society … which helps to condition both what is chosen and the structures within which choices are played out”).} the bargain theory of consideration gives way to a notion of exchange that is broader in concept and more continuous and extended in time;\footnote{See eg. Ian R Macneil, “Whither Contracts” (1969) 21 J Legal Ed 403, n 2 (distinguishing exchange and consideration).} and the measure of damages looks less like a foundational question for the nature of contractual liability than it does a mere fillip for bargaining.\footnote{\textit{Cf.} Gordon, “Macaulay, Macneil,” \textit{supra} note 160 at 572 (“Macaulay … pictures the occasional resort by private parties to formal legal sanctions as mostly opportunistic and tactical: by going to law … they are usually engaged in maneuvers to improve their bargaining positions”).} Instead, relationalism invites both new subjects of analysis and new classifications.

readjustment.” As a “continuation of the [realist] project of contextualism,” relationalism invites the inclusion of empirical, historical, and narrative accounts of context in the study of judicial decisions. Contracts casebooks by both Macaulay and Macneil employ this approach, using cases as a primary subject matter but emphasizing a broader contextual approach.471

Another implication for legal education is a displacement of the state as a focus on legal inquiry— an invitation to legal educators to “abandon the assumptions of legal centris$m.”472 Pushed to the

468 Stewart Macaulay, “The Real Deal and the Paper Deal,” supra note 421 at 78. Macaulay uses the example of United States District Judge Robert Merhige, Jr, who presided over a consolidated set of cases between Westinghouse, a supplier of material for nuclear power plants, and its various customers. An increase in the cost of uranium had made it impossible for Westinghouse to supply uranium at its promised price, leading to a tangle of litigation. Macaulay recounts how Judge Merhige encouraged settlement through a number of techniques—announcing on day one that he expected the cases to get settled, hosting cocktail parties at his house for the lawyers and corporate executives, extending negotiation conferences, and appointing a law school dean as a special master in charge of mediation. The result was a solution that permitted both the plants and Westinghouse to continue their operations, whereas a judicial award of damages would have effectively terminated the relationships by putting Westinghouse into bankruptcy. In yet another example involving Westinghouse, judicial encouragement of settlement provoked a creative solution that enabled parties to continue operations by agreeing to share the costs of waste removal. See ibid at 73-6.

469 Feinman, “The Reception of Ian Macneil’s Work on Contract in the USA,” supra note 160 at 60.

470 For a list of other social-contextual studies that led the way relationalism, see Gordon, “Macaulay, Macneil,” supra note 160 at 567-8.

471 In the Preface to his 1971 casebook, Macneil writes, “A considerable amount of text, both original and borrowed, is devoted to trying to put the legal materials into the economic, social, financial and commercial contexts in which they exist” (Ian R Macneil, Cases and Material on Contracts: Exchange Transactions and Relationships (Mineola, NY: Foundation Press, 1971 at xv). In the Macaulay casebook, the first two readings provide a contextual background for the student of both studying law and studying contracts. In the second of these essays, after acknowledging that the casebook adopts a “blend” of legal realism, critical legal studies, law and economics, and sociolegal studies, the authors write, “We try to put contract law into its full context” (Stewart Macaulay et al, “What Contract Study Should Be” in Stewart Macaulay et al, Contracts: Law in Action (Charlottesville, VI: Michie, 1995), vol 1 at 29. Macaulay’s casebook has been characterized as providing “in-depth contextual discussions of contractual interactions, why litigation occurred, and how the litigation affected the relationship” (Braucher, Kidwell & Whitford, supra note 398 at xi). Both authors were influenced by Richard Danzig: Macneil acknowledges Danzig at the beginning of the second edition of the casebook (Ian R Macneil, Contracts: Exchange Transactions and Relations: Cases and Materials, 2d ed (Mineola, NY: Foundation Press, 1978) at xxiii [Macneil, Contracts: Exchange Transactions and Relations]), and Macaulay’s casebook, which grew out of a “Wisconsin supplement to the Macneil casebook,” were “significantly influenced” by Danzig, The Capability Problem In Contract Law, supra note 466 (Braucher, Kidwell & Whitford, ibid at xi-xii). Citations to the Macneil casebook are to the second edition unless otherwise noted.

extreme, this could encapsulate a vision of legal study that markedly seeks to undermine the centrality of state legal norms by emphasizing other modes and sites of normativity.\textsuperscript{473}

More cautiously, legal study could be organized functionally to highlight the interaction of state and other norms. Such is the type of categorical revisioning Macneil offers in his casebook.\textsuperscript{474} Macneil rejects for the large part the “doctrinal” ordering of traditional casebooks in favour of a two-part organization, the first on the “Introduction to the Nature of Contract,” including an emphasis on exchange and continuing relations, and the second on “Planning Contractual Relations,” emphasizing planning for performance and risk.\textsuperscript{475} This organization effects Macneil’s multi-layered goals for the contracts classroom: to “broaden” how students perceive exchange relations, to develop a sense of justice and injustice in a “system based on ongoing contractual relations,” to gain a sense of the type of contractual relations, to introduce students to planning for performance, and to appreciate the interplay between “exchange transactions and relations with the legal system.”\textsuperscript{476}

Many of these desiderata are refinements and developments of the visionary piece Macneil presented to the AALS contracts section in 1967, in which he argued that the “areas of human behavior from which materials are selected [should be] as broad as the common elements of contract behaviour;”\textsuperscript{477} that the subject matter “should have some present or future topical significance;”\textsuperscript{478} that


\textsuperscript{474} One of the five principal “goals of substantive social and professional understanding” that the Macneil casebook seeks is “[d]eveloping a general understanding of the interplay of exchange transactions and relations with the legal system,” including the “basic relations between law and the projection of exchange into the future” (\textit{Contracts: Exchange Transactions and Relations}, supra note 471 at xvii-xviii). Macneil also writes that “the book is organized largely on functional patterns, rather than doctrinally” (\textit{ibid} at xix).

\textsuperscript{475} \textit{Ibid} at xxv-xxviii.

\textsuperscript{476} \textit{Ibid} at xvii-xviii.


\textsuperscript{478} “Whither Contracts,” \textit{ibid} at 414.
“non-legal as well as legal aspects of contractual relationship should be considered;”\(^{479}\) that “a considerable volume of statutory law and administrative regulation and decisions ... be included;”\(^{480}\) and that functional over doctrinal organization be followed.\(^{481}\)

Taking these together, a Contract Law course organized around relational theory would communicate to students the primacy of lived experience over abstract legal categories. This would arise both at the more modest level that doctrinal rules are in “response to contractual relations,” and not vice versa,\(^{482}\) and at the more ambitious level that a plurality of legal sources – state and otherwise – impacts contracting behaviour. Contractual relations occur embedded within society, whose formal legal regulation is one of “legislative and administrative dominance.”\(^{483}\) Yet at the same time, it is the internal law of the contractual relationship that is pre-eminence in not just the “private legislation”\(^{484}\) or “statutes of private governments”\(^{485}\) in the form of textual contracts, but in the actual operating norms and practices of the exchange relationship.

Attention to such multiple layers of normativity operating on the contractual relationship is not, however, merely in aid of descriptive prowess. There are two other important and related goals. One is to assist students in “planning” – the forward looking activity in which the lawyer assists the parties in determining goals, ascertaining costs, and communicating a mutual agreement with respect to either performance or risk. Such an activity requires the lawyerly tasks of ascertaining facts, negotiation, drafting, and application of legal knowledge.\(^{486}\) This is a “practical”\(^{487}\) activity, justified, in part, by the

\(^{479}\) Ibid at 415.

\(^{480}\) Ibid.

\(^{481}\) Ibid at 416.

\(^{482}\) Ibid.

\(^{483}\) Ibid

\(^{484}\) Friedman & Macaulay, supra note 112 at 820.


\(^{486}\) Macneil, Contracts: Exchange Transactions and Relations, supra note 471 at 20-21, 31-43. Macneil summarizes the section on planning as follows:

> Performance and risk planning embrace four essential processes – ascertainment of facts, negotiation, drafting, and application of legal knowledge. The application of these processes to the preliminary goals and cost assessments of the parties results in the final substantive content of the particular contract being planned. These processes also determine the substantive content of the equally important, though necessarily elusive, unplanned portions of the contract (ibid at 43).
empirical evidence that maintaining ongoing relationships is the primary concern of contracting parties. The other goal is to instil a sense of justice and concern with policy. As Robert Gordon notes, Macaulay and Macneil do not just paint a rosy picture about solidarity and cooperation; there is a “dark side” to their work, which is the possibility that contractual relations may entrench power relations – making it more difficult for a subservient party to escape domination in light of sunk costs. Relational theory, with its concerted focus on actual relationships and actual behaviour, thus both stimulates the constructive or pragmatic role of a planner and enhances the critical capacity to understand the effects and consequences of exchange relationships.

The relational approach, moreover, views these two roles as intimately related. As Macneil writes in the Preface to the second edition of his casebook:

It would be easy to infer from these titles that Part I [Introduction to the Nature of Contract] is the basis for a “policy-and-justice” approach to contract study and Part II [Planning Contractual Relations] the basis for a “practical” approach. In fact, while some change in emphasis does occur between the two parts, I do not believe that policy, justice and practice can thus be separated. The deep currents both of social justice and of social injustice flowing through our exchange-oriented socioeconomic system manifest themselves in every “practical” contract question. At the same time, no one unfamiliar with the “practical” world of contracts can fully understand the exchange currents of social and economic policy flowing so strongly through our society and its legal system.

By broadening the concept of exchange, by broadening the notion of law that governs contractual relations, and by expanding the set of lawyerly skills that are central to an introductory course, relational theory helps to collapse the categories of “law” and “society.” It does so in part by showing that “contract law” is composed not only of the common law rules but of social and customary norms and, indeed, of social relations themselves. On a more conceptual level, the “contractual

487 Ibid at xix.

488 In the introductory section on planning, Macneil reproduces an excerpt from Macaulay, “The Use and Non-Use of Contracts in the Manufacturing Industry” (1963) 9 The Practical Lawyer 14, which reproduces the findings from “Non-Contractual Relations in Business,” but in a more colloquial tone written for practicing lawyers (Contracts: Exchange Transactions and Relations, ibid at 27-30).


490 Contracts: Exchange Transactions and Relations, supra note 471 at xix.
relations” paradigm transcends the law/society distinction by focusing on the relation itself as a unit of inquiry. The account describes the relation as embedded in a complex legal-social fabric; parsing that fabric (distinguishing what is “law” from “not law”) is simply not an inquiry consistent with the paradigm. Placing the exchange relationship front and centre (both empirically and conceptually) recommends a functional analysis: either in aid of understanding and promoting ongoing contractual relations or via a critique of the relation’s consequences. Such functionalism rejects both the truth and utility of existing doctrinal categories, breeding its own novel organizing scheme.

**D. Summary**

By placing actual human behaviour at the forefront for understanding contract law, the relational theorists obliterate the boundary between law and society. Context is not only relevant in adjudication, it provides the concepts based on which contract law can be understood and around which its study and teaching can be reorganized. While this functionalist approach may have parallels with law and economics to the extent that transactions and ongoing relations are impliedly encouraged, relational contract theory, unlike law and economics, embraces questions of politics through its concern with “dark” possibilities of contractual relations to cement power imbalances. Accordingly, relational contract theory suggests perhaps the most expansive vision of legal reasoning and legal practice of all the traditions discussed. It implies that neither understanding nor practicing law is possible without considering the human relations at play. The same amount of complexity and context required in understanding how people relate is required for understanding law; the legal professional self approaches the full imaginative, creative, and intellectual self.

**VII. Conclusion**

The subset of contract law scholarship surveyed in this chapter paints a counterimage to the acontextual practices of contract law teaching identified by Elizabeth Mertz. It shows how the implicit tenets of Mertz’s account of legal reasoning – classical legal science’s emphasis on rules, principles, courts, and law’s separation from politics, morality, and social behaviour – have been systematically attacked by leading American contract law scholars over the course of the twentieth century.
While the attack on formalism by no means receives unanimity among North American contract law scholars, legal realism is undoubtedly widespread in contemporary understandings of contract law. The line between the “legal” and the “extra-legal” has been inexorably blurred by the understanding that psychology, politics, or policy account, at least in part, for judicial decisions. The skepticism about whether legal reasoning forms a coherent whole, or whether its internal discourse constitutes an autonomous domain, has spawned the claims of Critical Legal Studies and Law and Economics: that ideology or policy preferences underlie both legal rules and techniques of legal reasoning (such as in the choice between rules and standards), that doctrine is indeterminate, and that alternative accounts can serve as both a standard for evaluating, and account of, legal decision-making. The relational theory of contract has reconfigured the line between text and context into a circle that encapsulates law and human relations, viewing them as an integrated, mutually entailing continuity. These four significant intellectual traditions converge to undermine the claim that context or policy is “marginal” to the study of contract law. On these accounts, context – political, human, economic, social – is central to, and constitutive of, contract law.

This embrace of context has expansive implications for legal reasoning and legal practice. First, the erasure of bright lines between law, on the one hand, and politics, policy, and social relations, on the other, calls into question the idea that legal reasoning is its own truly distinctive form of reasoning. To the extent that social desiderata drive judicial behaviour, for example, a need arises for skills in social science, or economic analysis, as part of the lawyer’s toolkit. Such skills need not be articulated as distinctively legal in order to form part of the range of appropriate tools for the legal professional. The inclusion of other disciplines into legal argument is one way in which one may “operationalize” the insights from legal realism into legal practice.

At the same time, one need not jettison the idea of a distinctively legal form of reasoning in order to see how realist influences are important. The realist and critical schools may serve to modify legal reasoning through a process of deconstruction, consciousness-raising, and the introduction of new categories and considerations. Critical Legal Studies, for one, highlights the contingency of legal reasoning and its political underpinnings and consequences. It suggests, as Dalton does, that new

categories, previously considered wholly outside of law, can help us understand legal decisions, and thereby be deployed to influence them. Understanding the phenomenon of contracting behaviour, as the sociolegal theorists do, emphasizes how legal reasoning includes not only the argumentative modes applicable to courtroom advocacy but a wide range of skills, such as relationship building or identifying shared interests, that may help accomplish social ends. The overarching theme of functionalism shines the light on how legal interventions can achieve desired ends, making legal reasoning an eclectic exercise in the selection of appropriate means, as Fuller demonstrated in canonical works on contract law and lesser-known works on eunomics, the “science, theory, or study of good order and workable social arrangements.”

Contract law teaching, by simply embracing the leading contract law scholarship of the twentieth century, can therefore quite naturally provide students with a toolkit comprised of the eclectic range of methodological commitments that Kennedy and Fisher write characterize American legal thought. Mertz’s account, therefore, signals some failure in translation, and there remains work in the US to determine what might have accounted for this interruption in signals.

The remainder of this dissertation explores whether a similar or analogous signal failure arises in Canadian contract law teaching. At first blush, this might seem like an odd question, because Canada, it hardly needs reminding, is a separate country from the United States, with a different legal system and legal culture. Thus, one piece of work this dissertation undertakes is to demonstrate the influence of the American Legal Realists and their heirs on Canadian legal thought. As it turns out, the thinkers canvassed in this chapter have made their mark on the attitudes of Canadian contract law professors. One place where this is particularly evident is in the casebooks. As the next chapter shows, the American influence is evident in all three current, and one historical, casebook. However, as the casebooks also demonstrate, there is a gap between the way these editors pledge allegiance to these realist and critical ideas, on the one hand, and the way they model a vision of legal reasoning that embodies the formalist ideas of classical legal thought, on the other. Chapter 5, in turn, portrays a similar pattern by looking at my participant data.

Fuller, ”American Legal Philosophy”, supra note 252 at 477.
Chapter 3
Canadian Contract Law Casebooks

I. Introduction

Contract law casebooks are a rich source of information about the messages communicated to students about law and legal reasoning. As Janet Ainsworth writes, “Because casebooks still maintain the center of gravity in legal education, they serve as the vehicle through which each succeeding generation of lawyers is socialized into patterns of thinking about law and legal practice.”493 In the US, scholars have embraced the contract law casebook as metonym494 for the shifting and turbulent terrain of legal thought. The first contracts casebook, by Christopher Columbus Langdell,495 is not only the origin of the ubiquitous case method, it also serves as one of the best concrete examples of classical legal thought.496 Once the “age of anthology,” which Langdell ushered in, ended in the mid-twentieth century,497 casebooks were increasingly reviewed for the way editors “wear their heart upon their sleeve.”498 Accordingly, casebooks signaled profound changes in attitude about legal thought. Lon Fuller’s “post-realist”499 innovation in 1947,500 Kessler & Sharp’s “anticonceptualist”501 intervention in 1953,502 and Knapp’s “humanist”503 take on the teaching matter in 1976504 stand as three well-reviewed examples.505

493 “Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews (1997) 20 Seattle University L Rev 270 at 275. See also ibid at 274 (“Casebooks provide their authors with an opportunity to construct a thoroughly realized, if often inadequately articulated, instantiation of their own particular jurisprudential and normative belief systems”).

494 See The Oxford English Dictionary (online), sub vero “metonym” (“a thing used or regarded as a substitute for or symbol of something else”).

495 Selection of Cases (1879), supra note 110.


500 Lon L Fuller, Basic Contract Law (St Paul: West, 1947).


In Canada, meta-level discussion about the casebooks is less developed. While there are numerous thoughtful reviews of selected editions of Canadian contract law casebooks, there has been little attempt, if any, to draw high-level insights by looking at the books together and over the course of their development. This chapter attempts to do precisely that. I look at the prefaces and introductions of all editions of the four Canadian published casebooks – one historical (Milner), three current (Swan, Waddams, and Ben-Ishai & Percy) – to tease out their stated and implied

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506 This chapter incorporates a survey of all scholarly reviews of the four major commercial casebooks. In the Works Cited section, I have grouped all reviews together under one category for easy reference.


510 Prior to the eighth edition, the lead editors were Christine Boyle and David Percy. In the eighth and subsequent editions, Stephanie Ben-Ishai replaced Christine Boyle. In this chapter, when referring generally to the casebook, I will name it by its contemporary authors: Ben-Ishai & Percy. When referring historically to any of the first seven editions, I will refer to the work as Boyle & Percy. See Christine Boyle & David R Percy, eds, Contracts: Cases and Commentaries (Toronto: Carswell, 1978) [Boyle & Percy 1st ed]; Christine Boyle & David R Percy, eds, Contracts:
attitudes about law. I then compare what these casebook editors say with what they do, by examining the vision of legal reasoning they model through the treatment of substance – specifically, in the remedies chapters of the most recent edition of the three current books. To supplement this textual analysis, I draw on scholarly reviews of the casebooks, casebook editors’ selected other writing, and selected reviews thereof.

This analysis yields two key discoveries. First, I show how all the major books in Canada owe a large intellectual debt to the canonical American legal scholars explored in the last chapter. Canadian contract law editors encourage students to seek the underlying values of rules and doctrines, to reason purposively and functionally, to consider social realities of contracting, and to engage in policy thinking. The influences of Corbin, Fuller, Gilmore, and Macneil figure prominently. Ideas from later schools also play a central role – Critical Legal Studies, Law and Economics, sociolegal approaches, and feminist and race critiques of contract doctrine surface in the introductory passages in each book, to different degrees.511 The influences manifest differently in each of the books – sometimes incorporated into explicit argument (Swan), sometimes operating implicitly in editorial choices (Waddams), sometimes coalescing in a critical survey (Ben-Ishai & Percy), sometimes appearing in a “perspectives” chapter (Waddams). However expressed, the dominant set of intellectual theories that explicitly frame the study of contract law in Canada teaching derive from these American, critical traditions.

Despite this surface commitment to realist and critical approaches, only one of the three books, Swan, operationalizes these attitudes into a workable vision of legal reasoning and legal practice in the remedies chapter. The two most frequently used casebooks, Ben-Ishai & Percy and Waddams, model a vision of legal reasoning that embodies a commitment to law more kindred with the classical attitudes

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511 The ideas of Legal Process school also make an appearance but, largely owing to the prioritization of adjudication and to historical factors, they figure less prominently. See II(B), below.
purportedly rejected than to the realist attitudes propositionally advanced in the introductions. Whether expressed as a commitment to “tradition” or whether simply performed without commentary, these books treat cases as the archetypical source of law, and legal reasoning as predominantly the exercise of distilling rules, exploring how they interrelate, and applying them to hypothetical fact situations in search of relevant similarities. This focus on rules and cases betrays an underlying commitment to the formalist values of coherence and consistency and the related conception of legal reasoning that makes analogical reasoning central and policy thinking marginal.

The casebooks thus suggest that while the eclecticism of American legal thought is alive and well in Canada, Canadian casebook editors largely do not translate their theoretical commitments into practice; the realist and critical ideas remain suspended at the level of theory and not incorporated into the presentation of doctrine and legal reasoning in these pedagogical texts. The overwhelming impression is of a conventional, formalist conception of legal reasoning and a correspondingly narrow vision of legal practice that models the courtroom advocate, the barrister, in an emphasis on litigation and judicial reasons for decision. The vision of legal thought portrayed by the Canadian casebooks is, in other words, closer to the picture painted by Mertz than it is to the one imagined by Kennedy and Fisher.

The chapter consists of two parts. The first part takes us through the introductory and prefatory comments of each of the casebooks, one at a time, in chronological order. The goal is to identify the commitments about law that underlie each casebook, whether these be derived from explicit statements, between the lines, or by inference from other writings.

The second part is a review of the most recent version of each of the remedies chapters. The idea behind this task is to compare the explicit and inferred statements about law canvassed in the first part with the messages about law and legal reasoning communicated by the substantive material. This part enables us to draw inferences and make observations about what is done via the substance, in contrast to what is said in the introductory passages. Remedies is chosen because the subject matter incorporates realist and functionalist themes and because the decision about whether to include remedies first or last in a course has served as a longstanding proxy for debates between formalism and realism, an issue we will revisit in Chapter 5.
II. What is Said: Critical and Realist Perspectives in Canadian Contract Law Casebooks

One story of the Canadian contract law casebook might emphasize its American roots, portraying the first Canadian contract law casebook, Falconbridge’s *Law of Sales* in 1927, as an example of importation of the US case method.512 This chapter seeks to highlight not so much the affinity or subtle differences between the countries’ approach to the case method,513 but rather to detail the influence on the Canadian books of American ideas that constituted the “assault” on the formalist ideas ascribed to casebook editors of the late nineteenth and early twentieth century.514

The late 1970s is a flashpoint for the emergence of these ideas in Canadian casebooks. In 1978, two new casebooks came on the scene in Canada: *Swan and Boyle & Percy*. Each of these books has an extensive introductory chapter full of messages from American Legal Realism and subsequent critical theories of law, introductions that have been carefully edited up until their present editions. The third major casebook today, *Waddams*, traces its intellectual roots to 1977, the year that Stephen Waddams published his realist textbook, *The Law of Contracts*,515 and completed his first major revision of *Milner* (3d ed). This Part details the messages contained in the three casebooks, and in James Milner’s original Introduction.

Before proceeding, some numerical context informs the largely textual analysis that follows. Of the seventy-five participants in my study, fifty-eight assigned a commercial casebook, ten used original compilations of materials, and seven used or adapted a noncommercial “house” casebook. Of the fifty-eight who used commercial casebooks, thirty-two (55.2%) assigned *Ben-Ishai & Percy*, seventeen (29.3%) assigned *Waddams*, and nine (15.5%) assigned *Swan*.516 Confidential sales data provided by the


514 See Gilmore, *Death of Contract*, supra note 167 at 14-17, 43-44 (on Williston and formalism); Williston, *supra* note 222 at iii-iv (acknowledging his “indebtedness” to Langdell).


516 For this metric, I count the casebook most recently assigned as of the date of first participation in my study (the interview date or, for non-interview participants, the first time they sent me their course syllabus). For most interview participants, this was the casebook assigned in the year of interview, but for the professors who were not currently teaching at the time of interview, it was the casebook most recently used. Most of these fall between
three publishers broadly confirms the relative weighting, with Ben-Ishai & Percy possessing a slightly greater market share than my numbers indicate. Between 2011 and 2016, approximately two out of every three commercial contract law casebooks sold in Canada was a Ben-Ishai & Percy, one in four was a Waddams, and one in ten was a Swan.\footnote{Ben-Ishai & Percy is the recommended casebook for the Federation of Law Society’s National Committee of Accreditation examination in Contract Law, an examination that some foreign trained lawyers are required to take as a condition of being licensed in Canada. The NCA has provided me with the number of annual sittings of the contract law examination dating back to 2010, and these numbers are not large enough to materially affect the ratio stated above.}

A. Underlying Messages about Law in Swan

Swan is a good place to start for a few reasons. First, because it sets out its realist messages so clearly, it provides a good intellectual basis for understanding the messages communicated in the other casebooks. Of the books, it is the most polemical, which has the virtue for review purposes of explicitly and powerfully making claims. Where analogous claims are sketched in the other books, having foregrounded the Swan approach enables us to understand them in greater depth. Where the other books differ from Swan, the early immersion helps highlight the contrasts.

But it is also Swan’s outlier status that justifies a substantial focus. Unique among the books, Swan translates her\footnote{Despite the fact that the book is a collaboration I attribute the casebook’s ideas to Angela Swan individually for ease of communication. This is also justified given that she is the only individual who has remained an editor for all nine editions. However, it should be noted that Swan attributes the ideas equally to Barry Reiter. See Swan 4th ed, supra note 508 at xxviii (“Neither of us now know who had which idea first. The work is a joint effort in the truest sense of the word”). Jakub Adamski replaced Reiter for the 9th edition.} theoretical commitment to realism into an operationalized methodological approach – what she calls the “solicitor’s perspective.”\footnote{Swan’s use of the term “solicitor” not so subtly contrasts with the convention presentation of lawyerly activity as being predominantly about making arguments in court, which in the British system would fall under aegis of the barrister. In Canada, barrister and solicitor are not separately licensed activities, as they are in the UK, although the licensing process still notionally separates them, by requiring separate examinations for barrister and solicitor-like activities.} As Part II demonstrates, the other books are characterized by a methodology in tension with their realist commitments. So Swan is distinctive in this regard. But, Swan is not only the least adopted commercial casebook in Canada, it has also provoked
hostile responses from other contract law professors, including two other editors of major Canadian teaching texts on contract law.\textsuperscript{520} To make the general claim, as this chapter does, that the contradictions in the other casebooks suggest that there may be distinctive features of Canadian legal thought, \textit{Swan}, the maverick outlier, serves as an instructive foil.

From the very first edition of \textit{Swan}, the authors have, in their prefaces and introductory sections, expounded a distinctive vision of law and a self-conscious awareness of the role that contract law instruction plays in forming the legal consciousness of their students. The following statements capture central elements of this vision: law is an instrument for achieving social purposes; contract law does and should operate to satisfy the reasonable expectations of the parties, and can be evaluated according to this criterion; studying contract law requires understanding competing and contradictory values; adjudication is only one available form of social ordering among many worth understanding; social context is essential to understanding and practicing contract law; relational contracts are important; “usefulness” and reality matter exceedingly more than abstractions. Increasingly, as time has gone on, the editors have put their philosophy into practice by adopting a distinctive approach to teaching law: the solicitor’s approach. The main thrust of this vision has been more or less consistent over time, but subsequent editions have assisted the authors in gradually developing and refining their viewpoint.

i. \textit{Swan} 1\textsuperscript{st} ed

Angela (at the time John) Swan and Barry J Reiter, Professors of Law at the University of Toronto at the time of publication, authored the first edition of \textit{Contracts: Cases, Notes and Materials} in 1978. The publication is based on earlier drafts of teaching materials used at the University of Toronto, and were “put together after several years of co-operation between the authors and Professor E. J. Weinrib,” also of Toronto.\textsuperscript{521} The casebook began, in other words, as a teaching document, and this


\textsuperscript{521} \textit{Swan} 1\textsuperscript{st} ed, supra note 508 at vii. In her joint review of the \textit{Swan} 1\textsuperscript{st} ed and \textit{Boyle & Percy} 1\textsuperscript{st} ed, A Anne McLellan writes that “The book is the product of their experience in the teaching of contracts at the University of Toronto” ((1979) 28 UNB LJ 257 at 259) [McLellan, “Joint Review of \textit{Swan} and \textit{Ben-Ishai & Percy}”]. Weinrib’s participation in the textbook “antedated” his ideas on corrective justice and formalism, and so the mention of his involvement should not imply the importation of those ideas into the text. Weinrib and Swan taught a first-year course that combined contracts and torts in the mid-1970s and shared offices beside each other for a number of
pedagogical stance is retained right up to the present 9th edition. In the Preface to the first edition, the authors acknowledge the close influence of two other casebooks, Fuller & Eisenberg’s Basic Contract Law (3d ed.) and Ian Macneil’s Contract, Exchange Transactions and Relations (2d ed). Fuller’s and Macneil’s influence are indeed strongly felt throughout the book, both informing the ideas in the Introduction and in the form of excerpts throughout the book.

The Introduction to the first edition represents an early articulation of the authors’ commitment to four ideas (the numbers that follow track the enumeration of sections in the Introduction): (1) social context is as important as “institutional” concerns about the development of the law; (2) studying law requires confronting and balancing competing values, and asking whether cases “make sense” may require a wide range of evaluative criteria; (3) the law is about solving problems, adjudication is only one of many legal modes of problem solving, and assessing adjudication requires analyzing more than simply the reasons for decision, including the role of the lawyer, judge, and jury in formulating facts; and (4) studying contracts must be done in its historical context.

In Weinrib’s opinion, the statement referring to him in the introduction “significantly overstates” his role (email correspondence with author, 4 June 2017).

Roger Brownsword writes, in his review of Swan, 1st ed, that the “nub, the positive criterion [for case selection] is pedagogic interest” ((1979) 42 Mod L Rev 479 at 479). In the most recent edition the pedagogical theme continues. See Swan 9th ed, supra note 508 at § 1.59.

Swan 1st ed, supra note 508 at vii.

Excerpts of the Fuller & Eisenberg and Macneil casebooks are the first voice the student is exposed to in Chapter 1 on Remedies in Swan 1st ed, supra note 508. Macneil’s article, “Whither Contracts,” supra note 464 is the final excerpt in every edition.

Swan 1st ed, supra note 508 at xxvii. (While “any judgment can only be seen as a product of a particular period in a particular society,” it is “equally dangerous to suggest that any judgment is only valid for a particular time and place.” Instead, each case represents a balance between “the value represented by the concern for some constancy of the law over time and the need for law to reflect current social values”).

See ibid at xxviii (“[W]hat does it mean to ask if a judgment ‘makes sense’? … It may be an adequate criticism … to say that it was unfair … It may be equally valid to suggest that the result is economically expensive and results in a waste of resources … Blind adherence to rules is never an adequate reason for doing anything in the law”) [emphasis in original].

Ibid at xxvii-xxx.

The authors describe how contract law has historically been “greedy,” overtaking other areas of the law, such as property, but in modern times the ambit of contract law has been reduced with the increase in legislation, particularly in labour and employment, consumer, family law, and business practices (ibid at xxx-xxxi).
These ideas – the value of social and historical context, the awareness of multiple forms of social ordering, the central role of (balancing competing) values, and a focus on law as problem solving – would develop in later editions into a more fully articulated vision of law. This blossoming began quickly, with the second edition, published in 1982, again by Butterworths.

ii. **Swan, 2d ed: Macneil and the Reasonable Expectations of the Parties**

Two significant intellectual events occurred after the publication of the first edition, both of which made their mark on the second edition. First was the publication in 1980 of Ian Macneil’s *The Social Contract*. The Introduction to the second edition contains nine new pages of text, six of which are dedicated to Macneil’s theories of law, from his definition of promise\(^{529}\) to the centrality of exchange\(^{530}\) to the distinction between discrete and relational contracts.\(^{531}\)


Second was the crystallization of the authors’ philosophy of contract law resulting from workshops on contract law in the Spring of 1979. These workshops, involving Stephen Waddams, Michael Trebilcock, and other scholars, resulted in a book edited by Reiter & Swan and published by Butterworths.\(^{532}\) In the first chapter of *Studies in Contract Law*, Reiter and Swan set out what they claim is a “common assumption”\(^{533}\) of all the studies in the book:

The assumption is that the fundamental purpose of contract law is the protection and promotion of expectations reasonably created by contract. We believe that the law

\(^{529}\) 2d ed, *supra* note 508 at xlii.

\(^{530}\) 2d ed, *supra* note 508 at xlii-xlvi.

\(^{531}\) 2d ed, *supra* note 508 at xlv-xlvi.


\(^{533}\) Reviewers agree with this characterization in various proportions. Mary Hatherly writes, “[T]he studies ... partake of a common philosophical perspective and in a certain sense are merely illustrations of a more generalized view of contracts” (Book Review of Reiter & Swan, *ibid*, (1981) 30 UNBLJ 265 at 270). Fridman writes, “[T]hey have endeavoured, almost heavy-handedly, to attain some sort of internal consistency in these studies by ensuring that the contributors adhere to much the same sort of philosophy of law and legal analysis as they, with the result that there are no significant philosophical disparities among the ideas advanced” (Review of Reiter & Swan, *supra* note 520 at 408), later specifying that some of the latter chapters in the book do not conform as readily to the basic assumption as the earlier chapters (*ibid* at 421). Percy calls *Studies* “a collection of law review articles with only a loose connective theme” (Percy, Review of Reiter & Swan, *supra* note 520 at 864).
should and does protect such reasonable expectations and that all ‘contract rules’ are merely specific illustrations of this guiding principle.\textsuperscript{534}

The idea that contract law both \textit{does} and \textit{should} protect reasonable expectations implies other commitments about law, about which Reiter and Swan are fairly transparent in their essay.\textsuperscript{535} These include the notion that contract law, and law in general, is purposive, functional, and instrumental;\textsuperscript{536} that contract law can be evaluated according to its “suitability” to actual relationships;\textsuperscript{537} that legal institutions beyond courts, such as legislation and “administrative processes,” play a role in effecting change;\textsuperscript{538} that it is important to look “below the surface” to “identify and assess … principles and policies” that underlie cases and legislative instruments;\textsuperscript{539} and, ultimately, that the purpose of legal

\textsuperscript{534} Reiter & Swan, \textit{supra} note 532 at 6. The authors continue a page later:

The role of contract law is thus to enhance the institution of contract, to make it more stable and reliable, and thereby to increase the pervasiveness and efficiency of its use in society. This is achieved if the law can assure the parties to contracts that they will receive the benefits that they have been promised (\textit{supra} note 532 at 7, footnotes omitted).

\textsuperscript{535} Percy suggests that their methodology “leads” to discovery of the reasonable expectations theme (Review of Reiter & Swan, \textit{supra} note 520 at 854).

\textsuperscript{536} Reiter & Swan write, “We hope that these studies will help in the attempt to develop useful and functional rules that should guide laymen, lawyers and judges” (\textit{supra} note 532 at 4). Hatherly in her review elaborates on the functional and purposive nature of their “central hypothesis”:

that a contract is an instrumentality, a bilateral arrangement entered into to achieve certain objectives and that the law of contracts is less concerned with the definition of a system of contract as a legal institution than with the attainment of a certain end: that obligations freely entered into will be enforced and that certain interests created by consent – expectation, reliance and restitution – will be judicially recognized. A view of contract as a purposive mechanism encourages consideration of the ‘results’ of contract law as signified by available remedies to which the injured party may be entitled reflects the philosophical justifications for the enforcement of contract as a general legal principle (\textit{supra} note 533 at 271).

Linda Vincent, in her review, describes Swan & Reiter’s view of the purpose of studying contract law as being “to regard the body of contract law not as a set of ‘black letter’ rules but, rather, as a living, changing response to particular problems, some responses being better than others” (Book Review of Swan 1st ed, \textit{supra} (1979) 9 Man LJ 347 at 349)

\textsuperscript{537} Reiter & Swan, \textit{ibid} at 5.

\textsuperscript{538} \textit{Ibid.}

\textsuperscript{539} \textit{Ibid at} 2. See also Percy, Review of Reiter & Swan, \textit{supra} note 520 at 854 (“Swan and Reiter borrow heavily and fruitfully from the writings of Karl Llewellyn as they seek, in a manner which recalls nostalgically the realists of the [thirties], to describe what courts, legislatures and administrative bodies do in fact, rather than to analyse the rules or doctrines which they offer as justifications for their decisions”).
study can serve an “intensely practical” function, that is, to recommend more effective rules of (contract) law.\textsuperscript{540}

*Studies in Contract Law* has been described as a “theoretical companion” to *Swan*\textsuperscript{541} and indeed, the above commitments are reflected in the casebook. This is so in the presence of the “reasonable expectations” theme in various editions, from the first to the most recent,\textsuperscript{542} but also in the casebook’s explicit passages about the theory of law, which begin in earnest in the second edition. For example, in the second edition’s Introduction, the authors take pains to distinguish their preferred approach to law from the competing philosophy of positivism.\textsuperscript{543}

An alternative [to positivism] sees the law as being justified only in so far as it forwards or participates in the achievement of social values. Law in this view is a purposive endeavour. It makes no sense to ask whether a rule exists as a separate inquiry from a consideration of the rule’s purpose and function. In fact, on this view a rule can really only be said to exist in so far as it does help to achieve some social goal ... Generally, the functional approach will be fact-specific, and a critical question for it is whether or not its demands exceed the institutional capabilities of our judicial processes.\textsuperscript{544}

Thus, Swan and Reiter signal to their students that their book will not teach rules for their own sake, or evaluate them according to the standards of internal consistency. Instead, and in concert with the contributions of Macneil, they emphasize the virtue of realism: their focus is on the real phenomenon of exchange,\textsuperscript{545} the real reasons behind decisions,\textsuperscript{546} the practical and functional role of

\textsuperscript{540} Ibid at 4.

\textsuperscript{541} Hatherly, supra note 533 at 270.

\textsuperscript{542} See *Swan* 1\textsuperscript{st} ed, supra note 508 at xxvii (reasonable expectations as one of three things the judge must consider in respecting his or her role in the legal system). See also *Swan* 2d ed, supra note 508, c 6 (subsuming about 380 paragraphs of material under the subheading “Protection of Reasonable Expectations”).

\textsuperscript{543} On positivism, the authors write: “[T]he English Positivist tradition ... holds generally to the view that one can consider whether a particular rule of law exists or not, and discuss its application in various fact situations without making any inquiry into the rule’s function” (*Swan* 2d ed, supra note 508 at l). Compare Reiter & Swan, supra note 532 at 17 (“The essence of positivism is the belief that the existence of law or the fact of law can be understood apart from the goodness or badness of the law ... A faith in positivism leads one to search only for a rule and not for a reason for a result”).

\textsuperscript{544} *Swan* 2d ed, supra note 508 at li.

\textsuperscript{545} See *Swan* 2d, supra note 508 ed at xlv (“There is a tendency for lawyers (including especially judges, academics and law students) to think that if there were no law of contracts, there would be no exchanges, and that the society we know would collapse. This is a grand illusion. People must eat and have somewhere to sleep and these needs will be met regardless of the law”).
the law to deliver real social results\textsuperscript{547} – and, by implication, the need for the student to develop skills and perspectives that can make a real impact for their clients.

Such an approach signaled, no doubt, a significant departure from traditional approaches to studying and teaching contracts. Viewed through the lens of these reviewers (contract law scholars themselves), we can glimpse how the Swan & Reiter approach challenged a positivist orthodoxy.

b. Challenging Orthodoxy: Reviews of Swan and Reiter & Swan

The reviews of the first casebook give a sense of the perceived novelty of the Swan & Reiter approach,\textsuperscript{548} but it is really in the reviews of Studies of Contract Law that the departure into realism was most fully canvassed. On the more complimentary side, Mary Hatherly emphasizes the influence of the “American perspective” – Posner, Fuller, MacNeil and Gilmore – and writes that the authors “succeeded in establishing a Canadian approach to contract analysis which is provocative, intelligent and as persuasive as the arguments advanced by exponents of the bargain theory.”\textsuperscript{549} She writes of the “plausibility of the central hypothesis” of “contract as a purposive mechanism.”\textsuperscript{550}

By contrast, three reviewers took issue with the Reiter & Swan hypothesis. These more critical reviewers included David Percy, law professor at the University of Alberta, and editor of a competing

\textsuperscript{546} \textit{Ibid} at xli (“ideas about contracts, ideas about the justifications for keeping promises and about the proper role contracts should play in our society have been and are a battleground for competing philosophical theories and political ideologies”).

\textsuperscript{547} \textit{Ibid} at li.

\textsuperscript{548} Of the five reviews discovered, four were largely positive and the one negative review (Rodney Brazier, Book Review of \textit{Contracts: Cases, Notes & Materials} by John Swan & Barry J Reiter, (1980) 43 Modern L Rev 235) spoke mainly of the book’s irrelevance to a UK audience. Reviewers highlighted the original, if idiosyncratic, nature of the book. See McLellan, \textit{supra} note 521 (“a highly personal approach ... one that may not be readily adopted by others in the field” at 261); Brownsword, \textit{supra} note 522 (“a more varied, demanding and stimulating agenda than English equivalents” at 479); Vincent, \textit{supra} note 536 (a “lively, thought-provoking and ... rather sophisticated” book, which nevertheless needs supplement because of the authors’ “selective and idiosyncratic approach” at 347, 349); Gordon Turriff, Book Review of \textit{Contracts: Cases, Notes & Materials} by John Swan & Barry J Reiter, [1979-80] 4 Can Bus LJ 489 (“The editors deserve congratulations for taking a compendious and difficult subject which defies logic in so many ways and presenting it in a way, I am sure, that appeals to students of varying abilities and interests” at 491).

\textsuperscript{549} Hatherly, \textit{supra} note 533 at 270.

\textsuperscript{550} \textit{Ibid} at 271.
casebook, Gerald Fridman of Western University (author of *The Law of Contract in Canada*, now in its sixth edition) and Brian Coote, a law professor at the University of Auckland, NZ. Each of these was, in different form, an attack on the underlying theory of law propounded in *Studies*. Fridman, for example, accuses the authors of being “hypercritical[,]... tend[ing] toward the revolutionary”:

[Their] approach is inclined toward the view that everything can be resolved by a gradual process of rational, demystifying analysis ... They have a belief in the inherent rationality of man, such that one only has to point out certain arguments, based, for example, upon economic or social “facts,” for everyone to accept the validity of the conclusions that follow ... Their critical approach ... reveals an essentially antagonistic attitude to the spirit of Blackstone. They are far from being laudatory of the common law ... The “basic assumption” ... involve[s] too much psychology ... What the courts do now is combine the attempt to discover what was the true nature of the bargain between the parties ... with the application of legal policies that are intended to give effect to what the courts believe will be a reasonable, workable, and suitable law of contract ... To replace this by some more general, supposedly “people-oriented,” approach to the law of contract, would ... invite perhaps a less “mythological” system of rules into the courtroom, but also a less certain, less secure system.

Along similar lines, Percy and Coote also attack the realist grounding of *Studies*. Coote (who “confesses” to being a positivist under the Reiter & Swan definition) criticizes the process by which Reiter and Swan derive their theory of reasonable expectations, which he calls the attempt to “codify and institutionalize the ‘horse-sense’ of judges and legislators” of the “social, economic, and political consequences and implications of what is actually being done.” This horse-sense may not be well informed, and academic lawyers may not be the best equipped to make such generalized deductions. Using the reasonable expectations criterion to evaluate contract law may be problematic, as doing so

551 *Boyle & Percy* 1st ed came out the same year as *Swan* 1st ed (1978) and was reviewed jointly in McLellan, *supra* note 521. McLellan writes that the Swan & Reiter book is a “more comprehensive, and in many respects more interesting and challenging, study of the law of contracts than that presented by Professors Boyle & Percy” (at 260).


553 Fridman, Review of Reiter & Swan, *supra* note 520 at 422-3. In present times, Fridman reveals his own preference for a theory of contract based on promise in *The Law of Contract In Canada*, *ibid* at 4-5 ([Holmes theory of contract as providing promisee with expectation of receiving a sum of money in the case of breach] is “extremely antipathetic to the true, essential nature of contract ... The law of contract is about promises that must be kept”). Fridman cites Fried, *Contract as Promise*, *supra* note 113 frequently and approvingly (*ibid*).

554 Coote, *supra* note 520 at 358.


556 *Ibid* at 359.
ultimately boils down to consistency, “one of the very sins of which [the authors] accuse the ‘positivists.’”

Percy similarly criticizes the use of the concept as leading to a “dogmatic condemnation of some decisions as ‘wrong’ and to a lack of emphasis on other significant policies which underly the law of contracts,” arguing that the “‘theme’ of protecting reasonable expectations and the ‘purpose’ of encouraging economic efficiency are often ... contradictory.” He calls the Reiter & Swan introductory essay “the most disappointing part of the book, because the initial promise of a useful analysis is not sustained.”

The first two editions of Swan, therefore, evince an iconoclastic approach to teaching contract law, heavily influenced by American legal realism, constructed as a pedagogical text on the basis of a very personal approach. These features would persist and develop in subsequent editions, tempered by one major gradual shift: the rise of the “solicitor’s” perspective and an increasing emphasis on usefulness.

iii. Swan, 3d and 4th eds: The Solicitor’s Perspective and the Reduced Importance of Cases

The third edition of the casebook (1985) differs from the first two in a number of ways. For the third edition, the publisher changed to Emond Montgomery (the editors acknowledging the “advice and support” of their “publisher and friend,” Osgoode Hall law professor Paul Emond) and underwent

557 Ibid.

558 Percy, Review of Reiter & Swan, supra note 520 at 856.

559 Ibid at 855.

560 Ibid at 854. See also Patrick Atiyah’s review, which calls the preliminary essay “somewhat simplistic.” For Atiyah, the concept of contract has “dropped out” of the Reiter & Swan theory, producing the result that the purpose of the law is to give effect to reasonable expectations, a “vacuous” goal, “uncertain” as to its contents (Book Review of Reiter & Swan (1981) 5 Can Bus LJ 245 at 247). Other, briefer, reviews of Studies (generally positive, but more descriptive rather than analytical) include Dean I Scaleta, Book Review of Studies in Contract Law by Barry J Reiter & John Swan, eds, (1981) 11 Man LJ 117; Saul Schwartz, Book Review of Studies in Contract Law by Barry J Reiter & John Swan, eds, (1981) 15 UBC L Rev 519 (“Their basic premise is one with which few would disagree: that is, while judges display an uncommon degree of ‘horse-sense’ in reaching the ‘right’ decision they are much less adep at rule-making” at 519).

561 3d ed, supra note 508 at xxiv.
“ruthless editing,” “the elimination of many cases,” that shortened the page count by about a third.\footnote{Ibid.} The book was divided into two Parts – Part 1 dealing with topics “introductory to the problems of the modern law of contracts” and Part 2 exploring “the problems of making the law of contracts function efficiently in the modern world.”\footnote{Ibid.} Most significantly, perhaps, by the third edition, Barry Reiter was no longer a law professor, but rather a “partner in the firm of Tory, Tory, DesLauriers and Binnington,”\footnote{Ibid, inside cover (unnumbered).} and by the fourth edition (1991), Swan had left academia as well.\footnote{Swan 4th ed, supra note 508, inside cover (unnumbered) (identifying Swan as “a partner in the firm of Aird & Berlis”).}

The third and fourth editions, therefore, evince a number of substantive changes, many of them seemingly related to the editors’ developing identity as practitioners.\footnote{See ibid at xxviii (“Both of us have now been in practice for some years. Our experience in this setting has led us to change almost none of the ideas that underlay the previous editions, and, indeed, we have been pleased to find that our ideas seem to work very well when applied to the practical problems of advising clients and helping to make contractual relations work”).} The introduction to the third edition, while largely a compressed version of the introduction to the second edition,\footnote{The introduction to the third edition retains but compresses many of the sections from the second edition: the definitions of “contract and promise,” a section on “Exchange,” a section on “The Importance of Exchange” (renamed “Exchange and Planning” in the third edition). The section “Philosophical Ideas about Contracts” from the second edition is removed, as is the reference to positivism and its alternative (quoted above) that, in the second edition, preceded the original text of the Introduction to the first edition. That first-edition Introduction is maintained in the third, but preceded with new text, and divided into headings (“The Use of Cases,” “The Problem of Values,” “The Institutional Structure”).} renames one section, “The Importance of Exchange” to “Exchange and Planning.”\footnote{Ibid} The original Introduction (which had been reproduced in the second edition) is retained (though now partitioned into separate headings) but this time, instead of being preceded by the quoted-above passage about positivism and its preferred alternative, is now preceded with language emphasizing the limits of studying case law and introducing the solicitor’s perspective:

A Note on the Materials

...The consequence of a focus on cases ... tends to encourage one to think that we are concerned only about what happened (or might happen) in court: that every problem...
and issue should be approached as if it were going to be decided by a court. We believe that this introduces an unfortunate bias in developing an understanding of the law of contracts. The law of contracts is about agreements ... Any contractual dispute should therefore be regarded not as a common or everyday event, but as an unfortunate aberration. It is a much more important function of lawyers to keep their clients out of court than it is to engage in the process of litigation once the parties have chosen to bring their dispute before a court.

The materials we shall examine are pathological. So long as one considers only court decisions, one can get no glimpse of how healthy contracts work ... 

The role of the solicitor in drafting contracts and in structuring contractual arrangements will be emphasized ... 

The Use of Cases
...

We must consider how useful the [judicial] statement is, how satisfactory it is as a basis for prediction of what the courts will do in the future, and, most important, how well the statement functions as a guide to lawyers who want to keep their clients out of trouble.569

Accordingly, the shift is from a more theoretical account of the purposive or functional approach to contract law to a more operationalized account: the underlying theory is the same,570 but is pursued more through getting the student to put him- or herself in a prospective or planning state of mind, focused on keeping the client “out of trouble.” The role of the “solicitor” is mentioned in the 3d edition twice, for the first time.571 The impression that one is moving away from the “academic” to the

569 Ibid at xxx-xxxi [emphasis added].

570 In the Preface to the fourth edition, the editors write that “almost none of the ideas that underlay the previous editions” have changed (supra note 508 at xxviii). Also retained in both third and fourth editions is the opening to the Introduction that “[i]deas about contracts, about the justification for keeping promises, and about the proper role of contracts have been and are a battleground for competing philosophical and political ideologies” (3d ed, ibid at xxvi; 4th ed, ibid at xxix). The third edition also continues to emphasize social context by providing contemporary examples (Westinghouse’s failure to keep promise to provide a guaranteed supply of uranium at a fixed price in the face of increase to the worldwide price of uranium) (ibid at xxx). The Westinghouse example would be mined, many years hence, by the pre-eminent law and society contracts scholar to demonstrate the need for even judges to transcend the mode of litigation and assist parties in arriving at practical solutions. See Stewart Macaulay, “The Real and the Paper Deal”, supra note 421 at 73-7 (Judge Merhige encouraging settlement by, inter alia, holding cocktail parties at his house with CEOs of opposing parties).

571 In addition to the above-quoted passage, see Swan 3d ed, supra note 508 at xxxiii (“We have argued that the law of contracts involves more than cases, but it is the cases that set out the general outline of the law within which the solicitor must advise her client and within which legislation must be crafted”.


“practical” is further reinforced by the omission in the third edition of the three-page section on “Philosophical Ideas About Contract” that appeared in the second edition.572

Coupled with the rise of the desire to get students to think of themselves as “lawyers” is the powerful caveat not to lose their intuitive or even childlike sense of human dignity:

[The most important aspect of any study of the law of contracts (or of any area of the law, for that matter) is the ability to retain a sense that the law is part of human life and that it must always respect human dignity. We have to retain an almost childlike faith that things must be fair ... Without this faith in fairness, law can easily become little more than an implacable and impersonal set of rules divorced from human values and based on some abstract idea of the need for certainty and predictability. Do not become cynical: there is too much at stake to risk the dangers of an unconcern for fairness and decency. Do not fall into the trap of thinking that it is somehow “unlawyerly to be passionately concerned for justice, or of believing that “to think like a lawyer” means that one has to forget that one person who, until law school, did care that results be fair and that people behave decently towards each other.573

This rise of a “practical” sensibility is therefore not in tension with, but directly in aid of, a view that seeks to place law, and law practice, within a broader social, indeed even moral, context.

a. Law as an Instrumentality

They also begin the Introduction with a discussion about the fall of the Soviet Union, which was transpiring during the preparation of the casebook. In addition to using this event to reprise their point that the law of contracts is about exchange relations, whose problems “have become the stuff of philosophies and moral codes,” thereby exemplifying the point that law is “permeated by ideas that express very deeply held values and moral ideas,”574 they use the occasion to reformulate their functional approach to contract law, while retaining a spirit of critical inquiry:

We hope that these materials will not be viewed as an apology for a market economy or as accepting the social value of exchange relations as either beyond question or raising questions outside their scope. We believe that we have to face the fact that we live in a society in which exchange relations have an important role and that, whatever view one takes of their value, making the system work, thinking through what fairness and justice requires, and what are the best means to protect those who need protection are

572 Swan 2d, supra note 508 ed at xlvii-l.
573 Swan 3d, supra note 508 ed at xxxiii.
574 Swan 4th ed, supra note 508 at xxix-xxx.
important questions. A useful focus for lawyers is to remember that to an important extent, “law is the science of getting from here to there.”

The emphasized portions of the above passage illustrate the commitments the editors continue to hold that law should be instrumental to social ends and not admired or revered for its own internal qualities. “Getting from here to there” can be interpreted at two different levels of generality. On the one hand, the role of the lawyer is to assist the client in getting from here to there – achieving exchange-related goals while staying out of trouble. At the same time, the legal “system” can be evaluated by how effectively it achieves its goals – ensuring fairness and justice, and protecting those in need of protection. The commitments are in a way distinct – the training of lawyers who can think prospectively, and the education of critics who can evaluate a legal system – but they also seem to flow from an underlying unified idea of law as primarily an instrumentality.

Further, the emphasis on instrumentalism appears to welcome critical discussions about ends themselves: although the authors believe “we have to take the existence of a market economy as a fact,” they assert that “we do not have to agree on its political, moral or philosophical bases.” Swan & Reiter appear to want to lay bare the reasons behind decisions, as the American realists did; they invite critical discussion about the ends to which legal regulation should aim; they want students to become adept at evaluating whether legal regulation is achieving these ends; they want students to develop a set of tools, including litigation, but extending to planning and even law reform. Their approach is “intensely practical” but in its pursuit of various ends, critical and contextual.


This somewhat polymathic approach to studying contract law continues through subsequent editions. For the fifth edition (1997), the publisher has changed again, to Butterworths, and a third editor has been added: Nicholas C Bala, Professor of Law, Queen’s University. The structure of the Introduction remains largely the same in the fifth edition but there are some additions and changes. The theme of the solicitor is expanded upon slightly, as seen in the claim that “most lawyers who practice ... contract law are negotiators and drafters, not litigators,” and that the utility of cases lies primarily in determining “what might have been done to avoid the problem, what advice (or different advice) the

575 Ibid at xxx [emphasis added].
576 Ibid at xxix.
parties might have been given, or how the relation between the parties might have been better structured." Also, the authors reinforce their commitment to broad social context – updating their examples, but also by inserting a paragraph on the context of domestic contracts, an area in which Bala had previously published. This example stands, in the authors’ view, for the underlying principle of “how far rules developed for commercial relations can be pushed or applied in a very different context.” The authors reinforce, with added text, their commitment to cultivating students’ appreciation for justice and fairness, tempered with a caveat about the need for precision.

v. **Swan, 6th ed: Expanding the Framework**

The sixth edition (2002) elaborates on the theme of justice and fairness, continues to expand the contextual frame, and says more to students about their evolving identities as lawyers. The three editors return for this edition, though Swan is now listed as both a practicing lawyer and as a Professor of Law, McGill University (a position Swan held from 1996-2002). This renewed academic affiliation can be felt in the Introduction. While law is still defined as the “science of getting from here to there,” “making the system work” is no longer listed as a related “important question;” the emphasis is instead on “[t]hinking about what fairness, justice and efficiency demand of different types of exchange relations.” Also perhaps inspired by McGill, which immediately preceding and during Swan’s tenure

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578 The beginning passage now refers to China (4th ed, *supra* note 508 at xix), the Quintette example is updated with more recent factual developments (*ibid* at xxiii), and the authors comment on recent developments in the former Soviet Union (*ibid* at xxvi).

579 5th ed, *supra* note 508 at xxv. For Bala’s research on the domestic contract, See eg. Nicholas Bala, “Domestic Contracts and the Supreme Court Trilogy: A Deal is a Deal” (1988) 13 Queen’s LJ 1; Nicholas Bala, “Recognizing Spousal Contributions to the Acquisition of Degrees, Licences, and Other Career Assets Towards Compensatory Support” (1989) 8 Can J Fam L 23.


581 *Ibid* at xxx (“It is part of what we believe is the goal of these materials to show you that fairness and justice are and can properly be made central to the law. You must, however, be careful in saying that a decision is ‘just’ or ‘fair’. These terms are usually conclusions: they are not reasons and, as conclusions, they have to be justified”).


was preoccupied with curricular reform about “transsystemia,” superscript 586 the Introduction speaks of the “broad similarities in the types of contractual problems that are faced in different countries,” how a student “with a good understanding of the contract law in Canada will be well placed to begin to study contractual regulation in other legal systems,” and the influence on Canadian contract law of other jurisdictions, including the UK, US, and “some subtle influences from the thinking of those trained in the Quebec Civil Code.” superscript 587

This nod to transsystemic or interjurisdictional relevance can be thought of expanding the geographic frame of reference, and the contextual frame is pushed further at other points in the Introduction. New text is added in the beginning section that expands upon the 5th edition’s reference to how commercial rules should be applied to non-commercial contexts. superscript 588 The authors then connect this expansion to a consideration of a legal framework outside the normal bounds of private law, arguing how the Charter of Rights and Freedoms: has caused judges to reconsider their role as lawmakers. Judges are now more willing to consider whether a principle of common law produces socially, economically, and legally desirable results ... [T]here is now a clear willingness to permit incremental change in the common law.” superscript 589

Contract law, in other words, is viewed not only as the product of doctrinal rules, primarily judicially made, but connected to a broader social and legal context. Reference at the beginning of the Introduction to “public” agreements, such as aboriginal treaties, illustrates the very broad canvass on which the authors are painting their image of contract law’s relevance. superscript 590

The message to students in all of this is that a wide range of skills, contexts, facts, and perspectives are necessary to understand contract law. As this understanding develops with each successive edition, so too do the messages addressed directly to students about their role in

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587 6th ed, supra note 508 at xxii.
588 Ibid at xxiii (“The focus of this book is on exchange transactions, but this does not mean that our concern is only with economic interests... Increasingly the law is struggling with questions of how to recognize non-economic interests in exchange transactions”).
589 Ibid at xxiii.
590 Ibid at xxiii.
approaching the study of contract law. In the sixth edition, the authors expand on the distorting effect that a focus on case law has for students,\(^{591}\) and they further develop the message to students about the need for precision in making evaluations about the “justice” or “fairness” of legal rules.\(^{592}\)

vi. **Swan, 7\(^{\text{th}}\) ed & Swan’s Textbook: Reigniting Controversy**

The seventh edition came out in 2006, the same year that Swan published her treatise, *Canadian Contract Law*. The first edition of this treatise took, in Swan’s own words, an “unconscionable” amount of time to prepare, and represented the coalescence of ideas developed through years of teaching.\(^{593}\) Similar to the Reiter & Swan essay of 1980, the thesis of *Canadian Contract Law* is that contract law is designed to protect the reasonable expectation of the parties.\(^{594}\) Like the Reiter & Swan collection of essays, the reasonable expectations theme drew criticism. Geoff Hall, a lawyer at McCarthy Tétrault and soon-to-be author of a text on contractual interpretation,\(^{595}\) criticized the treatise for “blur[ring] the distinction between what the law is and what (in Swan’s view) the law should be,”\(^{596}\) arguing that Swan “gives too much credence to grand theory,” that the principle does not accord with the majority of case law,\(^{597}\) and that reasonable expectations is unsuitable as an organizing principle because it is both circular (parties’ expectations are created in part by judicial decisions) and

\(^{591}\) *Ibid* at xxix-xxx (“The focus on cases ... encourages students to think that the main concern is about what happened (or might happen) in court: that every problem and issue should be approached as if it were going to be decided by a court”).

\(^{592}\) *Ibid* at xxxii (“To say that a decision is ‘unfair’ or ‘unjust’ is really a conclusion that needs to be explored: by itself, such a statement is neither a valid criticism of nor a basis for a decision. It may be an adequate criticism of a case to say that it fails to protect the reasonable expectations of the parties, or that the decision will encourage exploitative behaviour. It may be equally valid to suggest that the result is economically expensive and leads to the mis-allocation or waste of resources”).


\(^{594}\) See John Swan, *Canadian Contract Law* (Markham: LexisNexis, 2006) at 639 (“the broad purpose of the law of contracts [is] to protect the parties’ reasonable expectations”) cited in Geoff R Hall, “A Study In Reasonable Expectations”, *Book Review of Canadian Contract Law* by John Swan, (2007) 45 Can Bus LJ 150 at 151; Swan & Adamski Student Ed, *ibid* at §1.2 (The arguments in the book are “based on the belief that what is most important is not some abstract value like ‘freedom of contract’ or some economic value like efficiency, but what is a defensible result from the point of view of the parties in the individual disputes brought before Canadian courts”).

\(^{595}\) Geoff R Hall, *Canadian Contractual Interpretation Law* (Markham: LexisNexis Canada, 2016). The first edition was published in 2007 (Markham: LexisNexis), the same year as Hall’s review of the Swan treatise.

\(^{596}\) Hall, “A Study in Reasonable Expectations”, *supra* note 594 at 151.

\(^{597}\) *Ibid* at 153-8.
indeterminate (the principle cannot yield a result in difficult cases, the ones most likely to be litigated). 598

Reiter rose to Swan’s defense, arguing that while protecting the reasonable expectations of the parties may not appear consistently in judicial articulations of doctrine, it is not what judges “say” that matters, but rather what they “do.” 599 For Reiter (and Swan), protecting reasonable expectations captures the pursuit of justice that judges engage in prior to deciding which doctrinal explanations they will use to arrive at the end result. This standard is desirable – it leads to “economic organization that is in the best interests of society” 600 – and it also leads to a more useful understanding of what judges do, directing solicitors to “look to facts supportive of reasonable expectations” and litigators to “adduce supportive evidence and argue on these terms.” 601

The publication of Swan’s Canadian Contract Law therefore reignited an old debate among contract law scholars between those focused on the “real” underlying reasons for decision and those more inclined to take contract doctrine on its face, searching accordingly for a degree of structural or conceptual purity. Critics like Hall, who decry the concept’s indeterminacy or lack of fit with explicit doctrine, echo the classical legal thinkers of contract whose search for coherence gave rise to sophisticated doctrinal theories centered around the “intentions of the parties.” 602 The reasonable expectations theory, by contrast, allies itself to functional, equitable, and contextual mechanisms in contract law such as detrimental reliance, estoppel, and good faith. 603 The resistance to reasonable expectations as an organizing theory must therefore be understood as part of a perennial debate about the relationship of form and function, text and context, that runs through contract law (and indeed legal


599 Barry J Reiter, “A Study in Reasonable Expectations: A Rebuttal to Geoff Hall” (2008) 46 Can Bus LJ 95 at 95 [Reiter, Rebuttal to Hall].

600 Ibid at 97.

601 Ibid at 99.

602 See Sébastien Grammond, “Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions” (2010) 48 Can Bus LJ 345 (reviewing of how the reasonable expectations does not fit well onto the Québec understanding of contract law). Cf. Reiter, Rebuttal to Hall, ibid at 99 (“I agree with Swan that [the reasonable expectations] approach is more likely to be helpful than a search for “objective mutual intent”).

603 See Grammond, ibid at 346-7, 364-5; Smith, “Unhelpful Concept”, supra note 598 at 378-9 (demonstrating the similarity but not congruence of protecting induced reliance and protecting “expectations”).
theory generally). Understood as a manifestation of this perennial debate, a parallel can be drawn to the lifelong disagreements between the two great American Restaters, Samuel Williston (reporter of the classical *Restatement on Contract*) and Arthur Corbin (reporter of the functionalist *Restatement on Contracts (Second)*). As Stephen Smith notes in his own critique of the reasonable expectations concept, The Swan-Reiter hypothesis has a true kinship with Corbin, whose first section in his great 1950 treatise is titled “The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises.”

Despite these criticisms, the Swan treatise – first and recent editions – drew praise for its novelty and sophistication of thought. Like the casebook, the treatise’s originality is unquestioned; and, like the casebook, it has been praised for its pedagogical value. Rick Bigfoot, Professor of Law at Bond University, in his review of the third edition of the treatise, describes it as “an excellent, multi-layered, educational resource for investing law students ... with comprehensive content knowledge and critical legal reasoning skills.”

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604 Cf. Grammond, *ibid* at 346 (“the controversy about reasonable expectations may be seen as a struggle to reframe the official account of the process of contractual interpretation in a manner that openly acknowledges that it is legitimate to take into account elements other than the parties’ intention and that judges in fact do so”).


606 Smith, “Unhelpful Concept”, *supra* note 598 at 366. Jay Feinman also describes Corbin as the origin of this concept (Jay M Feinman, “Good Faith and Reasonable Expectations” (2014) 67 Ark L Rev 524 at 534 (“Begin at the beginning. Corbin entitled the first section of his treatise “The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promise”)), though it can be traced back to at least as early as 1763 to Adam Smith, and through to the writings of Austin and Pollock. See JH Baker, “From Sanctity of Contract to Reasonable Expectation?” (1979) 32 Current Legal Problems 17 at 22-23. Smith attacks the reasonable expectations theory on the grounds that the term conceals many different possible meanings (of which he describes “normative,” “empirical,” and “semantic” meanings, critiquing each), and it is only by switching among these that the term can begin to do the work its proponents claim. Accordingly, he argues, “the idea that the law of contract protects, or should protect, contracting parties’ reasonable expectations” is little more than a “slogan” (*ibid* at 388). Swan replied to Smith, writing tersely that she was “at a loss to understand his confusion and that “the concept of reasonable expectations simply means that the law will not seek to protect unreasonable expectations as that would expose a promisor to the risk of unfair treatment ... the concept isn’t hard to understand or, indeed, apply” (*ibid* at 343).


609 Bigfoot, *ibid* at 314.
A careful reading of the Introduction to the seventh edition of the casebook reveals the influences of the treatise. Although much of the text of the Introduction is the same as in the sixth edition, there are three significant additions. Two of these additions consist of themes that had been present in the second edition (the one immediately following the publication of the Studies in Contract Law) but were removed in the third. It is almost as if the effort in crystallizing the ideas about reasonable expectations inspired reflection on a couple of once-abandoned themes.

The first of these additions is a reference to the “conceptual distinction” between discrete and relational contracts.610 The editors once again refer to Macneil’s The Social Contract and announce that the book will consider “how to modify the legal regime which largely developed based on the model of the discrete contract to deal with the increasingly common relational contract.”611

Second, the authors have inserted a reference to the “growing body of theoretical literature on contracts.”612 Unlike, however, the reference to philosophical concepts of law that appeared in the 2d edition, which purported to consider these concepts as central to the casebook,613 the reference to theory here signals a disdain for abstract theory: “those wishing a sustained theoretical study of contract” are encouraged to look elsewhere, and the reader is reminded that “judges and lawyers developed the common law with only limited explicit reference to theories of law, and an understanding of what judges have done is a foundation for more advanced theoretical analysis and criticism.”614 Such veiled antipathy to theory would seem to be consistent with the claim that opens Swan’s treatise that “what is most important is not some abstract value like ‘freedom of contract’ or some economic value like efficiency, but what is a defensible result from the point of view of the parties.”615 This distancing from theory coincides with Swan’s departure from academia – his final year at McGill was the year of publication of the seventh edition, which affiliates her exclusively with Aird Berlis LLP – and the specific

610 This distinction was present in the 2d edition (supra note 508 at xlv-xlvi) but removed in the 3d edition, when the casebook migrated to Emond Montgomery and underwent heavy pruning.

611 7th ed, supra note 508 at xxxi-xxxii.

612 Ibid at xxxiii.

613 2d ed, supra note 508 at xlvii-l.

614 7th ed, supra note 508 at xxxiii.

615 Swan & Adamski, Student Ed, supra note 580 at §1.2.
references to Stephen Smith and Stephen Waddams in the Introduction may implicitly signal Swan’s
difference of opinion with his former colleagues.  

A third addition to the Introduction of the seventh edition is the point that the delineation of
contract law as a category for study is an “artificial construct.” This, too, is a theme of the treatise.
The casebook authors write that grouping materials under the rubric of contract can be “misleading if it
suggests that the neat boundaries fixed for a particular course or ... casebook ... really do represent
neatly separated ideas or topics.” Instead, the authors reprise the functionalist theme: the study of
contracts “must be situated in a functioning society and its legal system;” such “functioning systems”
are “analytically messy.” A problem that can be viewed from one perspective as a contract problem
can, from another point of view, be considered one of “torts, restitution, businesses associations or, for
example, those of interest to a Competition Bureau or a provincial securities commission.” Thus, while
not descriptive of reality, the isolation of a body of “contract” law represents an “over-simplification,”
which is to be followed by seeing how things fit together.

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616 Both Smith’s Contract Theory, supra note 491 and Waddams’ Dimensions of Private Law: Categories and
Concepts in Anglo-American Legal Reasoning (Cambridge: Cambridge University Press, 2003) [Waddams,
Dimensions] had come out in between the 6th and 7th editions. Although Smith’s critique of reasonable
expectations wouldn’t come out until 2009, it is reasonable to expect that given that they were on faculty
together, Swan would be aware of a difference of opinion between the two at the time of writing the Introduction
to the 7th edition. With regard to Waddams, while Waddams had been a contributor to the 1981 Reiter-Swan
collection and grouped under the same like-minded “philosophy” in that introductory essay, Dimensions
represents a considerably more theoretically developed piece that likely signaled a growing intellectual distance
between the two former colleagues (Waddams was not only a former colleague of Swan’s, but a former student,
too).

617 7th ed, supra note 508 at xxxv.

618 This analytical messiness is a central theme of Canadian Contract Law, 3d ed (see Swan & Adamski, supra note
608 at §2.200, cited in Bigfoot, supra note 608 at 321). As Bigfoot writes, the authors eschew conceptual
categorization of the common law, providing instead detailed discussion that “expos[es] the specific norms or
values that judges apply ... in deciding commercial cases and safeguarding the parties’ ‘reasonable expectations’”
(ibid at 319).

619 Swan had a longstanding concern with breaking down the barriers between conventional categories in private
law and legal pedagogy. The reference in the first edition to Ernest Weinrib’s involvement, for example, may be an
allusion to the course they taught in the mid-seventies in which they combined the study of torts and contracts
into one. As Weinrib recounts, “One year in the mid-seventies Swan and I taught a combined first year small group
that covered both contracts and torts, and that reflected our belief at the time that the boundaries between
contract law and tort law were more blurred than the traditional taxonomy of private law acknowledged” (email
correspondence with author, 3 June 2017).

620 7th ed, supra note 508 at xxxv-xxxvi.
The combined effect of these additions is to highlight the indeterminacy of contract law doctrine and to emphasize the criteria of usefulness and purposiveness in studying contract law. The introduction also serves to portray the law in books as a contingent and manipulable tool to achieve social ends, ends which must always be placed in their broadest possible context. Other additions to the seventh edition’s Introduction further these points – reminding the reader that the casebook is merely an “introduction to a broad and complex study that may consume the rest of your professional life,” that the “common law is always changing,” and that “these materials do not purport to resolve controversies, but rather reflect the fact that there are emerging and controversial areas of contract law.”

621 It is important to signal here the limitation of introductions and prefaces as a subject of analysis. On the one hand, they do represent an occasion in which editors can proclaim their own attitudes explicitly, and are thus a useful indication of their underlying views. It may be, however, that there is significant deviation between what is said in an introduction or preface and what is actually done in the book. Indeed, that would correspond to what I have found in my interviews with the contract law professors, namely, the gap between what they say and what they do. The idea that prefaces may express a different attitude about law as expressed in the body of a text appears to be a recurring one in the world of contract law publishing. For example, Waddams makes the following observation about CG Addison’s 1847 work, A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu (London: Benning, 1847):

Addison wrote in his preface (1847) that English contract law was founded “upon the broad and general principles of universal law” and that the “law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal” … Following such a preface, the reader might have expected a book like Colebrooke’s [that was “founded on the assumption that the law of contracts depended on and manifested universal principles”], but the text of Addison’s treatise turned out to consist almost entirely of somewhat pedestrian discussion of decided English cases, reflecting in part, no doubt, commercial considerations, but also the genuine impossibility of attempting to formulate principles of English contract law without regard to their formulation and reformulation in past judicial decisions. (Waddams, “Nineteenth-Century Treatises on English Contract Law”, supra note 157 at 132, 1)

See also Angela Fernandez & Markus D Dubber, “Introduction: Putting the Legal Treatise in Its Place” in Fernandez & Dubber, eds, supra note 157 at 10-11:

Lawyers wanted cases. They wanted the ability to generate complexity, which, after all, is the water they swim in … Waddams tells us that Colebrooke was never able to write a preface to his work. Perhaps he did not understand (as someone like CG Addison did) that a preface might say one thing (very high-sounding) and the book do another (give cases that could be used as authorities slotted onto a more or less developed theoretical framework).

622 7th ed, supra note 508 at xxxiii.

623 7th ed, supra note 508 at xxxiv.
The Introduction changes little with the eighth edition (LexisNexis, 2010), although it is now Angela (not John) Swan listed as first author. Also, Reiter and Bala have switched places in the order of authorship – the eighth edition’s editors are listed in the order of Swan, Bala & Reiter.

vii. *Swan, 9th ed: Full Chapter Status*

The ninth and most recent edition (LexisNexis, 2015) witnesses some more significant changes. Reiter is replaced by Jakub Adamski, Swan’s collaborator in *Canadian Contract Law* who had been, in the third edition of that treatise, elevated to the status of co-author. Adamski “practices litigation and corporate law” and teaches selected law courses at McGill and the Université de Montreal.

The main difference between the introductory section in the eighth and ninth editions is that the commentary now gains the full status of a chapter, no longer an “Introduction.” The chapter is titled “Contracts, Their Context, and Learning the Law,” and paragraphs are now individually numbered, as they are (for the first time) throughout the rest of the casebook, and as they are in the Swan & Adamski treatise. By conforming these introductory comments to the presentation of the remainder of the materials, the hope, presumably, is that it will be more widely assigned and read. Such a move also suggests that these introductory statements should be considered to be equally substantive as the remainder of the book – which makes sense given the theoretical richness that underpins them and the careful way in which they have been developed over the years. All of these themes have accreted over the eight preceding editions; the ninth edition reflects them all, with some modifications to elaborate or refine this vision.

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624 Aside from a few minor changes, the only notable one is the deletion of one paragraph on the first page that describes the existence of the market economy as a fact (8th ed, *supra* note 508 at xxix).


626 *Swan 9th ed, supra* note 508 at vii.

627 The authors continue their tradition in updating their examples to provide contemporary context. For example, they add, in speaking about the Churchill Falls example, “that it is not now considered fair by the government of Newfoundland and Labrador is another matter entirely” (9th ed, *ibid* at §1.16), and use Churchill Falls as an example of a large project where customers’ promises induce banks or bondholders to provide financing (*ibid* at §1.34). “[C]orruption in China” is added as an additional consequence of a “lack of effective legal system to regulate and enforce contractual and property rights” (*ibid* at §1.31). The authors bolster references to the solicitor’s role, adding, for example, the emphasized portion in the following passage: “Without a knowledge of what might go wrong, it is not possible to recommend what should go into a contract or to advise clients” (*ibid* at §1.41 [emphasis added]). The authors also elaborate on their advice to students to contextualize and problematize what they read. They add: “It is never adequate to study reasons for judgment without having in mind some criterion or criteria by which to assess them; reasons for judgment are always more than a story” (*ibid* at §1.49).
viii. Summary of Swan

The result is that Chapter One of the ninth edition of Swan represents not only the authors’ best attempt at presenting the material in a way that encapsulates their particular approach to the subject matter, but also reflects the gradual development of the authors’ ideas and life experiences over the better part of four decades. From their genesis as academic iconoclasts – challenging prevailing attitudes among Canadian contract law scholars with realist views\(^\text{628}\) – to their journey away from academia into practice, albeit one never fully divorced from the university (by virtue of Swan’s temporary return and Bala’s participation since the fifth edition), the Swan editors now present, in their first chapter, an explicit and fully conscious vision of the meaning and value of studying not just contract law, but law in general.

This view instructs students to demand justice and fairness in their evaluation of the law, to understand law as not fixed or determinate but rather malleable and contestable. It exhorts the student to imagine the law as a tool for achieving ends, and to both debate those ends and to critique the law’s success at achieving them. It presents common law decisions as the primary source material but is self-critical about the limits of adjudication as a mode of social ordering. It highlights relational contracting

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They more fully elaborate upon the realist and functionalist theme, rewriting their caveat about the casebook being merely an introduction: “In an important sense, a useful introduction to the law of contracts cannot be introductory. Students are dropped into the middle of a functioning economy with real, live problems. This book reflects that fact” (ibid at §1.46). They also signal to the student reader that he or she is being initiated into a new, exclusive interpretive community with its own shibboleths:

[A]n important part of law school is exposing students to cases that are important in a cultural sense. These cases ... are important as cases that every law student will have read; they become, in effect, coded phrases to refer to a particular kind of problem, a particular legal analysis or solution. Later cases will often be more useful but the original case remains the identifier, indicator or the signal illustrating the problem (ibid at §1.52).

And, the authors signal the importance of (and perhaps a bit of their own idiosyncratic preoccupation with) the precision of language, concluding the chapter with an admonition against the misuse of pronouns: “The use of the plural pronoun in federal statutes when the referent is singular is horrible and to be strongly deprecated” (ibid at §1.74).

\(^{628}\) As discussed, the Swan and Reiter viewpoint can be seen as a challenge to the positivistic and promise-centric vision of Fridman, and to elements of the philosophy of some of Swan & Reiter’s University of Toronto colleagues and sometimes collaborators: the law and economics vision propounded by Michael Trebilcock, the historical perspective grounded in traditional conceptual divisions present in some of Waddams’ work, and to concerns for internal coherence of the private law propounded by Ernest Weinrib. See eg. The Idea of Private Law, supra note 180.
as economically and socially significant and enlists the student both in critiquing doctrine and in imagining how law can preserve or enrich existing relationships. The student is encouraged to do all this while remaining aware of broader social context and cultivating a concern for rigour and precision. The reasonable expectations of the parties serves as a realist and pragmatic overarching theoretical framework.

As compared with the other casebooks, the messages in Swan are more unified, explicit, and polemical. But what is most distinctive about Swan is the attempt to specifically operationalize these theoretical attitudes about law into a workable vision of practice under the aegis of the “solicitor’s approach.” Swan appears to want her students to think of themselves as future solicitors, planners, and problem-solvers, and to break away from a vision of legal practice that emphasizes adjudication. As will be shown in Part II, the way she treats the remedies chapter consistently executes this vision, encouraging functional reasoning over conventional analogical reasoning focused on the judicial formulation of rules. Moreover, as the next section shows, the skepticism about judges’ words and adjudication’s centrality sets her apart from the two other casebooks that enjoy the majority market share.

B. Underlying Messages About Law and Legal Education: Waddams

The casebook known as Waddams has its origins in a casebook edited by the University of Toronto Professor James Bryce Milner and first published in 1963.629 Following Milner’s untimely death at the age of fifty-one in 1969,630 Stephen Waddams took over the casebook, editing three successive editions of Milner’s Cases and Materials on Contracts in 1971, 1977, and 1985. In 1994, Waddams, together with Michael Trebilcock (of the University of Toronto) and Mary Ann Waldron (of the University of Victoria) brought out Cases and Materials on Contracts, replacing Milner, whose influence continues

629 The genealogy goes back further, by virtue of this casebook’s “faint resemblance” to Dean Wright’s original casebook (Milner 1st ed, supra note 507 at xx). See Fernandez, “Object Lesson”, supra note 512 at 509-10 (detailing Wright’s consent to have his casebook reproduced by UBC and the “first published casebook” in Canada by Falconbridge in 1927).

630 Fernandez, ibid at n 112 (“Milner died from a heart attack on a flight from Ottawa to Toronto in 1969 at the age of fifty-one”).

Given Waddams’ heavy involvement in Milner, by understanding the messages in it we can learn more about Waddams by observing which messages were continued or discontinued.

i. Milner, 1st ed

Milner, like Swan would a decade and a half later, wrote a fairly long and substantive Introduction to his casebook. It is a rich source of messages about law and, like Swan, it conveys a “highly personal” approach:

This introduction has been deliberately written in the first person because I intend it primarily for my own classes. I should warn any other reader that the objectives of legal education and the consequent arrangement of topics in a course are highly personal, and my views may very well not be shared by other law teachers.

This highly personal approach happens to bear some similarity with that of Swan. In the first instance, we see the same skepticism about the Langdellian approach to the case method – the idea that each case stands for an abstract proposition that can be categorized in a rational system of rules. Milner describes the student desire to ask of each case what it stands for as a “virus.” Implicitly repudiating Langdell, Milner disabuses the student of the idea that “the cases are building blocks, that each has an understandable shape and will fit neatly into a little wall of law, snugly and certainly.” Instead, for Milner, the “correct” answer is that each case stands for a “little segment of human history, history of an event or of an idea, or of both.” The facts are primary – he cites an unnamed Supreme Court Justice who claimed that “when I have mastered the facts I have done seventy-five percent of the job” – but he cautions the students against unproblematically accepting the characterization of the facts in the appellate case reporter. The facts are “not always fully known or available for study.”

631 See Waddams 1st ed, supra note 509 at iii. The acknowledgment of Milner is retained in prefaces to all successive editions.

632 Milner 1st ed, supra note 507 at xix.

633 Ibid at vii.

634 Ibid at vii.

635 Ibid at ix.

636 Ibid at vii.
“[w]itnesses are not perfect,” judges may “deliberately or otherwise” omit facts in their abstraction of the facts on the record, and many important “background facts” that influence the decision may be purposefully kept out of the record.

This emphasis not only on the importance of facts but on the various occasions in the litigation and reporting process where facts may be determined is reminiscent of Swan’s admonition to students to think of how counsel “got the facts before the judge” in her discussion of the fact-finding process. Even more reminiscent of Swan’s approach (Swan and Milner overlapped as faculty members at the University of Toronto for about four years) is Milner’s practical side. Milner writes that the “important question is: What is to be done with the case?” He reminds the student that the client will not likely ask what the law is, but “more commonly what can he do, or not do, in particular circumstances.” Like Swan, for whom the lawyer’s job was to keep the client out of trouble, for Milner, the “business man … consult[s] his lawyer [when] he wants to avoid trouble and he is not sure what to do.” Indeed, Milner, like Swan, emphasizes the purposive nature of contract law, both making the claim explicitly

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637 Ibid at vii.
638 Ibid at viii.
639 Ibid at ix.
640 Swan 2d ed, supra note 508 at liii. Both Swan and Milner use the example of Hadley v Baxendale (1854), 9 Ex 341, 156 ER 145 to suggest that background factors – “background facts” for Milner (1st ed, ibid at ix), or for Swan the judge’s own “perception of the propriety of one party’s conduct” (2d ed, ibid at liv) – impact the fact-finding process.
641 After completing her BCL at Oxford, Angela Swan began as an assistant professor at the University of Toronto in 1965. Milner passed away in 1969. See http://www.airdberlis.com/bio/Angela-Swan#. Swan “can remember some conversations with [Milner] about Fuller,” though they “never did talk much about Contracts” (Angela Swan, email correspondence with author, 19 October 2016).
642 Milner 1st ed, supra note 507 at vii.
643 Ibid at xv.
644 Swan 3d ed, supra note 508 at xxxi.
645 Milner 1st ed, supra note 507 at xvi.
646 See eg. Ibid at xix (“Throughout the book emphasis is constantly laid on the fact that contract is a purposive activity”), xvi (“lawyers in a case influence the court’s decision, so that the prediction of law becomes a complex purposive activity of man”).
and using purposiveness as the rationale for certain editorial choices, such as starting the book with remedies. Milner relates human purposes to the “basic problem of justice”:

All of this should make apparent to you the importance to the law of human purposes. These purposes are many, varied, and conflicting; the task of the law is to sort them out and promote those that should be promoted and suppress those that should be suppressed. We might call the difficult task of selection the basic problem of justice.

Also like Swan, this canvassing of various modes of activity leads Milner to point out that barrister-like activities do not represent the full range of things lawyers do. He later further teases out the range of things a solicitor might do, connecting this range of activities to the legislative mode of ordering:

Their professional action will be based on their predictions, but it may take the form of, for example, drafting clauses in a contract, persuading an administrative official to vary a regulation, or a legislative committee to recommend an amendment to a statute, or organizing a new corporation. All of these activities are in a sense legislative, rather than adjudicative, and they justify, in my view, an even greater emphasis on the legislative area than our legal education presently offers.

a. Lon Fuller’s Legal Process Influence on Milner

The idea that the future lawyer should be trained to master a wide range of legal processes derives from the Fuller-inspired idea that various modes of social ordering lie at the lawyer’s disposal to pursue various purposes. Like Swan, Milner warns students against thinking about law as solely adjudication. Like Swan, he emphasizes these multiple forms of social ordering as alternative modes

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647 *Ibid* at xix (starting with remedies gives “an excellent perspective of the purposes of the law in enforcing contracts”).

648 *Ibid* at xvii.

649 *Ibid* at xi (providing estimates of proportions of lawyers who work as barristers in Canada and the UK).

650 *Ibid* at xvii.

651 The parallels with Swan are striking. Compare Milner 1st ed, *ibid* at xi (“First year law students can too easily get the impression that life in the law is just one continuous lawsuit. Case study falsely emphasizes this impression. The cases are almost always cases in courts, and the constant reading of cases may tend to drive out of mind the other areas in which law is equally operative”); Swan 3d ed, *supra* note 508 at xxx-xxx ("The consequence of a focus on cases – that is, on the record of judicial decisions – tends to encourage one to think that we are concerned only about what happened (or might happen) in court: that every problem and issue should be approached as if it were going to be decided by a court"). However, it is worth signaling here, as will be discussed further below, that both Swan and Milner both rely heavily on appellate case law for their main materials.
the lawyer should develop in pursuit of justice. He describes “three basic processes” as separate branches of the legal discipline: “the contract process, of negotiation, promise and exchange;” “adjudication, of which the judicial process is an instance, but so is arbitration;” and “legislation, or the exercise of power by a body authorized to make rules for general application,” and which includes both state legislative bodies and private individuals given such power by “contract or special arrangement.”

This implies that legal education should, at the very least, elevate the status of “legislative” processes to that of adjudicative ones.

These ideas are congruent with those expressed at one point by Lon Fuller. Milner generated his “great debt” to Fuller during his time at the Harvard Law School, where Milner studied with Fuller as a graduate student in 1949. It was a time of ferment in legal education at Harvard, with Lon Fuller recently having chaired the 1947 Special Committee on Legal Education, whose preliminary report was so influential it apparently continued to circulate as of 1984. The curricular reforms that followed “stressed the importance of reducing concern with problems at the appellate level and focusing on the many perspectives of the law – e.g., trial, counseling, negotiating, drafting and the like.” In the Winter

652 Milner 1st ed, ibid at xvii-xviii.

653 Fuller defies easy categorization. Many of the Fullerian views canvassed here may seem surprising to some readers. They would not seem obviously to align with the natural law commitments (the principles of legality) for which he may be best known (See Lon L Fuller, The Morality of Law, revised ed (New Haven: Yale University Press, 1969)). His earlier work on remedies and his curricular work in the 1940s suggest commitments to realism and legal process – to the “real” actions of judges and to the diversity of processes to which a lawyer must be aware. This latter constellation of ideas, that surface both in Basic Contract Law, supra note 488 and The Principles of Social Order, supra note 253 at 264-5, have led some to characterize his objectives as being to produce “social architects.” See eg. John MA DiPippa, “Lon Fuller, The Model Code, and the Model Rules” (1996) 37 S Tex L Rev 303. While it is beyond the scope of this study to canvass Fuller’s intellectual developments and reconcile the various strands of his voluminous oeuvre, it is sufficient to note here that Fuller’s views are capacious and to signal that different ideas of his may be (and have been) used to support different philosophical, pedagogical, and political projects. That “social architecture” may be reconcilable with natural law theory is hinted at by Fuller’s use of the former term in his “response to critics” in The Morality of Law, ibid at 241).

654 Milner 1st ed, supra note 507 at xx.

655 Milner was 31 at the time of his graduate studies at Harvard and had already taught law for four years (from 1945-49) at Dalhousie University. See Inventory of the James B Milner fonds, online: http://archivesfa.library.yorku.ca/fonds/ON00370-f0000357.htm.

656 See Robert Summers, Lon L Fuller (Stanford University Press, 1984) at 15. Harvard in the late thirties and forties was also a time when Hart & Sacks, the future authors of The Legal Process, supra note 251 were experimenting with new legislation-related teaching materials in the field of public law. See William N Eskridge, Jr & Philip P Frickey, “The Making of The Legal Process” (1994) 107 Harv L Rev 2031 at 2033-45.

657 Albert Sacks, cited in Summers, ibid at 15.
of 1948, Fuller published his views on legal education in an article entitled “What the Law Schools Can Contribute to the Making of Lawyers.” Milner not only read this article while at Harvard, but organized a graduate student reading series at which Fuller presented it. Milner and Fuller would remain in correspondence for the subsequent two decades, and Milner would include this article in a list of recommended Fuller readings he shared with members of the Canadian judiciary. Milner would have also encountered a series of related legal-process ideas in the Legislation Seminar he took with Henry Hart, architect of the Legal Process school. Indeed, Milner’s two highest grades were in Fuller’s Jurisprudence seminar and in Hart’s course.

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658 (1948) 1 J Legal Ed 189 [Fuller, “Law School”].

659 James Milner, Memorandum to “Fellow Graduate Students,” 28 November 1949, York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds, 1992-014/005(161) (“On Monday night Professor Fuller will lead off with observations on what law schools can contribute to the making of lawyers’); Letter from James Milner to Erin Griswold (Dean of Harvard Law School), 27 March 1950, York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds, 1992-014/005(161) (“We owe a particular debt to Professor Fuller, who not only started the ball rolling at the first meeting, at which we discussed his article 'What the Law Schools Can Contribute to the Making of Lawyers,' but who also gave us continuous encouragement and advice throughout the year”).


661 See Eskridge & Frickey, supra note 656 at 2039-40.

662 See generally Hart & Sacks, supra note 251.

663 Milner received his highest grade, a 39.5 out of 50, in Fuller’s Jurisprudence Seminar. His second-highest grade (39 out of 50) was in Hart’s Legislation seminar. See Harvard Law School, Examination Record of James Bryce Milner, June 1950, York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds, 1992-014/005(161). Hart seems to have made an impression on Milner. As Milner wrote to Caesar Wright, “Hart’s idea is that legislation is a fancy name for legal method. I thought I was back in jurisprudence for five weeks” (Letter from James Milner to Caesar Wright, 4 May 1950, York University Libraries, Clara Thomas Archives & Special Collections, James B. Milner fonds, 1992-014/005(161). In an earlier letter, Milner told Wright that he viewed “Legislation as a jurisprudential and public law subject” (Letter from Milner to Wright, 20 April 1950, ibid).

Milner was one among a number of Canadian legal academics who studied law at Harvard. These included the founding Dean of the University of Toronto Faculty of Law, Caesar Wright (SJD, 1927) and other U of T colleagues John Willis (Special Student – no degree, 1932), Bora Laskin (LLM, 1937), and Dick Risk (LLM, 1962). Others included Osgoode Hall Law Professor Stanley Edwards (LLM, 1947), McGill Law Dean Maxwell Cohen (Special student – no degree, 1938), Toronto and UNB Law Professor, and UBC President, Norman MacKenzie (LLM, 1924), UBC Law Professor Malcolm MacIntyre (LLM, 1930, SJD 1940), and Dalhousie Law Professor Angus Macdonald (SJD, 1929). See Harvard Law School, Alumni Directory of the Harvard Law School 1963: The Quinquennial Catalogue (Cambridge, MA: Harvard Law School, 1963) at 832-33. Erin Griswold, Dean of Harvard from 1949-67, would likely have overlapped with some of these figures, during his own SJD, completed in 1929. Described elsewhere as the “éminence grise of Canadian legal education in the common law,” Griswold was a
In his essay, Fuller advocates for a new conception of legal education that views its object as giving “the student an understanding of, and an insight into, the processes in which a lawyer participates.” Fuller divides law into two basic social processes, adjudication and legislation. Adjudication includes “all forensic methods of deciding disputes, including informal arbitration and the work of administrative tribunals as well as the traditional processes of our courts.” Legislation “refers not merely to the planning and drafting of statutes, but includes the negotiation and drafting of contracts and other private documents.” He argues that traditional legal education is deficient at emphasizing legislative process, with professors operating under the false assumption that it will be sufficiently covered incidental to a focus on adjudication. Fuller recommends that legal education should teach processes in their “most elementary form,” and expects that knowledge of rules and

passionate advocate of graduate legal education and a frequent correspondent with a number of Canadian legal educators, including Milner. See Philip Girard, “Who’s Afraid of Canadian Legal History?” (2007) 57 UTLJ 727 at 740; Erin Griswold, Letter to James B Milner, 26 June 1959, Harvard University Archives, UAV 512.26.15, Box 18, folder “University Law Schools (12)” (“In the University of Toronto Law Journal I find your very interesting Presidential Address. I am glad to see that you are taking pokes at the great in Canada”).

The period during which Milner studied at Harvard came during a resurgence of graduate legal education after the comparatively dry years of World War II. For a period, elite schools like Harvard invested significant resources in graduate legal education for Americans, although, as Gail Hupper points out, the focus on graduate legal education gradually shifted to international students. See Gail J Hupper, “Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law” (2015) 49 New Eng L Rev 319; Gail J Hupper, “The Rise of an Academic Doctorate in Law: Origins Through World War II” (2007) 49 Am J Legal Hist 1; Gail J Hupper, “The Academic Doctorate in Law: A Vehicle for Legal Transplants?” (2008) 58 J Legal Ed 413. Canadians at Harvard, however, were often considered as closer to Americans than to other international students, notwithstanding some discrepancies in the undergraduate legal education as between Canadians and Americans. See eg Erwin N Griswold, “Graduate Study in Law” (1950) 2 J Legal Ed 272 at 275 (“In the case of applicants from Canada, their general purposes are much the same as in the groups already mentioned, and we have had many Canadian graduates of whom we are very proud, including the president of this great University. But Canadian law schools do not all follow the general pattern of instruction which is common in the United States”).

664 Fuller, “Law School”, supra note 658 at 189.

665 Ibid at 192. Perhaps accounting for Milner’s specific mention of arbitration, Fuller identifies arbitration as a pedagogically useful example of adjudication, because it “reduces it to its most elementary form” (ibid at 198).

666 Ibid at 192-3.

667 Ibid at 194 (neither legislative nor adjudicative processes “can be taught as an unplanned by-product of teaching the other”), 195 (professors have a “responsibility for conveying to the student an understanding of both of the basic processes”).

668 Ibid at 199.
skills would emerge as a by-product of this saturation.669 Focusing on process, moreover, it is “metaphysically sound”:

Life is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality. For that reason I believe that the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts, but will promote their just solution. If we do things the right way, we are likely to do the right thing.670

Milner’s language almost verbatim reproduces many of these thoughts – his emphasis on “process,” his division into legislative and adjudicative processes (though at one point distinguishing contractual processes from legislative, at another point including them within it),671 his highlighting of lawyerly activities that emerge from the legislative arena, his criticism of legal education as unequally weighted toward the adjudicative.672

Milner’s “highly personal” introduction therefore conveys his own legal education at Harvard. This American training, as Angela Fernandez has highlighted in the context of Milner, and as reported by the historians Kyer and Bickenbach, was in the air at the University of Toronto Faculty of Law in its early days.673

There is another way in which the distinctive time and place of the University of Toronto Faculty of Law appears in Milner. The Introduction contains references to the fierce debates over the control of legal education.674

669 Ibid at 197 (“we should concentrate on the major ways in which legislation and adjudication function in our modern society, and let knowledge of rules become an unplanned by-product”), 196 (“our task is to saturate the student with the ... process, and let the skills and techniques develop as a by-product”).
670 Ibid at 204.
671 Compare Milner 1st ed, supra note 507 at xvii (drafting a contract is “in a sense legislative”), xvii-xviii (describing “three basic processes as “the contract process, adjudication, and legislation”).
672 Ibid at xi.
673 See Fernandez, “Object Lesson”, supra note 512 at 508, quoting Kyer & Bickenbach, supra note 12 at 236-7 (“Wright, Laskin, Willis, Milner and Smith were all Harvard trained. It would certainly be American ideas and teaching methods that would guide the direction of the faculty in the future”).
674 Kyer & Bickenbach, ibid.
b. Milner and the “Fiercest Debate”

Milner’s support of Fuller’s views reveals a commitment to the more practical sides of legal study. The focus on problem-solving and the mastery of different legal processes are intimately related to a client-focused notion of legal practice: helping the client figure out what he or she can “do, or not do, in particular circumstances.”675 At the same time, he demonstrates a genuine commitment to the academic study of law. The co-presence of these tendencies suggests something of a rejection of the oppositional terms of the “fiercest debate.”

1. Milner the Academic

Milner exalts university study in his discussion of the tendency to ask whether a case is “rightly decided.” Milner’s discussion of this question is somewhat ambiguous. At first his language suggests caution in asking this question, intimating that it may be premature or even outside the bounds of the “precise world of legal propositions”:

Early in your legal education many of your teachers will have picked up a virus from some unknown source that drives them to ask you, of each case, is it rightly decided? You may be tempted to ask, if you have been bitten by the bug of semantics, “What do you mean by right?” The question is a fair one, and no law teacher or law student should try to dodge it, even if you or they may occasionally feel you are poised on the brink of philosophical chaos. To ask this question [presumably, the question, “Is the case rightly decided?”] is to introduce the element of ethics into the rather more precise world of legal propositions.676

Yet as Milner goes on, it becomes clear that these deviations are to be embraced, not resisted. This is so not only because it prompts reflection on non-adjudicative processes, but because of the academic nature of university legal study itself:

What then, is the answer to the teacher’s question, “Is the case ‘right’?” Can there be any less of an answer than an examination of the possible reasonable and practical alternatives? The answer to the question may be a qualified “yes, but” in some cases, because on a proper view of the problem of the case it may appear that there are other legal processes better adapted to its solution than the adjudicative. While the case as presented may be “rightly” decided, the problem of the case, which is also the law student’s concern, is not satisfactorily solved. It is admittedly a dangerous question, one

675 Milner 1st ed, supra note 507 at xv.
676 Milner 1st ed at xiii.
that opens up large and exciting vistas and yet, in a university, no matter how modern, can one properly refuse to consider it?\footnote{Ibid at xiv (italics in original, underlining added).}

The proper domain of “university” study is therefore not only to contain oneself within the frame of analysis (adjudication), but to look beneath the phenomenon of the case itself to consider the underlying “problem,” which may not be “satisfactorily solved” by even a “rightly decided case.” In this somewhat elliptical passage, therefore, Milner is affirming both the role of the traditional case method (which, presumably, will engage the teacher and student in considering the “reasonable and practical alternatives” to the adjudicative resolution of the dispute at hand), and the idea that other “large and exciting vistas” – which could be a reference to other disciplines – can be brought into the law classroom. Such an incorporation of other disciplines into legal study is precisely what Fuller had in mind in his own essay about legal education.\footnote{See Fuller, “Law School,” supra note 658 at 201 (“It is apparent that this process of synthesizing considerations that lie in different realms of human competence is one aspect of the larger process I have called legislation”).}

In simultaneously affirming the role and importance of traditional case study and a broader, more liberal study of law, Milner’s approach would seem to break down the dichotomy between “practical” and “academic” legal education. This breaking down of the dichotomy occurs at different levels. There is his case study approach, which, as the Introduction suggests, is far from facile, instrumental, or mechanical, but rather steeped in a deep and nuanced concern about justice. Milner quotes Cardozo’s \textit{Nature of the Judicial Process} to the effect that “Law never \textit{is}, but is always about to be,”\footnote{Milner 1st ed, supra note 507 at xvi.} compares it to the Lord Mansfield aphorism that the common law “works itself pure” by drawing on “fountains of justice,” and calls the idea that law is \textit{always} about to be a “great” one.\footnote{Ibid at xvii (emphasis in original). Lord Mansfield is quoted in \textit{ibid} at xiv (citing \textit{Omychund v Barker} (1744), 1 Atk 21 at 33, 27 ER 15 at 22-3)).} Milner also emphasizes the “uncertainty in the law.”\footnote{Milner, \textit{ibid} at xv.} He tries to disabuse the student of the idea that law “consist[s] of a long series of settled rules … to memorize and to understand.”\footnote{Ibid at xv.} He does not let the...
student plunge into complete relativism – he asserts that there is “accepted doctrine,” but emphasizes that the lawyer’s task is not just to provide the client with the applicable doctrine.683

The Milner Introduction is light on theory per se, but richly alludes to theory. In discussing the role of law as prediction, Milner uses a meteorological metaphor to cavass the various approaches of “black letter law, functional analysis, and the law-in-action”684 – all references to legal scholarly traditions. And the Introduction is laced with references to legal scholars – Holmes,685 Cardozo,686 and Fuller.687

2. A Conciliatory Vision

Thus the Milner Introduction communicates to students a remarkably conciliatory vision of the relationship between the academic study of law and its practice. The articulation of what a lawyer does is assimilated to a similar type of purposive activity – helping clients stay out of trouble, or solve problems – that accounts for the nature of law itself. The vision of law (and life) as a process feeds both the academic inclination to “understand” law, in a nuanced way, and equips the future lawyer to be of

683 Ibid at xv-xvi (The client “does not want an abstract statement of what the law is, or what some lawyer believes it to be” at xvi).
684 Ibid at xvi:

So far as the law consists of prediction, it may be likened to weather predictions in the daily papers. The short, overly simplified “black letter” version usually appears on the front page in an upper corner. The Toronto Globe and Mail announced there, on August 30, 1954: “Sunny, Warm, High Here 80.” Anyone interested in the conflicting influences which led to the summary statement could turn to page two, where an incomprehensible map showing these influences was supposed to make everything clear. As a matter of interest, and to complete the analogy with law as prediction, the forecast turned out, in this instance, to be rather misleading. On page two of the same paper, on August 31, the maximum temperature for the day before was said to be 68 and 0.65 inches of rain fell. It was explained that “the disturbance over Lake Ontario was retarded in its eastward trek by the slow northward motion of the hurricane off the North Carolina coast.” The corresponding situations in law would probably be called black letter law, functional analysis, and the law-in-action. We are, I think, still lagging behind the other social sciences in our study of the law-in-action, yet that is where the functional analysis receives its only important testing. Obviously, the analogy with weather prediction falls down when we remember that the lawyers in a case influence the court’s decision, so that the prediction of law becomes a complex purposive activity of man, not an observation of inanimate elements having no known purpose.

685 Ibid. at xvi (quoting OW Holmes, “The Path of the Law” (1897) 10 Harv L Rev 457).
686 Ibid. (quoting Benjamin N Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921)).
687 Ibid at ix (quoting Fuller, Basic Contract Law, supra note 488).
use to future clients. This is a “conciliatory” approach when contrasted with the oppositional shadow that the “fiercest debate” would have cast over the Faculty of Law during Milner’s tenure.

These reflections suggest a slight differentiation with Swan. Whereas Milner’s purposive, process-centric vision of law might seem to reconcile academic and practical goals of legal education in one fell swoop, the Swan vision, while accommodating both visions, oscillates in its emphasis of one or the other, perhaps occasioned by Swan’s own move in and out of practice. Swan, while never abandoning her commitment to the idea that justice must be at the centre of legal study or that social context be held in contemplation – both ideas at home in a principle-centric academic university – nevertheless signals a type of pre-eminence to practice, both explicitly (recounting in a Preface that the editors are pleased to see their ideas being borne out in practice) or implicitly (in prioritizing “usefulness” as a standard of evaluation). Swan’s stance on the academic/practical divide cannot, of course, be characterized as facile or one-sided, but hers is of a different flavor – a conciliation that happens in between the lines, as a product of accreted life experience and successive editorial revisions. Milner, in part because his early death halted the development of the casebook and its introduction, demonstrates the conciliation a little more all-at-once.

c. A Not-So-Abject Apology

There are, of course, other differences between Milner’s view and Swan’s. Whereas Swan is quite emphatic in her cautions against a focus on case law, Milner, by contrast, qualifies these cautions somewhat. Thus his “apology for so many cases is not quite abject, because first year law students are expected to learn thoroughly the judicial process, how and why it works and what its limitations are.”688 As Angela Fernandez observes, “Milner seems to have been uncomfortable with something about th[e] process of canonization of codification of cases in law school casebooks. He referred to his own work as ‘admittedly’ a casebook.”689 Yet, this did not stop him from adopting the classical form of the casebook, choosing, unlike Swan (whose commentary fills the pages throughout the book), to provide relatively sparse commentary throughout. As the legal-historian-to-be Kyer wrote in comparatively reviewing the two casebooks (Milner’s third edition with Swan’s first) when he was a second-year law student at the University of Toronto:

688 Ibid at xi.
Waddams’ edition of Milner’s casebook fits more comfortably into the traditional mold. The principal teaching aid is the body of cases ... [T]he cases predominate; the other materials simply supplement them.

Swan and Reiter’s volume ... abounds with notes by the authors and lengthy articles and excerpts from monographs. The cases are important, but they do not represent as substantial a portion of the volume as do the cases in Waddams’ book. In a sense, what Swan and Reiter have produced is a combination casebook, text-book, and book of readings on the law of contracts ...

Waddams’ casebook is more succinct. It presents the essentials of the law of contracts in a shorter compass. As Milner thought best, the student is left to think things out largely on his own. Swan and Reiter provide the student with more direction.

1. “Just the Cases”: Critical Thinking

The sparse approach to editing (i.e., providing “just the cases”) has at least two implications. First, it provides an occasion for Milner to express his pedagogical desire that students take responsibility for their own critical thinking.

Milner indeed is quite emphatic about the students thinking things out “largely on [their] own.” In a similarly pedagogically direct style to Swan, Milner pleads with his students to trust their own

690 Clifford Ian Kyer, Book Review of Milner 3d ed, supra note 507 and Swan 1st ed, supra note 508, (1978) 37 U Toronto Fac L Rev 152 at 152, 153, 155. Although Kyer is commenting on Waddams’ fairly substantial re-working of the Milner text, the above observations about style would apply to all editions, even the first, of the Milner text. See eg. Christopher Carr, Book Review of Milner 2d ed, supra note 507, (1971) 6 UBC L Rev 451 at 451 (Waddams has “steered towards updating Professor Milner’s work rather than producing a new book”); C Granger, Book Review of Milner 2d ed, supra note 507, (1971) 5 Ottawa L Rev 268 at 269 (Waddams has “left the second edition substantially similar to the first”). One reviewer of the third edition does mention that the format has “considerably changed the format of the book by adding many more problems and questions” (RS Nozick, Book Review of Milner 3d ed, supra note 507, (1978) 16 Alta L Rev 544 at 545), but both he and other reviewers suggest the editors could go even further (ibid at 546; see also GHL Fridman, Book Review of Milner 3d ed, supra note 520, (1977) UWO L Rev 256 [Fridman, Review of Milner 3d ed] at 257); and of course Kyer, in his review just quoted, did not find these additions sufficient to affect his general characterization of the casebook as being one in which the cases speak for themselves.

thinking. This includes refraining from consulting secondary sources,\textsuperscript{692} not only so that they may figure things out for themselves, but also to better trust and develop their critical instincts. “[B]efore you have been completely brain washed,” he writes, “I hope you may add to the intellectual ferment that ought to characterize any lively classroom of beginning law students.”\textsuperscript{693} In advising students how to read a case, he tells them they have to:

> Try to do two rather irreconcilable things. You have to get to know the best which has been thought and said about the law of contracts, and you must turn a stream of fresh and free thought upon our stock notions and habits ... You have to know what judges and legislatures have said but you also have to know that there are other, and sometimes better, ideas that they might have expressed; and you have to know the legal system, how and why it works, or doesn’t work, so that you, as future law reformers, may have some hope that your better ideas will be adopted.\textsuperscript{694}

It is to this goal of stimulating this fresh, critical insight, that Milner attributes his own reticence with questions and commentary:

> I have not put questions after every case because you may not bother to ask your own if you spend too much time worrying about mine. Your own efforts will be more rewarding in the long run. Take nothing for granted until you are forced to. Ask yourself whether you fully understand the judge’s point of view before you attempt to criticize it, but do not hesitate to criticize it constructively.\textsuperscript{695}

This emphasis on critical thinking, on imagining students not only as future lawyers but as future “law reformers,” further bolsters Milner’s status as an academic. The student is told not only to think for him- or herself, but to actively criticize the subject matter; not to take authority for granted, but to understand it so that it may be criticized. This is consistent with going beneath the surface “problem” of a case to understanding it as a broader problem to be solved via alternative legal processes.

2. “Just the Cases”: Their Implicit Predominance

The choice to include only cases has a second implication, one that suggests yet another distinction with Swan. This lies in an implied underlying commitment about law. One might observe, for

\textsuperscript{692} Milner 1st ed, supra note 507 at xii.
\textsuperscript{693} Ibid at xi.
\textsuperscript{694} Ibid at xii.
\textsuperscript{695} Ibid at xii-xiii.
all of Fuller’s influence on Milner, a certain implicit prioritization of doctrine. The traditional form of *Milner* – a heavy collection of cases with minimal commentary – implies that there is something of great value to be discerned from the cases. The student may very well think for him- or herself, but if the primary object of reflection is the case, then it is perhaps inevitable that “the judicial process, how and why it works and what its limitations are” will remain the primary focus. This tendency may serve to reinforce an idea that law is typified by judicial reasoning, thereby endorsing the view that there is a distinct mode of legal rationality – that the “precise world of legal propositions” is for Milner very much real.

If this inference is correct – that a prioritization on short case excerpts with minimal commentary suggests a faith in an inherent legal rationality (recall that Milner approvingly cites Lord Mansfield’s idea of the common law working itself “pure”) – then there is somewhat of a tension between the stated goals of understanding various legal processes and the implicit messages communicated about law through the main body of the casebook. Milner seems aware of the tension – it is “admittedly” a casebook, “there should probably be more” legislative examples, and he “apologizes” (albeit not quite “abjectly”) for too many cases. But it is an open question whether this tension is simply a result of Milner not being able to accomplish the Fullerian goal, given limited resources and time, or whether the reproduction of Fuller’s philosophy masks an unconscious preference for the case method, and with it the adjudicative process and so-called “internal” legal reasoning. Indeed, unlike Fuller’s essay,696 there are no specific references to the role of “external” disciplines in the Milner Introduction – only the cryptic reference to other “new and exciting vistas” that are the domain of the university.

ii. *Milner, 2d ed: The Tension Deepens*

This tension appears more accentuated in the Introduction to the second edition of *Milner*. Waddams is now the editor, because of Milner’s death in 1969, but the Introduction remains Milner’s, and includes some revisions made by him – it is dated “1963 and 1968.”697 The changes consist largely in a new section at the end of the Introduction entitled “Instead of a Definition.” This text expands on the idea of legal process by highlighting themes of institutional competence and describing “new trends in private arrangements.” While these themes serve to deepen the connection to Fuller, they also more


697 *Milner 2d ed*, supra note 507 at xxxi.
deeply implicate Milner in an apparent tension between the Fullerian views and more conventional commitments.

a. Furthering Fuller: Institutional Competence

Milner makes the point that in the 19th century, courts performed two functions – “develop[ing] contract doctrine (a ‘legislative’ role) and settl[ing] disputes over the facts and their interpretation (an ‘adjudicative’ role)”.698 As the economy became more complex in the 20th century, however, this allocation of responsibility shifted away from the courts exclusively, to other areas of the state – namely, legislatures and administrative agencies. Milner’s commentary on this phenomenon is two-fold. First, he suggests that this shift in institutional allocation of responsibility is appropriate, because, for example, “[t]he social problems of our time demand a less haphazard timing of their solution ... The legislatures have been able to provide more generalized solutions and from a strategically more effective point of view.”699 From this statement may be inferred a greater importance placed on non-adjudicative legal processes.

b. New Trends in Private Arrangements

The need for new forms of legal regulations flows from the changes in the “character” of private arrangements,700 a phenomenon that urges Milner to expand on the Fuller-like prescription earlier that the lawyer must master these various modes of social ordering in order to be effective:

The lawyer simply has to widen his horizon to include in his understanding of contract law, not only judge-made law but legislative and administrative controls as well. He must also know more about the changing reliance in business and domestic arrangements, on private ways of settling disputes rather than on litigation in a State court. Use of the courts for even simple settlements of disputes will be avoided where continuing business relations make resort to the emotionally charged atmosphere of courts undesirable. The lawyers will increasingly work out sensible settlements without the judges’ supervision. All of this is meant to protect the reader from over-exposure to judicial opinions.701

698 Ibid at xxx.
699 Ibid.
700 Ibid (using the examples of sale of drugs and standard form contracts).
701 Ibid at xxxi.
This passage, all the more emphatic as the penultimate paragraph in the Introduction, reaffirms the importance of multiple legal processes. It even expands the frame to include non-state normative arrangements – “private ways of settling disputes.”

At the same time, however, this passage also recalls the tension in Milner’s thinking between affirming a diversity of legal processes, on the one hand, and perhaps betraying a preference for the adjudicative, on the other. What “over-exposure” to judicial opinions are these comments meant to protect the reader from? It can be none other than what follows in the remainder of the casebook – and what follows is of Milner’s own making. This reprise of his “apology” serves to highlight the gap between the Introduction, which by virtue of its elegance conveys Milner’s commitment to the Fullerian views, and the views of law implied by the choice to emphasize case law in the main body of the book.

Such a tension appears in another place in this new added passage. Near the beginning of the new section, Milner writes, “A large part of human affairs is successfully conducted by private arrangements that do not involve the State in any immediate way. It is with this area of private arrangement that this book is concerned.”702 The very next paragraph, however, begins with “The circumstances under which the State can be and should be invoked are at the heart of contract law.”703 This juxtaposition invites the question: is “this book” concerned with non-State “private arrangements,” or with the “circumstances under which the State can and should be invoked”? The former emphasizes private normativity; the latter, state normativity. This apparent tension mirrors the impression of a gap between Milner’s stated commitments (diversity of legal processes) and possible unconscious bias (adjudication). In both cases, an alternative is proposed to the conventional view, and one could say that the “stated” preference is for the alternative, while the “revealed” preference is for the conventional.

How to make sense of this apparent tension? One way is to loosen the rigours of linguistic interpretation and resolve the tension by reformulating Milner’s words. The book, in other words, is “concerned” with the underlying problem of private arrangements, but treats that problem using the best available means, which happens to be judicial decisions. In this case there is no tension in underlying philosophy, just an acknowledgment of the limited availability of subject matter to effectively study other legal processes (legislation, administration, private arrangement). This is certainly a

702 Ibid at xxx.
703 Ibid at xxxi.
plausible position. But if this is the case, why then is there no specific explanation? There is no attempt
to account for the reason why case law is emphasized, other than to affirm the importance of
adjudication for the first-year law student. This suggests, therefore, that the retention of case law is a
conscious choice – the “apology is not so abject.” Accordingly, the tension is apparently real: on the one
hand there is the magisterial articulation of the limits of the adjudicative process; on the other, a
conscious decision to emphasize that process, with no real explanation for the decision.

iii. Summary of Milner

The Milner introduction reveals a range of related but at times apparently contradictory
messages. The emphasis on multiple legal processes coincides with the idea that law is above all a
purposive endeavour, a study of “means,” as Fuller has written elsewhere.704 By implication, the end
goal of legal education is to produce lawyers, or “social architects,”705 who are able to accomplish
various client or social ends by using the means most appropriate to the circumstances. A realist view of
law as functional, a legal-process embrace of multiple forms of social ordering, and an integrative view
of theory and practice would all seem to surface in the Milner introduction. In these ways, it resembles
the Swan book. Swan, too, acknowledges the influence of both Fuller and the Legal Process school,
although Swan never met Fuller.706

At the same time, Milner appears to be conflicted about legal processes, as evidenced by his
not-so-abject apology and his decision to rely on the case method so heavily. His minimalist approach to
casebook writing, which takes for granted the predominance of cases, may suggest a subconscious
preference for adjudication, notwithstanding the propositional claims to the contrary. This tension
forecasts three related phenomena about the teaching of contract law in Canada. First is the immediate
succession to Milner, Waddams’ editorship and eventual departure to produce his own casebook. As the
next section will show, Waddams displays no similar ambiguity about the importance of adjudication.
For Waddams, the importance of case law is accepted without caveat or qualification, and he even takes

704 Fuller, “American Legal Philosophy”, supra note 252 at 477, 478.
705 See supra note 639.
706 Swan acknowledges both Fuller’s influence (see Swan 1st ed, supra note 495 at vii (Preface)) and that of Henry
Hart (“Another very important influence on my thinking was the “Legal Process” materials of Hart [,] & Sacks ... They
provided me with a vehicle for fitting my views on the substantive law, initially of Conflicts and then Contracts, into
a functioning legal structure” (Angela Swan, email correspondence to author, 19 October 2016)). Swan “never met
Fuller ... had hoped to meet him when he came to Ottawa once but family responsibilities prevented that and he
died not long after” (ibid).
occasion in his textbook to argue for the importance of its centrality. What might have become a broader flourishing of Fullerian legal-process ideas at the University of Toronto expired with Milner’s untimely death. In its place grew a sophisticated and complex exposition of contract law that, however much it continued the American legal realist tradition, cemented the dominance of the adjudicative process in Canadian contract law teaching.

Second, the tendency to accept adjudication as the predominant mode in contract law teaching is a more general one. It figures prominently in the best-selling casebook, Ben-Ishai & Percy, which contains its own version of a not-so-abject apology. This tendency to naturalize the case method is, moreover, a feature of the vast majority of contract law teachers. So, while American Legal Realism figures prominently in the other two books, and in the attitudes of most contract law teachers generally (as we will see in Chapter 5), challenges to adjudication remain more or less isolated in the Swan book and in the first two editions of Milner.

Third, the difference between one’s propositional claims about law, and the ideas of law communicated by higher-order choices about substance, structure, or method, is a persistent theme of contract law teaching in Canada. We see it, too, in Waddams and Ben-Ishai and Percy, and, indeed, it is the major observation made about contract law teachers’ attitudes in Chapters 4 and 5. Propositional, or aspirational, statements about law and law teaching seemed destined to lie in tension with actual practices.

iv. Subsequent editions of Milner and the rise of Waddams

Major changes to Milner came in the third edition (1977), when Waddams’ imprint became the most emphatic.707 “Significant” changes included the functionalist reorganization of materials around the concept of a bargain, with a greater emphasis on reliance; a new thematic chapter on the protection of weaker parties; and revisions to reflect a “rapid and fundamental change” in the law of contracts.708 The third edition adds “a considerable amount of statutory material on consumer protection” and a “substantial number of questions and problems.”709

707 See Milner 4th ed, supra note 507 at vii (“the general organization of the third edition has been maintained”); Milner 2d ed, supra note 507 at vii (“the general object of the revision has been to bring the book up to date”).
708 Milner 3d ed, supra note 507 at vii.
709 Ibid at vii.
These changes would seem to take Milner in the further direction of the Milner Introduction and signal a greater proximity to Swan.\textsuperscript{710} At the same time, the third edition begins to depart from the Fuller-inspired\textsuperscript{711} writings of Milner and Swan. Milner remains very much in the “traditional” mold.\textsuperscript{712} Despite the addition of new questions and problems, reviewers of the third edition consider the additions to fall short of higher standards in other casebooks.\textsuperscript{713} And while the reorganization of materials was generally praised, it was not perceived to be as radical as Reiter and Swan’s Studies in Contract Law.\textsuperscript{714} Fridman, who had so energetically attacked the “hyper-critical” and “revolutionary” approach of Reiter and Swan,\textsuperscript{715} is comparatively sanguine about the third edition of Milner.\textsuperscript{716} He chastises the authors for the lack of a pan-Canadian focus,\textsuperscript{717} and saves his most scathing critique for the choice to present remedies first. He gets in his jab (“Conceptually speaking, this is almost to adopt the heresy of Holmes, i.e. that a person ‘buying’ a promise is really only purchasing potential damages”),\textsuperscript{718} but he is also briefer in his critique and somewhat more conciliatory, acknowledging the academic 

\textsuperscript{710} See eg. Kyer, \textit{supra} note 690 at 152 (The authors of both casebooks “see the purpose of contracts as the protection of reasonable expectations. They contend that the law ought to be developed rationally, with less emphasis upon consideration ... more upon reliance. They are also in agreement that ... increasing control [is] being exerted over the liberty of parties”). Kyer does not provide references for this assertion, so it is difficult to know whether his observations are derived from the casebook itself (none of the Milner Introduction, Waddams’ Preface to the Third Edition, or the Summary or Analytical Tables of Contents makes reference to reasonable expectations), or whether perhaps this observation is gleaned from Kyer’s own experience as a student at the University of Toronto. Recall that Reiter & Swan claimed, in their introductory essay to Studies in Contract Law, \textit{supra} note 519 that all the authors of the collection (including Waddams) ascribed to the reasonable expectations theory. These essays were based on workshops held at the University of Toronto in the Spring of 1979, when Kyer would have been a second-year law student and editor the Faculty of Law Review, in which his comparative review appeared. For Kyer’s status at the time, see Kyer, \textit{ibid} at 155; https://ca.linkedin.com/in/ian-kyer-0478945. Because legal publications may advertise a date that is later than their actual release, it is hard to know whether this review was written before, or after, the workshops held of U of T in the Spring of 1979.

\textsuperscript{711} See \textit{Milner} 1\textsuperscript{st} ed, \textit{supra} note 507 at ix (referring to Fuller’s “nice account” of the problem of background problems); \textit{Swan} 1\textsuperscript{st} ed, \textit{supra} note 508 at vii (acknowledging the Fuller casebook as being “particularly useful”).

\textsuperscript{712} Kyer, \textit{supra} note 690 at 153.

\textsuperscript{713} Many of the reviewers who level this criticism compare Milner, unfavourably on these grounds, to the British casebook JC Smith & JAC Thomas, \textit{A Casebook On Contract}, 5\textsuperscript{th} ed (London: Sweet & Maxwell, 1973). See eg. Nozick, \textit{supra} note 690 at 545-6; Fridman, Review of Milner 3d ed, \textit{supra} note 690 at 257.

\textsuperscript{714} See eg. Nozick, \textit{ibid} at 545 (describing the new chapter on Public Policy as a “cosmetic” change).

\textsuperscript{715} Fridman, Review of Reiter & Swan, \textit{supra} note 520 at 422.

\textsuperscript{716} Indeed, the main thrust of the review is positive. See Fridman, Review of Milner 3d ed, \textit{supra} note 690 at 256 (“It is up-to-date; it contains much useful Canadian material; it provides the student with a handy (even if bulky) guide to the leading cases and statutes”).

\textsuperscript{717} \textit{Ibid} at 256-7. See also Nozick, \textit{supra} note 690 at 546.

\textsuperscript{718} Fridman, \textit{ibid} at 257.
liberty of each instructor.\textsuperscript{719} Combined, this suggests that even to a formalist, promise-centric doctrinalist such as Fridman,\textsuperscript{720} Waddams’ editorial choices are perceived somewhat less of a threat than are Reiter and Swan’s ideas.

Although the fourth and final edition of Milner (1985) does not contain major substantive changes, the book appears to be more distinctly the work of Waddams. The book looks different: the publisher has changed to Emond Montgomery.\textsuperscript{721} The Milner Introduction is now billed as “Professor Milner’s Introduction to the First Edition,” implying a distancing. And in the very short Preface, Waddams writes, “Cross-references to my textbook on the law of contracts have been added.”\textsuperscript{722} These short words provide a major clue as to the philosophy underlying Waddams’ editorship.

\textbf{a. Waddams’ Textbook, The Law of Contracts: The Editor’s Underlying Philosophy}

The textbook to which Waddams is referring is his \textit{The Law of Contracts}, published in 1977 (the year of the third edition of Milner) by the Canada Law Book Company.\textsuperscript{723} This book, and its reception, provides clues to some of the substantive commitments that Waddams was bringing to his editorship of the third and fourth editions of Milner, and also, of course, to the substance to which students were referred as of the fourth edition. \textit{The Law of Contracts} was an innovation in Canada, introducing a legal realist approach to treatise writing that emphasized an appreciation for the “underlying” principles animating contract law decisions, based on an analysis of what judges “do,” not what they “say.” A significant substantive focus is on the doctrine of unconscionability.

\textit{The Law of Contracts} was received as a “departure from the traditional approach” of the two pre-existing Anglo-Canadian treatises (namely, Fridman’s 1976 \textit{The Law of Contract in Canada} and

\footnotesize{\begin{itemize}
\item\textsuperscript{719} Fridman, \textit{ibid} at 257.
\item\textsuperscript{720} See GHL Fridman, \textit{The Law of Contract in Canada}, 6\textsuperscript{th} ed, \textit{supra} note 552 at v (revisions “ensure that [the text] reflects the true content of an area of the common law that is ... logical but sometimes applied irrationally in order to achieve a just, fair, reasonable and commercially sound result” [emphasis added]), 1 (“vital difference between legal and moral obligations”).
\item\textsuperscript{721} Swan also moved to Emond Montgomery in 1985, staying there for two editions.
\item\textsuperscript{722} Milner 4th ed, \textit{supra} note 507 at vii.
\item\textsuperscript{723} Waddams text 1\textsuperscript{st} ed, \textit{supra} note 515.
\end{itemize}}
Côté’s 1974 *An Introduction to the Law of Contract*). For one reviewer, Waddams’ text signaled the arrival of “substantial critical analysis” of case law that had been absent up until then; Soberman goes so far as to describe Waddams as a present-day Corbin. Beale, another reviewer, comments on Waddams’ concern for functionalism and policy. These observations of the realist character of the text are borne out by both the text’s Preface and an important 1976 article that formed the basis for the unconscionability chapter in *The Law of Contracts*.

In the Preface to the first edition of *The Law of Contracts* (written in August, 1977, around the time of the Preface to the third edition of *Milner*, and which continues to be reproduced in the student edition of the treatise to this day), Waddams communicates three essential features of his philosophy. First is the need to look “beyond surface rules of contract law to the conflicting principles that lie beneath;” indeed, this is the very “aim” of the book. Second is the idea that contract law is in a state of flux between rigidity and flexibility, the latter in ascendance at the time of writing. And third, Waddams expresses reverence for the role of adjudication in achieving “rational decision making,” an end that is bolstered by the recognition of underlying principles:

> I do not mean at all to say that legal reasoning is of no consequence, or that cases can be determined by some intuitive apprehension of “justice” not requiring communicable reasons. So long as we value rationality in decision making we shall continue to require

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725 Soberman, *ibid* at 314.

726 *Ibid* at 315.

727 Beale, *supra* note 724 at 140 ("the author is more concerned with the function of rules than their form").

728 SM Waddams, "Unconscionability in Contracts" (1976) 39 Mod L Rev 1. See Soberman, *supra* note 724 at 317 (the textbook chapter is “drawn from” the article); Beale, *ibid* at 140 (the chapter is “similar” to the article with some “useful addition[s]”).


730 Waddams, Preface to 1st ed text, *ibid* at vii.

731 Waddams, Preface to 1st ed text, *ibid* at vii. *Cf. Milner* 3d ed, *supra* note 507 at vii ("The law of contracts seems to be in a process of quite rapid and fundamental change").
that like cases should be decided alike and that there should be a rational distinction between cases that are decided differently. *I do not believe that these ends can be otherwise realized than by an impartial tribunal giving reasons subject to appeal.* But rational decision making is strengthened, not weakened, by open recognition of conflicting values. It is better to recognize competing values, even if that recognition appears to involve a difficult and uncertain balance, than to pursue certainty by adopting a rule that suppresses important countervailing principles. Such pursuit is self-defeating, for important values are rarely permanently suppressed. The rule that is supposed to achieve clarity and certainty becomes riddled with exceptions, judicial and statutory, devised to avoid injustice, and leads in the end to the loss of the very certainty that was supposed to be its chief merit.  

In this passage we observe the seeds of a tension analogous to the one we observed in *Milner*. On the one hand, there is the commitment to the realist tradition of identifying the underlying reasons for legal phenomena. “Values” are among these: they either underlie the rules themselves, or, to the extent that rules become incompatible with the values, spring up like weeds to crack and transform the rules. His kinship with Swan is also apparent here — the Swan editors referred to the centrality of values in the Introduction to every edition of their casebook.

On the other hand, in his treatment of “rational decision making,” Waddams reveals other pre-commitments, some of which may not be congruent with other realists, such as Fuller, Milner, or Swan. Whereas Waddams takes care to *argue for* the importance of values (their recognition strengthens rational decision making and may reduce uncertainty by exposing the source of haphazard exceptions), he merely *asserts* the importance of “rational decision-making,” the virtue of like cases being treated alike and insisting upon rational distinctions for cases being treated differently. There are at least three fundamental assumptions that underlie this treatment.

First, it assumes that law is legitimized by a particular type of thinking — “rationality,” or the articulation of “rational” grounds for making relevant differences. “Rationality” is not defined or explained, but asserted as a basic value. This is by no means an uncommon view — attempts to define

732 Waddams, Preface to 1st ed text, *ibid* at vii-viii [emphasis added].

733 Waddams thanks Swan, as well as Warren Mueller and Peter Hogg, for “helpful suggestions” on the treatise (*ibid* at viii).

“legal reasoning” often hinge on some process or criteria for drawing relevant differences\(^ {735}\) – but there are certainly other plausible foundations.\(^ {736}\) This short passage therefore assumes a particular foundation for law (rationality), and a particular criterion of rationality (drawing relevant differences).

Secondly, Waddams does not portray this assumption about rationality as an individual or idiosyncratic one (contrast this with the self-conscious idiosyncrasy of Milner or Swan) but rather as a collective one – “So long as we value rationality in decision making.” Here there is the unstated claim that a community of readers exists, but also that this community shares this commitment to rational decision-making. Again, this use of “we” impliedly asserts (without argument or justification) the existence and character of such a community. To the student reading this passage the message may be an implied threat of exclusion. Either share these values, or fall outside the “we;” and since the “we” is undefined (contract law practitioners? Lawyers? Law students? All members of some vague legal community?), the threat is somewhat more ominous. The initiate may think it safest (and certainly easiest) to simply adopt the commitment to rationality as a core value of law – or, at the very least, to accept the cognate view that what typifies legal reasoning is the drawing of relevant distinctions for differential treatment of cases.\(^ {737}\)

A third commitment, which distances Waddams from Milner, Swan, and Fuller a great deal, is a view of adjudication as being central to law and legal reasoning. Absent from Waddams’ Preface to his textbook is any Milner- or Fuller-like reference to multiple forms of social ordering or diverse legal processes. Instead, the assumption about the importance of rational decision-making to law is followed by a claim to the exclusivity of the adjudicative process: “I do not believe that these ends can be otherwise realized than by an impartial tribunal giving reasons subject to appeal.” Of course, as written, the Preface does not preclude there being valuable skills other than “rational decision making” to law that might be better encouraged through different legal processes,\(^ {738}\) but the absence of any such


\(^{736}\) See eg. Lon L Fuller, “The Case of the Speluncean Explorers” (1949) 62 Harv L Rev 616 (for a representation of five different “philosophies of law and government” at 645).

\(^{737}\) As will be discussed in Chapter 5, this notion of discerning relevance surfaces to be the key structural idea underpinning the vast majority of contract law teachers’ conception of legal reasoning.

\(^{738}\) Cf. Lon L Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353 (in discussing the multiple forms of adjudication (at 374ff), Fuller describes adjudication as “a device which gives formal and institutional
discussion, coupled with the force of argument and the implied sense of consensus, produces the
distinct impression that “impartial tribunal[s] giving reasons” are the most important feature of the legal
system.

Therefore, we observe in the Preface to the first edition of Waddams’ textbook another
example of a dual message. The surface message is about the importance of underlying values and the
need to look at what judges actually “do,” not only what they “say.”

Looking at function, not form, is key – as it is for Fuller, Waddams, and Milner, and other legal realists. This mode of analysis likewise
gives rise to concerns about policy – it is a view simpatico with Swan that law is a tool for achieving
social purposes.

At the same time there is an assertion about the nature of law: there is a distinctive
“legal reasoning,” legitimate by virtue of its “rationality,” a rationality that consists in the ability to draw
“rational distinction[s] between cases that are decided differently.” Judicial decisions are not only
central illustrations of such legal reasoning, but the end cannot be realized “otherwise.” Implicitly,
Waddams also suggests that the mastery of this distinctive type of rationality – or, at the very least, an
appreciation of it – is a precondition to being part of an undefined legal community.

A couple of paragraphs in a Preface to a treatise should not, however, serve as fodder for too
vast an inference. Other authors, including Swan and Milner, do make reference to the type of legal
expression to the influence of reasoned argument in human affairs, ... assumes a burden of rationality not borne by
any other form of social ordering” at 366).

739 See Waddams, “Unconscionability in Contracts,” supra note 728 at 1 (“the law of contract, when examined for
what the judges do, as well as for what they say, shows that relief from contractual obligations is in fact widely and
frequently given on the ground of unfairness, and that general recognition of this ground of relief is an essential
step in the development of the law”). Cf. Fuller & Perdue, “Reliance Interest 2”, supra note 202 at 373 (“We have
attempted to bring together a series of situations in which judicial intervention has been (or in our opinion, should be) limited to a protection of what we have called the reliance interest”), 418 (“the
contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does
in the textbooks”). Both Waddams and Fuller & Perdue are, in effect, looking at what judges actually do and using
this comparative study to argue both a descriptive and prescriptive point about a principle (reliance for Fuller &
Perdue, unconscionability for Waddams).

740 See Waddams, Preface to 1st ed text, supra note 745 at viii (“I have attempted to assess the changes that have
occurred and to analyze the reasons for them with a view to suggesting what further changes seem desirable”).
Compare Reiter & Swan, supra note 532 at 2 (All contributors, including Waddams, “believe that the law ... is and
should be instrumental. That is, the law attempts to support particular principles and to promote particular
policies, and this purposive aspect of the law is both desirable and inevitable”).
reasoning that Waddams refers to\textsuperscript{741} and so it would be unfair to give the impression that Waddams is alone in its articulation. Also, to reduce Waddams’ philosophy to a mere focus on legal rationality would severely disserve his contributions to a nuanced understanding of the common law.\textsuperscript{742} However, if the end is to understand the messages communicated to first-year students, then what is stated or not stated in the rare moments when the author speaks directly to students ought to be taken seriously. It is in these moments, like Prefaces, that an attempt is made by the author to bring to consciousness (or indeed, argue for) his or her commitments about law.

Waddams is as a general rule quite sparing in his introductory or prefatory comments in the casebooks in which he has edited – the three Milner versions contained short, half- or quarter-page Prefaces, a practice continued in all editions of Waddams. None of the Waddams editions contain a significant introductory passage in the vein of Swan or Milner. Thus there are few occasions where Waddams speaks directly to students – which is why the Preface to the first edition of his textbook is a helpful aid. Waddams did, however, write an entire book directed to beginning first-year law students. It

\textsuperscript{741} See eg. Swan 9th ed, supra note 508 at §1.62 (“The law must operate in a way that permits decisions to be made on clearly articulated and appropriate bases. Judicial decisions have to be rationally defended. The legal process must be carried out in a way that permits such a defense”); Milner 2d ed, supra note 507 at xxii (“Are the reasons consistent with other judgments you have read? Do you agree with the judge’s interpretation of earlier decisions or statutes? Are his reasons consistent with themselves? Has the judge used words ambiguously? Has he disclosed an attitude inconsistent with the ideal detachment of a judge?”).

\textsuperscript{742} See eg. Waddams, Principle and Policy, supra note 188. Although an excerpt cannot capture the breadth of his nuanced study, it gives a flavour of the irreducible and complex nature of his understanding of legal reasoning:

From a historical perspective, contract law cannot be reduced to any single or simple explanatory idea, internal or external. The interdependence of principle and policy is part of the reason for this conclusion: every principle, since it incorporates prudential considerations, has operated in tension with countervailing considerations which themselves can be, and often have been, formulated as principles ...

General considerations of common sense, convenience, policy and justice have usually ... been reflected in and incorporated into principle. But it does not follow that the concept of principle could have been dispensed with, or that the law could have been or could be – still less that it should be – restated in purely policy terms. Common sense, convenience, policy and justice, as free-standing ideas, have not been sufficiently stable or precise to support legal conclusions: principle has been an essential component of legal decision-making and at the same time an essential restraint on it, and an important part of what has made legal reasoning distinctively legal (ibid at 227-8, footnotes omitted).

See also Waddams, Dimensions, supra note 616.
too may serve as a useful source for understanding Waddams’ understanding of law, and examining it can serve to reinforce some observations made above.743

b. The Editor’s Underlying Philosophy: Introduction to the Study of Law

Waddams’ Introduction to the Study of Law744 came out in 1979, two years after his treatise and the third edition of Milner. It was the first Canadian book addressed to intending law students245 and received some early favourable reviews for its “economy and wit,”746 its “style and manner,”747 and for “adequately circumnavigat[ing] the world of what law is, who lawyers are, how they think, and why law teachers behave as they do.”748 These short reviews emphasized Waddams’ ability to captivate his readers, the book’s “currency and pertinence,”749 and his provision of a “concise and complete picture of how Canada’s legal system operates.”750

In a much longer and more critical review in the University of Toronto Law Journal, Roderick A Macdonald examines some of the implicit messages communicated by Waddams’ book. In his review, Macdonald critiques Waddams for communicating a positivist, adjudication-centric, deterministic, and insular vision of law. While the tone of Macdonald’s review is hostile and presents a somewhat caricatured impression, Macdonald’s efforts to render explicit the philosophy communicated to students

743 The potential influence of such introductory texts should not be underestimated. For example, HLA Hart’s The Concept of Law, “one of the most influential works in modern legal philosophy,” is “based on introductory lectures in jurisprudence” given to law students at the University of Oxford (Leslie Green, “Introduction” in HLA Hart, The Concept of Law, 3d ed (Oxford: Oxford University Press, 2012) xv at xv; Leslie Green “Preface to the Third Edition” in Hart, ibid xi at xi.


746 Pratt, ibid at 270.

747 Norman, supra note 745 at 172.


749 Norman, ibid at 173.

750 Bilodeau, supra note 748 at 394.
by a book whose target is the initiate are useful for understanding the range of possible messages in the casebook, also intended for first-year students.

Macdonald’s review contains two parts: first, he examines the text to discern the attitudes about law, legal education, and the role of the lawyer that are “implicit” in the materials.751 The “fundamental orientation” of the book,752 he writes, conveys the idea:

that law and justice are separate concerns, that justice is relative and often not capable of rational discovery, and that equity, fairness, and justice militate against a law which is stable, certain, and predictable.

... Waddams appears to suggest that it is not only desirable, but also possible, for judges simply to apply the law, ... justifying their judgments by an appeal to a pre-existing law which can be objectively determined.753

Critiques of the remainder of the text include the point that Waddams adopts a “traditional view of law, legal problems, and the lawyer’s role,”754 that he fails to elucidate or justify his “epistemological and semantic assumptions,”755 and that he unduly emphasizes the adjudicative mode for dispute settlement.756

In the second part of his review, Macdonald reports on the “explicit and implicit views picked up by students” on the basis of his own “canvass [of] the reactions of those who have read it as a preparation for law school.”757 In this analysis, Macdonald is even more emphatic. He describes “a series of four propositions about law, complemented by several corollaries”:

751 Macdonald, Review of Waddams, supra note 745 at 437.
752 Ibid at 438-9.
753 Ibid at 439, 440
754 Ibid at 441. See also ibid at 443 (Waddams’ discussion on the legal profession is a “traditional position,” an “apology for the status quo”).
755 These assumptions Macdonald lists as “touching the limits of the legally relevant, the nature of a legal fact, the concept of precedent, the set of authorities which are determinative of a legal dispute, and reasoning by analogy” (ibid at 442). Macdonald also criticizes Waddams for failing to “justify his distinction between [and sub-branches among] public law and private law” (ibid).
756 Ibid at 443 (in his critique of the Quebec small claims court, “Waddams seems merely to be trumpeting the legal profession’s hostility to any dispute-settling mechanism which does not reflect the adversarial, adjudicative, lawyer-controlled model of the common law courts”).
757 Ibid at 444.
1 All law happens in courts: a/ the adversarial, adjudicative processes of the common law are the best, if not the only way for a legal system to operate; b/ all other societal decision-making agencies, including legislatures, perform a minor role in the Canadian legal system; c/ hence, the lawyer’s principal preoccupation is with reading and analyzing cases and in preparing for court.

2 Law can be certain, objective and authoritative: a/ it is a one-way projection of authority from official state organs; b/ the concept of precedent and the principles of statutory interpretation always give one right answer to any question; c/ the “law in books” is a lawyer’s main concern.

3 Law is a distinct discipline with its own internal logic: a/ concerns such as justice, morality, economic efficiency, and social practice are only marginally related to the business of determining the law; b/ law can be compartmentalized, and legal practice is largely a matter of finding the correct rule to apply; c/ legal training should be restricted to professional lawyers, who will uphold its conservative values.

4 There is little, even today, that can be called an indigenous Canadian law; a/ most law in Canada is pure English common law; b/ American law and developments are of little significance; c/ understanding Canadian legislation and the peculiarities of Canadian society is not of great importance for lawyers.758

Having stated these views in brief compass, Macdonald goes on to find passages from the primer that “generate these impressions” on behalf of the reader. What follows is five and a half pages of textual analysis coupled with further articulations of these themes.759

There are a few observations to make about the Macdonald critique of Introduction to the Study of Law. The first is the great distance between the view of law that Macdonald claims is communicated by the Waddams primer, and the Fullerian view of law as process, and lawyer as social architect. When Macdonald writes, for example, that “law is seen to be about resolving disputes and therefore none of its planning or facilitating functions are emphasized,”760 he is almost perfectly describing the opposite of the virtues identified by Milner or Fuller about the need to equally teach different legal processes. In a similar vein is his critique that the “student is likely to develop an unbalanced appreciation of the law and the lawyer’s role.”761

758 Ibid at 445.
760 Ibid at 447.
761 Ibid at 446.
That Macdonald would have had Fuller in mind is likely, given that he completed his master’s thesis, a review of Fuller’s complete oeuvre, under the supervision of Angela (at the time John) Swan in 1976.\footnote{One of the final passages in Macdonald’s LLM thesis reads as follows:}

So Macdonald was perhaps keen to see in a book that focused on cases, and that espoused a traditional view of legal reasoning, a very partial image of law, one that he found “troubling.”\footnote{Macdonald, Review of Waddams, supra note 745 at 444.} However, though the review may be particularly astringent, his analysis is well supported by textual references. No doubt, some, if not all, of the messages Macdonald identified represent a reasonable (if contestable) interpretation. This being the case, two observations arise.

First, his review may signal an increasing philosophical distance between Fullerian casebook editors such as Swan and Milner, on the one hand, and Waddams, on the other. While Waddams diligently remounted \emph{Milner} three times, his eventual break to produce his own casebook may flow from such a departure. One might also suspect that any intellectual kinship with Swan (the supposed shared “fundamental premise” from \emph{Studies in Contract Law}) is either not as robust as Reiter and Swan originally claimed, or has experienced a decline.

At the same time, it is also apparent that many of the messages about law identified by Macdonald patently contradict Waddams’ own stated views. For example, the idea that law can be “certain, objective and authoritative” and that the “law in books” is a lawyer’s main concern, would seem to run precisely counter to Waddams’ views that the underlying values need to examined, that “the foundations of even the most firmly established ruled are being undermined,”\footnote{Waddams, Preface to 1st ed text, supra note 745 at viii.} and that it is what judges do, in addition to what they say, that matters.\footnote{Waddams, “Unconscionability in Contracts”, supra note 728 at 1.} The idea that Macdonald ascribes to the primer the idea that “justice, morality, economic efficiency, and social practice are only marginally related to
the business of determining the law”766 would seem to expressly contradict the instrumental and purposive philosophy of law ascribed to Waddams by Reiter and Swan,767 and to Waddams’ own work in his seminal article on unconscionability and *Principle and Policy in Contract Law*.

The Macdonald critique therefore brings to light the possibility that the messages communicated by the substance of a text may differ from the author’s own beliefs, attitudes, or commitments about law. Indeed Macdonald signals this very point when he writes:

> It is nowhere suggested that the author himself would subscribe to any of these views implicit in his manual. He may, in fact, reject them all. Nevertheless, they are all perspectives that intending law students who read the book gained from it. They are all perspectives which, one suspects, any reader of *Introduction to the Study of Law* would develop.768

This insight is relevant at this juncture for two reasons. First, it recommends caution when drawing on exogenous evidence (such as other writings or biographical details) to infer the messages conveyed by a given text. This chapter has certainly engaged in that activity, by looking at the numerous activities and writings by Swan, Reiter, Milner, and Waddams to make sense of the views contained in their casebooks. While such exogenous evidence does help us understand each author’s intellectual development and commitments about law and legal education, we should not blindly assume a one-to-one correspondence between these and the messages conveyed by a particular casebook. Such a caution is reinforced when it is remembered that a casebook, as an artifact, can be emphasized, presented, or framed in various ways by different teachers. This point reinforces the need to look not only at the casebooks themselves but how they are used.769

Second, the possibility of a distance between an author’s commitments and those communicated by his or her work can be understood as a manifestation of a tension that arises more ubiquitously in legal education. This is the tension between one’s stated commitments about law and


767 Reiter & Swan, *supra* note 532 at 2 (“We all believe that the law, and this includes the rules governing contracts, is and should be instrumental. That is, the law attempts to support particular principles and to promote particular policies, and this purposive aspect of the law is both desirable and inevitable”).


769 Cf. Fernandez & Dubber, *supra* note 156. Chapter 6, III(b) provides some insight into how Canadian contract law professors perceive and use the casebooks.
the ideas about law communicated implicitly through teaching. As we will see in Chapters 4 and 5, these commitments often diverge. What law professors say they believe about law (and legal education) is often more diverse, wide-ranging, and capacious than the set of messages communicated by their teaching, which tends to coalesce around a more monolithic understanding of legal reasoning and legal practice. The reasons for such a gap, including such structural considerations as path dependence, will be canvassed in Chapter 6.

v. Introductory and Prefatory Comments in *Waddams*

The *Waddams* casebook, as has already been mentioned but bears repeating, is predominantly free of “explicit” messages about legal education – there is no substantive introductory text (as there is in the Waddams textbook on contract, or in the *Swan* casebook, or indeed – as will be discussed – in the third major national contract law casebook, *Ben-Ishai & Percy*). In fact, the minimalist Preface would seem to disclaim any idiosyncrasy: the casebook is presented as a seemingly neutral “collection of materials suitable for the basic course in the subject” to be adaptable to individual instructors’ purposes. While the casebook makes one controversial editorial decision – the placement of remedies at the beginning of the book – even here the editors disclaim any intention to prescribe:

> We do not expect that all users of the book will proceed through it sequentially, and we have designed it to be suitable for dealing with the material in several different orders. Some users will wish to start with contract formation. Others will wish to start with remedies. Others may prefer to start with the theoretical perspectives. We hope that all will find the book equally suitable for their purposes.\(^{770}\)

Thus the editorial choice is to offer little explicit theoretical or perspectival guidance to the teacher. Nor is Waddams’ own purposive approach to contracts (presumably still alive, as Waddams continues to reproduce the Preface to the First Edition of his textbook in all successive editions) given an airing. This editorial choice suggests two features of *Waddams*: First, the messages about law and what it means to be a lawyer are largely implicit (and may require an exegesis analogous to the one Macdonald gave of the implicit messages of *Introduction to the Study of Law*). Second, this choice to let the materials speak for themselves itself may communicate a message about law and legal reasoning.

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\(^{770}\) *Waddams* 1st ed, *supra* note 509 at iii. This Preface is largely unchanged for subsequent editions. The 3d edition adds in a short paragraph on the “growing importance on the law of restitution” (*supra* note 509 at iii) and the fourth edition acknowledges the contributions of Michael Trebilcock (who has ceased to be an editor) (*supra* note 509 at iii).
vi. Chapter One of Waddams

These implicit messages will largely be discussed in Part III, which consists of a closer reading of the remedies chapter of each of the casebooks. However, a brief word on Chapter One of Waddams is relevant here. Chapter One is an innovation with the move from Milner. It contains a series of theoretical pieces about contract law, on the rationale, as stated in the Preface, that “[t]here has been a lively interest, during the past ten years, in the theory of contract law.”771 The chapter reproduces scholarly articles without any interspersed commentary; the first edition features philosophical, promise-based, economic, critical, feminist, and sociolegal perspectives, and the selection is modified and added to in the third, fourth and fifth editions, with an increasing diversity of perspectives. This format reveals a view salient features. First is the strong presence of American legal scholars representing the American canonical schools of thought.772 Second is the model of eclecticism, presenting these theories neutrally to be selected amongst. And third is the editorial choice to separate these theories from the rest of the book. As will be discussed in Part III, these theories do not appear to be operationalized into the vision of substance and legal reasoning that appears in the remedies chapter. Accordingly, the first chapter of Waddams is an excellent example of the prevalence of American legal thought, but its corresponding relegation to the more or less autonomous domain of “theory.”

vii. Summary of Waddams

In summary, therefore, there is an apparent tension in the philosophy underlying Waddams, as inferred by the minimal prefaces and introductions to the casebook and related writings. On the one hand, we have ample evidence in Waddams’ contract treatise, his contributions to the Reiter and Swan collection, and his early writings on unconscionability that he adopts a purposive and functional approach to the study of law and considers it essential to understand the values underlying judicial reasons for decision. On the other hand, the implicit messages in An Introduction to the Study of Law and his textbook Preface suggest a view that privileges adjudication, that takes judicial reasoning seriously, and that considers legal reasoning to consist primarily of discerning relevant differences in pursuit of rationality – for which judges’ reasoning is the best study aid.

771 Waddams 1st ed, ibid at iii.

772 In the fifth edition (supra note 509), 7 out of 10 authors spent most of their careers at American law schools (the other 3 teach at Canadian law schools).
The big-picture editorial choices in *Waddams* reinforce this tension. On the one hand, the failure to replace the Milner Introduction with a new substantive introductory text may suggest a conscious distancing from Milner’s Fullerian views. The absence of commentary also may suggest a prioritization of the adjudicative method, presenting cases as the natural and neutral default of law, “speaking for themselves.” On the other hand, the inclusion of American realist and critical schools of thought in the introductory chapter, new functional organization in certain chapters (e.g., Protection of Weaker Parties, Public Policy), the increased presence of restitution, the attempt (though perhaps not fully realized) to add in questions and commentary, the placement of remedies at the beginning of the book, the explicit referencing throughout the text to the Waddams’ textbook – all may be said to convey a more functional, purposive, or realist image of law.

As will be shown in the second part of this chapter, the impression is a lot less ambiguous when one considers the actual treatment of substance. There, I will show how the realist and critical inclinations are largely not translated into the presentation of “substantive” law. The stated philosophy from the Preface to the textbook, emphasizing rationality and judicial reasons, appears to very much motivate the treatment of substance and structures the dominant image of legal reasoning and legal practice. Before proceeding, however, an exploration of the explicit messages of the most widely assigned Canadian contract law casebook, *Ben-Ishai & Percy*, is in order.

C. Underlying Messages About Law and Legal Education: *Ben-Ishai & Percy*

On its face, *Ben-Ishai & Percy* differs from *Swan* and *Waddams* in at least two ways. First, it is more self-consciously a collaboration, a collection of chapters by various different contributors throughout the years. Second, the book is more national in character. Its genesis, as a collaborative project begun in the mid-1970s through the Canadian Association of Law Teachers, reflects these features.773

773 The Preface to every edition of the book opens with a variant of the following passage:

This casebook had its genesis during the mid-1970s in a number of gatherings of contracts teachers at annual meetings of the Canadian Association of Law Teachers. It was inspired by a widely held feeling that there was a need for a national book that might command acceptance across the common law provinces. (*Ben-Ishai & Percy* 9th ed, *supra* note 510 at v).
Accordingly, Ben-Ishai & Percy should be understood differently than Swan or Waddams where, despite acknowledgment of collaboration, one lead voice (Swan) or one lead editor (Waddams) clearly predominates. The editors’ goal has been consistently to “expose students to slightly different approaches to contracts problems,” providing some “degree of uniformity to the various sections of the book without affecting the flavour of each individual contribution.” Indeed, appearing before the Preface in every edition is a list of contributors – with institutional affiliation – identified with each chapter. A quick look at this list communicates both the message that each chapter is the individual work of one sub-editor and the virtue of pan-Canadianism. This contrasts with Swan, with fewer editors all speaking with one voice, and with Waddams, where the editorship of different chapters is not identified, and whose predecessor, Milner, had been criticized for its Ontario-centrism.

The collaborative nature of the casebook, however, does not imply a lack of personal touch by the lead editors. In fact, in contrast with Waddams, and more reminiscent of Milner and Swan, Ben-Ishai & Percy contains a lengthy introductory chapter that canvasses a wide set of views about contracts and law in general, heavily influenced by American Legal Realism and its heirs. The introduction communicates the idea that the teaching of first-year Contract Law is fertile ground in which to cultivate a nuanced and critical understanding of law and, correspondingly, an eclectic vision of legal reasoning and legal practice. At the same time, however, other aspects of the Introduction reveal a complicated relationship with this critical view of law. As with Milner, lurking behind the capacious and critical view are clues that the traditional approach predominates.

774 Ibid at v. Cf. Boyle & Percy 1st ed, supra note 510 at v (“one of the possibly beneficial results of this type of co-operative casebook may be that students will be exposed to slightly different approaches to contract problems, though, we hope, not to the extent of inducing a schizophrenic reaction”). This reference to diversity of perspectives has remained almost uniform throughout the ninth edition, although the reference to “schizophrenic reaction” was removed in the 5th edition (supra note 510 at v).

775 For example, the first edition lists fifteen different chapter editors from 8 Canadian law schools and one Canadian Department of Law (Boyle & Percy 1st ed, ibid at iii); the ninth edition, 9 different Chapter editors from 6 different Canadian law schools. The University of Toronto, where both Swan and Waddams’ academic careers were headquartered, is not represented in any of the 9 editions.

776 Waddams 5th ed, supra note 509 at iii (Preface signed by “The Editors”).

777 See Fridman, Review of Milner 3d ed, supra note 690 at 256-7; Nozick, supra note 690 at 546.
i. The Boyle Introduction

The introductory comments in Ben-Ishai & Percy have been lovingly and carefully tended, permitting growth and evolution over the years.\footnote{Prior to the 6th edition (supra note 510), the “Student Introduction” appeared unattributed (thus presumptively the work of both editors) and gradually increased in length from 2 pages in the first edition, to 6 pages in the 2d and 3d, 7 in the 4th, and 9 in the 5th. In the 6th edition, the comments expanded to 12 pages and it currently stands at 14.} A major leap forward occurred in the sixth edition, when the introductory comments received billing as a full chapter (Chapter One), and its authorship was attributed solely to Christine Boyle.\footnote{See Boyle & Percy 6th ed, ibid at v-vi. In the 6th ed, in addition to Chapter One, the editors also added Chapter 11, which reflects David Percy’s reflections on the interrelation of contract with tort and fiduciary law and the evolution of various doctrines. On the “personal” nature of these comments, the editors write: “We felt that it was unfair to place these materials in chapters that were the prime responsibility of other contributors and recognized that our own views are personal and might be tendentious” (ibid at vi.).} In the 8th edition, Stephanie Ben-Ishai and David Percy took over the chapter. The discussion begins with an analysis of Boyle’s comments, focusing on her latest edition (Boyle & Percy 7th ed), and proceeds to discuss amendments made by Ben-Ishai and Percy.

a. Boyle’s Critical Perspectives

The chapter begins with somewhat of a see-saw between critical and traditional justifications for the study of contract law. The very first sentence is a quotation from Macneil, that memorable recast that the law of contracts is “an affirmation of the human will to affect the future” through the projection of exchange.\footnote{Boyle & Percy 7th ed, supra note 510 at 1. All editions, up to the present (9th ed, supra note 510 at 1), commit the typographical error of writing “protecting exchange,” instead of “projecting exchange,” Macneil’s actual formulation (Macneil, The New Social Contract, supra note 153 at 4).} Immediately thereafter, a host of traditional rationales for studying contract law follows. Substantive law is billed as relevant in itself and as a “stepping” stone to upper-year courses. The casebook is said to “equip” students to reflect on values, freedom of contract serving as a practicing ground. Skills figure predominately: the course will teach them “analysis and use of case law and, to a lesser extent, legislation,” with emphasis on applying rules and principles to hypothetical fact situations and questions that prompt reflection on law reform.\footnote{Boyle & Percy 7th ed, ibid at 1.}

But quickly, students are told that this is not all that is important:
The law should not be studied in a philosophical vacuum, without consideration of its function in society and without discussion of the value judgments inherent in any judicial discussion or legislative rule ... [T]he law ... is not made up of a static body of rules, simply awaiting discovery by the conscientious student.782

What follows is a series of sections, each of which introduces a different theoretical or critical perspective, largely drawn from the American canonical schools.783

First is the debunking of the “Classical Theory of Contract.” After suggesting that ideas of laissez faire economic liberalism still “retain great power,” Boyle reproduces an excerpt from Gilmore Grant’s The Death of Contract to suggest that the stable body of doctrine has been disrupted.784 Students are encouraged to look for classicism and romanticism in the judgements they will read, and are told that “law is a social construct and so ... must change and adapt over time.”785 The advent of the Internet serves as example.

The next section, “The Intersection of ‘Private’ and ‘Public Law,’” makes the realist point that “the free market is a form of government regulation in itself,” citing both law-and-economics scholar Michael Trebilcock and critical scholar Allan Hutchison to this effect.786 Boyle also underscores how “democratic decisions about how to promote such things as equality, a healthy environment, safe and fair working and housing conditions, and the public welfare in general” operate to constrain freedom of contract.787

The third section, “Freedom of Contract,” expands on this theme and asks the student to reflect on his or her own experience to assess “the degree to which freedom of contract is a reality.”788 Boyle

782 Ibid.

783 These sections were an innovation of the 7th edition, ibid, in which the text of the Introductory Chapter was significantly edited, and reorganized into sections. Ben-Ishai & Percy preserve these headings with one addition.

784 Ibid at 2 (citing Gilmore, Death of Contract, supra note 167 at 102 on the “alternating rhythms of classicism and romanticism”).

785 Boyle & Percy 7th ed, ibid at 2.

786 Ibid at 3. The section concludes with a quote from Trebilcock: “Behind the law of contracts lies a much broader set of economic, social, and political values that define the role of markets in our lives” (ibid at 4, citing Michael J Trebilcock, The Limits of Freedom of Contract (Cambridge, Mass: Harvard University Press, 1993) at v).


788 Ibid.
references Ayres’ work on gender and race discrimination in car sales, and provides a statutory example prohibiting the sale of body parts to demonstrate “legal” limits on freedom of contract. She discusses the doctrine of good faith to show how the common law “has become more activist in protecting vulnerable people.” The section concludes with the suggestion from the critical scholar Jay Feinman that modern contract law is “neoclassical” in that it “attempts to balance the individualist ideals of classical contract with communal standards of responsibility to others.”

The following section, “What Promises Are Enforceable,” encourages the student to consider alternatives to the rule requiring consideration. Boyle speaks to the reader in the second person, asking students to think critically – one could say realistically – about these categories. The fifth section, on remedies, provides a mini-introduction to the measure of remedies, making the additional point, with reference to Stuart Macaulay, that law may not be a significant mechanism for dispute settlement. The next section, “Theories of Contract Law,” provides a brief introduction to diverse theories of contract law from different schools, including Law and Economics and Critical Legal Studies. The brief reference to these theories is eclipsed, however, by Boyle’s discussion of feminism, which was by

790 Boyle & Percy 7th ed, supra note 510 at 5.
792 Ibid at 6:

You will start to develop your own ideas soon about which obligations are (and should be) legally enforceable ... In doing this it will be necessary to look behind the words of the judges who decide cases ... [C]onsider to what extent the judge tries to discover the ‘intention’ of the parties ... or whether in some cases this is simply a convenient way of saying, without appearing too paternalistic, that the judge is satisfied that the result reached is a fair one.

793 The seventh edition removes the reference to Fuller & Perdue’s article on the reliance interest, which has been in this section since the 2d edition (supra note 510 at lvi).
796 Boyle & Percy 7th ed, ibid at 8 (citing Feinman & Gabel, supra note 262).
far the most significant discussion of feminism of the three commercial casebooks.\textsuperscript{797} The seventh edition of \textit{Ben-Ishai \& Percy} contains a full two pages of synthesized text surveying a wide range of feminist thought, a text that had been gradually built upon since the fourth edition.\textsuperscript{798}

The next section, “Relational Contracts,” not only introduces students to Macneil’s concept of relational contracts (“that there is an unwarranted focus on one-time exchanges rather than ongoing relationships,” in Boyle’s paraphrased words),\textsuperscript{799} but connects the concept to later chapters\textsuperscript{800} and considers several counterpoints.\textsuperscript{801} She also cites studies that relate relational theory to a feminist approach\textsuperscript{802} and references a “gay-friendly” approach.\textsuperscript{803}


\textsuperscript{798} The first reference to feminism appeared in the 4th edition, where Boyle included just one short paragraph, noting that Dalton’s work on deconstruction (\textit{supra} note 247) drew on feminist methodology, but that “[i]t is too early yet for general themes to have emerged in the literature” (Percy 4th ed, \textit{supra} note 510 at lxv). In the fifth edition, two paragraphs were added, largely highlighting feminist critiques of specific public policy problems (preconception contracts, cohabitation agreements, pay equity, domestic work, and affirmative action) (Boyle \& Percy 5th ed, \textit{supra} note 510 at lxxxi). The sixth edition adds in a paragraph on feminist analyses that “have tended to be critical of contract law’s emphasis on the notion of exchange,” also highlighting that “[f]eminist analyses have been critiqued in their turn ... for failing to include perspectives drawn from lesbian legal theory” (Boyle \& Percy 6th ed, \textit{supra} note 510 at 6-7). The seventh edition adds three paragraphs, including long quotes totaling almost a page. The main focus of these additions is on the exclusion of women from the “social contract,” with a counterpoint by Justice Bertha Wilson (Boyle \& Percy 7th ed, \textit{supra} note 510 at 8-9).


\textsuperscript{800} New text in the seventh edition calls into question whether the “moment of contracting” can even be identified, with reference to Battle of the Forms in a subsequent chapter (Boyle \& Percy 7th ed, \textit{ibid} at 10).


In a section that was unique among the Canadian contract law casebooks, a little over a page is
dedicated to “First Nations and Treaties” (the section was developed between the 5th and 7th editions).
Boyle illustrates how treaties differ from conventional contracts804 but suggests how a study of contract
law can inform the student’s understanding of the fiduciary obligation of the Crown and other issues of
interpretation.805

The penultimate section highlights the importance of “transcending conceptual boundaries”: “It
may be helpful to ... avoid thinking of contracts, or any of your courses, in ‘pigeonholes.’”806 Students are
encouraged to rethink the contract/tort divide, reminded of the overlap between “the law relating to
aboriginal rights, treaties and contracts,”807 and given the example of restitution as an example of the
overlap between contract, tort, and unjust enrichment.

803 Boyle & Percy 7th ed, supra note 510 at 11 (quoting Craig W Christensen, “Legal Ordering of Family Values: The
Case of Gay and Lesbian Families” (1997) 18 Cardozo LR 1299). This text appeared in Boyle & Percy 6th ed, supra
note 510 at 5, and continues to appear in Ben-Ishai & Percy 9th ed, ibid at 12.
804 She does this by first distinguishing the character of the agreement (“[t]reaties are not of course simply
contracts in the ordinary sense — they could be seen as resembling international agreements and as having a
constitutional quality”) and, second, by quoting case law to show that “[e]ven if contract analysis ... were
appropriate, it is not yet clear that, in Canadian law, treaties are accorded the status of contract, with the
connotations of sanctity that implies” (Boyle & Percy 7th ed, supra note 510 at 11, originally appearing in Boyle &
Percy 5th ed, supra note 510 at lxxxiii).
805 In new text for the 7th edition, while having made the point that “[t]he fact that ‘the honour of the Crown’ is at
stake with respect to treaties makes them stand out ... in sharp relief against the general law of contracts, where
fiduciary duties are exceptional,” Boyle argues:

Nevertheless a study of contract law will alert you to many questions relevant to issues of pre-
contract obligations, interpretation and enforcement. For instance, is there an obligation to
negotiate in good faith? Is there ... a difference between treaties and modern commercial
transactions between two parties of relative equal bargaining power? Is interpretation strict or
generous, and how do the courts reconcile different perspectives? When can terms be implied?
...

Attention to treaties also illustrates the point that contracting takes place in many different
contexts, thus creating a need for doctrinal flexibility (Boyle & Percy 7th ed, ibid at 12).
806 Ibid at 12. “Transcending Conceptual Boundaries” is the title of the ninth section.
807 This formulation is retained in this section in the 8th and 9th editions, with the text “as mentioned above,”
notwithstanding the removal of the section on Treatises.
The final section provides “A Final Word of Caution.” In text that has remained substantially unchanged since the second edition, Boyle introduces a major warning to keep the materials “in perspective,” signaling their limitations and alternative possibilities:

The student should realize that the emphasis on case law, especially appellate case law, is not the only way to study “law” and represents a particular focus which not all would accept as useful. One alternative would be to discover empirically-recurring problems for contracting parties and examine the impact of the law on these problems, rather than allowing the choice of appropriate areas of study to be dictated by the lottery of litigation. Such an approach would concentrate on the total functioning of the law, that is, on the sociology of the law as a means of social control and as a mechanism for dispute settlement.

This caveat about the use of appellate case materials very closely resembles that of both Swan and Milner. And, similar to Milner’s not-so-abject apology (and to a lesser extent Swan’s acknowledgment of the importance of courts), it is followed by an explanation of why, notwithstanding this “word of caution,” a departure from case law is a path not taken:

Although this approach is not adopted here, our contributors preferring to concentrate on the inculcation of skills associated with more traditional materials, it is important to remember that this has significant limitations, dictated by the objective chosen.

Up until this caveat, the messages of the Boyle Introduction are complex and rich, but consistent. The introduction draws from a range of critical schools of thought – legal realism, feminism,
law and economics, critical legal studies, and sociolegal studies – largely featuring American writers, to challenge the classical vision of law. Boyle invites the student to reflect on how law, including both common law and legislation, may be reformed to achieve social purposes. The chapter models and invites self-criticism, encouraging students to question the materials, and by extension, their own presuppositions. After briefly exploring Ben-Ishai and Percy’s influence on the chapter, we will return to the caveat to explore how it reveals a flip side to these dominant critical messages.

b. Ben-Ishai and Percy’s Influence

For the most part, Stephanie Ben-Ishai and David Percy continue to celebrate critical and realist messages in the Introductory chapter of the eighth and ninth editions. There are, however, a number of noteworthy changes. Ben-Ishai and Percy remove the substantial discussion of feminism and the entire section on First Nations and Treaties. They add, on the other hand, extended commentary pertaining to the role of the common law in policing freedom of contract, provide new examples that focus on financial transactions, and elaborate on the function of critical theory – all while preserving and carefully editing the Boyle text. The general orientation is the same, but there can be observed two subtle shifts: a greater concern for “substantive” equality, and a greater value placed on cases.

1. Ben-Ishai & Percy: Concern for Substantive Equality

What accounts for the redaction of the text on feminism and First Nations issues is likely not antipathy towards the perspectives of women or First Nations but, rather, a desire to foreground other critical perspectives; namely, how contract law may operate to ensure greater substantive equality.

The best example of this is the significant development of the “Freedom of Contract” theme. Ben-Ishai and Percy divide this theme into two sections: Reality and Regulatory Response (comprising the Boyle text) and Common Law Response (new text). In the new section, Ben-Ishai and Percy provide almost three new pages of analysis that expands on how judicial interventions have ensured that the freedom of contract “was never perfectly realized.” This has occurred “within the traditional categories of contract law” (citing Lord Denning as a cas typique) and in the creation of “general

816 Ben-Ishai & Percy 8th ed, supra note 510 at 10-12. The editors leave only two short paragraphs on feminism in the entire chapter (ibid at 11, 13).
principles that transcend the law of contract, such as the fiduciary principle and the doctrine of good faith. A realistic attitude animates the discussion. About half of this text appears to have been taken directly from Chapter 11 of the seventh edition, written by David Percy, and about half consists of new material.

This commentary can be seen as emphasizing the ways in which common law judges ensure greater substantive equality among the parties to the contract. A similar concern is revealed by the choice of examples that Ben-Ishai and Percy insert into other parts of the text. For example, they highlight the work of Bridgeman and Sandrik on “bullshit” credit card agreements to introduce the need for regulatory intervention into markets. They supplement the example of racial discrimination in car sales with a study demonstrating racial discrimination in a quintessentially economic field of activity,
mortgage lending. These examples may reflect Ben-Ishai’s own scholarly concerns with substantive equality in the financial sector.

2. Ben-Ishai & Percy: High Regard for Cases

The addition of a new section on “common law responses” is revealing not only for its concern for substantive equality but for its fidelity to case law as an important source of information. While Ben-Ishai and Percy make plenty of references to sources other than cases – legislative or regulatory responses and academic argument – they add in a significant number of cases to illustrate or extend the points made by Boyle. The addition of the new section on “Common Law Responses” to freedom of contract is the best and longest example of this, but we see it also in the section on Transcending Conceptual Boundaries, where they cite two cases in support of Boyle’s idea that students should not think of their courses as “pigeonholes.”

The editorial decision to preserve the points made by Boyle but to, presumably, improve on them by adding judge’s words, may indicate a certain commitment to the adjudicative process. Despite the editors’ clear commitment to critique, they demonstrate commitments to more conventional understandings of law.


825 See eg. Ben-Ishai & Percy 9th ed, supra note 510 at 3 (referring to consumer protection legislation).


828 See Ben-Ishai & Percy 9th ed, ibid at 11 (“One suggestion when thinking about law and critical theory is to keep in mind that the law is merely a consensus reached at one point in time by the individuals who were at the table … [N]otions about ‘justice’, ‘truth’, ‘right’ and ‘wrong’ are fluid and intangible. These notions affect people differently and therefore can be seen from multiple perspectives which … may or may not be included in traditional legal reasoning and discourse”).
ii. *Ben-Ishai & Percy: The Traditional Flip Side*

The caveat to the Word of Caution—“our contributors preferring to concentrate on the inculcation of skills associated with the more traditional materials”\(^{829}\)—signals the flip side to the lovingly crafted critical commentary. This flip side is a commitment to adjudication, the inculcation of conventional legal reasoning skills, a marginalization of policy, and an uncritical acceptance of the notion of a “core” of doctrinal substance. Such views not only surface explicitly in text\(^{830}\) but have been identified, in scholarly reviews of the casebook, as a hallmark feature of *Ben-Ishai & Percy* ever since the first edition.

In a review of the first edition, David Vaver suggests that the editors “correctly” say that their approach is traditional.\(^{831}\) Vaver, after some praise and critique,\(^{832}\) declares the “real difficulty” of the book to be its philosophy:

What impression of contract law does one gain from perusing this work? The impression I got is that contract law is a relatively static subject which looks for its solutions to an internally generated logic … This book does not systematically examine where the law of contract came from and where it is going … [Almost no scholarly article] is considered worthy of extensive quotation. Such quotation would put a subject or an area as a whole in some sort of philosophical, economic, or social context … The format of case followed by notes and questions repeated *ad nauseam* is good as far as it goes, but gives the erroneous impression that contract law is a purely deductive art with the occasional statutory incursion to mar its inexorable internal logic.\(^{833}\)

In a similar vein, writing about the second edition, John Manwaring, then of the Université de Moncton, reinforces the traditional character of the book:

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\(^{829}\) *Ibid* at 14. The only editorial change to this “final word of caution” has been to enclose the quoted passaged with em-dashes – an innovation of the 8\(^{th}\) edition (*supra* note 510 at 14).

\(^{830}\) See *Boyle & Percy* 1st ed, *supra* note 510 at v (“[t]he materials and their organisation are somewhat traditional, for they are designed to constitute the basis of a core course in Contracts”); *Ben-Ishai & Percy* 9th ed, *ibid* at vi (identical quote, changing the spelling to “organization” and de-capitalizing “Contracts”). The language of “core” is repeated at the beginning of the Introductory chapter – “this book is intended to contain what the contributors feel to be core materials for a basic course in the principles of contract law” (*ibid* at 1).


\(^{832}\) Vaver, *ibid* at 567 (“excellent … in ensuring some continuity of treatment and similarity of style”), 570 (disputing the relegation of remedies, the “traditional Cinderella of contract law,” to the back of the book), 571 (insufficient treatment of performance and breach of contract). See also McLellan, *supra* note 521 at 25 (insufficient treatment of damages).

\(^{833}\) Vaver, *ibid* at 571-2.
It reminds me of those severely traditional black shoes with sensible heels and strong laces that my grandmother used to wear – solid, well-made, very comfortable and unlikely to irritate.  

Manwaring elaborates on the advantages and disadvantages of the “traditional design.” On the plus side, he lauds the authors for having placed remedies at the back of the book. For Manwaring, this signals a “return” to the “formal logic of the law of contracts as the organizing principle.” Offering his own take on the timeless theme of whether remedies should go first or last in a Contract Law course, he argues that placing remedies first gives a false impression that the “conception of the law as primarily functional or instrumental” is the dominant form of legal consciousness in Canada today. The Ben-Ishai & Percy structure is superior, he argues, because it does not “obscur[e] the contradictions within the dominant legal consciousness,” but rather permits students to “investigate the formal logic of the law of contracts and the evolution of Canadian legal consciousness while building into the discussion examples of principle and counter-principle which show that the final categories are extremely problematic in light of actual exchanges.”

However, he writes, the book does not succeed at this goal of foregrounding formalism in order to debunk it. It fails to avoid the danger that “the law of contracts will be presented as a system of scientific rules to be deduced from certain basic principles or premises.” While the Introduction acknowledges this danger by raising questions that can help “avoid this return to formalism,”

The weakness of the book is precisely that the issues are raised in the introduction and not adequately integrated into the discussion of doctrine ... After the introduction, these issues are either never mentioned again, or mentioned in a perfunctory note. The student will quickly get the message: the study of law involves the study of cases. The rest is just gloss. It is not really law but merely policy ...

835 Ibid.
836 Ibid.
838 Manwaring, supra note 834 at 784.
839 Ibid at 784-5.
840 Ibid at 785.
Thus, the decision to structure the book according to the categories of the formal logic of contract law gives the impression that formalism is still tenable after all these years ... [W]hat would have been an important step forward in Canadian casebook design if done with the requisite sophistication becomes a step backwards into history.841

In addition to this critique that the body of the case law betrays the commitments espoused in the Introduction, Manwaring argues that the book insufficiently highlights legislation and ignores the “realities of the exchange relation.”842

These critiques – a marginalization of policy and politics,843 a failure to disrupt the classical, formalist image of law, and insufficient attention paid to exchange realities – surface again in Richard Devlin’s review of the fifth edition of Ben-Ishai & Percy. In that article, Devlin offers a number of comments in the spirit of “critical affirmation.”844 Despite the casebook’s virtues,845 he writes, “there is something missing. Each chapter tends to focus on the micro details of its particular subject area with little effort to locate these issues within the larger context of the contemporary debates around contract law.”846

In particular, Devlin bemoans the “decontextualizing (and depoliticizing) tendency” in a number of chapters – a tendency that effaces “ideological predispositions” in the chapters on Certainty of Terms and Representations, and “constrain[s] the opportunity for students to critically analyze” materials on

841 Ibid.
842 Ibid at 786. Manwaring cites a range of critical scholars whose ideas combine to show that the classical model of first year law teaching do not reflect the reality of exchange. These include Friedman, supra note 71; Macaulay, “Non-Contractual Relations”, supra note 114; Friedman & Macaulay, supra note 112. Manwaring also cites Roderick Macdonald’s essay on legal education about classic contract law imagining “the private sale of used typewriters and bicycles” (Rod Macdonald, “Legal Education on the Threshold of the 1980s: Whatever Happened to the Great Ideas of the 60s” (1979) 44 Sask L Rev 39 at 43).
843 Cf. Mertz, supra note 3 at 76-77.
845 Devlin, ibid at 145-6 (the selection of cases, use of law reform commission proposals, the sense that there is “an increasing Canadianization of contract law,” pithy introductions, informative notes and commentaries, and appropriate emphasis on the more problematic elements of contract law).
846 Ibid at 146.
Frustration. Issues of race and gender fare better, representing “significant progress in the process of modernizing and contextualizing contract law,” but these issues are ultimately “ghettoized” by being characterized, for example, “as ‘women’s issues’ and therefore marginal.” Later on, Devlin recommends that greater use be made of “sociolegal studies of the operation of contracts” and suggests that “critical empiricism” can “enrich and destabilize” understanding, bolstering what he suggests is an insufficiently detailed allusion to thinkers such as Ian Macneil.

Like Manwaring, Devlin critiques the disjuncture between the Introduction, which he qualifiedly endorses, and the rest of the book. He urges the editors to “encourage their contributors to attempt to incorporate these larger debates explicitly into their chapters” with the aim of providing “greater intellectual depth and stronger thematic coherence, thereby enabling teachers and students to escape the dull compulsion of the doctrinal.” He specifically singles out the final paragraph of the Introduction in which the editors explicitly abandon the sociolegal approach to contracts in favour of the “inculcation of skills associated with more traditional materials.” For Devlin, this is a “curious surrender of editorial influence.”

Devlin acknowledges that practical challenges may preclude covering all critical perspectives in a casebook – he acknowledges that his critiques, if taken seriously would result in a “somewhat” longer book – but he opposes the idea that the alternative – treating the casebook as a source of “core”

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847 As of the 6th edition, Devlin serves as editor of the Frustration chapter in Ben-Ishai & Percy (6th ed, supra note 510). He takes the opportunity to remedy the critiques he levels, adding in an extended introduction to the chapter (with excerpts from four scholarly articles) and an entire section on “Social Force Majeure.”

848 Devlin, Review of Boyle & Percy 5th ed, supra note 844 at 147.

849 Ibid at 148.

850 Ibid at 150.

851 See ibid at 148 (The presence of “issues of competing theoretical perspectives, identity, and ideology” is a positive step, but more excerpts should be included).

852 Ibid at 148.

853 Boyle & Percy 5th ed, supra note 510 at lxxxvii. Devlin clarifies his critique: “[M]y comments are not intended to trash ‘traditional skills’ nor abandon ‘legal doctrine’). Rather, these are acknowledged to be crucial and necessary skills; but they are not sufficient” (Review of Boyle & Percy 5th ed, ibid, n 18).

854 Devlin, ibid at 149.

855 Ibid at 151.
contract doctrine and resorting to instructors’ supplements to provide additional perspectives – is either straightforward or unproblematic:

[T]here is a legitimacy and hierarchy problem. When one attempts to raise issues of, for example, gender, class, race or sexual orientation in a contracts course there are some students who resist on the basis that it is not real law and they are only being forced to study these issues because of the subjective preferences of the individual teacher ... My point is twofold: what constitutes the core of a contracts course is contestable and contingent upon certain material and ideological presumptions; if we want our supplements to problematize and endanger the conventional structure and practices of contracts pedagogy we need to be more inclusive.856

The failure to thoroughly integrate such critical perspectives into the core of the contract law casebooks, accordingly, can be seen to marginalize these perspectives. Devlin would appear to hold this critique of Ben-Ishai & Percy even after he became a contributing editor (which he did in the edition immediately following his critical review, the sixth). In article co-written by Anthony Duggan and Louise Langevin, in which the authors argue for integrating theory into the teaching of first-year Contract Law, Devlin includes the seventh edition of Ben-Ishai & Percy in a footnote for the following proposition:

[T]he leading Canadian textbooks and teaching materials on contracts are somewhat thin when it comes to the theoretical dimensions of contract law ... [T]he overwhelming emphasis is on relatively traditional doctrinal discussion and analysis."857

Judging from his publicly available syllabus, Devlin continues to heavily supplement Ben-Ishai & Percy with his own custom reading list.858

iii. Summary of Ben-Ishai & Percy

The overwhelming impression of the Ben-Ishai & Percy casebook gleaned from the Introduction and reviews is of a series of contradictory messages. On the one hand, the significant intellectual accomplishment of the Introduction to synthesize a range of critical and external perspectives on

856 Ibid at 149. Elsewhere, Devlin writes, “My own position is that it is the ‘basics’ themselves that are problematic and contestable, and that we should therefore address issues of theory from day one” (Ibid at 148).

857 Devlin, Duggan & Langevin, supra note 102 at 1.

858 Richard F Devlin, Contracts and Judicial Decision Making, Syllabus (Schulich School of Law at Dalhousie University, 2016-17), available online: https://www.dal.ca/content/dam/dalhousie/pdf/law/Academic%20Information%20Syllabi%20Moots%20Regulations/Syllabi/LAWS%201000%20Contracts%20(Section%20B)%20-%202016-2017%20Devlin.pdf [Devlin Syllabus].
contract law – coupled with its status as the first chapter of the book – signals a genuine commitment by the editors to foreground critical perspectives. The introductory chapter could potentially function to disabuse students of the idea that law is a series of internally consistent abstract rules. The reader is invited to take into account context, human behavior, values, political preferences, and policy desiderata when analyzing or practicing law.

However, these explicit messages are contradicted by the apparent sense that another attitude – the “traditional” one, in which law is presented as a formalist system of rules in the Langdellian mold, the adjudicative process as archetypal, and the lawyer’s role as primarily being to advocate before a court – predominates. Among all the casebooks, the contrast is perhaps most acute here. Of the three, *Ben-Ishai & Percy*’s introduction canvasses the broadest range of perspectives with the greatest degree of synthesis and most explicit commitment to a critical attitude. It is also the most explicit in its deliberate choice to emphasize a “traditional” thrust. The influence of tradition and convention seem to exert a gravitational pull on editorial choices, drawing them back into the centre to propagate the mainstream methods of teaching, using conventional doctrinal categories, despite the editors’ critical awareness of those limitations. Like *Milner*, the acknowledgment of these limitations does not translate into any significant action to reform the core approach. As the next section shows, the force of the gravitational field is indeed strong, and impacts the way that the editors of *Waddams* and *Ben-Ishai & Percy* treat their substantive material. It also, as we explore in Chapter 5, exerts a powerful force on the approaches contract law teachers take to legal reasoning.

### III. What Is Done: Messages Communicated by Substance

What the above analysis has shown is that the introductory and prefatory comments of the casebooks – in which editors have the opportunity to say what they are attempting to do and what they believe – reveal both the influence of American realist and critical schools of thought and a commitment to a traditional core of legal knowledge and legal reasoning reflecting the formalist attitudes reminiscent of Langdell. This Part explores the extent to which the editors’ treatment of one substantive subject area – remedies – reveals a similar tension. I show how, while *Swan* carries forward her solicitor’s approach into the treatment of remedies, evidencing a good degree of fit between her propositional statements about law and her treatment of substance and legal reasoning, the image of legal reasoning and legal practice conveyed by both *Waddams* and *Ben-Ishai & Percy* coincides much more closely to the formalist and classical commitments in their introductions than to the critical and realist ones. Before proceeding with this analysis, I outline the rationale for focusing on remedies.
A. Why Remedies?

I have chosen to analyze the remedies chapter for a series of reasons. First, the subject matter of remedies is perhaps most naturally suited to an approach that challenges formalist understandings of law. Ever since Fuller and Perdue’s seminal articles on the reliance interest, a functional understanding of remedies – the interests that remedies awards recognize and try to protect – has framed the introductory study of remedies. Thus, if the realist attitude is to be present anywhere in the first-year course, it is very likely to be here; conversely, were more formalist attitudes to predominate in the teaching of remedies, this would be evidence of a powerful formalist underlying commitment.

Second, the role of remedies in the first-year course has been a longstanding matter of debate, reflective of a deeper debate about the nature of law. The traditional order of teaching a course is to begin with the beginning of the life of the contract, the formation stage, and to proceed somewhat chronologically through the life of the contract until breach and its consequences, remedies, appears at the end. Indeed, fully half of Langdell’s casebook focused on the formation stage and the book included no section on remedies. Thus the traditional emphasis has been on the rules that govern the formation of the contract itself, an approach that corresponds to a formalist view of law, an embodiment of legal science and classical legal thought.

By contrast, ever since Holmes’ review of Langdell’s casebook in which he famously wrote that “the life of the law has not been logic: it has been experience,” the realist critique that purposes or

859 This is certainly so in Canada. See Swan 9th ed, supra note 508 at 52; Ben-Ishai & Percy 9th ed, supra note 510 at 795, Waddams 5th ed, supra note 509 at 25 (Fuller & Perdue’s article appearing at or near the beginning of each remedies chapter).

860 This order is well exemplified in Ben-Ishai & Percy. Many professors describe this rationale to me. See Chapter 5, IV(A)(ii)(b), below.

861 Langdell, supra note 109 at xi-xiii (Table of Contents). Langdell divided his casebook into three Parts, the first two of which were Mutual Consent and Consideration and comprised about half the length of the book (the third Part is Conditional Contracts). As Gerber points out, supra note 837 at 626, the first edition of Williston’s book also contained no section on consideration. See also Allan Farnsworth, supra note 509 at 1436.

862 See Klare, “Contracts Jurisprudence and the First-Year Casebook”, supra note 164 at 877-8:

In the traditional formalist approach, the subject was organized around central categories of concepts thought to be “essential” or “intrinsic” to the contractual relationship ... The origins of this conceptualist-deductive approach can be traced to [Langdell’s casebook] ... The formalist casebook, particularly in its emphasis on problems of offer and acceptance, exemplified a way of thinking about contracts as abstract relationships, analyzable apart from their social context.

See also Manwaring, supra note 834.
effects of law need be emphasized has translated into the view that the question of remedies is foundational.\footnote{Holmes, Review, supra note 180 at 234.} As one editor of the “leading [American] contemporary example of the remedies-first approach”\footnote{Gerber, supra note 837 at 596.} writes:

[C]ontract law is best understood ... if it is approached through a remedy-centred study. The underlying purposes of contract law (what it seeks to protect, and how it hopes to accomplish its aims) are revealed most clearly when problems are looked at from a perspective of taking care of harms or losses, or gains held unjustly.\footnote{John P Dawson, William Burnett Harvey & Stanley D Henderson, \textit{Contracts: Cases and Comment}, 8th ed (Mineola, NY: Foundation Press, 2003) [Dawson] at iii, cited in Gerber, \textit{ibid} at 596.}

The “innovation” to put remedies first is attributed to Fuller, whose own casebook (first edition 1947) placed remedies first.\footnote{Fuller, \textit{Basic Contract Law}, supra note 500. On the book as an “innovation,” see Gerber, supra note 837 at 625. See also Farnsworth, supra note 509 at 1436 (“It remained for Fuller in 1947 to take the bold step of putting remedies up front”).} Although Fuller did not articulate why he did so in that edition, correspondence between him and Corbin about a planned (but ultimately aborted) jointly authored casebook reveals some of his reasons. In proposing the new order to Corbin, Fuller wanted to “bring home to the student the fact that back of the question, ‘Is there a contract?’ there always lies a more specific problem of enforcement.”\footnote{Lon L Fuller, Letter to Arthur L Corbin (7 October 1940), reproduced in Gerber, \textit{ibid} at 604.} He wanted to make the student “remedy-minded,”\footnote{Lon L Fuller, Letter to Arthur L Corbin (10 November, 1941), reproduced in Gerber, \textit{ibid} at 615.} to ensure that contract law is analysed in the terms of the “hierarchy of interests” from his “Yale article.”\footnote{Lon L Fuller, Letter to Arthur L Corbin (24 November, 1941), reproduced in Gerber, \textit{ibid} at 617.} He was modeling this approach after his own experiment of having reversed the traditional order of teaching in the Property course, in which he placed the consequences of legal possession before a definition of possession – which had the virtue of “imparting a functional conception of legal rules.”\footnote{Fuller, \textit{ibid}, reproduced in Gerber, \textit{ibid} at 620.}

Placing remedies first can thus be understood as communicating the “central realist message” that “it is impossible to understand the nature of legal rights and relationships or to logically deduce remedial conclusions from them without knowing what courts can and actually will do to and for
However, while the remedies-first approach has been adopted by some editors in the US, the traditional approach remains prevalent. Even later editions of Fuller’s book have abandoned the remedies-first approach (although the rationale for this is claimed to be “pedagogical,” not philosophical).

B. The Remedies Chapter: Swan

Of the three books, Swan demonstrates the closest correspondence between the messages communicated in the Introduction and the messages communicated via the substance in the remedies chapter. As in the Introduction, the remedies chapter emphasizes a functional approach to law, with a broad view of the lawyer’s role (including an emphasis on the solicitor), and an appreciation for context in understanding contracts. The editors communicate these messages through their ample commentary, which they intersperse between almost every case and article excerpt.

Explicit references to the role of remedies play an important role in the chapter in arguing for a particular vision of law. The chapter opens with an argument for why remedies is best studied first, using the conventional “formation-first” approach as a foil:

One difficulty that a [formation-first] creates is that it distorts the relative importance of the topics that make up what is called the “Law of Contracts.” Lawyers spend comparatively little time worrying about the process of contract creation. They spend much more of their time worrying either about the risks that the deal creates for their clients and the ways by which those risks may be avoided, controlled or allocated, or in

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872 See Farnsworth, supra note 509 at n 167 (identifying three US casebooks with this approach – Dawson, supra note 865, John H Jackson & Lee C Bollinger, Contract Law in Modern Society: Cases and Materials (St Paul, Minn: West, 1980) and E Allan Farnsworth & William Franklin Young, Cases and Materials on Contracts (Mineola, NY: Foundation Press, 1980) [Farnsworth & Young]). Gerber distinguishes between casebooks that begin with a full treatment of remedies and those that use the “hybrid” approach, with “a brief introduction to remedies before the formation materials are addressed in depth” (supra note 837 at 596). Gerber categorizes Farnsworth & Young, ibid as “almost certainly the leading example of the hybrid approach” (ibid at 597).

873 See Gerber, ibid at 626, noting that the fourth and sixth editions of Basic Contract Law, under the editorship of Melvin Eisenberg, returned to the remedies-last approach. Gerber quotes Eisenberg as attributing this to “pedagogical” considerations, arguing that “policy issues raised by consideration tend to be more accessible to students just beginning law school than the issues raised by remedies, which are often technically complex and laden with special economic implications” (Lon L Fuller & Melvin Aron Eisenberg, Basic Contract Law, 4th ed (St Paul, Minn: West, 1981) cited in Gerber, ibid at 626). Indeed, in the disagreement between Corbin and Fuller as recounted in their correspondence reproduced by Gerber, Corbin’s objection to placing remedies first can be considered equally “pedagogical”: while he “sympathizes,” Corbin tells Fuller that he may be “asking too much of beginners” (Lon L Fuller, Letter to Arthur L Corbin (21 November 1941), reproduced in Gerber, ibid at 615).
negotiating the deal and keeping the arrangements working smoothly when the parties are in the deal or relation and need to co-operate.

It makes more sense to start the study of contract law by considering what might happen when things go wrong, what the risks of non-performance might be, where they come from and what one can do about them. Once one understands the rights that a party may have if a contract is not performed and the consequences of non-performance of a contract, one has a better grasp of the problems that making a deal might create.874

With its focus on risk, negotiation, “keeping the arrangements working smoothly,” “deals” and solving “problems,” the editors signal that the subject matter of remedies reinforces the importance of relational contracts and the solicitor’s role in prospective planning and avoiding litigation.

The introduction to this chapter goes on to place the question of remedies in its broadest possible ambit, surveying a range of possible remedies for breach, spanning criminal sanctions, formal and informal exclusion from a business or trade, being “publicly labelled as one who did not keep promises,” a court declaration that a contract has been breached, orders of specific performance and, finally, damages.875 It ends with an elaboration of the pedagogical justification for beginning with remedies: asking what the law will do if it decides to enforce a promise “make[s] more intelligible the inquiry ... into the kinds of promises the law will enforce,” encourages lawyers and clients “to have a general idea of the risks and consequences of what they are doing,” and empowers the lawyer to determine whether “the amount likely to be recovered makes it worth starting or defending an action.”876 The first words of the first substantive chapter of the book, then, de-centre courts and their remedies from an understanding of law, invite the student to adopt a pragmatic and practical state of mind, and emphasize function over form.

Elsewhere in the chapter the subject matter of remedies serves as a departure point for commentary about legal theory. For example, about midway through the chapter, the editors seemingly bolster their preference for the remedies-first view by alluding to the common law’s historical position

874 Swan 9th ed, supra note 508 at §§2.1-2.2.
875 Ibid at §2.3.
876 Ibid at §2.8.
that there is no right without a remedy. Near the end, they critique the idea that “law is a forum ... for a confrontation between parties with ‘rights-based’ claims,” which they characterize as a “restricted vision of the nature and scope of the relations that the law governs and supports.” They propose alternative views that focus “less on the idea of rights and more on the ideas of mutual duties and good faith,” and “less on the limited bounds of the relation created by a contract and more on the expectations that the relation has encouraged.” In comments like these, the editors’ preference for relational understandings of contract, including the reasonable expectations of the parties, rise to the surface. If these comments serve to undermine the centrality of rights, in other comments they undermine other tenets of classical legal thought, arguing for functional considerations over such virtues as “doctrinal purity.”

In addition to these more lengthy and explicit passages, the chapter contains other comments that reinforce the editors’ commitment to their view of law, which includes an appreciation of context, the importance of the reasonable expectations of the parties, functionalism, and the
role of the solicitor. The organization of the chapter, whose main subject headings tend toward practical considerations instead of doctrinal divisions, reinforces the functionalist view. In addition to

§2.402 (“In every case, one needs more facts about the specific agreement, the parties and the context before deciding what should be done about the problem presented by the dispute” [emphasis added]).

881 See eg. ibid at §2.125(a) (“If the focus of our inquiry is at least in part on what Cornwall Gravel reasonably expected from Purolator” [emphasis added]; §2.331 (“The principles ... may cause difficulties if one sees the purpose of the law of contract as the protection of the parties' reasonable expectations” [emphasis added]); 2.338 (“An award of damages should only be justified if it can be seen as protecting the plaintiff’s reasonable expectations without doing too much violence to expectations of defendant; §2.435 (“if one focuses ... more on the expectations that the relation has encouraged, one may have greater appreciation of the value of a range of equitable remedies”; §2.449 (a) (“Do you think that even a stage-struck young actress would agree to such a contract?”). The theme of reasonable expectations also appears frequently in the case excerpts in the chapter. See eg. para. 41 of Bowlay Logging Ltd v Domtar Ltd (1978), 87 DLR (3d) 179, [1978] 4 WWR 105 (BCSC) [Bowlay Logging], reproduced in Swan 9th ed, ibid at 115; para. 54 of Fidler v Sun Life Assurance Co of Canada, 2006 SCC 30, [2006] 2 SCR 3 [Fidler], cited at para 55 of Keesys v Honda Canada Inc (2008), 294 DLR (4th) 577, 239 OAC 299, reproduced in Swan 9th ed, ibid at 140; para. 49 of Fidler, ibid, reproduced in Swan 9th ed, ibid at 159; para. 46 of Bank of America Canada v Mutual Trust Co, [2002] 2 SCR 601, 211 DLR (4th) 285, reproduced in Swan 9th ed, ibid at 233.

882 See eg. Swan 9th ed, ibid at §2.63 (Fuller and Perdue “emphasize what must never be forgotten: every rule must be justified in terms of its contribution to the effort to forward certain social values”); §2.89 (“the important question is ... what do we want to do and why?” [emphasis in original]); §2.208 (“the issue is ... what the courts (or we as a society) want to do” [emphasis in original]); §2.376 (“The question is, as always, what values and interests should the law support? What is the purpose of the legal rules about remedies?”); §2.389 (“What makes [Bank of America Canada v Mutual Trust Co, ibid] of more general interest is the fact that the Supreme Court states more explicitly than most courts what it wants to do and why”); §2.402 (“In essence the problem always is: ‘Given what we know about the dispute, the parties, and the deal that they have made, what do we want to do?’ [emphasis in original]); §2.429 (“allocating risks is ... the focus of what courts do”); §2.472 (“The drawing of lines around principal areas of the common law is seldom easy or, what’s far more important, useful or helpful” [emphasis added]).

883 See Swan 9th ed, ibid at §2.24 (referring to negotiation strategy generally and in reference to Peevyhouse v Garland Coal & Mining Co, 382 P 2d 109 (SC Okla) [Peevyhouse]); §2.44 (damages have direct impact on drafting); §2.47 (“How would you advise a client to behave?”); §2.82 (a “careful solicitor” would draft a different contract for Mr. & Mrs. Peevyhouse); §2.84 (solicitors “can control or limit the position that the promisee can expect”); §2.108 (steps the solicitor can take to protect clients from risk); §2.114 (how would railway lawyers have responded in the drafting of the standard form contract?); §2.126 (what would you advise Purolator to tell its drivers to say?); §2.141 (what advice would you have offered the board?); §2.148 (the solicitor is “professionally concerned to foresee or worry about the consequences of a breach of contract”); §2.283 (if you were General Counsel to Sun Life what language would you recommend?); §2.342 (limitations of liability are a hugely important feature of contractual planning); §2.385 (“After Semelhago v Paramadeavan [[1996] 2 SCR 415, 136 DLR (4th) 1, it has become more difficult for solicitors to advise their clients about real estate contracts”); §2.448 (a) (what would effect of Warner Bros [Pictures v Nelson, [1937] 1 KB 209 [Warner Bros]] have on contracts that Warner Brothers had with all its stars?); §2.490 (in the middle of the spectrum it will be harder to “give advice”); §2.513 (2), §2.513(3) (review problems on drafting letters and giving advice).

884 The subsections of the chapter are: “Introduction” (2.1), “The Compensation Principle” (2.2), “Some Problems in Awarding Damages” (2.3), “Equitable Remedies” (2.4), “Interest and the Date for Assessing Damages” (2.5),
these views about law, which correspond well with the editors’ “practitioner” identities, there is also
evidence of a lively intellectual and critical spirit, with more traditional commentary about the cases
themselves885 and academic disagreement with some theoretical views, such as law and economics.886

In summary, therefore, both the form of the chapter (its structure and heavy use of
commentary) and the substance (the content of the commentaries) align well with the vision of law,
legal reasoning, and legal practice propounded in the Introduction. There is no significant discernible
gap between the stated aspirations of the Introduction and the execution of the subject matter of the
remedies chapter. This congruence is unique among all three books. In both Waddams and Ben-Ishai &
Percy, the contrasts between the propositional or underlying attitudes about law and the remedies
chapters are greater.

C. The Remedies Chapter: Waddams

We observe in the Waddams’ chapter on remedies a similar tension to that detailed earlier. This
is the tension between, on the one hand, a purposive, functionalist, realist vision of law and, on the
other, a preoccupation with the adjudicative process and law’s internal rationality. Because the chapter
is so sparing in its commentary, this tension has to be discerned largely in between the lines.

“Recovery of the Defendant’s Gains or Restitutionary Remedies” (2.6), and “Reasonableness in the Face of
Contract Breach: Accounting for Gains Arising from a Breach” (2.7) (Swan 9th ed, ibid).

885 See ibid at §2.13 (three broad types of questions that must be considered in examining “almost any case);
Shipping]] is the House of Lords adopting or rejecting Robinson v Harman[ (1848), 1 Exch 850]?); §2.181 (Lord
Denning “fails to provide a clear basis for the award”); §2.204 (“Should the rules for damages differentiate
between dogs and stereos?”); §2.239 (critique of damages award in Wallace v United Grain Growers Ltd, [1997] 3
SCR 701, 152 DLR (4th) 1 [Wallace]); §2.267 (does Hadley v Baxendale [supra note 640] get the Court in Fidler
[supra note 881] as far as it wants to go?); §2.269 (“is foreseeability alone sufficient for liability?”); §2.292, 2.295
/issues are obscured and ignored by Binnie in Whiten v Pilot Insurance Co, 2002 SCC 18, [2002] 1 SCR 595
[Whiten]); §2.300 (failure of court in Whiten, ibid to deal with the relationship between damages for economic
loss, mental distress, and punishment); §2.304 (is it rational to say punitive damages deprive wrongdoer of profits
if court doesn’t know or take notice of actual profit?); §2.475 (“Does Lord Nicholls satisfactorily deal with the
objections raised by Lord Hobhouse? [in Attorney General v Blake, [2001] 1 AC 268, [2000] 4 All ER 385]”).

886 See Swan 9th ed, ibid at §2.88 (assumption that damages will fully compensate plaintiff is false); §2.396
(critique of Posner’s use of “profits”); §2.398 (transaction costs of litigation are high); §2.399 (deliberate efficient
breach conduct is rare because parties want to preserve their reputation); §2.406 (economic analysis of law tends
to produce a market-oriented, socially conservative analysis of many problems); §2.428 (efficient breach can have
no impact on long term relational contracts).
Superficially, the Waddams text presents largely as a conventional anthology of cases. Aside from a short introductory comment on specific performance,887 a slightly longer one on restitution,888 and some comments on unjust enrichment,889 the vast majority of the text in the chapter consists of reproductions from cases interspersed with short notes and questions. This lack of extended commentary is probably the most noteworthy difference with Swan; the fact that the cases are left to “speak for themselves” gives rise to the inference that a court-centric view (such as the one that Macdonald had ascribed to Waddams in Introduction to the Study of Law) figures prominently. Recall that unlike in Milner, there is no “apology” for the large number of cases and, unlike in Swan, there is no introductory framing about the limited usefulness of appellate judgments. The first and primary message communicated by the format is the centrality and unproblematized importance of cases.

Further bolstering this impression is the nature of the notes, questions, and commentary. Not only are they sparse and compact, but they at times serve to create an impression that contract law is comprised of a series of abstract rules, and that legal thinking and practice consist of applying rules to hypothetical fact scenarios. By far the most common formulation in the notes and questions sections is the provision of facts similar to those in a case just reproduced, with the invocation that the student “advise” a client as to the likely outcome of a legal claim.890 In some instances, interesting and obvious policy considerations are raised by the facts of a case, but the commentary and questions constrain themselves to the conventional formulation.891 Many of the questions following cases invite students to focus on rules, whether to clarify, evaluate, or elaborate upon them.892 The prevalence of such

887  Waddams 5th ed, supra note 509 at 121.
888  Ibid at 153.
889  Ibid at 158.
890  See eg. ibid at 32 ("Advise A"); 36 ("Will B succeed?"); 44 ("Advise K"); 44 ("Advise A"); 53 ("Is Baker’s Department store liable for the loss?"); 79 ("A sues for pain and suffering a loss of wages. Will she succeed… Will he succeed? … Advise her"); 111 ("Advise C … Advise Q Company"); 120 ("Advise C. Would it make any difference if C’s repudiation was based on expert advice … ?").
891  See eg. ibid at 112 (fact pattern about unwelcome child and question whether should have mitigated damages: only “Advise C,” no discussion of broader issues); 112 (old and valued customer: no discussion of relational contract despite Macaulay excerpt in the Perspectives chapter); 126 (Sky Petroleum v VIP Petroleum Ltd, [1974] 1 WLR 576, [1974] 1 All ER 954: the interim order is mentioned in the case but there is no discussion of why a court may be reticent to supervise an ongoing order); 151 (despite the many interesting factors included in the Wroth v Tyler, [1974] Ch 30 decision, the question that follows focuses on counterfactuals and does not engage with the context).
892  See eg. Waddams 5th ed, ibid at 35 (Bowlay Logging, supra note 881); 45 ("What is the proper measure of damages? Does it make any difference whether the breach is deliberate or accidental"); 60 (Is the distinction valid?
interventions reinforces a traditional view of legal rationality preoccupied with analogical reasoning and discerning relevant differences, very much in line with Waddams’ stated views in the introduction to his textbook. The presumed model of the lawyer here looks much more like the courtroom advocate than the solicitor – even when the student is asked to “advise” a client, the implied invitation is to focus on the rules and their presumed straightforward application. The themes of relational contracts, limited usefulness of contract doctrine, and the disjuncture between what judges do and what they say are largely absent from the notes and commentary.  

These observations apply to a large portion of the chapter and might give rise to the impression, similar to Macdonald’s, that a traditional view of law, with its emphasis on rules and courts, predominates. But there is a danger in oversimplifying. Embedded in the chapter, not so much in the commentary but in the choice of excerpts, is material that serves to supplement this vision with an appreciation of the contingency of rules, the importance of context, and pragmatic considerations.

The contingency of rules is highlighted by means of a number of devices. One is the highly comparative nature of the case law. The first seven cases of the chapter, for example, come from the England, Oregon, Ontario, New Hampshire, and Minnesota, with a reference in a note to a Kentucky case. Examples from other jurisdictions are often raised to demonstrate alternative rule formulations. Such a selection disturbs any impression that this “traditional” casebook is concerned with transmitting the doctrinal content of any one place. It communicates a more catholic and intellectual appreciation for

893 This is so despite occasions in the excerpts and notes to discuss such themes as relational contracts. See eg. Waddams 5th ed, ibid at 126 (reproducing an excerpt from Sky Petroleum Ltd v VIP Petroleum Ltd, supra note 891, in which the judge only awards an interim, not permanent injunction). Swan had invoked this decision to suggest it resulted from “concerns about … forcing parties into a continuing relation” (9th ed, supra note 508 at §2.444). No commentary whatsoever about continuing relations is offered in Waddams. See also Waddams 5th ed, ibid at 112, n 5 (“B replies that he could not so treat and old and valued customer,” with no elaboration on the theme of ongoing relationships)

894 See eg. Waddams 5th ed at 53 (“Corbin on Contracts (vol 5, s 1008) suggests we distinguish between willful and nonwillful breach,” a distinction not adopted in Canadian or English cases); 87 (different jurisdictions decide differently on whether the contract as a whole must be for peace of mind in order to award damages for mental distress); 122 (historical and comparative examples of specific performance including Scotland and the Civil Code of Québec); 157 (the Restatement’s theory “remained heterodox in England” until the last decade of the 20th century).
legal developments, a sensitivity that is amplified by the inclusion of historical developments of rules895 and examples of dissenting or differing opinions.896 By showing rules as contingent upon place, circumstance, or history, the chapter would appear to support Waddams’ concern, stated in the Preface to his textbook, with looking beyond the surface of rules to their underlying principles.897

Moreover, despite the absence of Swan-like commentary which might argue for the importance of context, many of the editorial decisions about what to include demonstrate an appreciation of its value. Indeed, although Waddams is sometimes considered to have rather short excerpts, its case excerpts are occasionally longer than in Swan – so while the cases are left to speak for themselves, they sometimes say more.898 On at least one occasion the authors use an excerpt from an academic article to provide commentary about a case, achieving a similar end that the Swan editors accomplish with their commentary.899 Sometimes the paraphrasing of facts is more detailed and colourful than necessary to situate judicial reasons for decision,900 and on numerous occasions the editors provide post-script

895 In an apparent celebration of intellectual curiosity the editors include numerous examples of the nuanced development of legal rules. See eg. ibid at 55-6 (evolution of ratios in Horne v Midland Railway Co (1873), LR 8 CP 131 (Ex), Hydraulic Engineering Co Ltd v McHaffie (1878), 4 QBD 670 (CA), Rivers v George White & Sons Co Ltd (1919), 46 DLR 145, [1919] 2 WWR 189 (Sask CA), Kinghorne v Montreal Telegraph Co (1859), 18 UCQB 60. Sometimes the cyclical nature of history is invoked to show how old rules may lose and regain favour at different historical moments. See eg. Waddams 5th ed, ibid at 158 (excerpt from Moses v MaCerlan (1760), 2 Burr 1005, 97 ER 676 and following discussion, a “restoration of the view of Lord Mansfield”).

896 See eg. Waddams 5th ed, ibid at 120 (mention of Hounslow London Borough Council v Twickenham Garden Developments Ltd, [1971] 1 Ch 233, where court refused to grant injunction to keep a defendant builder off the site – different grounds (equity) than precedent (White & Carter (Councils) Ltd v McGregor, [1962] AC 413, [1962] 2 WLR 17 (HL)); 152 (Lawson commentary on Wroth v Tyler, supra note 891 highlights the contradictory decisions – problematizing and complicating the rule from Wroth v Tyler, ibid).

897 Waddams, Preface to 1st ed text, supra note 745 at vii-viii.

898 See eg. Waddams 5th ed, supra note 509 at 75ff (including Baroness Hale’s decision in Transfield Shipping, supra note 885 in which she uses the device of an “examination question” to frame her analysis); ibid at 145-151 (reproducing a long excerpt in Wroth v Tyler, supra note 891 including many facts not germane to the ratio). By contrast, Swan paraphrases Wroth v Tyler, ibid in five paragraphs (Swan 9th ed, supra note 508 at §§2.410-2.414). See also Waddams 5th ed, ibid at 161 (providing a longer excerpt of Attorney General v Blake, supra note 885 than in Swan, one that provides more facts and context than does Swan’s paraphrasing of the facts (at Swan 9th ed, supra note 598 at 247)).


900 See eg. Waddams 5th ed, ibid at 112 (thoughtful paraphrasing of the facts in White & Carter (Councils) Ltd v McGregor, supra note 896); 141 (providing some colourful details about Warner Bros, supra note 883 derived from Bette Davis, The Lonely Life: An Autobiography (New York: Hachette, 1962)).
information about what happened after the resolution of the case, continuing the story beyond the courtroom and indirectly communicating the practical reality of the litigation.  

The editors also provide historical and intellectual context for many areas of law, as where the editors provide a brief history of the distinction between law and equity or the origins of the tort of inducing breach of contract. In the one lengthy commentary of the chapter, which introduces the section on restitution, the editors place the cases that follow in a broader intellectual framework. Unlike Swan, who is seemingly impatient with doctrinal separations, the Waddams editors provide a more neutral account, indicating some allegiance to the categories of the common law. Yet this treatment cannot be said to indicate a commitment to doctrinal purity; the thrust of the introduction is that Canadian courts would go on to adopt the more functional view of the Restatement, treating the constructive trust as a widely available remedy. In passages such as this, not to mention the fact that the chapter opens with an excerpt from Fuller & Perdue’s “Reliance Interest” articles, we see evidence of the functionalist and realist leanings of the editors.

The overall impression of the chapter is that it is written by someone with a love of the subject and an appreciation for its nuance and complexity. It would be inaccurate to characterize it as a Langdellian exercise in legal science. But it would be equally inaccurate to say that the chapter, on its face, communicates an unambiguous commitment to the realist values that explicitly appear in Waddams’ other writing. The style is too minimalist to make such a claim, the missed opportunities too frequent. Rather, the chapter appears to be designed for students and instructors alike to discover for themselves the emphasis they prefer. The instructor who wishes to treat the “law” of remedies as a set of judicially constructed rules that may be applied to different hypothetical fact scenarios will have the resources to do so. The instructor who may wish to tease out the policy or practical considerations has

901 See eg. Waddams 5th ed, ibid at 44 (reporting a post-judgment settlement in Groves v John Wunder Co, 205 Minn 163, 286 NW 235 (1939)).
902 Waddams 5th ed, ibid at 121.
903 Ibid at 145.
904 Ibid at 153. The editors make reference to the “third branch of the law of obligations, in addition to contract and tort, the law of restitution” (ibid).
905 Ibid at 154.
906 Ibid at 53.
the raw material to do so as well. The chapter is neither dogmatic nor polemical. Commentary or critique is often indirect, such as via a series of rhetorical questions.

That said, the result of such neutrality may be, in the end result, a triumph of the conventional, traditional view. Absent a corrective such as what Milner or Swan provide to the adjudication-centric model, the dominant message likely received is the importance of judge-made rules. Although the chapter is rich in context, history, and nuance, the objective of such contextualization appears to be to test or push the limits and contours of the rules, not to challenge their relevance or centrality. Indeed, the relevance of what is included is taken for granted, not argued for, leaving the criteria for relevance (as previously observed in Waddams’ introduction to his text) unstated and implicit.

This silence creates somewhat of a vacuum, and it would likely take a particularly diligent student (who will follow the chapter’s pinpoint references to the textbook) to fill the vacuum with other than a conventional view of the importance of courts and rules. By leaving so much unsaid, Waddams et al curiously vacate the arena in which they have so ardently contested conventional

907 For example, the long excerpt in Wroth v Tyler, supra note 891 provides ample opportunity to explore questions of the protections afforded to spouses in marital property regimes (Waddams 5th ed, ibid at 150). Note 3 at 112 provides the provocative invitation to consider whether a mother could have been expected to abort or put child up for adoption in order to mitigate the “damages” flowing from an unwanted child. Some questions do invite discussions about policy, although the editors do not provide any suggestive answers. See eg. Waddams 5th ed, ibid at 53 (“Who, of Hadley and Baxendale, could more easily insure against the loss that occurred?”). The idea that there is a “price” for risk appears not in commentary but tucked away in the case law. See Waddams at 56 (Kinghorne v The Montreal Telegraph Co, supra note 895), 71 (Transfield Shipping, supra note 885 at para. 13)).

908 The concept of efficient breach comes up a couple of times but is not commented on (in contrast to Swan, who comes back to it numerous times throughout the chapter, often to critique it. See Waddams 5th ed, ibid at 106 (describing the concept at note 2 and briefly mentioning Bank of America v Mutual Trust Co, supra note 881 in which the court refused to discourage it), 171 (reproducing the relevant extract from Bank of America v Mutual Trust Co, ibid, slightly longer, but without commentary). The concept of reasonable expectations comes up in the excerpt of Transfield Shipping (ibid at paras. 13 and 16, reproduced in Waddams 5th ed, ibid at 71 and 75). Following Attorney General v Blake, supra note 885 the editors ask one of the rare questions in which the explicit term “policy” is mentioned (“Did the attorney general or the Crow suffer a financially compensable loss? If not, on the basis of what policy considerations can the recovery of profits made by Blake be justified” at 171).

of doctrinal thinking in their other writings. The reticence produces an implied emphasis on the conventional doctrines and categories of contract law, and the impression that the case method and adjudication are the natural domains of its study. This naturalness privileges conventional analogical reasoning and the importance of substantive doctrinal rules as the core of the lawyer’s (and law student’s) work, foregrounding formalism and castigating the realist and nuanced ideas to the peripheral domain of theory. This marginalization of theory is emblemized by the stand-alone nature of the Perspectives chapter which, it turns out, a number professors who teach from *Waddams* do not assign at all.

**D. The Remedies Chapter: Ben-Ishai & Percy**

Stephanie Ben-Ishai has been the editor of the remedies chapter since the 8th edition, when she took over that chapter from David Mullan. For the purposes of this review, I will refer to the chapter as if she is the sole editor responsible, acknowledging that (without detailing how) the chapter is likely an accretion of contributions from its previous editors. Since for seven out of the nine editions of *Ben-Ishai & Percy* the editor of the remedies chapter has also been an editor of the casebook (although never Christine Boyle, the author of the introductory chapter), inferences drawn about the chapter may be more generally applicable to the book as a whole than might otherwise be the case.

Similar to the tension between the Boyle Introduction and the reception of the book as a whole, there is in the remedies chapter a tension between critical and traditional perspectives. What is *said* in the commentary often resembles a realist or critical framing, while what is *done* pedagogically serves to perpetuate a more traditional view of law and legal reasoning. In addition, the structure of the chapter adopts a more conceptual, as opposed to functional, organization, furthering the impression that formalist commitments lurk in the background.

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910 In addition to the writings by Waddams canvassed here, See eg. Michael Trebilcock, *The Limits of Freedom of Contract*, *supra* note 786. Although Trebilcock was not an editor on the 5th edition, many of the features of the remedies chapter are preserved from the period when he was one. The lack of attribution of the chapter to an individual author makes it difficult to make a direct comparison between the particular editor’s(‘) views and his/her/their writings.

911 See eg [048], Interview, lines 393-413, [025], Interview, lines 443-5. See also *infra* note 945; Chapter 6, III(B), below.

912 David Mullan edited the remedies chapter in the 6th and 7th editions; all previous editions were edited by David Percy.
This interpretation requires some justification, for the chapter – which contains a good deal more commentary than *Waddams*, though less than *Swan* – is laced with references to legal realism and other critical perspectives. For example, the very first two excerpts in the chapter are from Holmes, with his “bad man” quote, and Posner. They are deployed here in the service of what Ben-Ishai calls the “dominant position,” that “contract breach should be morally neutral.” This is a striking treatment of Posner when contrasted with *Swan’s* critical take of concepts such as efficient breach, and even with the *Waddams* treatment, which refrains (despite the law-and-economics expertise of Trebilcock, a lead editor for the first three editions) from praising or arguing for such claims. Indeed, elsewhere in the *Ben-Ishai & Percy* remedies chapter the economic perspective is deployed rather uncritically, perhaps so that it may function unimpeded as critical of doctrinal presumptions.

Numerous other realist perspectives are offered throughout the chapter, speaking to the practical motivations of clients, emphasizing the policy considerations that are “obscured by verbal formulae,” commenting on the importance of bench composition, suggesting that judges use


914 *Ben-Ishai & Percy* 9th ed, *ibid* at 792.

915 See eg. *ibid* at 833 (offering Posner’s critique of *Groves v John Wunder Co*, *supra* note 901 without any critical response); 937 (presenting as fact without evidence the idea that economic efficiency accounts for the preference for damages over specific performance); 938 (“assuming that most contractual parties will generally act in an economically rational way,” without defining economically rational or providing empirical support). Reference is made to Ian R Macneil, “Efficient Breach of Contract: Circles in the Sky” (1982) 68 Va L Rev 947, but only by way of citation, not discussion (at 794).

916 See *Ben-Ishai & Percy* 9th ed, *ibid* at 805 (reliance damages come up in the jurisprudence because a plaintiff has not suffered losses measurable by expectation, or is unable to prove or establish expectation losses, or where reliance damages are potentially more lucrative); 950 (“Do you think that the injunction merely ‘tempted’ Bette Davis to perform the contract, or ‘drove’ her to perform it? … Nourse LJ in *Warren v Mendy*, [1980] 1 WLR 853 (CA) … described the decision in *Warner Bros* as ‘extraordinarily unrealistic.’ Do you agree?”).

917 *Ben-Ishai & Percy* 9th ed, *ibid* at 880:

Just as in torts, [in remoteness] these fundamental issues are inevitably somewhat obscured by verbal formulae, which the courts have adopted in an effort to justify or rationalize their actions in particular cases. It will be immediately appreciated that the verbal tests propounded by courts do not, of course, solve in litmus fashion future cases and that, in this area of law in particular, Holmes’ axiom ‘general propositions do not decide concrete cases’ must be borne in mind.

References to policy occur elsewhere. See eg. *ibid* at 833 (“Should the deliberate nature of the defendant’s breach have had any influence on the approach of the majority?”); 889 (“Should courts be concerned with ‘the extent of the promisor’s information and the proportionality between the risk he is being asked to undertake and the benefit expected?’”); 934 (“Is there a justification for the traditional distinction between liquidated damages clauses and deposits?”).
flexible formulations or engage in contestable readings to arrive at ends they deem appropriate, and suggesting the practical insignificance of legislative intervention. There are some references to the importance of values and distributive concerns, and questions that invite students to imagine the practice of law as transcending the barrister’s mode to include that of the solicitor. The voice of the commentary is fresh, with references to popular culture and accessible everyday examples. The very first “Learning Objective” listed at the beginning of the chapter is to “[a]rticulate and assess the general policy considerations influencing judicial decisions.” All of these references give the impression that the editor of the chapter is critically minded and concerned with practical and realistic implications of contract law, and desires to inculcate in readers a capacious understanding of the subject that cultivates a diverse array of skills.

918 See ibid at 890 (calling “noteworthy” the change in the composition in the Manitoba Court of Appeal between Scyrup v Economy Tractor Parts Ltd (1963), 43 WWR 49, 40 DLR (2d) 1026 (Man CA) [Scyrup] and Munroe Equipment Sales Ltd v Canada Forest Products Ltd (1961), 29 DLR (2d) 730 [Munroe] a “critical swing ‘vote’”).

919 See eg. Ben-Ishai & Percy 9th ed, ibid at 890 (“the obvious flexibility of the principles of Hadley v Baxendale, supra note 640 allows courts to impose liability when it seems appropriate, even where breaches of contract by carriers result in a loss of profit”); 930 (“Irrespective of whether it is a fair reading of Dickson J’s judgment in Elsley v JG Collins Ins Agencies Ltd [1978] 2 SCR 916, 83 DLR (3d) 1 [JG Collins], there is now a significant body of Canadian case law supporting the proposition that penalty clauses are enforceable” [emphasis added].

920 See Ben-Ishai & Percy 9th ed, ibid at 944 (“the current availability of the injunction approximates its availability before “fusion”).

921 See eg. ibid at 791 (“the study of contractual remedies offers an introduction to values in contract law such as efficiency and morality”); 934 (“The following case makes clear that enforceability of a liquidated damages provision in an agreement engages two competing objectives: freedom of contract versus the right of the courts to intervene in a given case to relieve against an oppressive or unconscionable result”).

922 See ibid at 940 (granting specific performance in sales of residential property on the grounds that there is something about the property that makes it particularly desirable is “a consideration that to this point has been favouring the wealthy”).

923 See eg. ibid at 921 (“How could the drafting of the clause in this case be improved?”); 928 (“how would you advise the respondent to achieve that protection in the future?”); 934 (“What can you learn about structuring sales transactions from the approaches that courts have traditionally taken to deposits and penalty clauses?”).

924 See ibid at 837 (referring to The Paper Chase, supra note 109 to introduce Hawkins v McGee (1929), 89 NH 114, 146 A 641).

925 See Ben-Ishai & Percy 9th ed, ibid at 837 (“When I agree with a friend to exchange books that we have each read recently and enjoyed, both sides to this transaction have as their objective the achievement of the pleasure that comes from reading a good novel or biography”).

926 Ibid at 791.
If the critical spirit does animate the editorship of this chapter, it does so alongside an apparently disparate set of commitments. These commitments presume the pre-eminence of doctrinal rules, the primacy of analogical reasoning, and the marginality policy in legal reasoning. This other constellation of views lies in stark contrast with the realist messages, and parallels the tension observed in the Introduction.

A number of indicia justify this interpretation. There is the obvious point that of the three commercial casebooks, *Ben-Ishai & Percy* is the only one to place remedies last. The chapter opens with a list of learning objectives; six of the eight use action words that presume a fixed rule or other knowledge base. Four of them hope that students will “Describe and apply” legal rules, one that students will be able to “calculate” damages, and another that students will be able to “explain” what types of losses are compensable. Only two relate to more critical goals – “policy considerations” influencing judicial decisions, and “critical analysis of the dominance of the expectancy measure of damages” – yet even the latter one is closely tied to a narrow doctrinal subject. Only in one place in these objectives are students expected to “critically assess the law.”

Moreover, the way in which readings are introduced suggests that many of the readings can be distilled into discernable take-aways, often in the form of rules. This process of simplification and transmission of knowledge occurs with respect to cases, scholarly articles, and even to the entire law of contractual remedies. Some passages in the commentary simply set out rules or principles, in the same manner as a conventional treatise might. Serving to reinforce the importance of rules, many of the questions posed to students require them to distill rules or tests to demonstrate

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927 *Ibid* at 791.

928 See *Ibid* at 826 (*Chaplin v Hicks*, [1911] 2 KB 786 (CA) “illustrates that courts are not prevented from awarding expectancy damages just because there is an element of guesswork in assessment”); 893-4 (*Koufos v Czarnikow (C)* (*The Heron II*), [1969] 1 AC 350, [1967] 3 All ER 686 (HL) addresses two issues when operating in a *Hadley v Baxendale*, *supra* note 640) rule one situation


930 See *Ben-Ishai & Percy* 9th ed, *Ibid* at 792 (law of contractual remedies may be broken down into four key general concepts).

931 See eg. *Ibid* at 894 (a plaintiff will not be able to recover to the extent that she has failed to act reasonably to limit or reduce her loss caused by the defendant’s breach); 902 (the general rule is that the loss will be assessed at the earliest date the plaintiff can be expected to mitigate).
comprehension.932 The highly conceptual organization of the chapter serves to further the impression that abstract rules and ideas form the intellectual building blocks of the law.933

The chapter does not particularly exalt the notion of context. There is the occasional reference to “common” practice934 but in other instances the editor refers the reader to whole other chapters to discern the factual matrix of the case.935 Many of the excerpts provided are shorter than in the other books936 and some cases that receive detailed treatment in the other books are not reproduced at all (although the inverse is true in some instances).937 A reference to Danzig’s contextual study is so brief as to be perfunctory.938

Policy, while ranking first in the list of learning objectives, receives an ambiguous treatment. The editor poses a number of questions that invite policy-related thinking; yet, on closer inspection, many of these merely include rather vague and open-ended formulations – “should" X be the case, do you “agree,” which choice do you “prefer,” “how” should X be justified – with little guidance to the reader (instructor or student) as to what considerations or other information go into making such determinations.939 This treatment is reminiscent of the “anecdotal and speculative” ways that US

932 See eg. ibid at 883 (What are the two limbs of the remoteness test in Hadley v Baxendale, supra note 640?); 887 (What does Asquith LJ in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd, [1949] 2 KB 528 (CA) do to the two limbs of the remoteness test from Hadley v Baxendale, ibid? What is the remoteness test to this point?); 933 (What remedy does Lord Denning in Stockloser v Johnson, [1954] 1 QB 476, [1954] 1 All ER 630 envisage where the purchaser defaults after having paid 90 percent of the price of the necklace?).

933 The sections of the chapter include “Damages: The Interests protected,” “Damages: The Boundaries of Recovery” and “Equitable Remedies.” In the latter section a number of highly detailed subsections suggests a highly taxonomic approach to organization.

934 See Ben-Ishai & Percy 9th ed, supra note 510 at 836 (Farm-out agreements are “very common” in oil and gas industry in Canada and US).

935 See ibid at 805.

936 See eg. Ibid ed at 803 (Wertheim (Sally) v Chicoutimi Pulp Co, [1911] AC 301 (PC) merely mentioned, ratio provided); 809 (Anglia Television Ltd v Reed, supra note 899 just mentioned in a note); 833 (Peevyhouse, supra note 883 not reproduced); 836 (Ruxley Electronics and Construction Ltd v Forsyth, [1966] 1 AC 344 [Ruxley] only mentioned in a note); 856 (Keays v Honda Canada Inc, supra note 881 not reproduced); 887 (excerpt from Miller CJM in Scyrup, supra note 918 is shorter than in Waddams, 5th ed, supra note 508).

937 See Ben-Ishai & Percy 9th ed, ibid at 872 (Hodgkinson v Simms, supra note 818 included whereas it was not in the others); 907 (Southcott Estates Inc v Toronto Catholic District School Board, 2012 SCC 51, [2012] 2 SCR 675 reproduced in slightly longer form than in Swan; Waddams doesn’t reproduce it at all).

938 Ben-Ishai & Percy 9th ed, ibid at 883.

939 See eg. ibid at 889 (“Should courts be concerned with ‘the extent of the promisor’s information and the proportionality between the risk [and reward]?” [emphasis added]); 920 (Why did the parties in Shatilla want to
contract law teachers incorporate policy. In other places, key policy considerations and other interesting features are either omitted from discussion or not taken up.

And, while there are references (albeit clustered in one section) about the role of the solicitor, the model of the barrister may be seen to figure equally, if not in greater degree, throughout the chapter. Of the tasks most frequently demanded of students, comparing and distinguishing cases figures prominently as does the navigation of hypothetical and counterfactual scenarios.

include a stipulated damages clause? “Should these reasons have been considered acceptable by the court?” (emphasis added); 817 (“Do you agree [with BCCA] that reliance losses only exist as alternative to loss of profit?” (emphasis added)); 825 (who has the “better” of the argument, Lord Nicholls or Hobhouse? [emphasis added]); 856 (which approach [of the majority or dissent in Wallace, supra note 885] “do you prefer”, or “might it have been better” had the Court reevaluated its position from Vorvis v Insurance Corp of British Columbia, [1989] 1 SCR 1085, 36 BCLR (2d) 273 that, absent an independent actionable wrong, neither aggravated nor punitive are available in wrongful dismissal? [emphasis added]); 880 (who has the “better” of the argument on causation: the majority or minority in Hodgkinson v Simms, supra note 818?); 901 (Atiyah argues that the mitigation requirement makes a dent in the theory that a plaintiff is entitled to expectation damages. “Do you agree?” [emphasis added]); 901 (“How can the duty to mitigate be justified?” [emphasis added]).

See eg. Ben-Ishai & Percy 9th ed, supra note 3 at 77.

See eg. Ben-Ishai & Percy 9th ed, ibid at 809 (“as counsel for a plaintiff wanting to set up a claim based on wasted opportunity, how would you go about doing it?”); 856 (How might Wallace, supra note 885 have been useful to Vorvis [supra note 939] in formulating his cause of action against his former employer?); 955 (“Would the plaintiff had been better advised …?”). See eg. Ben-Ishai & Percy 9th ed, supra note 510 at 917 (introduction to liquidated damages fails to include the central policy consideration that militates against enforcing penalties); 929 (policy rationale for refusing to enforce penalty clauses as explained in JG Collins, supra note 919 not taken up by editors); 925 (Court’s concern with fairness and reasonableness in deciding whether to enforce a liquidated damages term); 937 (failure of respondents to appear in court in Super Save Disposal Ltd v Blazin Auto Ltd, 2001 BCSC 1784).

See eg. Ben-Ishai & Percy 9th ed, ibid at 862 (Why was the court in Whiten, supra note 885 prepared to see the wrong as a component of the contract when it was not prepared to find a contractual requirement of good faith in Wallace, ibid?); 890 (contrast Scyrup, supra note 918 with Munroe, supra note 902 – are there rational grounds for distinguishing the case?); 928 (has the court in Clarke (HF) Ltd v Thermoidare Corp Ltd, [1973] 2 OR 57, 33 DLR (3d) 13 [Clarke] altered the law relating to liquidated damages as you became to understand it? As the OCA had understood it?); 930 (How does Dickson J’s approach different from that of majority in Clarke, ibid?).

Sometimes students are asked to create such scenarios. See eg. Ben-Ishai & Percy 9th ed, ibid at 809, 812, 862. Other times such scenarios are provided by the editors. See eg. ibid at 813 (If Bowlay Logging, supra note 881 had been able to characterize respondent’s failure to provide sufficient trucks as negligence …?); 817 (What influence, if any, might the plaintiff’s lost expectancy have on the recovery of reliance losses?); 828 (Would a similar objection have had any effect in Chaplin v Hicks, supra note 928?); 836 (question 1 about Barbara); 880 (Would the answer be different depending on whether the plaintiff was claiming damages based on expectation or reliance
The number of these examples suggests that the center of gravity of the chapter is not a critical, functional, or realist conception of law but rather a vision premised on the importance of rules and analogical reasoning. This vision may not be one shared by its editor; indeed, the fact that Ben-Ishai assumed (with Percy) the authorship of Chapter 1, the Boyle Introduction, and that they have made a number of contemporary additions to that chapter, suggests that her commitments are quite decidedly critical. So, this chapter is yet another example (albeit one complicated by the multiple contributing editors over time) of an apparent contradiction between the scholarly commitments of the editor and the dominant message communicated by the casebook’s substance. We observed a similar tension between the non-casebook writings of Waddams and his casebook; and, in Milner’s Introduction, between his description of his beliefs and his description of his approach to the casebook. Indeed, it is only in Swan’s book that we do not see such a tension.

IV. Conclusion

Each of the leading commercial casebooks takes as a premise the idea that law is more than a system of abstract rules. Each of them at the very least acknowledges the century of largely American legal scholarship that has served to undermine classical legal thought. Each casebook in its own way participates in an intellectual discourse that privileges underlying factors in judicial decisions, functional and purposive thinking, and exogenous critique.

And yet the old guard still stands sentry. The commercial casebooks, Swan aside, privilege rules and courts, and model legal reasoning primarily as the judicial technique of reasoning by analogy. The conventional view persists notwithstanding most lead editors’ scholarly commitments to realism. The study of the casebooks therefore discloses a gap between most editors’ propositional views about law, and the views about law and legal reasoning that they communicate through their substance and pedagogical direction in notes and questions.

But the picture is not entirely straightforward. Both Waddams and Ben-Ishai & Percy intersperse propositional statements about realism throughout the remedies chapters as well. So it is not simply a
question of stating one thing in an introduction and abandoning those ideas completely in the execution of substance. Rather, the principled commitment to American realist and critical thought informs the whole but manages, nonetheless, to remain apart from the casebooks’ core message. Understanding this nuance produces additional insights.

The gap between propositional and executed commitments suggests that the casebooks may be characterized by the failure to operationalize their theoretical commitments into a workable vision of legal reasoning and legal practice. Policy and contextual factors figure prominently as a matter of theory, but do not make their way into the privileged vision of legal reasoning. Thus, they become marginalized in the way that Mertz observed in the US classroom. The uneven tendency of professors to actually assign the introductory chapters is a sign of this marginalization, as is the low market share of Swan, the one book that does thoroughly attempt to connect its theory with its practice.945 All the casebooks evidence a theoretical eclecticism (even Swan, which has a unifying theory, draws on a wide variety of ideas about contract derived from different American authors), but very few of the books actually used by teachers and students put these ideas into practice.

The gap also reflects the failure to incorporate theory into practice, which is somewhat ironic given that the books all, in their own way, aspire to do exactly that. Swan embodies this aspiration most directly in the solicitor’s approach, and Milner’s explicit embrace of both professional and academic virtues models a vision of theory and practice as mutually reinforcing. But even Waddams and Ben-Ishai & Percy, in their own way, evince a similar concern. The assumed professional consensus that appears to operate in the background shows how neither book is a mere academic discursus on law but is intimately tied to the future training of legal professionals. Ben-Ishai & Percy’s Introduction both begins and ends with an emphasis on the “essential skills” the students will develop over the course of studying contract law,946 and the Waddams notes and questions frequently invite students to “advise” hypothetical clients. Practice is important to all the books; the books are meant to be used as teaching

945 Based on syllabi, six instructors do not assign the Waddams perspectives chapter, as opposed to three who do. By contrast, seven instructors do not assign the introductory chapter in Boyle & Percy, whereas seventeen do. Interestingly, one instructor who teaches from Swan assigns the Waddams perspective chapter. The theme comes up occasionally in interview. See [048], Interview, lines 393-413, [025], Interview, lines 443-5 (do not assign the Waddams Perspectives Chapter). An interesting parallel is the commercially unsuccessful realist contract law casebook, by Harold Havighurst, who organized the course around subject matter, not doctrinal categories (Harold Canfield Havighurst, A Selection of Contract Cases and Related Quasi-Contract Cases (Rochester, NY: Lawyers Cooperative, 1934).

946 Ben-Ishai & Percy 9th ed, supra note 510 at 1, 14.
tools in a self-consciously *professional* educational environment. But, just because the books seem to embody the virtue that a theoretical and practical study of law are mutually reinforcing does not mean—and this is crucial—that the particular theories and particular visions of practice correspond.

The source of the disparity between theory and practice could arise for any number of reasons, and I explore these in Chapter 6—for, as will be shown in the next two chapters, the gap between theory and practice is a persistent feature of contract law professors’ attitudes as well. But the most obvious and perhaps most powerful force is the implicit, unstated idea that there is a core body of knowledge, and shared professional competence of lawyers that *specifically* requires a focus on courts, rules, and analogical reasoning. *Milner’s* not-so-abject apology, *Ben-Ishai & Percy’s* “confession and avoidance,” Waddams’ collective references to the importance of rationality in his textbook Preface all point in the direction of a powerful *nondit* operating in the background that implicitly prioritizes a traditional, classical view of law and legal reasoning despite the century of scholarly developments to the contrary.

The next two chapters reveal similar tensions to those observed in the casebooks among Canadian contract law teachers. Chapter 4 discloses the general aspiration to incorporate theory into practice in one’s teaching while revealing the tenacity of an oppositional narrative about the profession and the academy. Chapter 5 mines the words of my participants to portray a very similar tension observed in the casebooks between a theoretical realist aspiration and a practical formalist reality. Chapter 6 tries to account for these endemic tensions.
Chapter 4
Theory and Practice in Canadian Contract Law Teaching

I. Introduction

This chapter engages with the interview data to explore the relationship between theory and practice as a general theme. Recall that there are two contrasting tropes in the discourse on legal education. The majority trope, emblemized in Canada in Kyer & Bickenbach’s *The Fiercest Debate*, is one of a contest between the profession and the academy over jurisdiction and curricular control. That perennial debate implies differences over the nature and purpose of legal education: in caricatured terms, whether legal study should be broad, liberal, and humane, emphasizing the academic values of inquiry and public values of civic virtue and citizenship; or, whether it should primarily aim to equip students to practice, ideally producing practice-ready lawyers. The minority story, emblemized by Arthurs’ *Law and Learning*, Kronman’s *The Lost Lawyer*, and the *Carnegie Report*, rejects the dichotomous terms of the conventional debate and asserts that academic and professional values, which serve as a proxy for theory and practice, are mutually reinforcing. The humane and civic virtues of the university serve a humane and civic *professionalism*, and the public virtues of the “statesman” are intertwined with the “lawyer,” in which the civic virtues make better lawyers, and the training of better lawyers produces more able and more engaged citizens.

In my interviews with professors, both of these tropes appear, but a surprising pattern emerges. When professors speak about their teaching, the integrative view of theory and practice largely predominates, despite its secondary status in the literature on legal education. Many professors, not surprisingly, vaunt the importance of theory or critique to legal education, evincing a concern for the traditional domain of the university. However, when I ask these professors why it is important to teach theory, very few of them answer that it is important for intrinsic reasons.\(^9\) Rather, consistently among those with very different theoretical perspectives, the overwhelmingly tendency is to answer that theory is important because it makes better lawyers. In describing their goals (what they want to

\(^9\) Cf. Coleman, *supra* note 9 at 2579-80 (“legal theory is both instrumentally and intrinsically valuable. It is instrumentally valuable insofar as it contributes to or enhances actual legal practice. It is intrinsically valuable in two ways. First, it is an aspect of the integrity of law as a field of study. Second, it is an aspect of the integrity of law as a social practice”).
achieve), methods (how they teach), and rationales (why these are important), the vast majority of professors thus aspire to an integrative view of theory and practice.

However, the situation appears to reverse when professors speak in general terms about their role or about the mission of the law school. In these more general comments, the familiar oppositional debate surfaces and professors are more likely to highlight the tension between theory and practice, or to take the side of either an academic or a professional education. Generalized comments focused on role identity or institutional mission in this way draw on and reinforce the historical fierce debates. This tendency is by no means uniform, and indeed it is less prevalent than the tendency to speak in integrative terms with respect to teaching. In this regard, a number of professors describe the role or mission of the professor or law school as being to “integrate and balance” theory and practice, thereby signaling an emerging higher-level narrative.

Part II focuses on instances in which professors talk about their own teaching, whether their goals or practices. I show how, when talking about teaching, Canadian contract law professors of different theoretical stripes commonly state that critical or theoretical perspectives are important because learning them will make better lawyers. This tendency paints a respectful and nuanced portrait of practice and leaves the impression that in conceiving their teaching, most contract law professors view theory and practice as mutually reinforcing. In Part III, I highlight moments when professors speak more generally or philosophically about their role as a law professor, or the law school’s mission.


Commitments to academic values flourish among contract law professors, as expressed in two particular ways. First, most participants expressed a commitment to some theoretical view of law, informed by research, scholarly training, and reflection. Second, many identified engendering critical thinking or critical perspectives as an essential goal. These two features are perhaps the hallmark of the academy; seeing them surface among law professors would seem to vindicate the victory of universities’ control over legal education. What disturbs this narrative, however, is the frequency with which professors answered the question “Why is a particularly theoretical or critical perspective important?” with some variation of “because it makes better lawyers.” When speaking about their own teaching, fully 50% of the participants in my study (34) provided a clear, direct and distinctive answer in this vein. By contrast, only about four participants expressed some skepticism about the importance of practical
utility. This overwhelming tendency to justify the importance of academic values in practical terms suggests both that professors have internalized practice as a core virtue of their teaching and that theory lies in service of, and integrated with, it.

Reinforcing the depth of this integrative commitment is the sophistication and diversity of ways in which theory informs practice. As Chapter 5 will detail, contract law professors’ theories and commitments about law vary greatly. This chapter shows how no one theory seems to be more, or less, amenable to the instrumental-practical justification that teaching theory makes better lawyers. In this sense, the integrative view appears to stand as one of the few common commitments among contract law professors.

Moreover, the formulation “because it makes better lawyers” serves to deepen and enrich what it means to practice. Sometimes, this occurs when professors specify the particular skills that define or constitute the better lawyer. The most common among these are the skills of making persuasive arguments and the related goal of becoming better advocates. Slightly less prevalent, but by no means negligible, are skills of problem-solving, advising, and more discrete solicitor skills of negotiation and drafting. Occasionally, being a better lawyer may mean creative lawyering or working to change the law, and can even extend, I will explore in Section C, to a concern with the ethos of being a better lawyer.

Other times, however, and more frequently than any one of these skills, professors use the term “better lawyer” without disaggregating it into particular attributes. A particular theoretical virtue is said to make better lawyers. The effect of this is to inflect the idea of practice with a variety of robust theoretical commitments. Accordingly, justifying theory in terms of its relevance to practice serves not only to integrate the two concepts, but to imbue practice with dignity and nuance. We see this respectful treatment of practice in comments by those professors who have, and have not, practiced law themselves.

This Part’s first section (A) surveys the various instances in which professors articulate the ways in which their various theoretical commitments to law prepare students to be, in the generic, “better lawyers.” The purpose is twofold: to show how this rationale is common among professors committed

948 Because these were semi-structured interviews and not standardized questions, in some interviews the theme may not have arisen. There are likely more than 34 instances of this view, and I am confident that were I to systematically survey the participants in my study, the vast majority would agree with the statement that pursuing theory or critical thinking is important because it produces better lawyers.
to a diverse range of theories, and to illustrate the complex and nuanced ways in which professors imagine legal practice when they do not disaggregate it into specific tasks, skills, or attributes. The second section (B) draws from a different set of excerpts and is organized by the various specific skills in legal practice that professors highlight, for which theoretical commitments equally provide good preparation: crafting persuasive arguments, advocacy, problem solving, advising, negotiating, planning, and creative lawyering. The third section (C) explores the various ways in which theoretical and critical perspectives serve broader values, making lawyers that are better, not because of their proficiency, but because of their ethos. Taken together, this Part illustrates how, when professors talk about their teaching, they overwhelmingly express the aspiration to operationalize their theoretical and critical perspectives – to which they are deeply committed – into a view of legal practice.

A. Diverse Theories of Law: “Better Lawyers” Tout Court

Producing better lawyers is a commonplace justification for why it is important to expose students to theoretical or critical perspectives in first-year Contract Law. This section focuses on examples where “better lawyers” is intended as “proficient” lawyers, and not disaggregated into particular skills. It illustrates instances where professors (i) make the general case, and (ii) draw on specific theories of law, which I have loosely grouped into (1) a “formalist” bundle of commitments to logic, systematization, and conceptual foundations, and (2) a “realist” bundle of concern for policy, politics, and context. I introduce this theoretical classification at this stage, only to develop it much more fully in Chapter 5.

i. The General Case

One professor makes a principled and general case for the interrelation between theory and practice. In an “argument” section of the course syllabus, Professor 1 writes that the primary objective of the course is:

to reason and work in the law of contracts at a high theoretical level. This is to say, move from a technical solution according to a certain system of positive law to a concept. And, returning from this concept, be able to understand the technical solutions that flow from it.949

949 Translation from the French original: “Raisonner et travailler en droit des contrats à un haut niveau théorique. C’est-à-dire savoir passer d’une solution technique valide selon un certain système de droit positif à un concept. Et,
For Professor 1, “concepts,” variously including “freedom, will, responsibility, patrimony, market, certainty, foreseeability, calculability, etc.,” are more easily “operationalized” than doctrinal law. Developing this theme in interview, Professor 1 says:

It’s in the material that we call “technical” that there is a need to bring well elaborated theoretical material … It’s indispensable to show, in teaching, that at the heart of this technical material lies a theoretical content, or theoretical forms, or content borrowed from other disciplines. Put another way, in the technical material there is an interplay between law and the totality of knowledge.

Drawing from Professor 1’s experience in teaching licensed lawyers as part of continuing professional development, Professor 1 affirms that that “theory makes better practitioners.”

Professor 4, whose main goal is to show that there is an “internal logic, a set of principles, that anchor contract law” – similarly says:

[You do theory to help you with practice, right? I’m very theoretically inclined, but theory for the purpose of theory is silly … We want to know how to act in life and … do law in life and when we run into an obstacle, we have to analyze what’s going on and that takes us to theory and philosophy.]

repartant du concept, pouvoir comprendre les solutions techniques qui en découlent, y compris dans leurs divergences” ([001], Syllabus (2015-6) at p 1).

[001], Interview, lines 142-3 [Translation from the French original: “Liberté, volonté, responsabilité, patrimoine, marché, sécurité, prévisibilité, calculabilité, et cetera].

[001], Interview, lines 99-113 [Translation from the French original: “Je pense de plus en plus que c’est dans ces matières dites techniques qu’il y a un besoin, qu’il y a une nécessité d’amener du matériel théorique très élaboré … Je crois que c’est … indispensable d’indiquer dans le cadre de l’enseignement, … d’indiquer au sein de ces matières-là un contenu théorique très élaboré ou les formes théoriques très élaborées ou des contenus qui appartiennent ou empruntés à d’autres disciplines. Autrement dit, je crois que dans les matières techniques se joue vraiment l’interaction du droit et de la totalité des savoirs].

[001], Interview, lines 284-92 [Translation from the French original].

[004], Interview, line 7. [004] describes the logic “logic of two equal parties exchanging” (ibid., line 64).

[004], Interview, lines 607-12.
Both these professors are particularly inclined to theory in discussing both law and legal education. The fact that even they reject theory purely for its own sake is striking and accords with the broader trend among Canadian contract law professors, as set out below.

ii. Specific Theories and “Better Lawyers”

Many other professors convey a similar understanding of the practical value of theory, but they tend to do so not via general arguments, but rather by setting out how particular theories make “better lawyers.” This tendency seems to transcend formalist and realist views of law.

a. Logic, Systematization, Conceptual Bedrock

We see this justification, for example, among professors who prize logic and systematization. Professor 8, for example, strives to apply Peter Burke’s idea of a taxonomy to private law as a whole, and asserts that doing so helps students “create a road map” and “helps them to understand the situations they’re dealing with.” For Professor 15, who “like[s]” the logic of contract law and who is a “believer in rules,” learning to “mix ... the logical and the ... quasi-intuitive,” fitting “real life into these abstract ... categories,” “makes better lawyers.”

Professor 27 speaks of how without understanding the “grammar” of contract law, accessed through Hohfeld’s distinctions between right and freedoms, one is “lost as a lawyer”:

Sometimes I put it this way: ... there is a deepening narrative of what contract law is doing—should be doing. But there’s also a grammar and it does it in a particular way. If you don’t understand the grammar, then you’re lost as a lawyer. So ... we actually spend time with Hohfeld and ... on fundamental legal conceptions. We ... draw the distinction between rights and freedoms and liberties and immunities, but essentially between rights and freedoms. That is, there is these basic kind of conceptual bedrock which ... law forces you to come to grips with. Otherwise you’re just gassing around in the abstract.

955 Interview, lines 152-7.
956 [008], Interview, lines 163-180.
957 [015], Interview, lines 32, 283, 235, 323-5, 431.
958 [027], Interview, lines 403-412.
b. Policy, Context, Politics

Frequently, professors speak about the importance of looking beneath or beyond the doctrine to understand the underlying factors of policy, politics, and context. These varieties of realist perspectives are often directly tied to the instrumentality of making better lawyers.

For Professor 67, “going beyond the obvious makes you a great lawyer.” Professor 56 argues that the “realist, policy-driven” question of “what is going on here and do you think that’s right” should “always ... stay[] with you as a lawyer.”959 For Professor 29, understanding how doctrine “does in fact have a solid foundation in public policy ... makes you a better lawyer.”960 Professor 16, who emphasizes the ability to “see law in context,” which includes “policy and politics,” and that law is “a very integral part of our society that affects and is affected by other societal matters,” believes that “it makes you a better lawyer if you understand that there are those things going on.”961 And Professor 28 has seen that those students who “excel” at law firms are

ones that know that it’s just not enough to look at the law on ... paper or ... doctrine... But ... they search farther—they try and figure out where it came from. Where that particular rule came from, and what the context of that case was, they look at the context of this case—and they’re able to do much more.962

I develop the content of the realist and formalist attitudes about law much more fully in Chapter 5. But a key point to take away from this section is the idea that even the most strongly held and distinctive theories are justified in terms of their practical relevance. The self-styled “very theoretically inclined” formalist Professor 4 rejects “theory for the purpose of theory.” The adherent to Hohfeld (Professor 27) repudiates “gassing around in the abstract.” And Professor 3, a professor who identifies with Marxism,963 equally justifies theoretical commitments in distinctly practical terms:

I try to encourage students to see what I believe is the truth of law, which is it’s a battleground of ideology ... And it’s the basic conflict that we play on politically between our more ... capitalistic tendencies and our socialistic tendencies and it’s a conflict we

959 [056], Interview, lines 110-14.
960 [029], Interview, lines 217-222.
961 [016], Interview, lines 863, 862, 581-3, 866-7.
962 [028], Interview, lines 363-8.
963 [003], Interview, lines 108-109 (“That’s kind of a Marxist analysis of it but I think it’s correct”).
play on personally between our sense of wanting our individual freedom unencumbered by social constraint, and wanting and needing communities to support us and help us understand who we are. It’s the human condition, laid out in contract law ...

I tell them you’re going to be much better lawyers if you understand that legal argument is about manipulating rhetorically and analytically, the grand arrogance of our collective culture. That’s where you’re going to be persuasive. That’s where you’re going to appeal.964

B. Specific Skills of the Better Lawyer: Persuasion, Advocacy, Advising, Problem-Solving, Planning, Creative Lawyering

Law professors do attempt to articulate what skills and attributes better lawyers will have, and they do this in reference to the theories of law to which they are committed. The most prominent idea, which we can see in the quote by Professor 3 above, is that theoretical perspectives assist students in crafting more persuasive arguments. Professors often connect this objective to the role of being an advocate. Other attributes include problem-solving, advising, and creative lawyering.

i. Making Persuasive Arguments

By far the most common instrumental reason for engaging with theory, or learning to think critically, is the idea that doing so will enable one to make persuasive arguments. Professors state this virtue both as a general virtue and as one specifically related to making arguments in court.

a. A Theory Trains Persuasive Argumentation

When I ask why a given perspective is important, professors frequently answer that it helps to “make persuasive arguments.” Again, this tendency transcends different theories. For example, Professor 31 will specifically bring up “realist” comments, emphasizing that “judges know the result they want to reach and then they have to fit it in the common law doctrine” in order to “signal the importance of … making persuasive arguments.”965 For Professor 50, highlighting factors that might “play a very persuasive role in the way a judge will jump” is important in order to “get to the heart of the judge.”966 For Professor 16, looking at the law “in a broader context … makes you a much more

964 [003], Interview, lines 124-138, 234-8.
965 [031], Interview, lines 201, 205-7, 230-32.
966 [050], Interview, lines 135-6, 166.
powerful advocate.” For Professor 11, it is important to understand how the “judge is also concerned with ... policy implications” because “their job as lawyers is going to be to make arguments and sometimes they’re going to be making the tougher argument.” Professor 44 focuses on “disagreements in policy between the judges” in order to help students reflect on their “argument before the final court.”

For the formalist Professor 4, it is important for students to discover an inner logic to the law because reconciling cases to accord with a common principle is a persuasive advocacy strategy:

That that’s what they’re going to be asked to do in front of a tribunal. When they go into court, the judge wants to know, “Put these two cases together for me ... Tell me why that I should follow this case as opposed to the other one?” ... Every now and then you’ll say, “Well, no—they’re contradictory” ... That’s never the preferred answer ... The judge will always prefer the answer that actually is able to reconcile the materials together.

And, for Professor 30, who emphasizes relational contracts:

[U]nderstanding a contractual relationship between parties as an evolving process, which may depart from the strict terms of the contract, is vital to ... students’ ability later on to craft arguments on behalf of their ... clients.

b. Multiple Theories Enable Persuasive Argumentation

It is extremely common for professors to state that they are not interested in advocating for a particular theoretical perspective, but rather to expose students to a range of various perspectives. Professors thus advance theory generally as useful for crafting persuasive arguments. The rationale functions in two related ways. First, professors want to expose students to a range of argument types to comprise their “eclectic toolkit” of arguments, to borrow from Kennedy and Fisher. Second, they want

967 [016], Interview, lines 548-9.
968 [011], Interview, lines 421, 443-4.
969 [044], Interview, lines 684, 699-700.
970 [004], Interview, lines 279-292
971 [030], Interview, lines 515-9.
972 Kennedy & Fisher, supra note 37 at 3.
students to be able to take both sides of an argument, consider alternative perspectives, and anticipate counterarguments, analogous to Kronman’s virtue of “imaginative sympathy.”

Professors from across the theoretical spectrum demonstrate this commitment to this “argumentative eclecticism” rationale. Both the strongly committed formalist Professor 4 and the realist Professor 28 assert that their job is to “play devil’s advocate” and “won’t share” their views. Professor 50, who speaks about the importance of getting to the heart of the judge, doesn’t “take a clear view on what is good or bad about particular cases;” it doesn’t matter whether students prefer one policy over another, but that they “understand both sides.” Why? Because “it is very important in practice that you fully and completely understand where the other side is going to go ... and fully understand the arguments they’re going to make.” Professor 64, who ascribes to an “element of critical legal theory,” tries to “minimize my opinion;” a “convincing” argument is one that “is going to be some combination of legal impact, policy effect, and values.” Professor 33 specifically cultivates the ability to make arguments by randomly assigning positions to students based on themes of class, race, and power. Professor 52 says, “Part of what makes a person a good lawyer is to be able to consider different perspectives.”

c. “Critical Thinking” and Persuasive Argumentation

In addition to theory, the academic virtue of critical thinking – the definitions of that term vary – is often justified in terms of making persuasive arguments in practice. Professor 37 wants students to “hone their skills of imaginative insight and to think with an agile mind that’s able to transcend

973 Kronman, *The Lost Lawyer*, supra note 24 at 98.
974 [004], Interview, lines 427 (“I think my answers to these questions [as to whether law is autonomous] are irrelevant to the course”), 452 (“So they say one thing, I say the opposite. They say something completely radically opposed and I’ll say again the opposite”).
975 [028], Interview, line 236 (“there’s certain issues I have strong views on, but I know they won’t share them”).
976 [050], Interview, lines 438-440, 486, 503-6.
977 [064], Interview, lines 743-50 (Professor 64 continues: “I’m more of the ‘Could you decide this way, could you decide that way? If you were to decide the case differently, what is your analytical pathway for reaching that point?’”).
978 [064], Interview, lines 584-6.
979 [033], Interview, line 480.
980 [052], Interview, lines 167-8.
boundaries” in order (in part) to “be better advocates for their clients ... at a very basic level;” “to question assumptions, to look beyond the answers, behind the answers—and ultimately to be able to be creative enough to think of new answers.” Why? You can “help your client better if you understand how to think in this much more creative and critical way.”

For Professor 45, the ability to “critically analyze rules” – to “offer some kind of critique [and] not just blindly follow” or apply rules – would help persuade the court of a particular perspective, or to convince a court to move in a particular direction ... The best lawyers, the great lawyers, are those who can construct the most persuasive legal arguments.

### ii. Problem-Solving, Advising, Negotiation and Planning

While courtroom advocacy remains the more frequent type of practical skill that professors invoke for the relevance of theoretical perspectives and critical thinking, a series of other skills not directly related to advocacy surface.

#### a. Problem Solving

Two participants, distinctive in their emphasis on non-state normativity, specifically connect a pluralist focus on the “legal systems” of contracting parties to skills of planning, problem-solving, negotiation, and drafting. Professor 42 says:

I try to persuade students that contract is a dynamic and forward-looking mode of social ordering and that therefore it’s a course about lawyers’ involvement in the construction of little legal systems, each time they negotiate a contract. And although it’s a planning exercise, a dynamic forward-looking exercise, there are all kinds of really good skills that are grounded in law, but are nonetheless skills. So, negotiation, figuring out how much to say when and where, determining how many of a client’s instructions should be acted upon, and later on, maybe, having to convert a deliberately ambiguous or informal arrangement into codified form ... The basic theory is it’s a course in comparative law, and the idea is to compare all of these little legal systems that lawyers make for their clients, usually in multifarious and informal ways, done against the background of some

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981 [037], Interview, lines 274-77, 259-61, 318.

982 [045], Interview, lines 135-9, 112-13, 158-60.
basic contract doctrine, but it also tries to be a course in the kinds of skills that are relevant to that operation.983

Professor 36, for whom Stewart Macaulay and Ian Macneil were “formative,” connects sociolegal and pluralist theories of law by arguing that the ability to navigate different normative systems trains problem-solvers:

[T]he reality is that if you speak to a client in a particular business environment or particular cultural environment or family environment, you quickly become conscious of all of the stuff that constrain[s] their actions which doesn’t actually flow from law. It flows from different kinds of pressures, normative or otherwise. And so when people say, “I learned more in [the first month at a law firm] than I learned in law school,” actually what they’re saying is, “I wish I’d understood earlier on that there was this connection that needed to be made in order to be effective problem-solvers. I needed to modulate my understanding of legal norms to fit with the environment” …

If one is concerned about training professionals who are effective problem-solvers in the world, and I am, … people who are able to understand the aspirations of the individuals who rely them for those skills, then I think the first and most important value should be the ability to navigate different normative systems and the recognition that they exist out there.984

Problem-solving also appears to be another objective, like making persuasive arguments, that is a feature of more traditional doctrinal teaching. Two instructors, both with over forty years of experience, use doctrine to explore underlying policy ideas and emphasize the importance of problem-solving. Professor 48, whose preferred method is to incorporate critical perspectives such as “feminist analysis” into problems, says that determining relevance is a skill that students can take to any kind of problem-solving. What are the facts you’ve got? What do you have to resolve? How would you go about resolving? What are the options for resolving? How have others resolved it? … [P]eople who are not lawyers … [have] no concept that when you’ve got a problem, [a key thing to determine is] which parts of those problems are key and have to be solved, and which parts you can talk about forever but actually they’re not key.985

983 [042], Interview, lines 79-95.

984 [036], Interview, lines 207-16, 247-59.

985 [048], Interview, lines 438-442, 700-715.
Likewise, Professor 29 tries to get students “to see how what they are doing might be relevant to problem-solving in the real world.”986

Another senior professor, in addition to case law, draws from “problems” from Professor 44’s own law office files to evaluate students. The desired end is similar: Professor 44 seeks a “confluence” of theory and practice.” “I do theory and then switch into, ‘Well, here’s how we use the theory in everyday practice.’”987

Finally, there is the example of Professor 43, an early adopter of technology, who has been using some form of screen capture of lectures in order to free up class time for problem-based learning since the mid-1990s. Professor 43 believes strongly in the importance of context and translates this belief in two ways. First, context is important to provide good legal services: “[Law firms are] saying, ‘We need people who understand our clients and our clients’ businesses ... we need [lawyers] to have that context ... side of things.'” Second, the desire to emphasize context motivates the problem-based pedagogy used. Problem solving is what students “do when they get out of here.” It is “the biggest skill we give our lawyers.”988

b. Advising

Another commonly identified skill of legal practice is the generic verb advising. This is the action word used in many, if not most, examination questions and in many of the notes and questions sections of the contract law casebooks, especially Waddams.989 Occasionally, law professors inflect this skill with the virtues of policy. Professor 66 says that “in many advising situations you should also be mindful of the policy context.”990 Professor 12, who takes a very strong instrumentalist viewpoint that advising should be the primary aim of legal education, acknowledges the importance of theory and practice to that endeavour, incorporating theory into teaching in order to help students discover “what on earth moved the court to do this?”991

986 [029], Interview, lines 663-4.
987 [044], Interview, lines 226-35, 40-42.
988 [043], Interview, lines 1295-1300, 1146-52.
989 See Chapter 3, III(C), above.
990 [066], Interview, lines 453-7.
991 [012], Interview, lines 417-20.
c. Creative Lawyering

Finally, professors state that theoretical or critical perspectives on law are important because they help produce creative lawyers capable of effecting change. The contingency or arbitrariness of law, which for some flow from the insights of legal history, may help students participate in changing the law. As Professor 17 says:

[T]he conceptual point that’s really, really important is the point ... [that] the rules really do get made ... They get made by people. They arise in certain circumstances, and if ... circumstances had been different, they might have developed a completely different way ... [I underline] arbitrariness and the contingency of it ... This is what I say to them: “If you want to change it, if you want it to be different, you ... have to know that.”

Similarly, Professor 62 tries to “deconstruct” contract doctrine, or “teach the social construction” of contract law doctrine, in order to show how “law is made and remade and what the constraints are and what the creative opportunities” are. This objective is deeply connected to Professor 62’s theoretical commitments:

[M]y prior commitment, and ... training as a ... critical legal pluralist, is that it’s the truth ... I think it’s really important to counter ... [students’ inclination to] look for certainty and black letter law ... Even something that seems as dry and as technical as contract law has a sociocultural construction.

Later on, Professor 62 connects the idea of “making and remaking” law to critical thinking:

[A] critical approach to law to me is grounding law as a social and cultural institution with a history, that’s both ... temporal and place-based ... [D]econstruction can only be useful if it leads to reconstruction, and ... remaking legal practice is something I’m really interested in ... I’m trying to help them critically unmask, so to speak, contract law doctrine, so that we can then begin the task of thinking collectively ... about how contract law doctrine should be remade, if at all.

Other professors articulate the similar idea in more prosaic ways. Professor 54 encourages students to “become comfortable with uncertainty ... As long as you can identify what’s uncertain, why

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992 [017], Interview, lines 332-43.
993 [062], Interview, lines 276-8, 295-301, 350-53.
994 [062], Interview, lines 615-63.
it’s uncertain, and what the potential arguments ... to resolve the uncertainty are, ...that’s all you need
to do ... as a lawyer.” To analogous effect, Professor 33 states that morality and public policy play a
large role in the course because “that’s where the most creative lawyering takes place.”

C. The Ethos of “Better” Lawyers

But what do you mean by better lawyers? ... Are better lawyers ... lawyers who are
better people and more likely to be ethical? That’s one way of being a better lawyer and
then the other way of being a better lawyer is they can manipulate the hell out of the
law to win for their clients ... And I think I’m doing both.

Up until now, I have treated better lawyers synonymously with being more proficient. But
professors state that theoretical and critical perspectives also serve the goal of making better lawyers in
terms of the ends these lawyers are meant to serve. These include being ethical; supporting
marginalized communities; being aware of social effects, power imbalances, and diversity; and
performing the “moral duty” to represent clients.

Professor 3, from whom the quote opening the section was taken, directly connects the desire
to underscore the ideological basis of law with making more ethical lawyers:

A lot of people come into law school believing in justice ... I want to vindicate that belief
rather than destroy it. I want to tell them that they’re actually reflected in the law ... I
think when people feel they can detach themselves from the moral basis of what they’re
doing and create a sensibility that this is a purely technical enterprise, I think that’s a
really dangerous place to be ... I try to say, “Actually, your intuition that law is about
justice is absolutely right. And I’m going to show you that in the law, the struggle about
what justice is is happening all the time, everywhere, and that as a lawyer, you are part
of that struggle. So you cannot escape that moral role as a lawyer.”

Many professors have particular understandings of how “better” lawyers may serve justice,
drawing specifically on their theoretical commitments. Professor 63 emphasizes both a “realist” and
“critical” perspective directly in order to “advocate for change ... for members of marginalized

995 [054], Interview, lines 733-8.
996 [033], Interview, line 260. In Chapter 5, II(A)(i)(b), I expand on the realist theoretical dimensions of the
aspiration to produce creative lawyers capable of effective change in the law.
997 [003], Interview, lines 309-16.
998 [003], Interview, 269-86.
communities or [those] less well-represented in the judiciary;” advocates must become proficient at explaining “context” to judges. In this respect, critical thinking is a “professional responsibility.”

Similarly, Professor 33 exposes students to a range of theoretical perspectives ... because I don’t want them to be—unknowingly—participating in perpetuating something that is harmful to other people, without any thoughts as to the consequences of their actions.

Professor 35, who “takes a light crit approach ... tying ... the practical, everyday practice of law to theory,” strives to “make visible underlying tensions” to clarify legal doctrine and help with issue-spotting, but also to ensure that lawyers are aware of concepts such “power relationships [and] the way socioeconomic resources are distributed”:

It annoys me ... when lawyers are out in the world and not paying attention or not engaging with ... and not seeing ... that law can have that effect. Particularly when you’re talking about regulating the market. So I just want lawyers to be conscious and not stick their heads in the sand.

Professor 15, who focuses largely on doctrinal law, strives to show students that “even contract law has this dimension [of social policy] and is part of a social order and ... has certain social effects ... and you do have to ask yourself, is this good?” For Professor 15, the good lawyer is able to “master the nuts and bolts ... but also ... be alive to why they’re doing it, and whether it’s a good thing to be doing it.”

Professor 17 probes the context of a case in part to raise awareness of diversity issues as part of a professional “acculturation”:

999 [063], Interview, lines 167-73, 153-4, 850-54:
I think about the law in the legal realist kind of perspective of an advocate ... I encourage them to think about ... what sort of demographic their decision-maker is likely to come from. If they’re advocating for members of marginalized communities or [those] less well-represented in the judiciary for example, [I want them] to think about what that means as an advocate in terms of insisting on explaining the context (ibid at lines 167-73).

1000 [033], Interview, lines 374-77.

1001 [035], Interview, lines 771-4, 303-13, 618-29.

1002 [015], Interview, lines 677-79, 638-40.
It’s almost like ethics issues really. You are going to be a lawyer so you need to know that you have agency and you are … going to have power, and you’re in control of how you might use that. Also you’re going to be entering a profession that has … this long history of gender inequality and sexism and racism to some extent too … I call it the “patriarch’s privilege” …

[It] makes me feel like I’m doing something important for them—not necessarily in terms of contracts but just in terms of their general acculturation to the profession … You want people … out there to be sensitive to diversity issues. 1003

Professor 53, another professor heavily influenced by realism, attempts to help students challenge authority through critical thinking, which Professor 53 describes as the joint ability of being able to “break things down … in a strictly legal sense” and “see the problem in a human sense”:

Our graduates are legal thinkers. They’re the ones that have to protect society from the government, from the police, from big business, from each other … That’s what legal thinkers do, whether they’re practicing lawyers or academics or anything else. They’re the ones that have to say, “The emperor has no clothes.” 1004

Even in circumstances where the aim is not to challenge authority, still theory serves to accomplish ends that professors describe in principled terms. Thus Professor 26 describes the moral duty to represent a client in relation to both the principle of perspective-taking and an instrumental conception of law:

I want them to start thinking, right from the moment they get here, that they’re in a profession … That they owe an obligation to clients, that they have both legal and moral duties to their clients and duties to represent their client’s point of view … I want them to start thinking like this isn’t just a game … There’s real lives … involved here. 1005

D. Summary: Practice as Important, Thick, and Mutually Constitutive with Theory

When law professors speak about their teaching goals, objectives, and practices, they predominantly describe their theoretical and critical perspectives as relevant largely in the service of

1003 [017], Interview, lines 202-34.
1004 [053], Interview, lines 397, 434-40, 421-2, 398-403.
1005 [026], Interview, lines 393-409.
practice. They not only treat practice as a core objective, they endow it with a robust and principled content. Theory informs practice, and imbues it with a commensurate weight and importance.

There are also indications that for some of these professors, practice informs theory. Professor 33, for example, is hesitant to put a theoretical label on Professor 33’s (realist) commitment to exposing students to the underlying factors of law. Instead, Professor 33 attributes it to Professor 33’s experience practicing law:

[M]y experience practicing in [a particular area of] law was that you had to be extremely aware of the practical outcome of doctrines being interpreted in different ways. And that if you weren’t extremely aware of the on-the-ground consequences, and address them in your legal argument, that your legal argument was going to be rejected. So—whatever object, whatever label you want to put on that [my perspective] is very much [grounded] in the trenches experience of judicial decision-making.1006

Similarly, Professor 1 writes in the course syllabus of the complicating insight that actual practice will have on one’s theoretical or conceptual view of law, discussing the mutual importance of “praxis” and “critical” thinking to the development of “professional aptitudes”:

A day at a law firm, in the legal department of a business, or in court will suffice to disabuse anyone of the idea that knowledge [la connaissance] enables one to master the law as it is. The ability to understand legal solutions, to attribute a theoretical foundation to them, or to determine their genealogy cannot guarantee sustainable solutions. That which can seem to go without saying intellectually might disappear in the violence of a clash of interests. In the entanglement of pro and con arguments. There is also context. There is also all that distinguishes one case from another. Legal practice – one should say praxis – disrupts the idea of common law or civil law as systems.

A dogmatic jurist loses a part of his or her skills, a part of his or her professional agility. By contrast, the jurist capable of critiquing his or her knowledge augments his or her professional aptitudes. Thus, critical work must accompany conceptual work in the learning of law. 1007

1006 [033], Interview, lines 624-31.
1007 Translation from the French original:

Une journée passée dans un cabinet d’avocats, dans le service juridique d’une entreprise ou au tribunal suffirait à détromper quiconque pense que la connaissance permet de maîtriser le droit tel qu’il est. La capacité à comprendre des solutions juridiques, à leur attribuer un fondement théorique ou à en établir la généalogie ne saurait garantir la pérennité de ces solutions. Ce qui
In such passages, where practice is specifically invoked to inform or complicate theoretical understandings, we see the inklings of a view that considers theory and practice as mutually reinforcing virtues, analogous to Anthony Kronman’s *The Lost Lawyer*, in which the traits of deliberative wisdom and civic-mindedness simultaneously enable the “outstanding” lawyer to serve the interests of private clients and the public.  

E. Minority Report: The Attenuated Importance of Practice

The foregoing sections should not be taken to indicate that all professors unproblematically assert the importance of practice to their teaching. A number of professors attenuate their commitment to practice when speaking about their teaching. Sometimes, professors distinguish between preparing students for practice, and between preparing students to think. Professor 58 writes, in the course syllabus:

> [T]he focus is not on preparing you to write a professional Bar examination in a particular jurisdiction or immediately to write legal opinions on complex contractual matters. Instead, after this course you will be able to do the legal thinking and research necessary to do so.  

Similarly, Professor 23 states that first-year Contract Law doesn’t prepare students for practice but “to prepare people for thinking about practice.” These examples may be seen not so much to displace the importance of practice, but rather to acknowledge the limited amount that a first-year course can accomplish. While expressing some hesitancy about directly preparing for practice, they nevertheless acknowledge their roles as a precursor to it.

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1010 [023], Interview, lines 516-17.
Other times, professors may mount a stronger opposition to the instrumentality of practice. Professor 47, a realist, for example, states:

My objective is not to turn out legal plumbers. They’re not doing contract law plumbing. They’re saying where the plumbing fits in the big house … I will gladly teach stuff that is practically useless [if I think it will help] … students to get some idea of the context of law.1011

Occupying the other end of the realist-formalist spectrum, Professor 22, who teaches contract law by focusing on the ways to “classify … using moral ideas,”1012 questions the virtue of “practical implications”:

I tend to think the practical implications are not as important … I think we use classification systems fundamentally to understand—and in theory they have practical implications but in practice … I … think that people reason more from the results backwards to theory … The fundamental role is understanding, but that’s not really going to change the world … I don’t think philosophical reflection changes the world very much.

R: … So that’s not presumably a goal of teaching the course, … to change the world?

P: Maybe to get people to think about the world—and I suppose in the long run maybe some changes, yes. But I … tend to think that academic reflection doesn’t have much effect on those things—although obviously all sorts of people disagree. I think Marx had it … backwards. He said the point of philosophy is not to understand the world but to change it … And I think the reality is the opposite of that—philosophy is to understand the world, not to change it. And once you start changing it, you’re not doing philosophy. Or you’re not being academic.1013

This last quote is instructive for two reasons. First of all, despite this strong claim in favour or “understanding” over “practical implications,” even Professor 22 speaks elsewhere about the importance of applying understanding to real life fact situations,1014 for which classification may have

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1011 [047], Interview, lines 774-7.
1012 [022], Interview, line 150.
1013 [022], Interview, lines 198-240 (underlining added).
1014 [022], Interview, lines 173-6 (“Why does classification matter? What might it affect? Why would how we classify this affect how we think the remedy should be—for example? What pre-conditions our … practical implications?). Later in the interview, it became apparent that applying knowledge to practical scenarios is also an important goal:
some relevance.\textsuperscript{1015} And even Professor 47, who does not want to produce “plumbers,” emphasizes application to practical scenarios.\textsuperscript{1016} Indeed, no professor says that theory is completely irrelevant to practice, or that it makes worse lawyers. In some ways, the reticence about “practice” here might indicate not so much a general antipathy toward practice but a more specific resistance to produce “practice-ready” lawyers, meaning lawyers who are able to conduct specific lawyerly tasks. To that extent, these professors are not so much in the minority, but the vast majority, for very few participants in my study make the claim that law school should producing practice-ready lawyers.\textsuperscript{1017}

It’s important to me that they could advise a judge, advise a client—as to what is legally possible, required remedies, et cetera. So the kind of questions I would ask in a hypothetical fact pattern require … more than just in a sense knowing the rules. You have to know how to apply them, et cetera—but they do require you to in a sense explain what the consideration rule is, explain what is required for an offer, what is required for acceptance—so the standard remedy is how you calculate it. So those—that is certainly something I think is important … maybe a little more than average I care about those things (at 408-19).

\textsuperscript{1015} Ibid, lines 472-508:

[Classifying all the way up and all the way down … classifying is seeing what’s different … in terms of classifying rules, you’re classifying what’s different between those rules. But you’re classifying the situation … Is this situation where somebody broke a promise? Or … they told a lie …[T]ry and make a distinction on what you know … But it’s not something people always pay really close attention to … Do we want to teach our kids the difference between breaking promises and telling lies? Everybody knows that. Surely that’s an important distinction and we’re just doing the same thing in law … I demonstrate … the difference by using examples—that would be a hypothetical type thing. I’m not sure if it shows you how to reason imaginatively—the classification part—which is a large part of doing hypotheticals—how to apply a rule in a way that doesn’t … [seem] obvious on the surface, but once you think about it, it works. I’m not sure—it’s not clear to me—whether that’s helped or hurt by talking about classification. I don’t know.

\textsuperscript{1016} [047], Interview, lines 285-7, 666, 697-699 (students evaluated on their ability to “apply a good functional analysis of the problem” on exams, which are “old fashioned … What we need is [for] students [to] solve a concrete problem, or to show them how to solve a concrete problem”).

\textsuperscript{1017} Indeed, no participant expressed the idea that law school should primarily produce lawyers ready to conduct procedural or technical tasks on day one, although Professor 43 states that law schools should respond to pressure from the profession to produce lawyers who can “hit the ground running.” These and similar examples are canvassed below in section III(B)(ii). Nevertheless, by far the most common idea is that students should be prepared to think, reason, and write proficiently in order to learn how to acquire the specific professional tasks required of them. The quotation by Professor 58 earlier in this section is an excellent example. For a survey of the calls for producing “practice-ready” lawyers and a refutation of that objective favouring a broader approach to professional preparation, see Martha Kanter & Grace Dodier, “Discarding the Fiction of the Practice-Ready Law Graduate To Reclaim Law As a Profession” (2016) 17:3 W Mich Cooley J Prac & Clinical L 265. For a recent submission to the Law Society of Upper Canada by many Canadian law professors, including some contract law professors, that specifically rejects the idea of producing practice-ready lawyers, see Berger et al, supra note 14.
Second, observe how the more that Professor 22 begins to speak about the general role of the law professor, the more distant the importance of practice becomes. Preceding the long quote, Professor 22 speaks in the first-person singular about teaching classification. As the quote proceeds, Professor 22 switches grammatically to the plural – “our” fundamental goal, “we” use knowledge – and thematically to the general (“the” fundamental role is understanding). These formulations, which can be seen as a pivot from the individual experience to the expression about a collective mission, in turn lead Professor 22 to reflect on the general role of philosophy and ultimately to the idea that “once you start changing the world ... you’re not being an academic.” This move nicely illustrates a broader tendency among law professors to increasingly speak of theory and practice as being in opposition as the discussion moves away from themes of teaching toward themes of the “role” or “mission.” Part II explores this tendency.

III. Theory and Practice, Worlds Apart: Reproducing the Conventional Narrative

While it is relatively rare for law professors to assert the primacy of either practice or theory when discussing their teaching activities, the picture is somewhat different when discussions drift into the more abstract topic of what a law professor’s role is, or what the mission of a law school (or faculty) should be. In these discussions, it is more frequent for professors to speak about the tension between theory and practice, or to assert that either academic or professional goals ought to be prioritized. There are professors who articulate the mission or role as being to integrate and balance theory and practice, but such comments are much less frequent than the attitude of integration in teaching outlined in Part II. Approximately twenty participants – including eleven who were also quoted in Part II – made comments that could plausibly be interpreted as reflecting, if not advocating, this oppositional construct. The conventional narrative about theory and practice surfaces in these comments.

This Part begins (A) by highlighting moments where professors describe the tension or argue that there should be a divide. It then (B) recounts examples from each “pole:” instances where professors declare partiality for either theory (the academy) or practice (the profession). Finally, it (C) explores some general comments in which professors advocate for the integrative view.

A. The Perennial Debate

A number of professors make references to the debates about legal education that place theory and practice in tension. Though they may have different opinions about the debates – some view the
tension as productive, others as detrimental – treating the tension as a given serves to perpetuate the oppositional attitude.

Reflecting a more benign view of the tension, Professor 15 says:

The debates are just the same now as they were forty years ago ... And it’s the old debate about to what extent is the academic study of law really just a preparation for practice and to what extent is it a broader intellectual discipline. And the answer is—it’s both ... Acknowledging that people take this degree ... to get qualified for the Bar ... is relevant. And [it] is also what gives law schools their claim to be a distinct discipline ... The purpose of the legal studies department is to study law as a kind of social phenomenon ... But the law degree is learning the law ... in part as a professional discipline.¹⁰¹⁸

Similarly, Professor 44 self-identifies both with the tension and with having reconciled it:

[The title of] one of the finest articles on law teaching I’ve ever read ... is ... “The Law Teacher—A Man Divided Against Himself”[¹⁰¹⁹] ... And the idea is, what are we? Are we academics, or are we people preparing students for practice? Now is it ... purely academic, or is it ... kind of vocational? ... I’ve been in that situation because ... I’ve always done both!¹⁰²⁰

One younger professor acknowledges the tension at a very general level. Professor 56 discusses how the tension makes for a less “boring” approach to teaching:

[I]n a way we’re scholars, in a way trained scholars and thinkers, but at the same time trained lawyers. And I think that’s the main structural tension that law teachers, whatever subject they teach, have to somehow come to terms with ... If I didn’t have to worry about training lawyers, I could do an entirely different course ... I could make it about the history or I could make it about the theory. But ... given that these people are not just being prepared for ... PhD’s in law, I think it wouldn’t be right ... And in a way [it] also would be more boring because law is about ... sending people out into the real world and ... helping, solving, resolving disputes. It’s not just ... creating articles that nobody reads!¹⁰²¹

¹⁰¹⁸ [015], Interview, lines 744-56.
¹⁰²⁰ [044], Interview, lines 27-37.
¹⁰²¹ [056], Interview, lines 567-86.
Professor 7, more senior, takes a less benign view, arguing that the tension makes it difficult for first-year students to navigate between technical and broader conceptions of law, and “drums out” enthusiasm:

There’s a tension in what we’re trying to do—a tension between intellectual goals and professional goals—that perhaps makes it harder for them to … understand what it is that they’re supposed to achieve … The profession itself has a huge influence on students and [produces] pressure … to get the highest possible marks immediately. So there’s no transition—students are plunged into this competitive environment, which is not created by the university but it’s created by professional pressures and … it may be that they discover that the material isn’t that interesting …

The tension between learning what you need to be a lawyer—which sometimes gets reduced down to learning what you need to pass the Bar exam—and the ambitions of law schools to teach law as a social phenomenon, is not always easy for the students to navigate … The pressure from the profession— … as the profession actually exerts it, and also the pressure that comes from students who think they know what the profession wants them to learn — makes it hard for them to navigate those two objectives that exist in tension.1022

Pro or con, these descriptions of tension and allusions to the perennial debates serve to reinforce a sense of oppositionality between theory and practice.

B. Oppositional and Partial Accounts of Theory and Practice

In comments about role or mission, professors sometimes take sides in this oppositional construct. This partiality ranges from mild, offhand comments to strong, normative, even hostile assertions.

i. Preference for “The Academy”

A number of professors stake out a position in favour of the law faculty’s “academic” role, and they do so, in part, as a reaction against the pressure from the profession to which Professor 7 made reference immediately above. Professor 40 articulates a strong form of this resistance, railing against the incursion of the local bar into teaching priorities:

I actually would like to keep these separate … [W]e’re not embedded in a court house … We’re in a university campus. And … there is a great deal of pressure upon the Faculty of

1022 [007], Interview, lines 33-89.
Law to see itself as a kind of vocational training ground for the local bar ... [I]t’s not unknown for members of the Law Society ... to come to [faculty] councils, and tell us ... what we should be teaching, with a view to producing the kinds of lawyers that they want ... There’s always been a certain amount of pushback, but it’s never been thoroughly successful ... I’m not terribly inclined to do some of the things that ... law society folks would want us to do, which is pure drafting skills ... I won’t do that. And I’ve been quite resolute in that ...

I do think that it’s important to maintain a fairly clear divide between the two experiences ... Here, you’re being taught the law, but you’re also being taught to analyze it, to think about it rigorously, systematically, to see if it makes sense, to see how it can be improved when it doesn’t make sense ... And the best practitioners do that, day in, day out. But ... there should be a divide of some sort. Not an absolute divide, but a divide nonetheless.1023

Professor 40, like just over a third of participants in my study, has limited experience practicing law.1024 However, we see a similar attitude of oppositionality in mission among professors who do practice. Professor 2 is very interesting in this regard. Professor 2 has taught law for over thirty years and has maintained an active practice during that time. Professor 2’s connections to practice are so deep that former students regularly contact Professor 2 to get advice on active files.1025 Like many, Professor 2 is convinced of the relevance of theory to practice, the course syllabus outlining a list of nine detailed objectives that are heavily weighted to practical objectives, including the relatively rare “practice” goals of developing skills of “negotiation, drafting, and interpretation” and “preparing and presenting claims.”1026 But, if Professor 2 is perhaps among the most integrative in teaching, Professor 2 is also among the most oppositional in describing the role of the law professor and law school:

1023 [040], Interview, lines 865-905.
1024 Professor 40 articulated for a year before going back to grad school, and refers to Professor 40’s own “limited” and “idiosyncratic” articling experience as an additional reason why Professor 40 does not try to advance the “practitioner’s perspective” (Interview, lines 839-65). Based on my interviews and a review of publicly available curricula vitae and biographies, 47 out of my 75 participants (63%) had experience in formal legal practice, whereas 28 (37%) did not. For this metric, I only included, for the purposes of experience in practice, legal practice apart from the articling or clerkship year. Among the 47 with practice experience, some referred to it as quite minimal.

1025 [002], Interview, line 925. [002] also takes pride in the fact that students come back to describe how insights from the course were useful in practice (line 907).

1026 [002], Syllabus (2015-16), pp 2-3. Other objectives include “applying knowledge to the solution of practical problems”; “understanding, interpreting and applying legislative provisions”; identifying the issues, ratios, rules and principles from case law; and mastering the terminology of contractual obligations and legal terminology in French. Only one of the objectives of the course might be thought of as more “academic”: to “determine the
The intellectual approach is the basic skill. We are first and foremost a faculty of law ... The role of a university is to enable students to reflect on law and I want [the students in my course] to reflect on the law of contracts, on the place of contractual obligations in society, and to also reflect on all dimensions of reform and development of the law. ... A university is a place of reflection, a place of critique, a place of social change. That’s the role of a faculty of law and the same for faculties of social sciences. To help students reflect on society. A faculty of law is ... not a place where you learn a practice [une pratique], or technique. It’s not a technical school ... [I]t’s a place of reflection ... I’ve worked in offices. I do practice, it’s important, but it is easily learned. What you must learn [in a law faculty] is more the theoretical aspect of law, reflection and social critique ... The day where faculties of law stop playing this role, they will no longer belong in a university ... I know there are significant discussions these days in Canada on the role of law faculties to prepare students for practice, but I don’t believe it is my role to do that. My role is to enable them to be able to understand the law and once they have understood it, they will learn the rest.1027

Other professors reference the distinctively academic goals of the law faculty or university in briefer compass. When this occurs, we see the conventional narrative of a fierce debate operating in the background. For example, Professor 32 insists on using the term jurist, instead of lawyer:

This is—frankly, in reality, nowadays, probably a bit of a fiction—but I’m clinging to it anyways ... You argue that you don’t necessarily go to law school to be a lawyer ... Even if that is somewhat a fiction, I ... still think it’s important that students consider themselves ... to be jurists and not only proto-professionals who are learning the tools of the trade ... It goes back I think to the old ... law school is a trade school versus part of the academy debate and just for me it’s one of those ... codes or symbols of keeping me grounded in the academic pursuit.1028

Similarly, Professor 64, who uses the case-file method to emphasize problem solving and encourages students to read “actual agreements,” couches these more practice-oriented skills with the caveat that “it’s not our obligation to teach everything from a practitioner’s perspective.”1029 And Professor 1, who writes and speaks so eloquently about integrating “technique” and “concepts,”

1027 [002], Interview, lines 225-42, 732-64 [Translation from the French original].
1028 [032], Interview, lines 138-49.
1029 [064], Interview, lines 498-9.
distinguishes the “law school” objective of training good legal workers from the “law faculty” objective of participating in the construction of knowledge.  

ii. Preference for “The Profession”

Other professors, equally aware of these debates, portray themselves as partial to the other pole. Some professors espouse a very strong view that the law school should exist to serve the profession. Others, in passing comments, betray a milder, but nonetheless polarized, understanding of the law school’s mission.

Occasionally the tone can be hostile. Professor 12, for example, says that the Arthurs Report was “absolutely dreadful” because it “deprecated severely” the “highly practical” work that Professor 12 does in contract law teaching and writing:

[To the extent that the law schools repudiate the obligation to teach their students how to practice law, they’re not doing what they should be doing. You would think it monstrous if the Faculty of Medicine said to its students, “We’re not going to teach you how to cure people. We’re going to teach you the theory of medicine.” Medicine and law are professions, and the job of a profession is to do things in the world ... Law schools should ask themselves the question, “Is what we are teaching, whether individual courses or a range of courses, designed to give a student the ability to give ... good legal advice?”

Professor 60, hired many years before the Arthurs Report came out, stipulated as a condition of employment that Professor 60 “would not write.” For this professor, who “never” did publish legal scholarship other than a case comment:

I always valued law school mainly as the way to prepare for a profession, where you do the work as opposed to ... an academic discipline in itself ... And we’re in a somewhat 

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[001], Interview, lines 685-709:
[The ability to understand realist and formalist views of law together] intersects with the quality of a being good jurist [juriste]. Once students have left the faculty, one imagines that they will have better work, in my opinion. That first response is therefore very “law school.” The second answer is more “faculty of law,” more relating to the university. We don’t distribute a knowledge that is considered as complete, but a knowledge in the process of being made. The people who teach are people who, in their way, try to progress this understanding, thus participate in its confection, its creation. In an abstract way, it is simply the progression of knowledge [Translation from the French original].

[012], Interview, lines 783-9, 409-18.
difficult position. We’re at a university and ... the idea is you should do what other professors do at the university. You know, make it academic. But it’s a professional school.1032

Another senior professor argues that law schools should respond to the demands of the profession. This individual is the early adopter of technology discussed above, who focuses on problem-based learning. Professor 43 says:

We’re talking about pushing articling [from] the law firm back into the law schools. There’s a reason for it. It’s because there’s no work out there for these kids ... In the good old days, [firms] could take articling students on ... and charge them out to a company and they didn’t mind. They can’t do that anymore ... Another way they can improve their profitability inside the law firms is when I get hold of this kid, they have to be damned good right from the start. They’ve got to hit the decks running ... So they’re going to push that back into the law schools too. That’s what the Federation of Law Societies’ ... competencies piece is about ...

We’re caught in a bind ... We’re busy sort of going, “Oh! Come to us!” ... “We’re diverse! ... We’ve got social access to justice! ... We’ll get you an internship here, and we’ll give you that here” ... We can’t do that any longer because the firms, the big client, the buyer, has shown up at the door and said, “That’s not what I want ... I want the kid who’s ready to go now because I’m worried about my profitability. I can’t train anybody anymore.”

And so we as law schools have to recognize that and gear up and transition. We have to stop putting out so many... and we also have to put them out more prepared, so there’ll be much more practical, experiential stuff.1033

Each of the above three professors, who advocates strongly for preparing students for practice, is an outlier in one sense or another: one has left the full-time academy, another was hired on condition of specifically avoiding scholarly writing (at a time when such a demand was plausible; it likely no longer is), and a third genuinely stands out in pedagogical approach (problem-based learning). These expressions are much more emphatic, idiosyncratically so, when compared with the views of the majority of the participants in my study. However, a number of other professors express similar views, albeit more mildly. They do so notwithstanding demonstrating a commitment, elsewhere in their interviews, to scholarship, or to integrating theory and practice in their teaching.

1032 [060], Interview, lines 583-91, 284-91.
1033 [043], Interview, lines 723-810 [emphasis added].
We see such views, first of all, in off-hand comments that reveal a background assumption about the law school (or law professor’s) mission. Professor 49, who compresses the doctrinal material into one semester, and focuses on reading real contracts for another semester, states simply that “I don’t see why you wouldn’t emphasize the practical side of contracts.”\textsuperscript{1034} Professor 26 sees it as an “obligation to students” not to emphasize theory over “a sufficient knowledge ... of core concepts,” tied to a “practice-oriented approach ... in emphasizing law as something that is usable as opposed to knowable.”\textsuperscript{1035} Professor 54 tells students the practical benefits of what they are learning in class “all the time” because “[legal reasoning is] really what they’ll be doing as articling students and I think that’s what we’re in large measure training them for in law school.”\textsuperscript{1036} Even Professor 57, a professor who did graduate work bridging legal theory and philosophy and who includes more theory in the course than Professor 57’s colleagues do, nevertheless emphasizes practical relevance, even against the backdrop of the conventional narrative:

[Reading case law is] an \textit{enduring} skill that they need later as a lawyer ... We say that we’re not necessarily preparing them to be practitioners, but \textit{most} of them are going to go on to be practitioners.\textsuperscript{1037}

A second way in which professors assert the importance of professional considerations is by reference to their own identity as practitioners, or reference to their own practice. Comments such as “I’m sort of a practitioner; I’m not a theory person much myself,”\textsuperscript{1038} or “I’m trying to teach the course from a practical perspective ... because I’m a practitioner myself”\textsuperscript{1039} relate pedagogical choices to a sense of personal role or identity. Using one’s practitioner’s identity is, moreover, not restricted to adjunct professors, part-time teachers: one of those comments was by a Full Professor, one by a full-time practitioner.

This section has tried to emphasize how, notwithstanding the overwhelming tendency of teachers to treat theory and practice as mutually reinforcing virtues in their teaching, many professors

\textsuperscript{1034} [049], Interview, lines 216-7.
\textsuperscript{1035} [026], Interview, lines 238-40, 523-7.
\textsuperscript{1036} [054], Interview, lines 352, 366-8.
\textsuperscript{1037} [057], Interview, lines 141-2, 235-6, 500-503.
\textsuperscript{1038} [013], Interview, lines 630-31.
\textsuperscript{1039} [065], Interview, lines 164-7.
do espouse an attitude that the academy and the profession, theory and practice, exist in opposition. Sometimes this is done in the most direct and polemical fashions, as if it is important to stake out a position and argue it. Other times, it is the awareness of the debate that operates in the background to structure or inform conversations and characterizations of the law professors’, or the law school’s, role or mission. The conventional narrative remains powerful, but mainly so when discussions are at this higher level of generality.

But as with all stories, there are sub-plots, and the next section identifies the instances in which professors articulate – at the more abstract level – the notion that theory and practice can and should be integrated and balanced.

C. Balance and Integrate: A Secondary Trope

There are signs that a secondary story is starting to be told – by a small number of professors, for the moment – about the nature and purpose of legal education. This asserts that theory and practice should be integrated, and indeed that it is natural to do so. For some, this is an expression of an obvious truth; for others, an aspiration. These integrative accounts of legal education at the general level appear less frequently than do the oppositional ones recounted above. There appears to be a “lag” between the account professors give of their teaching and the story they tell about their, or their institutions’, roles.

The most explicit champion of the integrative approach is Professor 62, a young professor who has published on legal education theory and maintains an active practice of law. Professor 62 challenges the orthodox view with as much vigour as some of those who advocate for one side or the other:

I find the distinction ... between theory and practice or skills and theory, an inane, untenable distinction ...

[P]art of the reason I think I was hired is because I’m kind of a hybrid academic/practitioner to begin with ... Before I even began to put together ... my syllabus, there was an expectation that this is what we do [at this law school]—we explode the distinction between theory and practice ... [I]n many ways, [my institution]’s ... focus on trying to integrate skills and practice ... in some ways grows out of, ... at least intellectually, the article that I [co-authored], ... focusing on law, the teaching of law, the learning of law, the practice of law, as an interpretive practice ...

1040 [062], Interview, lines 509, 524.
I’m not just trying to help students become lawyers, ... but rather ... how to ... lead a virtuous life as a lawyer. And that’s a huge, of course, ambitious undertaking ... and I almost feel embarrassed to say it, and I think that says something about the climate that we’re in, politically and ideologically, but I think that has to be the task ... We’re not trying to foreground and emphasize skills to the detriment of theory or to the detriment of ideas. It’s the opposite. It’s trying to bring the two together. And it’s trying to use skills and techniques as windows ... into the ideas underneath them and underlying them, and to challenge them, to remake law and legal practice from the inside out.1041

A number of factors combine to produce such an impassioned articulation: a prior intellectual commitment (evidenced by the co-authored article), the sense that Professor 62 is furthering an institutional mandate, and some desire to resist, or even reframe, a conventional debate (reacting against “the climate we’re in”). These conditions combine with Professor 62’s dual-identity as a scholar and a practitioner to produce a highly refined articulation of legal education’s mission at the more abstract level.

The confluence of these conditions and personality is not common, nor is it necessary to produce expressions of an integrative philosophy or story of legal education. They can appear in more prosaic ways, as when Professor 51, a particularly innovative instructor who, among other things, founded and performed in a contracts dance collective with students, describes the “ideal” as being to “integrate and balance ... doctrine, theory, and some practice.”1042 Another example is when Professor 16 describes theory as a “container” or “framework” of law, and aspires to find the “right balance ... connecting that theory to practical real-life examples.”1043

IV. Conclusion

At least three implications follow from the above observations. First, and perhaps most simply, the attitudes of contract law professors appear to reverse the relative priority, seen in the literature on legal education, between oppositional and integrative accounts. There are many more instances, all told, of professors talking about the aspiration to integrate theory into practice than there are expressions of a tension between them. An impressionistic reading of this chapter would suggest that the integrative belief easily outstrips the oppositional belief among Canadian contract law professors,

1041 [062], Interview, lines 455-513, 642-56.
1042 [051], Interview, lines 582-4.
1043 [016], Interview, lines 467-80.
suggesting that the dominant narrative, recounted largely through the lens of institutions, curricula, and markets, does not necessarily capture the attitudes of professors on the ground. This alone signals the value of empirical accounts of individual professors for understanding legal education.

At another level, the fact that professors speak differently about the relationship between theory and practice when speaking about their teaching, as opposed to when they discuss their role or the mission of the law school, further complicates the picture. The tendency of some professors to reproduce the conventional oppositional debate in discussions at higher levels of abstraction could suggest any number of things. It could be that the conventional debates are just so familiar and ingrained that any discussion operating at the higher level of abstraction becomes automatically, almost subconsciously, conditioned by the familiar terms. On this account, the tenacity of the conventional oppositional accounts results from a kind of discursive inertia: professors reproduce the familiar terms even though they may dissonate with their lived experience, but the very fact of reproducing these terms ensures that they remain predominant. The “perennial” nature of the debate may be driven more by the dynamic of myth telling and retelling and less by the empirical reality of lived experience.

Alternatively, professors’ views about teaching might actually be different from their views about their bigger-picture role or the mission of the institution. This, in turn, could be the product of different factors. For example, in describing their role or the mission of the law school, professors may be apt to emphasize their dominant role identity (scholar), which is putatively distinct from the relatively circumscribed role of teacher. In the case of those who espouse a preference for the academy, the practical virtues of producing “better lawyers” may well describe their attitude as teachers, but they may relate more to being scholars, and in that role more acutely perceive threats to scholarly independence posed by professional demands. In the case of those who express a preference for the profession, the stated views about teaching could be the ones they actually believe in, but they may perceive these ideas to run counter to the norms of the university community in which they find themselves.

The possibilities canvassed in the last two paragraphs shine the light on another dichotomy in legal education, that between structure and agency. The difference between views about teaching and views about role or mission may signal a dissonance between those areas over which professors experience agency, and those areas about which they feel structured or conditioned by external factors. I explore this relationship between structure and agency in greater detail in Chapter 6.
Perhaps the most striking feature of the relationship between theory and practice is, however, the one most simply stated. This is the idea that the vast majority of professors in this study assert that their own theoretical or critical perspectives are valuable because they make better lawyers. That is so simple a proposition that it is easy to overlook its significance. It is significant not just because it challenges the conventional story of the fierce debate, adding a new layer to a well-rehearsed, but ultimately largely descriptive, story about legal education. The aspiration to incorporate theory into practice is especially significant because of what it implies for actual experience. If theory really does serve the goal of producing better lawyers in the full breadth of the ways that professors claim that it does, then the promise of incorporating eclectic perspectives into legal reasoning seems very close at hand. To the extent that contract law professors turn this aspiration into reality, they may succeed where the casebook editors did not, operationalizing their eclectic theoretical commitments into a workable vision of legal reasoning and legal practice. Chapter 5 takes a closer look at my participant data to explore the extent to which this happens.
Chapter 5
Realism and Formalism in Canadian Contract Law Teaching

I. Introduction

So far we have a somewhat ambiguous picture about the relationship between theory and practice in legal education. On the one hand, we have the claim, by Kennedy and Fisher, that contemporary legal reasoning is an eclectic practice built up from the methodological sediment produced by a series of critical schools, schools which themselves were primarily methodological in that they challenged previously agreed-upon rhetorical and argumentative techniques. In their view, legal reasoning today is the exercise of deploying an eclectic “toolkit” that admits of a wide range of strategies appropriate to legal discourse and argumentation. Chief among these are diverse arguments based on policy and social context. The seminal contract law scholarship of the twentieth century, we saw in Chapter 2, instantiates the ideas of the critical schools.

If the professional practice of legal reasoning and argumentation did successfully operationalize the critical ideas from these schools, as Kennedy and Fisher claim, this would serve as one successful example of theory being translated into practice. For, while Kennedy and Fisher describe the major schools as primarily methodological, they are also no doubt milestones in legal theory. Scholars such as Fuller and Macneil, to name just two, shifted both legal theory and legal reasoning simultaneously. Their reception into the contract law canon, combined with Kennedy and Fisher’s claim that legal reasoning incorporates diverse methodologies, would therefore suggest that contract law teaching is a natural place to translate theory into practice.

In Chapter 4, we saw how Canadian contract law professors are not only amenable to such a vision, but affirm versions of it in their own words. The vast majority of the professors in my study said that the main value for incorporating theory or critique – hallmarks of university education – into their teaching was to produce better lawyers. We also saw, in Chapter 3, how the materials that most contract law professors use in teaching their course are heavily influenced by the authors surveyed in both Kennedy and Fisher’s canon and in Chapter 2. These conditions, taken together, hold the promise that in their teaching, Canadian contract law professors may very well operationalize these eclectic theories into a contemporary vision of legal reasoning and legal practice.
At the same time, we have seen signs of a conflicting account. The high-level narrative about integrating theory and practice, from Arthurs, Carnegie, and Kronman, we saw, is actually a secondary story. The primary story is one that asserts an opposition between theory and practice, the academy and the legal profession. Kyer & Bickenbach’s account of legal education in Ontario provided one historical example, but the debate is really a perennial one, going back at least as far as Blackstone, and abutting right up to the present with renewed combats over jurisdiction and control over legal education. Theory and practice have made, historically in the context of the discourse about legal education, strange bedfellows (even if that phrase sounds odd from some philosophical perspectives).1044

Moreover, the story that Kennedy and Fisher tell about legal reasoning may itself prove to be more of an aspiration than reality. For despite their claims that legal reasoning consists of the methodological sediment of diverse schools, Elizabeth Mertz’s study of eight Contract Law classes showed how contract law professors tend to marginalize, not operationalize, considerations of policy and context in teaching students to think like lawyers. Moreover, we observed an analogous tendency in the contract law casebooks. For, while the editors espouse attitudes amenable to the realist and critical schools of the American canon, the image of legal reasoning that the two most frequently assigned books embodies resembles the Mertz account much more than the Kennedy and Fisher account. Thus, I concluded that the Canadian casebooks fail to translate their theoretical eclecticism into a methodological pluralism – they fail to put into practice their avowed beliefs about law.

This chapter now looks to substantive attitudes about law – as expressed by law professors, implied by their descriptions of legal reasoning, and reflected in their teaching practices and materials – to determine where Canadian contract law teaching fits into this story. As it turns out, the patterns observed in the casebooks appear to recur in the words of my 67 interviewees and in the course materials I have reviewed. As with the casebook editors, most – but not all – Canadian contract law professors espouse strong theoretical commitments to the ideas of American Legal Realism and its intellectual heirs. Indeterminacy, policy, context, politics, underlying factors, and external critique all figure prominently in professors’ propositional statements about law. However, when we look at how professors describe legal reasoning, and when we examine their teaching practices and materials for the attitudes of law they reflect, rules, adjudication, and analogical reasoning predominate. This suggests

1044 See supra note 9.
that the realist themes do not figure prominently in the way that most professors understand the practice of legal reasoning, and that most professors do not operationalize these realist and critical ideas into how they teach contract law (which includes both how they teach and evaluate legal reasoning and the other substantive ideas about law they emphasize in the course). The privileged set of attitudes about law reflected in both cases align with a different set of ideas, those that only a minority of professors – formalism’s “champions” – propositionally proclaim.

Part II of this chapter focuses on how professors describe what they believe about law. These beliefs surface both when professors describe their legal philosophy directly and when they talk about their pedagogical goals or the rationales for those goals. In these comments, most professors espouse genuine and deep commitments to the realist ideas that law is indeterminate; that rules are mutable and contingent; that one must look to underlying factors of judicial personality, politics, and policy considerations to explain legal doctrine; that social context and non-state normativity are relevant to law; and that critical perspectives that evaluate law from external normative positions are essential to a complete understanding of law. By contrast, a minority of professors demonstrate explicit commitments to a series of “formalist” ideas: that law is an autonomous discipline, that the content of rules matters and is relatively fixed, and that it is important to discover an internally self-referential coherence, logic, or structure of how rules fit together.

Part III shows how the relative weighting between realist and formalist ideas reverses when professors speak about legal reasoning. In these instances, most professors describe legal reasoning as a distinct form of discourse, take the content of rules and judicial reasoning seriously, believe that legal reasoning primarily consists in drawing lines between what is relevant and irrelevant, and espouse the importance of structure and coherence. Only a minority of professors call into question legal reasoning’s distinctiveness or actively try to translate their theoretical realist or critical ideas about law into a vision of the pre-eminent legal professional practice, legal reasoning. These professors emphasize cultivating human judgment, thinking critically, training one’s gut, incorporating policy, and developing an eclectic range of argument-types. However, not only are these professors largely in the minority, but the rigour and extent to which they attempt to inflect legal reasoning with these other features pales in comparison to the focus in most other accounts of legal reasoning on the ruthless discernment between the relevant and the irrelevant, while treating those categories as neutral.

In Part IV, I show how the attitudes put into practice through teaching methods and materials are largely the same formalist attitudes that predominate in professors’ descriptions of legal reasoning.
In direct expressions about teaching philosophy or course objectives (whether in interviews or course syllabi), in decisions about how to order the course or what readings to assign, and especially in the choice of evaluation, the importance of rules and conventional legal reasoning figure as the privileged messages. The prevailing impression is of a much narrower vision of law communicated by teaching materials and practices than by professors’ propositional statements about law. This trend is by no means absolute – there are examples of custom-designed evaluations, syllabi, and even reading materials that fit with the critical and realist aspirations. I detail these here too, but the overwhelming impression is that they remain, at least for now, in the minority.

Accordingly, this chapter demonstrates how the claims from the previous chapter, that theory and critique are important primarily to make better lawyers, should best be understood primarily as aspirational, rather than reflecting the true state of contract law teaching in Canada. While many if not most professors may believe that theory serves practice, their own particular theoretical commitments do not appear to generate targeted and particular conceptions of legal reasoning or to be thoroughly integrated into the substantive teaching of the course. This chapter illustrates two profound mismatches between theory and practice. First, while there is an eclecticism of theories about law, spanning the range of theoretical schools canvassed in Chapter 2, there is a relatively homogenous attitude about what legal reasoning is. Second, the content of legal reasoning coalesces around the skills of discerning the relevant from the irrelevant, a line-drawing exercise that serves to castigate the purportedly central concerns of policy, context, and politics, to the margins of legal epistemology. This line-drawing exercise weaves the whole of the contract course together, animating and driving the substantive teaching, and modeling a powerful, but circumscribed, understanding of the “core” of legal professional practice.

II. Realist and Formalist Attitudes about Law and Contract Law

This chapter categorizes ideas about law according to the labels “realist” and “formalist.” Such a device is necessarily a heuristic, given the heterogeneity of ideas that each of these two labels encompasses. Realism, on the one hand, has famously been described as not having any one core set of beliefs, and as not being a movement at all;\textsuperscript{1045} it is much less frequently defined affirmatively than it is.

\textsuperscript{1045} See Horwitz, \textit{Transformation of American Law}, supra note 193 at 169 (“Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory”); Karl N Llewellyn, “Some Realism About Realism – Responding to Dean Pound”, supra note 194 at 1233-34; Grant Gilmore, “Legal Realism: Its Cause and Cure”, \textit{supra} note 194 at 1038.
described as a “revolt against formalism.”¹⁰⁴⁶ Formalism, on the other hand, is a word that receives deep philosophical treatment and definition. Some, like Leiter, take pains to confine the term to theories of *adjudication*, combining the ideas that “the law is rationally determinate, ... judging is mechanical, ... [and] legal reasoning is autonomous.”¹⁰⁴⁷ Others, like Weinrib, use it more broadly to refer to an entire legal philosophy that “embodies a profound and inescapable truth about law’s inner coherence,” postulates that “law is intelligible as an internally coherent phenomenon,” and “proffer[s] the possibility of an ‘immanent moral rationality.’”¹⁰⁴⁸ This chapter does not attempt to reconcile or even select from among such definitions, but rather uses the general ideas of each school to categorize the views and attitudes expressed by Canadian contract law professors.

This task is necessarily imprecise, but the purpose is not precision. Rather, it is to elucidate the underlying attitudes about law that the participants in my study espouse. Not every professor whose utterance or written word I classify as realist or formalist might identify in one camp or the other, although some do. The fact that some individuals may resist being so categorized does not, however, 

¹⁰⁴⁶ Horwitz, *ibid* at 184. See also Kennedy & Fisher, *supra* note 37 at 7:

> [*L*egal realism ... remains in the vernacular to refer to those debates and affinities, and also to denote a series of loose reasoning tendencies – a heightened awareness of deductive errors in doctrinal analysis, the routine use of criticisms of analytic positivism, enthusiasm for purposive and functional styles of reasoning, and efforts to tolerate and affirm legal pluralism and social custom.


¹⁰⁴⁷ Brian Leiter, “Positivism, Realism, Formalism,” *Book Review of Legal Positivism in American Jurisprudence* by Anthony Sebok, (1999) 99 Colum L Rev 1138 at 1145 [emphasis in original]. Leiter provides a summary of other definitions at 1144-45. See also Grey, *supra* note 174 at 9 (“formalism” describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles), 8 (“a legal system is *formal* to the extent that its outcomes are dictated by demonstrative (rationally compelling) reasoning”).

preclude us from noticing that some of their words have an affinity with certain formalist or realist ideas. The labels, therefore, are helpful to paint a picture about the general state of ideas about law. Moreover, the act of classifying certain words as realist or formalist enables us to highlight the discrepancies that might appear between what is said in some contexts and what is said in others. The labels thus facilitate the key observation in this chapter that views about law differ greatly as between when professors assert their views about law and when they describe their views about legal reasoning or their teaching practices. Finally, by classifying professors’ particular words according to the capacious and contested labels of realism and formalism, we learn something about how these terms manifest in the attitudes of law professors across the board, beyond the subset of those who choose to write about them.

With these qualifications in mind, this chapter sets out the attitudes about law as the professors in my study articulate them to me. These expressions arose, in almost all cases, not in response to direct questions such as “what is your philosophy of law,” but rather by asking professors to expand on something they had mentioned in response to an initial open-ended question.1049 In the first section (A), I focus on the realist views that professors have expressed about law generally, or about contract law in particular. These include an emphasis on the indeterminacy of law, the importance of underlying policy factors, the idea that the purportedly “external” factors of politics, morality, and context are integral to law, and the importance of exogenous critiques to a complete understanding of law in its social context. The second section (B) highlights ideas expressed by a vociferous minority – the “champions” of formalism – about the importance of rules and internal coherence to the rule of law. These formalist views, I show, also appear more subtly among the professors characterized in the first section as realists. What begins as a clean classification gives way to a picture of a more complicated relationship between realist and formalist ideas, which leads directly into the more stark contrasts revealed in Part III.1050

1049 The sample transcript in Appendix A demonstrates a typical progression.

1050 Apart from the detailed look at selected quotations that comprise this chapter, I have tried to give a global assessment of each professor’s interview transcript to determine whether each could be classified as leaning formalist or realist. While I acknowledge that both the exercise of categorization and the particular categorizations may be contestable, the numbers do give a flavor of the relative weighting. Judged primarily on their stated beliefs about law, I have identified 49 professors who fall squarely into the realist camp and 7 into the formalist camp. Eleven professors fell into an “in-between” category, either because they did not express strong views or because their views seemed truly mixed. I do not mean to suggest that only these eleven participants labeled as “in between” exhibit complex or contradictory tendencies. As will be discussed, many of the 49 “realist” professors exhibit such contradictions.
A. Realist Views About (Contract) Law

Two interrelated claims about law pervade my interview transcripts. First, there is the widespread belief that law is not a collection of fixed rules whose application yields determinative legal results. In this rejection of a mechanical jurisprudence, many contract law professors insist that rules themselves are indeterminate – contingent on historical and social factors, potentially arbitrary, “made by people,” subject to change, and never fixed or revelatory of truth. Accordingly, law is not a collection of discrete rules but something much more uncertain and messy. Second, many professors take pains to emphasize the underlying factors that help account for this indeterminacy or contingency. Thus, in an apparent rejection of the idea that law is an impermeable, distinct discipline consisting entirely of internal reasoning techniques, many professors take pains to show how factors otherwise considered exogenous – policy, politics, justice, morality, behavioural economics, social relations – impact and even constitute law. To tease out these pervasive influences of realism, I divide the discussion below into (i) indeterminacy of law, and (ii) “external” factors.

i. The Indeterminacy of Law

(a) Claims About the Nature of Law

A thread that runs throughout the interview transcripts is the idea that professors want to “disabuse” students of the idea that law is a closed system of rules that are immune to social forces and on their own determinative of legal results. As Professor 27 writes:

Most people come [with] some set of ideas about law—almost all of which turn out to be good starting points for showing them that’s not what’s really going to happen, or not what’s going on ... [These include the ideas] that law is a bunch of rules, that it’s a ...  

![Image](https://via.placeholder.com/150)

certainty, has a certain form. That ... in order to have legal certainty, we must have a number of things in place. So in contract law ... people believe that contracts should be in writing, or that they have to be in writing ... That’s a very simple idea that turns out to be very untrue ... The classical view of contract law fits perfectly with ... most people’s preconceptions.

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1052 [052], Interview, line 33; [027], Interview, lines 79, 1016; [026], Interview, lines 494-6.

1053 [027], Interview, lines 213-32.
A host of instructors attack the idea of law’s determinacy, in differing formulations. Much of the time, this takes the form of undermining the very idea that there are fixed rules of law. Thus, Professor 26 wants to “shake” students of the “notion … [t]hat the law is out there, it just is what it is, and either you know it or you don’t.”\[1054\] Professor 13 rejects the idea that “contract law is just a sort of a puzzle … and [that] there are … black and white rules that apply to give you determinate answers.”\[1055\] Likewise, Professor 31 tries to “avoid the students taking the legal rules as being some sort of … data that go into a statistical calculation and you come up with the answer.”\[1056\] Professor 44, with almost five decades of experience, describes how this appreciation for indeterminacy dawned gradually:

[W]hen you get to my age … what you do realize is how … little you know … [I]n my first two or three years of teaching, it was a goal—a rule, “Yeah, that’s it!” Whereas today, it’s just, “Well, yeah, it could be. It might be. Yeah, it could be too.” There’s just more questions and never answers, at which the kids get a wee bit frustrated. “But surely you must know after all these years.” “No, I’m telling you that there’s so many different ways to look at this, and there’s not an answer. There’s just answers, and there’s just more questions … So that’s the way the law is and that’s why we litigate, because there’s never a rule.”\[1057\]

The theme of uncertainty – and students’ discomfort with it – comes up frequently. For example, Professor 54 states:

[T]hey love certainty and clarity [and] … they don’t like indeterminacy … at the beginning. But I … tell them, “Look—the reality is that it is indeterminate, and you’re going to have to become comfortable with uncertainty … As long as you can identify what’s uncertain, why it’s uncertain, and what the potential arguments you would bring to bear to resolve the uncertainty are, then that’s okay … It’s just the reality, so we need to embrace that reality and become comfortable with uncertainty.”\[1058\]

Similarly, Professor 26 illustrates a commitment to the same idea by recounting how a colleague (who teaches Property) would

\[1054\] [026], Interview, lines 454-5.
\[1055\] [013], Interview, lines 73-8.
\[1056\] [031], Interview, lines 216-8. Cf. [027], Interview, line 695 (law is “not a bunch of data points or rules”).
\[1057\] [044], Interview, lines 802-29.
\[1058\] [054], Interview, lines 730-42.
walk into the room and before he would say anything, ... would write “UNCERTAINTY” in big letters on the chalkboard, and turn around and say, “Get used to it.” And students always want to know, “What’s the answer? What’s the rule? What’s the outcome?” And often in law it’s—there isn’t a “the answer.” There may be wrong answers, but that doesn’t mean there’s only one right answer.¹⁰⁵⁹

Reinforcing this ontological point about the nature of law, a similar message appears in Professor 26’s syllabus. This excerpt also appears in the syllabus of Professor 70, a senior colleague at the same institution, who is likely the original author:

The rules of contract law are not set out in any book or (to any significant degree) any act of any legislature. They cannot simply be looked up. Nor could they be. While it is possible to baldly state some fundamental principles of contract law, their meaning and scope is never fixed, since there are always further distinctions to be made.¹⁰⁶⁰

Accordingly, professors widely and strongly make the claim about the nature of law that it is indeterminate and uncertain. We see other such ontological claims as well, related to these ideas: professors emphasize law’s “complexity”¹⁰⁶¹ and assert how the common law is “messy.”¹⁰⁶²

(b) Normative Claims and Aspirational Language

Sometimes, professors connect these ontological claims to more idealized visions of law and lawyering activity. This occurs, for example, when Professor 63 states that not only is law not “a clear set of rules,” but that:

¹⁰⁵⁹ [026], Interview, lines 459-67.
¹⁰⁶¹ [001], Interview, line 596. Professors 2 considers it necessary to tell students how law is not static, but evolves, that legislative change can be necessary because society changes, and that law evolves in a historical context ([002], Interview, lines 551-63 [Translation from the French original]). The original reads:

Mon rôle c’est de les convaincre que le droit c’est une discipline intellectuelle qui nécessite de la part des étudiants un esprit ouvert pis un esprit critique. C’est ça mon rôle. Mon rôle aussi c’est de leur dire que le droit est pas statique, le droit évolue ... Mon rôle c’est de leurs faire comprendre que parfois, on a pas le choix que d’avoir des réformes législatives pour changer certains comportements parce que la société change. Pis mon rôle c’est de leurs apprendre qu’un décision c’est un portrait d’une situation qui se produit dans un moment dans l’histoire et que puis parfois il faut comprendre ce moment historique.

Professor 56 aims to show that “law is not God-given ... [but rather] a highly complex product of ... social historical interactions” ([056], Interview, lines 415-7).
¹⁰⁶² [027], Interview, lines 723, 695.
Normatively, you probably wouldn’t want to have law that’s a perfectly defined, clear set of rules applicable in every circumstance because we’d have an institution that would be pretty difficult … to respect at the end of the day.\footnote{063}

The idea that rules applied “rigidly across … every case”\footnote{064} would undermine the respect due to law corresponds to another widely held idea – that law is a sociocultural construct, that it is “made” by people, and can therefore be changed. Numerous professors advocate such a view, connecting it to an aspirational vision of the lawyer or jurist who participates in the “making and remaking” of law.

Thus, Professor 26 “thinks of the law as a human institution … [that is] constituted anew in each litigation or in each contract negotiation.”\footnote{026} Professor 11 connects the idea that law graduates are going to try to “change the law” with the idea that law is a “human” and “political construct.”\footnote{011} Similarly, Professor 54 focuses on judicial personalities in order to show students that “law really is a construct,” “artificial in the sense that these are just humans that are writing these things.”\footnote{054}

Being a “construct,” law is often portrayed as something that can be changed by “legal actors.” Thus Professor 17, who underscores the “arbitrariness and contingency” of law, the “conceptual point … that the rules really do get made … by people,”\footnote{017} says:

the common law is not just the rules—they’re mutable, they’ve changed over time, they’re subject to change … [I]n the future you can change them as a legal actor … You’re going to be one of these people at some point either as a lawyer or a judge or whatever.\footnote{017}

\footnote{063}{\cite{063}, Interview, lines 421-6.}
\footnote{064}{\textit{Ibid}, lines 411-12.}
\footnote{065}{\cite{026}, Interview, lines 403-5.}
\footnote{066}{\cite{011}, Interview, lines 445-8. See also \textit{ibid}, lines 474-9 (“it’s important to … bring to their attention the fact that [law is] not a given—it … didn’t have to develop this way but it did for various reasons … [It’s] not … something that’s … out there to … just discover and that’s the way it is and … should be and … always will be”).}
\footnote{067}{\cite{054}, Interview, lines 699-701.}
\footnote{068}{\cite{017}, Interview, lines 333-8. Professor 17 continues, “They arise in certain circumstances, and if … circumstances had been different, they might have developed a completely different way” \textit{(ibid)}.}
\footnote{069}{\cite{017}, Interview, lines 148-53.}
In an analogous fashion, Professor 37 connects the aims of “destabilizing” students and showing them that “the ground beneath [them] isn’t firm anymore” to the virtue of becoming “creative” lawyers who think of “new answers”:

I don’t think that there is one answer in law, and I don’t think that the answers, to the extent that they exist, exist for an interminable period of time ... I really want [students] ... to question assumptions, to look beyond the answers, behind the answers—and ultimately to be able to be creative enough to think of new answers ... I want them to be the lawyer in Pettkus and Becker who thought about using the constructive trust to help a woman in a common law marital situation who was being hard done by ... I want them to hone their skills of imaginative insight and to think with an agile mind that’s able to transcend boundaries.\footnote{\[037\], Interview, lines 244-75.}

Accordingly, Canadian contract law professors overwhelmingly view their roles as trying to undermine the idea that law is a collection of determinate rules, or a source of certainty. They demonstrate strong theoretical commitments about the nature of law, and they reinforce the strength of their commitments by making aspirational claims about the role that graduates will play as legal actors capable of effecting change. Closely intertwined with this general notion about the nature of law are the more specific ways, outlined in the next subsection, about the factors that affect law.

ii. Underlying Factors, Policy, and External Perspectives

It is extremely common for contract law professors to espouse the realist claim that “underlying” factors – whether judicial personality, policy, politics, concerns of justice or morality, or empirical truths about relationships and human behaviour – impact or even constitute law. At the level of stated beliefs about law, Canadian contract law professors reject – or at the very least qualify – the idea that law is a distinct discipline, constituted by its own discourse and modes of reasoning. Instead, most professors portray the legal discipline as porous, law being the product of the underlying factors.

This subsection starts by (a) elucidating the wide and varied claims about the importance of underlying factors, or results-based reasoning. It then (b) explores how this focus on underlying factors, often expressed by a commitment to the importance of policy, can be disaggregated into two quite distinct understandings. First is the idea that the underlying perspectives describe the policy considerations effectively internalized by contract law doctrine. Policy can thus be used as a way of
understanding the true motivations for existing contract law doctrine. Law and policy are interrelated because the latter explains and accounts for the former. Second, there is the idea that policy serves as an external vantage point for evaluating law. Here, professors argue that exogenous concerns of politics, morality, justice, economics, historical context, or social relations are essential not so much because they account for doctrine, but because they enable a more global understanding of law in its broader social context. This distinction in turn leads to an extended discussion of (c) the importance of external perspectives.

(a) The General Claim: The Importance of Underlying Factors and Results-Based Reasoning

Professors frequently assert that it is important to go beyond, or behind, the words of judges to determine the real factors motivating legal decision-making. Often, professors express this idea very simply. Professor 67 speaks of going “behind the words” that “disguise differences” or “mask complexity;” Professor 50 aims to “identify below doctrine, what is really driving decisions;” Professor 25 tries to elucidate the underlying “problem” that judges as “human beings” are not “confronting” directly but are rather addressing indirectly by manipulating legal doctrines. Professor 23 aims to help students “understand what it is that is motivating – influencing – judges in making their decisions beyond their words.” Professor 45 aims to understand judicial biases from a “systemic point of view.” Professor 54 emphasizes how the “personality” and “inclinations” of a judge affect the law.

1071 [067], Handwritten Notes of Untranscribed, Unrecorded Interview, pp 4-5.
1072 [050], Interview, lines 128-9.
1073 [025], Interview, lines 173-85:

It’s often useful to remind students that judges are human beings with pasts ... [J]udges when confronted with a problem in the law have a choice. They can confront the problem, or they can find a route around the common law. Typically they find a way around the problem—with the result that the ... common law is exceedingly complicated ... [A] first year student ... ceases to question why the courts don’t talk about the actual problem ... They need defined doctrines—they need to find ways to circumvent the problem. And I ... think I have a responsibility to keep pointing that out to students.

1074 [023], Interview, lines 97-101. Professor 23 continues, “Their words are often important but often there’s an economic, social, legal, political context that is important to understand” (ibid).

1075 [045], Interview, lines 252-8:
In the same way that a focus on underlying factors undermines the importance of the actual words used in preference for some imagined reality, many professors express skepticism towards doctrine by focusing on the importance of results. This can take several forms. Judicial reasoning may be characterized as “reasoning backward from the \textit{just result}”\textsuperscript{1077} or “results-based reasoning,”\textsuperscript{1078} bolstering the skepticism about the importance of particular words used. Or, professors may encourage their students to think primarily about how to achieve “results,” either by considering rules as “powerful tools” for effective argumentation,\textsuperscript{1079} or prioritizing a consideration of the “demographic” make-up of a “decision-maker.”\textsuperscript{1080} One professor, expressing an extreme version of the disdain for doctrine, simply states that “black letter law” will “never help.”\textsuperscript{1081} Professors occasionally make a more ontological point that what law \textit{is} is deeply tied to results. Some, like Professors 48 and 64, specifically invoke Holmes for this claim: “law is predictions ... [of] what the courts say it will be;”\textsuperscript{1082} a ratio is “a form of

\textsuperscript{1076} [054], Interview, lines 680-4.
\textsuperscript{1077} [016], Interview, line 284.
\textsuperscript{1078} Professor 53 illustrates this attitude perfectly:

[I]t is an ongoing struggle to remind ourselves that often the judge is engaging in result-based reasoning. That is, they’ve \textit{decided} what the result that they think is right \texttt{is}, and so now they’re just reasoning backwards from that result. And although they say it’s about the words, it really isn’t. If you had worded it the way the judge suggested, he or she would have just come up with some other reason why they had to come to this same result (Interview, lines 568-75).

\textsuperscript{1079} [016], Interview, line 372. See also Professor 31, who says, “[I]t’s your job to try to find the persuasive arguments that will lead to the result that ... your client wants ... It’s not just finding \textit{this rule} ... there’s more to it” (Interview, lines 249-55).
\textsuperscript{1080} [063], Interview, lines 169-70.
\textsuperscript{1081} [049], Interview, lines 253-9:

[I]f you \textit{really} think about black letter law of contracts and contract practice ... nothing you learn about consideration in that way will help you. Nothing. Promissory estoppel [might be] a last ditch effort in litigation. It’ll never really help you.

\textsuperscript{1082} [048], Interview, lines 193-7 (“But I think that basically the common law method [corresponds to] the old Holmes adage, the law is what judges say it is ... Law is predictions ... Law is what the courts say it will be”).
prophesizing." Others emphasize utility to characterize law: “law is something you use—not something that is;” by looking at a “practical solution ... you actually see much more clearly what the law actually is.”

Occasionally, professors may expand on the importance of external perspectives in more extended ways. For example, Professor 7 aims to

convince [students] that a positivist theory of law, which sees law as ... an autonomous social phenomenon that doesn’t take into account other dimensions—is not convincing ... [P]urely positivist thinking, at least in the extreme version you sometimes parody, is not possible ... [T]here’s positive law that exists and there are formal criteria that help us identify what the law is. But the fact that the law is, is not in itself a justification of that law.

Such a quotation captures the prevailing attitude that the law cannot be understood apart from its underlying factors. The suite of “underlying factors,” of course, varies among professors and spans a wide range. The following two subsections attempt to disaggregate these underlying factors to show how the general realist attitude contains a number of discrete ideas about law, both (b) immanent in contract law doctrine and (c) drawn from an eclectic range of external perspectives.

(b) Policy: Internal and External Conceptions

Policy can mean a vast range of things – from arguments about function, institutional competence, or the behaviour of market actors to settled and stable formulations that take on a universality akin to “principle” in judicial reasoning. As Stephen Waddams writes:

1083 [064], Interview, lines 318-21 (“the ratio is what a future judge will say a case stands for in a particular set of circumstances, and that it’s a form of prophesizing”).
1084 [026], Interview, lines 408-409.
1085 [012], Interview, lines 282-88:

For example, one chemical plant was still working but it couldn’t meet the demand and so what it did was rather than cancelling all its contracts, ... it gave each of its customers a pro rata share of what they’d already bought. So it’s ... a practical solution—it wasn’t required by any contract but this is how they dealt with it ...If you look at those things you actually see much more clearly what the law really is.

1086 [007], Interview, lines 281-91.
1087 Kennedy & Fisher, supra note 37 at 4-5 (“Fuller, Hart and Sacks, Coase and Calabresi each proposed specific types of policy argument that have become routine methods of judicial reasoning”).
1088 See Waddams, Principle and Policy, supra note 188 at 223:
Policy, as applied to judicial decision-making in English law, has sometimes been a word of approbation, signifying that which it is desirable for judges to do ... but sometimes it has signified the opposite ... where policy considerations [are considered] to be excluded from the proper judicial sphere.1089

These debates about the role of policy in judicial reasoning inform an understanding of how professors invoke policy in describing their views of contract law and law teaching. They signal that policy may be used alternatively to describe internal considerations – the principles or interests internalized by, and thus immanent in, contract law doctrine – or external considerations, factors that contradict or challenge the tenets of existing doctrine. While the distinction between internal and external may be “difficult to apply to contract law, viewed as a historical phenomenon, because considerations that have effectively influenced the law have, by that very fact, been internalized,”1090 it nevertheless serves as a useful organizing logic for understanding the ways that contract law professors talk about their understandings of law and their objectives.

1. Policy as Factors Effectively Internalized into Doctrine

Many professors assert the importance of underlying policy factors in a way that assimilates policy to factors, considerations, or interests that contract law doctrine has effectively internalized. They may do so while specifically identifying with legal realism. For example, consider the following exchange with Professor 51:

[R:] Would you say that legal realism influences your approach to teaching the course?

[Professor 51:] Yes.

[R:] ... In what ways?

policy considerations, when they can be incorporated in a rule that corresponds with past practice, that is likely to be fair to individual parties, that is judged to be likely to have beneficial effects in the future, that can be articulated in a form that is likely to be stable and that is suitable to be applied by judges are apt to be called principles. Thus policy may take the form of principle.

1089 ibid at 216. Waddams underscores that such a tension exists in modern legal theory as well, citing Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass: Harvard University Press, 1977) for the proposition that “principle only, and not policy, belong[s] properly to the judicial sphere” (Waddams, ibid at 20).

1090 ibid at 222.
[Professor 51:] ... I tend to get very legal realist ... in terms of ... what the final outcome of any contract cases are, in terms of what the parties’ reasonable expectations would be in the commercial context ... I tend not to have a lot of patience for some of the long rambling ... House of Lords decisions where these fine semantic distinctions are made, and ... I tend to focus a lot more on ... policy factors in terms of being much more determinative ... I tend to emphasize ... policy factors in terms of ... what is actually going to drive the decision in the end. And you know, it’s got to be things like reliance and reasonable expectations and trade practices and assumption of risk, commercial reasonableness.1091

These policy factors – “reasonable expectations in the commercial context,” “trade practices,” “assumption of risk,” “commercial reasonableness” – can all be considered internal in at least two senses. They are internal to the demands of the commercial economy in that they serve its smooth functioning and do not fundamentally threaten to challenge or regulate it.1092 They are also internal to the body of contract doctrine, either because these considerations have crystallized into principle or because on a global analysis, courts appear preoccupied with these underlying factors. The idea that the “reasonable expectations of the parties” – pillar of the Swan casebook – underlie the whole of contract doctrine is one such example; Professor 51 began teaching from Swan and includes this idea and other such “facilitative” policies in the course syllabus.1093

1091 [051], Interview, lines 203-33.
1092 Cf. Friedman, supra note 71 at 20 (“The law of contract is ... roughly coextensive with the free market”).
1093 In the syllabus, Professor 51 provides the following comments meant to “provide [the student] with some very general direction”:

a. Policy Factors

While there are exceptions, many of the principles of contract law are expressed in very general terms and thus appear to be highly indeterminate. It will assist you if you keep in mind the following underlying policy factors:

Contract law ought to:

(i) enforce voluntary obligations that are assumed in a bargain context;
(ii) avoid imposing contractual obligations;
(iii) protect the reasonable expectations of contracting parties;
(iv) protect the reasonable reliance on a promise by another;
(v) avoid imposing unfair surprise (e.g. liability for damages) on a party to a contract; and
(vi) develop (and apply) rules that promote commercial efficiency

([051], Syllabus, 2013-14, p 3).
We see similar searches for the “internal” policies of contract law in the words of other professors. Professor 50 cites Swan directly in describing the driving decisions “below” the doctrine:

I talk a lot about what lies at the heart of Swan’s book, [the] idea that contract law essentially is to fulfill the reasonable expectations of honest people, and the importance of bad faith and good faith, and ... the fulfillment of the intention of the parties ... I talk about the reliance ... there are so many cases where I’m able to indicate to them that the court didn’t say anything about reliance, but there has been such fundamental reliance by the parties, it had to have been some degree of influence.1094

Similarly, Professor 24 invokes reliance as a major theme used to get at the “underlying question of liability,” a formula used to help students “bridge” traditional gaps between conventional private law categories, and within contract law itself.1095 Professor 12 asserts “good faith” as a “fundamental” feature of contract law despite courts’ traditional reticence. In an interview given before the Supreme Court of Canada’s recognition of good faith as an “organizing principle,”1096 Professor 12 says:

[A] large part of my first-year class here is to challenge the idea that good faith in fact isn’t ... fundamental. Good courts say, there’s no good faith in negotiations. Well actually there is because there’s many cases which say, “If I know you’ve made a mistake in your draft, and I don’t tell you about it, I can’t enforce it. If I make an amendment to the draft you sent me and don’t draw it to your attention, I can’t enforce it.” Now you might not call it good faith, but if you look at it, it really is good faith.1097

Professor 13 similarly aims to identify the “conventional contract law policies that underlie a lot of the basic law of contracts” – that “courts themselves” don’t identify. These include “freedom of contract and maximizing personal choice and ... individual liberty, [on the one hand], and ... fairness on the other.”1098

1094 [050], Interview, lines 45, 463-76.
1095 [024], Interview, lines 216-9 (avoiding the idea of contract law as a “hermetically-sealed discipline that doesn’t interact with torts, and property”), 164-72 (“[T]he real question is—is a person liable? Period. Liability I think should be the underlying question”). Professor 24 also seeks to bridge “disciplinary gaps” within contract law, highlighting areas not traditionally covered, such as agency, capacity, restitution, company law, and bailment (ibid at 476-93). This functional search has strong parallels with seminal realist works. See eg. Fuller & Perdue, “Reliance Interest 1”, supra note 209; Gilmore, Death of Contract, supra note 167 (advocating for the study of “Contorts”).
1096 Bhasin v Hrynew, supra note 819.
1097 [012], Interview, lines 326-33.
1098 [013], Interview, lines 265-309.
Taken together, these examples demonstrate how many professors use the idea of the underlying policies of doctrines to better understand what courts are actually doing. There are two distinct intellectual tasks here. One is rendering explicit what is otherwise implicit – showing what is motivating judges, doing what the judges’ words don’t (indicating what the courts “didn’t say” [Professor 50], rejecting “fine semantic distinctions” [Professor 51]). The other task, however, is to show the congruence between these “underlying” policies and the law itself. This goal is to elucidate the “true” content of the law, and in this sense, it considers law and policy as indistinguishable. As Professor [A] writes:

I certainly tell the students that there there’s no real distinction between law and public policy. Law is an exercise in developing, implementing, and applying public policy choices to social activity, commercial activity of various kinds.\footnote{[A], Interview, lines 231-3.}

Accordingly, policy, when used as the underlying interests or factors beneath doctrine, predominantly refers to the range of factors that have been “effectively internalized” by judicial decisions. The fact that many of these factors coincide with realist projects of elucidation – the search for reliance, unconscionability, or good faith as true underlying factors – demonstrates the depth to which realist attitudes have permeated Canadian contract law teaching.\footnote{See Fuller & Perdue, “Reliance Interest 1”, supra note 209; Waddams, “Unconscionability in Contracts”, supra note 728; Swan & Adamski Student Ed, supra note 593 at §8.139 (“It is possible to see expressions of the general concern represented by the concept of good faith in many areas of the law, even though there is no explicit reference to the phrase, ‘good faith’“).}

And yet, this is only one way in which policy can be understood. Policy can also be used to bundle external perspectives that provide standards against which to measure the suitability of existing doctrines. As I explored in Chapter 3 and as I expand upon later, it is this understanding of policy that can at times become marginalized by virtue of its relegation to theory.

2. Policy as External Perspectives

So-called “external” perspectives of law can also be translated into “policy” arguments for use in judicial reasoning. Kennedy and Fisher portray policy as central to their vision of legal reasoning as the methodological sediment of the critical schools:
What should go into reasoning about “policy” – how much ethics, how much empiricism, how much economics? ... Each new method of professional policy argument was proposed – and continues to be taught – as a corrective to common errors and misunderstandings in the ways lawyers typically reason about policy.¹¹⁰¹

In Kennedy and Fisher’s account of American legal thought, these external perspectives have become admitted into the range of acceptable legal argumentation by being framed as policy arguments.¹¹⁰² Accordingly, “each new method of professional policy argument ... has found its way into “the background consciousness of today’s legal professional.”¹¹⁰³

There are, of course, two distinct steps to this characterization. First is the belief that these external perspectives are valuable for understanding law. Second is the idea that they can be operationalized into legal reasoning. The next section explores how, among Canadian contract law professors, the first belief is alive and well. Canadian contract law professors overwhelmingly assert the importance of external perspectives for the purposes of understanding and critiquing law. I detail how professors state this proposition at a general level, and how they explore the specific factors of politics, morality, justice, economics, and social context.

(c) External Perspectives

1. The General Case for an Eclectic Series of External Perspectives

Canadian contract law professors very commonly emphasize the importance of exposing students to external perspectives. Most of the time, they couple this commitment with a catholic attitude. Most Canadian contract law professors, even those whose own scholarly work is firmly situated in one school, tradition, or perspective, emphasize that their own perspective is “irrelevant” and strive to expose students to a range of perspectives. In Chapter 4, we observed how this tendency translates into an instrumental justification of theory. In this subsection, we see how this theoretical eclecticism is valuable for the purpose of externally critiquing law to arrive at a better understanding.

¹¹⁰¹ Kennedy & Fisher, supra note 37 at 4.
¹¹⁰² Ibid at 4:

Which of the arguments laypeople use count as professionally acceptable arguments of ‘policy’ and which do not? Which mark one as naive, an outsider to the professional consensus? What is it about policy argument that makes it seem more professional, more analytical, more persuasive, than talking about ‘mere politics’?

¹¹⁰³ Ibid at 4.
One proponent of law and economics makes the general case for the importance of external perspectives. Making reference to Professor 18’s own intellectual development, Professor 18 argues that any external perspective is important for the “normative reference point” that it provides:

Being exposed in my early 30s to an economic perspective on law was something I definitely remember. [Previously] I [had] thought of law as an internal … discipline … An economic [perspective] … requires one to … justify the legal doctrines by reference to something outside the legal doctrine itself … Without some kind of a normative reference point, I always felt a bit unsatisfied … You have to have some sort of relevant theory as to what the rules or doctrine are trying to achieve … I’m not claiming any special vehemence for economics here but rather for kind of almost any perspective external to the details of the doctrine itself.1104

In an analogous fashion, Professor 57, in expanding on the idea of teaching “critical perspectives,” emphasizes the idea of external “standards of preferability”:

... calling it critical … I’m not trying to sign up to a particular school, … but I would anticipate that students … do some thinking about the normative dimension of what we’re doing, and … why some rules of law [or approaches to law] might be preferable to others, considered against a variety of ways that they might consider one thing preferable ...

I started with preferability because I think that can … open it up to a number of different ranges of approaches … [For example, students may] need to say something about what makes something more or less just … [Or] which rule of law is more economically efficient … [Or] what’s the impact of a particular rule on specific groups within society, versus the impact of another rule on specific groups within society? What’s the impact of one rule on stability of society versus the impact of another law on stability of society? … I don’t try to judge for them which standard of preferability they should use, but to try to get them to think about a few of these.1105

Professors often expose students to a range of perspectives in order to produce a “sophisticated appreciation” of the law.1106 Thus, Professor 47, whose intellectual self-description is both eclectic – “I put [Patrick Atiyah, law and economics, and Charles Fried] in a blender”1107 – and “conservative,”1108

1104 [018], Interview, lines 89-111.
1105 [057], Interview, lines 523-69.
1106 [018], Interview, lines 424-5.
1107 [047], Interview, lines 481-94.
1108 [047], Interview, lines 923-4 (“I’m a conservative person”).
includes all of those perspectives, plus “feminist” perspectives, in order to “challenge” students and render them more “critical.” Professor 2 includes a range of perspectives – law and economics, critical legal studies, feminism, even Marxism, to show that there are “different ways of conceiving and approaching law. None is perfect. There are different ways of viewing it and questioning it.” Professor 58 not only describes the perspectives explored in the course as “eclectic, rather than a single overarching ideology,” but makes these ecumenical words the very first ones the students encounter in the course:

[What is contract?] Facilitator of fruitful exchange, irrelevancy ignored by parties in functioning relationships, or instrument of exploitation? Contract is perhaps all of the above.

Professor 32 canvasses almost the entire waterfront of theoretical perspectives:

[I introduce students] to notions of corrective justice and some of the theories of contract—contract as promise for example, and the notion of relational contracting, the notion of contract law in its … legal pluralist perspective. And then some of the … more doctrinally based theories … about what kind of interest you’re protecting when awarding remedies.

This theoretical eclecticism maps tightly onto the widespread attitude that professors do not aim to proselytize their own favoured perspective. Professors variously state that “my answers to [the question of whether law is autonomous] are irrelevant to the course;” “you can’t tell them what to think or believe, but you can at least show them that they’re acting upon a belief, if only an implied one,

109 [047], Interview, lines 859-66. Elsewhere, by implication, Professor 47 indicates a debt to a “feminist and left-wing” collaborator for having “changed the way I think about contracts … on the law and feminism side” (lines 437-45).

110 [002], Interview, lines 815-49. [Translation from the French original: Law and Economics ... [a] une place. Critical Legal Studies a une place également. Feminism and the Law a une place également. J’essaye de montrer ... aux étudiants que il y a différentes façons de concevoir et d’aborder le droit. Il n’y en a pas un qui parfaite. Il y a différentes façons de le regarder et de se questioner].

111 [058], Syllabus, 2007-08, p 1. The syllabus opens these words preceded by the introduction “Recall that the registration materials described the course in this way.” Thus, even before registering, students were exposed to this eclectic survey of theories about contract law.

112 [032], Interview, lines 236-42.

113 [004], Interview, lines 428-9.
or an implicit one,"1114 "I try to minimize my own opinion;"1115 "Other than being able to ... articulate [and apply] the different ... positions, ... there's no requirement that somebody ... actually change their personal beliefs;"1116 "I hope that they understand different alternatives ... but I know they won't share [my strong views];"1117 "I try to explain to them the various perspectives or views that one might have, rather than declaring [mine] ... you need to allow those students to come to those conclusions themselves;"1118 "I don't try to advocate for one [worldview] or another;"1119 "my objective is never to have the students to think about contract law the way I do."1120 Some emphasize the role of playing “devil’s advocate.”1121

The general and overarching picture, therefore, is of professors who are highly committed to the project of presenting a series of eclectic theoretical perspectives. The purpose of doing so is overwhelmingly to provide external critiques of law and encourage a deeper understanding of contract law in a broader context. Moreover, the use of the external perspectives serves to further the realist rejection of law as a purely internal, self-referential system. Canadian contract law professors very frequently assert that “external” considerations are actually essential to its study. These considerations

1114 [042], Interview, lines 465-7.
1115 [064], Interview, lines 745-6.
1116 [033], Interview, lines 475-8.
1117 [028], Interview, lines 234-7.
1118 [050], Interview, lines 438-43.
1119 [026], Interview, line 678.
1120 [053], Interview, lines 386-7.
1121 [004], Interview, lines 452-4 ("I constantly play devil's advocate. So they say one thing, I say the opposite. They say something completely radically opposed and I’ll say again the opposite"); [002], Interview, lines 522-42 (trying to keep students in a state of “instability” by providing counterarguments constantly) [Translation and paraphrase of the French original:

Je les laisse très souvent sur une situation instable parce que s’ils prennent une approche plus conservatrice, ... je vais moi une approche beaucoup plus pour favoriser le rôle d’intervention des tribunaux. Mais s’ils prennent une approche parce qu’ils croient que je suis interventionniste pis qu’ils veulent dire oui on est d’accord, à ce moment-là je vais avoir une approche qui sera beaucoup plus proche de celle de Trebilcock ou de d’autres de dire non c’est pas le rôle des tribunaux d’intervenir parce que lorsque les tribunaux interviennent ils finissent pas créer une plus grande inégalité entre les parties, ils éliminent une partie ... J’essaye toujours de leurs donner les deux côtés de la médaille pis de les garder dans une certaine position d’instabilité vis-à-vis ma position.]
include politics, morality, justice, economics, social context, race, and gender, as detailed in the next subsection.

2. Specific External Perspectives

2.1 Politics

Many law professors appear to have internalized the message from Critical Legal Studies that “law is politics.”1122 This commitment surfaces in different ways. Frequently law professors make the general claim that law and politics are constituted by one another. We also see instances of professors dissolving the distinction between public and private law,1123 conceiving of law as a battleground between opposing forces of individualism and collectivism (in various formulations),1124 emphasizing the role of power and inequality, and focusing on winners and losers.

2.1.1. Law is Politics

The idea that law “is” politics surfaces in many different ways. Sometimes, professors will use that formulation directly, referencing legal realism, without further elaboration. When this happens, as it does with Professor 31, the lack of description almost passes for a shorthand, reflecting an obvious, taken-for-granted truth:

We talk about, and this comes back to … legal realism, … [how] law is politics, and how laws can be deployed to reinforce the position of the more powerful and how that might change over time.1125

Similarly, Professor 64 explains how the “political” comes up in class:

[B]oth the political and law are constituted by one another … the law does not exist in the absence of a political context, nor does the political context exist in the absence of law … That is the philosophical message of trying to teach ratio as prophecy … you are

1122 Mensch, supra note 259 at 33. See also Kennedy, “Politicizing the Classroom”, supra note 259 at 84.
1123 See eg. Dalton, supra note 247 at 1002.
1124 See Kennedy, “Form and Substance”, supra note 114 at 1712-13, 1723 (altruism/individualism); Feinman, “Critical Approaches to Contract Law”, supra note 262 at 838, 839-44 (individualism/collectivism); Singer, “The Legal Rights Debate”, supra note 265 at 980 (self-regarding/other regarding); Dalton, ibid, n 14
1125 [031], Interview, lines 408-11.
looking through the lens of a legal thinker who is also incorporating ... the socioeconomic and political climate that they're making the decision in.\textsuperscript{1126}

Professor 21 aims to “unpack the political, social, economic value judgments that inform judicial decision-making in the realm of contract law.”\textsuperscript{1127} Professor 21 uses legislative examples to show how judges are in a sense very unimaginative and in fact, unresponsive to changing social market norms in contract law ... [An] example of where the legislative dimension actually is required ... helps break down the idea that contract law is private law ... I actually ... teach contract law as a form of public law. It’s a mechanism by which we regulate market norms.\textsuperscript{1128}

Professor 35 also tries to highlight market regulation and political choices:

I try to get them into thinking about ... basic ... political principles about regulating the market ... 

I do want them to see that the court is making choices ... and that they are making choices—and that their clients are making choices about how we organize market relationships ... 

[In some cases, like unconscionability, good faith, or economic duress,] the courts have said, “Oh, we can’t go here. This is a political choice ... that’s something for the legislature to step in and deal with” ... And I ... try to say to them, “Well, that’s the court making a political choice, in and of itself. It’s not the legislature is political and the court is not ... [M]aking choices about what boundaries they can set on market behaviour is its own political choice” ... 

I say there’s no natural role for the courts ... The courts have chosen to set boundaries for their behaviour and we see places where they’ve come in through the back door.\textsuperscript{1129}

Several other professors similarly emphasize the political role that law plays in regulating the market, reinforcing the idea that the supposedly “private” field of contract law has an important public element. Thus, Professor 27 argues how contract law gets to the core of basic political values:

\textsuperscript{1126} [064], Interview, lines 759-68.
\textsuperscript{1127} [021], Interview, lines 35-7.
\textsuperscript{1128} [021], Interview, lines 42-8.
\textsuperscript{1129} [035], Interview, lines 47-8, 386-407, 418-25.
[C]ontract law is great is because it touches on the central nerve ... about the limits of markets. It’s about what are markets good for ... What do we render unto the market and what don’t we? ... And this just takes you right to the ... core values ... and limits of market ordering as ... a way of running things. Which is ... the large political debate that divides [Ontario Conservative Party Leader] Tim Hudak from ... [Ontario New Democratic Party Leader] Angela Horvath, or [Ontario Premier and Liberal Party Leader Kathleen] Wynne for that matter ... It’s just the basic debate about the markets, which I think is probably the most sensitive and over-political socioeconomic sort of set of choices we face.1130

Other professors similarly describe contract law as a “launching pad to talk about the role of autonomy versus the paternalistic protection of the state ... [and] about the pros and cons of distributive justice in private law,”1131 or the product of “choices [that] involve ... not just precedent, but political preferences [and] economic preferences.”1132 Professor 42, for whom “every burp and hiccup in law is about ethics and politics,”1133 conceives of holding up a mirror to students in class to get them to say, “Now you’re making a choice here. What are the assumptions that you’re bringing to bear? And why did you make that choice?”1134

2.1.2. Law as Battleground of Ideology

Some professors elucidate the political and economic preferences undertaken by judges by portraying law as the product of a universal battle between individualism and collectivism, a longstanding claim of Critical Legal Studies.1135 A number of professors invoke this binary directly. Professor 3 does so in perhaps most explicitly, reproducing at times a “Marxist analysis.”1136 Not only does law manifest decisions on either side of the dichotomy, but the “myth” of law as neutral is itself political:

[Contract law] really is an area where ... fundamental moral dilemmas of living in an organized society are palpable in the law ... Are we these self-interested, rapacious,

1130 [027], Interview, lines 321-35.
1131 [037], Interview, lines 113-5.
1132 [062], Interview, lines 730-33.
1133 [042], Interview, lines 464-5.
1134 [042], Interview, lines 719-21.
1135 See Chapter 2, IV(A), above.
1136 [003], Interview, lines 108-9 (“That’s kind of a Marxist analysis of it but I think it’s correct”).
consuming, unconnected-to-others types of individuals who don’t need society and don’t want [its] constraints … or is our true nature that we are collectively-oriented communal beings? …[L]iberalism versus communitarianism, socialism versus capitalism … free market versus regulated market—all of those … lines of political economic social thought … are so palpably present in contract law …

I try to encourage students to see what I believe is the truth of law, which is it’s a battleground of ideology …

The myth is that that law is this neutral, amoral kind of system that doesn’t reflect ideology, that doesn’t reflect philosophy, that doesn’t reflect any particular politics.

And that myth is itself political because it presents the courts and therefore the state as purely neutral actors, whereas … the predominant tendency of [classical] contract law … is to sustain a capitalist market economy … [I]n order to have a particular kind of capitalism that is unrestrained, … it helps to have a state that says you can do whatever you want …[I]t also helps to legitimate that, to say that that’s not political, that’s just normal, that’s just natural … The view that law is somehow … different from … new types of normativity—political, moral, social, justice, whatever—… serves a very profound political purpose. It serves the interests of capital over those of the environment and of the workers and everybody else.1137

Another professor, who “peppers” the discussion with allusions to Marx, similarly highlights the role of competing ideologies, with specific reference to Critical Legal Studies:

I … teach the course from, broadly speaking, a legal realist slash critical legal studies perspective … [I try to] bring to the surface of the discussion questions about power. Power relations, asymmetries in power, power dynamics, and shifts in power dynamics, and how those have influenced and in turn been influenced by the law … You can tell a very interesting story … of the various power dynamics that have fashioned the law, and in turn been constituted at least partly by the law …

I’m open about my politics …When we get to unconscionability, duress, particularly economic duress, undue influence, [I] drop a bit of Marx into those discussion … in order to show them [how to look] at these cases … as an attempt to socialize the law … I try to get them though to think of themselves as social actors, not simply … as neutral, objective specialists in the law. This doesn’t exist, of course. It’s a fabrication. It’s an abstraction … They’re always already embedded in a whole variety of social relations, some of which are playing out behind their backs and of which I want them to be at least somewhat conscious. Similarly with politics, similarly with political economy, the whole bit—all of this is bundled up into the law.1138


1138 [040], Interview, lines 64-88, 381-422.
Other professors emphasize the role of competing ideologies. Professor 33 describes how the theme of ideology comes up in discussions of reasonableness and commercial efficacy, and how the “notion of neutrality ... is certainly not left unchallenged.” Likewise, Professor 25 emphasizes in interview the tension between the “will of the parties” and “social judgment” as the “big picture” of contract law. Professor 25 also expands on this theme quite extensively in the course syllabus:

Often we forget that on the playing-fields of Contract-dom thrilling ideological interests are in contention ...

The legal correlative of laissez-faire economics is freedom of contract; ie, the source of obligation as the will of the individual contracting freely. Hence is the notion that the proper function of a court (ie, the state, society) is not to make or unmake contracts for parties but passively to enforce contracts that the parties themselves made of their own freely-operating will. Historically this idea of free contract was viewed as wonderfully liberating. Freedom of contract was the mechanism that enabled those born poor to die rich if they were sufficiently shrewd bargainers of their talents. Here again, you see, contract is a sort of antithesis of feudalism, where one was classified at birth (as a noble, a serf, &c) more or less for life. Of course, the idea that untrammeled economic/contractual freedom is infinitely liberating and that all status-based relations will and should give way to contract-based relationships underwent such severe scrutiny in the 20th century (1929, social democracy, feminism, &c) that the grand intellectual edifice of 19th-century contract theory sometimes seems to be falling to ruin. That is the story of this course.

2.1.3. Power and Fairness

In less grandiose terms, the theme of ideological battle sometimes surfaces in professors’ desires to elucidate how power imbalances manifest in the law, or to highlight distributive consequences (winners and losers) of a particular legal rule. Thus, even among professors who may not explicitly self-identify as Marxists or critical legal scholars, the role of politics surfaces.

1139 [033], Interview, lines 311-23.
1140 [025], Interview, lines 105-116:

[T]he big picture relates to ... the tension between the judges who want to say that a contract is the product of the will of the parties and the role of the court is not to make the contract but passively, antiseptically, apolitically to enforce the deal that the parties have made—on the one hand—with the other side of that picture. Which is to say that doctrines of contract law ... is by definition a social judgment ... made by a representative of society who to some extent is reflecting society's values.

For example, Professor 28 includes “power relations” as an important underlying theme of the course, “touching on it” in “almost every topic” in the course – in more legislated topics like family, labour, and consumer contexts, but also in traditional doctrinal areas like consideration. Professor 35 tries to “draw[] to the surface” “the power relationships between people ... and the way socioeconomic resources are distributed.” Professor 7 tries to get students to think about “power and inequality” which “traditional contract law tends to suppress.”

The concern of fairness, distributive justice, or “winners and losers” also arises periodically. Thus, Professor 58 looks at doctrinal rules from the perspective of “design choices,” getting students “to think through who wins or who loses” from choices like the mailbox rule of offer formation, considering it “pretty important” that students “assess the enterprise in terms of justice or its effects ... [by] thinking who was being advantaged or disadvantaged by different things we do.” Professor 45 aims to “shed[] light on ... the role that [contracts] play in ... disadvantaging certain groups.” Professor 32 emphasizes “practical judicial politics,” which relates to “distributive justice” and is “essentially ... about fairness.” Professor 4 asks students to think about “who will be the overpowered? Who will be the losers in this—and the winners?” Professor 26 seeks to emphasize how broader “social values,” “political objectives,” or distributive justice are “encoded” in technical

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1142 [028], Interview, lines 173-209. Other professors specifically use consideration to explore the grand tension between autonomy and social control. See eg. [064], Interview, lines 774-8 (courts in cases of unconscionability do assess the adequacy of consideration); [003], Interview, lines 141-59:

It used to be the case that law and morality were not very separate. And now they’re saying consideration is just anything—something of value in the eye of the law—we’re not going to judge what it is or whether it’s good or what intention was behind it. So right there, it’s the whole story—between talking about a law that is animated by moral concern—concerns about justice, and talking about a law that’s effectively amoral.

1143 [035], Interview, lines 618-21.

1144 [007], Interview, lines 319-21.

1145 [058], Interview, lines 157-9. Cf. Grey, supra note 174 at 3-5 (Holme’s critique of Langdell’s statement that “substantial justice, and the interests of the contracting parties” was an “irrelevant” consideration).

1146 [058], Interview, lines 194-6.

1147 [045], Interview, lines 186-9.

1148 [032], Interview, lines 719-23, 740-44.

1149 [004], Interview, lines 404-6.
rules, and to show how “contract law is full of apparently neutral rules that actually systematically favour one side or another.”

Accordingly, the influence of Critical Legal Studies, and some of its early realist origins, is alive and well in the minds of Canadian contract law professors as they conceptualize and explain the vision of law they attempt to present to their students. Many of them – this section has quoted from twenty professors – dismantle the distinction between law and politics and between public and private law. They view contract law doctrine as a “launching pad” for exploring the battleground of ideologies that constitute human nature. And they insert distributive concerns into the core of the contract law curriculum.

2.2 Morality and Justice

Another longstanding tenet of classical legal thought is the idea, in its strongest form, that law is a separate domain from morality or justice; or, in a more qualified form, that such considerations are relevant “only so far as they are embodied in principles – abstract yet precise norms that [are] consistent with ... other fundamental principles of the system.” Oliver Wendel Holmes Jr attributed the strong form of this idea to Langdell, who famously argued that the “substantial justice, and the interest of the contracting parties” was an “irrelevant” consideration. Holmes attacked this idea with his memorable claim that “The life of the law has not been logic: it has been experience ... The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.” Since then, the extent to which justice or morality should

1150 [026], Interview, lines 1018-19, 887-8.
1151 Ibid, lines 1046-7.
1153 Grey, supra note 174 at 15.
1154 Grey, ibid at 3-5.
1155 Holmes, Review, supra note 180 at 234.
be considered central to, or apart from, law, has featured prominently in legal philosophical debates, with realists like Fuller arguing for their centrality.

A number of Canadian contract law professors assert that either morality or justice ought to be considered central to law – either explicitly or by implication. Professor 55 articulates a strong version of this philosophy:

The rules are meant to be ... the realization of what is ... a just ordering of things ... The rules ought to unfold in that fashion so we should be examining them and criticizing them in that light ...

I understand law very much in moral terms ... It is an attempt to put in place rules that are just and right and advance human good ... We criticize law when it fails in that enterprise, and rightfully so, and it fails all the time, but then, say, “No it’s bad law and ought to be made better to conform better to what ... any one of us might think is right or just.”

Professor 30 articulates an equally strong commitment to morality, but does so in a more autobiographical way, rejecting individualism and instrumentalism as foreign to the way Professor 30 “had been raised and grew up”:

In the world that my mother came from ... she grew up in a village where the emphasis in all relations was not on breaching your engagements [but] ... on observing your relations ... The law as I first encountered it in Canada ... seemed to ... infer and imply an autonomy and an individuality that was foreign to the way in which I had been raised and grew up.

Professor 43, who decries the loss of an “internal sense of decency,” argues:

[Y]ou have to bring your morality to the law internally. There’s no law and morality separation. There’s not a split. I’ve always been massively opposed to that idea.

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1157 See Fuller, ibid.

1158 [055], Interview, lines 319-24, 448-68.

1159 [030], Interview, lines 602-18.

1160 [043], Interview, lines 350, 475-7.
And Professor 3 speaks about “vindicating” students’ instinctive belief in justice as a means of warding against the “dangerous” separation between law and morality:

I have a belief that a lot of people come into law school believing in justice. And part of what I want to do is ... to vindicate that belief rather than destroy it. I want to tell them that they’re actually reflected in the law ... Because law is all about trying to create that detachment ... when people feel they can detach themselves from the moral basis of what they’re doing and create a sensibility that this is a purely technical enterprise, I think that’s a really dangerous place to be.1161

These strong rejections of the separation between law and morality clearly take as a given the longstanding debates in the legal academy. Occasions to insist on the centrality of justice arise periodically as well, although these are somewhat less elaborate. Rather than strongly rejecting the separation between law and justice, the tendency instead is simply to insist on its importance, making a point of saying the word *justice* because it needs to be said.

Thus, Professor 56 wants to ensure that students don’t get “lost in the doctrine,” that conversations are not “eclipsed by the doctrinal discussion,” but rather that the doctrine is “always relate[d] to ... larger themes of ... justice.”1162 Professor 58’s three-page substantive introduction to the course syllabus concludes with the question “Why is the word *justice* uttered so rarely?”1163 Professors also argue more affirmatively for ideas such as “law isn’t just about the rule of law, but it’s also about producing justice across communities,”1164 or “we put a lot of investment into law now as way to provide ... a way that people can live in harmony with one another in a fair and just society.”1165

2.3 Context

The debates in contract law have been caricatured as a disagreement over what judges should be able to consider in adjudicating contract disputes: just the four corners of the contract, or the series of other factors that exist alongside the contract.1166 Much of legal realism sought to show how the

1161 [003], Interview, lines 269-81.
1162 [056], Interview, lines 79-107.
1163 [058], Syllabus, 2007-08, p 3.
1164 [063], Interview, lines 383-4.
1165 [020], Interview, lines 712-4.
1166 See generally Gilmore, *Death of Contract*, supra note 167 at 14-17, 43-44. See also Chapter 2, VI-VII.
other contextual factors – for example judicial preferences and psychology,\textsuperscript{1167} details of the factual record,\textsuperscript{1168} and realities of social and business relations\textsuperscript{1169} – were essential to understanding judicial decisions and the empirical reality of contracting norms. Canadian law professors frequently refer to the importance of context. They do so by invoking specific scholarly writings – the case-in-context studies of legal historians, such as Simpson and Danzig; relational theorists Macaulay and Macneil; Grant Gilmore; Roderick Macdonald – and by offering their own contextualized interpretations of ideas such as the objective theory of contract. And even when they do not make these specific, elaborate references, they refer more casually to the importance of social context, complete facts, everyday life, or the real world, suggesting a thoroughgoing commitment to the idea that the elements “apart” from the text need to be taken into consideration.

2.3.1. Scholarly Influences

Professor 27 provides an elaborate description of the way in which a richly contextual understanding underlies the whole law of contract, invoking the case-in-context studies of Brian Simpson as a “beautiful” example of using context to determine “objective” intention:

The objective theory is a theory about figuring out what you said to me and how I know what you said to me, and in some sense it’s the whole of contract law.

So are you talking to me? Are you talking contract? Are you making me an offer? What are the terms of that offer? Is that really a promise or is that idle sales talk? Is that misrepresentation? What does that mean? Was that a promise? What kind of promise? ... That’s what contract law is ... It doesn’t matter what you subjectively think you’re saying to me, it’s how I as a reasonable [person would understand what you are saying] ... What is a reasonable [person?] It’s not a fly on the wall, it’s not some judge sitting on a bench, it’s not some ... composite of ... people on the Clapham Omnibus. It is rather you, in this context.

So it deeply depends on who you are, when it comes to you making claims about how I understood what the other person was saying ... It’s deeply contextualized ... This is why Brian Simpson’s articles about contract law are so beautiful ... To arrive “ex peerless” — what does that mean? Well, it turns out it’s really difficult to find out what it means. You have to go back and learn a lot about the cotton trade, and Liverpool, and technology, and mercantile practice and it turns out that was a highly technical meaning, and when

\textsuperscript{1167} See eg. Frank, \textit{supra} note 6.

\textsuperscript{1168} Simpson, “Quackery”, \textit{supra} note 467; Simpson, “Beauty”, \textit{supra} note 467.

they said “ex peerless” they actually were saying something about the timing of the
arrival of the cotton—and that actually was a term. So, people ... a hundred years later
saying, “Oh, that’s this—stupid judges! They thought the name of the ship was
important—how stupid can they get?” ... It turns out, if you do the work, and you
contextualize it, it actually was.\textsuperscript{1170}

Professor 17 likewise uses case-in-context studies\textsuperscript{1171} to “generate critical distance” from, and
“historicize the uptake” of, rules.\textsuperscript{1172} For Professor 25, teaching historically is “my version of legal
realism,” teaching “trends in the cases” to point out to students how “law is contingent.”\textsuperscript{1173} Professor
28 specifically says that “the law doesn’t matter so much ... [what matters is] context and how ... the
rules ... are used,” reprising themes of case-in-context studies without citing them.\textsuperscript{1174}

Professor 42, who describes Brian Simpson as a “mentor,” uses case-in-context studies to
counteract the “pathological” presentation of relationships in case law. These studies can emphasize the
“little legal systems” created by the parties, in an approach that bridges historical studies, sociolegal
perspectives, and legal pluralism:

The case law [is misleading because it ] describes pathological relationships ... Our socio-
legal friends tell us that that’s something like one or two percent of commercial time, so
what kind of lens or telescope or vantage point is this, really? The difficulty is that you
can’t go on field trips inside of law firms to watch the constitution of contracts, the
formation of contracts, in action ... The risk is that you end up viewing a mode of social
ordering contract through unrepresentative lenses of it.

We have a growing literature ... courtesy of scholars who have attempted to do case-in-
context studies of particular contract cases. My own mentor Brian Simpson ... has done

\textsuperscript{1170} [027], Interview, lines 850-99.
\textsuperscript{1171} Professor 17 refers to Danzig, \textit{Hadley, supra} note 880 ([017], Interview, line 117). Professor 51 also uses both
the Danzig study on \textit{Hadley (ibid)} and the Simpson study on \textit{Raffles v Wichelhaus (supra note 467)} to deepen the
understanding of the context of those cases (Interview, lines 302-23).
\textsuperscript{1172} [017], Interview, lines 449-58, 624-31.
\textsuperscript{1173} [025], Interview, lines 518-30.
\textsuperscript{1174} [028], Interview, lines 111-29. Earlier in the interview, Professor 28 says:

I think the main message that I’m trying to convey is that what is written ... isn’t the full picture.
And by going and sitting in on trials and looking at the reasons afterwards, you can see how it
does not reflect what happened in the courtroom. But often you don’t have that possibility. So
... everything has to be read in context. And [that includes] understanding the judge, where the
judge is coming from, understanding the case, where the case is coming from—understanding
the time when it emerged (\textit{ibid}, lines 48-56).
several of those ... They’re not plentiful, but you can work through them. Moreover, if you select judgments ... on the basis of what they tell you about the parties’ relationship, and how they set out creating this little legal system for themselves ... you can do some of that too.

... Contract doctrine ... doesn’t tell you anything about the content of those legal systems because that’s the blank slate that the state provides facilitatively ... That’s the exercise you’ve got to get your hands on. The haggling, the bargaining back and forth, the mediation, the negotiation ... You’ve got to march back through time and start asking, “Well, how did they really perform?” ... Either there’s no text or there are multiple texts of words and conduct. But the key point is that the doctrinal part ... only tells you about the parameters for constitution-making by the parties themselves.1175

Professor 36 similarly connects legal realism and the influence of Stewart Macaulay to a pluralist focus on “mini customary environments” in describing intellectual influences on teaching the Contract Law course:

[My teaching of Contract Law] was very much influenced by people like ... Rod Macdonald, and others, and therefore [there] was a strong emphasis in the course on legal realism, on informal contractual relations ... The primary subtext ... was the ways in which contractual relationships operate as a mini-customary environments in which the formal dimensions of the contract are just one element in a much larger normative set ...

If you were asking ... “How do you think you can prepare your students best for legal practice in a contractual setting?” I would say, “Well, read Stewart Macaulay over and over and over again ... these people very much shaped my approach to the teaching of contract law.1176

Similarly, Professor 37, who concludes the course every year with a reading of Macneil’s “Whither Contracts,”1177 says:

The course on Contracts allows us to explore how ... we govern complex personal relationships. And ... that’s what law’s all about. If you read Fuller and ... Macdonald, ... at the base of it, the basic nature of ... law is human interaction. What better example of human interaction than contracts?1178

1175 [042], Interview, lines 106-46, 106-46, 394-433.
1176 [036], Interview, lines 37-42, 236-44.
1177 [037], Interview, lines 365-6 (referring to Macneil, “Whither Contracts”, supra note 464.
1178 [037], Interview, lines 107-112.
Professor 62, who also credits Gilmore as a major influence, is also “predisposed to like most of Lon Fuller’s ideas, because of Rod Macdonald’s influence on my thinking.”

A number of professors acknowledge or reveal an intellectual debt to Ian Macneil and his theories of relationalism. Professor 12 “admired” Macneil’s ideas about relational contracts “early on” and teaches the course as if contractual relations are “more important practical and economic terms” than discrete transactions; Professor 44, a former colleague and “good friend” of Ian Macneil, considers both Macneil and Macaulay as influences, particularly with respect to “ongoing relations.” Professor 30 supplements readings with “Macneil and other relational scholars” to counteract the focus on individualism and efficient breach. Professor 32’s syllabus opens with an emphasis on themes of contractual relations and invites students to “be mindful of [contracts’] commercial or social context – in other words, how contract functions in everyday life.”

For these scholars, the granular context of “mini-customary environments” disturbs the formalist focus on propositions derived from case law. Understanding contract law becomes a search for the empirical reality of social or business relations, an activity that can be aided by historical research.

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1179 [062], Interview, lines 122-3, 255-6 (“this is all derivative of Grant Gilmore, who in my mind was a genius when it came to contract law”).

1180 [012], Interview, lines 1024-6, 1004-1007.

1181 [044], Interview, lines 103-31.

1182 [030], Interview, lines 205-14.

1183 [032], Syllabus, 2013-14, p 1:

Contracts may present themselves in the form of written agreements drafted by lawyers (though neither writing nor lawyers are necessary). How relevant are commercial and industry practices to interpreting those written artefacts? What about in cases of long term “relational” contracting where unwritten practices develop organically beyond the written memorial of the agreement; how relevant are those practices? …

[W]e should ... be aware that a case/litigation-centric approach is pathological. By looking at cases where something has gone wrong with a business or other relationship, we may lose sight of the role contract plays (or does not play) in the vast majority of transactions. We may also lose sight of the way contracts are actually drafted by solicitors and others on a daily basis, using standard forms or building ambiguity into the text in order to facilitate agreement and flexibility ...

Accordingly, when reading contracts cases in the abstract, we must be mindful of their commercial or social context – in other words, how contract functions in everyday life. This is sometimes called a “socio-legal” approach.
While these professors develop this attitude with specific reference to realist and pluralist scholars – Fuller, Gilmore, Macneil, Macaulay, Simpson, Danzig, Macdonald – a number of other professors display a commitment to the importance of context and empirical reality and, implicitly, about the importance of non-state normativity, in less explicit ways. References to the importance of everyday life and the “real world” communicates a similar commitment to idea of incorporating context.

2.3.2. Everyday Life and the “Real World”

Professors frequently mention how important it is that what they teach accords with everyday life, or the “real world.” These claims rely, however implicitly, on the ideas that context outside of legal doctrine, and indeed entire normative systems outside the state, are essential to a complete understanding of contract law. Thus, while many of these professors may not specifically invoke the scholarly case-in-context studies, or studies that directly connect everyday life to legal pluralism, the widely occurring tendency to seek everyday and real-world examples further disrupts a positivist and formalist emphasis on doctrinal law.

This tendency takes a number of forms. Sometimes, professors state that they want to incorporate everyday examples in order to connect with students and to show them how their own lives, experiences, and understandings are relevant to contract law (and vice versa). We see this in the frequent attempts to provide everyday examples of contracting, such as buying a cup of coffee, exercise bicycle, or a computer program, or the desire to choose examples that will specifically relate to students. Often, these examples only implicitly suggest how students’ own understandings generate

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1185 See eg. [008], Interview, lines 605-12:

And increasingly as you go through the months, the students start coming into class and asking, “Well, what about in this situation?” And it’s clear that they’re talking about a personal issue that they have with a landlord or an exercise bike that they bought, or whatever it is ... And that’s great—that means they realize that this is not just something abstract or theoretical that they learn about in law school—but something you deal with every day.

See also [041], Interview, line 181-206 (using a deposit for a hotel room and credit card transactions to exemplify the frequency of “contracts” in everyday life); [016], Interview, lines 38-9 (getting students to “think about ... lots of the informal ... contracts that they enter in and out of every single day”).

1186 See eg. [009], Interview, lines 129-45, 164-8, 748-53 (bringing in a statement of claim regarding a Marilyn Manson contract); [010], Interview, lines 231-37 (replacing “Sandra Bullock” for “Bette Davis” [the subject of Warner Bros, supra note 883] because students “don’t know who Bette Davis is”).
contextual and normative information that is relevant to understanding contract law. But sometimes, professors are more explicit. Professor 51’s course syllabus states, in its Introduction, that “in most cases the parties are oblivious to law and act in response to other interests or norms.” Professor 1 specifically aims to “valorize” the intuitions that students bring from their own lives prior to law school, and Professor 62 offers a theoretical connection between law and life, citing again the influence of Roderick Macdonald: “Law is play and therefore is life … that active interpretive constitutive practice in many ways is play, and … one of the best ways to do legal pedagogy, is to do play.”

Other times, professors will make reference to the “practical” reality, often meaning the pragmatic business or strategic considerations of legal practice. Sometimes, professors do this by providing examples from their own practice, as when Professor 39 “thinks back to practice” to come up with relatable examples that convey information about strategy. Other times, they connect the idea of context to a claim about the “reality” of commercial activity. Professor 12, who believes that casebooks should “tell a story” and give “context to” cases, and who wants to expose “students to real life contracts,” aims primarily to “situate doctrine … in the real world.” Professor 13 argues that a

\[\text{References}\]

1187 [051], Syllabus, 2016-17, p 2.
1188 [001], Interview, lines 410-27:

Students have both an *a priori* knowledge of contract law, but also a knowledge that is not so much *a priori* as it is empirical, drawn from their own experience outside of the faculty … I think you need to use these prior understandings to open up the classroom to them [and] valorize intuition. Intuition interests me a lot; we already know many things about the law of contracts before opening up a book on the subject [Translation from the French original: On a une connaissance a priori du contrat et pis on a aussi une préconception, une conception préalable qui n’est pas a priori cette fois-ci, mais qui est empirique, qui vient de notre expérience en dehors de la faculté. … [J]e crois … qu’il faut l’utiliser en fait, ouvrir la salle de classe à ça, et c’est-à-dire valoriser l’intuition, c’est un truc ça qui m’intéresse beaucoup l’intuition, on sait déjà, en fait, beaucoup de choses sur le droit des contrats avant d’avoir ouvert un livre de droit des contrats].

1189 [062], Interview, lines 550-53.
1190 [039], Interview, lines 766-94:

I can think back … and an experience might pop into my head [from] … when I first started practicing or articling, or ended up in small claims … [S]mall claims are great for [teaching] Contract Law because there’s so many very funny … scenarios … Swimming pool liners … Concrete that’s dried improperly. And a lot of times, people actually have had those experiences … I’ll actually stop what I’m doing and then just say, “Okay, let’s think of something … I definitely will bring in … my experiences … in practice, … trying to figure out, “Okay—how do you actually deal with this particular issue and deal with the client?”

1191 [012], Interview, lines 220-24, 871-3.
drafter “need[s] to take into account the ... interchange between [the] client and the other person with whom it interacts in the marketplace to figure out how ... to ensure that [the] provisions will prevail.”

Professor 11 emphasizes to students that in a “practical” or “business” context, contracts go “smoothly” “most of the time.” And Professor 43 directly connects the idea of context to the task of understanding client needs. In all these ways, teaching about “context” not only moves the subject of study beyond the reported facts and legal analysis contained in judicial reasons for decision, it elucidates the normative relevance of everyday experiences, commercial reality, and social relations.

2.4 Law and Economics, Feminism, and Race

Whereas many professors provide detailed and committed accounts of the importance of law-and-society scholarship, Critical Legal Studies, and legal pluralism, when it comes to some other seminal schools of thought, such as Law and Economics and “identity politics,” the treatment is somewhat more attenuated. While most professors do include these schools, they usually do so as part of a grab bag of “alternative perspectives,” without demonstrating a deeply developed intellectual commitment to the ideas. There are a few exceptions, but these tend to prove the rule that in Canada, contract law professors consider law and economics, feminism, and race, to be important perspectives to include, but generally not significant enough to frame the central logic of their course. Unlike the role of politics, policy, or context, it is more frequent to see economics, feminism, and race grouped together in a series of perspectives, sprinkled throughout the course, or deployed selectively to canvass argumentative techniques – but, as will be discussed in Part II, without the requisite rigour to consider these perspectives truly “operationalized” into legal reasoning.

1192 [013], Interview, lines 388-94.

1193 [011], Interview, lines 94-117 (“if you just read cases, they might get the impression that contract disputes happen all the time ... most of the time this goes very smoothly. So that’s part of what I mean about the context”).

1194 [043], Interview, 1288-1319:

They have to understand context ... The biggest problem ... [is] the way we impart legal knowledge ... without context ... The law firms [are] saying, ‘We need people who understand our clients, and our clients businesses. We don’t need people who just know the law. We need them ... to have that context ... side to things’ ... We have difficulty doing it, because we’re so focused on [abstract doctrinal rules] ... We don’t teach it with a narrative.

1195 Kennedy & Fisher, supra note 37 categorize the emergence of “eclecticism” in American legal thought according in the following chapters: Policy and Economics; The Law and Society Movement; Critical Legal Studies; Identity Politics.
2.4.1. Law and Economics

Most Canadian law professors include some degree of law and economics in their course. However, those who enthusiastically commit to the field are in the minority – only about ten do so, and among these, only two self-identify as “law-and-economics scholars.” Approximately eleven professors demonstrate specific commitments to certain law and economics ideas, albeit with less conviction. Some professors do not expand greatly on the ideas themselves, but include them among

1196 Many professors emphasize the utility of law-and-economics concepts, even when they opt not to use the label “law and economics” for fear of turning students away. See eg. [023], Interview, at lines 69-73 (“I don't talk about it in that language, usually because as soon as I say “law and economics” people get anxious … I try to stay away from terminology and just talk about economic forces”); [047], Interview, lines 119-49:

law and economics is a strong interest of mine … I ... encourage students to raise what they might not [consider to be] economic arguments [and demonstrate how they are] ...You can tell students [that an example about expectation interests] involves law and economics, but that's a horrible way of teaching it. To teach it, you really want to tease out of them [the interests] and then you address it in economic language ... It's usually a common-sense question which is reflected in economic doctrine.

Others simply acknowledge the compelling nature of the ideas. See eg. [048], Interview, lines 337-9 (“law and economics changed at least my thinking about the law of contracts and those kinds of issues that I tried to introduce into class”); [053] (“I'm very interested in it”); [057], Interview, lines 129-32 (the “economic emphasis would almost communicate best to the students right when they first come in”); [032], Interview, lines 662-89 (employing concepts of risk-bearing and restraint of trade); [051], Interview, lines 272-311 (emphasizing efficient breach, risk allocation, and transaction costs). Yet others simply state confidently that they teach whatever law and economics comes up in the casebook ([044], Interview, lines 724-5).

1197 [018], Interview, lines 45-6 (“my general orientation or perspective on law is a bit of a law and economics scholar”); [061], lines 23-7 (“I teach very much in a law and economics kind of way ... Contracts ... is one of the natural go tos for [a] law and economics scholar”).

1198 Some professors argue how law-and-economics concepts are helpful in some instances but not in others. See eg. [026], Interview, lines 1106-1111 (“I think law-and-economics analysis of contract formation is really helpful ... In what areas is it efficient to impose contractual liability and not? But, ... and this is counterintuitive to a lot of people, I feel like the law-and-economics literature has not been so helpful in remedies”); [029], Interview, lines 355-60 (“If I find there’s an opportunity to talk about law and economics—thinking about the expectancy rule or conflict in the measure of damages ... — I will seize upon it ... though [while] the law of efficiency [may be] a plausible explanation for a particular rule, [I] warn them that, in my view at least, it's not an explanation for every rule”); [059], Interview, lines 715-23 (“I highlight for students ... what the law-and-economics perspective would say about this ... I do talk to them ... quite a bit about contract law as a ... risk allocation vehicle, ... which is implicitly ... law and economics ... But I also think law and economics is ... in itself, is too limited a perspective”);

[038], Interview, lines 651-5 (“So it’s not that I would dismiss altogether law-and-economics analysis as ... irrelevant because I think they can provide a series of useful insights if you’re seeking efficiency ... [M]y point is just that there are certain cases in which there are other goals that [we] need to be concerned with”). Some specifically mention that they do not include it as much as they otherwise might. See eg. [038], Interview, lines 408-409 (“I don’t emphasize this as strongly. Of course ... there is an economics dimension to contracts—that’s inescapable. But ... efficient breach ... [when I studied it in the US], was like two classes. I do mention to my students that there is this idea, but then ... I criticize it a little bit so they have a sense of the fact that it’s an academic debate”). Some simply refer to the minimal way they include it without further commentary. See eg. [005], Interview, lines 122-3 (focusing on the “economic reasons that underlie the law of contracts”); [008], Interview, line 500 (bringing law
a series of perspectives that they aim to include, along with others such as feminism, race, and “critical” perspectives. Ten professors (nine of whom are otherwise realists) either do not include it or are hostile towards it. This variegated embrace of law and economics differs markedly from the American situation, in which law and economics plays a much more dominant role. Indeed, even among the strongest acolytes in my study, no professor expressed a sentiment similar to the idea that it would be almost impossible to teach contract law without law and economics, or as one US contract law teacher expressed to me, that “there are a number of lessons of law and economics ... that have become [so] completely hard-wired into the modern understanding of contract law [such that] if you didn’t

and economics “occasionally into the syllabus”); [009], Interview, lines 431-43 (incorporating “a little bit” of law and economics). One professor would like to include more, but feels inadequately prepared to do so. See [056], Interview, lines 703-708 (“from my perspective, the one thing that I’m not doing enough ... is law and economics ... [I]t’s because I’m really not good at it. I don’t have any ideological bias against it, as some people do at [my institution]”).

1199 See generally Chapter 5, (II)(A)(ii)(c)(1), above. See [002], Interview, lines 817-21; [004], Interview, lines 28-29 (“[I ask] realist [questions] every now and then, economics questions, feminist questions—whatever”); [007], Interview, lines 277-81 (“different theories of law, whether the economic analysis, feminist theories of law, ... critical theories, ... other kinds of liberal theories ... social policy”); [021], Interview, lines 60-62 (“we run through an introduction to law and economics, to feminism, to critical legal studies and critical race theory as ... value systems that might inform contract law”); [031], Interview, lines 51-2, 190-98; [033], Interview, lines 363-7, 614-7; [045], Interview, lines 54-7; [052], Interview, lines 144-7; [053], Interview, lines 686-8.

1200 Reticence about law and economics ranges from the mild to the severe. See eg. [011], Interview, lines 365-6 (“it doesn’t explicitly play a role. It’s not my approach to law”); [017], Interview, lines 1185-7 (“I do mention it ... [but] my own [understanding] is pretty limited so I don’t really get into it that much”); [050], Interview, lines 453-4 (“it does not [appear] ... I’ve never felt very comfortable in having a full and complete understanding of economics”); [036], Interview, lines 50-52 (“it’s almost invisible”); [066], Interview, lines 624-9 (“I study [law and economics] but ... we don’t [in the course] ... I find it interesting, but it’s also seems a bit dated too”); [025], Interview, line 439 (“I don’t see the world as a legal economist sees the world”); [019], Interview, lines 472-4 (“Sometimes economic theories work their way in but I find them in most cases very unpersuasive so I don’t ... teach them explicitly”); [030], Interview, lines 454-5 (referring to the “artificiality of ... [an] efficiency-driven law and economics perspective”); [040], Interview, lines 280-82 (“law and economics was not something I was sympathetic to ... Seeing a contract as ... being about transaction costs and information asymmetries made no sense to me”); [055], Interview, lines 427-39 (“law and economics as kind of a normative account of moral decisions is ... fundamentally mistaken ... As soon as you try to make the move from ... using economic concepts to measure ... [to using] it as either a moral theory or a utilitarian kind of moral theory as a substitute for a moral theory, then it’s just ... wrong. You’re just mistaken about ... what is valuable and what is right”); [012], Interview, lines 462-4 (“Basically I think that law and economics is a dead end. Better we never had gone down that [road] because quite frankly, its ability to be useful is almost nil”). Of the foregoing, only Professor 19 leans more formalist than realist; thus the rejection is not a rejection of the realist and critical perspectives generally but rather of law and economics per se.

1201 See eg. Stephen, supra note 355.
understand those lessons you’d be disserving your students.”1202 Indicative of the distance between Canada and the US on this point, one Canadian professor distinguishes Canada by implication, “mentioning [in class that] law and economics [is] ... a dominant structure in the American education of contract law.”1203

2.4.2. Feminism and Race

Feminism came up in at least a third of the interviews I conducted. At least twenty-three professors volunteered the idea that they seek to incorporate themes of feminism into the course. But as with law and economics, most of the time, professors simply mentioned feminism along with a series of other perspectives, usually critical legal studies and economics. Fifteen professors listed feminist, gender, or “women’s” issues in this way, without significantly expanding on the ways in which they sought to incorporate them.1204 This cursory mention does not necessarily imply that these professors treated feminist issues cursorily in the course, but it does suggest that most professors did not consider feminist issues to be significantly central to their approach as to expand upon them in depth, as they did with the themes of contingency, indeterminacy, policy, politics, and context. About five professors gave slightly more expanded examples,1205 and two professors provided quite lengthy discussions about the role of feminism.1206 Of these, one approach was particularly emphatic.1207 The overall impression is that

1202 Interview with Douglas Baird (11 April 2013) at 29:20-29:32 (attributed with permission). Baird is a former President of the American Law and Economics Association.

1203 [020], Interview, lines 421-3.

1204 [021], Interview, lines 60-62, 290-91 (“I’ve taken on board feminism, I’ve taken on board critical disability theory, critical race theory”); [002], Interview, lines 815-25; [004], Interview, lines 27-29 (“economics questions, feminist questions, whatever”), 590-2; [007], Interview, lines 267-9; [013], Interview, lines 642-5; [016], Interview, lines 572-7; [018], Interview, lines 78-82; [028], Interview, lines 490-2; [032], Interview, lines 244-46 (“a brief run at times of the feminist critique of contract, ... a racialized perspective on contract and so on”); [033], Interview, lines 364-7; [044], Interview, lines 714-25; [045], Interview, lines 56-7, 601-17; [053], Interview, lines 686-8; [063], Interview, lines 684-91.

1205 [047], Interview, lines 207-12 (“And the other one I love doing that is the Balfour and Balfour case [Balfour v Balfour, [1919] 2 KB 571 (CA)] and the position of women in contracts ... I put up a 1972 Australian textbook by Sutton whose chapter is ‘The Drunk and the Insane and Married Women’ all in one chapter, ‘and contract capacity’”); [051], Interview, lines 291-3 (undue influence and spousal guarantee cases); [010], Interview, lines 62-6 (man standing in place of wife for a loan transaction); [033], Interview, lines 352-7 (invoking Ayres’ study on discrimination in car sales, supra note 789); [059], Interview, lines 213-33 (critiquing Lord Denning’s judgments on domestic agreements); [048], Interview, lines 63-74 (referring to Ayres, ibid and to Mary Jo Frug’s feminist critique of contract law casebooks, supra note 797); [065], Interview, lines 305-308 (women coming back into the work force and engaging with an employer).

1206 These are Professors 17 and 9. Professor 9 is discussed in the next footnote. Professor 17 says:
feminism is widely considered an important perspective to expose students to, but only occasionally does this appear to correspond with an agenda of advocating for greater equality. Even firm proponents of including feminism specifically say things like “It’s not my job to make you feminists.”  

The situation with race is even more cursory and sporadic. Race is occasionally mentioned as part of a list of critical perspectives, and a few professors discuss Ian Ayres’ study of discrimination in car sales. One difference between law and economics, on the one hand, and feminism and race, on the other, is that no professor claims to be hostile to critical race or feminist theoretical projects.  

[Bertha Wilson] went around doing tons of work and not getting any acknowledgement … I brought that in and one of the students actually came up to me and said, “I’m so glad that you’re bringing up an issue of women in the profession” … It’s the type of thing that … you don’t have to bring up when you teach Vorvis [supra note 939] and Fidler [supra note 881] by any means but … you’re in first year with them [and] you’re responsible for sensitizing them to a whole range of issues … You’re going to be entering a profession that has this long history of gender inequality and sexism and racism … Today I taught them a case called Jackson and Horizon Holidays [Jackson v Horizon Holidays Ltd, [1975] 1 WLR 1468, [1975] 3 All ER 92 (CA)] … Denning is … talking about the food—how horrible it is—he’s calling Sri Lanka “Ceylon” even though it’s clearly after independence … it’s just … got so much chauvinism … and you’ve got these cases where … [there is a] patriarch … I call it the “patriarch’s privilege” (Interview, lines 189-200, 205-18).  

1207 Professor 9 says:  

I teach feminism in contracts expressly … Christine Boyle had done some feminist work on Balfour and Balfour and written a very, very good article on it—gives it a feminist critique … I teach … feminisms … It is a very successful lecture—actually two lectures … Then I also look at other authors in the area of feminisms and feminist critiques of law … Balfour and Balfour … [is] the best example [of] … a strong argument for a misogynist rule that really excludes women from the courtroom when they’re trying to enforce a “domestic contract”—in quotation marks … Let’s take feminism because probably there are some people that are opposed to feminism. And being a feminist is a political state. Now I talk about what I say feminism is—I have kids—I have a daughter who’s twenty-eight and a son who’s twenty-five—and my son was saying, when you say you’re a feminist for … his age group and that’s the age group of many people that I teach—what you’re really saying is, “Women should be more equal—more equal than men.” That’s what in his age group he says a lot of people [think] feminism is. So I’m like, “Well that’s not what I think feminism is.” So I talk about what I think it is. But ultimately I’ll say, “It’s not my job to make you feminists” (Interview, lines 177-200, 630-39).  


1209 See supra note 1187.  

1210 Occasionally, however, professors will indicate a slight disagreement or distancing. See eg. [040], Interview, lines 299-304 (“I actually try to tell them throughout, ‘Well look, you know, a feminist would actually look at this case in this way, and a law-and-economics scholar would look at it in this way.’ And then I’d say, 'Well, they’re
However, while all three theories do play a role in the teaching of contract law, none holds the centre of gravity that some of the other realist themes do.

The importance of these schools therefore appears to lie less in the normative reference points they typically offer (efficiency, equality), or in their particular methodological or critical techniques (cost-benefit analysis, deconstruction). Rather, they primarily serve as items on a shopping list of possible “critical” perspectives that might assist students in developing a range of argumentative techniques. In other words, the largely cursory ways in which these specific schools are invoked only serves to confirm the preference for a general eclecticism, outlined above. Moreover, while the occasional professor specifically designs pedagogy to translate these eclectic perspectives into diverse argumentation, the overall impression is that most professors do not rigorously mine these schools for their methodological and argumentative possibilities. Judging by the way professors describe how they use these schools, the impression is closer to that of a loose and casual invocation than it is to a tight and technical one.

iii. Summary: Realism at Different Speeds

This last observation anticipates the argument in Part III, where I detail how most professors fail to fully “operationalize” their theoretical and critical commitments into legal reasoning. I will not expand on it at this point, but will rather provide a brief overview of the terrain thus covered.

Legal Realism is alive and well in the minds of Canadian contract law teachers. The majority of professors I met enthusiastically described how they strive to highlight the indeterminacy and contingency of law; that underlying factors, such as policy, politics, and context, play an essential role in understanding contract law; that so-called “external” virtues of morality and justice are legitimate ends for law to pursue, and legitimate standards against which to evaluate law; and that economic, feminist,
and race-based analysis and critique are important – at the very least, for enabling students to develop a range of different argument-types.

Professors articulate these commitments with detailed reference to the scholarship of realist authors and their heirs; this scholarship not only directly influences their beliefs, they cite it to explain their commitments, and recount how they assign and teach these authors in their classes. American authors predominate, highlighting the influence of the American legal academy, but some British authors (e.g., Atiyah) and some Canadians (e.g., Macdonald) surface as well. The views are thus well-informed, well-referenced, and well-digested; professors intertwine references to the literature with their personal convictions.

I have detailed these genuine commitments at length for at least two reasons. First, these professors’ words concretize the catch-all phrase “realism,” providing specificity to the generic label I use to roughly categorize their theoretical leanings. Second, the detail provides ample evidence for the claim that legal realist perspectives form a core feature of Canadian contract law professors’ attitudes about law.

This claim is also important to keep in mind for the rest of this chapter, the bulk of which aims to qualify, attenuate, or even undermine this apparent consensus commitment. We will see, in the next section, how a series of apparently contradictory attitudes about law play an important role in Canadian legal academics’ legal consciousness. There are champions of formalism, and there are instances where the realists canvassed here reveal formalist attitudes. In the Part that follows the next section (Part III), I deepen the claim that formalism is more central than it first appears. There, I explore how legal reasoning, the ways in which attitudes about law are “operationalized,” leans much more to the formalist than to the realist. Part IV reinforces the centrality of formalism by detailing ways in which attitudes about law are translated through pedagogical choices. The emphatic and detailed account of realist attitudes in this section is most of all important to serve as a constant reminder that the realist convictions are genuine, however complicated the picture is about to become.

B. Formalist Views About (Contract) Law

Professors who resist or reject the lessons of realism are certainly in the minority, but those who do, do so with eloquence and commitment. While “formalism,” like realism, may capture a range of
possible meanings, I use it here to group together those professors who emphasize the importance of doctrinal law, a sense that law is an autonomous discipline with a truly distinctive form of reasoning, and the virtues of coherence or unity, including aesthetic appeal. A major theme is how all of these virtues give legitimacy to law and support the rule-of-law principle of equal treatment under law.

I begin by detailing the views of the seven “champions” of formalism. Then, I return to many of the “realist” professors canvassed in the previous section to demonstrate how in some of their turns of phrase and offhand comments, they reveal commitments about law, however implicitly, that have affinity with this formalism.

i. The Champions of Formalism: Rehabilitating Law

For some, the skeptical approach of realism, that seeks to look to underlying factors for judicial decisions, undermines the legitimacy of law by portraying it as arbitrary. These professors view their role as “rehabilitating” law by focusing on the distinctive reasoning that makes the legal discipline autonomous and that ensures that everyone is treated equally under the law. The “negative” attack on realism goes hand in hand with a more “positive” reconstruction of the importance of Law. Tightly connected to these claims is the assertion that “law” and “politics” are distinct.

Approximately seven professors articulate some version of this rule-of-law justification for law as an autonomous discipline. I call the professors in this subsection “champions” of formalism because they are the few who put into words the reasons why they believe in law’s autonomy. As the following subsection aims to show, there is good reason to believe that these views about law play a role even among the realists canvassed above. These champions say explicitly what many other professors appear to believe implicitly. A careful look at how the champions describe their commitments about law thus serves as an important reference point for the rest of the dissertation, providing a more rich and textured presentation of views for which the label “formalist” will serve as shorthand.

Among the formalists, the champion of champions is Professor 19, who details at length a series of formalist commitments about law. Consider, in the following extended passage, how an attack on legal realism connects to the goal of “rehabilitating” law in service of the rule-of-law virtue of equal treatment; how a distinctive and autonomous idea of legal reasoning is the main bulwark against the

1215 See supra notes 1046-1048 and accompanying text.
dangers of arbitrariness; and how the aspiration to rehabilitate law depends on the clean distinction between “law” and “politics,” “juris” and “prudence”:

I find a lot of my course [is] defending the common law from claims it’s ridiculous ... I think it’s important that ... when the law comes and takes something from [someone] that they think it’s being taken for a good reason. When I threaten to throw you in jail, or I threaten to seize your house and sell it, I think that people would want to know well, there’s a good reason ... and it’s not arbitrary ...

Part of the rule of law is treating like cases alike—and so, if we’re not treating like cases alike, we’re not just breaking the rule of law—we’re just arbitrarily taking somebody’s house in situation X and not taking somebody’s house in situation Y, to satisfy a judgment when it’s totally arbitrary or ridiculous ... It’s very important that the law tries to make sense. As Ernie Weinrib would say, [law] tries to show itself working itself pure ... It’s trying to show you there’s ... some coherent undertaking that’s involved and we are trying to treat like cases alike and if they don’t appear to be alike, then either they’re wrong, or perhaps you don’t understand they’re alike in a particular way that you can’t realize because you’re not a lawyer yet ...

[I challenge legal realism because] any theory that says you have to understand something by assuming everybody’s lying to you all the time ... is probably not a good theory of anything ... That’s basically what legal realism is. Judges aren’t telling you the truth all the time. And I don’t think it’s true, because I’ve worked for judges as a clerk and ... I don’t think they were lying to me, or lying to the people all the time in their judgments ...

[O]ne other academic once called me ... “The Great Rehabilitator” in the sense that ... there’s these areas of law ... [that] everybody said didn’t make any sense or wouldn’t possibly make sense—that I almost always could try to give you some reason why it might not be as dire as you thought it was before ... Judges aren’t just sitting there ... flipping coins or doing things which are ridiculous. They actually have some reason why they’re doing these things ...

As one professor ... actually said, “There’s too much prudence and not enough juris.” So there’s too much policy and not enough law—not enough attempting to understand the law ... I think there’s too much prudence and not enough juris, and so I try to give my students a little bit of juris because I assume everyone else is giving them the prudence part ...

That’s the heart of law ... If it’s all prudence, why don’t we just be part of the politics faculty, or economics faculty? Is there not some type of particular knowledge that’s distinctive to law? That’s the juris part. If we’re not doing that, then we don’t need law school. Then we’re just applied mathematicians or applied social scientists, or applied economists, or applied political philosophers or applied politicians. Then we’re nothing if we don’t have a legal method. And unfortunately that seems to be happening in the United States—they’ve given up ...
In some ways I feel ... that I’m trying to rehabilitate and understand the law—that was around at one point in time that ... people have lost focus of ... If you ... show a student today what [a judge] said in 1920, they just won’t understand it. They’ll think of it as code for something else. Everything that they read, even if it’s framed in terms of juris, will be understood in terms of prudence. And that’s an effect ... of legal realism and the effect of economic analysis, the effect of policy analysis, the effect of laziness, or lack of instruction [in] juris [that] has led to this self-fulfilling prophecy.

If you start off with a casebook ... that says, “Look at this case. Isn’t this ridiculous? ... We don’t need to know [what previous cases said] because it’s just all preference and policy.” And those kind of people then get to be law professors and write books that say, “Oh look, isn’t that ridiculous” ... And then those people get taught, and those people then become judges, and you have sort of a negative reference loop ... And somebody has to try to break that ...

I have this hope .. that if ... we emphasize the juris, those same people then will go on to write textbooks, they’ll be appointed judges, and then we’ll ... have a positive reference loop rather than a negative one.1216

Moreover, Professor 19 specifically attributes this distinction between law and politics as a reason for “enjoy[ing]” teaching the course:

I enjoy teaching Contracts [because] ...it’s ... based ... on a 1930s or ‘40s consensus ... that there is a distinction between politics and law. That somebody who [is the] Lord Chancellor [could consider it] entirely appropriate ... to be in cabinet one day, and to come decide contracts the other day ... They asked him, “How can you do that?” and he said, “Because I knew they were two different things. When I’m Lord Chancellor sitting in the Executive, I’m doing politics, and then when I’m deciding a contracts case, I come over here and I do law.”1217

Professor 20 provides a similarly developed defense of certain formalist ideas, though of a somewhat different variety. Like Professor 19, Professor 20 takes the content of doctrinal rules seriously, is “dismissive” of critical perspectives, which “withdraw legitimacy from law,” and believes that law is a distinct discipline from politics. Unlike Professor 19, however, Professor 20 is skeptical of models that aspire to unity, in the way that Professor 19 interprets Weinrib’s corrective justice account to do.1218 Nevertheless, Professor 20 still aims to construct a model – a “cathedral edifice” for a “secular

1216 [019], Interview, lines 724-813, 188-209, 585-645, 724-813.
1217 Ibid, lines, 966-79.
1218 [020], Interview, lines 340-81 (contract law doctrine is important because it is a “building block” for other courses), 478-83 (“I don’t accept the ... corrective justice perspective. I think corrective justice ... provides some
world” — that provides a “fair normative structure,” incorporates ethics and morality, provides for certainty, and leads to a more “fair and just society.” Law, as a distinct discipline, is a “legitimate” means to do this, and taking contract doctrine seriously aids in working toward such a model. Professor 20 says:

I’m dismissive of critical perspectives in the sense that … after demolishing the cathedral, I don’t actually see what’s being put back in …

I think a lot of what … critical perspectives were doing were basically demolishing things, … withdrawing legitimacy from law and from judgment … It was just power and … society is nothing more than just raw power … You go back to that play—A Man For All Seasons—once you’ve cut down all the trees, and the winds blow through, who’s going to help you then? …

At the end of the day, it’s a … sort of cathedral edifice that we’re building … We want the certainty of the rule in its application because people can make determinations on that … There’s a large part of … contract doctrine which is sort of apolitical, amoral … in that sense it does … satiate the desires of many students who think that all law is a matter of … learning rules … [although] I do point out that that is perhaps a flawed understanding of all contract law, as it is a flawed understanding of all law …

There is something in law which is inherently different from other disciplines … There is a certain ethics and morality to it, that the public expects to see that in law … [In a secular world, these are … rules to guide conduct and normative behaviour. And that’s not just a question of … who’s going to win. It is different than politics …

Can we come to a better model that will reconcile more normative behaviour? … I hope that we will … Law is a worthwhile investment in doing that … You can’t travel around Europe without seeing the influence of religion, in these magnificent cathedrals and edifices and churches. You think … what was a society that was able to organize so much of people’s behaviour or action around building these marvelous edifices … Well, … we abandoned that, and … rightly so—we put a greater investment in political processes

_illumination_ but I … see in the law … so many practices of distributive justice that [I can’t accept] … the categorical perspective of corrective and distributive justice”), 692-4 (“It’s when the person building the model espouses that this is the only model and [that] … it explains all conduct that I think they fall astray.”)

Professor 20 invokes relational scholars to show how the model is flawed, but nevertheless uses the commercial model as the main framing for the course:

I take comfort that contract law is perhaps not like tort law or constitutional law in that in essence the contract law, the building blocks that are being built in a contract law course [are based on cases between] commercial entities … I do point out that model of contract law that we’re engaged in building is … perhaps something of a flawed model in the sense that the vast majority of contracts that people enter into don’t follow the particular model—the model is geared up for what in essence you know, commercial use of parties (Interview, lines 607-16).
and we find those political processes wanting, we put a lot of investment into law now as way to provide ... a way that people can live in harmony with one another in a fair and just society ...

At the moment we still sense that people have free will and ... that there’s a notion of responsibility for one’s actions and so we have to structure a world that’s fair and law seems to be a legitimate avenue [to do that] ... Can we create a model that will provide a ... more fair normative structure? ... I wish I could, but I know I can’t. But I don’t think Duncan Kennedy can either. I don’t think Ernie [Weinrib’s] model is the way to go either.1220

Professor 19 and 20 appear to agree that the judicial formulation of rules is something to be taken seriously in bolstering the law’s legitimacy. The rules themselves are important because they provide both the stable, secure footing on which parties can plan their behaviour and the constant, universal guides to normative conduct that apply to everyone equally (and thus further the rule of law). The judicial formulation is important because it demonstrates the distinctive type of legal reasoning that justifies differential treatment when it occurs. Where they differ is in the purity of a possible model to describe how rules fit together. For Professor 19, a “unity” of private law is possible, and Weinrib’s account is persuasive. Professor 20, on the other hand, thinks no one model can describe all of contract (or private) law, and that unity is therefore elusive. This difference, for present purposes, may be considered largely a difference in degree. Professor 20 considers it worthwhile to seek a more general account of discrete elements – this is what “building a model,” analytically, does. The purer “coherence” of Weinrib’s formalism and Professor 20’s aspiration to find a model for “normative guides to conduct” are different versions of a similar desire to construct law as a “cathedral:” a solid edifice, legitimate source of authority and power.

The importance of rules and the aspiration for coherence or structure are thus hallmarks of the formalist. Alongside the notion of a distinct “legal reasoning” – subject of Part III of this chapter– they contribute to the idea that law is a distinct discipline, apart from policy or politics, and source of its own legitimacy. The next two subsections highlight how other champions of formalism express these ideas, along with related attacks on legal realism.

ii. The Importance of Rules

A number of professors resist the realist idea that rules are nothing but “pretty playthings.” They do so both negatively – attacking skepticism – and positively – articulating why rules are important. For example, Professor 15 says:

I’m a believer in the rules … You don’t hear it as often as you used to, but in the 70s and 80s people were basically saying, “The rules are just a sham.” That is, really they are just after-the-fact rationalizations for a decision arrived at along non-legal logical grounds. And yeah, okay—there’s some truth to that. But when you look at the way cases are actually decided, the constructs matter! ... You can’t just treat them like Silly Putty and ... push them into any shape. They do guide thinking ...

It’s not a totally unpredictable ... crapshoot ... depending on the judge you happen to encounter. You can make predictions about how a particular case is going to be decided ... I think it is doing the students a disservice by overemphasizing the manipulability of the rules. They are manipulable, and ... fitting an abstract label onto real life ... is a very creative process. But it’s not a totally random process ... A proper understanding of law ... does require a respect for the power of the concepts. With all of their limitations, they matter.1222

As with Professors 19 and 20, some invoke the importance of doctrine specifically in relation to the rule of law. As Professor 56 says:

I ... try to make them understand ... what the lofty idea of the rule of law can be broken down to. You know, that there’s actually a point in doing this ... There is a path dependency that makes doctrine develop in sometimes curious ways and that it mushrooms and then you have to invent counter-doctrines to make it work again. But that this is all ... born out of the idea that ... like cases should be decided alike, and ... that judicial arbitrariness should [be] bridled somehow, and ... that it’s the rule of law, not of men.1223

An extension, perhaps, of the idea that the rules matter is the idea – explored immediately below – that it matters how (and that) the rules fit together.

1221 Llewellyn, Bramble Bush, supra note 6 quoted in Schauer, supra note 3 at 131.
1222 [015], Interview, lines 283-315.
1223 [056], Interview, lines 394-409.
iii. Coherence, Logic, Structure

A number of professors believe that there is a coherence, “inner logic,” or “structure” to the law of contract. Some of these, in addition, articulate why this inner logic is a virtue, and why it is important for students to discover it. Professor 46, for example, “think[s] that there is a coherence to contract law,” and is skeptical about attempts to foreground ideology in assessing judicial reasoning. Like Professors 19 and 20, Professor 46 asserts that the stated rationales for rules are important and suggests that doctrinal explanations should precede critique. In critiquing the Ben-Ishai & Percy casebook, Professor 46 invokes the importance of coherence and structure, and the dangers of presenting law as absurd:

[Ben-Ishai and] Percy ... spent more time presenting the feminist approaches to law or ... various race theory or whatever other Marxist critique ... in a context that I thought made the critiques look more powerful than they are ... [and] made the mainstream theory look like it was more irrational and more absurd.¹²²⁴

I guess I have a prejudice because [although] ... contracts law was developed by men ... to address business needs initially, ... because it’s applied neutrally to both parties ... in general it [has] developed some rules that ... are somewhat fair ... I think that that there is a coherence to contract law that is helpful for the students to be able to see, meanwhile being able to imagine how the law could be reformed in particular areas ... [Students should] understand why the principles evolved as they did. Then they can more intelligently criticize them ... [T]hey need to at least understand coherence in the sense of why it might originally have been thought fair to have [a] rule of consideration or a rule of privity et cetera, and then move to ... challenge those doctrines as perhaps not always meeting goals of fairness or the parties’ expectations. I think the one comes before the other. It’s almost like ... it makes some sense to understand Newtonian physics as a context for understanding the small number of cases where Newtonian rules don’t apply and Relativity does ... You need both ... the original theory and the revolutionary theory.¹²²⁵

Like Professor 19, Professor 46’s experience in having been a law clerk has produced a skepticism for ideological critiques of judicial reasoning:

I can’t recall a single time when there’s been any substantial discussion [in my Contract Law course] based on an ideological critique of a particular set of principles ... That

¹²²⁴ Elsewhere in the interview, Professor 46 says, “I got the impression from the Percy book that some must be actively trying to show how the law is an ass in certain areas” (lines 637-8).

¹²²⁵ [046], Interview, lines 171-92.
might be informed in part by the fact that I used to clerk for [a high-ranking Canadian judge], and ... I'm not particularly persuaded that ... their judgments were clouded by some deep ideological biases, whether the judges were women or men.\textsuperscript{1226}

And, while Professors 46 is not “trying to get [students] to see a structure that’s as clear as a Napoleonic Code,” structure is still very important:

I’m trying to help them see what at least is the ostensible rational structure of contract law, while recognizing that there are areas of ambiguity and areas that need clarification ... I would like them to be able to look at it and ... at least understand the structure the judges see when they think of contract law ... The vast bulk of my time is spent trying to help the students understand what the courts have said and be able to play with the principles the courts have set out, to basically see how these different rules interact.\textsuperscript{1227}

Professor 4 similarly is interested in a “rational structure” of contract law, but inclines somewhat more towards a unitary conception. For Professor 4, there is one “central logic” that “animates the various rules of contract law” – the “equality of the two parties” – and the main pedagogical goal is to “connect various rules together through the set of underlying principles.”\textsuperscript{1228}

Similar to the other professors canvassed in this section, understanding this inner logic is important in order to assure order in the law and ward off arbitrariness:

Only concepts and principles ... will be able to put some order in the law. Otherwise, ... it looks like it’s just arbitrary and all over the place ... When you see [two cases on consideration that] look exactly the same but [yield] the opposite conclusion, ... [if] you go back to the initial concept, you can account for the different decisions ... You can see why it is that it was “Yes” in one case and “No” in the other ... Maybe it’s an act of reconstruction.\textsuperscript{1229}

\textsuperscript{1226} [046], Interview, lines 527-94.

\textsuperscript{1227} [046], Interview, lines 607-28. Professor 15 utters a very similar sentiment: “[I’m] trying to get [students] to understand the conceptual structure ... [and] give them a decent respect for the value of concepts” (Interview, lines 217-18).

\textsuperscript{1228} [004], Interview, lines 49-56, 38-9.

\textsuperscript{1229} [004], Interview, lines 254-264.
For Professor 4, not only does “reconcil[ing] the principles together ... improve on the consistency of the law,”\textsuperscript{1230} it is an activity that Professor 4 finds aesthetically and intellectually gratifying. Taking the doctrine seriously is thus a double virtue:

I just think [contract law is] beautiful—it’s aesthetically pleasing ... It works together. Maybe it’s one of the areas of law that is most responsive to this structure, ... the constant return to central principles ... I’ve been teaching this for twenty years now and every year I re-read the cases from beginning to end. And every year I change my interpretation of the cases. I refine them. There’s new things I understand that I didn’t understand before ... Fortunately I have to say it’s going in the right direction because ... these principles that I think are central do more and more work for me as the years go by ... Every year ... I have a new layer of understanding ... and that’s nice.\textsuperscript{1231}

Other professors characterize the virtues of structure differently. Professor 22 emphasizes the intellectual task of “classification” – it is “basic to knowledge” and “fundamental” to legal reasoning, which largely consists of the task of seeing “how certain cases are alike and other cases are unalike.” But unlike Professor 4, who uses the central “logic” of equality of the parties to reconcile principles, Professor 22 seeks to show how law is “animated” by “moral ideas”; law is “intimately tied to morality, so it makes sense to classify the law in terms of ... moral things.”\textsuperscript{1232} Despite differences, both are ultimately concerned with organizing doctrine along rational and structured grounds that are intrinsic to law. Professor 59, in briefer terms, speaks similarly about a “passion” for building a “framework of understanding” that seeks to show how doctrine at various levels of generality “fits together.”\textsuperscript{1233}

\textsuperscript{1230} [004], Interview, line 299.
\textsuperscript{1231} [004], Interview, lines 342-64.
\textsuperscript{1232} [022], Interview, lines 126-57, 65:

I happen to think that working out what’s alike and what’s different is the fundamental thing you’re doing in legal reasoning. It’s not the only thing you’re doing, but it’s ... maybe the most fundamental thing to see how certain cases are alike and other cases are unalike ... That’s what we’re always trying to work out ... Classification is kind of basic to knowledge—and so learning to distinguish between different kinds of rules, different bases of rules, is more or less what learning is ... when you’re talking about anything. But learning about rules [is] learning to classify between them. If you’re talking about rulings or factual scenarios, that classification is more or less basic to knowledge—in any field, but including law.

\textsuperscript{1233} [059], Interview, lines 155-65, 494-99, 680-1:

As a student I still remember ... that in Contracts ... I ... understood the little pieces of it, but I just really never understood how it worked together—what the ... logic of contract doctrine was ... And that goes back to ... [the] way I categorize the doctrine. I always really try to give students a sense of ... what’s the pathway of analysis? How does this fit together? ... Where is this case
Similarly, Professor 8 seeks to show how “contract always tells the same consistent story ... The beauty of contracts ... is that it ought to tell a coherent story.” On a more macro scale, Professor 8 strives to remediate legal education’s “failure” to present law as a “series of snapshots” by developing a “taxonomy” of private law. The virtues of a taxonomic approach sound very similar to those of doctrinal coherence articulated by the professors quoted above:

Peter Burke had an idea of legal taxonomy—the idea that you can’t understand the natural world unless you have a taxonomy. You have the platypus—you have to do something with it—it can’t just be an outlier. And his idea was that you can do the same with law ... It’s not just a mass of miscellaneous and disparate instances where we have rules, that it all makes sense—that you can categorize these things and it makes the individual subjects more accessible because you can understand where they are and how they relate to other subjects.

The commitments expressed by the seven champions of formalism quoted in this section exert a powerful counterforce to ideas expressed by the much more numerous realists. Their convictions are seemingly equally, if not more, deeply held, and they have the added strength coalescing into a more consistent message. Doctrine is something to be taken seriously in order to establish and uphold law’s distinctiveness and, ultimately, its legitimacy. Specific rules are important both for their content – reflecting principles or moral ideas – and for the method illuminated by their judicial formulation: the distinctively legal “reasoning” of determining “like” from “unalike” cases. This reasoning skill forms one basis for the “rule of law” – the idea that everyone is treated equally by the law, and that any differential treatment is arrived at rationally. This requirement of “rationality” in turn explains why rules are important not only in the particular but in the aggregate: A big-picture look at how rules fit together helps identify the central logic or structure – derived entirely internally from judicial reasons – that is the relevant? Where is that case relevant? How do things fit? ...Understanding that overall structure is of primary importance in the way that I teach ...

We’re building a framework and filling in the blanks of the framework, not just as that high-level generality that they started with, but ... by addressing the elements and sub-elements within each part of the doctrine ...

I have a real passion ... [for] this ... framework of understanding thing.

1234 [008], Interview, lines 185-97.
1235 [008], Interview, lines 574-5.
1236 [008], Interview, lines 143-151 [underlining added].
foundation for rationality and differential treatment. Thus, rules, legal reasoning, and coherence all support the rule of law; the rule of law is a pre-eminent social good (it ensures a “fair and just society,” in the words of Professor 20), and is the moral basis for calls for law’s distinctiveness as a discipline.

Juxtaposing the ideas canvassed thus far presents a rather dichotomous view of the ideas underpinning Canadian contract law professors’ attitudes about law. There are the few champions of formalism and the many who resist formalism’s tenets. Such a construct aligns with other accounts of legal thought, as when Kennedy and Fisher describe legal realism as a “wholesale assault on the jurisprudence of forms, concepts, and rules”\textsuperscript{1237} in classical legal thought, or in Grant Gilmore’s account of the Williston-Corbin divide in contract law.\textsuperscript{1238} Indeed, as ideal-types, the ideas expressed by the “realists” and “formalists” (as I have labeled them in this study) fit comfortably on opposing poles. However, as this Chapter is about to show, this crystalline presentation is only a first-level picture of Canadian contract law professors’ attitudes. It is (to evoke Professor 46) akin to the Newtonian model of physics: a basic initial model necessary to understand a subsequently more complex and accurate one (Relativity). That complexity unfolds over the next subsection and subsequent Parts. Returning to some “realists’” words, we hear the echoes of the champions of formalism. In off-hand expressions and references, we see how the importance of forms, concepts, and rules permeates the realists’ understandings of law: some realists take doctrine seriously, reveal a commitment to law’s distinctiveness, and occasionally reinforce the importance of structure.

iv. The Realists as Formalists

a. Law: A Substantive, Positivist Content

A number of the professors characterized as realists imply, in their throw-away comments, the importance of the solidity of rules. Often, they do so by referring to the importance of information that must be “delivered,” or through an unproblematized reference to law as if that term connotes defined, substantive content. We see this even from those who speak elsewhere of the need to disabuse students about the determinacy of law.

Thus, Professor 52, who wants students to be “free thinkers” and not “adhere blindly to doctrinal dogma,” who likes it when students are “disabused” of the idea that law is a “a static, verifiably
\textsuperscript{1237} Supra note 41 at 10.
\textsuperscript{1238} Gilmore, Death of Contract, supra note 167 at 42-63.
correct or incorrect thing," designs the “overall structure of the exam ... to create maximum coverage of the content.” Frequently, Professor 52 uses the verb “deliver” to describe both Professor 52’s role and that of the law school in general. Professor 52 includes the idea of not accepting prevailing contract law “dogmatically” in the course objectives of the syllabus, but it appears at the very end of a half-page-long section that lists a series of detailed doctrinal concepts of which the student is encouraged to develop a “sound” and “solid” understanding.

Similarly, Professor 31, quoted above as trying to avoid the idea that law can be treated as “data that go into a statistical calculation and you come up with the answer,” and who tries to make the point that “rules are tools,” nevertheless appears preoccupied with the idea that the “content” of law, and its accuracy, matter. Professor 31 emphasizes the importance of “correct” answers on exams, and prepares for class largely by “updating” cases and legislation with the concern not to give students “bad information.” Professor 54, who states that the “reality is that [law] is indeterminate, and [that students must] become comfortable with uncertainty,” discloses a preference for the idea of “core” substance in discussing the curriculum:

the real advantage at [my school] is that it has a focus on the bread and butter first ... the students are actually getting a fabulous black letter doctrinal experience and education ...

if you’re going to be a lawyer or have a law degree, I think you need to have ... been introduced to some of the foundational core zones of law and have some sense of the doctrine in all of these areas.

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1239 [052], Interview, lines 165, 143-5, 31-33.
1240 Ibid, lines 268-9
1241 Ibid, Interview, lines 296-7 (“the way I deliver a particular case or get into a particular discussion”); 338-9 (“[where I studied contract law] was delivered in much the same way as we deliver contract law here”).
1242 [052], Syllabus, 2016-16, p 2.
1243 [031], Interview, lines 217-18, 224.
1245 Ibid, lines 446-51.
1246 [054], Interview, lines 733-4.
Thus, the claims about law’s indeterminacy co-exist with the perhaps more foundational idea that doctrinal substantive knowledge is a key requirement of being a lawyer. That implicit commitment might also be revealed in the way Professor 54 describes preparing for class: “I familiarize myself with the material and I have my lecture notes and I go in and I just deliver.”

This focus on the importance of substantive doctrine appears among others. Professor 28, who highlights context in part to show that “that the law doesn’t matter so much,” lists substantive knowledge first in discussing course objectives (“I want them to know the rules”). Professor 30, who emphasizes the importance of Macneil and relational contracts, conveys an apparently disparate concern with substantive doctrine and systemization by making “extensive use of the Canadian Encyclopedic Digest because I find that’s most like the Restatement, in terms of a kind of clear exposition of what the law is.” For Professor 57, “a basic expectation, if someone says they have a law degree, [is that they] should be able to identify what the law is.” Related to this idea of “fixed” notions of law is the appeal that there is a “proper structure” to thinking about law, or that rules may fit together neatly like a “puzzle.”

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1249 [028], Interview, lines 111-12.
1250 Ibid, lines 159-68:
I expect them to know like ten basic overshadowing concepts—and then all the subs of that ... I want them to know those rules. And then I want them to have an understanding of how they’re applied, how they’re not applied – the limits of those rules. And then some underlying themes that never seem to go away in contract law. Like, power relations, the role of morality or lack of morality, this concept of rational actor, or ... behavioural economics—those are the ones I tend to push at.
1251 [030], Interview, lines 202-212.
1252 Ibid, lines 547-49.
1253 [057], Interview, lines 510-12. See also [039], Interview, lines 609-10 (“I don’t [want] loosey goosey answers ... I want them to learn the law”); [006], Interview, lines 308-309 (“In first year you have to learn how to read the law and understand the law”), 815 (doctrine “actually is the law ... understanding or using case law or statutes [is] ... the fundamental capacity and skill of the lawyer”); [041], Interview, lines 823-5 (“I do short answers, which are basically what I call ‘brain dumps.’ ‘Tell me everything you know about this doctrine’”), [041], Syllabus, 2015-16 (title is “The Law of Contracts” [emphasis added], learning the “fundamental principles and rules of the law of contracts” is the first learning objective); [056], Interview, line 269 (there’s “just so much law you have to teach them”).
1254 See eg. [037], Interview, lines 211-14 (“there’s not one way of thinking about law ... There are proper organizing principles and there’s [a] proper structure to the way you think about law, but there really is no one structure of reality”); [062], Interview, lines 47-54:
The point of highlighting these examples is not to imply that a realist concern with underlying factors is inconsistent with a concern for precision or accuracy, but rather to show that these professors emphasize precision and accuracy about law in a way that reveals a commitment to the importance of rules. This treatment stands somewhat at odds with their statements elsewhere that other factors (context, policy, relationships, etc.) are more important. Notwithstanding their critical and realist commitments that disaggregate, complicate, and render contextual the place of law in society and law’s relationship to justice, many use the word “law” as if it is an uncomplicated source of definitive information and normativity.

b. Law as Distinct from Policy and Politics

Closely related to the solidity of doctrinal rules is the notion that law is a distinctive type of discourse, separate from policy or politics. Even among those who express realist attitudes, “law” is treated not only as denoting a core substance, but a distinctive way of reasoning that yields a distinctive authority. Some professors, while considering additional factors important for generating legal results, or for evaluating or critiquing law, nevertheless assert law’s distinctiveness in a way that echoes the formalist champions. Consider some of the explicit ways in which professors articulate this idea, first with respect to policy:

[R:] Do you think there’s a … useful distinction between law and policy?

[Professor 6:] Oh there … certainly should be. One should keep clear that there is a difference … To teach more policy would be to give up teaching some of the law. [In first year] there’s a lacking in understanding [and] ability and facility with law. I don’t think [emphasizing policy is] appropriate.1255

The course … came together as a whole for me … when I was a first-year student … it really clicked together for me around March—kind of like the way Chemistry clicked together for me when I was a first year undergrad. I was in a fog for most of the year, and then all of a sudden I could see the whole picture, could hold it all in my head at once … And that was enormously satisfying intellectually … The almost puzzle nature of it.

1255 [006], Interview, lines 600-610.
[Professor 30:] The question of policy has to be distinguished from questions of law. So law is what’s binding. Policy is everything that, in my view, is done as a matter of practice.1256

In these comments, however indeterminate or contextual law may be, “law” is nevertheless its own discipline, its own domain.1257

With respect to politics, we see a similar divide. Consider Professor 30’s attitude:

Politics and law are closely related but they’re absolutely distinct … My goal is to make sure that students are absolutely clear in how those things are distinct.1258

Professor 54 asserts that “zero” politics appears in the contracts course, as opposed to “policy,” which has a place. Professor 54’s distinction recalls the idea, expressed above in subsection II(A)(ii)(b)(2) of this chapter, that “policy” has both an “internal” and “external” understanding. Asked whether politics enters the classroom, Professor 54 responds:

I would say just about zero, really, in Contract Law … One of the enjoyable things about teaching [Contract Law,] frankly, is that students have almost no understanding or preformed views about the subject matter at all when they come in … I doubt they’ve ever thought about the doctrine of frustration. Nobody’s ever thought about mistake of law … [or] consideration or promissory estoppel … Most of this stuff is pretty apolitical … The policy choice that runs through … every sub-area of contract law is really this conflict … between certainty and flexibility … We see that tension lots in contracts … but I don’t know that that’s really a political question.1259

1256 [030], Interview, lines 335-8.
1257 Cf. [064], Interview, lines 759-68. While portraying a complicated relationship between law and politics, Professor 64 nevertheless demonstrates a commitment to law’s distinctiveness by using the term “non-legal aspects”:

Both the political and law are constituted by one another, but also independent … [T]he law does not exist in the absence of a political context, nor does the political context exist in the absence of law … The philosophical message of trying to teach ratio as prophecy [is] that you are looking through the lens of a legal thinker who is also incorporating non-legal aspects, whether those are the facts, or the socioeconomic and political climate that they’re making the decision in [emphasis added].

1258 [053], Interview, lines 526-8.
1259 [054], Interview, lines 472-97.
In this response, not only do “internal” policy considerations of certainty and flexibility pre-empt any political considerations, but the answer presupposes the importance of doctrinal categories. The considerations proper to law eclipse external considerations. This is from the professor who insists that the “reality is that law is indeterminate.”\footnote{1260Ibid, lines 733-4.} In an analogous way, Professor 11, who says that “law is political” in the sense that it’s “developed by people”\footnote{1261[011], Interview, lines 381-4.} – evoking the realist idea that the contract law elides the public/private divide – nevertheless reinforces this divide in the course syllabus.\footnote{1262[011], Syllabus, 2014-15, p 1 (“Along with Torts, Contracts serves to introduce you to the field of law known as ‘private law’ or the private law of obligations, which generally governs legal obligations between individuals, in contrast with ‘public law’, which generally deals with the relationship between individuals and the state”).}

The next Part of this chapter shows how such articulations are not mere slips of the tongue but rather a window into the prevalent tendency of most Canadian law professors to consider legal reasoning to be a distinctive mode of reasoning, in which rules stand as fixed data points and the analytical task of determining relevance predominates. The realist or critical expressions about law somehow fade into the background when these professors describe what it means to reason or argue like a lawyer.

III. Formalist and Realist Attitudes About Law as Reflected in Understandings of Legal Reasoning

In this section, we depart the staging ground of attitudes about law and proceed to the operating theatre of legal reasoning – or at least, how law professors describe legal reasoning. Legal reasoning includes the set of thinking skills that professors aim to inculcate in their students in order, to use the hackneyed phrase, to “think like lawyers.” Whereas in Part II, the bulk of explicit attitudes about law tended to de-centre doctrinal rules, by considering them indeterminate, contingent, or less relevant than external considerations of policy, politics, and context, the overwhelming impression of how professors describe legal reasoning tends much more to the formalist emphasis on doctrine, structure, and the related rule-of-law concern with formal equal treatment.

These messages exist at different levels of generality. Most generally, there is the overarching claim that there is a distinctive “legal” reasoning. Most professors take this idea seriously and disclose a
preference for a “strong” type of distinctiveness that invokes law as an autonomous discipline.\textsuperscript{1263} No professor directly said to me any serious version of the idea that “legal reasoning is ordinary reasoning applied to legal problems,”\textsuperscript{1264} and the small minority of professors who question the “legal” in “legal reasoning” do not seem to do so in order to attack the notion of a distinctively legal epistemology.\textsuperscript{1265} This alone indicates a commitment to law’s autonomy in a way that would be amenable to the formalist champions but is a bit more at odds with the widespread realist idea that politics, policy, and law are intertwined. Thus while professors’ ontological claims about the nature of law may portray law as mutually constitutive with other domains and disciplines, epistemological claims about the nature of legal knowledge (i.e., the reasoning that derives from and generates legal knowledge) treat law as very much distinct.

The way that professors describe legal reasoning as functioning also reinforces this separation between law, on the one hand, and policy, politics, or context, on the other. A main structural feature of legal reasoning that emerges from professors’ accounts is the ability to discern the “relevant” from the “irrelevant” – which facts are relevant to legal analysis, which rules of law are relevant to hypothetical fact scenarios, which judicial words are relevant to determining a rule of law. This preoccupation with relevance reinforces a sense of otherness between law and its surrounding context in a manner consistent with the formalist claims about law’s autonomy.

A core skill emerging from this preoccupation with relevance is the ability to make reasonable distinctions between similar fact scenarios – to “distinguish and analogize” cases. This core skill not only embodies the structural preoccupation with relevance, it directly supports the rule-of-law aspiration that everyone be treated equally under the law. This skill is the formalist’s bulwark against arbitrariness, as Professor 19 so eloquently described above. Distinguishing and analogizing also has the effect of emphasizing the importance of discrete doctrinal rules. The importance of rules and an attendant concern with structure thus round off the formalist commitments embodied by the vast majority of professors’ accounts of legal reasoning. As observed in the contract law casebooks, the overwhelming

\textsuperscript{1263} See supra notes 3 and 5 for a discussion of “strong” forms of distinctiveness and the relationship to formalism and law’s autonomy.

\textsuperscript{1264} Alexander & Sherwin, supra note 6 at 3.

\textsuperscript{1265} See Chapter 5, section III(B)(i), below.
impression is that contract law professors do not conceive legal reasoning as the operationalization of their realist and critical theoretical ideas about law.

The first section (A) details this main story, bringing in quotations from professors whose conceptions of law range from the highly critical, to the mildly realist, to the avowedly formalist. These distinctions among the professors for the most part collapse when examining attitudes about legal reasoning. The second section (B) illustrates the minority accounts of legal reasoning that do appear to translate or operationalize realist and critical attitudes about law. This second section demonstrates how such a realist methodology is possible but is also, at least for now, empirically in the minority.

A. Formalist Methodology: Mainstream Legal Reasoning in Canadian Contract Law Teaching

i. A New Language: Legal Reasoning’s Distinctiveness

It is reasonably common for professors to make the general claim that legal reasoning really is a distinctive type of reasoning. Some professors specifically distinguish legal reasoning from other methods of reasoning, which they implicitly criticize as unrigorous, casual, or merely common sense. These other methods are sometimes explicitly labeled as “policy reasoning,” reflecting Mertz’s finding about the marginalization of policy reasoning in the US context; other times, professors simply criticize incoming students’ tendency to label outcomes as “unfair.” Other professors, while not necessarily making comparisons with other modes of reasoning, emphasize the notion of legal reasoning as a lingua franca for the legal profession; they want to equip students with a “new language.” The status of law’s distinctive reasoning is, furthermore, enhanced when professors assert that “critique” is subordinate to legal reasoning as taught through the case method.

a. Legal Reasoning as Distinct from Other Reasoning

A number of professors almost echo each other in their common tendency to assert that their role is to teach students that the formulation “that’s not fair” is not a legal argument. Professor 6 provides a good example of this tendency:

\[\text{Supra note 26 at 75-77.}\]
The type of critique ... that they engage in is very unsophisticated, like, “That’s not fair!” ... That’s not a legal argument so we’ve got to ... recast that into a legal argument.1267

Professor 35, similarly, provides critiques of judgments only “periodically,” because

sometimes then the students think they’re free to ignore what the law is—and just tell you what they think it should be—no matter how many times you tell them that ... “I think that’s unfair” is not a legal argument.1268

In slightly larger compass, Professor 5 (who happens to be a casebook editor) specifically tries to direct students towards the “parameters of appropriate legal reasoning,” showing how judicial rules can prevent students from going “too far” in making general arguments based on unfairness:

[I try to convey] the parameters of appropriate legal reasoning to solve problems ... There are certain ways of approaching legal argument that are ... acceptable in legal circles. [Learning to use] those methods of argument is a lot of what you learn as a lawyer ...[I] go through a case and indicate ... how the judge reasoned the decision and ... relied ... or stepped out [of] the precedent, or expanded the concepts a bit ... Students try the same thing and sometimes they go a little bit ... too far, or they miss the point and so [I try] to model back ... what the appropriate way of reasoning in this context is.1269

Many other professors outline the “appropriate parameters of legal reasoning,” distinguishing “legal” from other types of reasoning. Like Professor 5, most professors do not claim that legal reasoning is universally better, but rather better for specific purposes. Thus, Professor 47 (another casebook editor) tries to get at the “peculiarity of the legal way of analyzing [a] problem ... without devaluing other ways of looking at the same problem ... Our function is to [look] at it from a legal viewpoint.”1270

1267 [006], Interview, lines 317-20. Cf: [019], Interview, lines 845-7 (“I tell my students, ‘A lot of the rules aren’t fair—but they’re just ... [T]here’s a difference between fairness and justice, and that’s why you study the law”); [061], Interview, lines 104-110 (“If they say a particular word they’re not allowed to finish the sentence. They have to spell out what they mean by certain words ... You have to explain why it’s efficient, why it’s fair, why it’s against public policy”).

1268 [035], Interview, lines 464-8.

1269 [005], Interview, lines 35-58.

1270 [047], Interview, lines 258-65.
Similarly, Professor 27 says that while law “is a way of doing politics,” it is its “own” way. In this professor’s words, a substantive concern with political and economic theory lies side by side with the methodological claim that law has a distinctive “grammar” – which for Professor 27, relates to understanding Hohfeld’s fundamental legal conceptions.1271 Professor 27 describes this relationship with great enthusiasm. Exposing students to law’s distinctiveness in first year is “electrifying”:

Teaching upper year is ... not nearly as electrifying or as exciting ... as teaching first year.

[First year is] a chance to ... [investigate] whether law is a discipline unto itself—whether it has something to say or if it’s just reducible to other disciplines, like economics—which I don’t believe. I believe that ... there is a legal view of the world—a language, a grammar of law ... Law is a way of doing politics, but it is its own way ... How common law works is one of the great mysteries of this life ...

The law imposes its own discipline upon answering ... questions [of political and economic theory] ... There are ways of ... determining the limits of a market. You can go into legislature and pass a law. You can go over the ramparts and overthrow a society and establish an autonomous collective ... There’s just lots of ways of changing the way things work. But law is one way of doing it, and ... law ... carries its own internal discipline [that] imposes itself ... Sometimes I put it this way: ... there is a deepening narrative of what contract law ... should be doing. But there’s also a grammar and it does it in a particular way. If you don’t understand the grammar, then you’re lost as a lawyer.1272

The metaphor of “narrative” and “grammar” might account for why so many professors, who do believe in the role the law plays in furthering political or economic ends, nevertheless express that law has “its own way.” Expressed less completely and eloquently than Professor 27, a good number of professors do explicitly differentiate legal reasoning from policy, economic, political, or even normative reasoning.

1271 [027], Interview, lines 406-12, 445-7 (“we actually spend time with Hohfeld and we do spend time on fundamental legal conceptions. We draw the distinction between rights and freedoms and liberties and immunities, but essentially between rights and freedoms ... There is [this] basic kind of conceptual bedrock which ... law forces you to come to grips with ... [Hohfeld is] saying, ‘No matter what narrative you have, ... here are the good legal building blocks that you should be aware of’”). Professor 27 made reference in the interview to Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1913) 23 Yale LJ 16; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1917) 26 Yale LJ 710 and, as a “handbook on how to read Hohfeld” ([027], Interview, line 481), John Finnis, “Some Professorial Fallacies About Rights” (1971) 4 Adel L Rev 377.

1272 [027], Interview, lines 5-72, 394-406.
For example, Professor 53, who insists that “no law is neutral,” states that “legal reasoning is completely different from political reasoning.” And while students’ common sense or intuition may accurately predict legal results, students must, “rather than react with emotional reaction about what should happen in a particular case, … apply a legal reasoning structure to … problem[s].” 1273 Professor 38 refers to incorporating policy as going “offside.”1274 Professor 11 aims to show policy concerns that are “hidden,” but conceives that task as distinctly separate from “legal analysis.”1275 Professor 14 critiques the casebooks other than Waddams for having too much “extraneous” commentary; “a lot of commentary … detracts from acquiring [the] basic skill [of learning to read cases].”1276 Professor 54 aims to help students move away from the idea that “everything is very normative, [meaning without] reference to authority,” and toward the ability to “unbundle … the compound assertion … into constituents … [and] analyze each one independently with reference to authority.”1277 And Professor 4 specifically distinguishes between legal and non-legal arguments to subtly provoke students to reflect on the nature of law’s autonomy:

I’ll say something like, “Oh, that’s all very nice, Counsel, in this policy consideration, but can you give me a legal argument for that?” … Which a judge would honestly do … They have to find a way to wedge into this policy argument … It’s not automatically the case that because you have a strong economic, … moral, … political, … or sociological argument that somehow it’s something you can present in a court of law. And why is that? … To what extent is the legal autonomous? Clearly there’s a very close connection, 

1273 [053], Interview, lines 544-8, 143-150:

I try to … show them that … they actually know a lot of this stuff before they even come here. They just have to … structure that knowledge so that rather than react with [an] emotional reaction about what should happen in a particular case, they should apply a legal reasoning structure to the problem, and that will give them a legal result which is probably very close to … what they thought in the first place.

1274 [038], Interview, lines 251-69 (“I felt it was very unfair because the assignment focused on policy analysis was basically giving an advantage to the students who had some kind of training in policy analysis. Whereas, assignments that are focused on legal skills, nobody has legal skills”), 598-609 (“My emphasis on public policy has increased in the classroom … If you take like the very first year that I taught it, I … [stuck closely to] the case[s] … because I didn’t feel safe to navigate those waters … As I got more secure, I felt] more secure to venture offside [into] what I do, … which is public policy”).

1275 [011], Interview, lines 413-21 (“I … sometimes talk about policy because in contracts it’s a bit more hidden … We can do the legal analysis and talk about how this fits with general contract law principles … But you can also see [how] … the judge is also concerned with the policy implications”).

1276 [014], Interview, lines 65-8.

1277 [054], Interview, lines 332-41.
so ... can we still make sense of law as separate from these things? ... I won’t say this that explicitly [but] ... just will poke them to reflect on these things.\textsuperscript{1278}

This focus on law’s autonomy is not surprising coming from Professor 4, one of the formalist champions. However, as the preceding examples show, the tendency to articulate law’s distinctive way of reasoning transcends professors of all theoretical stripes.

\textbf{b. Taking Doctrine Seriously: The Language, Grammar, and Discourse of Law}

The professors just canvassed explicitly oppose law with other types of reasoning. Yet another group of professors express the same idea, implicitly and less directly, by speaking about law as its own “language,”\textsuperscript{1279} “science,”\textsuperscript{1280} or “discourse,”\textsuperscript{1281} or about legal education as a process of “indoctrination,”\textsuperscript{1282} or its role in producing “linguistic competence.”\textsuperscript{1283} In this way, they paint a picture of law’s distinctiveness by constructing a kind of exclusive epistemological community into which students need to become initiated. Messages about law’s autonomy not only surface in the existence of such an exclusive community, but by virtue of the fact that this initiation largely occurs through the specific process of taking doctrine seriously.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{1278}] [004], Interview, lines 410-24.
\item[\textsuperscript{1279}] See eg. [059], Interview, lines 28-34:
\begin{quote}
I like the satisfaction of ... opening their eyes to this new universe of understanding, the way of seeing the world through the prism of contract law—not that that’s ... the only or primary prism through which we view the world, but it is a whole new way. It’s almost like teaching someone a new language ... and having the satisfaction of seeing that take hold and watching them explore it.
\end{quote}
\item[\textsuperscript{1280}] See eg. [044], Interview, line 413 (“They’re learning a new science”).
\item[\textsuperscript{1281}] Professors 4 and 56, quoted at length immediately above and below, both use the term \textit{discourse}. In the case of Professor 36, “discourse” is used as a substitute for the term “thinking like a lawyer”: “Thinking like a lawyer’ ... is a phrase I \textit{never} use. I particularly \textit{dislike} this idea but [my goals do include] understanding legal discourse and becoming \textit{proficient} with legal discourse” (Interview, lines 26-9).
\item[\textsuperscript{1282}] [052], Interview, lines 543-51 (“I really tried to keep the course primarily to the case law ... The reason for that is ... I think it ... goes to the whole theory of ... first year ... [C]all it indoctrination ... however you want to characterize it, but basically just an introduction to the common law case law method”); [032], Interview, lines 133-6 (“I think in addition to the contracts stuff, both doctrine and ... critical perspectives, there’s also that sort of general indoctrination into the juristic world, and juristic reasoning”).
\item[\textsuperscript{1283}] [062], Interview, lines 195-8 (“Building their sophistication ... and their linguistic competence, was a key goal of mine, because \textit{that} to me is the portal into being able to \textit{think} about legal problems”).
\end{enumerate}
\end{footnotesize}
For example, Professor 56 speaks of an “initiation” in which doctrinal discourse is to be treated not “cynically,” but “seriously on a level of craftsmanship”:

[T]he initiation [is really] the use of legal terminology ... and that ... relates to understanding the role of doctrine as the language you have to speak to partake in a very specific discourse ... You actually need to be able to speak this language ... Even if we’re critical, we can’t be cynical about the actual doctrinal discourse because ... we’re training ... [students] to partake in this discourse ... Even if we find that [a given doctrine is] ridiculous, ... it doesn’t spare us from actually being able to handle it ... We still have to master it ... I don’t think you’re doing students a service if you’re not making sure that they understand the importance of taking this seriously on a level of craftsmanship.1284

Professor 1 elaborately connects the importance of “technical” and “dogmatic” law to the notion of exposing students to the “grammar” of private law, learning the language of law, and developing the “juridical unconscious” (a term that could alternatively be translated as “legal consciousness”):

I find technical courses – basic, fundamental courses that form the heart of many legal traditions and whose study constitute a rite of passage for jurists – to be absolutely necessary. Teaching Contracts involves both a substantive study of the subject but also teaching a grammar of the private law in general ... The course is dogmatic in the sense that it spontaneously appears in all curricula as representative of the positive law ... [These dogmatic, technical courses are important to teach] because they fix the fundamental vocabulary, the categories or concepts ... It is also in these courses where the juridical unconscious [l’inconscient juridique] is formed. And I believe we have to intervene at all costs in this unconscious if we don’t want to leave it to develop outside of our control. It’s an exigency of justice, of transparency; the value of knowledge is to enlighten rather than to allow things to remain concealed.1285

1284 [056], Interview, lines 315-62.
1285 [001], Interview, lines 25-160 [Translation from the French original:]
Les cours techniques à la faculté de droit c’est quelque chose que je trouve très nécessaire ... quand je dis technique, je devrais dire peut-être un cours ... élémentaire, fondamental, qui forme le cœur dans beaucoup de traditions juridiques ... la première approche ... que je vais qualifier de passage obligé pour les juristes ...Le droit des contrats en général ça tient tout à la fois de l’enseignement d’un sujet juridique, mais aussi d’une grammaire du droit privé en général. Et, sur l’aspect technique, ce que je veux dire par là probablement c’est que, c’est du droit dogmatique ... dogmatique parce que ça fait partie des matières qui se présentent spontanément dans les curriculums comme représentatives du droit positif ... [C’est important d’enseigner un course aussi central à la formation] parce que c’est dans ces matières-là que se fixe le vocabulaire fondamental, les catégories ou les concepts ... C’est là que se fabrique l’inconscient juridique des juristes dans ces matières-là. Et je pense que nous devons à tout prix intervenir dans la
Together, these attitudes give an impression that the prevailing norm among Canadian contract law professors is to take the idea of doctrinal discourse seriously, not to denigrate it as mere “rhetoric.” This prevailing norm appears to lie in stark contrast to the US context, in which advocates of “taking doctrine seriously” articulate it as an outsider claim.

**c. Doctrine First/ Critique Second**

Another tendency among contract law professors reinforces the idea that that legal reasoning is intimately tied up with the judicial formulations of doctrinal rules. This is the tendency for professors to treat “critique” as a subordinate virtue vis-à-vis the objective of teaching legal reasoning through case law. Placing critique second effects two separate attitudes. First, prioritizing legal reasoning reinforces the idea that it has a comprehensible, identifiable, distinctive “core.” It is not only something that can be

...fabrication de cet inconscient-là si on ne veut pas laisser cet inconscient se développer en dehors de notre contrôle. Parce que, parce que c’est une exigence de justice, parce que c’est une exigence de transparence, parce que l’approbation du savoir suppose d’éclairer plutôt que de laisser se noircir.]

1286 See eg. Richard A Posner, *Economic Analysis of Law*, 4th ed, supra note 356 at 23. The word “rhetoric” has different meanings, but Posner’s usage is probably closer to the secondary meaning in *The Oxford English Dictionary* (online): “language characterized by artificial, insincere, or ostentatious expression; inflated or empty verbiage” (sub *vero* “rhetoric,” entry 2c). Even when participants in my study use the term “rhetoric,” the usage of that term appears less derogatory and closer the OED’s first listed definition, “The art of using language effectively so as to persuade or influence others” (*ibid*, entry 1a). For example, when Professor 26 describes law as a “formalized and specialized species of rhetoric,” Professor 26 appears to take seriously doctrine at least for the instrumental purpose of effective advocacy. This instrumental perspective seems to consider the distinctiveness of legal discourse seriously. Any cynicism is directed to law as the source of “pure reason,” not the integrity of the discourse itself:

The biggest misconception that law students have before they start law school is that they think that law is an application of *pure reason*. But in many ways, it’s not really logic at all ... it’s a species of rhetoric. It’s a formalized and specialized species of rhetoric and it’s a tool rather than a thing that exists. So I want to get them to *think* like that, and to start to develop some skills [of] *using* the law as a tool ... Understanding ... why it’s *ineffective*—not necessarily *morally* wrong or something, but *ineffective* to tell a judge, “We had a bargain, it’s only fair.” And it is effective to tell a judge, “There’s consideration on both sides, therefore these promises are binding.” Even though they amount to the same thing (Interview, lines 215-45).

1287 See eg. Markovits, *supra* note 149 at x-xii:

[Contemporary legal education slights doctrine. Although considerations from outside law remain at the margins of even contemporary casebooks, they come quickly to dominate classroom discussion ... And so doctrine is slighted in modern legal education, even as modern teaching texts continue to valorize it ... *Contract Law and Legal Methods* ... takes doctrine seriously – more seriously than other contemporary casebooks*”.
taught, it is more important than other virtues. Second, it suggests that subjecting the core to critique is not particularly important, or at least not of equal importance to communicating that core. Thus, the attitude that “critique” is deferrable avoids portraying legal reasoning as contestable or contingent. This in turn reinforces the apparent solidity and impermeability of legal discourse.

One particularly acute expression of this idea lies in the words of Professor 46, one of the formalist champions quoted above. To recall, Professor 46 states that:

[Students should] understand why the principles evolved as they did. Then they can more intelligently criticize them ... [T]hey need to at least understand coherence in the sense of why it might originally have been thought fair to have rule of consideration or a rule of privity et cetera, and then move to ... challenge those doctrines as perhaps not always meeting goals of fairness or the parties’ expectations. I think the one comes before the other. It’s almost like ... it makes some sense to understand Newtonian physics as a context for understanding the small number of cases where Newtonian rules don’t apply and Relativity does ... You need both ... the original theory and the revolutionary theory. 1288

In the way that the metaphor about physics is used above, the classical (“Newtonian”) ideas provide a foundational understanding for subsequently developed, more complex accounts of phenomena. The classical model is not superseded by subsequent theorization, but rather retains its importance (you need “both” theories). Such an idea does, indeed, surface among physicists – in the oft-quoted statement by Niels Bohr, the “patriarch of quantum mechanics,”1289 that “it would be a misconception to believe that the difficulties of the atomic theory may be evaded by eventually replacing the concepts of classical physics by new conceptual forms,”1290 or Heisenberg’s claim that

1288 [046], Interview, lines 171-92.
1289 Sergio Chibbaro, Laberton Rondoni & Angelo Vulpiani, Reductionism, Emergence and Levels of Reality: The Importance of Being Borderline (Springer, 2014) at 122.

The recognition of the limitation of our forms of perception by no means implies that we can dispense with our customary ideas or their direct verbal expressions when reducing our sense impressions to order. No more is it likely that the fundamental concepts of the classical theories will ever become superfluous for the description of physical experience. The recognition of the indivisibility of the quantum of action, and the determination of its magnitude, not only depend on an analysis of measurements based on classical concepts, but it continues to be the application of these concepts alone that makes it possible to relate the symbolism of the quantum theory to the data of experience (ibid).
“Newtonian mechanics is a kind of a priori for quantum theory ... in the sense that it is the language which enables to say what we observe.”1291

The idea that it is important to emphasize a classical “core” of law is expressed by other metaphors. For example, Professor 41, in recommending a cautious approach to answering examination questions (some of which are designed to be “brain dumps,” disclosing another preference for core, substantive knowledge,)1292 invokes chess and the well-worn metaphor of “thinking outside the box”:

It’s kind of like playing chess ... If you do the traditional things in chess, there’s going to be a long game, you’re going to win some, and you’re going to lose some, but you’re not going to look like an idiot ... Sometimes people try something very original, and it doesn’t work and then you look kind of like an idiot. And I don’t know whether it’s because you were trying something original, or because you just don’t know ... where the box is. Being outside the box is fine, but you also have to show you know where the box is.1293

Professor 43 sounds an analogous note of caution in describing why questions of fiduciary obligations, otherwise described as “crucial” to legal education, are best deferred to upper-year courses:

You have to be careful with racehorses. You can’t just put them in the race right at the start. You have to train them. “Okay, this is a track and this is how you got to go around it. And now, here is the starting gate, and this is how you calm down and get inside the starting gate. When this gate opens, this is when you take off.” And so on. “This is how your ride behind other horses, and it’s okay.” Et cetera ... It’s a staged process.1294

More prosaically, Professor 30 (one of the few Canadian professors who actively uses the US Restatement), explains how clarity must come before critique:

I ... share ... excerpts from the Restatement of Contract Second, because the Restatement is often a really good distillation of things, almost in the manner of a code. That clarity ... is something that we want to try to emphasize to students, at least for the purposes of their debut in the area. Later on I think it’s possible to come at issues in

1291 Werner Heisenberg, Oral history interview by Thomas Kuhn, Archive for the History of Quantum Physics, Harvard University (27 February 1963), quoted in Chibbaro, Rondoni & Vulpiani, supra note 1268 at 123.
1292 [041], Interview, line 824. See supra note 1235.
1293 [041], Interview, lines 737-47.
1294 [043], Interview, lines 40, 1172-80.
contract law with a critical perspective, but I think that you can lose a lot of students by not indicating what the basis and most recent expressions of the law are.\footnote{030}, Interview, lines 119-28.

This quote, like many others in the section, constructs this choice as largely a choice of pedagogical effectiveness – the concern with not “losing” students. Pedagogy is indeed a powerful explanation for why professors make the choices they do, one that I will explore in Part IV of this Chapter. For present purposes, however, I want to emphasize how the decision to place clarity or core content before critique also reveals a commitment to the solidity of law, a commitment somewhat at odds with the notion of law’s indeterminacy. For Professor 30, the desire for clarity brings along with it a concern for the “basis” of law. Methodologically, an emphasis on clarity evokes a certain degree of formalism.

Numerous other professors express the similar desire to focus on black letter law before critique. Professor 39 draws an analogy with science education to explain why Professor 39 foregrounds “proper analysis,” again invoking pedagogical effectiveness but revealing a deep concern with learning “black letter law”:

I want them to learn the law … I want them to do proper analysis … It’s like when you learn medicine. You don’t learn medicine just by … learning about generally how people are. You learn very specific information … about the anatomy, about the physiology … And then you can say, “Maybe there are these environmental factors” … Same with learning about animals in the environment. You don’t learn about the animal just by looking at … the bear walking around on top of … the mountain ledge. You need to learn about … the bear unto itself. And then you might look at its environment and then its interactions with other animals … [My preferred approach is] learning contract law from the minutiae, … the traditional way, and then … understanding it in its broader context. … I know other people would prefer to start analyzing/critiquing contract law in the bigger picture and say that this isn’t fair and stuff. But I don’t know that [first-year] students … have had … enough experience to be able to understand those bigger picture ideas [of] … the law in context … [I don’t want to] overwhelm or undermine the capacity to learn black letter law by bringing too much information in to critique it when you don’t really have the tools to understand what it is that you’re looking at in the first place.\footnote{039}, Interview, lines 609-43.

Similarly, Professor 59 explains how the decision to abandon the Swan casebook flows from the idea that “understanding precedes critique”:

1295 \footnote{030}, Interview, lines 119-28.
1296 \footnote{039}, Interview, lines 609-43.
I felt that the Swan and Reiter book was getting so heavily into ... philosophical and social questions ... I just didn’t think students were sufficiently well equipped to be able to deal with them ... I was more interested in a book that I thought was a better foundation for establishing ... what ... contract doctrine [is] ... I talk about [uncertainties and contextual issues] ... but they tend to be secondary [and] not primary in the way I teach ... [I] believe that in order to challenge any thought system or belief system, you need to understand what it is very well before you’re qualified to evaluate, criticize, [or] really fully understand the implications of it. So to me, understanding precedes critique.1297

Similarly, Professor 6 emphasizes the idea that first year is a “boot camp of doctrinal law,” reserving upper years for “sophisticated critique.” Reasons of pedagogical effectiveness (students are “not ... realistically capable of critiquing law in the second month of law school”1298) blend into claims about the essence of law as doctrinal, and the importance of “using” formal legal sources:

First year is actually not a bad place to be ... quite doctrinal and very black letter ... Become fluent in law. Get the tools. And upper year is where you can then work with it ... [and] engage in sophisticated critique ... A first year ... boot camp of doctrinal law where you get a really strong foundation in the main areas of law is [not] necessarily a bad thing ... It actually is the law ... Even in second and third year, [I see students who are] not good at using ... case law or statutes. And that’s the ... fundamental ... capacity and skill of the lawyer.1299

Other professors express similar attitudes. Professor 54, who describes in the course syllabus how underlying premises and policy rationales “animate” (i.e., not critique) the various doctrinal rules,1300 jettisons the notion of critique not only from first year but from the entire undergraduate law curriculum:

1297 [059], Interview, lines 292-326.
1298 [006], Interview, lines 311-12.
1299 [006], Interview, lines 801-22.
1300 [054], Syllabus, 2012-13, p 1:

The purpose of this course is to introduce students to the fundamental principles of Canadian contract law. Students will learn the basic rules of contract law, and how to apply these rules to novel situations. Emphasis is placed on developing the analytical skills necessary to identify contractual problems and propose reasoned solutions. Attention is also paid to the fundamental premises and policy rationales animating the various rules we shall encounter throughout this course.
All this policy-type criticism and so on and so forth, it’s very interesting at a graduate level, but I’m not sure at an undergraduate level. I don’t know how you can set about criticizing something you don’t really understand yet. That’s my view. So I think you really need to learn the law, and then if you really want to criticize it, go do a masters.\textsuperscript{1301}

And, expressed not at the level of curricular order, but within the course itself, other professors describe optimal sequencing as “begin[ning] with a very thorough understanding of what is, before moving on to the critique and the plan for what ought to be,”\textsuperscript{1302} or starting first with distilling “the legal rule, ... us[ing] it for reasoning by analogy,” and then later asking “what should it be?”\textsuperscript{1303}

This subsection has demonstrated how the overwhelming tendency among Canadian contract law professors is to consider law as its own discipline with a distinctive methodology, one that treats doctrine seriously. This “serious” consideration of doctrine means that the rules have a content that is knowable and important to know, but also implies the idea that the distinctive legal reasoning process performed by judges is teachable and worth teaching.

The next subsection seeks to elaborate on the elements of this distinctive legal reasoning. I start first with the key structural feature of legal reasoning, the effort to distinguish the relevant from the irrelevant. This intellectual task transcends the various levels of generality to which legal analysis applies: identifying relevant facts, relevant rules, and relevant principles. There is a deep parallelism between the common tendency (described above) to distinguish legal reasoning from other forms of reasoning, and the mechanics of that legal reasoning, which obsesses with what is “inside” and “outside” the parameters of relevance.

\textsuperscript{1301} [054], Interview, lines 924-30.
\textsuperscript{1302} [063], Interview, lines 154-6.
\textsuperscript{1303} [061], Interview, lines 269-84. The sequencing is not only within the course, but a process of professional development for this junior professor. Professor 61 says:

The first semester was more about ... “Here’s what judges do. Here’s how it affects behaviour” ... Just spelling out what law is, how it comes about, where it comes from, how we use law as a lawyer ... And just in the last few classes, I’ve started stripping that back and just saying, “What should it be?” ... I start ... just teaching why we have cases, how we use cases ... How a lawyer uses cases. We use them for trying to work out what the legal rule is, and then if we’ve got the legal rule, ... we use it for reasoning by analogy ... Now more recently I’ve been using it ... as ... an observation for how the law should be, how we should treat the law, what we should think the law should be (\textit{ibid}).
ii. Determining Relevance: A Structural Feature of Legal Reasoning

Drawing a line between what is relevant and irrelevant, and categorizing phenomena as falling on either side of this line, may be considered a structural element of legal reasoning in two senses. First, determining relevance descriptively captures the main intellectual task involved in a range of discrete, more particular steps in the reasoning process; transcending many discrete parts, it reveals a deeper structure to what legal reasoning is. Second, it specifically bolsters – provides the supporting structure for – law’s claim to legitimacy, and in this sense is a normative requirement of the rule of law. To subject some people, and not others, to legal consequences in a way that respects the rule-of-law principle of equal treatment under the law requires a coherent, universal, non-arbitrary method of arriving at decisions. The words of the participants in my study suggest that the core of this method is the ability to rationally determine which criteria are relevant to producing differential outcomes.

The examples that follow serve to confirm the descriptive sense in which determining relevance is structural: the notion of relevance indeed appears frequently as both a general virtue and embodied by discrete steps of legal reasoning. But the very fact of ubiquity also gives the impression of a shared belief in the normative appeal of relevance. The formalist concern for rational argumentation and rule-of-law equal treatment, expressed so eloquently above by Professor 19, the formalist “champion of champions,” therefore emerges as a shared value among almost all participants in the study.

a. Determining Relevance: The General Case

In a field in which legal reasoning is so often described using the terms “reasoning by example,” or “reasoning by analogy,” it is informative to see how frequently professors use a related, but alternative, formulation – “determining relevance” – to describe the crux of legal reasoning. This section starts by highlighting the instances in which determining relevance is described generally – these leading quotations illustrate how central a feature of legal reasoning it is. I then detail two specific reasoning tasks – discerning relevant facts and issue spotting – in which determining relevance is central. Only then do I address the more conventional formulation for legal reasoning: distinguishing and analogizing cases. Many professors do use this formulation for describing the essence of legal reasoning, but the understanding derived from “determining relevance” proves important to understanding just what “distinguishing and analogizing” comprises.
One very senior professor, Professor 48, describes relevance as being at the centre of the legal method. Consider the following exchange, in which Professor 48 not only asserts how relevance is central, but how it distinguishes lawyers from non-lawyers:

[R:] Is what they’re learning in the first year contracts course important for ... students?

[Professor 48:] The method part is, yeah.

[R:] Why?

[Professor 48:] Because those are skills you can take to any kind of problem-solving. What are the facts you’ve got? What do you have to resolve? How would you go about resolving? What are the options for resolving? How have others resolved it? That’s basic legal method ... The problem I find with people who are not lawyers ... is they have no concept of relevance. They’ve no concept that when you’ve got a problem, which parts of those problems are key and have to be solved, and which parts you can talk about forever but actually they’re not key. And that’s something I think legal education trains you—in relevance—in working out a problem, what exactly is important, and getting rid of the non-important parts, interesting though they may be, and deciding it.1304

At least three other very senior professors express similar ideas about lawyers’ peculiar ability to discern the relevant from the irrelevant. For example, Professor 15 says:

The lawyer—the person with the legal background—has a huge advantage in terms of distinguishing the irrelevant from the relevant. And it drives you crazy because everybody else at the table is talking about stuff that you keep saying, “No—no—no—that’s not the issue! The issue is this!” And that’s something law gives you. Which other disciplines, even if you’re fabulously gifted at them, does not give you.1305

Professor 44, the most senior professor in my study, assimilates “analysis,” the core of what the lawyer does, mostly to discerning relevance:

[R:] What are the lawyering skills that you’re trying to convey?
[Professor 44:] Analysis, analysis, analysis ... I do say to the students, “You listen to the client speaking, and as you’re listening, your brain is formulating what’s material, what’s immaterial, what’s relevant, what’s irrelevant, what’s the cause of action, what

1304 [048], Interview, lines 696-715. Elsewhere, Professor 48 describes legal method as “how you read and analyze cases and understand what courts are saying and understand what is relevant from one case into another” (ibid at 126-33).
1305 [015], Interview, lines 601-607.
strengths have they got, ... what remedy can we go with ... That’s all we do for a living! An endless analysis of the story told by the client.\footnote{044}{Interview, lines 534-42.}

Articulating the word “relevance” is not only the ambit of experienced professors (the three just quoted have a combined 130 years of experience teaching contract law). Some young law professors use that term to describe legal reasoning as well. For example, Professor 58, who had taught Contract Law just twice at the moment of interview, says that “excluding the irrelevant” is among a lawyer’s “core work.”\footnote{058}{Interview, lines 772-85:} Professor 26, teaching Contract Law for the fifth time at the moment of interview, says, “I want them to learn the skill of reading a case and deciding what in it is relevant.”\footnote{026}{Interview, line 582.} And Professor 54, in the second year of teaching, says, “There’s so much in that thinking like a lawyer business ... Part of it is that really heightened sense of relevance.”\footnote{054}{Interview, lines 321-6.}

In addition to these general expressions of the importance of “relevance” are the more specific, and fairly widespread, articulations of the need for students to learn how to discern which facts are relevant to legal analysis and, conversely, which legal issues are relevant to a given fact pattern.

b. Determining Relevant Facts

Cultivating the skill to determine relevant facts sometimes takes the form of professors wanting to ensure that students read complete accounts of the facts in cases, as opposed to short excerpts. Professor 50, for example, says:

The fact pattern ... There is a value in that kind of legal analysis ... It’s both an intrinsically useful set of skills, and something that helps them in the rest of their law school experience ... [Those skills include] closely engaging with a set of facts or with legislation ... and ... analyzing it, and organizing the answer, and excluding the stuff that’s irrelevant. [Those skills] ... strike me as pretty core ... legal work.

Later, Professor 58 says, “I would explain to them ... why excluding irrelevant things is important, like the sort of client focus or the idea of how quickly ... a ten-page factum or a ten-minute intervention go ... To be able to really focus on what matters most is important” (ibid, lines 794-800).
I want the students to read the whole case to have a full understanding of the facts, and to be able to ... read a full judgment to figure out for themselves what was important and what was not important, what is obiter, what were the material facts, why did the court talk about this fact and not that fact?\footnote[1310]{[050], Interview, lines 194-9.}

Other professors make similar claims about “whole cases.”\footnote[1311]{See eg. [014], Interview, lines 105-110 ("[R:] There’s a preference for having more case material there because it helps them develop the skill of knowing what is relevant? [Professor 14:] : Yes."); [047], Interview, lines 354-62 (short excerpts are “really harder to teach than ... a ... reasonable ten page extract [in which students have to] ... winnow the irrelevant from the relevant"); [064], Interview, lines 481-4 ("If you condense a case so much that it’s all there, then it’s right in front of you, and you don’t get the skill of finding [issues, ratio, obiter, and analytical reasoning] in an actual case").} Sometimes, this preference for long cases directly leads to helping students identify how specific facts yield specific results:

One of the reasons why even reading four pages of a contracts case can be a long, involved process is [that] every sentence could be considered important. What’s really \emph{important} though? That’s an analysis skill. That’s a division skill—dividing up the not important at all, kind of important, really important ... The thing that many students don’t get, when they read snippets, is they get the “really important because it’s the law” part, but they don’t get why. The facts are sort of summarized, and they don’t spend a lot of time going, “Okay, what are all the facts?” So then they have to read through and figure out what the important facts are ... If I flip this factor out, does it change things?\footnote[1312]{[041], Interview, lines 595-607.}

Likewise, Professor 65 connects determining relevant facts to thinking about how cases might have been different, had the facts been different:

I don’t want ... a summary of all of the facts—just what are the important facts ... How do you ... train a lawyer’s mind to figure that out? And what are considered quote unquote “important” facts? Those are the ones that a case turns on ... “Without this fact, there may have been a different decision.” \emph{That} is an important fact.\footnote[1313]{[065], Interview, lines 171-8.}

Similarly, Professor 66 gets students to “identify in ... [a] certain key case, what is the \emph{operating fact} of the story?"\footnote[1314]{[066], Interview, lines 164-5.}
c. Issue Spotting

Another deeply important feature of legal reasoning is the ability to identify the relevant legal issues that arise in a complex fact scenario. The shorthand for this skill, which many professors identify as key, is “issue spotting;” it is the primary skill examined in a conventional examination question, which consists of a hypothetical fact scenario. As Professor 32 tersely says, “in the hypothetical type case, ... issue-spotting is fifty percent of the battle.”1315

Issue spotting involves determining the relevant legal issues from a mass of factual information. It receives a number of alternative formulations. For Professor 51 it is “translating the facts of a human problem into legal categories.”1316 For Professor 29, legal analysis involves “pulling apart a factual situation and identify the issues of ... law that it implicates.”1317 For Professor 43, the “biggest skill we give our lawyers” is “the ability to take a complex set of facts, to sift them out and isolate the relevant issues—to find out the rules and principles that you want to apply to solve ... problems.”1318 For Professor 59, the focus is on “identifying an issue ... [or] governing principle” – a task that directly requires making determinations of what “matters” and what doesn’t:

“One of the puzzles of contract law or any law ... is that it ... kind of puts us in a box where we say, “These are the things that matter inside this box ... There are some other things like ... how people felt ... or how it impacted their family life or the business ... We’re not looking at those things ... I try and make them conscious of that difference, between the things that law recognizes and the things that it doesn’t.”1319

Similarly, Professor 14 describes the evaluation methods – memo writing and exam writing – as essentially testing the student’s ability to discern which legal issues are relevant:

[The memo requires students to] sort through the materials that you dug up and decide which materials you want to include and which ones you feel you can overlook ... [The

1315 [032], Interview, lines 482-3. Professor 6, similarly, says that “analysis” and “identification of the legal issues” “gets you the ninety-seven marks” (Interview, lines 514-6).
1316 [051], Interview, lines 335-6.
1317 [029], Interview, lines 78-9.
1318 [043], Interview, lines 1148-51.
1319 [059], Interview, lines 168-9, 56-66. Cf. [007], Interview, lines 160-179 (the case method permits students to “ask why certain kinds of arguments are ruled out within a legal framework. Why is it that certain kinds of reasons can carry the day and other kinds of reasons can’t?”).
exam requires students to appreciate what the problem is. And then to apply the appropriate legal principles to that problem. And ... that means as well to recognize the principles or areas that do not apply to the problem. 1320

A similar concern with excising the irrelevant occurs when professors emphasize the need to discern the ratio decidendi of cases from obiter dicta.1321

d. Distinguishing and Analogizing

Identifying the relevant facts and the relevant issues (or principles) are the building blocks of analogical reasoning, or reasoning by example: it is the determination of “relevant” similarity that is often posited as the most important intellectual task.1322 What is important about a set of facts, and what isn’t, is the analytical task involved in treating “different facts differently.”1323 As Professor 22 says:

Working out what’s alike and what’s different is the fundamental thing you’re doing in legal reasoning. It’s not the only thing you’re doing, but it’s ... maybe the most fundamental thing to see how certain cases are alike and other cases are unlike.1324

Closely related to the task of “distinguishing” cases is the verb “analogizing” – the two terms are frequently used hand-in-hand1325 – which involves deciding when and to what extent to “apply” the rule derived from a previous case to a new fact scenario. Making distinctions is essential to this act of

1320 [014], Interview, lines 446-49, 488-91.
1321 See eg. [004], Interview, lines 163-66 (“The judge said that, but was that dicta? If it’s dicta, it doesn’t count. Why? Because it doesn’t speak to the actual facts ... [The common law emphasizes] the difference between the holding and the dicta”); [050], Interview, lines 119-22 (“I want them to understand how the court has utilized one argument or the other as the substance of the case to understand what might be the ratio and what might be the obiter”); [057], Interview, lines 455-7 (legal reasoning is “working with case law materials to be able to extract the ratio, to extract obiter and know what to do with obiter”); [064], Interview, lines 479-81 (“We’re trying to teach students how to discern what the issues were before a court, what the ratio is, what’s obiter, and what the analytical reasoning was”).
1322 See eg. Levi, supra note 720 at 1-6; Schauer, supra note 3 at 94.
1323 [004], Interview, line 638.
1324 [022], Interview, lines 126-30.
1325 See eg. [026], Interview, lines 364-7 (“Distinguishing and analogizing [is] ... conceptually simple [but] hard to pull off”); [011], Interview, lines 273-5 (“one of the main goals is ... can they apply case law? Can they distinguish, analogize?”); [052], Interview, lines 134-8 (“a lot of it’s really about developing their legal thinking skills ... The ability to analogize, to distinguish, [to] reconcile seemingly irreconcilable decisions. I think those are skills which I would hope that students came out of the class with”).
The study of law is the study of distinctions. Failing to show up for a dinner engagement will rarely attract legal sanction, but the case for imposing legal liability ... is more compelling in some circumstances than in others and the law is, or ought to be, sensitive to these shades of gray. The study of (contract) law is therefore rarely “easy.” It is never enough to know the easy cases – that a dinner engagement with a close friend is non-contractual, for example. Only if we are able to say exactly what, if anything, distinguishes this case from that of the restauranteur, or the friend of the friend, will we be able to fully understand and critically evaluate the legal principle involved in that “easy” case.

The study of law is therefore the study of individual cases. The rules of contract law are not set out in any book or (to any significant degree) any act of any legislature. They cannot simply be looked up. Nor could they be. While it is possible to baldly state some fundamental principles of contract law, their meaning and scope is never fixed, since there are always further distinctions to be made. The best we can do as students of the law is to learn how to make these distinctions by learning how judges think. And this involves reading a great many decided cases. Legal reasoning is nothing else but reasoning by example, that is, from case to case:

It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case (EH Levi, *An Introduction to Legal Reasoning*, 1948).1326

This long quote demonstrates how “application” – central to both a lay understanding of law (“applying the law”) and to my participants’ own conception of lawyerly tasks1327 – is in fact deeply connected to making distinctions, which is at heart a task of determining relevance. Professor 26, who also happens to reproduce some of Professor 70’s words above in Professor 26’s own syllabus,1328 highlights how in contract law, the more difficult task is not the application, but the determinations of relevance that come before the task of application:

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1327 See eg. [052], Interview, lines 317-26 (“it’s really about application, ... which I think is a big part of what we do as lawyers. It’s not ... enough to know what the law is or understand what a particular rule provides. We need to know how to apply it”).
1328 Professor 26 reproduces the paragraph that begins with “The study of law is ... the study of individual cases” with only minor modifications (Syllabus, 2011-12, p 1).
In contracts you have a whole lot of rules, and they apply to very narrow sets of facts. So once you know which rule applies, applying it is easy. It’s knowing which rule that applies—that’s the hard part. In public law courses it tends to be you automatically know which rule applies, but applying it is the tough part—it’s a balancing test, there’s all kinds of factors—that kind of thing. So in contracts, it appears to be extremely rigid—for each situation, there is a rule. But once you start reading the cases, you realize that it’s very easy to characterize the particular factual situation one way or another way in order to invoke a different rule ... It’s important for them to learn ... the importance of how you characterize the facts, and how you analogize to other cases, in order to achieve a result.\textsuperscript{1329}

Thus, Levi’s three-step description of reasoning by example – whose analogues can be found in the words of my participants\textsuperscript{1330} – while it culminates in “application,” centrally appears to depend on the intellectual task of determining relevant similarities. Treating like cases alike requires determining which facts matter; applying rules to a given fact scenario requires deciding which rules to apply. Such line drawing emerges as a structural feature of legal reasoning, but also a ubiquitous one, given the prevalence of hypothetical fact scenarios as a pedagogical and evaluative technique.\textsuperscript{1331}

To the extent that line drawing becomes presented as the fundamental, or structural, feature of what it means to think distinctively like a lawyer, “legal” analysis appears more naturally the exercise of exclusion. Thus in direct contrast to the (realist) propositional claims that policy or context are essential to law, the actual practice of legal reasoning may lead to the determination that “contextual” factors constitute the “irrelevant” facts, and “policy” considerations fall by the wayside of more determinative, doctrinal legal principles to be applied. In this way, the intellectual substructure of legal reasoning paints the image of a core of relevance surrounded by a periphery of irrelevance.

iii. Extracting Rules and Fitting Them Together

Like Levi, professors in my study frequently state that “extracting” or “distilling” rules is a key feature of legal reasoning. The importance placed on rules is noteworthy for a few reasons. First, it

\textsuperscript{1329} [026], Interview, lines 270-9. Professor 26 alludes to determining relevance in “characteriz[ing] the particular factual situation one way or another” (ibid at 283-4).

\textsuperscript{1330} See eg. [006], Interview, lines 346-53 (“I’d be delighted if they could ... understand how to distinguish cases on the facts and the law—how are they analogous? How are they different? And ... identify and articulate legal issues and apply legal issues to the facts or facts to legal issues”).

\textsuperscript{1331} Fifty-one out of sixty-seven interview participants uttered the words “hypothetical,” “fact pattern,” or “fact scenario” to describe their teaching or evaluation practices.
demonstrates a thoroughgoing commitment to the idea of “taking doctrine seriously;” professors not only espouse this view in support of law’s distinctiveness, they actively cultivate the practice of discovering doctrine. In this light, contract law pedagogy seems not far removed from Langdell’s.\textsuperscript{1332} Second, the emphasis on rules tends to give the impression that professors treat them as if they are more fixed, and more determinative, than the standard realist critique allows. And, finally, the focus on rules implies an inherently positivistic understanding of law, taking for granted an implicit rule of recognition that delineates law from non-law. In this way, the majority trend implies a barrier between legal and social norms, law and society.\textsuperscript{1333}

Professor 57, for example, foregrounds the importance of rules in legal reasoning, treating them as having definitive, positive content (a “rule of law that’s there”):

[Legal reasoning is] being able to arrive at what the legal rule is and to explain why that’s the case, or to advocate that the legal materials support a particular legal rule. [It involves] working with case law materials to be able to extract the ratio, to ... know what to do with obiter ... [It’s] being able to use the legal materials to interpret the rule of law that’s there ... I would [also] include ... being able to apply these rules to facts ... [but that’s] not actually my focus because I ... think the more troubling stuff is ... through the rule of law often, and arguing what that is.\textsuperscript{1334}

Extracting or distilling rules is often the first goal professors say they have for their students. For example, Professor 35 says:

\textsuperscript{1332} Cf. Langdell, \textit{supra} note 109 at vii (“the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied”).

\textsuperscript{1333} Compare Leiter, \textit{supra} note 1047. Leiter distinguishes legal formalism from legal positivism, arguing that the former is a “theory of adjudication” whereas the latter is “theory of law” (\textit{ibid at} 1150). Leiter argues that given this distinction, realists “are tacit legal positivists” (\textit{ibid at} 1153-5). My own usage of formalism conceives that term more broadly than simply a theory of adjudication; however, Leiter’s distinction is helpful to demonstrate how the attempt to define law according to a rule of recognition is a distinct intellectual commitment to the ideas of coherence and determinism conventionally ascribed to formalism. On the relationship between a “delineation between law and non-law” and “analytical jurisprudence,” see Macdonald, “Custom Made”, \textit{supra} note 154 at 309 (each the five tenets of legal orthodoxy – monism, centralism, positivism, prescriptivism, and chirographism – “has an exclusionary ambition and reflects a different preoccupation with delineating the legal from the non-legal”), n 28 (“Together they comprise the core of twentieth-century analytical jurisprudence as propounded by [Kelsen, HLA Hart, and Hart’s followers]”).

\textsuperscript{1334} [057], Interview, lines 452-84.
I want [my first-year students] to be able to *read* a case and ... extract the legal principles and reasoning. Which is challenging in contract law because the cases are *old* and there’s a lot *of imprecision* ... about the doctrine ... That ... is a big goal. 1335

Professor 39 emphasizes "developing the skill set for extracting principles and ideas [from cases];" 1336 Professor 54 doesn’t “think you can *do* law and think like a lawyer unless you can *distil* legal arguments” into a structure of facts, issues, rule, analysis, conclusion ("FIRAC"). 1337 Professor 14 wants students to “extract an understanding of the case[, including] ... what the issues are, ... what the reasoning of the judge is and recognize what is important and what is less important or not important at all.” 1338

The focus on rules has a couple of other implications. First, the preference for abstracting general principles may have the effect of reducing appreciation for contextual differences; in the hands of some professors, the idea that the same rules may apply to different situations may actually serve to collapse, not highlight, distinctions:

[What makes someone good in contract law is] the ability to see the commonplace ... in quite extraordinary circumstances ... They can recognize that, “Hey, this case ... *seems* so very different, [but] once you cut away the frills and look at the facts, it’s really *identical* to this other case.” 1339

Second, occasionally the focus for abstract rules can translate into a concern for the underlying structure or coherence of contract law. Not surprisingly, we see this among our formalist champions, who include in the idea of legal reasoning the ability to “articulate ... issue[s] in a more *general* way, or build “a framework and [fill] in the blanks of the framework ... by addressing the elements and sub-elements within each part of the doctrine;” 1340 or the ability to assimilate analytical tasks at different

1335 [035], Interview, lines 35-41.
1336 [039], Interview, lines 54-55.
1337 [054], Interview, lines 314-7, 49-50.
1338 [014], Interview, lines 95-8.
1339 [060], Interview, lines 31-7.
1340 [059], Interview, lines 178-9, 496-8.
levels of generality relevant to “classification.” But it surfaces among others, as in Professor 29’s commitment that

aspects of the law of contract form an interlocking or interweaving whole. Students are forced to go through the exercise of assembling the various pieces of the puzzle and internalizing them and creating the diagnostic tool in their brain ... At some point [students] have to develop the ability to ... assimilate large bodies of information of this kind and develop those kinds of underlying frameworks. When you come out of law school you may end up doing something quite different from anything you’ve ever studied and you need to be able to develop a similar kind of understanding of a large and complicated body of data ... That’s what lawyers do.

Finally, occasionally the focus on rules brings with it a type of narrowness that some professors deprecate, reflecting a humility and awareness of legal reasoning’s partiality. Thus, Professor 15 says:

[L]egal thinking ... is in its own way rather blinkered. It’s learning to think in a particular way in order to do particular things ... It lacks a lot of imagination. There’s no poetry in it. And it values certain things a lot more than it values others—simply because of the job that law has to do ... Lawyers have to learn to think like lawyers [and] for some [non-lawyers] it is also a very good thing. But I wouldn’t have thought it’s a good thing for everybody.

And Professor 7, similarly, says:

I tell my students all the time, “Law is boring. Law is about detail. It’s about learning how to fill in documents. It’s about learning how to pay attention to the finest detail of situations and it’s not exciting. It’s not what you see on TV. It’s about being meticulous, and being meticulous isn’t exciting.”

This recognition of legal reasoning’s shortcomings serve, if anything, to highlight and reinforce the idea of law’s distinctive reasoning. Moreover, the idea that legal reasoning may be “blinkered” or

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\[022\], Interview, lines 472-9:

[Answering a hypothetical fact pattern involves] classifying all the way up and all the way down ... classifying is seeing what’s different, so in ... classifying rules, you’re classifying what’s different between those rules. But you’re [also] classifying the situation—like what sort of situation is this? Is this [a] situation where somebody broke a promise? Or did they [tell] a lie? [You] ... try and make a distinction on what you know.

\[029\], Interview, lines 55-59, 86-94.

\[015\], Interview, lines 489-92, 545-60.

\[007\], Interview, lines 44-8.
“boring” implies that legal reasoning gains its distinctiveness from a particular type of authoritativeness: its reference to a discrete set of technical, precise, and formal sources. In this way, the importance of rules not only constitutes a substantive element of legal reasoning, but a foundational source of its distinctiveness and authority.

iv. Focus on Adjudication

In Chapter 3, I observed how the legal-process views of Lon Fuller and Hart & Sacks have been relegated to a minority position in Canadian contract law casebooks. This happened, first, with the untimely death of James Milner, whose nascent (though complicated) legal-process ideas were largely ignored and ultimately abandoned by Waddams. Second, while Swan champions the idea of de-centering adjudication, the low market share of that book (approximately ten percent) signals its secondary importance. Even Milner and Swan, too, demonstrate a focus on adjudication, an allegiance to the importance of cases as the primary source material.

Expressed in the attitudes of contract law professors, we see, perhaps not surprisingly, a similar commitment to the pre-eminence of the adjudicative process. For example, Professor 2 likes to focus on the “pure” common law, to focus on the “monologue of the courts,” and to see how jurisprudence works. Professor 3 speaks of the “incredible importance of judges,” Professor 26 tries to get students to “put themselves … in the shoes of the judge,” Professor 63 “come[s] at this course like a litigator,” Professor 45 likes to focus on the “big personalities” of certain judges, getting students imagine themselves as “litigator[s] … or barrister[s],” and Professor 57 speaks about the “in-built bias” in favour of focusing on case law. The first-year Contract Law course at the Schulich School of Law at Dalhousie University is aptly named “Contracts and Judicial Decision-Making.” Correlatively,

\[\text{\footnotesize 1345 See Chapter 3, II(B)(i)(a), above for a discussion of the influence of the Legal Process school on James Milner and Angela Swan.}\]

\[\text{\footnotesize 1346 [002], Interview, line 635 [Translation from the French original].}\]

\[\text{\footnotesize 1347 [053], Interview, lines 244.}\]

\[\text{\footnotesize 1348 [026], Interview, line 386-7.}\]

\[\text{\footnotesize 1349 [063], Interview, line 114.}\]

\[\text{\footnotesize 1350 [045], Interview, lines 20, 110-11.}\]

\[\text{\footnotesize 1351 [057], Interview, lines 273-6.}\]

\[\text{\footnotesize 1352 Devlin Syllabus, supra note 858.}\]
the legislative processes (legislation, negotiation, and drafting) figure less prominently – examples exist, as detailed below in section IV(B), but these are more exceptions that prove the rule.

The foregoing overview has demonstrated how contract law professors, when they describe legal reasoning, tend to uphold the idea of a distinctive type of reasoning in which the judicial formulation of doctrinal rules is taken on its face, in which the rules themselves are treated as meaningful and as solid reference points, and in which the intellectual task of line drawing – distinguishing “relevant” from irrelevant features of fact and law – predominates. In this way, the internal system of judicial reasons gains an eminence that is at odds with the importance placed on external factors – policy, politics, context – that professors assert in discussing “law” more generally. Legal reasoning, or methodology, does not seem to put into practice the theories of legal realism and its heirs. At the same time, the majority picture of legal reasoning not only reflects some of the ideas behind legal formalism – the importance of rules and how they fit together – it also serves to reinforce and support the formalist preoccupation with the rule of law. Standard legal reasoning constitutes and reproduces the idea of a distinctive, reasoned form of argumentation that establishes law’s legitimacy by yielding rational justifications for differential treatment.

The next section serves primarily as a foil to this main story. It reproduces the instances – not isolated, but by no means pervasive – in which professors describe some skills of legal reasoning that do appear put into practice the realist insights. One purpose of the next section is to show how, in principle, a realist-inspired vision of legal reasoning is possible within the framework of Canadian contract law teaching. Another purpose is to show how, empirically, it remains in the minority. Immediately after the next section, in an analogous fashion to the section on the “realists as formalists” above (Chapter 5, I(B)(iv)), I conclude with some examples that suggest that despite the possibility of a realist legal methodology, underlying attitudes about what is really “core” may be preventing professors from fully operationalizing their theoretical commitments.

B. Realist Methodology: A Minority Position

In Chapter 4, I demonstrated how professors frequently claim that theory is important because it makes “better lawyers,” and detailed a few specific skills that are said to flow from diverse theories of law. These skills included, primarily, making better arguments, and, to a lesser extent, problem-solving, advising, solicitor skills of drafting and negotiation, and “creative lawyering.” My point in that chapter was to destabilize the conventional dichotomy between theory and practice and show how professors
largely view theory as important for the “practical” goal of making better lawyers. Establishing this widespread aspiration, however, does not equate to saying that professors actually translate or operationalize the perspectives and argumentative techniques of the various theories into legal reasoning. In order for that to be the case, we would need to see a definition of legal reasoning that incorporates some of the reasoning techniques from the other theories or disciplines. Or, at the very least, an indication that the distinctiveness or impermeability of “legal” reasoning ought to be called into question.

What the examples of this chapter have shown is that predominantly, the “legal” in legal reasoning is not called into question or modulated by other reasoning techniques. Thus, to a large extent, claims that law students develop an “eclectic toolkit” or argumentative techniques should not be considered as providing empirical evidence for the claim that legal reasoning constitutes “an eclectic practice built from the methodological sediment laid down in successive projects of wholesale criticism and reform.”1353 The relatively small number of examples below in which law professors either call into question the distinctiveness of legal reasoning or specifically explain how realistic concerns with policy or context are to be integrated into legal reasoning provide the seeds of such a possibility, but are too infrequent to establish that the widespread aspiration is commonly realized.

i. Questioning the “Legal” in “Legal Reasoning”

As already mentioned above, no professor in my study has made the aggressively realist claim that “legal reasoning is ordinary reasoning applied to legal problems.”1354 A number of professors do, however, call into question the reverence and distinctiveness given to “legal” reasoning, although they often do so implicitly. Professor 58, for example, questions the term “thinking like a lawyer” by explicitly placing it in “scare quotes.”1355 Professor 36 attacks the term more directly, although taking issue more with the term “lawyer” than with “thinking”:

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1353 Kennedy & Fisher, supra note 37 at 3.

1354 Alexander & Sherwin, supra note 6 (“legal reasoning is ordinary reasoning applied to legal problems” at 3). See text accompanying note 1264, above.

1355 [058], Syllabus, 2007-2008, p 3. The passage is surrounded by other probing questions apparently intended to get students to question other purportedly foundational axioms of the course:

What is the role of this course, and of legal education more generally, in shaping professional attitudes and consciousness? What are the assumptions underlying the choices to teach law the way we do, notably reliance on appellate judgments? What does the choice of evaluation methods signal? What are the assumptions and ambitions underlying the selection and exclusion
“Thinking like a lawyer” … is a phrase I never use. I particularly dislike this idea … If thinking like a lawyer is understood [as Kronman presents it in The Lost Lawyer] then I like it. But it’s never understood that way … It’s understood in reductive terms, as though you can break down the habits of mind of a lawyer in ways that don’t connect to any kind of moral duty, or ethical duty, or public duty, and don’t relate to a sense of the unique role of lawyers in society … as problem-solvers, but also leaders, … and the conscience of a community … I don’t like that phrase anymore. I try not to use it.  

This quotation can be read as emphasizing the need for a more contextual and nuanced understanding of the lawyer’s task and, by implication, legal reasoning. Professor 36 appears to incorporate the realist concerns about law’s contingency into a vision of the lawyer’s work. Professor 36 aims to instil in students the importance of “laughter and doubt,” emphasizing how the role of the lawyer is “embedded in doubt”:

Years ago, as I was just starting to teach, [a newspaper columnist] wrote something about … what you should give your children: … “It comes down to two things—laughter and doubt” … If I had to summarize what I’m trying to do as a teacher, I would say that’s exactly that. I want my students to have fun—because law should be fun … And then doubt … [Doubt is important] because … students come here … with a preconceived image of law as not based on doubt, … as pretty much given, fixed, and relatively straightforward. They quickly discover … that this picture is inaccurate, and it makes them anxious. It’s part of the anxiety of being a law student.

But in a sense … it’s such a central dimension of one’s life as a lawyer, that you need to reinvent yourself, question well-established principles, examine every premise, every time, that you need to develop doubt as a way of life … I think the role of lawyers is embedded in doubt … You really have to … accept it as a way of being.  

of material in this course? What do they imply about lawyerly priorities? What does “thinking like a lawyer”—these are scare quotes—mean, and what are the advantages and costs of learning to do so? Why is contract so central to the legal imaginary, and what does that centrality reveal about the view of legal subjects? Which narratives do law and legal education privilege, and … suppress? What does it mean to be an ethical legal professional? Does the privilege of membership in the legal profession entail any responsibilities? Why is the word justice uttered so rarely?

1356 [036], Interview, lines 27-8, 382-99.

1357 [036], Interview, lines 59-111.
Like Professor 36, who aims to help students become “proficient with legal discourse,” other professors do not jettison the idea of a distinctively legal way of speaking or thinking, but nevertheless seek to include in legal reasoning broader or more critical attitudes. Thus, Professor 2 says that law is a “discipline that requires and open and critical spirit.” Professor 53, in a longer passage, implicitly critiques conventional legal reasoning as “dehumanizing,” but explains how it can “rehumanize” by integrating human judgment, emotion, and critical thinking. This integrative vision nevertheless upholds the distinction between politics and law:

[R: How would you] *unpack* what those legal reasoning skills are that you’re trying to teach them?

[Professor 53:] It’s sort of a *whole circle*. So what we want to do first of all is ... to *dehumanize* the people ... in the cases. We want to try to break things down to a legal structure ... But then when we’re done, we want to *rehumanize* everybody in the story ... and recognize that ... what we started off discounting, the emotion or the human aspect, really *is* a big part of it, but it’s not the *only* part ... We have to be true to the rules because otherwise it’s politics not law. But ... judges do have flexibility ... and that means you have to understand the human element as well. But it’s a feature that *shapes* how the rules will be applied. It’s not a decision-making feature on its own ...

[R:] If I were to ask you to unpack what you mean by critical thinking, how would you do that?

[Professor 53:] That’s sort of the “thinking like a lawyer” question. Which is *really hard* ... Law schools across North America have a horrendous record of damaging students ... Many students feel ... like they have to turn their back on who they are and what they *believe*. And then ... we’ll sort of fill them up with this “thinking like a lawyer” thing and that is being dispassionate, dehumanizing the court case, applying legal principles ... The question is always, “What’s the test? What’s the legal test here?” ... What we’re *really* trying to do and *don’t* do very well is to say, “But you have to bring your passion to this, your perspective, your life experience, and interpret this in the ways that you see” ...

[R:] So ... this humanizing element and the critical thinking element, really go hand in hand?

[Professor 53:] Absolutely! Yup.

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1358 [036], Interview, line 29.
1359 [002], Interview, lines 551-3 ([Translation from the French original: “le droit c’est une discipline intellectuelle qui nécessite de la part des étudiants un esprit ouvert pis un esprit critique”]).
1360 [053], Interview, lines 175-206, 406-43.
Like Professor 53’s attempts to help students incorporate their own life experience and perspective into their legal reasoning, a number of other professors explain how other “external” factors of politics, policy, politics, or even common sense, integrally form part of legal reasoning. In these comments lie the seeds of attempts to render operational many of the realist theoretical perspectives.

ii. Operationalizing External Factors

As detailed in Chapter 4, some professors argue how a particular theoretical perspective can assist students in crafting persuasive arguments. This tendency is merely a “seed” of the attempt to operationalize theory, because while in principle it reflects the notion of putting a theoretical perspective into practice, it does not appear to go so far as to redefine what distinctively legal reasoning is. Nevertheless, some of the examples from Chapter 4 could, if their logic were followed through to a full execution, exemplify the attempt to integrate various factors into legal reasoning.

Sometimes, professors make general statements about the need to integrate external factors into legal reasoning. For example, Professor 64 says that the “best lawyers” are able to make convincing arguments that are “some combination of legal impact, policy effect, and values.” Professor 74 reproduces a passage from a colleague’s syllabus in which students are told that their participation grade in part will reflect the extent to which they “articulate their own positions by reference to basic underlying values.” Later, the syllabus states that “the operative values must become explicit.”

Professor 3, who highlights ideology at the core of Professor 3’s legal philosophy, tells students that their arguments will be more persuasive to the extent that they can “evoke … those grand themes” – although whether this reflects a genuine attempt to recast legal argumentation is an open question; it may just be a sales pitch. Also stated somewhat aspirationally, Professor 7 describes how one aim is to show how

\[1361\] [064], Interview, lines 585-8. In a similar vein, Professor 1 wants students to be develop a quality of “lucidity” that would enable students to alternate between formalist and realist, discerning which is more persuasive in a given context (Interview, lines 539-61).

\[1362\] [074], Syllabus, 2016-17, p 3 [emphasis added].

\[1363\] [003], Interview, lines 250-261. Professor 3 says:

Your argument about rules has to … evoke those grand themes and the more powerfully you can do that, the more successful you’re going to be in persuading people. And you also have to understand the problems that people have with that story—especially if they’re committed … to free market ideology. And so you also have to think about ways to make what you’re saying into or at least not run totally counter to that other grand narrative that it might contradict. But you
the frontier between legal reasons and other kinds of reasons is not impermeable. It’s not fixed. As you learn to think about problems, you can … convince a court to incorporate into law the certain kinds of reasons that would not otherwise have been acceptable.\textsuperscript{1364}

Similarly, Professor 13 wants students to be able to “marshal[] facts and policy considerations and legal doctrine to create a legal argument.”\textsuperscript{1365}

Other times, professors specifically invoke the importance of facts and context to suggest that legal reasoning is not just an operation of abstract thought. For example, Professor 27 says that one distinctive feature of legal reasoning, as opposed to philosophy, is the idea that “you just have to bring it down to the ground.”\textsuperscript{1366} Professor 67 describes legal reasoning as going behind the words that “mask complexity” and “engaging with actual facts,” because “that’s how law arises – not through generalities.”\textsuperscript{1367} For Professor 15, the “ideal” of the case method is to “bring home” to students the idea that “law … is not just an intellectual construct [but] and instrument of … human justice,” by

\begin{Verbatim}
\textit{[Common law reasoning is] the way we reason from analogy and draw distinctions and how courts respond to the felt necessities of the day and the various … values that underpin contracts decisions in our legal system … By values I mean things like what is economically efficient, what protects the reasonable expectations of the parties, what is fair, [and] protecting vulnerable parties.}
\end{Verbatim}

\textsuperscript{1364} [007], Interview, lines 365-72.

\textsuperscript{1365} [013], Interview, lines 218-19. Later in the interview, Professor 13 says, “The whole objective … I’m trying to achieve … is to get people to figure out how to make effective arguments … [This includes identifying] policy bases to … your position” (\textit{ibid} at 319-22). Other professors articulate how legal reasoning is a product of a constellation of factors. See eg. [031], Interview, lines 38-53:

\begin{Verbatim}
\textit{Before I came to law school [I was] a philosophy student … In writing philosophy essays … some smart remarks and really clever moves … give[] you a great paper … In the law, that’s nothing! Some smartass remark doesn’t get you anywhere. You actually have to say, “Okay now, given that—who wins here?” Somebody always wins and somebody always loses. You just have to bring it down to the ground. So it’s a way of disciplining—as the law imposes a discipline on all this thinking that people come to law school with.}
\end{Verbatim}

\textsuperscript{1366} [027], Interview, 283-96. Professor 27 says:

\textsuperscript{1367} [067], Interview, Handwritten Notes of Untranscribed, Unrecorded Interview, pp 4-5.
demonstrating how things “actually play out for people” in “concrete terms.” For Professor 43, “you get the context ... [from] the fact patterns.”

Just as incorporating context or concrete experience into legal reasoning reflects an attempt to put into practice the importance of everyday reality, some professors seek to include in legal reasoning the notion of common sense or intuition. Professor 33 speaks of the “common sense component that has to always be held onto when you’re dealing with a new situation.” Professor 1 rejects the conventional idea that it is necessary to “erase” students’ consciousness and substitute new concepts in order to be a good jurist. Professor 58 speaks of the need for students to “train their gut” to counteract the tendency of legal education to alienate students from their sense of common sense.

1368 [050], Interview, lines 87-111:
You want them ... to have a broader understanding that [law] is not just [an] ... intellectual construct—it’s an instrument of ... human justice ... Part of being a good lawyer is having a good sense of what the law is doing in people's lives ... The case method sort of does it automatically because you start with human stories and ... it makes law personal ... It does give you a sense of the human elements in play ... What the teacher can do is use that advantage of the case method to really bring home to students, “Don’t just think about—whether this is good law or bad law—but ... think of it—as best you can—in concrete terms. How does it actually play out for people? ... At least that’s the ideal ... to bring that home to them.

1369 [043], Interview, lines 1317-1320.

1370 [033], Interview, lines 644-6.

1371 [001], Interview, lines 512-19:
It’s neither necessary nor established that the brutal exercise of erasing students’ consciousness and putting in its place a series of concepts, categories, and words, makes better jurists, better educated, or better human beings [Translation from the French original: “Ce n’est pas nécessaire, je pense qu’il n’est pas établi que ça fasse des meilleurs juristes, ... d’opérer de façon très brutale au fond, en effaçant la conscience des gens et en mettant à la place toute une série de concepts, de catégories, de mots ... Je ne suis pas sur qu’elle fasse ... des individus qui soient mieux éduqués ou de meilleurs êtres humains. Je n’ai pas de démonstration de ça].

1372 [058], Interview, lines 463-81:
The first term I ever taught, there was an exam question which my layperson parents grasped fundamentally at the dinner table over the Christmas holidays in a way that many of the folks in the class didn’t ... And I thought, “This is amazing!” That their term of law school makes people worse at this problem than the people who know nothing legal. And I thought ... we’re not making space for the common-sense instincts around the problem ... I actually explicitly address that ... issue [now] and tell them that of course you will be solving the problem using legal tools, but your fundamental gut instinct about the thing probably should be guiding you to some extent ... You have to train your gut.
Other realist attitudes make their way into legal reasoning or thinking skills. Some professors specifically try to cultivate the skill of reasoning backwards from results. Professor 16 will take students through the following sequence: “Here’s the facts. Here’s the decision we want to reach. How do we fill in the middle? ... How would we work backwards?”\footnote{1373} For Professor 33, the ability to distinguish between ends-based reasoning and understanding when to read a case “on its face” is an “essential lawyering skill.”\footnote{1374} Other professors emphasize the skill of “framing a case,” reflecting the realist idea that the development of doctrine is contingent on many factors, including the vicissitudes of advocacy choices.\footnote{1375} Thus a key legal skill for Professor 62 is the ability to “frame problems, ... to identify different ways of framing a problem, and [to see] ... the really critical connection between how you frame a case and what remedies you try and get.”\footnote{1376} Professor 13 tries to train the ability to “characterize the facts in a way that allows you to make particular arguments. The way in which Swan and Reiter [argue that] you have to give the court a ‘peg’ ... to hang their result on—in the form of a legal argument.”\footnote{1377}

As sketched in Chapter 4, some professors aspire to translate their theoretical commitments into a desire to cultivate discrete skills outside the framework of adjudication. The number of examples expanding upon or concretizing this aspiration pales in comparison to the overwhelming emphasis on making better arguments, but they are worth highlighting because they indicate how some professors are actively trying to resist the “pathological” look at contract law focused on litigation (with its commensurate emphasis on judicial reasoning) and instead focus on various prospective, forward looking skills. Thus, policy analysis, problem-solving, and drafting skills all surface among the various skills that professors aim to develop in their students. Consider the following examples.

Professor 61, a law-and-economics scholar, takes the opportunity of the small-group format to encourage students to think about policy design, by “imagin[ing] there is no law”:

\footnote{1373 [016], Interview, lines 281-6.} \footnote{1374 [033], Interview, lines 588-606.} \footnote{1375 \textit{Cf.} [017], Interview, lines 145-59 (“The common law is not just the rules—they’re mutable, they’ve changed over time, they’re subject to change ... You’re going to be one of these people ... [I teach a case-in-context study of \textit{Peevyhouse}, \textit{supra} note 883 to show that] the way the cases end up coming out, it’s because of the way the lawyers framed it”).} \footnote{1376 [062], Interview, lines 591-7.} \footnote{1377 [013], Interview, lines 573-5.}
Imagine that ... you have to make the law. Like, there's no law to start from. You have to make an argument ... And at the end, we'll come back and just say, “Okay, so here's how they've set it up. Why? Is that better than what we've got? ... I ask them to argue] what the rule should be ... They probably veer towards economics types of arguments because they know I am an economist. [But] I have no problem with them bringing up any ... arguments based on morality or [other considerations].

Professor 42, quoted at length above in this chapter (II(A)(ii)(c)(2.3.1)) and in Chapter 4, says that “skills like reading cases, or synthesizing cases, or extracting ratios, or reading statutes, are important skills, but only insofar as a door to exposure to other kinds of skills.” Professor 42 suggests that these skills include “negotiation, figuring out how much to say when and where, determining how many of a client’s instructions should be acted upon, and later on, maybe, having to convert a deliberately ambiguous or informal arrangement into codified form.” Similarly, Professor 12 gives students cases “but then the cases are not used as cases in the sense of “what’s the ratio” [but] ... as examples of solutions to problems.” Professor 12 not said this to me in interview, but articulates it to students in a summary of the course provided to students:

A useful understanding of the Law of Contracts ... regards the cases, not as sources of legal propositions, but as examples, sometimes horrible examples, of problems and of solutions to them. As I said more than once in class, my course is a course focused on problems; the problems that arise when people try to arrange their affairs — where to live, where to work, what to eat and wear, where and how to have fun, who to work with, how to make money — by dealing with other people.

Other professors describe course objectives as including developing “forward-looking transactional skills” or express a desire to one day incorporate drafting exercises in order to add to the students’ “toolbox” the ability to “proactively prevent a dispute.”

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1378 [061], Interview, lines 237-94.
1379 [042], Interview, lines 85-9.
1380 [012], Interview, lines 99-101.
1381 [012], Review Notes for the Course (30 Nov 2016), p 1.
1382 [051], Interview, lines 340-57 (“I try to ... emphasize both the learning objectives in terms of forward-looking transactional skills and then also ... just the more traditional ... litigation of commercial contracts problems. I [also] ... spend ... quite a bit of time on ... interpretation of contracts”).
1383 [056], Interview, lines 280-298:

It ... would be really great to ... have one ... or two weeks dedicated to a drafting exercise ... It would be really interesting to show students that ... you can switch out of this reactive mode
And finally, Professor 63 emphasizes empathy, listening skills, and the ability to inhabit and communicate the perspective of marginalized communities to a judge:

[If students] bring the perspective of being a member of a marginalized community, [I want them to show how] a rule doesn’t make sense for them or for their community, or [that] it would have to be understood in different way in order to be meaningful. [If they don’t have personal experience, I want them to] start thinking [about] building empathy and listening skills so ... we can nevertheless understand [that] we have obligations as legal professionals ... to work to make sure that law isn’t just about the rule of law, but it’s also about producing justice—across communities.1384

The foregoing examples demonstrate that the project of translating, putting into practice, or operationalizing critical and realist insights is something that is on some law professors’ radar. But in contrast to the prevailing model of legal reasoning, it is somewhat insignificant – both numerically and as a matter of depth. Not only are there many more examples of formalist legal methodology, but the descriptions of conventional legal reasoning are much more elaborate and fiercely defended than the episodic and tentative forays into realist methodology just quoted. The latter examples tend to be aspirational and descriptive, rather than mount an active, practical vision of how thinking like a lawyer can embody the realist insights.

This impression is furthered by a number of instances in which professors fail to operationalize their theoretical viewpoints, and reveal an understanding of legal reasoning in which rules and reasoning by example predominate. The next section briefly outlines some of these examples.

where you’re just assessing what has happened[,] ... dealing with ... pathological cases[,] and[,] ... proactively think how to prevent a dispute ... That is actually a different mode of thinking [for which] you have to be even better informed with regard to your toolbox ... [You would need to not only know] the law that’s out there [but also] understand ... [what] can go wrong in the future [and] ... predict[,] how certain developments will go.

1384 [063], Interview, lines 370-84. Elsewhere, Professor 63 describes one important skills as being able to communicate to explain the specific context of marginalized communities to a judge (Interview, lines 200-217). Surprisingly, the term empathy came up very infrequently in my study – a global word search of all 1,500 pages of transcripts only turns up this one instance.
C. The Failure to Operationalize and What Is Really Core

This section mirrors subsection II(B)(iv) of this chapter, “The Realists as Formalists,” in demonstrating how, even among the professors identified as realists, there is a tendency to treat the formalist attitudes as “core.” Whereas that section focused on attitudes about law, this section conducts an analogous analysis focused on attitudes about legal reasoning. I begin first by highlighting some explicit passages that suggest that there is a resistance to operationalizing the eclectic realist perspectives detailed in Part I. I then show how a close look at language reveals a sense of what is really core. These examples of explicit statements are meant to serve as a sort of finishing touch, to polish the impression given so far of a distinction between realist theoretical commitments and formalist methodological ones.

(i) A Failure to Operationalize

Professor 48, in concluding a discussion about the influence of law and economics and law and society, almost perfectly illustrates the point that, by and large, contract law teaching fails to translate its theoretical commitments into methodological ones:

I think law and economics and ... social context have been the biggest factors that have influenced not the method of delivery of contracts, but the kinds of things you talk about in class.¹³⁸⁵

While expressed less directly, a number of other professors suggest that the work done by these theories lies outside the actual enterprise of legal reasoning. Thus, while Professor 33 views perspectives of class, race, gender, and power to be “integral” to teaching Contract Law,¹³⁸⁶ these perspectives are addressed primarily at the “beginning and ... end” of the course.¹³⁸⁷ Moreover, while in interview Professor 33 is clearly passionate about these perspectives – “dislik[ing] the traditional focus on the development of doctrine¹³⁸⁸ – the course syllabus simply states that students will be “exposed to contemporary and historic discourses regarding judicial rule-making and political interventions.”¹³⁸⁹

¹³⁸⁵ [048], Interview, lines 346-9.
¹³⁸⁶ [033], Interview, lines 448-72.
¹³⁸⁷ [033], Interview, line 400.
¹³⁸⁸ [033], Interview, lines 15-24.
¹³⁸⁹ [033], Syllabus, 2015-16, p 1 [emphasis added].
Accordingly, rather than thoroughly integrating the critical perspectives, the mainstream vision of what it means to study contract law seems to predominate.

Similarly, in the course syllabus of Professor 50, the most active words in a list of learning objectives pertain to conventional legal reasoning — “analyze” factual disputes, “distil legal rules from judicial opinions,” whereas the one reference to underlying factors is comparatively passive — “identify factors which influence judicial thinking.” Underlying factors are not presented as useful for making persuasive arguments, and the one reference to making arguments is surrounded on all sides by more conventional elements of legal reasoning. Professor 38, whose own research emphasizes policy analysis, includes policy analysis in the course, but frames it somewhat in opposition to the work of a “lawyer.” Moreover, in explaining why Professor 38 has no regrets about discontinuing policy questions in examinations, Professor 38 distinctly separates policy analysis from “legal skills.”

(ii) What Is Really Core?

Like Professor 38, a number of other professors with strong realist convictions convey the idea that the conventional tasks of legal reasoning are core. For example, Professor 24 in interview expresses a sophisticated and original concern with rethinking the order of the course and emphasizes critical thinking; and yet, the first objective that Professor 24 lists is to “be able to write a clear answer to a fact pattern.” Professor 37 says, “I don’t teach by way of doctrine. I teach by way of big questions and big

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1390 [050], Syllabus, 2013-14, p 1 [emphasis added]. It appears in the phrase “to make and present a legal argument and assess its merits,” which is preceded by “applying rules to factual situations” and followed by “appreciate the importance of precision in the use of legal terms.”

1391 [038], Interview, lines 124-34:

Because of my research, I do a great deal of public policy analysis as well with them—which is trying to alert them to the fact that there were broader social and economic consequences of setting up certain rules in one way or another ... You may not be thinking about this as a lawyer. You just have a client—your client has one particular goal and you’re trying to achieve that ... But if you become a judge or a legislator or ... someone who does research, you might [need] to think about those broader public policy concerns.

1392 [038], Interview, lines 303-11:

I guess I could have decided to instil in them the love for policy analysis! But I don’t perceive that as my job ... [My job is to] giv[e] them the legal skills and the legal training to functionally operate as effective lawyers and provid[e] them a little bit of awareness of basic principles of policy analysis in case they go to these other roles that I have talked about. But I don’t think the course should be focused on policy.

1393 [024], Interview, lines 333-4.
topics.” 1394 And yet a paragraph in the course syllabus about the role of human relationships in contract law is immediately followed by the statement that “[t]he aim of this course is to examine basic principles governing these contractual relations,” and immediately reproduces a list of subject that, however functionally stated, closely resemble conventional doctrinal categories. 1395 Professor 45 emphasizes the importance of “critical analysis” in interview, yet the discussion of objectives in the course syllabus foregrounds common law reasoning and concepts. 1396 Examples of this kind proliferate. 1397

A concluding example of the taken-for-granted nature of the conventional case method can be found in the words nearing the end of my interview with Professor 61, who earlier in the interview claimed to feel no constraints whatsoever in how to teach the course. I floated the idea of dispensing with the case method altogether, and it elicited this response:

1394 [037], Interview, lines 650-51.
1395 [037], Syllabus, 2016-17, p 1:

The law of [contracts] is concerned with duties that emerge in the context of human interaction – those that are created or recognized by the parties themselves and that, at least traditionally, are seen as being voluntarily undertaken, rather than being imposed by the State and its institutions.

The aim of this course is to examine basic principles governing these contractual relations ... The concepts that will be covered include the enforceability of contractual undertakings (what constitutes an “agreement” and what kinds of agreements will the law enforce); justifications for their non-performance (and reasons for setting aside prima facie valid agreements); sanctions for their breach; and an examination of to whom obligations are owed.

1396 [045], Interview, lines 121-89; [045], Syllabus, 2015-16, p. 1:

This class has two primary objectives: the first is to provide an understanding of the process of development of the common law through judicial decisions; the second is to provide a basic knowledge of the doctrines and precepts of the law governing the making and performance of contracts.

1397 See eg. [013], Syllabus, 2013, p 2. The fourth criterion of evaluation of exams is listed as “identification of any social/policy issues arising from legal adjudication of the fact pattern,” reflecting the realist influence; but the previous three criteria are much more conventional:

(i) comprehensive identification of the issues raised by fact pattern problems; (ii) demonstrated familiarity with related case law, and any relevant statutory provisions; (iii) clear and concise identification and application of the relevant legal test(s) to the fact pattern given, including possible alternative arguments on both sides of the issues.

[017], Interview, line 619 (conceives role as giving students the “black letter plus” – however much the “plus” may be emphasized, this formulation posits “black letter” as the foundational core); [063], Interview, lines 97-102 (“I try to ... balance ... between ... encouraging mastery of the fundamentals of common law ... and then to help them ... start thinking about the critique” – positing conventional substance and methodology as “fundamental”).
[R:] And [if,] hypothetically, you wanted to dispense with case reading [altogether, could you]?

[Professor 61:] I guess that would be stretching the bounds ... My unmitigated freedom was certainly ... a more local thing than the global freedom ... I mean obviously I have to teach contracts ... Let's hypothetically say I decided to teach contracts by just bringing in a different contract in every week ... If I taught it that way, I don't know who would be stamping down on me ... [But] my guess is that the case method is one of those core elements of the first year program that should be taught.

[R:] ... Why should the case method be taught?

[Professor 61:] ... One of the central elements of being a lawyer is being able to ... understand what cases are useful for. Which is: we unpack rules, we discern how the law has evolved, and why it's evolved in this way, and ... cases provide reasons ... We also teach reasoning by analogy via these cases ... I teach my students [that] the ...two reasons why a lawyer will use ... cases ... in legal writing [are to] discern rules and for reasoning by analogy ... Now, having said that ... if they got all their case method ... from other courses and then one of their courses was more practical and they did contracts? ... I don't know ... My guess is that's not the purpose of a law school. Not the purpose of an academic law school, anyway. 

This exchange is revealing for several reasons. First, it illustrates how even among a professor whose scholarly views fall squarely within the “realist” camp – Professor 61 is the law-and-economics scholar earlier quoted as emphasizing policy thinking – there is a very strong sense that distilling rules and reasoning by analogy are “core.” This notion of core, moreover, appears to transcend both “academic” and “practical” visions of legal education: conventional legal reasoning is both central to the work of the “lawyer” and to the function of the “academic law school.” Second, the exchange raises a number of possible factors of what might account for this commitment to a “core” methodology. On the one hand, Professor 61 seems to express a personal conviction about the importance of the case method through the possessive formulation “my students.” On the other hand, there is a sense that some external forces operate to impose or condition the case method. These may in part be external, concrete, or institutional – Professor 61 at least contemplates the idea that someone might “stamp[] down on me.” But in large part, explicit sanctions do not seem to figure predominantly. Instead, the overwhelming impression is that the requirement to teach the case method flows from a collective, however ethereal, idea of what “should” be taught, as well the sense of having inherited a tradition (the common law) that develops its substantive law through cases. These references signal, perhaps, the

1398 [061], Interview, lines 923-77.
underlying influence of a legal consciousness, manifesting in the consensus around the case method but revealing deeper commitments to the structure of legal reasoning and the concomitant formalist values.

The reasons for formalism’s powerful hold on the attitudes of Canadian contract law professors are among the mysteries to be explored in Chapter 6. Before proceeding to that exploration, this chapter concludes by looking at some illustrations of pedagogical practice uncovered in my study. I demonstrate how the majority of messages communicated through course syllabi, teaching practices, and evaluation corroborate the emphasis on formalism illustrated up until this point. Again, realism is not silent, but it is the minority player.

IV. Attitudes Expressed Through Teaching Materials and Practices

This section consists of a slightly more systematic version of the exercise began just above, whereby I demonstrate how choices about pedagogy reflect commitments about law. This section highlights examples from course syllabi, examination questions, and other course materials, but most of the analysis focuses on the ways that professors describe their teaching practices or explain their evaluation criteria. Since I am relying heavily on self-reporting by professors and not direct classroom observation, I cannot make reliable claims about the actual teaching practices of contract law professors, as other studies have done.1399 How someone actually teaches may differ a great deal from how one describes one’s teaching in an interview, or how one articulates one’s goals in a course syllabus. Nevertheless, these examples are informative because they reveal professors’ attitudes expressed through the lens of how and what they teach. The lens of pedagogy illustrates how professors operationalize their attitudes about law through the practice of educating. Thus, to the extent that the attitudes revealed by the practical lens of pedagogy may differ from the attitudes they express propositionally about law, we move one step closer to identifying a gap between theoretical and methodological commitments.

And, indeed, the bulk of the examples in this section bear out this interpretation by demonstrating a commitment to the importance of rules and conventional analogical reasoning. The first section (A) focuses on these instances of formalist pedagogy; the second (B) details the smaller number of examples where realist attitudes appear to be translated into pedagogy. As with Part III of

1399 See eg. Mertz, supra note 3 (linguistic analysis of student and professor utterances in contract law classrooms).
this chapter, the purpose is in part to show the overall emphasis on formalism, and in part to show how realistic pedagogy is possible in the context of Canadian contract law teaching, however infrequent it may be.

A. Formalist Pedagogy

I organize this section along the lines of the different type of pedagogical examples as opposed to the themes already exhaustively detailed. Thus, I explore how formalist attitudes are implicit in (i) syllabi and expressions of teaching, (ii) decisions regarding substance, and (iii) evaluation methods and criteria. Most of these come from professors who espouse predominantly realist attitudes about law as detailed in Part II of this chapter.

i. Syllabi and Expressions of Teaching

Course syllabi are a useful source of information because they provide the professor with an untrammeled opportunity to articulate what they believe: the professor is almost always the sole author setting the tone for the beginning law student.\textsuperscript{1400} Professors take up the opportunity to express themselves explicitly to varying degrees: some course syllabi contain only the bare minimum of administrative statements and a reading list, without any adornment;\textsuperscript{1401} others extend to multi-page discourses on legal education, law, legal writing, and career advice.\textsuperscript{1402} On the one hand, the minimalist approach to syllabus writing may implicitly communicate the importance of doctrine by making cases effectively the only bit of substantive content in the presentation of the course. On the other hand, the substance of what professors say when they do say something may communicate pedagogical priorities that in turn reflect commitments about law.

The examples that follow are not exhaustive but rather serve to exemplify how the course syllabi of even strong realists may reinforce the importance of doctrine and the notion of conventional legal reasoning. For example, while Professor 10 includes examining contract law “in its social and political context” as an “aim of the course” in the first sentence, the next sentence states that the “main

\textsuperscript{1400} The rare exceptions are in a semesterized program, if Contract Law happens to be taught in the winter term, or when a two-semester course is split between two professors and students encounter a new syllabus in the winter term.

\textsuperscript{1401} See eg. [003], Syllabus, 2015-16, [067], Syllabus, 2013-14.

\textsuperscript{1402} See eg. [025], Syllabus, 2015-16.
objective” of the course is to “enable students to acquire basic legal skills to competently identify, analyze, synthesize and apply the law of contract.” Professor 40, who teaches “broadly speaking, [from] a legal realist slash critical legal studies perspective,” includes a wide range of conventional objectives at the very beginning of the course syllabus; that section concludes with, “The purpose of this course is to familiarize you with these rules and principles.” Other examples are easy to find.

Along with syllabi, professors’ accounts of their own teaching are an opportunity to highlight or foreground their priorities. Frequently, professors describe their teaching objectives to me in similarly conventional terms, notwithstanding commitments elsewhere to realistic attitudes. Indeed, when asked

1403 [010], Syllabus, 2012-13, p 1.
1404 [040], Interview, lines 64-5.
1405 [040], Syllabus, 2015-16, p 1. The section reads as follows:
This course provides a general introduction to the law of contracts. How is a contract formed? What is an offer, and how can it be accepted? Are all promises legally enforceable? Should parties to a contract be allowed to avoid certain obligations? What happens when a party makes a mistake about the nature or quality of what they buy or sell? What happens when one person takes advantage of another person in order to conclude an agreement? What about “fine print” in a contract? How exactly can one terminate a contract? These and other questions lie at the heart of the law of contracts, a complex body of rules and principles developed over centuries of adjudication, interpretation, and codification.

1406 See eg. [011], Syllabus, 2014-15, p 1:
The main objective of the course is to introduce you to the core legal principles and concepts of the law of contract, including those principles and concepts relating to contract formation, enforceability and remedies for breach. The course will provide you with the foundation necessary to study other areas of law that rely on contract principles, including employment law, family law, wills and estates, real estate and commercial law ...

Contracts is a common law subject. This means that the content of the law of contracts is derived from cases decided by judges, as opposed to legislation ... For this reason, in this course, you will learn how to read, brief and analyze a case; how to identify general principles from a group of cases; how to analogize and distinguish cases from one another in making a legal argument; and how to apply cases to a new set of facts.

See also [002], Syllabus, 2014, pp 2-3 (first listed objective is to “analyze case law in determining the relevant facts, the issues, the ratio, the holding and the rules or principles that flow from it” [Translation from the French original]); [058], Syllabus, 2007-8, pp 1-2:
By the end of the course, you should be able to translate a factual problem into a legal problem, to express the stakes of a conflict as a function of the fundamental concepts of the law of contract, and to identify the major questions and juridical arguments raised by a contractual dispute. You will have noticed the verb translate. The notion here is that co-operative interactions—activity we might want to characterize as contractual—often proceeds without explicit reference to the law of contract. It is generally only when a relationship meets trouble that a party invokes the law of contract. Once a party has done so, key questions arise ... You will become familiar with them.
about their goals for teaching the course, almost every professor identifies learning substance and
teaching analogical reasoning as the first two goals (in that order), with about a third of professors
adding in a third goal of incorporating critical perspectives. It is not uncommon to hear expressions like
“I want them to be able to think like a lawyer operating within contract law” or accounts that focus
“primarily [on] ... cognitive skills and ... the skills of reasoning through analogy.” Other examples
emphasize the distinction between law and policy or between law and politics.

ii. Decisions Regarding Substance

a. Remedies First or Last?

The decision regarding substance that figures most prominently in discussions about contract
law teaching is whether remedies should be taught first or last. I discussed this choice in greater
detail in Chapter 3, and I briefly review it here. The choice to begin a course with remedies was
pioneered by Lon Fuller in his 1947 casebook. According to Karl Klare, this choice signaled “a central
realist message [that] it is impossible to understand the nature of legal rights and relationships or to
logically deduce remedial conclusions from them without knowing what courts can and actually will do
to and for litigants.” By contrast, the decision to start a contract law casebook with issues of
formation dates to Langdell, whose first chapter was “Mutual Consent”; Langdell did not include
remedies in his contract law casebook at all. Accordingly, in caricatured terms, the decision to
foreground issues of formation may suggest a preoccupation with doctrinal categories that evoke the
formalist conception of contract law associated with Langdell, whereas the desire to focus on remedies
can appear as an attempt to highlight the “real” consequences of legal decisions.

1407 [004], Interview, line 4.
1408 [066], Interview, lines 122-4.
1409 See eg. [039], Interview, lines 704-12 (distinguishing “two sets of questions” – “narrow questions” about
“ratio[s]” and “questions around policy”).
1410 See eg. [038], Interview, lines 312-33 (“neither politics broadly defined or narrowly defined” enters the
classroom); [059], Interview, line 759 (politics not a significant element).
1411 See generally Gerber, supra note 832.
1412 See Chapter 3, III(A), above.
The practices of Canadian contract law professors suggests a preference for putting formation first. Out of the seventy-four contract law professors in my study who taught the full course, fifty of them teach formation first; nineteen teach remedies first, and three use a “hybrid” approach, with a mini remedies section, followed by formation, and with a longer remedies section at the end. Among those who teach formation first, at least six have tried it the other way and affirmatively decided to switch. By contrast, only one participant (Professor 18) described switching the other way around.

More interesting than the numbers are the ways in which some professors describe the preference for the formation-first approach. Perhaps surprisingly given the historical importance placed on the question of order, a number of professors state they have “no strong feeling” about what order to teach in. Others simply treat the order that the subjects are presented in the casebook as determinative, and may switch orders depending on the casebook they use. Another series of professors make the argument that beginning with formation is pedagogically more effective and easier for students, in that it provides a series of relatively discrete and concrete concepts to confront in the early days of law school. Yet another group says how they prefer to follow the order of the natural

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1414 These numbers refer to the approach taken at the most recent moment for which I have information. For some, this was the date of interview, and for those who submitted syllabi, it is the date of the most recent syllabus provided. Two professors teach in a different order altogether, and one participant taught only half semesters (at least in the data I had). These numbers are simply meant to capture the relative order of formation and remedies. Some of them precede a discussion of either with a small section on critical or theoretical perspectives, or consideration.

1415 [007], [019], [022], [025], [051], [053].

1416 See eg. [005], Interview, 357-8 (“I don’t actually think it matters that much, to be honest. There’s advantages to each”); [031], Interview, lines 361-2 (“[R:] It doesn’t sound like you have a strong feeling one way or another. [Professor 31:] I don’t”); [018], Interview, line 631 (“Having taught it both ways, I don’t have a strong preference”).

1417 [033], Interview, lines 233-5 (“pretty much” follows the order of the casebook (formation first)); [052], Interview, lines 75-6 (“we basically followed the Percy and Ben Ishai casebook”); [044], Interview, lines 85-6 (“I follow the casebook. I take Steve Waddams’ volume ... and I just go through it”); [006], Interview, lines 988-9 (“I don’t think an outline would be very exciting to you. It’s basically just the casebook” (Swan)).

1418 See eg. [026], Interview, lines 544-7 (“I really appreciate the arguments for starting with remedies—both theoretical and practical—but I think for teaching purposes, it’s really jarring for the students and it’s better to start with formation”); [051], Interview, lines 99-115:

This one article ... suggested that from a pedagogical perspective, starting with remedies is actually very difficult for students ... because conceptually it’s ... more difficult than ... starting with formation, which may ... be ... more mechanical ... Students ... get the idea of offer acceptance and ... bargain quite quickly and ... being immersed in a market-based society, they ... catch on to that quite easily, while ... the concept of expectation damages and lost opportunity ... are ... maybe more complex ... From a pedagogical perspective ... there’s an argument that ... it’s conceptually easier for students to start ... at the beginning.
life of a contract in the way parties might encounter it.\textsuperscript{1419} And finally, a number of professors express that beginning with formation is the “proper order,”\textsuperscript{1420} that it just “makes sense,”\textsuperscript{1421} that it enables them to present in a clear way how law is structured,\textsuperscript{1422} or that including remedies is simply a “mistake.”\textsuperscript{1423}

These different responses have different implications. Some of them, like the choice of casebook, or references to pedagogical effectiveness, highlight the idea that frameworks other than legal theory might be useful for understanding the complex relationship between realism and formalism. The point, for example, about following the order of casebooks raises the question of path dependence and the extent to which institutional and other material factors might play a role in constructing legal consciousness. The point about it being easier to teach in the classical mold suggests

Not all professors feel neutrally about this. Professor 25, for example, has “surrendered” to the notion of pedagogical effectiveness:

I start with offer and acceptance. I have surrendered. I start with offer and acceptance because I think it’s vastly more interesting to students beginning law school than remedies. If you begin with \textit{Peevyhouse [supra note 883]} … remedies soon bogs down. As far as the student structuring his or her understanding, it just makes sense to begin at the beginning (Interview, lines 287-93).

\textsuperscript{1419} See eg. [009], Interview, lines 57-64 (“I’m a big believer in narrative, in a story arc, and the beginning of a contract really is offer and acceptance … Following this idea of a narrative, I think that thematically, it makes sense”); [032], Interview, lines 416-23 (Teaching remedies first is “putting the cart before the horse in some ways. I understand why people [do it], but I like to start with the basic building blocks and make my way up to remedies”).

\textsuperscript{1420} [055], Interview, lines 401-2 (“from the beginning [I] intended to teach in what I consider “the proper order”).

\textsuperscript{1421} See eg. [046], Interview, lines 230-53:

I don’t start with damages as the casebook does. I start with offer and acceptance, which is … the way I understand contract law … It doesn’t make a lot of sense to spend a couple of months teaching about damages and compensation before the students know what it is the courts are talking about when they say there was a contract here between X and Y.

\textsuperscript{1422} See eg. [053], Interview, lines 43-54:

We start at formation. And we move slowly at first because as I said, a lot of our students don’t have a grounding in the common law at all … And that is to make sure that they have a clear concept of how the law is structured … [We] try to make sure that everybody’s got a very clear understanding … of the content particularly.

\textsuperscript{1423} [022], Interview, lines 315-20 (“I think it’s a mistake to focus too much on … remedies … Remedies aren’t actually part of contract law in my view—they’re a different part of law, basically. Offer and acceptance and a few other things—there isn’t too much else that’s really contract law. Half the course isn’t contract law!”).
that pedagogy is not only a subject of analysis (as it is in this section) but also a framework for explaining apparent inconsistencies between messages about law. I explore these frameworks in Chapter 6.

At the same time, while the formation-first approach should not necessarily be taken to imply that a formalist vision of law is being advanced (and vice versa) – there are some revealing counterexamples – explanations that focus on clarity and structure do reveal an implicit preference for these values. To say that it is easier or makes more sense to focus on areas of law in which rules can be distilled and made to seem coherent presents this formalist exercise as natural. What might start out as being the path of least resistance or most helpful may implicitly communicate ideas that it is natural, neutral, acceptable, or even preferable to view law in this particular way.

b. Other Course Materials

The way that law professors treat substantive ideas in their slides, handouts, and other study aids occasionally communicates the importance of doctrine and systematization, notwithstanding proclamations about law elsewhere. Professor 30, who speaks about the importance of relational contracting, for example, provides students with self-authored class outlines that resemble a treatise, Restatement, or the Canadian Encyclopedic Digest.\(^\text{1425}\) Professor 26, who expresses the instrumental

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\(^\text{1424}\) The idea that formation-first reflects the way in which parties themselves encounter contractual issues may suggest a preoccupation with empirical behaviour more so than with doctrinal coherence. Thus, Professor 42 likes to "March through the transaction in the same sequence that the parties followed" in a manner that prioritizes the parties' perspective (email correspondence with author, 28 April 2017, reprinted by permission). In another counterexample, Professor 59, one of the formalist champions, teaches remedies first in order to bolster the importance of doctrinal categories:

In order for the students to understand why all [the doctrinal rules matter], you need to know what's the consequence at the end of the road ... Now this sounds like ... results-oriented reasoning, but I like students to be aware that the end of the line can influence the way in which we think about those initial issues, like contract formation ... It's important to help students understand the relevance of those preliminary issues—contract formation, terms, and enforceability (Interview, lines 109-23).

\(^\text{1425}\) See eg. [030], Contracts Small Group Outline Class 26:

Mistake of Identity

1. An operative mistake as to the identity of one of the contracting parties renders the contract void. Such a conclusion will likely result in the vitiation of any intention to pass property under the contract.

2. Thus, if the contract purports to be one for the sale of goods, no property in the goods will pass to the buyer, and the buyer will be unable to pass good title to an innocent third party purchaser.
idea that “the law is something you use—not something that is,” reproduces in class slides a sense that legal reasoning is focused on determining relevance, emphasizing the importance of rules.

iii. Evaluation

Perhaps the most striking evidence of an emphasis on formalist values is the predominant method of evaluation, the final exam. In almost every large section of Contract Law, a final exam worth the majority of the grade is the primary mode of evaluation. These examinations, moreover, tend primarily to focus on hypothetical fact pattern questions, which test the knowledge of substantive rules, issue spotting, and applying rules to fact scenarios through reasoning by analogy. Both the nature of the questions asked and the criteria of evaluation serve to reinforce the importance of these skills and implicitly prioritize the related formalist ideas about law.

a. The Questions Asked and Not Asked

The most common type of examination question sets out a long hypothetical fact scenario and asks the student to “advise” a hypothetical client. Very often, the action part of the question is framed in the most generic possible terms. Professor 48’s examination script is representative. A page and a half

3. If, however, there is no operative mistake of identity, the contract is not void but may be voidable on grounds of some fraud or misrepresentation.

4. If a voidable title passes to the buyer, it will be able to pass good title to an innocent third party purchaser, provided it does so before the original seller rescinds the original contract of sale (Shogun Finance v Hudson[, [2004] 1 AC 919]).

1426 [026], Interview, lines 408-409.

1427 [026], Class Slides, January 2017:

[C]oncentrate on the facts that are legally significant ... This can only be reasoned backward once you understand the whole case ... rules are the link between the law and the facts. They are statements of the law relevant to the particular facts of the case ... Rules say: “in situation x the result will be y” (although they usually aren’t phrased that way).

1428 In small sections, legal writing exercises may form the bulk of a grade, but overall, these are in the minority. Moreover, the type of legal writing that tends to be encouraged are memos and facta that tend to reproduce the type of conventional case analysis, albeit in a different format and emphasizing different skills. The most common practice is to have a December “fail safe” examination, whose grade can count toward the student’s final grade only if it is equal to or higher than the grade received on the final. A typical allocation is 25% for the December mid-term and 75% or 100% for the final, depending on whether the December examination is counted.
of a factual story is followed by “Advise [X] on all the legal issues that arise.”\textsuperscript{1429} Except in the most indirect of ways, the examination does not appear to engage students with the questions of “social context” that for Professor 48 are so important to the course.\textsuperscript{1430} Such a tendency is common, even among those professors who attempt to design their courses to align with their theoretical commitments. Professor 7, for example, one of the few professors who begins the course with neither formation nor remedies but with a study on the limits on contract, has a “very traditional law school exam” in which students are asked to “identify the issues,” “argue for and against … a specific result,” “advise the client,” or sometimes pretend to be a “judge.”\textsuperscript{1431} Professor 40, who teaches from a legal realist/CLS perspective, has standard exams that focus primarily on issue spotting using cases and “never” include a policy question. Professor 40 describes the standard practice in the following way:

My exams … always have the same structure … Question one, question two—each of them tends to be about two pages long, single-spaced … Typically I’ll have two to three issues or clusters of issues embedded in each question … I’m interested in seeing that you know the general contours of contract law, the basic analytical frameworks that have been worked up in these big issues, that you know all the cases that are relevant … to the contentious issue at hand, that you’re able to deploy those cases in persuasive ways on behalf of all the relevant parties.

I don’t have a policy question … on any of my exams. And I never have. I was sort of told not to do that when I first came here, that there was a custom of not having policy questions on exams, the reason being there was no way of really grading them accurately … The thinking [was that] you couldn’t … set up … a points chart … It was just sort of everything under the sun … I’m not persuaded by that argument, but [when I was in law school] … I actually found generally that policy questions hurt people … more than they helped … I’m not sure [the exam is] the place to ask questions like that.\textsuperscript{1432}

\textsuperscript{1429} [048], “Contract Exams – Example A.”

\textsuperscript{1430} [048], Interview, lines 290-8. Professor 26’s examination questions reveal a similar pattern. While Professor 26 expresses to students in class slides that “exam questions will require you to … engage critically with a philosophical or doctrinal issue” (January 2017), all the exam questions from 2009-2012 appear to emphasize conventional legal analysis (eg “what recourse … does [X] have against [Y]?“ (Dec 2009); “Can [X] obtain a remedy against [Y] or [Z]? (April 2010); “Advise [X]” (Dec 2010); “Advise [X] with respect to possible legal claims he may have against [Y]” (April 2011); “Advise [X] about whether he can recover any or all of the remaining [money]” (Dec 2011); “Discuss the possible remedies that each party might pursue and assess their chances of success” (April 2012); “Please advise [X]” (Dec 2012)).

\textsuperscript{1431} [007], Interview, lines 562-73.

\textsuperscript{1432} [040], Interview, lines 766-820.
This idea that exams are not the place to incorporate policy considerations arises elsewhere, coupled with the idea that a focus on conventional legal reasoning is fairer to students. Thus, Professor 38, who does policy analysis “for a living,” explains the choice to abandon policy questions on exams:

It’s always fact patterns. I never do policy questions on exams ... There were a couple of years in which I had an assignment with policy questions. But that didn’t go very well, so I took it out ... The students didn’t know what to do! They were completely lost. And the students who had some sort of background in policy analysis did beautifully, but then everybody else was at a loss ... So I felt it was very unfair ... Whereas, assignments that are focused on legal skills, nobody has legal skills ... We’re leveling the playing field.1433

Commitments to other considerations also appear to fall by the wayside at the level of evaluation. Professor 23 speaks animatedly about how the breadth of the Contract Law course enables students to expand their mind beyond adjudication – but in the next breath acknowledges the limited nature of exam questions:

[Contract Law is] such a broad course ... it’s an introduction to ... half of law school ... One could call it, “Contracts: A Selection Of Interesting Principles,” although ... the way I teach it, it’s probably more than that ... [I want to] get [students] thinking about being both a lawyer and a judge and what the difference is between those things ... and how they ... fight back and forth and interact with each other. And to think about transactional practice as well. It’s sort of difficult because the exam, ... if I have an exam, and even the problems I set when I have them do memos, are very ... litigation oriented.1434

Similarly, Professor 25 “finds it hard” to put questions about the contingency of law on a “compulsory question,” even though it is a theme Professor 25 “approaches daily in half a dozen ways.”1435 Professor 44 relishes the opportunity to expose students to “pragmatic” factors in class, but

1433 [038], Interview, lines 273, 256-67.
1434 [023], Interview, lines 275-92.
1435 [025], Interview, lines 582-613:

[Professor 25:] I ... approach [the question of contingency of the law] daily in half a dozen ways—or I think about it. But I can see that students don’t necessarily take it on board as readily.

[R:] Do you any of your exam questions or writing assignments call them to draw out that theme of contingency?

[Professor 25]: (Sighs.) (Pauses.) Unusually. Unusually. Now, it’s true that sometimes I ask students to talk about ... the course of contract law over the last fifty years ... But I don’t usually do that ... I would think that to go into such a subject matter deeply on an exam would preclude one from examining on subjects that students would more readily have anticipated ... I would
never tests them on in an exam: “that’s not fair, because they’re not in the office ... the examination is always on the casebook.” And Professor 51 – who takes a “very legal realist perspective” focusing on the “outcome of cases” and the “reasonable expectations of parties,” who views even questions of formation through a “policy framework,” and who endeavours to recast the course to emphasize transaction skills and theory – uses mainly a “standard hypothetical” question with an “issue identification aspect” and has recently stopped using essay exams in order to align with a co-instructor and to save on marking time; a recent final examination consists entirely of issue spotting and application questions.

b. The Best Answers

Evaluation criteria generally align with the types of hypothetical fact pattern just described: they master substantive doctrine, identify issues “correctly” and comprehensively, apply rules to the hypothetical facts persuasively, are “concise” and “devoid of fluff.” Together, these descriptors paint the image of law as a collection of discernable, discrete rules and legal reasoning as technical, precise, and surgical with respect to relevance. The following examples breathe life into this description:

[The best exam answers] are concise. They clearly identify the issues. They don’t identify the issues that are not issues. They do a very neat and tidy analysis. They are able to pinpoint the authority for ... the principle that they’re stating, and apply it really clearly ... I had one exam this past year that was just so phenomenal. I had never ever seen anything like it, actually. It was almost the perfect answer. Which was quite shocking, because it really just said, “This is the issue. Here is the analysis. These are the cases.”

have a hard time putting such a question on as a compulsory question. I’m not very satisfactory on this point ... I probably haven’t been as ambitious as I should have been in how I lead students to expect what would be on an examination—particularly a final examination.

1436 [044], Interview, lines 515-35.
1437 [051], Interview, lines 205-45.
1438 [051], Interview, lines 384-413.
1439 [051], Interview, lines 465-514.
1440 “Did [X] breach its contractual obligations to [Y]?”; “Assuming that the contract does not limit [Y’s] liability, what damages can [X] seek from [Y]?”; “Advise Y with respect to the ... contract”; “What legal claims offer [Z] the best chance of success?” ([051], Final Examination, April 2014).
You know? And it was perfect. It was concise. It was brief. And it was amazing, actually.\textsuperscript{1441}

The best answers will identify the issues in the problem and then provide an analysis of the applicable doctrine—which manifests absolute mastery of the material.\textsuperscript{1442}

[The best answers “correctly”] identif[y]the issues and ... the rules applicable to that issue, and then discuss[ the] application of those rules to the issues.\textsuperscript{1443}

The best answers are devoid of fluff ... [They] identify the issues with some precision, and [give] a tight answer that’s tailored to the facts at hand. And when you see that, you sort of breathe a sigh of relief.\textsuperscript{1444}

The best answers ... concisely hit all the issues ... And although it doesn’t happen very often ... the very best answers come up with a different way of seeing the problem. And they actually throw back some issues at me that I hadn’t thought of when I set it.\textsuperscript{1445}

The best exam answers give plausible answers well justified by the cases as to why the result is this and not that.\textsuperscript{1446}

[The best answers] combine fairly comprehensive coverage with greater depth and application. [They] recognize ... the decisive parts of the story and ... provide safe advice, rather than ... treating it as some exercise and summarizing contract law.\textsuperscript{1447}

While these examples provide good evidence for the idea that policy-based reasoning is typically excluded from evaluation criteria, occasionally professors make this claim explicitly:

\textsuperscript{1441} [039], Interview, lines 169-79.
\textsuperscript{1442} [029], Interview, lines 404-406.
\textsuperscript{1443} [031], Interview, lines 301-306.
\textsuperscript{1444} [032], Interview, lines 480-86.
\textsuperscript{1445} [053], Interview, lines 85-88.
\textsuperscript{1446} [019], Interview, lines 364-6.
\textsuperscript{1447} [066], Interview, lines 196-200. See also:

[Professor 59: The best answers] demonstrate a capacity to ... employ the skills of legal analysis to solve a problem ... [They identify] the issues ... and what principles are relevant to solution of that issue, [and also] what cases ... those principles derive from ... (Interview, lines 602-13);

[Professor 44: The best answers demonstrate] the power of analysis ... When you read the papers, you see students who’ve got the ideas but they’re so disorganized ... The more adept ... have got the hang of the legal thing and the organization of your thoughts and your approach and your analysis, and your knowledge of the law, and drawing conclusions (Interview, lines 236-45).
[In] a traditional hypothetical problem ... essentially ... what I’m looking for is an evaluation of how well they’re doing in the first two of my goals, that is their understanding of doctrine, and their ability to make legal arguments. I’m not particularly interested in examining them on whether they think particular contract doctrine or case is ... good, bad, or indifferent ... I’m interested in ... how well they’re beginning to understand the rule system and how well they’re able to use that rule system to create legal arguments both for the plaintiff and the defendant ... 

What they think is good contractual policy, or what is fair, or what is just, or what is reasonable in the circumstances, ... I just find that a very difficult thing to evaluate. [What is really important is whether] they have those basic skills and an understanding of doctrinal analysis that [will] send them comfortably on into second year.1448

Indeed, even when social and policy issues are included explicitly in evaluation criteria, they may appear last after a long list of more conventional criteria.1449

This review suggests that the formalist emphasis on rules and conventional legal reasoning predominates in many of the attitudes and pedagogical practices of Canadian contract law professors. However, the picture is not a homogenous one. The next section identifies some instances where realist attitudes appear to have made their way into statements about teaching and evaluation.

**B. Seeds of a Realist Pedagogy**

Occasionally, professors attempt, through their teaching, their choices regarding substance, in their course syllabi, and in their evaluations, to foreground or put into practice realistic attitudes. The examples in this section demonstrate that it is possible to operationalize realist messages through pedagogical decisions and priorities. Many of the professors quoted in this section were also quoted in the previous section, suggesting that even among these professors the picture is a mix of realist and formalist attitudes.

1448 [050], Interview, lines 388-401, 444-50.

1449 See eg. [063], Syllabus, 2015-16, p 3:

In evaluating each exam we will look for: (i) comprehensive identification of the issues raised by a fact pattern problem; (ii) demonstrated familiarity with related case law, and any relevant statutory provisions; (iii) clear and concise identification and application of the relevant legal test to the fact pattern given, including possible alternative arguments on both sides of the issues; and (iv) identification of any social/policy issues arising from legal adjudication of the fact pattern.
i. Teaching Methods

There are a few different techniques that some professors use to encourage a different set of skills than conventional legal reasoning. Among these, problem-solving and drafting exercises are perhaps the most common.

a. Problem Solving and Flipped Classrooms

Pedagogical techniques that focus on problem-solving can be thought to respond to the functionalist idea that law is a purposive endeavour, and to engage policy analysis in a prospective, pragmatic way. In one sense, problem-solving is a feature of all hypothetical fact pattern exams, as the act of “advising” clients is an act of solving a legal problem using the techniques of legal reasoning and conventional doctrine. However, in this section I focus on the few instances in which professors attempt to take the problem-solving ethos further and refine their pedagogy to emphasize the solving of problems over the mastery of doctrine and analogical reasoning.

One example is when professors record a video of themselves delivering a conventional lecture on substantive areas of the law and have students watch this outside of class time, reserving class time for small group problem exercises. Some people refer to this as a “flipped” classroom, because it reverses the conventional use of class time to lecture with group work occurring outside of class.\textsuperscript{1450} A few of the instructors in my study have articulated the desire to do this, reflecting, perhaps, the idea that law should not emphasize doctrine as much as it does. But with one exception, the use of flipped classroom remains aspirational: Professor 37 “dream[s] of doing a flipped classroom,”\textsuperscript{1451} Professor 24 is “trying to progress toward” it in order to use the classroom as “a forum for discussion as opposed to information transfer,”\textsuperscript{1452} and Professor 31 is “interested” in doing one to increase “active learning” but is waiting for administrative support to do so.\textsuperscript{1453}

The exception is indeed exceptional. Since 1998, one professor (whom I will identify as Professor X to avoid inadvertent disclosure) has been “using technology to bring [students] together into small

\textsuperscript{1451} [037], Interview, line 667.
\textsuperscript{1452} [024], Interview, lines 125, 111-2.
\textsuperscript{1453} [031], Interview, lines 505-20.
groups,” using a case method based on the “business school model.”

Professor X video records a lecture and develops an elaborate set of case materials, around which students, in small groups, submit a discussion document prior to class. In class, one representative of each group serves as a discussion leader and Professor X coaches the students through comparing their approaches to the problems. Professor X has experimented with different formats over the years, at times bringing in practicing lawyers, but these core elements remain the same. Professor X describes one version of it as follows:

[Students] hand in the response paper so now I have fifteen papers coming in … I circulate those fifteen papers to the whole class. So now you all worked on the same problem and you saw your problem and you know it very well, hopefully, because you chatted about it inside your group. Now you see everyone else’s solutions … So now we have fifteen spokespersons in the class, so now I’ve got a seminar … I’m no longer running the class …

[I will say], “You and you came out to a different response. What’s going on? Talk to each other … Why did you go that way? What facts did you focus on? What facts did you focus on? What context did you put this in?” The assignments are always a bogus memo from a principal, coming out saying, “A client just came in the door. This is what they did. This is what they told us … This is the information we have. What do you think?”

One main difference between this approach and the more conventional use of hypothetical fact patterns is that it appears to be student-led; rather than the professor transmitting substantive information and modeling legal reasoning, the professor acts as coach to draw out the students’ own approach to problem solving. This interpretation is consistent with Professor X’s high regard for the students: “They love the challenge … This model … lets them run.”

Another professor, a former student of Professor X, uses a similar method, drawing on the US-based “Case File Method.” And another deploys a similar strategy in assignments, producing extensive case materials around which legal memo exercises are designed.

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1454 [X], Interview, lines 835-7.
1455 [X], Interview, lines 888-913.
1456 [X], Interview, lines 1053-60.
1457 This professor (whom I will call Professor Y), uses the materials from casefilemethod.com, associating them with Professor X (lines 414-45, “I used them myself when I was in Contracts”).
1458 [014], Interview, lines 245-306; [014], Research Memorandum Assignment (Fall 2012), pp 9-23.
b. Drafting

Drafting is prototypically the solicitor’s skill and involves a prospective and planning attitude and, if done at a conceptual (rather than technical) level, the ability to think about client purposes and anticipate problems. Drafting may also require understanding and responding to requirements elucidated in case law, but even then, the intellectual task, however analytical, also has a practical and pragmatic element. It also emphasizes the importance of attention to detail – not just linguistic detail, but the detail of the context in which the drafting problem is situated. For the most part, professors include few drafting exercises and few examples of actual contracts other than the excerpts that appear in the cases themselves. However, there are a few who experiment with each of these, and in these instances they tend to communicate the importance of a different set of priorities than the mainstream focus on doctrinal rules and reasoning by analogy.

Professor 12, for examples, asks students to redraft an exclusion clause that was at issue in the Supreme Court of Canada Tercon case. Professor 47, at the time of my interview, had just assigned an “evaluative drafting assignment” for the first time in forty years, describing it as follows:

I’m giving a fairly simple problem, an outline of “you must read these five cases before you attempt to solve this problem, from the casebook. What I want you to do is to draft your way around for one side’s perspective or the other. Give me a clause of not more than six lines in length, six or eight lines in length, to deal with this issue” ...

The great problem of Contract Law is there’s a lot of abstract discussion. What we need to do is have a way to find the students solve a concrete problem, or to show them how to solve a concrete problem.

Professor 20 makes some “modest attempts at contract drafting” of sale and purchase agreements, having students “swap” their drafts to “respond to whether they would agree with [the other student’s] clause, and how they’d want to change.” Professor 32 brings in a practitioner to teach “a class on contract drafting, or contracts in the real world so to speak.” Professor 30 spends “two or three classes” looking at different types of contract, because it is “important to see a contract

1459 [012], Interview, lines 530-35.
1460 [047], Interview, lines 677-99.
1461 [020], Interview, lines 350-60.
1462 [032], Interview, lines 98-104.
from that real world perspective." The most extensive use of drafting happens with Professor 49, who dedicates half the entire course to it: “In the second term, we draft contracts—that’s all we do.” Students begin with a negotiation exercise developed at Harvard on oil price negotiation, and then students “draft a confidentiality agreement, a licensing agreement, and then an outsourcing agreement.” Drafting exercises comprise 60% of the final grade and the third objective of the course underscores and places in bold the objective that students will be able to “apply [contract] principles in practice.”

ii. Course Syllabi and Expressions of Teaching

Professors also occasionally discuss their teaching in a way that suggests they are genuinely trying to incorporate certain realist attitudes. For example, Professor 54 starts each section with a discussion of the underlying rationales that the rules about to be discussed are “designed to achieve,” and prepares for class by researching policy. Professor 39, who says elsewhere that policy really only comes in at the beginning and end of the course, actually includes a “policy issue” for each case that Professor 39 prepares. Professor 42 prepares for class not by summarizing “subject matter or … doctrine” but by seeding and anticipating exchanges with particular students. Professor 28 gets

1463 [030], Interview, lines 225-38. Professor 30 expands: “The reality is—when students go into practice, ... 99.9% of times, they’re either going to ... be concluding a contract, or resolving some question arising out of the application of a contract, or settling a dispute over a contract—but rarely will in fact they go to court” (ibid).


1465 [049], Interview, lines 19-32, 110-229.

1466 [049], Syllabus, 2012-13, p 2.

1467 [054], Interview, lines 211-15 (at the beginning of each section “we talk a little bit about the rules that we’re going to encounter ... Let’s just think a little bit about why do we have these rules at all? What are we striving to achieve?”), 286-8 (“I’ll introduce the concepts a little bit and I’ll introduce some of the underlying rationales and policies”), 421-9 (“How do I prepare for class? ... I read all the cases ... and I have them each broken down into their individual FIRACs ... And then I’ll do some more general research to put in at the beginning and at the end where I’m going to talk about the policy and ... give them sort of an overview narrative”).

1468 [039], Interview, lines 726-30 (“I modify [my lecture notes] from year to year ... I’ll change them and I’ll write notes—what worked, what didn’t. [This is] what it looks like. Policy issue. Facts, issues, analysis, holding, questions, ratios, policy issue”).

1469 [042], Interview, lines 726-45:

[M]y classroom notes don’t say very much about the subject matter or the doctrine. They tell me who to ask which question to and then how to build on it. It’s like the script for a play ... [They differ] from one year to the next ... because each group of students has a different collective personality and obviously individual personalities as well ... I don’t usually say, "Now, Mr. Smith,
students to think as policy thinkers through classroom discussion, asking students “What would you do? … How would you respond to this issue? [Is] there a need for legislation? What would it look like?”; there is a policy question on the exam “every time” reflecting the policy questions explored in class. In the course syllabus, Professor 35 includes in “skill and comprehension outcomes” “legal reasoning,” which includes both “making an assessment about what the law IS on a given topic” and “where appropriate, making an argument about what law SHOULD BE, i.e. why the law should change in a given direction.” And Professor 58, who seems to incorporate backwards reasoning into teaching, “invite[s]” students, in the course syllabus, to “read the materials for this course with a vigilant eye for doctrinal classifications that do violence to the messiness of human interaction;” one class’s objectives includes “identify[ing] the legislative policy objectives in declaring surrogacy agreements unenforceable.”

Occasionally, a professor’s pedagogical philosophy reflects an iconoclasm reminiscent of the realist “attack” on a “jurisprudence of forms, concepts, and rules” and maps neatly on to the desire, detailed above, to disabuse students of their preconceptions about law. This is the case with Professor 27:

[O]ne of my [former] colleagues … who studied with Wittgenstein … told me that education consists in largely taking furniture out of the mind, not putting furniture in. So it’s disabusing people of their preconceptions, trying to get received wisdom, … the commercial, crass, … talk-radio view of the world out of people’s brains … No matter how well-educated, … people come with the preconception of law as a bunch of rules … And it turns out it doesn’t work that way at all …

blah, blah, blah, blah.” What I try to do is make a provocative statement that builds on something or other that Mr. Smith had said before, such that he will be compelled without being named to come forward.

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1470 [028], Interview, lines 451-68 (Exam questions may include “’argue for it, argue against this … What would you make?’ … It depends on what we talked about that term”).
1471 [035], Syllabus, 2015-16, p 2.
1472 [058], Interview, lines 447-9 (students should develop “a sense [of] where the judge’s intuition’s going to go … and then … start looking for doctrine to find out why”).
1473 [058], Syllabus, 2007-8, p 1.
1474 [058], Calendar and Learning Objectives, 2007-8, p 12.
I worry about ... when you’re halfway down the runway ... will we achieve liftoff? Will we hit the critical speed?” ... [Liftoff is] where people let go of their preconceptions and are prepared to give you a lot of rope, take a risk and ... come along for the ride ... 

[Northrop] Frye’s got the most radical view of education ... that I have believed in deeply for a long time ... The idea is that in some sense ... professors are like drug pushers ... People in the modern world ... are ... locked into extremely conventional, mass-market, non-critical, conventional, what’s-on-TV, what’s-popular [attitudes] ... [They have] never taken charge of their own thinking [and] don’t have the capacity for critical self-engagement with the world. And that’s what education is ... He has this wonderful line: ... “If governments really knew what I did in class they wouldn’t let me do it because I’d be like smuggling kids dope!” That is, [education] actually blows their mind. But blows it in the sense that they’re taking charge of their own thinking rather than just being a consumer of prepackaged goods.1475

In this excerpt, a critical understanding of education coincides with a desire to critique a prepackaged understanding about law. We see an analogous concern in the choices some professors make about substance.

iii. Decisions Regarding Substance

One good example of this is the few professors who assign readings that are critical about legal education in the Contract Law course. The most common of these is Duncan Kennedy’s famous article on the reproduction of hierarchy.1476 This is a noteworthy piece to include in a first-year Contract Law course because other than some passing allusions,1477 and unlike other of his major works,1478 the subject matter is not about contract law but rather about the ideological content of law school as a whole. Including it thus signals a desire for students to critically self-reflect on the broader enterprise of legal education. Professor 25 used to include it at the end of the course because it might “resonate” with students and to help them “see the forest.”1479 Professor 64 assigns it at the beginning of the course in order to help students “start evaluating more critically their legal education ... and start

1475 [027], Interview, lines 71-90, 140-90.
1477 See eg. ibid at 594 (exemplifying a “hot case” as one in which “an Appalachian farm family ... rent[s] their land for strip mining, with a promise to restore it to its original condition once the coal has been extracted, and then reneging on the promise”; the reference is almost certainly to Peavyhouse, supra note 883).
1478 See eg. Kennedy, “Form and Substance”, supra note 114.
1479 [025], Interview, lines 459-73.
thinking about what they would like as legal professionals and how they can construct their education in a way that fits that."\textsuperscript{1480}

In an analogous fashion, Professor 37 concludes the course every year with a study of Ian Macneil’s article, “Whither Contracts,” getting the students to reflect on whether six learning objectives outlined by Macneil were achieved in the course. This is part of a broader critical strategy to get students to ask the question, “Why do we have a course called Contracts? Is there something we can really put in this box?”\textsuperscript{1481} Professors commonly assign supplemental readings, often specifically in order to highlight realist perspectives or counteract the perceived shortcomings of the casebooks. For example, Professor 33 seeks to supplement the “weak section on the ... explicit role of public policy and morality in Ben-Ishai & Percy, and expose students to the themes of sex, race, and power in a more detailed way than the introduction does.”\textsuperscript{1482} Occasionally, a professor will choose to switch casebooks to better reflect a realistic attitude.\textsuperscript{1483}

\textsuperscript{1480} [064], Interview, lines 208-16.

\textsuperscript{1481} [037], Interview, lines 365-94. See Chapter 5, II(A)(ii)(c)(2.3.1), above for a survey of other professors who include Macneil as a supplement to other readings.

\textsuperscript{1482} [033], Interview, lines 240-56, 324-57. See also [006], Interview, lines at 67-124 (insufficient problems and exercises in all Canadian casebooks), [009], Interview, lines 106-49 (“I always like to find opportunities to talk about context-based, practice-based application of what we’re talking about”), [010], Interview, lines 200-243 (providing more contemporary examples than in Ben-Ishai & Percy to appeal to students’ sense of relevance), [021], Interview, lines 556-608 (filling in key moments missed when some cases taken out of Ben-Ishai & Percy), [017], Interview, lines 109-203 (to provide more context, more contemporarily relevant examples, and more gendered material than in Waddams), [027], Interview, lines 621-49 (providing extended excerpts to teach the cases more as “parables” in contrast to the editing in Waddams that “strip[s] the guts out of cases”); [035], Interview, lines 616-37 (without a “conscious effort” to include “big picture issues,” they would be missed because Boyle & Percy “doesn’t really raise those issues at all ... and that would be one of my minor disappointments”). Occasionally, instructors feel the need to supplement Swan, too. See eg. [016], Interview, lines 741-7.

\textsuperscript{1483} See eg. [013], Interview, lines 55-78:

I had a long conversation with John Swan, as he then was, and he convinced me. He said to me something that resonated to me based on my experience in practice which was that the issues that we focus [on] ... in the Boyle and Percy approach ... put emphasis on the wrong things ... technical issues of contract formation which in the vast majority of cases ... are not issues at all. And that the much more complex and indeed for that reason socially important ... issues are ... related to damages, and remedies more generally ... I decided ... that I would investigate using his book and after looking at it, was convinced that it was a better tool for teaching contracts to students in a way that would allow them to appreciate not only what was important about contracts, but ... would give them a better sense of the nature of contract law rules.

See also [048], Interview, lines 48-50:

The reason I switched to Swan and Reiter was that the earlier versions of Milner and ... Waddams ... didn’t provide much social context for the subject ... I went back to Waddams because it
Finally, not surprisingly, some professors opine specifically about the importance of teaching remedies, whether that means placing it first or suggesting to students that remedies “drives” analysis. And while in almost every course legislation plays a relatively minor role, a number of professors make the point of including some legislation, often consumer protection legislation, in order to explore the “history and [political] rationale of legislation,” provoke a “value discussion,” show the “context to [a] case, where it came from, and that more can be done with these issues,” avoid “unduly emphasizing case law,” or understand how the legislature acts to “level the playing field.”

iv. Evaluation

Some professors make an effort to evaluate on some of the realist themes. We see this in selected examples of different types of evaluation, examination questions, and criteria. Nine professors described having a significant writing assignment outside of the final examination, although the number is probably much higher given the policy at some law schools to require an optional assignment.

started to do that as well. And ... for a period of time I had supplementary materials that dealt with feminist issues, ... race, and diversity issues, in contracts.

1484 [013], Interview, lines 73-87:

the ... problem with teaching offer and acceptance [first] is you communicate to students a sense that ... contract law is just a sort of a puzzle [and that] ... there are ... black and white rules that apply to give you determinate answers. And contracts law ... or any other law is not really like that. And to the extent that you start by looking at remedies where the issues are complicated and the answers are not obvious, ... you give students a better starting point ... [It] makes it harder for students, but I think in the end, on balance, it’s more worthwhile to go that way.

1485 [051], Interview, lines 125-44:

Even when I start with offer acceptance, I spend ... two classes [first] on remedies, just to show ... the importance of the remedial issues ... I use a problem that [shows how] different contractual analyses will give you a different remedial outcome. And so ... from the legal realist perspective, to what extent is the remedy driving the legal analysis?

1486 [053], Interview, lines 469-89 (consumer protection and other legislation).

1487 [064], Interview, lines 525-6 (pledge agreement legislation).

1488 [028], Interview, lines 219-20 (consumer protection and debt collection legislation).

1489 [032], Interview, lines 763-4 (consumer protection legislation).

1490 [050], Interview, lines 372-86.

1491 See eg. [022], Interview, lines 633-4 (“I’ve always had an essay assignment. It’s just been traditionally required to have that”).
These range from commenting on “proposals for legislative reforms in contract law”\textsuperscript{1492} to providing commentary and critical thoughts on a scholarly journal about contract law.\textsuperscript{1493} One professor has “four or five interim assignments that emphasize different kinds of writing or counseling or synthetic skills.”\textsuperscript{1494}

Twelve professors mentioned in interview that they include an essay question on the exam; these range from “policy questions”\textsuperscript{1495} to “law reform questions” that ask students to “do a critical assessment of ... an area of law ... in a normative context.”\textsuperscript{1496} Such essay questions may specifically ask students to evaluate the classical theory of contracts, as Professor 56 does with reference to Patrick Atiyah or Grant Gilmore,\textsuperscript{1497} and as Professor 52 does with relation to Friedrich Hayek.\textsuperscript{1498} In these instances, while students are at least incentivized to study and engage with theoretical or critical perspectives, the essay questions, conceptually distinct from the fact pattern question, do little to disturb the conventional idea of legal reasoning.

Some professors, on the other hand, do state how the fact pattern question tests students’ critical thinking and engagement with policy. Thus, Professor 67 tells students that the fact pattern will examine them on “being critical about the law,” requiring them to “go behind what’s obvious and what

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1492} [056], Interview, lines 228-9.
\item \textsuperscript{1493} [024], Interview, lines 577-88.
\item \textsuperscript{1494} [042], Interview, lines 251-3.
\item \textsuperscript{1495} See eg. [028], Interview, line 462.
\item \textsuperscript{1496} [051], Interview, lines 492-4.
\item \textsuperscript{1497} [056], Interview, lines 214-23:
\begin{quote}
[I] focus on the broader themes of the course, the history of contract law or ... the broader theoretical developments ... The kind of Death of Contract [supra note 167] quotes ... In my last exam [I] had something by Atiyah who describes ... the classic contract theory of the nineteenth century where the courts just follow what parties have written ... [I asked,] “Is that ... an accurate description of what happened then and what happens now? Please compare.”
\end{quote}
\item \textsuperscript{1498} [052], Interview, lines 236-46:
\begin{quote}
I gave them a quote from Friedrich Hayek which discussed the conditions that exist in the great society, among them Freedom of Contract. Then I posed them the question ... “Hayek espouses this classical liberal theory of contract law where the purpose of this institution is to allow people to chart their own paths—that they’re free to contract as they so choose. But we’ve ... examined various doctrines and [those] principles that seem to undercut that” ... I ask the students to identify ... doctrines that override or temper ... the predominance of the pure classical liberal theory.
\end{quote}
\end{enumerate}
\end{footnotesize}
you’re told, both in terms of theory and in terms of the facts.” Professor 48 specifically tries to incorporate policy and social context into the problems themselves, preferring this method over an essay question:

When you write a paper [from] a feminist analysis of those husband and wife cases ... that’s not making them think of this as really part of how they should be thinking about contracts all the time. If you can integrate it into problems, it’s much better.

Professor 35 states in the course syllabus that the “critical reflection skills” of “identify[ing] the political and intellectual assumptions that underpin Canadian contract law doctrine, ... critically reflect[ing] on the contradictions and tensions between and amongst them,” and “critically engaging with the consequences of those assumptions and tensions for parties ... and for the development of contract law in Canada” are “primarily assessed through the midterm and final exams.” In a question that appears to integrate specific examples with a theoretical idea, Professor 58 asks students to “assess [one scholar’s] thesis on the normative importance of facts in light of materials covered in the course,” specifying that “the objective is not to reproduce the rule in the cases ... [but rather] to identify the role that these factual elements assume.”

Occasionally, professors will describe their assessment criteria as including an engagement with policy or critical thinking. For example, Professor 54 includes at the end of a long list of factors of what make the “best answer,” “making some reflection on policy.” Professor 37 describes how the best answers on a recent exam came up with “imaginative solutions” after having thought in a “creative and critical way.” And Professor 58, in a detailed examination grading memo, writes that the best answers to a question that asked students to write a “reasoned dissent” of a case studied in class had the following virtues:

1499 [067], Handwritten Notes of Untranscribed, Unrecorded Interview, p 6.
1500 [048], Interview, lines 438-42. One way that Professor 48 integrates these issues into policy questions is by use of counterfactuals: “How would you think about the issues if they were thus and so” (ibid, line 429).
1501 [035], Syllabus, 2015-16, p 2.
1502 [058], Final Exam, April 2008, p 2.
1503 [054], Interview, line 189.
1504 [037], Interview, lines 301-15 (“The best answers didn’t just go along with the kneejerk reaction path of ‘Oh! This is the prof trying to see whether I know the law on exclusion of liability clauses. This is a prof trying to make me think!’ Right? Think outside the obvious boundaries to much more imaginative solutions”).
The best answers combined a careful, close reading of the dispute ... and mastery of larger principles ... The most convincing dissent persuades and convinces at the level of the parties to the particular dispute and on bigger ideas: it demonstrates that the majority judges have misunderstand both the facts and the key ideas. I think we discussed in class once, in the context of persuasive legal argumentation, the idea that you would make submissions on several different levels for maximum persuasiveness.1505

In these above examples, we see the seeds of an attempt to internalize theoretical or critical perspectives, or external factors such as context or policy, into one definition of the privileged core of the Contract Law course – that which is evaluated. Moreover, in the questions that require students to integrate these factors into the exercise of legal argumentation, we also catch a glimpse of how these factors may be operationalized into another core domain – legal reasoning. Nevertheless, however illustrative these examples are, they still represent the minority and are more exceptions that prove the rule. The overwhelming impression is of a series of pedagogical choices that reinforce a conventional idea of legal reasoning, an idea that itself is predicated upon the importance of rules and the line-drawing exercise of determining relevance through reasoning by analogy.

V. Summary and Conclusion

When Canadian contract law professors describe and elaborate on their beliefs about law, most espouse a strong commitment to realist and critical attitudes. These include the notion that the rules of contract doctrine do not determine legal results and are the products of numerous contextual factors that ultimately render them mutable and contingent. Professors underscore the importance of broader factors emanating from outside the realm of distinctively legal discourse, such as judicial personality, political preferences, the contextual details of factual scenarios, social relations, and non-state normativity. Moreover, Canadian contract law professors largely consider critical and theoretical perspectives that seek to evaluate law from an external reference point to be integral to a complete understanding of law as a social phenomenon. In the embrace of both underlying factors and external perspectives, Canadian law professors seem to have internalized many of the lessons of American Legal Realism and its heirs, making detailed references to the canonical authors but also expressing the ideas in their own words and idiosyncratic ways.

1505 [058], Memorandum to class Re: April Final Examination, May 2008, pp 2-3.
For the most part, however, Canadian contract law professors do not translate these well-developed and internalized attitudes into practice, either in the way they understand legal reasoning, or in their pedagogical choices. Instead, legal reasoning and pedagogy appear to operationalize a different set of attitudes about law, those that emphasize the solidity of rules and the importance of distinguishing the relevant from the irrelevant with reference to an internally coherent set of rules. The methodological and pedagogical commitments of the majority thus map more cleanly onto the commitments about law that only a minority – the “champions” of formalism – directly articulate. These commitments emphasize the autonomy of law by insisting on its distinctive grammar, which not only constitutes a descriptive claim about how law speaks in its “own way,” but serves the normative end of bolstering law’s legitimacy in imposing formal sanctions in some cases but not others. In teaching and evaluating legal reasoning, most contract law professors take doctrine seriously, both in the sense that the rules matter – they are no “pretty playthings” – and in the sense that the judicial words that formulate and reason about the rules also matter – they are no “mere rhetoric.”

The primary story is therefore of a disjuncture between the attitudes expressed about law and attitudes revealed by the practices of legal reasoning and teaching. This disjuncture recalls the tendency Elizabeth Mertz observed in US Contract Law classes to marginalize considerations of policy (as she broadly defined that term) vis-à-vis the “carefully disciplined core focus” of legal reasoning. It also signals a distance from the claims by Kennedy and Fisher that American legal thought is “an eclectic practice built from the methodological sediment laid down in successive projects of wholesale criticism and reform.” The methodological sediment of legal reasoning expressed through Canadian contract law teaching does not seem particularly stratified, nor does it seem much to be a product of the realist “assault on the jurisprudence of forms, concepts, and rules.” The realist attitudes are alive and well, but they do not largely appear to be operationalized into discrete forms of reasoning and argumentation. Even less frequently do professors thoroughly design the substance of their courses,

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1506 Cf. Mertz, supra note 3 at 77 (including in the catch-all term “whether law operates in a just manner, whether certain legal decisions were motivated by class interests or other extralegal concerns, whether particular social conditions caused or resulted from specific legal decisions”).

1507 Ibid at 78. Mertz further writes that in her study policy is “marginal not only in terms of discursive structure, but also because these policy discussions never impart any real analytic standards for assessing one story against another ... When social context comes in the door, structure, standards, and rigor exit” (ibid at 79).

1508 Kennedy & Fisher, supra note 37 at 3.

1509 Ibid at 10.
their teaching methods, or their evaluation techniques to put into practice their realist and critical beliefs about law.

Accordingly, the realist and critical perspectives remain suspended, rather than dissolved, in the Canadian legal consciousness. They perform a powerful theoretical function in helping professors describe their attitudes about law, but for the most part these theoretical insights remain disembodied from the epistemological acculturation of making lawyers. These ideas do not penetrate the structural grammar of law or displace the conventional categories and practices for teaching contract law. Indeed, to the extent that the methodological and pedagogical choices – the prevalence of hypothetical fact patterns, the “reasoning by analogy” formula, the final exam, the choice to adopt or follow the order of a casebook, to name just a few examples – are experienced and portrayed as natural or obvious, they reveal even more deeply the tenacity of the classical, formalist vision of law, what Thomas Grey describes as “Langdell’s secret triumph”:

Categorical schemes have a power that is greatest when it is least noticed. They channel the attention of those who use them, structuring experience into the focal and the peripheral. In doing so, they influence judgment much as the agenda for a meeting influences the results of its deliberations. Heedless of this power of categories, modern legal theorists have not supplanted the classical ordering but have left it to half-survive in the back of lawyers’ minds and the front of the law school curriculum, where it can shape our thinking through its unspoken judgments – Langdell’s secret triumph …

Legal discourse largely retains its orthodox form. On official occasions, lawyers and judges still mostly talk in terms of rules and principles, presupposing right answers even to hard questions of law and disfavouring explicit arguments of policy …

One must recall and try again to feel the pull of the simple tenets of Langdell’s creed: law is a science; its materials are all in law books; behind the mass of those materials are a few simple principles; and discovery of those principles will allow us to “master the ever-tangled skein of human affairs.”

Replace, in the first paragraph of that quotation, “modern legal theorists” with “Canadian contract law professors,” and one arrives at a somewhat caricatured, but by no means wildly inaccurate, account of this chapter’s primary story. Contract law teaching appears to rely largely on classical categorical schemes of substance matter and legal reasoning. The result is the perpetuation of a discourse focused on “rules and principles” that “disfavor[s] explicit arguments of policy” by excluding

\footnote{Grey, \textit{supra} note 174 at 49-52.}
them from legal reasoning proper, and by deeming them insufficiently worthy to be rigorously cultivated or evaluated.  

But Langdell’s secret triumph has not only handed down the category of Contract Law and its doctrinal subdivisions, but also, crucially, the pedagogical formula of focusing on cases. Thus, the emphasis on adjudication and the relatively minor role that legislative processes play in contract law teaching and casebooks perpetuate a focus on substance (by focusing on canonical cases), a focus on discerning relevance in legal reasoning (by focusing on judicial reasoning and the use of precedent), and it sets up a tenacious model of evaluating and reinforcing the task of the litigator and judge, via the standard fact pattern examination. The case method, as much as substantive doctrinal categories do,


Practicing lawyers almost never appreciate new theories when they are proposed, dismissing them scornfully as airhead speculation. All the same, the new theories soak gradually into the marrow of lawyers’ bones, and, in time, lawyers come to rely on them without being aware of it. Lawyers bought the new treatises ... for their encyclopedic collections of cases; but, with the cases, they absorbed the categories and principles as well.

Gordon then goes on to cite Grey’s formulation of “Langdell’s secret triumph” (supra note 174).

This tenacity has also been observed in the British context. As David Sugarman wrote a generation ago, summarizing the observations made about the “textbook tradition” in English law teaching in the second half of the nineteenth century:

The “black letter” tradition continues to overshadow the way we teach, write and think about law. Its categories and assumptions are still the standard diet of most first-year law students and they continue to organize law textbooks and casebooks. Stated baldly it assumes that although law may appear to be irrational, chaotic, and particularistic, if one digs deep enough and knows what one is looking for, then it will soon become evident that the law is an internally coherent and unified body of rules. This coherence and unity stems from the fact that law is grounded in, and logically derived from, a handful of general principles, and that whole subject areas such as contract and torts are distinguished by some common principles or elements which fix the boundaries of the subject. The exposition and systematization of these general principles and the techniques required to find and to apply both them and the rules that they underpin, are largely what legal education and scholarship are all about ...

Despite the variety of producers and consumers of legal discourse, it is what judges say and the supposed needs of the legal profession as narrowly defined, that have had the greatest magnetic pull over the nature and form of legal education and scholarship. Other aspects that are equally important to understanding law, such as legislation, the operation of law in practice, as well as the history, theory, morality and politics of law, are ignored or marginalized (“A Hatred of Disorder’: Legal Science, Liberalism and Imperialism” in Peter Fitzpatrick, ed, Dangerous Supplements: Resistance and Renewal in Jurisprudence (Concord, MA: Pluto Press, 1991) 34 at 34).
becomes the unstated norm. As Professor 61 says, the case method is just “one of those *core elements* of the first-year program that *should* be taught.”

The picture of a formalist centre of gravity with realist convictions at the periphery would, however, be incomplete. It would give short shrift to the genuine and deep commitments to realism outlined in Part II of this chapter and to the attempts, outlined in Parts III and IV, by a minority of professors to reconstitute legal reasoning through realist influences, and to adapt their pedagogical practices, including evaluation, accordingly. The more accurate picture admits the co-existence of two powerful forces in the Canadian legal consciousness while also specifying their asymmetry. This observation very closely parallels the findings on the Canadian contract law casebooks in Chapter 3. Taken together, the views and practices of both editors and teachers leads to the generalization that Canadian legal thought may be characterized by an eclecticism of largely realist theory coexisting with a homogenous largely formalist methodology.

The concluding chapter will explore three possible accounts of this apparent gap between a realist theory and formalist practice. The first framework is loosely one of legal theory. It will ask to what extent realism and formalism are incompatible theories of law, and to what extent they are bundled up in one another. Is there an account of law that can render the co-existence of the apparently contradictory views coherent? While this sounds like a philosophical task for the ages, I will approach it modestly, using the data from the project to explore whether contract law professors’ words shine a light on the compatibility, co-existence, or incoherence of realism and formalism.

The second framework is pedagogical. Perhaps there are reasons of pedagogical effectiveness that might account for the apparent tension between realist theories and formalist practices. I will explore to what extent professors assert or imply that pedagogical agency might account for the apparent inconsistencies. Finally, I will explore to what extent structural features of legal education might help explain the gap. Do constraints or cultures within institutions, the profession, or the broader market for legal services condition or explain the apparent disjunction between what law professors say they believe, and what their teaching practices and descriptions of legal reasoning reflect?

\[1512\] [061], Interview, lines 955-7.
Chapter 6
Agency and Structure in Legal Education

I. Introduction

This dissertation has explored two perennial tensions in legal education. In Chapter 4, I explored how the conventional opposition of theory and practice in the discourse on legal education does not align with Canadian contract law professors’ accounts of their aspirations for teaching. While the professors in my study may reproduce elements of the conventional narrative when speaking about their own role or mission, or that of the law school in general, when law professors describe their own teaching experience and objectives, they overwhelmingly express the idea that theory directly informs practice. To a lesser extent, they also express how practice informs theory, and thus reflect the idea that theory and practice are mutually reinforcing concepts. The near consensus that theory and critical perspectives are valuable because they produce “better lawyers” thus serves to dismantle the conventional dichotomy between theory and practice, and also suggests that an emerging narrative – that legal education can and should serve to integrate and balance theory and practice – may one day come to subvert the traditional story.

Chapters 3 and 5 complicated the near consensus that theory translates into making better lawyers. Those chapters delved into the substantive theoretical ideas about law that contract law professors and casebook editors espouse, and compared these ideas to the ideas conveyed by the techniques of legal reasoning and pedagogical choices described and presented by teachers and editors. Those chapters observed how despite a commitment to an eclectic range of critical and realist theories about law, influenced heavily by the authors of the American canon, Canadian contract law education largely privileges a methodology that is homogenous, autonomous, and serves ultimately to marginalize the considerations of policy, context, and politics that professors propositionally claim are central to an understanding of law. Professors do not seem to translate these theoretical concerns into their understanding of legal reasoning and do not appear to privilege them in their teaching materials or practices.

Taking those two chapters together, we begin to see how contract law teaching reveals a deep gap between aspiration and reality. The aspirations are multiple: One is to convey a vision of law as contingent, grounded in uncertainty, connected to contextual factors, and expansively inclusive of “external” perspectives, including politics and policy. Another is to translate theoretical ideas into an
operationalized vision of legal practice. If these two aspirations were jointly met, we would see visions of legal reasoning that internalize and operationalize the critical and realist ideas. This could be both by incorporating the reasoning techniques of other disciplines into an expanded set of argument-types for the lawyer, and by modeling a set of other skills, such as planning, negotiation, problem-solving, and policy analysis, that in turn would present to students a wide range of “law jobs.” Instead, the primary practice of professional acculturation that we observe – inculcating legal reasoning (“thinking like a lawyer”) – implicitly marginalizes the central tenets of the realist and critical theories, emphasizing the determination of relevance largely through a self-referential, internally closed system of rules and precedents as the key reasoning and argumentative technique, and privileges the judge or barrister in the conception of legal professional.

In this concluding chapter, I aim to do two major things. First, I aim to explore some possible accounts of this apparent gap; second, I conclude the dissertation with some implications from the entire study.

In Part II, I explore how contract law professors and casebook editors conceive a conceptual compatibility between realist and formalist ideas. This compatibility manifests either in a theoretical linkage that connects these ideas under a unified view of law, or in intellectual attempts to reconcile the co-existence of two apparently contradictory ideas. To the extent this account is compelling, the apparent failure of the aspirations becomes less acute, because the gap between theoretical convictions and manifestations of practice is either smaller or nonexistent.

In Part III, I explore the possibility that deliberate pedagogical choices account for the apparent disjuncture. On this account, casebook editors emphasize in their treatment of substance only a partial vision of what they assert propositionally in their introductions, and professors emphasize conventional legal reasoning and substance, out of a desire for pedagogical effectiveness. This account, while not eradicating or minimizing the gap between aspiration and reality, nevertheless places it in a more positive light by acknowledging that conceptual coherence or pedagogical aspiration may have to make way for the pragmatic realities of teaching, and that unless professors teach students to walk before they can run, students might end up being able to do neither.

\footnote{Cf. KN Llewellyn, “The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method” (1940) 49:8 Yale LJ 1355.}
Both these sections can be thought of as individual “agency” accounts of the gap between aspiration and reality, as they derive from professors’ intellectual formulations or pedagogical choices. While each of these arises in the words of professors in my study, as I will discuss, neither account is wholly explanatory or satisfactory. Accordingly, Part IV explores an alternative possibility. Here, I contemplate the possibility that external factors account for the discrepancy between aspiration and reality. On this view, structural features of legal education – pressures from within law faculties, including from students, and from outside law faculties, including from the profession and markets – play an integral role in shaping the substance, method, and emphasis of contract law teaching.

Part V examines how the interplay between structure and agency relates to the gap between aspiration and reality. It explores how this interplay is both as complex as the interplays between theory/practice and realism/formalism, and how it helps understand these other dualities. I conclude with some thoughts about how complexifying these dualities may generate remedial possibilities for legal education.

II. The Conceptual Compatibility of Realist and Formalist Ideas

Law professors occasionally make sense of the apparent contradiction between realism and formalism using those concepts themselves. In this Part I explore those instances to elucidate how these concepts might help account for the apparent tension between realist theories about law and formalist reasoning and pedagogy. I focus on the writings and words of teachers and casebook editors that suggest principled reasons why realism and formalism might be compatible.

A. A Unified Conception: Realist Ideas Serve the Rule of Law

We might seek to reconcile the apparently disparate ideas via a unified philosophy of law. For example, when Waddams states in the preface to his textbook that “rational decision making is strengthened, not weakened, by open recognition of conflicting values,” he implies that realism furthers the goal of legal rationality. Put more fully: the rule-of-law value that law ought to treat everyone equally requires that there be rational distinctions to justify differential treatment. Adjudication is the pre-eminent legal process for cultivating this rationality, and thus should be the focus

\(^{1514}\) Waddams, Preface to 1st ed text, supra note 745 at viii.
of legal education. Understanding legal rationality requires not only understanding what judges say but
also (not instead)\textsuperscript{1515} what they do. As Waddams puts it:

It is better to recognize competing values, even if that recognition appears to involve a
difficult and uncertain balance, than to pursue certainty by adopting a rule that
suppresses important countervailing principles. Such pursuit is self-defeating, for
important values are rarely permanently suppressed. The rule that is supposed to
achieve clarity and certainty becomes riddled with exceptions, judicial and statutory,
devised to avoid injustice, and leads in the end to the loss of the very certainty that was
supposed to be its chief merit.\textsuperscript{1516}

Accordingly, for a thinker such as Waddams, there may be no contradiction between a realistic tendency
to understand the underlying values and a desire for judicial rule-making to attain “certainty.”

In a similar vein, another editor, John McCamus, espouses the view that understanding
underlying concerns directly serves the solidity of doctrine. McCamus plays a major role in both
\textit{Waddams} and \textit{Boyle & Percy}.\textsuperscript{1517} He has also published the longest, and perhaps most widely
recommended, contract law textbook in Canada.\textsuperscript{1518} In the Preface to that book, he foregrounds the
importance of doctrine:

\textit{The main objective ... is to provide an accurate account of the principles and doctrines
of the law of contract as it is currently understood and practiced in the common law
provinces of Canada.}\textsuperscript{1519}

Yet, unlike other Canadian texts, whose prefaces and introductions paint a more formalist
picture of the role of the treatise,\textsuperscript{1520} McCamus emphasizes the common law’s “adaptability to changing

\textsuperscript{1515} Waddams, “Unconscionability in Contracts”, \textit{supra} note 728 at 1 ("My view is that the law of contract, when
examined for what the judges do, \textit{as well as} for what they say, shows that relief from contractual obligations is in
fact widely and frequently given on the ground of unfairness") [emphasis added].

\textsuperscript{1516} Waddams, Preface to 1\textsuperscript{st} ed text, \textit{supra} note 745 at vii-viii [emphasis added].

\textsuperscript{1517} McCamus has edited the chapter on “Representations and Terms; Classification and Consequences” since the
first edition of \textit{Boyle & Percy}, \textit{supra} note 510. He also edits a chapter in \textit{Waddams} and contributes the subject of
restitution to a “number of chapters” (John D McCamus, Interview with author, 28 February 2014, lines 527-30)
(attributed with permission).

\textsuperscript{1518} Compliments for the McCamus text proliferate in my interviews. It was the book that most professors
recommended to students seeking clarity.

\textsuperscript{1519} McCamus, \textit{The Law of Contracts}, \textit{supra} note 893 at xxiii (Preface to the First Edition).
social and economic circumstances and its ability to reformulate doctrine in light of evolving professional attitudes and insights as to how the law can be improved.”\textsuperscript{1521} Although he aims not to “commingle[] the objectives of exposition and constructive criticism”\textsuperscript{1522} and is clearly concerned with more positivistic desires to “unravel the mysteries”\textsuperscript{1523} of doctrines or “get to the bottom of things,”\textsuperscript{1524} contract law’s underlying rationales seem integral to the very doctrine that his work attempts to elucidate.

This attitude is particularly apparent in the way McCamus describes his approach to teaching:

[It is important for students] to consider whether the doctrine does in fact have a solid foundation in public policy. If it doesn’t, it’s likely to change. If it does, it’s unlikely to change ...

I certainly tell the students that there’s no real distinction between law and public policy. Law is an exercise in developing, implementing, and applying public policy choices to social activity, commercial activity, of various kinds ... Understanding the ... basic architecture of the doctrine of promissory estoppel ... no doubt rests on the analysis of why would we give some effect to a promise that’s relied upon—and was intended to be relied upon ... The two analytical tasks are quite deeply related and it’s never been my view that you could somehow teach the law without thinking about the policy aspects of it.\textsuperscript{1525}

Accordingly, the underlying factors of policy and context (“changing social and economic circumstances”) are considered not as a challenge to, but directly in service of, doctrine. As with

\textsuperscript{1520} See Fridman, The Law of Contract in Canada, supra note 552 at v (revisions “ensure that [the text] reflects the true content of an area of the common law that is ... logical but sometimes applied irrationally in order to achieve a just, fair, reasonable and commercially sound result” [emphasis added]). 1 (“vital difference between legal and moral obligations”); Bruce Macdougall, Introduction to Contracts, 2d ed (Markham, ON: LexisNexis, 2012) at vii (“This part of what is called the Law of Obligations is fortunate in having a certain unity and logic to it”). Nothing, however, compels a textbook writer to foreground doctrine or logic. See Swan & Adamski Student Ed, supra note 593 at §1.1 (“The belief that underlies this work is that the Canadian law of contracts exists to forward the values that underlie Canadian society”).

\textsuperscript{1521} McCamus, The Law of Contracts, supra note 893 at xxiii.

\textsuperscript{1522} \textit{Ibid} at xxiv.

\textsuperscript{1523} \textit{Ibid}.

\textsuperscript{1524} \textit{Ibid} at xxv.

\textsuperscript{1525} John D McCamus, Interview with author, 28 February 2014, lines 218-45.
Waddams, realistic insights serve to buttress the formalist demands of a “solid” doctrine. This interpretation reconciles the commitment to two apparently contradictory views. The “basic” commitment is that the rule of law requires that (1) there is a solid body of rules that (2) are applied equally to all people, requiring (3) a well-refined rationality to justify differential treatment in similar circumstances. (4) This rationality is best refined and developed through judicial reasoning; thus, its study should be the predominant activity of legal education. Realistic attitudes are important not because they challenge these tenets, but because they serve them: by elucidating and sharpening judicial reasoning and rationality, and by ensuring that the rules are “solidly founded.”

This interpretation may very well explain some of the apparently contradictory statements in the casebooks, and it may also capture the attitudes of some law teachers. The emphasis on the “internal” policy factors, including those that have crystallized into the level of principle, is another example of how the realist search for underlying factors directly serves the quest for the solidity of doctrine and bolsters the rule of law.\(^{1526}\) Declaring realism as being in the service of formalism – or vice versa\(^ {1527} \) – makes it intelligible for a law professor to express attitudes about both simultaneously.

**B. The Coexistence of Realist and Formalist Attitudes**

The tendency to communicate a formalist impression of legal reasoning and pedagogy may reflect the fact that professors are genuinely committed to some elements of formalism while also holding their critical and realist beliefs. On this interpretation, while neither one set of views is rationalized to be in the service of the other, they are sufficiently compatible to co-exist. This compatibility may take several forms.

**i. The Tenacity of Existing Categories**

First, it may reflect the tenacity of existing categories of law as expressed in casebooks, course content and the curriculum. The tendency of law professors to accept these as neutral and perpetuate them reflects an implicit commitment to their formalist underpinnings notwithstanding their own realist

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\(^{1526}\) See Chapter 5, II(A)(ii)(b)(1), above.

\(^{1527}\) The correlative interpretation is that law professors’ commitment to the conventional modes and processes of legal reasoning exists primarily as a means of achieving legal results more effectively. Thus, when Professor 26 describes law as “a formalized and specialized species of rhetoric and ... a tool rather than a thing that exists,” the realist emphasis on results appears completely consistent with training students to master the terms and conventional techniques of legal reasoning (Interview, lines 217-18).
propositional claims about the nature of law. Like the scholarly critics, who “will probably never supply a scheme of categories and concepts that actually shape legal argument and judgment,”1528 law professors may exhibit different beliefs at different strata of analysis: a realist or critical concern with the seen consequences of law (effects, results, outcomes of cases, social “reality”) and a formalist allegiance to (or “nostalgia” for, to use Grey’s term) the substructural conceptual organization.1529

One such example arises in the interview with Professor 3, who takes a Marxist approach but nonetheless deploys traditional case law to do so. As Professor 3 says, “the core common law Contracts course has remained remarkably resilient, and I haven’t had the ... courage to challenge that.”1530 A similar attitude that the case method teaching is obvious and not worth challenging appears, not surprisingly, in the casebooks themselves. The Milner Introduction is an excellent example. After so eloquently developing the idea that adjudication needs to be de-centered from legal education, Milner goes on to state that his “apology for so many cases is not quite abject, because first year law students are expected to learn thoroughly the judicial process, how and why it works and what its limitations are.”1531 Why are law students “expected” to learn the judicial process? Does Milner feel this expectation is justified? He doesn’t say. This lack of explanation implies that he is committed, perhaps subconsciously, to adjudication after all. One can infer a similar ambivalence in Ben-Ishai and Percy introduction. The matter-of-fact way in which the authors announce that they prefer traditional methods and materials conveys strongly that the case method, with its attendant formalist messages, is taken for granted.

ii. Owning Intellectual Contradiction

Second, law professors may acknowledge more explicitly the fact that they hold contradictory realist and formalist attitudes at the same time. Professor 42, for example, describes a “schizophrenic” adherence to both a formalist set of ideas reflected in law school and realist ideas embodied in law reform and legal practice:

1528 Grey, supra note 174 at 53.
1529 Ibid at 51. See generally Ibid at 48-53.
1530 [003], Interview, lines 500-502.
1531 Milner 1st ed, supra note 507 at xi. Cf Milner 2d ed, supra note 507 at xxxi (expanding on themes of institutional competence and private normative arrangements to “protect the reader against an over-exposure to judicial opinions”).
We’re in a way conflicted, since on the one hand we continue to pay lip service to the rule of law, which is something else that you get out of this conception of legal science. [This includes] the idea that judges doing deductive reasoning from inductively articulated principles are merely making the future like the past ... It’s a conservative kind of approach to normativity ... And, at least in after-dinner speeches ... or in initiation rituals, like law school, we continue to [pay] a lot of credence to it. But again, there’s a disconnect. Take the field trip to Bay Street, and as often as not, you’ll find folks engaged in long-term planning exercises, not adjudicative exercises, in respect of which—drafting a will, or incorporating a company, or preparing a trust instrument, or negotiating a contract, or doing tax planning—the role of law is invisible. [Doctrinal law] just doesn’t matter, with respect to those kinds of activities that constitute a very large proportion of what people do. Moreover, we have come to think that at the same time as we have this thing called “rule of law,” which is sort of a formalistic brake on law reform, that we can do things with rules: that we can modify rules, adjust rules, and do social engineering. It’s virtually schizophrenic! We are, at one and the same time formalists and realists!

The other instance in which “schizophrenia” arose took me by surprise. Professor 32 spoke at length about Professor 32’s attempts to incorporate social context by inserting a “case in context” class four times throughout the year. Professor 32 read the course objectives aloud to me, which include the goal that students “have ... a contextual understanding of the role and limits of contract in society through a basic familiarity with historical, theoretical, and sociolegal insights.” Professor 32 incorporates Roderick Macdonald’s Lessons of Everyday Law and Stewart Macaulay’s work on relational contract theory into the course; legal pluralism figures prominently in the course, with little student resistance, and forms part of Professor 32’s “theoretical orientation.” So, when I asked

1532 [042], Interview, lines 630-52 (emphasis added).
1533 [032], Interview, lines 525-8.
1534 Supra note 1184.
1535 [032], Interview, line 596 (“I haven’t found hostility or resistance to it at all”).
1536 Ibid, lines 106, 538-53. Professor 32 expands:

[Professor 32: Why is incorporating relational contract theory important?] It partly just comes from my own theoretical orientation. You can’t be a student at [the university where I studied] and come out without any kind of pluralist perspective. But ... it’s also a question of students understanding the sociological realities of contracting ...

[R:] Can you describe how legal pluralism has influenced your approach to teaching contracts?

[Professor 32:] ... Contracts have various meanings in various places ... There can be different notions of what it means to contract, and ... there are different ways of enforcing a contract or not ... in maintaining a relationship ... It’s a question of letting them know the big picture and the realities involved ...
about Professor 32’s theoretical commitments, I was shocked to hear not pluralist or sociolegal theories mentioned first, but rather the formalist thinking of Ernest Weinrib. Consider the following exchange:

[R:] Would you say your own thinking is ... influenced by any particular theoretical perspective?

[Professor 32:] ... I’ll probably be a bit schizophrenic in this regard.

[R:] Why?

[Professor 32:] In the sense that ... I really get and have a lot of sympathy for a kind of Weinribian corrective justice type of approach ... I find that very ... compelling intellectually. And so I probably find myself there. But ... that can’t be the end of the story, and I don’t think they argue that it should be the end of the story either.\textsuperscript{1537}

Perhaps revelatory of this “schizophrenia,” Professor 32 is also one of the only professors to recommend both the formalist Fridman and the anti-formalist Swan and Adamski textbooks as “further readings” on the course syllabus.\textsuperscript{1538} One of the few similar instances is when Professor 14 recommends both Corbin on Contracts and Williston on Contracts.\textsuperscript{1539}

iii. Reconciliation

A weaker version of the attempt to subsume realism and formalism under one unified conception of law is the idea that the two concepts can somehow be reconciled. One such way of reconciling them is to search for a middle ground between the two. In one particularly well-articulated example, Professor 40 speaks about trying to find an “intermediate terrain” between the extremes of “ultra formalism and excessive anti-formalism” that can “reconcile” the two polar approaches:

[R:] And how do students respond to the themes of legal pluralism?

[Professor 32:] Good, yeah. I ... may have worried ... when I first started teaching [that students would] find this a distraction from ... the real stuff ... But I actually haven’t come across that at all\textsuperscript{1537} [ibid, lines 556-86].

\textsuperscript{1537} [032], Interview, lines 694-706.

\textsuperscript{1538} [032], Syllabus, 2013-14, p 2.

\textsuperscript{1539} [014], Syllabus, 2015-16, p 5.
I think there are two ... radical approaches to understanding law. One is the ultra formalist approach and one is a kind of no-holds-barred, anything goes, extreme, excessively anti-formalist approach. And I think real critique, both external and immanent, inhabits the territory between those two ... [The] default presumption that a lot of people, including [myself, have is that law is an] internally coherent, immanently rational system ... A lot of people continue to ... retain residual attachments, fetishistic attachments, to this kind of an approach, even when they've been ... intellectually weaned off of it ... It's a sort of comfort food ... Another extreme is the excessively anti-formalist approach ... It can manifest itself in the form of legal realism and early critical legal studies. It can manifest itself in the form of rational choice theories of various kinds as well ...

I think real critique tries to get a handle on the ... conceptually intermediate territory, by which I mean the following: you've got certain organizing rules and principles, ... some established or semi-established, quasi-established, patterns of reasoning [and] argumentation that can be ... deployed ... But ... those don't actually gel together. They don't fuse in the form of a [gapless] system ... that defers or displaces all contradictions ...

I try to ... teach them that ... there is something that is specifically legal, but the law is not wholly autonomous. It's not entirely independent of political economy, of sociopolitical dynamics, even of culture ... It's embedded in all of those things ... It's nourished by them and it in turn nourishes them as well ...

Law isn't simply anything that we want it to be, but it's also not THE LAW in caps lock! It's somewhere in between. And I think real critical analysis ... comes online when you grasp those two extremes ... Most people ... end up falling into one of those two categories ... We need something that ... takes the best from both, and reconciles them in some more adequate account of how law functions.1540

Another way in which realism and formalism might be reconciled is when professors describe their own attitudes as a mix of the two. Professor 56, for example, who combines the desire to take

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1540 [040], Interview, lines 131-33, 311-76. Professor 40 stated similar ideas earlier in the interview at 158-85:

I try to actually show them that ... the terrain has some structuring principles, has some organizing rules, has some established entrenched patterns of argumentation and reasoning, but it doesn’t cohere as a system. So it’s ... somewhere between order and disorder, in a sense ... It’s not total anarchy. It’s not simply as ... the old legal realists and first ... critical legal scholars would say. You know, what the judge happened to eat ... at breakfast and they’re just making it up as they go along. But it’s also not Weinribian ... Somewhere between the two ... I try to underscore the fact that that is precisely where the creativity and dynamism of the law, and specifically of contracts law, resides. And that’s what enables them to ... be creative and dynamic lawyers ... You can manipulate these patterns of reasoning, or argumentation, these rules and principles—“manipulate” in the best sense of the term—...to further your own cause, or [that] of your client, [but] only so far. They don’t bend infinitely, but they do bend significantly, in most cases.
doctrine seriously with “realist, policy-driven” questions of justice, describes Professor 56’s own ideas as a “weird concoction” of different traditions:

I try to describe it at the beginning [as] trying to deal with cases on several levels, [trying] to keep the balls in the air ... Doing one thing, understand why they’re doing it and at the same time being able to critique ... The culture is a bit different in Canada than it is in the United States ... There’s also more attention to doctrinal detail, I would say, because ... the Canadian classroom is still more heavily influenced by English ideas of doctrine. It’s not ... entirely American in the sense that ... all law is ... ridiculous—it’s just policy, ... politics and what not. So I just try to strike a balance there ... in terms of intellectual works on contracts in the Anglophone world. [I include Atiyah and Geoffrey Samuel] and ... [for a] very clear exposition of what cases say, I always liked McCamus here in Canada. That’s ... the book I love—I really like best. And ... in terms of ... my broader philosophy, I studied with [a leading Critical Legal Studies scholar]. So that ... helps you sometimes switch out of that doctrinal mode without following ... every whimsical twist of his ... philosophy! ... It’s a weird concoction, but ... in terms of ... what I’m trying to achieve, I think it ... worked well for me.

And finally, another way in which realism and formalism may be reconciled is to consider them as providing alternative perspectives, or sets of arguments, to be deployed selectively depending on the circumstances. Professor 1 does exactly this, aiming to cultivate the virtue of “lucidity” that includes the ability to select among formalist and realist arguments according to what is required in the circumstances. Professor 1 goes so far as to describe the co-existence of realism and formalism as ...

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1541 Professor 56 both focuses on a “realist, policy-driven” concern with justice and a desire to show students that “there is a point” to doctrine, that “cases should be decided alike, and ... that judicial arbitrariness should bridled somehow, and ... that it’s the rule of law, not of men” (Interview, lines 111, 406-409).

1542 [056], Interview, lines 511-41.

1543 Professor 1 says:

Lucidity consists in the ability to see [realist and formalist] attitudes and ... perhaps in being able to alternate from one to another. To be aware that these two points of view may be determinative at a given moment ... If one can alternate between these views, integrate them or simply understand them, one has a deeper understanding of law even though the mode of selecting among them may be random and spontaneous and it is not always possible to determine whether you are treating a problem from a realist or formalist perspective [Translation from the French original: Alors la lucidité ici consiste à apercevoir ces deux attitudes, ces deux points de vue ... [et] être peut-être capables de passer de l’un à l’autre. En tout cas avoir conscience que ces deux points de vue peut être à moment donné déterminant, à un moment qui n’est pas possible de fixer ... Si on est capable de passer d’un point de vue à l’autre, d’épouser ces deux points de vue ou de simplement les concevoir, je crois que l’on a une connaissance supplémentaire plus approfondie quoi qu’il faille en même temps accepter l’idée que ... le mode de sélection des points de vue lui reste extrêmement aléatoire enfin spontané [et qu’on ne] peut
describing a truth about the law; the “ethical” reason for exposing students to both realism and formalism is to ensure that Professor 1’s teaching is not founded on a “lie.”

Jurists, Professor 1 writes, are trained to “use” realist and formalist points of view about contract, though not at the same time.

In these multiple ways – constructing a unified account of the rule of law; accepting without challenge the conceptual categories of contract law and the case law format; entertaining simultaneously contradictory beliefs; or reconciling realism and formalism by finding a middle ground, mixture, or alternation – a conceptual frame helps to account for the apparent tension between realist theories about law and formalist practices of reasoning and pedagogy.

If I am aware of [the coexistence of realist and formalist approaches to law] and I don’t say it, I ... found my teaching on a lie. Am I satisfied to live in a world in which jurists are liars? In other words, there is an ethical dimension [Translation from the French original: si on commence à avoir conscience, disons si moi qui enseigne j’ai conscience de ça et que je ne le dis pas, je suis en train de mentir, je dissimule quelque chose que je crois savoir. Donc j’organise mon enseignement sur, sur un mensonge. Est-ce que je suis satisfait de vivre dans un monde dans lequel les juristes sont des menteurs ? Autrement dit, c’est une dimension éthique].

The [formalist] point of view looks at the contract from the point of view of the contractual document, what the parties have tried to capture with words, and approaches it conceptually. The [realist] point simply considers what the judge has recognized. Neither is more or less true. Jurists are trained to use both these points of view, but not at the same time. They are authorized to speculate on the effects of both these approaches, but if they do so together there is a contradiction [Translation from the French original: Il y a un premier point de vue qui est le point de vue du contrat lui-même ou des cocontractants, du concept contractuel, de la notion de contrat voir de la chose du contrat ou bien de la situation contractuelle qu’on essaie de fixer avec des mots, de désigner, de capturer, enfin un énoncé ou un discours théorique, c’est de rendre compte de ça. Et pis un autre point de vue, qui lui est le point de vue judiciaire et dans ce cas-là, la définition du contrat, le contrat c’est simplement ce que le juge accepte de reconnaître comme tel. C’est ni plus vrai, ni moins vrai. Les juristes sont fondés à utiliser ces deux points de vue. Ils sont fondés également à utiliser ces deux points de vue, mais pas au même moment. Ils sont autorisés à spéculer sur les effets de droit de ces deux approches. Ils sont absolument fondés à le faire, mais quand on les met au même plan il y a une contradiction].
While these examples are revelatory of professors’ attitudes, they may leave a residual unsatisfactory feeling. The critical project of legal realism, recall, was a “wholesale assault” on classical legal thought, part of a wider “generational revolt” against formalism. In its purest form, it serves to destabilize, not solidify, “forms, concepts, and rules.” The attempts above to render them compatible, whether the hard rule-of-law explanation or the softer explanations of reconciliation, sit uncomfortably with the polemical and bellicose character of the narrative of twentieth-century American legal thought. Such a qualification might be made somewhat plausible by positing a distinctively Canadian legal sensibility, one that places Canada on the middle ground between US skepticism and UK reverence for judicial reasoning; or, more broadly, that asserts a distinctively Canadian temperament for toleration, grounded in a history of admitting multiple legal traditions. However, even these cultural qualifications would not obliterate the apparent incompatibility, at some deep conceptual level, of certain formalist and realist ideas. In the absence of any readily proffered philosophically complete reconciliation, therefore, resources from other frames and perspectives might be necessary to fully account for the ubiquitous co-presence of realism and formalism in Canadian contract law teaching.

III. Pedagogical Effectiveness

One idea is that the inconsistencies can be reconciled by specific strategies of pedagogical effectiveness. We can explore this possibility with reference to the words of both teachers and casebook editors.
A. Instructors: The Pedagogical Strategy of Sequencing

While realist and critical attitudes might reflect law professors’ ideal beliefs about law, the demands of teaching a first-year course might require provisionally bracketing these ideals. In this sense, the fairly prevalent tendency of professors to insist that “critique” is a secondary objective reflects this prioritization. To recall Professor 46’s formulation:

[Students should] understand why the principles evolved as they did. Then they can more intelligently criticize them ... [T]hey need to at least understand coherence ... and then move to ... challenge those doctrines as perhaps not always meeting goals of fairness or the parties’ expectations. I think the one comes before the other. It’s almost like ... it makes some sense to understand Newtonian physics as a context for understanding the small number of cases where Newtonian rules don’t apply and Relativity does ... You need both ... the original theory and the revolutionary theory.

Thus, as discussed above, in the same way that one may teach physics to high school students by first positing a classical description of Newtonian mechanics, only to reveal the inaccuracy of the initial model once quantum physics is introduced, a classical picture of law might figure as a necessary precursor to more “modern” ideas about law. One can tease out a few possible rationales for this sequencing. One is that the content of the classical substance is a necessary precondition for further study in upper years, whether that means engaging in critique or simply acquiring specialized knowledge in upper-year courses. As noted earlier, these attitudes imply a notion that there is a

1550 See Chapter 5, III(A)(i)(c), above.
1551 [046], Interview, lines 171-92.
1552 See Chapter 5, III(A)(i)(c), above.
1553 A viral video in 2012 presented an “open letter to President Obama,” asking why high school physics classes emphasize concepts that date no later than 1865 – a date close in year to Langdell’s casebook, supra note 109 (1879). See minutephysics, “Open Letter to the President: Physics Education”, online: https://www.youtube.com/watch?v=BGL22PTIOAM.
1554 On the former, see Chapter 5, III(A)(i)(c), above. On the latter, see eg. [026], Interview, lines 227-41:

So many upper year courses ... really depend on that kind of knowledge. So ... any course in business associations or securities, there’s going to be some contract law underlying it ... Any course in insolvency, ... labour and employment, ... commercial law or international arbitration, ... or remedies or advanced contracts ... There’s just a large bulk of classes that you don’t necessarily think of as contract law courses, but which depend on those initial concepts ... I see it as an obligation to the students to equip them with a sufficient knowledge of those core concepts [so] that they’re not going to feel like they’re swimming when they get to an upper-year course.
foundational or core knowledge, so while they may be framed in pedagogical terms, they also reveal commitments about law.

Another idea is simply that the substance of classical ideas matters because they will be useful to the work of the practicing lawyer. Thus, in parallel with the idea that theory or critique matters because it makes “better lawyers” lies the idea that “what lawyers do” requires the mastery of certain skills for which formalism is the best guide, such as “assembling the various pieces of the puzzle, ... internalizing them, ... [and] assimilat[ing] large bodies of information.” Emphasizing substantive doctrine and thinking like a lawyer is thus a pedagogical responsibility because it teaches what graduates may pragmatically need to know. As Professor 56 says:

If you’re graduating from this school and take the bar and you’re in the courtroom, you have to be able to speak that language in order to make yourself heard ... There’s no point ... in being a scholar in the courtroom ... Even when you have the privilege of criticizing ... we’re still as a law school, a place where lawyers are being trained.

In this somewhat dismissive reference to the “scholar,” one might be tempted to extrapolate the notion of pedagogical effectiveness to the idea that law professors inhabit two distinct roles simultaneously, the scholar and the teacher. On this interpretation, critical and realist theories are the domain of the scholar, but in the classroom the scholar’s role yields to the domain of the teacher, who must emphasize substance and conventional legal reasoning out of an “obligation to the students.” The “schizophrenia” alluded to earlier may not be about concepts, but rather about two mutually exclusive identities simultaneously inhabited.

See also [009], Interview, lines 39-40 (Contract Law is “just absolutely foundational to upper year courses”).

1555 Compare, in this regard, one physics teacher’s justification for teaching “old” physics primarily in high school: “We spend a lot of time teaching students about physics from before 1865 because physics from before 1865 is pretty damn useful” (Chad Orzel, “Why Are Physics Classes Full of Old Stuff?”, Uncertain Principles Science Blogs, online: http://scienceblogs.com/principles/2012/11/15/why-are-physics-classes-full-of-old-stuff/).

1556 [029], Interview, lines 86-94. There are many examples throughout my data set of why developing knowledge of substance and conventional reasoning skills are what “common lawyers need.” See eg. [007], Interview, lines 160-62 (“[lawyers have] to read cases which consist of reasons and arguments in favour of a particular result. And so they have to be able to read cases—that’s one of the skills common lawyers need”).

1557 [056], Interview, lines 338-45.

1558 [026], Interview, line 239. See also supra note 1554.
Tempting as such an interpretation might be, it finds little support in my study. Most frequently, when professors refer to being “teachers” or “scholars,” they bundle those terms together in a way that suggest the objectives of each role are aligned. Only one professor indicated one to be “primary” over the other, but even that person admitted that they are “not so exclusive.” Most professors did not indicate that their goals, attitudes, or priorities differed substantially depending on whether they were inhabiting the role of teacher or scholar. The one exception was where professors suggested that their goals in Contract Law differed from those in courses in which they were experts in the field. But this distinction had more to do with the subject matter of those courses than with the fact that in specialized courses an identity of “scholar” figured more prominently.

There is a third pedagogical reason why professors may choose to deliberately downplay realist and critical theories. This is the idea that beginning law students are simply not ready to encounter their complexity. In this sense Professor 46’s statement that “one comes before the other” is another way of saying that students need to walk before they can run. Indeed, some professors do express variations on this theme. Professor 6, for example, says:

1559 See eg. [062], Interview, lines 618-21 (“What’s important to me, what I try to ... work through—as a law student, and now as a legal academic, a scholar, and teacher, [is] the reconstruction part”); [058], Interview, lines 31-33 (“as a scholar and a teacher, I do constitutional stuff better ... – with increased sensitivity to the private law stakes – [for having taught Contract Law]”)

1560 [061], Interview, lines 1002-1011:

[R:] How do articulate your ... professional [aspirations]?
[Professor 61:] As a teacher or as an academic?
[R:] Well, if they're different, then both.
[Professor 61:] I see my primary role here is not a teacher ... My primary role is a researcher. Having said that, I love teaching and I'm glad it's part of the role, part of the job. And they're not ... so exclusive. A lot of what we talk about in class is helpful for when I'm thinking about research.

1561 So, for example, Professor 38 does emphasize policy in an upper-year seminar, but feels justified in doing so only because students self-selected into it: “When I teach ... my upper year seminar, it’s only policy analysis. Law is instrumental to whatever policy you’re making ... These students self-select ... They sign up for the seminar because they’re interested in that” (Interview, lines 296-300). Professor 46, for whom critical perspectives almost never come up in Contract Law, frequently invokes them in another course in which Professor 46 specializes: “[The subject is] full of that kind of critique of Marxist and all kinds of other critiques ... and pluralism and various philosophical theories of liberalism, ... et cetera. In that one area, I think it can be quite helpful to be aware of the different prisms ... from which the problems can be analyzed and the different perspectives” (Interview, lines 563-9).
In first year you have to learn how to read the law and understand the law. Use the principles. And then you can move on when you’re a bit more sophisticated, into critiquing them. You’re not actually realistically capable of critiquing law in the second month of law school. Not really.\(^\text{1562}\)

While not many professors make the claim about first-year students’ lack of capability explicitly – some, by contrast, emphasize how capable their students are\(^\text{1563}\) – the tendency to shake students of their old patterns of reasoning is a more widespread version of the same sentiment.\(^\text{1564}\) First year is the year to build up the “cathedral edifice” of law, not to tear it down.\(^\text{1565}\)

**B. Casebooks: Allocation of Pedagogical Competence**

An analogous sequencing rationale could be applied to the casebooks. One could argue that the casebook editors consider their books to be simply the raw material to be deployed by instructors, and that therefore the failure of *Ben-Ishai & Percy* and *Waddams* to incorporate theoretical ideas into the substance and methodology of the rest of the books simply reflects their view of the appropriate allocation of responsibility between editor and instructor. On this view, the marginalization of policy and the relegation of critical perspectives to the un-operationalized domain of “theory” is not the intended end, but the unfinished work of the casebook – a waystation en route to classroom experience.

This interpretation is certainly plausible. At minimum, the editors of both books emphasize that the books are designed as teaching tools, meant to serve a wide variety of approaches.\(^\text{1566}\) Moreover, the *Ben-Ishai & Percy* editors specifically highlight the role of the instructor in promoting “critical

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\(^\text{1562}\) [006], Interview, lines 299-313. See also [054], Interview, lines 926-7 (“I don’t know how you can set about criticizing something you don’t really understand yet”).

\(^\text{1563}\) [043], Interview, line 1097 (“They’re amazing”).

\(^\text{1564}\) See generally Chapter 5, III(A)(i)(a), above, including [005], Interview, lines 35-91 (conveying to students the “appropriate parameters of legal reasoning”).

\(^\text{1565}\) Cf. [020], Interview, lines 36-8 (“I’m dismissive of critical perspectives in the sense that ... after demolishing the cathedral, I don’t actually see what’s being put back in”).

\(^\text{1566}\) See *Ben-Ishai & Percy* 9th ed, *supra* note 510 at vi (“The book continues to be designed primarily as a teaching tool ... We do not attempt to imbue the reader with a particular philosophy ... Rather we try to note a number of different approaches to contracts throughout and to leave scope for individual teachers to pursue their own themes with these materials as a solid base”); *Waddams* 5th ed, *supra* note 495 at iii ([W]e have designed it to be suitable for dealing with the material in several different orders ... We hope that all will find the book equally suitable for their purposes.”)
reflection.”1567 The fact that some law professors actually do attempt to incorporate the material from the introductory chapters into later substantive areas also suggests that the casebooks may serve this function.1568 Moreover, the fact that most of the professors demonstrating realist pedagogy described earlier use these casebooks in part to do so, suggests that it can be done.1569

On the other hand, it is equally plausible that the editors conceive of the casebooks’ pedagogical role as being to emphasize the “core” status of doctrinal rules and analogical reasoning. On this view, critical perspectives are important to understand, but really secondary to the basics. This attitude surfaces in editors’ pedagogically oriented language, which describes the books as being “designed to constitute the basis of a core course in contracts,”1570 or as a “collection of materials suitable for the basic course in the subject.”1571 That many instructors perceive the casebooks to be focused on a dogmatic core at the expense of critical perspectives is revealed by the fairly common tendency of contract law professors to produce their own supplements in order to highlight critical perspectives,1572 counteracting the perceived shortcomings of the casebooks.1573

1567 Ben-Ishai & Percy 9th ed, ibid at 1-2 (“Your own instructor will direct you to and discuss with you the writings that he or she feels will best promote critical reflection on the basic material reproduced here”).

1568 See eg. [009], Interview, lines 222-48 (incorporating critical perspectives from Ben-Ishai & Percy, 9th ed, ibid into class discussion).

1569 See Chapter 5, IV(B), above.

1570 Ben-Ishai & Percy 9th ed, supra note 510 at vi.

1571 Waddams 5th ed, supra note 509 at iii.

1572 See eg. [009], Interview, lines 106-49. Of the 58 professors who assigned a commercial casebook, 21 assigned supplementary materials that included scholarly articles. An additional 11 professors assigned supplementary materials that focused primarily on additional cases or references to short pieces of legislation.

1573 See eg. [006], Interview, lines 67-124 (insufficient problems and exercises in all Canadian casebooks); [010], Interview, lines 200-243 (providing more contemporary examples than in Ben-Ishai & Percy to appeal to students’ sense of relevance); [021], Interview, lines 556-608 (filling in key moments missed when some cases taken out of Ben-Ishai & Percy); [017], Interview, lines 109-203 (to provide more context, more contemporarily relevant examples, and more gendered material than in Waddams); [027], Interview, lines 621-49 (providing extended excerpts to teach the cases more as “parables” in contrast to the editing in Waddams that “strip[s] the guts out of cases”); [033], Interview, lines 240-56, 324-57 (to supplement the “weak section on the ... explicit role of public policy and morality” in Ben-Ishai & Percy, and expose students to the themes of “sex, race, and power” in a more detailed way than the introduction does); [035], Interview, lines 616-37 (without a “conscious effort” to include “big picture issues,” they would be missed because Ben-Ishai & Percy “doesn’t really raise those issues at all ... and that would be one of my minor disappointments”). Occasionally, instructors feel the need to supplement Swan, too. See eg. [016], Interview, lines 741-7.
Which is the more accurate view? The survival in the marketplace of Swan makes any sweeping generalization impossible; many instructors specifically use Swan because its overarching argument enables them to connect the ideas of legal realism to legal professional practices, including legal reasoning. Nevertheless, the majority market share of the other two books, the fact that their editors come from almost every common law Canadian law school, and the fact that the books undergo regular restructuring and editing, suggest that the dominant messages of the casebooks do illustrate a widespread viewpoint or, at very least, are compatible with many different views or approaches.

But the idea that the casebooks are primarily a launching pad for instructors to realize their own desired ends may be too simplistic and disregard the integral role that the books play in the construction of legal consciousness. As artifacts, casebooks capture and reflect the attitudes of their editors, who are teachers themselves. As pedagogical tools, they structure and guide the way the instructors teach the course. Their pedagogical assertions therefore cannot be considered in isolation from their role in sustaining and perpetuating classical categories through an exercise of collaborative, ongoing editorial agency.

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1574 See eg. [013], Interview, lines 55-87, 111-124:

The Swan and Reiter book ... make[s] decisions based on a complex matrix of things including the facts, their ... response to the facts, motivated by concerns about fairness, and then using legal argumentation to support the conclusion ... I think that that is a much more accurate way of describing what courts do and how judges actually do make decisions, and therefore if you’re trying as a lawyer to either predict what’s going to happen in a case, or you’re trying to put together an argument with a view to determining what’s going to happen in a case, or you’re drafting a contract with a view to trying to achieve a specific legal result, you need to take into account all of those things.”

See also [023], Interview, lines 315-26.

1575 The lack of companion teaching manuals produced by Canadian publishers, in contrast to US and UK books, makes it even more likely that the casebooks will be used differently by different teachers, as there is no explicit guidance on how to teach using the materials. While this could be considered to be a liberating absence of prescriptions, it may also deprive contract law professors of specific ways in which they could put into practice their theoretical commitments. At least one participant in my study bemoaned the lack of Canadian teaching manuals, going so far as to try, with difficulty, to adapt English teaching manuals to the Canadian situation:

I can’t get Canadian publishers to do this[, but the English publishers] ... provide a lot of exercises and practice materials for students, ... a volume that one prof could not reasonably produce ... I can—and do to some extent adapt the British materials, but they won’t give me the teaching resources unless I assign it to my class, which of course is not possible to do. So I don’t actually have access to all of it. I have access to a little bit, and I adapt it to Canadian. That is a huge lacking for first-year teaching in Canada— ... the lack of teaching materials from publishers ([006], Interview, lines 84-93).

1576 Cf. Fernandez & Dubber, eds, supra note 146.
Each of the pedagogical accounts in this Part relies to some extent on the idea that there is a core substance of law – doctrinal rules of contract law – that it is important to master, or to the idea that there is a distinctively legal mode of reasoning. Accordingly, while no doubt pedagogical justifications figure prominently among contract law professors, these pedagogical justifications seem to presuppose certain formalist understandings about law. Thus, it is not entirely possible to decouple pedagogical and conceptual accounts of the interplay between realism and formalism. Like the simultaneous belief in the solidity of doctrine and the contingency of law, pedagogical attitudes seem to alternate between paradigm-building and paradigm-busting aspirations. The widespread desire, detailed earlier, to “disabuse” students of their preconceptions, to “take the furniture out of the mind,” as Professor 27 says,\textsuperscript{1577} co-exists with the desire to replace the now-empty mind with a new set of furniture, the substance of contract law doctrine and the delineated (and delineating) practice of legal reasoning.

Professors’ subjective attitudes about law and pedagogy seem therefore inadequate to fully account for the complex interplay between realism and formalism, theory and practice in Canadian contract law teaching. We turn, therefore, to an alternative account of some of the phenomena observed.

**IV. Structural Accounts**

The two accounts offered thus far – one based on concepts, the other on pedagogical effectiveness – to explain the apparent disjuncture between propositional statements about law and attitudes about law reflected in conceptions of legal reasoning and teaching practices, tend to emphasize law professors’ intellectual and pedagogical agency. While professors have a high degree of autonomy in their own theoretical commitments and in how they teach, the apparent gap between aspiration and reality seems to be only incompletely explained by theoretical or pedagogical factors. Accordingly, a different frame – from outside law professors’ personal choices – may play a role. This Part explores the extent to which my data reveal the importance of structural considerations. They reveal the extent to which professors’ choices about what they teach and how they teach, including the vision of legal reasoning that they privilege, are influenced by explicit and implicit pressures from students, the profession, and within the law faculty. Identifying these features reminds us of the wisdom

\textsuperscript{1577} [027], Interview, lines 71-90; Chapter 5, IV(B)(ii), above.
in Harry Arthurs’ claim that “legal education is not an autonomous regime capable of defining and redefining itself from within,”¹⁵⁷⁸ and paints a picture of law professors as agents situated in an environment with its own norms and structures.

A. Structure and Path Dependence

To understand the complex interplay of explicit and implicit pressures that condition contract law professors’ choices about what they teach and how they teach it, I use a chronological device. Stitching together the accounts by various professors, I endeavor to tell a story about how a beginning professor might come to propagate conventional ideas about legal reasoning, through conventional pedagogy, that reflect a set of beliefs about law that differ from that professor’s own theoretical or principled commitments. While this story may not precisely reflect the story of any one individual, and viewed as an individual story might seem somewhat caricatured, it integrates a number of factors whose interconnection might not be as apparent were I to simply classify them. Combined, this hypothetical narrative reveals how explicit and implicit pressures might combine to create a path dependence that results in a series of conventional “self-evident” doxa¹⁵⁷⁹ about law that are remarkably resistant to the critical and realist ideas.

¹⁵⁷⁸ Arthurs, “The Political Economy of Canadian Legal Education”, supra note 93 at 14:

[L]egal education is not an autonomous regime capable of defining and redefining itself from within, in response to national reports, the prescriptions of professional bodies, decanal visions or even the initiatives of a reformist professoriate – though all of these make their contribution.

The following account is limited to the constraints and influences that professors identify in their interviews to me and so do not cover the entire waterfront of Arthurs’ political economy. Notably, the forces of globalization and neoliberalism are largely absent from the explicit accounts of professors, and I have not ventured here to infer the extent to which these forces are implicit in professors’ accounts.

¹⁵⁷⁹ Bourdieu’s account of doxa is a helpful construct to describe the series of unstated, taken-for-granted assumptions about law that become the “sense of reality” for law professors who inherit a conceptual scheme and established practices of education. Bourdieu discusses doxa in the following way:

Every established order tends to produce ... the naturalization of its own arbitrariness. Of all the mechanisms tending to produce this effect, the most important and the best concealed is undoubtedly the dialectic of the objective chances and the agents’ aspirations, out of which arises the sense of limits, commonly called the sense of reality, i.e. the correspondence between the objective classes and the internalized classes, social structures and mental structures, which is the basis of the most ineradicable adherence to the established order. Systems of classification which reproduce, in their own specific logic, the objective classes, i.e. the divisions by sex, age, or position in the relations of production, make their specific contribution to the reproduction of the power relations of which they are the product, by securing the misrecognition, and hence the recognition, of the arbitrariness on which they are based: in the extreme case, that is to say, when there is a quasi-perfect correspondence between the objective order and the subjective
i. The Beginning Teacher

Most professors hired to teach Contract Law are not experts in the field.\textsuperscript{1580} Few affirmatively request to teach the course.\textsuperscript{1581} Most are given a small degree of choice and express some interest in it, either because they enjoyed it in law school, did some research on contract law in graduate school, practiced in the area, or have related primary research interests.\textsuperscript{1582} But many are simply “told,”

principles of organization (as in ancient societies) the natural and social world appears as self-evident. This experience we shall call doxa (Pierre Bourdieu, \textit{Outline of a Theory of Practice}, translated by Richard Nice (Cambridge: Cambridge University Press, 1977) at 164).

The term doxa appears occasionally in the legal scholarly literature. Richard Devlin describes it as “a belief structure that so closely dovetails with common sense that it seems absurd to even question it” (Richard F Devlin, \textit{“The Charter} and Anglophone Legal Theory” (1997) 4 Rev Const Stud 19 at 63). American commentators on legal education have deployed Bourdieu’s term habitus to discuss how “the world’s divisions and classifications become embedded in our consciousness and come to seem natural, even unremarkable” (Nisha Agarwal & Jocelyn Simonson, \textit{“Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy”} (2010) 34 NYU Rev L & Soc Change 455 at 465).

\textsuperscript{1580} Only one third of the participants in my study have published once or more in the field of contract law (as judged by a review of titles of publications listed on their faculty web page or, where unavailable, a search on HeinOnline). On this metric, the number of contract law “experts” (26) is likely over-representative, as it includes people who have published minor works early on in their career. The number of true experts is probably closer to 18, which is the number of professors who have either published multiple articles, an academic book, or are a lead editor of a casebook on contract law – which would put the ratio at about 1 in 4. I have not included in the 26 those who publish in cognate areas such as labour or family law.

The correlative fact is that some faculties of law may not have any contract law specialists on faculty. See eg. [048], Interview, lines 659-61 (“we don’t have anyone at the law school who is really specializing in contracts. All of our contracts teachers are people who are specializing in something else and teach contracts”).

\textsuperscript{1581} I did not pose this question systematically, so I cannot make definitive claims about prevalence. However, I did ask most participants what led them to teach contract law and the fact that very few – around 3 – stated that they affirmatively requested to teach the course ([052], [056], [061]) signals that professors infrequently request to teach it. See eg. [056], Interview, lines 26-7 (“I had … in the negotiation let go of other important things to get the Contracts course”). It is nevertheless possible that some participants did request to teach the course, but it simply did not come up in our interview. Nevertheless, as note 1582, \textit{infra} shows, it is much more common for professors to express some initial interest in the course, without going so far as to affirmatively request it.

\textsuperscript{1582} A total of 30 professors in my study describe the initial interest they had in teaching the course. Five enjoyed the course while in law school ([023], [026], [031], [040], [062]), 7 practiced law in an area in which contract law played an important role ([013], [014], [044], [046], [049], [065]), 6 did graduate work in contract law ([001], [009], [019], [022], [048], [061]), and 12 stated that it related to their primary area of research ([010], [016], [018], [020], [026], [028], [030], [035], [045], [046], [050], [052]). See eg. [062], Interview, lines 17-22 (“I probably said Contract Law because I did very well in it at first year … And I remember liking it the most of my core courses with the exception of [one]”); [013], Interview, lines 4-6 (“I was a corporate commercial practitioner for five years … and negotiated a lot of contracts, and was interested in commercial law”); [009], Interview, lines 20-21 (“it was my area and I had done my Master’s in contracts”); [010], Interview, lines 5-6 (“for a lot of people specializing in international trade, teaching Contracts is somehow a natural segue from what we do”).
“required,” or “forced” to teach it with minimal input. As Professor 3 says, “When I first got my first teaching job ... I was basically told, ‘You have to teach a first-year course in addition to courses in your ... areas of expertise and we need you to teach Contract Law.’ So I said, ‘Fine,’ having little choice in the matter.”1583

The combination of a lack of experience and lack of expertise makes deference to existing practices extremely likely.1584 Starting professors almost never design the Contract Law course from scratch. Most “inherit” it.1585 As Professor 52 says, “I didn’t play a role in ... structuring the table of contents or the syllabus. That all ... came prepackaged.”1586 The pressure to use existing materials is even more prevalent and enduring. This pressure may come implicitly from students1587 or, more frequently, from the desire to go in “lockstep” with colleagues.1588 Very occasionally, there may be

1583 [003], Interview, lines 7-11. 21 professors indicated that they had simply been assigned the course without a meaningful choice, in response to faculty needs ([003], [006], [007], [008], [011], [015], [021], [024], [027], [032], [033], [037], [039], [041], [051], [053], [058], [059], [063], [064], [066]). See eg. [006], Interview, line 3 (“Because I was forced to”).

1584 See eg. [026], Interview, lines 592-600 (“for my commercial law course ... I did design my own syllabus, and it was an enormous amount of work ... but I didn’t want to do that for a first-year course for ... I was a totally inexperienced teacher”); [051], Interview, lines 523-8 (“contracts is not my main area of research interest ... I guess originally, [the impediment to doing exactly what I wanted] was more [that] I didn’t feel I had enough experience”); [038], Interview, lines 539-42, 712-15:

Canadian contract law was something that I had not learned before. So I think you’re less likely to rock the boat, so to speak, when you’re in that position, than when you are ... well-versed ... I have invested a lot more time redesigning, reconceiving, researching my [upper-year seminar] than the Contracts course, just because I spent most of my time thinking about it when I’m outside the classroom.

1585 See eg. [058], Interview, line 67 (“the overall structure was ... pretty directly inherited”); [066], Interview, lines 46-9 (“the course is not ... structured very imaginatively ... These syllabi can sometimes be ... inherited or legacy documents”); [021], Interview, lines 720-22 (“I did inherit the basic idea and ... [the] framing”); [045], Interview, lines 382-4 (“a lot of my materials are largely inherited ... Part of it’s just ... being a young prof coming in and having not taught Contracts before”).

1586 [052], Interview, lines 59-61.

1587 See eg. [017], Interview, lines 517-62:

When I was starting out, I didn’t want to use this [casebook]. I wanted to use John Swan or Angela Swan’s book ... because that’s one I had [been] taught with ... but I felt as a starting person, “No—I can’t do that! I have to use the house book” ... Because I have ... no credibility and [students] look at you [as if to say] “You’ve got to be kidding me! You look way too young!” ... You’re not famous ... So it’s very difficult I think when you’re first starting out—to buck [the trend].

1588 See eg. [051], Interview, lines 190-99:
explicit pressure from the administration to use the house book. In addition, young professors may internalize the authoritativeness of existing materials, as even Professor 62, a strong advocate of critical pedagogy, did:

[A senior colleague] very generously shared with me the casebook that he had assembled and put together over the years, which was ... about nine hundred pages of cases. And I took those, but he’s a true gentleman, and a true scholar, and he said, ... “These are yours. Do with them what you want, and make changes, by all means.” Now ... I was loath to make any changes. I didn’t remove anything because I thought, “Who am I to remove something? If he thinks it’s relevant, I’m going to keep it.”

Those who make an effort to design a course on their own often begin by consulting the course syllabi of colleagues from different law schools. Some may feel that for “political and pragmatic”

[I started teaching with Swan because] that was the casebook that [the other Contract Law teacher] was using at the time ... I went in lockstep with him then. I was the new guy on the block. I’d never taught Contracts before and ... trying to reinvent the wheel when you’re in your first year teaching is, as I’ve learned from experience, ... not generally a good idea! It’s better to ... take ... what’s there and then get some experience with it and then decide what you want to change.

The professors who spoke about the process of selecting a casebook overwhelmingly adopted the “house book.” Of these, 19 ([006], [011], [016], [017], [021], [026], [033], [035], [038], [045], [051], [054], [057], [059], [061], [065], [066]) described their decision as being motivated by wanting to have consistency with fellow instructors, to be able to draw on colleagues’ experience, or simply to not “buck” the trend. By contrast, only one ([026]) described reviewing all three casebooks in detail prior to teaching the course the first time . See eg. [033], Interview, lines 41-2 (“I didn’t [select Ben-Ishai & Percy;] it was what they were teaching with when I started teaching contracts here”); [035], Interview, lines 495-6 (“[Ben-Ishai & Percy] was the one that most people seemed to be using”); [054], Interview, lines 122-5 (“[The] professor ... who teaches the other section of Contracts was already using [Ben-Ishai & Percy] and just by default I thought I’d use the same one, so I actually didn’t shop around”); [016], Interview, lines 744-5 (“the Swan and Reiter text was the one that was being used at that particular time); [038], Interview, lines 561-3 (“I asked around, whether people used different casebooks. And what I heard was, “Everybody uses [Waddams], except for [one colleague], who has his own materials”).

1589 See eg. [041], Interview, lines 555-9:

When [another colleague] retired, the Dean sort of came to me and said, “Okay, you’re the only one who’s not [using the house book]. You’re the junior person ... You don’t want to be seen as being different unless you’re really committed to it. So are you really committed to it?” And I said, “No, not particularly.”

1590 [062], Interview, lines 807-17. Many professors simply follow the order of the casebook. See Chapter 5, IV(A)(ii).

1591 See eg. [011], Interview, lines 27-8, 32-4 (“I was able to get syllabi from ... my colleagues, which was really helpful ... I basically looked at what other people taught and ... picked the cases that seemed to be the ... consensus
reasons, partially in deference to a senior professor who “owns” the course, it may be better not to "reinvent the wheel."1592 And even in the absence of heavily influential senior colleagues, many starting professors follow the lead of their own Contract Law teachers or mentors for guidance on materials,1593 order,1594 approach,1595 or philosophy.1596 When it comes to teaching, many starting professors often take advantage of notes,1597 conversations,1598 and exams and assignments1599 happily provided by senior colleagues.1600

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1592 [064], Interview, lines 76-94:

The ultimate question when you’re starting out is how much do you take from what’s currently existing within the faculty and how much do you try and design your own thing? And there’s both ... political and pragmatic pros and cons that go into that ... [At this institution] there tends to be one senior faculty who quote unquote “owns” the course. Or owns the way the course is being taught ... there’s a real pole bend to follow that person’s approach ... I certainly felt free to make the course in my own image, but from a practical perspective, also just within how much time it takes to teach a new course ... there’s really good logistical reasons for not trying to reinvent the wheel.

1593 See eg. [041], Interview, lines 533-8 (“the first year that I taught Contracts, I [used] ... Boyle and Percy ... the reason I picked it was that it was the same thing that I’d been taught as a student”); [063], Interview, lines 533-6 (“I use Swan ... [and] have always used it. Nick Bala was my contracts professor”); [Professor Y], Interview, lines 414-45, (using materials from the case file method because “I used them myself when I was in Contracts”); [017], Interview, lines 13-14 (“I used ... a supplement just like this ... when I was [studying contracts]”).

1594 See eg. [028], Interview, lines 480-81 (teaching remedies first is “the way I learned it ... that’s why I started like that”); [064], Interview, lines 622-41 (teaches formation first in part because that is “how I learned myself”); [059], Interview, lines 104-108 (teaches remedies first because “I had a mentor [where I studied law] who I thought had a very sophisticated understanding of contract law—a senior member of the faculty—and that’s the way she taught it”).

1595 See eg. [032], Interview, lines 391-3 (“But as a non-specialist, I very much drew on my memory of what my course looked like when I was learning contracts, and the structure of the textbook”); [052], Interview, lines 332-9 (the course I taught was “delivered in much the same way [as the course I took]”); [045], Interview, lines 275-7 (“my approach to this class ... was largely shaped by ... the professors that taught me Contracts years ago”).

1596 See [062], Interview, lines 514-23 (“there wouldn’t have been any other way for me to go about teaching this course” other than under the influence of a mentor whose (non–Contract Law course) was “the most important educational experience in my life”); [028], Interview, lines 290-5 (“my supervisor for my graduate work, she is a phenomenal teacher and ... definitely influenced me—huge”).

1597 See eg. [038], Interview, lines 446-83:

When I was hired here, [a former professor] was very kind. He asked his assistant to copy all his handwritten notes for that course. And he ... shipped it ... via courier! ... I contacted everybody here who was teaching Contracts [and] all of them were kind enough to share their syllabus. And ... two of them ... shared their notes with me ... The first year I just got ...
There may also appear to be few incentives to instigate an original approach to teaching the course. At some institutions, professors may be told, or simply internalize the idea, that research is more important than teaching – and for those preoccupied with getting tenure, this idea may be particularly influential. Some may experience implicit pressure to conform to the current approach. As Professor 45 says:

They don’t want radically different approaches being taken … There’s an expectation that you work with other colleagues … And being somebody who is new, … again, it’s not that someone has come to me and said, “You can’t do this.” But I think as … a good colleague it makes sense that I don’t come in here and radically … torch the current a syllabus that looked exactly what most people were doing … and then in preparation for class, I would just read the cases, read [my colleagues’] notes, … try to prepare my own class. Then I would knock on somebody’s door.

1598 See eg. [051], Interview, lines 171-7 (“when I started teaching … I was teaching with another professor … and … often before class … we’d meet for half an hour and just talk about … what we were teaching that day, and I found that, particularly as a new professor who’d never taught Contract Law … incredibly useful”).

1599 [033], Interview, lines 735-8 (“the first two or three years, other people took complete responsibility for being the lead on writing exams and assignments and they would give me their drafts to then respond to and work out”); [064], Interview, lines 106-13 (“I wanted to try to … closely mirror what the other small groups professors were doing … That is to my benefit … because it means that … we can coordinate to have a common exam, rather than each person hav[ing] to make their own”); [035], Interview, lines 189-90 (“I draw [my in-class problems] from [a colleague’s] old exams”).

1600 Cf. [031], Interview, lines 327-31 (“So in cases where somebody’s new, I think all of us, and I can certainly speak for myself, are happy to share our teaching materials and notes or anything and to talk about issues relating to teaching the course”).

1601 See eg. [048], Interview, lines 724-47:

[R:] Do you have advice that you give to young professors who are starting out about … how they could have … the most rewarding career? …

[Professor 48:] … Tenure and promotion doesn’t depend on teaching. Yeah, there are student evaluations, but … even then, they won’t undermine … substantial research. So I tell them that … teaching is really rewarding, but don’t spend your life making new teaching materials … because that’s not what they’re going to evaluate you on.

1602 See eg. [017], Interview, lines 1008-12 (“we get the message … a lot that our research is … more important than our teaching. So I think that people rationally respond to that … and put … less effort … into their teaching”). Cf. [061], Interview, line 1005 (“I see my primary role here is not a teacher”).

1603 See eg. [011], Interview, lines 589-90 (“[R:] What would your professional goals be? [Professor 11:] Uh—to get tenure! [Laughs]”).
approach to teaching contract law because “it’s all wrong, and this is how I would do it.” I think that would be probably not an appropriate way to do things.1604

Some professors, particularly women, may feel that as junior colleagues they get more student pushback for departing from tradition than senior colleagues do.1605 Others may feel that their own intellectual approach goes against current norms and might out of insecurity suppress it in the early years.1606 For many, the need to become familiar with the material – to stay “one case ahead” of the students1607 – takes up all available time and space. Beginning professors may be particularly tight for time; as Professor 45 says, putting a “personal imprint” on the course will have to wait until “I have a bit more time … [I’ve] got this work burden and [I’m] trying to just survive.”1608

1604 [045], Interview, lines 369-80, 450-57.
1605 See eg. [B], Interview, lines 889-909:

All of our first years want parity—it’s extraordinary. Time and time again it’s come up that students have pressed the administration to mandate that all first-year courses all teach the exact same thing. So [teaching a first-year Contract Law course in a particular way] would be quite possibly more trouble than it’s worth … just the amount of resistance it might encounter … in conjunction with the tremendous amount of work, it probably would not be worth it. [Another colleague] … [teaches Contract Law in a] significant departure [from the norm]—but first of all he’s very senior, and a male, and … one shouldn’t actually underestimate the importance of that in terms of students’ views of faculty … He’s done it—it’s excellent for students. But you know what? They do fuss. They do fuss about it.

See also [017], Interview, lines 748-9 (“you get less push-back as you get more senior, regardless of what you’re doing”); [064], Interview, lines 897 (“It’s also problematic as a part-time, … non-tenured faculty to do something that is drastically different than the rest of your colleagues”).

1606 See eg. [004], Interview, lines 586-603:

I’ve changed my method over time. I’ve become more and more and more doctrinal … In my first years of teaching I was much more … directly theoretical. Comparing the feminist approach and law and economics approach and this and that. And using the doctrine more as a pretext to really see the different conceptions and theories … I think it had to do a little bit with a sense of insecurity at first … Doctrinal law is looked down on as somehow … dry and easy … Black letter law as opposed to all this fancy theory and when you’re in a top school you’re supposed to do theory … The more I gained confidence, the more I personally saw the interest in the doctrine and how interesting the doctrine was.

1607 [017], Interview, lines 574-5 (“you’re like one case ahead of them basically when you’re reading”). The fact of being just ahead of students is not always perceived to be a weakness. As one senior professor says, “I would probably put all young professors who are keen and engaged into the first-year classes, so the students get the benefit of that intellectual engagement by people who [are], as it always used to be, only a couple pages ahead of the students in preparation” ([048], Interview, lines 545-9).

1608 [045], Interview, lines 441-6, 474-5 (“I’m an early faculty, I’m just getting my legs, all this is new to me, I’m finishing up a doctorate … and that’s like two full-time jobs. So part of it’s some work constraints that I have at this
ii. Experienced Teachers

As time progresses, the patterns established in the early years may take on a more stable form, as professors at later stages experience a series of factors that impede the inclination to innovate. Professors at all stages of career are likely to experience considerable pressure to maintain consistency between sections. Pressure to continue to use the house book serves as a general disincentive to switching, as does the idea that professors have already sunk costs into the decision. In my interviews, only thirteen professors discussed affirmatively switching casebooks (and only two of these had taught from all three commercial books).

In respect of noncommercial materials, a similar tendency arises. In one particularly illustrative example, consider the aspiration expressed by Professor 50, lead editor of a collection of a non-published casebook:

I’m certainly in favour of first-year teachers, and maybe second-year teachers, probably using an existing casebook, either an in-house casebook or a commercial one, while they get to understand the subject and understand what they want to do. And then I think they should probably develop their own materials after that.

Now, compare that statement to the reality at Professor 50’s institution. As it happens, the collection that Professor 50 put together has become the de facto house book – it is this collection that point that I haven’t been able to put my personal imprint in the way that I eventually will want to when I have a bit more time”). See also [011], Interview, lines 279-89:

I have other things on my plate that needed my attention. And you know, it’s my first time—what I learned from [designing the course in] Corporations ... [in which I] I hand-picked every case in the syllabus ... [was that] you don’t really know how it’s going to go until you teach it. So there’s not a ton of value in putting all that work in ... There’s no need for me to reinvent the wheel.

See eg. [060], Interview, lines 106-107 (“of course you have to all use the same book, because if you don’t, questions arise on both sides”).

The overwhelming impression is that most professors choose one casebook and stick with it, often because of the investment made. See eg. [017], Interview, lines 572-83 (“[What I think can sometimes happen, is that, so you’ve been doing it a certain way—you just keep doing it that way because it’s just way easier and you can spend your time on other things”); [065], Interview, lines 136-8 (“to be honest with you, [Ben-Ishai & Percy] wasn’t my selection, and it’s just been more a product of the fact that that is now the casebook that I’ve used and will going forward”).

[050], Interview, lines 272-9.
one dean pressured a new professor to adopt, saying, “You don’t want to be seen as being different unless you’re really committed to it”; and about which another beginning professor says, “If he thinks it’s relevant, I’m going to keep it.” Indeed, all the professors I interviewed from Professor 50’s institution used a version of it; as Professor 50 says, “I think most of them have used my materials.” At another institution a different well-developed supplement is shared among most teachers.

The desire for “comity” might incline professors, even experienced ones, to conform to a conventional approach to evaluation. For example:

[Professor 51:] If I do an essay question, it’s generally ... asking them to do a critical assessment ... of an area of law ... in a normative context ... Law reform type of questions.

[R:] But you don’t do this all the time?

[Professor 51:] Not recently.

[R:] Why have you stopped?

[Professor 51:] I guess the reason I’ve stopped is ... out of ... comity for my ... colleagues ... In most recently working with [a particular colleague], her preference was for ... more *traditional* hypothetical exams. And so ... we ... did a question and ... I was willing to go with that. So ... one issue would be comity.

Moreover, there may be an implicit pressure to cover the same material as other instructors. Professors speak of “coverage pressure” and of feeling “obliged” to cite leading cases. One

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1612 See *supra* notes 1590-91.

1613 [050], Interview, line 666.

1614 See [C], Interview, line 128, [D], Interview, lines 364-7 (“there is a supplement that we use ... to supplement some of the areas that we analyze. In ways that was inherited in part, but I’ve sort of added some things to it that I think [are] important. I’ve also ... altered some aspects of the content ... , but ... there’s also the importance of ... consistency”).

1615 [051], Interview, lines 491-507. See also [033], Interview, lines 692-4 (“we write the exams together, we do grading together, and I value that consistency and collegial support, more. I'd rather have that, than get rid of the parts that bore me to tears”).

1616 See eg. [066], Interview, lines 56-80:

[S]ome faculty ... are more ... focused on having ... cohesive delivery of first-year subjects ... Which is sort of what I found at this school when I began, but I’ve sort of *resisted* that a bit. Nonetheless the course is structured in a traditional format ... when I joined the faculty here, the syllabus was discussed and it was *exact* between three sections.
professor actively “dislikes” the approach communicated by the materials (the “historical development of ... extremely complex but now obsolete doctrines”) but adopts it to conform with “school tradition” and work collaboratively with colleagues.1619

At a deeper level, some express hewing to a more conventional approach out of a desire to fit in with “institutional culture.” As Professor 38 says:

Institutions have cultures, right? ... And I think I got the sense from getting the notes from my colleagues that ... there was an institutional culture here that was a little more focused on getting some basic concepts across and it wasn’t so much about ... conveying some sort of broader message about the world. It was more like, ... “These are the cases, this is what you need to understand, and these are the skills you need to get as a lawyer.”1620

1617 [035], Interview, lines 806-808 (“I feel some coverage pressure ... How much do I need to cover versus depth? That’s difficult to manage sometimes”).

1618 [024], Interview, lines 664-5 (“I think I feel obliged to cite things like Carbolic Smoke Ball [Carlii, supra note 467]”).

1619 [033], Interview, lines 15-35:

[Professor 33:] I dislike the emphasis that’s in the course, ... which is very much in the historical development of contract law, because it requires the students to grapple with extremely complex but now obsolete doctrines on their little journey to understand how it operates today ... The amount of effort that they put into understanding how rules operated fifty years ago—which are now really quite irrelevant for practice today—doesn’t feel like a very good use of classroom time.

[R:] And so you feel to a certain extent compelled to include this historical approach?

[Professor 33:] Because the major textbooks very much take a historical approach and I use one of the major textbooks, so it would either be that or leave out most of the materials ... And there’s a school tradition, ... which I’m a part of. And working with my colleagues, if I’m going to have their support, co-write exams and have them co-read exams and so forth, then it’s important that we’re teaching very similar materials.

1620 [038], Interview, lines 544-55. Cf. John Willis, “Canadian Administrative Law in Retrospect” (1974) 24 UTLJ 225 at 227:

[Even I, who am, as I have already said, “a government man,” “a legislation man,” and “a what actually happens man,” and try to talk administrative law with a civil service and political science accent, have always felt constrained by social pressure to put my class materials together in such a way that they can, if necessary, be held out as constituting at least the shadow of a professional course.
And Professor 3, who says that “being a communitarian myself, I believe in collective enterprises,” describes operating “within the frame that we are expected to teach it in first year.”

The power of institutional culture or intellectual frameworks may also manifest in student demands that, however reflective of career anxieties and thus proxy for demands by the profession, also serve to reinforce the idea of a conventional core of substantive content. Professors report student pressure to ensure consistency between sections, to provide “traditional” education, and some resistance to theoretical or philosophical discussions. These student pressures may be exacerbated by high tuition fees and the desire for students to “get their money’s worth.”

See also John Willis, A History of Dalhousie Law School (Toronto: University of Toronto Press, 1979) at 76, 139 (Willis putting on a Judicial Review of Administrative Action course, instead of an Administrative Process Course, to satisfy the powers that be).

Cf. Arthurs, “The Political Economy of Canadian Legal Education”, supra note 93 at 20, 22, 31:

[In the 1960s] students ... tended to see themselves as legal practitioners ... Consequently they wanted law schools to equip them with the skills and knowledge necessary to achieve their professional objectives ... [More recently, f]ar from resisting initiatives [from the profession] as unworthy of an educational institution, students tend to support them, imagining that in doing so they are improving their own marketability and professional competence ... Most [students] try to make themselves more marketable by using their recently acquired power as “consumers” to insist on courses, syllabuses, and pedagogies which, in their perception, reinforce their survival skills.

See eg. [013], Interview, lines 903-909 (“the people who ... will fight the rear guard action are the students ... The students do not like change. And if they think that what they’re getting is different from what their colleagues are getting in the other sections, they won’t be happy”); [057], Interview, lines 287-301 (“I might be tempted to bring in ... more ... law and economics ... But there are strong pressures against it ... If [students] look at the other section and see that the other section is getting more case law than they are ... some of them get concerned”); [006], Interview, lines 888-9 (“all of our first years want parity—it’s extraordinary”).

See eg. [017], Interview, lines 707-11 (“I don’t all of a sudden want to put them on notice that [they’re] not getting the traditional thing”); [003], Interview, lines 522-31:

I’d rather [not] ... work ... against the grain because you always confront student expectations ... [Incorporating] collective bargaining and employment law ... and consumer protection and regulation [in my Contract Law class], ... students start to get really nervous because ... their friends are doing doctrine of consideration, mistake and frustration, and my students are like, “When are we going to do that?” [If I say] you’re not going to do that because I think this is more important, ... they freak out and they tune out and you lose them.

See eg. [020], Interview, lines 228-37 (“I team-taught with a philosopher from Philosophy, ... which I thought was a very interesting exercise ... Although the ... law students sort of hated the indeterminacy of the philosopher king ... It was a great experience for me but I don’t think the students enjoyed it”); [001], Interview, lines 210-22
A number of institutional features may also may distort professors’ ability to teach the way they like. The *requirement* of having to assign grades may be problematic – “Evaluation is a pile of crap”\(^{1627}\) – and a professor may consider the final exam format to be considered flawed generally,\(^{1628}\) or particularly so at the end of the first semester of law school.\(^{1629}\) The curriculum may impose constraints. Professor 29 says that having only one semester to teach the course is “not really enough.”\(^{1630}\) Professor 20 considers it unfair to give writing assignments because it would “require a disproportionate amount of

(refusal on behalf of some students to engage with the conceptual approach), 395-400 (particularly among the younger students). See also [040], Interview, lines 800-805, 944-54:

I don’t have a policy question [on the final exam] … and I never have. I was sort of told not to do that when I first came here, that there was a custom of not having policy questions on exams, the reason being there was no way of really grading them accurately …

To the extent that I wanted to build in large chunks of theory and policy into … a mandatory first-year bread and butter course [like Contract Law] … there would be pushback … Pushback from the students, pushback from other faculty as well, pushback from the profession that would be mediated through the faculty and the administration.

\(^{1626}\) See eg. [040], Interview, 981-90 (“it’s a crucially, crucially important consideration: people pay a lot of money for law school … So … I don’t want to *screw people over*, to put it bluntly, by not giving them what they’re expecting”); [006], Interview, lines 420-4 (“[R:] Where do you think this … desire to cover material comes from? [Professor 6:] Well … some of the students broke it down to me that they were paying seventy-three dollars and eighty cents per lecture so they wanted to get their money’s worth”); [043], Interview, lines 525-6 (“So we’re pleasing the students. Why? Because they’re the bloody source of revenue now”).

\(^{1627}\) See eg. [027], Interview, line 783 (“evaluation is a pile of crap—I wish we didn’t do it”). See also [054], Interview, lines 452-64 (“I’m not a huge fan … of the curve. I’d rather just give students what I think they deserve … to say I can only have six A’s out of a class of forty-six, well, you know, I have more than six A students … I’m forced to … take my twelve best and … put half of them into B pluses”).

\(^{1628}\) [053], Interview, lines 260-62 (“the first-year courses actually are *controlled* with what counts for evaluation. So we have basically a hundred percent final exam, which is probably the worst way for us to evaluate the students”); [014], Interview, lines 752-5 (“I’d like to eliminate the April exam and give the students other assignments if I could be assured that they would pay attention to the general course material”).

\(^{1629}\) [006], Interview, lines 360-8:

The Christmas exam was a final and … these are marks for the transcripts … [This] disrupts the learning for the students because they’re so worried about marks for getting jobs … Unfortunately the first year Christmas marks matter a lot for that and I think that’s a real disservice to students and their learning … Because they’re focused … on memorization, not skill-building and understanding and learning.

\(^{1630}\) [029], Interview, line 130. See also [006], Interview, lines 27-8, 456-7 (“for something like Contracts, it’s a real struggle to teach enough in that first term … I have never found that in one term … I can cover even all the [issues] that I think are really crucial”).
time on my course.” Professor 51 connects the lack of time to a high teaching load; Professor 58 laments the lack of administrative support to hand back assignments. Professors also cite room layout, scheduling, and class size as barriers to venturing beyond conventional and traditional practices.

Professors frequently cite the lack of available time; sometimes, it is the only constraint that professors acknowledge. For example, Professor 58 suggests that with more time, different approaches would be possible:

I have a pretty ruthless sense that … I can’t do everything … because one doesn’t have unlimited time … There are things I don’t do that I might do if I had … You could have them going out and … seeing more stuff in the community than we do, but it’s time intensive.

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1631 [020], Interview, lines 260-1. See also [059], Interview, lines 335-7 (refraining from incorporating a drafting assignment because of “student load in first year”).

1632 [051], Interview, lines 523-6 (“the constraints would really be … time … [My institution] already has a fairly high teaching load. We put a lot of emphasis on teaching”).

1633 [058], Interview, lines 829-31 (“I’ve cut back on the feedback I give them because we’ve cut administrative support here”).

1634 [053], Interview, lines 840-48:

We have two rooms that are used for first-year courses. One of them is new and modern and you’re very close to the students and sort of in a peninsula shape. The other is the old lecture theatre … with rows of horizontal desks going back to the horizon … It’s certainly a very different teaching experience depending on which of those two rooms you’re assigned.

1635 [064], Interview, lines 874-80 (“the way the first-year program is designed … it teaches it as … four or eight individualized classes, which is not my ideal. [My ideal] would be to see not just more problem-based learning but integrated problem-based learning as multiple legal issues that are raised in … aspects of what are covered in different classes”); [045], Interview, lines 431-9, 468-71:

I’d … like to experiment … with … teaching in a block as opposed to breaking up into one and a half hours … Maybe that would lend itself to more in depth discussions, rather than doing an hour and a half where … you’ve just started hitting your stride in terms of the classroom discussion and then the class is over … This is a bit of … administrative inertia in the sense that Contracts [has] been taught in a separated hour and a half block [for a long time].

1636 [006], Interview, lines 274-84 (“It would be much easier to do a lot more in terms of practice questions [in smaller classes] … [You could] sort the class … to move at two speeds instead of one speed. There are constraints to having a very large lecture class. It can’t be that nimble or responsive”); [057], Interview, lines 663-7 (“We don’t have small groups anymore. And I think there’s something valuable in that … They were removed as a budgetary measure a few years back”).

1637 See eg. [051], Interview, line 523; [059], Interview, line 559; [065], Interview, line 485.

1638 [058], Interview, lines 819-24.
Similarly, given more time Professor 30 might include more comparative law materials, Professor 4 might discuss legislation more, and Professor 57 might assign more writing assignments. The lack of time appears to be one complaint that unites professors of different rank and statuses, surfacing in the words of a full-time practitioner, a beginning professor, an associate dean, and a sitting dean.

Finally, concerns about time translate into assertions about priorities, which may signal the idea that some institutional cultures or reward systems do not prioritize teaching. For example, Professor 15 would incorporate problems, negotiation, drafting, and other solicitor skills “in a perfect world” but chooses to prioritize more conventional models because “the payoff isn’t big enough to justify spending the huge amount of time on it.” Similarly, Professor 13 hasn’t delved into law and economics to elucidate policy because “it’s a more complex construction of a set of norms that ... would take us more

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1639 [030], Interview, lines 540-6 (“Somewhere between three and five hours a week of teaching isn’t enough to teach them a Canadian law point, and then some comparison maybe with a relevant situation in the United States and say a relevant situation in Quebec”).

1640 [004], Interview, lines 528-40.

1641 [057], Interview, lines 672-5 (“doing more writing assignments ... would be beneficial. But ... that’s also always a balance on how much time can I spend reading and giving feedback”).

1642 [065], Interview, lines 510-12 (“I don’t have ... as much time as ... some of the academics ... to really develop a course”).

1643 [045], Interview, lines 441-6, 474-5 (“I’m an early faculty, I’m just getting my legs, all this is new to me, I’m finishing up a doctorate ... and that’s like two full-time jobs. So part of it’s some work constraints that I have at this point that I haven’t been able to put my personal imprint [on] in the way that I eventually will want to when I have a bit more time”).

1644 [016], Interview, lines 405-410 (“I was ... really shifting in my focus [in] teaching Contracts and became Associate Dean and had this kind of gap of, “I’ll go back to teaching Contracts when I’m finished being Associate Dean” and would spend a kind of substantial chunk of time kind of rethinking again how I want to teach and what I want to teach”).

1645 [E], Interview, lines 117-21 (“I’m probably less effective as a teacher than when I’m not Dean. I have more time to devote to my teaching, [am] more conscious of the rhythms of the class and the ways in which ... students interact with one another and ... with me”). The role of time and workload may also have significant impacts on the development of the law. As Karl Llewellyn is quoted to have said, “The whole history of the English Constitution could be written in terms of pressure of work” (quoted in William Twining, Karl Llewellyn and the Realist Movement (London: Weidenfeld and Nicolson, 1973), reproduced in Danzig, Hadley, supra note 880 at n 105). Danzig reflects on how the rule in Hadley v Baxendale can partially be explained by workload concerns and incentive structures of County Court judges: “Clearly the rule invented in the case offered substantial rewards to the judges who promulgated it and in later years reaffirmed it” (ibid at 274).

1646 [015], Interview, lines 393-419. Cf. [020], Interview, lines 222-8 (“to write any of those problem-based learning exercises [takes] a tremendous amount of ... personal time ... I just personally didn’t see the payoff to me for the time it was taking me to do that particular exercise”).
As Professor 43 bluntly states, “We don’t have any support. We’re not used to having support.”

iii. The End Game

The combination of incentives to start teaching in the mold of senior colleagues and lack of incentives to significantly depart from this practice as time moves on results in a state of affairs where change can be very slow to come, if at all. At least three senior professors — each with several decades of experience teaching Contract Law — acknowledge that their approaches have not significantly changed over the years. Another says that “after thirty years I have very comprehensive notes,” suggesting a strong degree of continuity. At the other end, some younger professors indicate a prospective steady-as-it-goes approach. Professor 66 is “not that ambitious” to contemplate changing the order in which the course is taught; Professor 32 “bid” for Contract Law mid-career “not because I like it more, but having prepped a course, it’s more efficient.” And Professor 52, a starting professor, doesn’t “plan on doing anything a whole lot different than what I’ve previously done.”

This story recounts how some structural features of legal education may produce a degree of path dependence in legal education. Occasionally professors describe this phenomenon. As Professor 17 says:

What ... can sometimes happen is that ... you’ve been doing it a certain way [and] you just keep doing it that way because it’s ... way easier and you can spend your time on other things ... I really think for a lot of people it takes a fair bit of effort to ... re-engage with [the material] and [ask], ... “How am I going to make it more my own?”

1647 [013], Interview, lines 661-3.
1648 [043], Interview, lines 1378-9.
1649 See [029], Interview, lines 680-84 (“I don’t think so”); [048], Interview, lines 325-330 (“I don’t think so”); [060], Interview, line 156 (“Very, very little”) (Each in response to the question of whether the approach to teaching the course had changed).
1650 [020], Interview, line 111.
1651 [066], Interview, line 599.
1652 [032], Interview, lines 476-7.
1653 [052], Interview, lines 607-8.
1654 [017], Interview, lines 580-85.
Added to the many institutional and internal cultural features described here is also the idea that the profession of law is inherently conservative. This characteristic plays a factor in the way that some professors describe legal education. As Professor 43 says:

Because we’re lawyers, [we have] a couple of personality ... characteristics. One of them is we’re risk-averse. All good lawyers are risk-adverse. Two, we’re tremendously skeptical and we hate uncertainty. That ... builds into the risk-averse thing. So we can’t take that leap easily. And we are by and large, in every law faculty I’ve seen, a bunch of nay-sayers. We have more reasons for “no” than for “yes.” So turning the models around is really hard.1655

The above account paints a picture of a powerful set of norms operating in the law school. These norms are rarely both formulaic and explicit; as Harry Arthurs observed with a certain degree of self-evidence, “Of course, pressures from the profession and the university only rarely arrive in the form of explicit prescriptions or even clearly articulated requests.”1656 The norms that most powerfully appear to be operating on law professors are implicit and inferential, akin to unwritten general principles, expressed by the term “institutional culture.” Other powerful influences include the formulaic but implicit norms resulting from the structures imposed by curriculum design, class size, and layout.1657 Whatever the influence of law professors’ conceptions about law, or their pedagogical rationales, there is no denying that professors are heavily influenced by the many and varied norms and structures within which they operate. These norms and structures create a deep channel through which mainstream practices course, undulating and powerful.

B. Agency

The relationship between structure and agency, however, is dynamic in the context of the law school. Professors do not appear to be passive “subjects” of the law school’s norms but rather participate in constituting, constructing, interpreting and, at times, transcending those norms.1658 In one

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1655 [043], Interview, lines 1772-81. Cf. [064], Interview, lines 943-7 (“[R:] And any resistance that you might ... perceive to increasing the amount of problem-based learning, where do you think that comes from? [Professor 64:] Well, as you know, we are a profession doesn’t like change”).


1658 Cf. Macdonald & Sandomierski, ibid at 614-5:
sense, this manifests in the commonplace assertion that professors experience little or no constraints. When I specifically asked professors about what constraints they feel (and I did so, directly, 45 times), most mentioned very minimal constraints, and fully fourteen stated they felt “no” constraints whatsoever. Many describe having complete freedom. As Professor 54 says, “I’m free to pick any textbook I want, ... make any syllabus I want, teach any material that I want.” One professor even laments the “overstated idea of academic freedom which [operates to shut down] ... conversation[s] about coordinating ... different sections.”

On the one hand, these statements could reveal the fact that professors may be blind to the constraining forces around them and that a formal notion of academic freedom describes only one of many normative strata; professors could be constrained without seeing or acknowledging it. On the other hand, the subjective reporting about freedom might signal a sense of agency and ownership over the law school’s structures, and over their own teaching. And there are, indeed, numerous examples of professors exercising their agency as against some of the structures identified above.

For example, while the tendency is ever-present to adopt a house book, a good number of professors – twenty-one of the fifty-eight who use a commercial casebook – either design their own materials or develop extensive supplements. Professor 1, for example, completely designed a set of

Legal norms, in whatever site of law, are imagined by human beings, given expression by human beings, lived by human beings, followed by human beings, modified by human beings, rejected by human beings – in a word, constituted by human beings not primarily as passive legal subjects, but above all as active legal agents.

1659 [008], Interview, line 514; [023], Interview, line 773; [011], Interview, line 614; [031], Interview, line 319; [039], Interview, line 936; [066], Interview, line 103; [049], Interview, line 446; [029], Interview, line 690; [032], Interview, line 600; [048], Interview, line 572; [052], Interview, line 522; [050], Interview, line 599; [026], Interview, line 952; [055], Interview, line 826. In addition, Professors 59 and 65 said they had no constraints whatsoever, except time (lines 559 and 485, respectively).

1660 [054], Interview, lines 396-7. See also [061], Interview, lines 911-3 (“I don’t have anyone ... looking over my shoulder and seeing what cases I’m teaching at all. I have an enormous amount of freedom”); [026], Interview, lines 624-6 (no pressure from colleagues to choose any particular casebook); [021], Interview, line 785 (“I get pretty much free range here”); [032], Interview, lines 601-602 (“I feel like I’ve got complete free reign on what kind of material I deliver and how to do it”).

1661 [055], Interview, lines 815-9.

1662 See supra note 1572.
materials the very first year of teaching the course. Professor 71, another beginning teacher, includes a highly curated and original set of extended readings for almost every class. Numerous mid-career professors have eclectic and custom-designed reading lists, some of whom designed theirs gradually over the years. And other longstanding professors prefer to “construct [their] own curriculum,” use “materials which are tailored to me and to my course,” or produce their own casebook “put together over time” that is emailed to students for free. Moreover, while many professors do not change casebooks, at least thirteen in my study did. Some switched casebooks for strong principled reasons about law, while others did so for more pedagogical reasons. One beginning professor spent the equivalent of two weeks, full time, reading all three commercial casebooks and deciding on them before teaching for the first time.

As powerful an intellectual force that former teachers or mentors may be, a number of professors specifically react against how they were taught. Professor 32 departed from the approach under which Professor 32 was taught – a “‘let’s get down to … to business’ kind of Contracts course” by specifically injecting four “contracts-in-context” days. Similarly, another professor decided to teach Contract Law in a more contextual way as a “reaction against” how that person was taught. Professor 48 includes “questions about inequality of bargaining power [and] the role of public policy in contract

1663 [001], Interview, lines 882-909.
1664 [071], Syllabus, 2015-16.
1665 See eg. [037], Fall and Winter Term Reading Lists, 2015-16; [017], Contracts Supplementary Materials, 2012-13; [017], Interview, lines 175-7 (“I wouldn’t say when I first started teaching that I [included a lot of race and gender materials in the supplement], but I have started doing it increasingly”); [016], Interview, lines 746-7 (“[a colleague] and I were getting less and less satisfied with it because our supplement every year got bigger and bigger”).
1666 [002], Interview, lines 125-6.
1667 [050], Interview, lines 187-8.
1668 [007], Interview, lines 475-80.
1669 See eg. [013], lines 55-78, (quotation reproduced supra, note 1460).
1670 See eg. [025], Interview, lines 302-3 (“I just think [switching casebooks is] a good thing to do. To some extent it shakes up the students a little”); [031], Interview, lines 349-50 (“usually every few years I like to change the book I use, just to mix it up a bit”).
1671 [026], Interview, lines 587-608.
1672 [032], Interview, lines 434-43.
1673 Interview, lines 93-100 [identity of participant deliberately redacted].
law” notwithstanding the fact that “as a student [those issues] were never raised because I simply
learned the rules.”

Similarly, many professors demonstrate original thinking or the ability to change their minds.
Professor 28 discusses how the conviction to include context comes from within:

I’ve always liked when I’ve taken courses to hear where the instructor’s coming from in
their work ... In recent years I’ve been ... particularly influenced by [having] taken a lot of
... creative writing [courses] ... I’ve been influenced by those teachers the most in their
style and the way they’ve brought their own writing into the class.

Professor 12 freely admits to “changing my mind” about substantive issues in contract law.
Professor 42 says, “I’m more or less self-educated, and I do it the way I like!”

Professors also take original approaches to designing and teaching courses. Professor 24
conducted a “major reorganization” early on in teaching, and aspires to produce an “honest course that
is] my own.” Professor 35, who borrowed many course syllabi from colleagues when first starting
out, nevertheless drafts a very original one. Professor 39 “read all the cases and made my own

1674 [048], Interview, lines 177-81.
1675 [028], Interview, lines 319-26.
1676 [012], Interview, lines 172-6:
I never leave a class without knowing more than I knew when I went in. Which is very exciting! I
don’t know what I’m going to know more ... but I suddenly find myself saying something [like],
“That isn’t right!” Students will say, “But you said this in an article you published four years ago.”
And I’ll say, “I’m sorry—changed my mind!”
1677 [042], Interview, lines 75-6.
1678 [024], Interview, lines 94-106:
Now I do a lot ... less major reorganization than in the first [or] second year [when] I had to
struggle with basic ideas ... I just basically looked at the way people do things differently ... and I
tried to combine the different things in my own way—which was a lot harder than it needs to be.
But for me I think that was the only way to do it clearly and do an honest course that was my
own.

Professor 24 also made meaningful changes in the structure of the course as between 2013 and 2015
([024], Syllabus, 2013-14; [024], Syllabus, 2015-16).
1679 [035], Syllabus, 2015-16, p 1:
Contract law is one of the foundational building blocks of the common law, the core of market
regulation, and a legal relationship that underpins a myriad of statutory and specialized common
law regimes. The common law presents contractual relationships as voluntary agreements
notes” on them in the first year of teaching.\textsuperscript{1680} Professor 51 switched the order in which remedies appears in the course on the basis of an article about pedagogical effectiveness, does “not want to become complacent,” and switches the cases assigned so that “you can’t rely on your same notes from the previous year” and in order to “keep engaged with the material.”\textsuperscript{1681}

As for any disinclinations to depart from standard practices, some, like Professor 43, disregard student resistance entirely – “I have no resistance because I don’t care ... My job isn’t to listen to the kids. My job is to teach ... I’m not in the crowd-pleasing mode.”\textsuperscript{1682} And whatever the perceived resistance, many professors do articulate plans to make changes in the future, whether to omit seminal readings,\textsuperscript{1683} change order,\textsuperscript{1684} design materials,\textsuperscript{1685} or even, as is the case with Professor 62, to radically alter the mode of evaluation on the basis of self-reflection and assessment:

One of the ways that I’m going to try to resist [student pressures about grades] ... is to try ... a mode of evaluation ... [that] I’d call transvaluation ... They’re going to get grades for doing ... [what] they actually want to do when they come in the first place, and better matches and tailors their actual aspirations, without being adulterated by ... the instrumentality of how to get particular grades to get particular jobs ... I’m glad you asked that question because I felt one of the biggest failures that I committed this year was sticking with this instrumental form of evaluation that didn’t match at all or ... not nearly as well as it could have—the integration ... of theory and practice.\textsuperscript{1686}

between parties, and defines a contract as an exchange of promises, the breach of which gives rise to a legal remedy. But a contract can also be thought of as a social relationship, as an institution that facilitates transactions on the market, as a problem-solving tool, and/or as grounding political philosophies concerning liberal, market-based democracy.

\textsuperscript{1680} [039], Interview, lines 704-709.
\textsuperscript{1681} [051], Interview, lines 88-123, 613-29.
\textsuperscript{1682} [043], Interview, lines 1103-13.
\textsuperscript{1683} [035], Interview, lines 521-3 (“I’m not sure I’m going to” teach Ron Engineering [& Construction Eastern Ltd v Ontario, [1981] 1 SCR 111, 119 DLR (3d) 267] again).
\textsuperscript{1684} [052], Interview, lines 103-107 (“in future years ... I might monkey around with it and do ... a mini lecture on damages right at the beginning of the course, and then ... follow the Percy and Ben Ishai text from that point forward”).
\textsuperscript{1685} [064], Interview, lines 450-51 (“I may use one assignment from last year as [a problem set], but I’ll probably design them myself”).
\textsuperscript{1686} [062], Interview, lines 1096-1124.
V. Implications

This concluding chapter has explored the interplay between professors’ exercise of agency and the structures within which they operate. Parts II and III explored how intellectual agency – the self-aware and explicit attempts to conceptually reconcile realism and formalism – or pedagogical agency – deliberate strategies to maximize pedagogical effectiveness – may help account for the apparent gap between aspiration and reality. Those aspirations, recall, include the desire to convey how considerations of policy, politics, and context are integral to law, ideally by showing how they inform the core of legal reasoning. As compelling as these agency-based accounts are, each is beset with at least one shortcoming. In the first instance, attempts to conceptually reconcile realism and formalism seem destined to succeed incompletely, if at all, given the revolutionary character of realism and the widely acknowledged idea that realism constituted a “wholesale assault” on formalist and classical ideas. In the second instance, accounts of pedagogical effectiveness seem irremediably tied up in an understanding of “core” knowledge and skills, an idea that cannot completely be decoupled from attitudes about law. Claims that students need to learn the basics for future courses or need to walk before they can run appear to rely on taken-for-granted conceptual categories, reflecting “Langdell’s secret triumph,” and so pedagogy does not seem to extricate us from the apparent tension between realist and formalist commitments about law.

Part IV focused on the external constraints and structures in which law professors are situated. This account, too, yielded no simple explanation. A structural lens revealed how external factors produce a dynamic in which many contract law professors’ starting choices are de facto constrained, as is the scope to change course as time goes on. These constraints are rarely formal and explicit, as when a dean specifically asks an instructor to use the house book. Rather, the constraints are most often implicit and inferential, manifesting in the idea of an institutional culture. Moreover, not only does institutional culture serve to define the boundaries of “appropriate” decisions, it also increases the costs relative to benefits of departing from convention. Implicit messages about academic career success may condition professors’ priority-setting, leading them to use the same course format and materials year after year in order to free up time for the better-rewarded task of research. At the very least, these messages may impel professors to save the inclination to innovate for courses, such as

\[1687\] [045], Interview, lines 456-7 (“I think that would be probably not an appropriate way to do things”). See Chapter 6, IV(A)(i), above.
upper-year seminars, that more closely align with their primary research. In these ways, conventional
and traditional ways of teaching a course such as Contract Law become propagated from generation to
generation and remain remarkably resilient over time.

Nevertheless, the story is not entirely one of determinism and constraint, as a significant
number of professors do make efforts to innovate – as detailed both in this concluding chapter and in
the final section of Chapter 5.1688 Likely, the instances of innovation and experimentation reveal not only
an assertion of agency as against institutional norms that deprioritize innovation, but also the fact that
institutional culture itself is not monolithic. University centres to support teaching, faculty initiatives,
curricular reviews and broader strategic visions often provide formal support (both practical and moral)
to professors who wish to innovate.1689 While these formal messages abut against the perhaps stronger
informal messages dampening the impetus to change, they also reflect and inform the informal culture
of the law school, however slowly and indirect a process that may be.1690

The complex relationship between structure and agency is relevant for at least three reasons.

First, it mirrors, in its complexity, the complexity observed in the other two dualities explored in this
dissertation, theory/practice and realism/formalism. As with those dualities, the dominance of one pole

1688 See Chapter 5, IV(B), above (“Seeds of a Realist Pedagogy”).
1689 See eg. [032], Interview, lines 880-89:

Our centre for teaching learning here is ... very active and good. We’re [also] undergoing
curricular reform right now ... so I suspect there will be some things that come out of there. I
suspect we’re going to go ... more into the area of experiential learning ... You might ask the
Associate Dean or the Dean for ... our strategic vision ... document.

Strategic plans from schools across the country assert the importance of support and innovation in teaching. See
eg. Allard School of Law, University of British Columbia, Allard School of Law Strategic Plan (2016 to 2021), online:
committed teachers and students in an active learning environment informed by research and effective
approaches to pedagogy”); Osgoode Hall Law School, Experience Osgoode: Strategic Plan 2011~2016, online:
commitment to ambitious curricular innovation, to active learning, and to excellence in legal pedagogy ... will
continue in our new Plan”), 7 (“Osgoode will establish the first Office of Experiential Education (OEE) at a Canadian
law school”).

1690 Strategic plans often result from intense collaboration within a law faculty, expressing the aspiration to
capture collective aspirations, not simply to impose them. See eg. Schulich School of Law at Dalhousie University,
“Strategic Planning 2016”, online: https://www.dal.ca/faculty/law/about/strategic-planning-2016.html (setting out
a consultation schedule and including twelve questions under the heading “Food for Thought.” These include,
“What are your hopes and aspirations for the long-term future of the Schulich School of Law?” and “How can we
enhance the teaching and learning experience at the Law School?”). Cf. Macdonald, “Curricular Development”,
supra note 121 at 569 (“thoughtful curricular debate is a law school’s primary heuristic device”).
over the other appears to change depending on how abstract a framing one applies. A focus on *formal* and *explicit* norms and constraints appears to highlight professors’ agency: professors tend to identify few or no explicit constraints, they receive formal support for innovation, and they benefit from official academic freedom. However, a focus on *implicit* and *inferential* normativity tends (although not exclusively) to suggest ways in which professors’ choices are structured or constrained through institutional culture and incentives. This correspondence recalls that observed in Chapter 4, in which *general* claims about role or mission tended (though not exclusively) to correspond with articulations about how theory and practice are in opposition, whereas more *particular* descriptions of one’s teaching highlighted how theory and practice could and should be balanced and integrated. And with respect to realism and formalism, as detailed in Chapter 5, *propositional* claims about law by professors and casebook editors tend to emphasize realism, whereas *operationalized* teaching practices and conceptions of legal reasoning tend (though not exclusively) to reveal a commitment to formalism.

Second, not only is the interplay between structure and agency similar to that of the other two dualities, but it also helps understand the dynamics between theory and practice, realism and formalism. With respect to their ideas about law, professors both exercise agency and appear conditioned by pre-existing conceptual categories. The suite of realist ideals detailed in Chapters 3 and 5 represents articulations of realist and critical scholarly ideas that professors and casebook editors have sufficiently internalized so as to express them in authentic, genuine, and original voices. At the same time, the formalist ideas they propagate through an emphasis on substance and conventional legal reasoning seem intricately tied to the conceptual categories of both the curriculum – Contract Law being established as a stand-alone class – and of contract law doctrine itself.

With respect to pedagogy, professors and editors exercise agency in numerous ways: by affirming the mutually reinforcing nature of theory and practice (aspiring towards an education that is both critical and useful), by foregrounding realist ideas in course syllabi, choices about substance, and evaluation, and, in the case of *Swan*, by formulating the entire book around the solicitor’s approach. But they are also deeply conditioned by the hegemony of the case method approach, institutional factors that encourage sticking closely to inherited course structures and methods, and (in the case of casebooks) dynamics that determine market share.

However, the image that professors aspire to convey realist and critical ideas but are either thwarted or only exceptionally escape structural constraints is an incomplete one. The interplay between structure and agency reveals that professors are not simply subjected to structural constraints,
but, possessing academic freedom, intellectual strength, good job security, high social status, and so on, also participate affirmatively in reproducing the structures that condition them. The enthusiastic and well-elaborated descriptions of conventional legal reasoning are perhaps the best example of this expression of agency in reproducing the structures in which they are situated. But so is the tendency to talk about theory and practice in oppositional terms when describing the role of mission of the law school. These descriptions are every bit as genuine and authentic as the articulations of realist or critical theories. And none of this is to forget the seven “champions of formalism,” who champion and defend a conventional focus on rules, analogical reasoning, and adjudication. Indeed, one of the possible reasons why professors described so few constraints may be that they experience many of the structural features that surround them in part as practices to which they themselves are genuinely committed.

This leads to the third reason why the interplay between structure and agency is relevant. Understanding the dynamic may inform remedial efforts to address the gap between aspiration and reality in legal education. At a basic level, understanding that institutional or structural factors might inhibit innovation shines the light on the need to reform them directly. The perceived lack of incentives to reorganize a course, or experiment with new methods, or even switch casebooks, is the type of empirical information that may guide certain institutional reforms. For example, in order to provide greater incentives for innovation, law faculties could provide instructors who wish to re-design a course or produce a new set of teaching materials with a reduced teaching load or fewer administrative responsibilities to offset the investment in time. Law faculties could invest resources by bringing in speakers, funding teaching assistants or research fellows, or supporting technological experimentation. Law faculties could seek to acknowledge the institutional culture by making certain latent expectations

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1691 In Bourdieu’s terms, these last features can be thought of as elements of the law professor’s capital, which combined with the structural conditioning, in a given field of activity, constitute a practice. See Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (Cambridge, MA: Harvard University Press, 1984) at 101. Other potential theoretical framings of the interplay between structure and agency would include the recursive and mutually constitutive relationship between structure and agency in Anthony Giddens’ structuration theory, and a relational concept of autonomy that views social structures as a necessary condition for autonomy. See Anthony Giddens, *The Constitution of Society: Outline of a Theory of Structuration* (Cambridge: Polity Press, 1984); Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011). Yet another parallel is with the breaking down of dichotomies in Clare Dalton’s work. See Chapter 2, IV(C)(i), above. This dissertation has revealed that the dualities of structure/agency, theory/practice, and realism/formalism may all be problematized in an analogous fashion as Dalton has done for the dualities in contract law doctrine.

1692 I am grateful to Mark Antaki for his word play between “constraint” and “commitment,” in conversation with me, for eliciting this reflection.
(such as consistency between courses or shared evaluations) explicit; the result could be either to remove expectations about comity or transform them into collaborative experimental initiatives. Law faculties could affirmatively try to shift institutional culture by championing innovative teaching efforts or convening faculty workshops focused on pedagogy.

Addressing the more substantive gap – between the ideas about law and how they are operationalized in legal reasoning and practice – poses more of a challenge, but could, conceivably, be targeted through more macro initiatives like curricular reform and program design. To take just one example, the current trend towards increasing experiential education at least posits the ideal of “deploying substantive knowledge” and critical analysis; one new law school declares the integration of theory and practice as its founding philosophy, and the idea figures prominently in the proposal for another. Other institutions could play a role, too. For example, a legal publisher could commission a teaching manual that specifically provides guidance on how to incorporate some of the theoretical ideas from the casebooks’ introductory passages into the substance matter of the course, thereby lowering the costs to individual professors who wish to do so, and inspiring those who might not otherwise have considered it.

1693 See eg. Lorne Sossin, “Experience the Future of Legal Education” (2014) 51:4 Alta L Rev 849 at 851: [E]xperiential learning transforms legal education from a focus on conveying specialized knowledge about law (and, in its best incarnations, critical analysis of law) to a problem-solving model, in which the goal of [the] law school curriculum is deploying legal knowledge (and, ideally, critical analysis) in order to advance our understanding of law and its contexts, and in order to improve the justice system and society [emphasis in original].

1694 See eg. Bora Laskin Faculty of Law, Lakehead University, “The Curriculum”, online: https://www.lakeheadu.ca/academics/departments/law/curriculum (“The theory of the law is integrated into the practice of law. The core law subjects essential to a quality law program remain, but they are tied to necessary practice skills”); Bora Laskin Faculty of Law, Lakehead University, “Integrated Practice Curriculum”, online: https://www.lakeheadu.ca/academics/departments/law/curriculum/ipc (“Lakehead’s model of legal education fuses the theory of law with the practice of law; where students not only learn law, but learn the necessary practice skills to use that law effectively. The curriculum at Lakehead University Faculty of Law is aimed at integrating legal skills with substantive legal knowledge”).

1695 See Academic Standards Committee, Ryerson University, Proposal For a Juris Doctor Program (Report #W2017-4, June 2017), online: http://www.ryerson.ca/content/dam/senate/ASCReports/2016-2017/ASC_Report_W2017_4_June_5_2017.pdf at s 1.3 (foregrounding the “Key Elements” of the proposed program with a salutary reference to a 2012 Report by the Federation of Law Societies of Canada that “stresses the need to blend theory and practice”). See also Michelle Cook, “Ryerson’s Law School Proposal: Gaps in Legal Education” (23 November 2016), theCourt.ca, online: http://www.thecourt.ca/ryersons-law-school-proposal-gaps-legal-education/.
What the accounts of the law professors in this study show, however, is that formal institutional interventions on their own are unlikely to succeed in isolation. Professors’ intellectual and pedagogical agency ensure that they will retain significant control over the substantive messages they intend to convey about law, legal reasoning, and legal practice whatever the institutional structures. Thus, one message for possible reformers is not to rely exclusively on top-down, formal, and explicit levers for change. Understanding the subjective experience and attitudes of law professors – giving expression to the implicit power of both institutional culture and legal consciousness – should therefore inform any project of reform in legal education.

In this regard, the role of agency in legal education signals the need for more research at the individual scale of analysis that seeks not only to tease out, as this study has done, the attitudes and objectives of law professors, but also to understand the attitudes and lived experience of students and graduates. One of the lessons from the Chapter 4 is how phenomena may appear very different at different scales of analysis. For the participants in this study, reflection at the macro scale (about the law school’s role) reproduced the oppositional dynamic about legal education that happens to align with the conventional narrative propagated by other macro-level studies on legal education. It was only by accessing more subjective descriptions of individualized goals and attitudes that we were able to discover the relatively common aspiration of translating theory into practice. If lasting and transformative change in legal education is desired, this study suggests that accessing the subjective experience of individuals, acknowledging their agency, is integral to avoid incanting the same old tropes and reproducing the same imagined consensus.

But it is the complex relationship between structure and agency that holds the most promise for enabling any transformative vision of legal education.Apparently more impactful than institutional culture, individual pedagogical choices, or theoretical opinions, are deeper elements about the Contract Law course that are sustained by both external structures and internal, individual commitments. These are the commitments to the conceptual categories of Contract Law as a course in the curriculum, and specific doctrinal rules within contract law; the idea of legal reasoning, or “thinking like a lawyer;” and the use of the case method. These elements are united in the fact that professors almost never attempt to seriously challenge them. While some attempts are made to incorporate functional headings in the casebooks or in the course, the conventional doctrinal categories and leading cases figure prominently

1696 See eg. Bliss, supra note 77.
in every book and in almost every course. Even in outlier approaches such as that of Professor 49, who spends half the course in drafting agreements, or Professor 43, who uses most class time for small-group problem-solving exercises, professors assign the conventional cases under conventional categories. The curriculum at every law school in my study includes Contracts or Contract Law as a first-year course, with only two notable (but not radical) modifications to nomenclature, no school in my study has gone the way of reorganizing the curriculum significantly away from Langdellian conceptual categories. The casebooks and instruction alike encourage the propagation of Langdell’s case method

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1697 McGill teaches Contractual Obligations in a transsystemic course that integrates common and civil law. The Schulich School of Law at Dalhousie University teaches Contracts and Judicial Decision-Making.

1698 Even the proposed new JD program at Ryerson University, which “will aspire to be different,” imagines a suite of conventional first-year courses. See Academic Standards Committee, supra note 1695 at ss 1.4, 2.8 (first-year required courses proposed as Contract Law, Torts Law, Property Law, Criminal Law, Constitutional Law, Administrative and Regulatory Law, Legal Research and Writing, Ethics and Professionalism, Foundations of Law and Legal Method, Indigenous Law in Canada, and a one-week Technology and Innovation Bootcamp). The choice to use conventional course titles may result from a strategy designed to maximize Ryerson’s chances of receiving accreditation from the Federation of Law Societies of Canada. Although the FLSC does not require any specific mandatory courses other than one in Ethics and Professionalism, the “substantive law” competencies it requires map almost perfectly onto conventional course names. See FLSC Report, supra note 11 at 47-48. This is turn reflects both the idea that curricular choices may not be a product of unmitigated agency, and that legal professionals (such as the ones responsible for the FLSC Report, ibid) may have internalized, and thus consider natural, the pedagogical and doctrinal categories in which they were taught. Cf. Gordon, Review of LaPiana, supra note 1511 at 1244-5.

Compare the Curriculum B of Georgetown Law School, which includes the following first-year courses: Bargain, Exchange, and Liability; Democracy and Coercion; Government Processes; Legal Justice Seminar; Legal Practice: Writing and Analysis; Legal Process and Society; Property In Time. It is advertised in part as follows:

A [traditional] curriculum … takes little account of the disruption in the common law system caused by the emergence of the regulatory state in the first part of the last century. Today, it is widely understood that adjudication amounts to much more than a retrospective sorting out of the rights of the particular parties before the court. Legal rules govern the conduct of large classes of people and provide appropriate incentives for how they should act in the future. Most of our law comes not from judges deciding individual cases, but from complex statutory schemes written by legislative bodies and from detailed regulations authored by government agencies. Law has a public focus. It allocates power and distributes resources.

Curriculum B is designed to educate students about this modern conception of law and about the problems that result when it conflicts with older conceptions.

Even this iconoclastic vision, however, hews in part to ideas about foundational concepts: “The Curriculum covers all the basics that student need to know in order to do well in upper division courses, pass the bar examination, and excel in the practice of law (including fundamental concepts of property, contract, and tort)” (Georgetown Law School, “Curriculum Guide – Curriculum”, online: http://apps.law.georgetown.edu/crurriculum/tab_clusters.cfm?status=Cluster&Detail=105).

See also Kim Brooks, “The World Needs More Rod Macdonald” (2014) 51 Alta L Rev 871 at 872:

One day while I was laying there staring at the ceiling [Macdonald] announced: “I think we should teach all of our first year through the lens of some regular object. Cars. Forget obligations
by privileging judicial decisions as the primary source material. And teaching students to reason or think like a lawyer is almost always cited as either the first- or second-most important learning objective when that issue comes up in interview, which it almost always does.

The consensus around these core features is a product of the interplay between structure and agency; these methods and priorities are inherited, but professors also independently articulate their virtues in their own words. One professor refers to “teaching case method [as] one of those ... core skills that we have to teach,”\textsuperscript{1699} another says that “How common law works is one of the great mysteries of this life.”\textsuperscript{1700} However much one problematizes the notion of law as certain, rational, or internally coherent, most professors keep coming back to the idea that there is a distinctive legal reasoning, using similar types of claims about distinctiveness that the champions of formalism use to reinforce law’s autonomy and legitimacy. Almost everyone in my study seems to perpetuate and adhere to the idea that there is something special that makes legal reasoning “legal,” and they invest their own energy and identity into this enterprise as much as they may be pressured or conditioned to do so by structural features.

Any desire to transform legal education needs to take into account the ways in which professors believe in and reinforce the structures that condition them. Ideas of a core substance drawn from conceptual categories, the “threshold” concept of legal reasoning that paves the way to a new epistemology and inclusion in the profession,\textsuperscript{1701} and a standard methodology of focusing on cases appear, for now, to be the invisible but nearly impermeable boundaries of the achievable imagination of

1699 [061], Interview, lines 942-3.
1700 [027], Interview, lines 70-71.
1701 See Donson & O’Sullivan, supra note 35 at 22-26. Members of the profession appear to share in this consensus. The Federation of Law Societies’ cementing of these conceptual categories in its articulation of mandatory competencies is one explicit example, but one can also infer in the ossification of the Langdellian categories the idea that distinctive legal reasoning through the case method is another assumed virtue. What else unifies a profession and justifies its self-regulation if not a common currency of ideas and secret codes? See supra note 1698.
most Canadian contract law professors. No project of change can hope to transcend these features without directly confronting their tenacity.

The stakes of doing so are exceedingly high. Leave aside for a moment the discombobulations impending on legal practice in light of economic globalization and technological development. Those, we are told, will transform the way that lawyers need to compete in the marketplace for legal services.1702 Deeper than that is the question of human potential. Lawyers and human beings in any age will likely succeed best when they have access to the full range of their aptitudes and can see the full range of opportunities to deploy them. By privileging courts and analogical reasoning, contract law teaching at this moment appears to under-include the type of skills and opportunities for contributing to society, adding value, and enhancing justice and equality. Remedial work should fall to no individual instructor, casebook editor, curriculum committee, law society, or dean, but rather rest on the collective shoulders of all those who operate within, and thereby reconstruct, the hidden boundaries of realizable aspirations in legal education.

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R: Um so, I guess I’ll just start by asking, how long have you been teaching contracts?

P: Uh—good question! I’m gonna say I started in [redacted (year)].

R: Okay.

P: [redacted (year)].

R: And you've been teaching continuously since then?

P: Subject to uh—sabbaticals. But what I have done when I've been on sabbatical is I split the course with [redacted (another instructor)]. I know you'll be speaking with [redacted] later today. So—and this year I'm on sabbatical second term so I’m teaching it first term and [redacted]'s picking it up second term. But normally I just teach my—the two term course.

R: You teach the full year course by yourself?


R: Um—wow, so that's a long time. How did you start teaching contracts?

P: I—just in terms of the opportunity?

R: Yeah. Like how did—did you choose it? Were you assigned it?

P: Well, it's sort of one of those things that’s all market driven—like continuing professors end up doing, right?

R: [Laughs.]

P: And we’re all very grateful for opportunities. Now, it was my area and I had done my Master’s in contracts as well, so—

R: Oh, interesting.

P: —I didn’t start teaching co—I started out uh doing sessional work both through the Faculty of Business and the law school. But then um I got on um—tenure—it was during the [redacted (historical time period)] that I came on stream so eventually a tenure-track job opened and I— I applied for that successfully but uh—so contracts became open and I think it was because [redacted (reason why another faculty member left)].

R: Oh wow.

P: Yeah, so that’s how I ended up teaching contracts and continued with it.

R: That’s great. So you enjoy teaching it.

P: Yeah, very much. It’s my favourite area. And it's where I do my research.
R: What do you—what do you like about contracts—like, the subject?

P: Um—I feel it’s very—I feel it’s a very dynamic subject. I think students are inherently interested in it. I think they come to the course with some reticence—I think they think it will be boring. But then they find out no, it really isn’t. There’s all kinds of concepts—uh—involved—policy analysis you can use—I often use contemporary examples in class to kind of keep things lively and—and as I said too, it’s just absolutely foundational to upper year courses so I really enjoy it. And it is also my research area. So—

R: Hm. Um—and—okay, that’s great. How do you organize your contracts course?

P: What goes on with contracts is I—I use David Percy—it’s actually Stephanie Ben-Ishai and David Percy’s uh casebook—

R: Mm hmm.

P: —which I’ve used—from the beginning and in fact as a student—I studied from an earlier edition—

R: Oh, interesting.

P: —so I’m quite familiar with the—with the vibe of this book. And what I really like about it is that it gives you an excellent structure for the course and then uh—you customize it as you—as you wish, but I’m always really confident that I’m given—that I’m being given the leading cases—

R: Mm.

P: —um historically, which I think are tremendously important historically. And then also contemporary.

R: That’s great. And so do you start with offer and acceptance?

P: I do. I’ve tried it a differ—a number of different ways, and I—I’m a big believer in narrative, in a story arc—

R: Mm hmm.

P: —and the beginning of a contract really is offer and acceptance.

R: Mm.

P: And so ultimately that’s why I’ve taught it—but I’ve also tried teaching consideration first? Not that that didn’t work, but you know, following this idea of a narrative, I—I think that thematically, it—it makes sense. Also consideration is quite complex. And—so I feel that students are able to grasp offer and acceptance and get their feet wet. Uh—and it’s perhaps less of a struggle for them.
R: And so the general format you start with—you do the formation section, and then what's next in the course? Is it—you follow the logic of the—the order of the textbook.

P: I do [flipping pages] follow the order of the textbook and the only thing that I do—now we—I don’t teach the whole textbook and I think you'll probably find some real variation—how much of the book is taught. [Flipping pages.] And um—my view is to teach contracts—uh—where there’s more discussion about a fewer number of cases and then there’s a thoroughness in how you look at a case—you can use one case for a number of different pedagogical goals. So my view is—fewer number of cases, and in depth analysis of it so that people really do have an understanding at every level the contingencies of contract law? And—and the other thing I do is I do teach remedies but not as a free-standing topic. So it is presented in the textbook appropriately as a free-standing topic—and we do have a remedies class, which I have taught here, though not lately—so I also use this to teach remedies. Uh—but what I do with remedies is I teach remedies as it arises in a case. And—and so I choose a few cases—like for example, just recently I was thinking about this. One of the cases that I’ve just recently taught is Goldthorpe and Logan—and the court quantifies damages incorrectly in that case. And—and so I—that’s when I introduce the idea of the measure of damages in contracts—what we’re trying to achieve—and the risk of double recovery. And how—it gets by everybody sometimes—up to and including judges. And therefore I integrate remedies as I go.

R: And what’s the ra—what’s the rationale for that? For integrating—

P: Well I think it goes with the idea of [flipping pages] “less is more”. Fewer cases is better. So if I can use Goldthorpe and Logan to show the goal of contract law damages, it actually even talks a little bit about the field—electrolysis case—so it really even touches on recovery of uh mental distress—so it's old law and mental distress and it's not a leading case on mental distress. In fact, it's not a leading case—it's actually a case that has a lot of errors in it—that's why it's in the text—or the casebook. Uh—but in any event, to treat remedies as it arises, and I'm strategically asking myself what cases am I gonna use—um—to deliver on the remedies part of the course?

R: Um—so you talked about um—fewer cases allows you to uh accomplish a range of pedagogical goals?

P: Mm hmm.

R: Could you speak a bit about what those pedagogical goals are?

P: Well yes, actually—I mean an example would be uh—[flips pages]—we do the Wren ??[6:53.7] case in uh—in the course and part of Wren goes to uh duty to disclose—which is a pretty fraught area of contract law so—I use the Rand case to talk about um—sort of that duty to disclose obligation. [Pauses.] How you can read in a textbook and they’ll say that there is, as a general rule, no duty to disclose, but then when you peel it back, how many contexts
within which you do have a duty to disclose—and therefore how you make
the general proposition and then you kind of add up the exceptions and you
have to really think about the general proposition closely. I also use it—I
always try to find opportunities to introduce a practice-based component to
the course? I do theory, which I’m happy to talk about as well—but I always
like to find opportunities to talk about context-based, practice-based
application of what we’re talking about. For two reasons: uh students I think
learn best in a context-based environment, and they know we’re doing this
because of this. And so I’m always very clear why we’re doing things and
what we’re going to accomplish. Um—second I think it’s meritorious on its
own—on its own—there’s a—we’re peeking towards where a lot of people’s
careers are going, which is in law—and it makes it more interesting. So for
example, within the duty to disclose area, what I also do after I do the Wren ?? [8:38.7] case, is there’s—I have to change—when Marilyn Manson is no
longer performing, I’m gonna have to change my example. But there was a
story out of Calgary where Marilyn Manson’s people had set up a concert
which was cancelled when the local villagers were concerned about this—
like he’s a shock rocker as you know—so there was a reported cancellation.
So we look at that as um—"Wow, there was a contract—there was a lease
to—to rent this facility and now it’s being ‘cancelled’" in quotation marks,
and the um—and the lessor was saying "Well we didn’t know about the
controversial nature of the act—it should have been disclosed." And at the
same time, um—I don’t know how I learned this—but in any event, Marilyn
Manson’s people brought an application for summary judgment—they sued
for breach of the lease. They brought an application for summary judgment
which was successful and I phoned the lawyer who—who was in charge of
representing Marilyn Manson’s people, and I got his um—I—got his uh—
exhibitions for a special chambers application, and it’s a really cool
application because he goes in his material he goes through all of the
newspapers that are giving reviews of Marilyn Manson’s concert and he
said—I guess one reviewer said the most shocking thing about the concert is
seeing Marilyn Manson in pantyhose, right? So the idea was there’s just
nothing going on here. And so there’s very much a um—uh—a context-based,
practice-based assessment of this duty to disclose and that was at the core of
his application for summary j saying there was no—well I think the first
position is they knew and they didn’t disclose, but also goes into the law
regarding the duty to disclose and also the law of mistake as it turns out.

R: Hm.

P: So I just do that and people are like, "Wow, that’s interesting." And, “Duty
to disclose is important.”

R: And do students read the submissions? You post them?

P: I post them—I have a [redacted (online course management)] site uh
where I post a lot of materials uh online. And yes I do—I do have—[flipping
pages]—so I do post this. It’s a—quite old now, but those are the—those are
the uh—those are the submissions of the special chambers application.
[Flipping pages.] And we kind of look at that. And students benefit from it. So
that’s another example of why I use fewer cases—because cases are doing
double duty. Wren ?? [11:12.5] goes to this duty to disclose, and I make it
taller and I also then have a practice-based component to it.

R: And have you always done this or is this something you’ve grown into as
you’ve taught the course more—incorporated practical—elements?

P: Well, yeah, it’s sort of a thing that you can just with experience and
exposure to what’s going on, you kind of build up a repertoire—but it’s
always my goal to do that. And eventually, like I told you—[laughs]—when
Marilyn Manson retires, I have to change the example that—everyone knows
about Marilyn Manson in the class—

R: Yeah.

P: —everyone knows the—the act so it’s not like I have to then explain what
it is—everyone knows.

R: Hm. Um—and how do students respond to the—uh—to the practical
materials?

P: I think they—it’s pure oxygen for them. They’re trying to get ready for a
job, a lot of them, right? So I do a lot of that work because I do think it’s
important, but also I think it makes for a better course. But that’s why I do
theory as well—it’s not just practice-based. And I use feminism—I teach
feminism in um—in contracts—expressly. And this is in the context of uh—
the case we use is Balfour and Balfour—intention to create legal relations?
[redacted (three lines of potentially disclosing information)]. And Christine
Boyle had done some feminist work on Balfour and Balfour and written a
very, very good article on it—gives it a feminist critique and so I teach a
feminist uh—feminisms—right? In relation to this course, or in relation to
this case and talk about how a critical perspective helps you see the
contingency of law. And—and how it reflects its time and place. And if you
can see that law as contingent, then you’re gonna be a much better lawyer.
And people really like it. It is a very successful lecture—actually two lectures.
And I use an article that Christine Boyle wrote on point, and then I also look
at other authors in the area of feminisms and feminist—feminist's critiques
of law. So I do—I like to kind of do a lot of different things but there’s another
example of why I don’t teach as many cases. I use Balfour and Balfour to
establish intention to create relations—what’s the deal there, what’s the legal
position—and then also to have a more theoretical exploration of um—well,
the best example—[flipping pages ]—a misogynistic interpretation of that—
sorry—an interpretation of this case that shows a—a—a strong argument for
a misogynist rule that really excludes women from the courtroom when
they’re trying to enforce a domestic uh—a “domestic contract”—in quotation
marks.

R: Um—so you talked a bit about how um understanding the contingency of
law will make students better lawyers?

P: Mm hmm. Yes.

R: Could you unpack that a little bit? Or develop?
P: Well yes, I have—my husband's a lawyer. I think there's probably—I have to sit down and count out how many lawyers are in my family. I've a lot of people in my family who practice law, think about the law, uh and so some of this I've learned from them because I don't practice law. I mean I am a member of the [redacted (law society)]—non-practicing. But the—what I've really learned in talking to lawyers generally is—that for them the law is important, but it's really a secondary aspect of any—of any litigation. First and foremost are the facts—and you've—you—and this is not an insight—you would have heard this in law school—that a lawyer would rather choose good facts than good law. And—but I've seen—I—I think there's so much truth in that. And that the law is important. But for almost any legal proposition you can find two competing cases, right? So how is—I mean as a general statement, there's always a case that's gonna help you and there's always a case that's gonna hurt you. And—and therefore a good lawyer can go through the laws that—or go through the cases that are adverse to their client with integrity and professionalism—take them apart.

R: Mm hmm.

P: And—and so therefore that critical perspective, up to and including calling out a case for—well, you can imagine—I don't want to talk about what a lawyer would do because that's really not my expertise at all—but just the idea that cases have vulnerabilities and if you are—are trained to see what those vulnerabilities are, you can persuade a court in another direction. And that's advocacy, right?

R: Um—and how—how do you um—how do you uh know whether your students are developing this ability to be critical of law and to understand its contingency?

P: Well part of it is just through class discussion—so you can see the insight in the comment or the question. And people do participate—I mean I teach contracts law and I have a lot of participation in contracts law. I also teach corporations law, which is much drier, and I have some participation there but it really falls off compared to contracts. So—I think—I think I know quite a bit more about what students are thinking in contracts law because basically they tell me.

R: They tell you.

P: Uh—and—and so I do feel there's a critical perspective that I think—it also shows—it also gives students a chance to grasp professional empowerment. Right? That—that you can professionally empower yourself by developing a critical perspective. And that—uh—we look for that everywhere. We're always evolving a critical perspective and—and um—and also in class like we really encourage people to talk about the cases and what their concerns are. I encourage people um—to disagree with me. I put out what I think, but I don't uh—I don't say that I've got this down. I'm telling them what I think and then we'll talk about it.
R: This is a difficult question. Um—how would—if I were to ask you to unpack what you mean by critical—

P: Mm hmm?

R: —how would you articulate that?

P: Well basically if you were to read a case and started to make a list of—sort of the social, cultural, historical et cetera—assumptions that are embedded in it, and start to take it apart. Another—so I do that in the context of misogyny in Balfour and Balfour—but there’s another example—[flipping pages]—I use it in the context of class—classist—uh assumptions—uh—[flipping pages]—and we do have the case now in our—in our materials. Uh—I’m—just one second—[flipping pages]—uh—uh—uh! [Humming musically while flipping pages]. So we have in Stilk and Myrick that pre-existing legal duty—and it’s—it’s about as you know, uh mariners who are trying to enforce a promise to pay more. And the court said no. And there’s an earlier case called Caris which cites the legal proposition that if the ship is lost, the wages are lost, because otherwise the seamen would permit the ship to sink. And I’m just saying, I don’t think so—right? I mean, I just don’t think so. And so we can—we can look at that area of law and who’s—who are the litigating parties here and who might the court be favouring in 1860 or whatever it is—um and sort of what’s going on with the dynamic of that case. I mean if a judge said to me in 2013 that legal proposition that people are gonna let the ship sink, are you gonna say, “Oh yeah, they probably would”?

R: [Laughs.]

P: I mean—No. So there’s I think a classist um—perspective there. So—and it’s—those are easier to see—you know, a hundred and fifty years later. At the time, when you’re in the contemporary context it’s maybe more—not impossible by any means but perhaps more difficult to see. But that—that’s always gonna be there. And so to look for that. And to look for the vulnerabilities in the cases and—and also the strengths. Because we also talk about why something works and—and—and what makes a good judgment.

R: And—so you’re assigning fewer cases in the hopes that they’re gonna read them more deeply and dedicate some critical energy to it—

P: Yes.

R: —um how do you know if they’re reading closely and critically?

P: Well again—it is—it is by and large by observing them in class.

R: Hm.

P: Uh—you can see that people are understanding something or not, just by looking at their faces. That’s my experience. And also the commentary. But also I have to say, some people haven’t read—and I accept that—I accept they haven’t prepared. You know, I think we have to acknowledge that—I—I take—I assume if someone hasn’t done something—this is my starting
point—there’s a good reason for it. So it could be they’re working. It could be there was a sick child. It could be there is some kind of reason why they can’t. Now there’s also the explanation that they didn’t feel like it. But I’m not gonna worry about that. That’s their call.

R: Mm.

P: Read, don’t read. If you’re not ready, my starting point is you have your reasons, and I’m not gonna—I’m not gonna judge them. And it’s not that hard to get ready for contracts—it’s just a few cases and they’re short.

R: Mm hmm.

P: And I also ask people—I don’t um—give them specific reading in textbooks but I say, "Grab a textbook—look up the case in the index—read the pages in the textbook about the case" and I said, "You’ll get more out of the class.” But it’s really up to them if they do it or not.

R: Um—and how do you evaluate the courses—a final exam?

P: Yes, so there’s a midterm?

R: Mm hmm.

P: And there’s a final. And the midterm—I give at Christmas—the Christmas exam schedule is failsafe.

R: Failsafe.

P: And I know there’s pros and cons to that. But all in—that’s what I do.

R: And what would your uh—and what would your exams look like?

P: They’re—they’re—it varies. Always a hypothetical, but then too I will um sometimes, not every year, uh have shorter answers or—or questions that ask—ask them to discuss for example the relationship between uh feminist cr—feminist legal criticism and—and such. Right? And so I will occasionally have questions like that too—it really depends. I try and have the exam follow what’s happened in the course?

R: Mm.

P: And—and so every year’s a little different—what’s going to happen, and such.

R: And so I just want to get—um ask about this uh practical—incorporation of practical in the context of this reasoning—um how do you run those classes? Uh is it lecture-based? Uh—are you—do you lecture about—this experience?

P: Yes, so I lecture—yeah, it’s really kind of a lecture slash discussion. So it’s not like I break people into groups and then have groups reporting. If it were maybe—I like to teach in fifty-minute blocks. That’s—that’s what I’m most
comfortable doing—that’s—because even I think—for me—you need a lot of
ergy in the classroom? And I can really deliver that energy for fifty
minutes—after that—mm. So for me, I feel I do best in the classroom in
that—in that amount of time. I suppose if you were teaching in a longer—
bigger chunk of time you might want to break things up a bit more because—
because—for obvious reasons. Uh—but really it’s lecture/discussion so I
courage people to jump in at any time. Um—I will stop at a certain point
in—in the lecture. I like to kick things off—give people a context. Oh, that’s
the other thing—giving people a context makes them more comfortable to
speak in class because they know okay, well these are kind of the parameters
of what we’re talking about and—so I—I kick things off—I um—and you
know, always ask people to interrupt and ask questions whenever they want
to seek clarification but then I’ll put a question out for discussion.

R: Hm.

P: And between those two things, fifty minutes passes by.

R: Uh.

P: Yeah.

R: So what would you say your goals are for your students?

P: Well—I mean, part of my goals is really just imparting contract law to
them and when I say “impart” I don’t suggest that it’s a unilateral exercise but
I want them to understand contract law.

R: Mm hmm.

P: And what does that mean? Well, it’s understanding the doctrine of course,
but then it’s understanding all of the policy reasons for why we do things a
certain way. You know? As I said, the contingencies of law—how you manage
the law? I talked a little bit about—kind of professional empowerment—how
you prepare yourself. I do talk about professional ethics as well in the course.
Um—as I do in corporations law. So if there’s some aspect or some case that I
can talk about—that talks about—or—or elicits that topic, I will explore it. So
it’s very contextual.

R: That’s very interesting. Does that example come to mind where ethics—?

P: Well uh—one example—well, of course uh it just comes up as a general
proposition uh how—lawyers are officers of the court—and how—what the
law is—uh—and precedents that are germane to your matter. It’s not a
game—you can’t say, “Oh, I wish I hadn’t read that case” and put it back on
the shelf. I mean, if this is a case that is on—I can’t articulate the exact test
right now—it’s in my notes—but um—the test from the [redacted] Court of
Appeal—when you have to [redacted]. And I do talk to the class about that—
that the law is not a game of hide and seek—

R: Mm.
P: —the law is what it is. But also—and your obligations as an officer to do—to draw this to the court’s attention. But also then getting back to the advocacy—that you’re better to own—you’re better to own a precedent that—that appears to be harming your interests or your client’s interests—and deal with it, than to just hope—setting aside the ethics—that you’re—well, you’re better to just deal with it. Right? So it’s uh—but first and foremost, you’re required—you’re an officer of the court. Uh—so—so I do it in—that would be sort of a general example and then um—there is a case which kind of elicits the question of what you can really tell your client in a given context and—and how would you advise your client and how far can you press things because you never want to participate in—in something that’s unethical. So we also talk about that.

R: Um—

P: We’re very busy in class!

R: It’s almost like the uh—sort of counterpoint to the learning how to exploit vulnerabilities. It sounds like it’s almost like a—part of the ethical corrective to—you have to be able to exploit vulnerabilities and think critically, but there’s a limit to that in the sense that you’re an officer of the court.

P: Well what it is—okay, so of course you’re always—when you exploit vulnerabilities that’s always in the context of truth and candor. Of course. So I don’t mean—anything underhanded. And in fact, that candor is what is going to make you a good lawyer as far as I’m concerned. But so what I mean about exploiting vulnerabilities more goes to the point, you have a precedent that’s problematic, but if you can say, “Well, listen, you know, I don’t really think—and this is what subsequent cases have done with Stilk and Myrick—that that old mariners’ case—we’re—we’re not gonna follow that because colon” So it’s more just unpacking the problems in the case itself. And that is the vulnerability of the case—it collapses on itself, right? But then there’s this whole professional—uh—uh—skill set, and professional obligations that you have as a barrister and solicitor that mean—you know, you have a case that—is hurting you but oh well! [Laughs.]

R: Yeah.

P: You know, according to your duties as a professional you have to draw that to the court’s attention and then I say deal with it. Deal with it.

R: Hm.

P: You can probably get a—have a very good argument about why this case shouldn’t be applied.

R: Um—so you talked a little bit about the policies?

P: Mm hmm.

R: So how does policy play a role in—in the classroom?
P: Uh well [sighs] um—I guess—mm—and this is what I think most professors would do—you don't wanna just give a legal proposition in splendid isolation and say, “Well there you go.” I mean—this legal proposition—emanates as a result of you know, opposing arguments and it’s kind of come forth to kind of carry the day [clears throat] choosing one or other, to put it sort of simplistically or simply. So you want to look at the policy reasons for doing A or doing B. And that’s the contest in many ti—in many cases. And of course there are cases that are selected for this casebook in many instances are chosen to exploit that.

R: Hm.

P: To help you to—to help you see what’s going on—on both sides.

R: Then how are—how are students at identifying the pol—the underlying policy reasons?

P: Well—I think you see that in an exam where—of course when you draft an exam you—you try to draft it somewhere—well, often—you’re—you’re—and I tell my students this—I draft an exam, it’s not gonna be exactly this case—it’s gonna be kind of like this one and kind of like this one. It’s not a trade secret, is it? And—so how—how do you discuss—a—a good answer in terms of analysis of that hypothetical, it’s not just the issue in the legal test, but that’s gonna be part of it—is what articulation of the test and with respect to these opposing cases, which one um do you think is stronger? So that’s where you will get uh more policy analysis I think in the students.

R: Um do you incorporate any law and economics in your course?

P: Uh—a little bit? So for example uh in the context of exclusion clauses—I don’t think this is really the case any more. But it could still be the case. It probably still is. People look at it in exclusion class and the go, “Well this is tremendously unfair—this exclusion clause. And I can't believe this service provider is putting in an exclusion clause like this.” And such and such. But uh, David Percy—in his text on that point includes an excerpt from Trebilcock which talks about um—which talks about how you reduce transaction costs as a result of these exemption clauses. And so then the actual cost of the product or service will be less because you’re buying less, right? So people are like, “Okay—so we don’t have to get—in advance whipped up about exclusion clauses—they really do have, and I think the law in economics defense of it is quite eloquent—so I’m sort of a jack of all trades—

R: Uh huh.

P: —I kind of roll with things and—and try and find what I think—uh resonates best with the topic.

R: Uh. You’re trying to find what resonates best with each topic.

P: Mm hmm.
R: And so what’s the—when you say something resonates best with the
topic—

P: Mm hmm.

R: —in what sense? So—

P: Well I think to—have a lecture you’ve got to have a perspective. And then
the students can react to that perspective. And so just to continue with our
example—I take the perspective that—let’s—let’s look at exclusion clauses
as—probably a good thing. And then we can talk about where lines are being
crossed and how the law addresses that. But that’s the perspective I take.
And then—I mean frankly I—I don’t think most people would really—
disagree with that. Now I take the perspective in Balfour and Balfour has a—
is a—sexist—and I say that’s my perspective. So I—I take a stand—I have a
vibe in my lecture because there has to be—otherwise it doesn’t have any
form. But I don’t insist on my perspective—I just say what it is. And I truly
don’t insist on it. I mean I think that you can have stronger or weaker
perspectives—but I’m not um—I’m not suggesting that my way is the only
way. But I think you’ve got to have—a lecture’s got to have a form.

R: And um—

P: And just on that point—you know, I will also add on this point of having a
perspective and a—and a—starting point, part of how I help students
understand that I’m not insisting on it is I use a lot of humour in the class. I
really do. I think that really helps people relax. I think they learn better—
and it also proves what I’m saying that this is not the uh—insisting on
something. Though—and that’s the other thing, the law is a conversation.
We’re having a conversation. So the reason you have a perspective is not to
convince them of that perspective. Or is it?

P: I think you have to have—well first of all I think you have to have it. And
even if you don’t think you have it, you have it.

R: Uh huh.

P: But I also—and actually frankly sometimes I will take a perspective—uh
momentarily—just to be somewhat controversial and then I’ll say that you
know, I don’t really think that. But just to elicit something from the class.
Um—but I think there’s a formlessness to a lecture without that. And I don’t
know—sometimes you don’t really have to—I mean, am I gonna take a
perspective on offer and acceptance? Probably not, right? But on the other
hand I think you can have a—you can have a perspective on—[flipping
pages]—um Goldthorpe and Logan being wrongly decided. So what I say is, “I
think this case is wrongly decided.” So I don’t make the students guess what I
think—

R: Mm.

P: I say, “I think it’s wrongly decided. What do you think?” So then—people
know the context of what—they know the context of what I’m coming from
and frankly I think that's why I get more student participation, because
people could still say they think it is correctly decided, but they don't feel like
they're in a mysterious situation where—you know, how—how—in what
context am I speaking. Right?

R: Um—that's interesting. Um it's—so you say—you say—you're trying to
avoid the formlessness of a lecture without a perspective.

P: Right.

R: So it sounds like you're doing it for pedagogical reasons, not necessarily to
convince them of a substantive perspective?

P: Right. Right. Now—I think that—yes, it is—but it's kind of linked. Uh—it's
kind of linked. I think pedagogically it's essential.

R: Mm hmm?

P: Uh—but it doesn't have to be combative and it doesn't even have to be
controversial. Do you know what I'm getting at?

R: Mm hmm.

P: Having a perspective doesn't necessarily mean that, but it means that
you've put things together in a certain way in your mind. Uh—you've worked
on it, in my case for—decades. Uh—this is how I approach it. "I think this
works. What do you think?" Right? And I always—it's uh—it's interesting too
how you always do learn from your students. And—so getting back to this
link between uh teaching and scholarship—uh—my work in mental
distress—really emanated from—a lot of my thinking on it was teaching it
and saying to students, "Well, I don't think this really makes sense. Do you
think it makes sense?" Or they might—they might be confused on a point
or—you know—so there's that conversation that we have with each other
that really um connects with the kind of research I do as well.

R: Right—so that's the link from your teaching to the research—

P: Mm hmm.

R: Does it go the other way around—do you bring your research into the
classroom?

P: Yes—yes I do. So—I uh—[sighs]—I have written on [redacted], so I talk
about that. I've written a lot on [redacted] so I talk about that. I've written
um—uh—uh [redacted]. Um—when I talk about the contingency of the law, I
give examples from other areas and often it will be uh scholarship that I
published that does that but in other areas, just to show that it's not just here
and it can be in a pronounced way, it can be in a softer way, but this is what's
going on. But my CV's online so you can see the kind of work I do, right? It's
online on our uh—on our website.

R: Um—so you talked about some of the uh benefits to practice that arise
from the critical perspective—
P: Yes.

R: —um, is that the only reason you—I mean, is that the main or only reason why you believe critical perspectives are important in the classroom?

P: Well it—it is for its own sake. Right? To have a critical perspective is for its own sake and there are many people who get law degrees and are in law only for a brief time or never intend to practice law. And I really respect that as well. But even—but even for the people that are anticipating a—a long career as lawyers, you know, just a critical perspective—looking at the law—looking at the law critically is just a life skill.

R: Mm.

P: Although life skill is not the word—it is a skill. Um—it’s a generic skill. But it also—it’s also tied to a desired outcome—which is to—serve their clients well. Represent them. I say to my students, “Clients come to you with their problems—and they ask you to carry their problems. It’s a big responsibility. Right? And now you have their problems and you’re carrying those. Let’s get ready to—solve those problems.”

R: Hm.

P: And also the critical perspective helps you anticipate the argument on the other side. You can’t just think of it from your own—from your own clients. And this is not—this is obviously quite an obvious comment I’m making. But as I would explain it to my students um—uh—in first year that—the critical perspective also helps you anticipate what the other side is going to do. Yeah.

R: Mm hmm. So would you say that um—you’ve been influenced by any um—you know, major theoretical writings—like that your teaching is influenced by?

P: Mm hmm. Mm hmm. Well—a lot of my approach to teaching has been through talking to my colleagues. And, certainly [redacted]’s been tremendously helpful. When I first started teaching contracts, the first year I taught it, like I would run into his office a few minutes before class with some issue and he’d help me sort it out. And I’d—you know, I’d pay it back as much as I can because I think the senior professors have a great perspective on kind of the classroom dynamic and how you achieve a good dynamic and how you deal with questions and—and such so—I learned a lot just through the mentorship of my colleagues. Also just talking amongst—everyone—we always, you know, I’m always asking myself, “How can I teach better?” And so a lot of it is—is through the conversation with other people. I do—I do sometimes read uh people’s articles on teaching. I can’t really say “And this person is my sort of in print mentor.” But uh—you know, my—my idea of teaching is that it’s context based—

R: Mm.

P: —and—and I think there’s writing on this that—it’s not problem-based. It’s not—I have read about problem-based—it’s not really that—it’s more
context-based, but you’re not talking in a set of abstractions. You’re saying, “Here’s the context of what we’re dealing with.” And then also for me context-based learning also um—calls on your creativity to take contemporary examples of what you’re talking about, or to generate interesting examples that—that press the limits—of what you’re trying to achieve. [Sighs.]

R: Mm.

P: But like—well I mean, I'll give you—like I said, I remember something I read—Kellye Testy, who’s the Dean of the Washington—University of Washington Law School—was writing about teaching corporations law to people. Which is a course I teach. And she really talked about how important it is to be sure that you get everyone to the same page in terms of vocabulary and basic understanding of what goes on, because there's such a divergence—

R: Mm hmm.

P: —uh—in the classroom and some people are freaking out—they don’t know what—if a share jumped up and bit them, they wouldn’t know what it was. So that you always start at the beginning, so everyone is together. Now I’ve always thought that—but she really articulated it very well and that’s creating an inclusive classroom. That’s creating a—a safe classroom. That’s creating a classroom where everyone can participate. So—so you see I kind of cobble things together because I’m always reading things. And that would be an example of something I read within the last year, and I thought, "Yeah, that’s exactly right."

R: Have you read um the—or heard significantly?? [44:36.6] of the Carnegie—the Carnegie Report on the—um—on legal education?

P: I think I used to know about it but just eludes me for the moment. Yeah. Is there a specific comment you had about it?

R: Well there’s—I mean, I think a lot of what you describe you’re doing um—

P: Yay!

R: —which is integrating the—they call it the cognitive, practical—the professional identity parts of the legal education.

P: Okay.

R: So I wondered if that was an explicit um—connection that you made? Or it’s just—sort of happenstance.

P: No. Yeah—but I sort of—yeah I’m not exactly familiar with that but it sounds brilliant! [Laughs.]

R: I think it—it—it—really—it would be very happy to see what you’re doing. [Laughs.] Sounds great.
P: Mm hmm. Yeah.

R: Um—and does politics enter the classroom?

P: Well, define “politics” right? When we identify a decision as say, classist—

R: Mm hmm?

P: —there’s a po—litical ideology that the decision is reflecting that we’re—

R: Mm hmm?

P: —we’re talking about. Um—I have taught constitutional law, back in the day,

R: Mm?

P: and it obviously would be more—more elicited in that area. I guess it

R: Mm hmm?

P: depends what you mean by politics. But there’s—I’d have to—I’d—maybe

R: Mm hmm?

P: something will come to me when we’re—by the time we’re done speaking

R: Mm.

P: but—nothing—nothing except in that more general sense of politics. Maybe

R: Mm.

P: you can tell me what you mean by politics?

R: Well um—I guess I deliberately left it open.

P: Uh huh. Understood.

R: I’m also interested in your um—I guess comments of the appropriate

P: Well—when I—okay, let’s take feminism because probably there are some

R: Mm.

P: people that are opposed to feminism. Right? And being a feminist is a

R: Mm.

P: political state. Now I talk about what I say feminism is—I have kids—I have a

R: Mm.

P: daughter who’s twenty-eight and a son who’s twenty-five—and my son was

R: Mm.

P: saying, when you say you’re a feminist for that—his age group and that’s the

R: Mm.

P: age group of many people that I teach—what you’re really saying is, “Women

R: Mm.

P: should be more equal—more equal than men.” That’s what in his age group

R: Mm.

P: he says a lot of people feminism is. So I’m like, “Well that’s not what I think

R: Mm.

P: feminism is.” So I talk about what I think it is. But ultimately I’ll say, “It’s not

R: Mm.

P: my job to make you feminists.

R: Mm.

P: “That’s up to you. I’m telling you, what I say what feminism is, and it’s

R: Mm.

P: about equality—and uh—and uh press case law that—that is—that gets in

R: Mm.

P: the way of that goal, I think we need to talk about.” But if someone disagreed

R: Mm.

P: with me, I would say, “Yeah. Okay. That’s your view.”

R: Mm.

P: I would not tolerate attacks on other students—I certainly wouldn’t

R: Mm.

P: tolerate attacks on myself—but I think we always have to be ready to

R: Mm.

P: converse. And I can’t—I’ve never really had—I think I probably have had

R: Mm.

P: students who really probably disagreed—with what I was saying, but they

R: Mm hmm.
P: Like I think some people think women are equal now and I would disagree. I would say, “No they’re not.” And there’s lots of examples of inequality. And we can talk about that.

R: Hm. And—

P: So that’s political.

R: Oh absolutely. Absolutely. That’s helpful. Um—and do you address um—any of the legislative regimes that overlay the common law of law of contract—like consumer protection, or labour law—or anything like that?

P: So again—uh—following this text, or this casebook—you know of course we have Ajudicature Act?? [48:50.1] which deals with the what I call “less for more”—forgiveness of a debt or taking a lesser sum in full satisfaction of the whole—so we have the legislative overlay there. We have a legislative overlay of course in the areas of consumer contracts—which is discussed in the text. I also talk about—well, for example um—earlier in the year I mentioned human rights because we do—in contracts kind of have this view—freedom of contract—you can deal with who you want to deal with. But then I talk about how there’s limits to that—even in—in the market place. And then I talk about discrimination—prohibiting discrimination in the human rights legislation of [redacted].

R: Hm.

P: And just helping students because first years are trying to figure out what is going on—so you’re saying, “Okay, human rights go in the private sector—charter—public sector.” What is the public sector? Well, you can ask your constitutional law professor about that. But just helping them navigate—the corpus of everything they’re doing—helping them understand that actually common—the common law of contracts—that it would just be common law and no statutory overlay? Huh? You’ve got to ask yourself, “Is there a statute that impacts on my problem because there very well is.” Sale of goods—we talk about um—uh—uh—uh—[humming musically while thinking]—yeah, that kind of thing. So yes—the answer to that is “yes”.

R: You do.

P: Hu—uh labour—no.

R: No.

P: No—we don’t have—really um—that doesn’t—that’s not really elicited by that. By the uh—case law ?? [50:29.9] [whispering inaudibly].

R: And do you bring in um actual contracts? Do you ever look at an actual contract in the class?

P: Let me think about that. Well, we do it to the extent that they’re present in the cases.

R: Uh huh.
P: Yeah, there is always a contract that's—so an actual contract yes, because there's actual contracts here. Uh—sometimes, oh no, that's not true—some are—I have to think about what I do. Uh—at one point in the class we had gone over um—a clause for uh discontinuance of action. And why they're so long.

R: Mm.

P: When you—when you have a discontinuance of action uh when you're resolving a legal matter, why they're so long. I have one—oh—I have a—a—contract and guarantee that I—I show the class. The other thing I did that I'm quite proud of for Goldthorpe and Logan is just because I recently taught it—I asked my husband to draft a draft statement of—like a fictional statement of play, based on the case because I find students don't know—okay, where does this judgment come from? So I used that to talk about—Okay, well this is—Mrs. Goldthorpe was—had a bad experience at an electrolysis spa. And so she complains to her lawyer. And then I explain the whole process leading up to the judgment—including the uh—uh fake statement of claim—fictional statement of claim that I had [redacted] draft.

R: Hm.

P: And I posted that statement of claim online—as fictional—uh to give them an idea of the pleadings that would lead to the litigation and uh—how the trial uh decision and appellate decision took form.

R: Hm. That's very interesting.

P: Yeah, people really liked it. They're like, “Oh! Okay, that makes sense.”

R: Sounds like you get a lot of positive um response to the practical elements that you—that you bring in.

P: Well yeah, and it just takes a minute—this is what I find. It's not—it is very much a course about the common law. But it only takes a minute—or five minutes—to bring it home to a—a—to something tangible.

R: Hm.

P: Like, another example I use—you know um—when you were—as you know, when you counter offer—when you counter offer—oh, it doesn't matter. I use lots of practice based examples. And uh—like I said, it's not a big deal—it's only a little part of the lecture. Sometimes it's more but it's often just a small portion.

R: Um have you ever felt um—constrained—um—you know, in your teaching of contract law, or have you felt total freedom or are there some constraints in what you feel you can do—in the context of a class?

P: Uh—do you mean like admin—administratively constrained? Or ??

[53:23.5]
R: You can be restrained administratively or from student culture or—

anything like that.

P: No. No. I do my own thing and people support me in doing my own thing. My students and—and faculty feel very supportive here.

R: And so would you say—if you—because you've taught this course for I guess almost [redacted] years, um—it's at the point—it's almost very, very close to your ideal way of teaching the course, would you say? Or are there gaps—significant gaps?

P: Well, no—well, I would just say that I've had an ongoing self-assessment. How am I doing this? How can I do it better? How can I change that example? And I always think about it after I've done a lecture. How could I change that? Already I have something I'm gonna change up for my lecture on Monday. Because I have an example of something and I can tell some people got it and some people didn't. I thought, "Okay—I know how to add one thing to this and I'll get the other—the other group and they're gonna get it on Monday."

R: Hm.

P: So I'll come back to it. So it's always evolving. But something like this—Marilyn Manson—like I told you, I can't find a better example. When Marilyn Manson—when I have to spend ten minutes explaining who Marilyn Manson is, it's time to change the example, right? Uh—and I'll be able to do that. But uh—but otherwise I—I have things that I think are working, but everything is up to be punted—if it—if it needs to go.

R: And how do you prepare for class?

P: Well, actually—I read the—I read the whole case again.

R: Wow.

P: And I have to do that for two reasons. Uh—first of all, and this is particularly the case with first years, they're gonna pick some access of the case that doesn't matter. [Whispering.] They do it all the time! And if you haven't read the case recently, like right before class in my case—uh—you're gonna forget about that part because it doesn't matter. It doesn't matter—so in order to respond to that student's question about it—and it's really important how you respond to questions—is to be able to explain well in a way that doesn't discourage them, that—Yes it was in relation to this and that's significant if we're looking at this, but we're actually looking at this. So I find that for that reason alone I have to read it again. Just the facility of having read the case is very important to me so I always take the time before class—and this will be until the day I stop teaching—I have to go through my lecture notes, completely. I make some changes, I read the cases—word by word—again.

R: In the casebook—from what they're reading from.
P: Yes. Yes—I have my own materials incorporations which are longer—uh—and I read every word of them too.

R: And when you teach do you use slides—Powerpoint slides? Or do you use the chalkboard or just—?

P: I use a combination—so I use—I—I post everything in advance on [redacted]—so this is an example of contracts under seal. This is an example—this is an example of your required to laugh because what I say to the class is, "You know, this is how I—the deal on contracts under seal." And then they're kind of like, "Oh my God—what's going on?"

R: [Laughs.]

P: And then—then I say, "And you know—once I finish telling you this, you're gonna find out that it's very hard to get a document under a seal." Right? And it's just a little thing—right? It's just a little thing. Uh—you can take it or leave it.

R: [Laughs.]

P: And—uh—so this is all posted on [redacted] and I call this up on the screen—

R: That's great.

P: —or on the overhead. Another example is—I like to make them for really complex cases as well because—students—now some people wouldn't want to do this, and I respect that—but for me, this is a—this is a nightmare case.

R: Mm hmm.

P: And to me, you cannot actually teach this case without a visual. And so I have this visual—

R: And you produced this?

P: I wrote this—I did this—well actually, I thought of how to do it and I sketched it out—and I have a great assistant, who actually delivered on this. Her name's [redacted] And this is a night watchman's cap—this is uh—this involves the stevedores dropping the drill—so we thought we'd put a little stevedore back there and just have a little thing—just a little point of interest. So uh—she helped me make it look this way. But then students look at that and they say, "You know what? I think I can participate in classes. I know what's going on." And um—so I'm very much about the visual in the classroom—

R: Hm.

P: —and it creates like a community of focus. We're together—we're looking at this. We're trying to get to the bottom of it.
R: That's very cool. Would you um—be interested in sharing any of your materials or teaching aids with me—for me to uh—look at for the purposes of the study?

P: Uh—yeah.

R: That would be really helpful.

P: That's fine. I mean, hopefully it's all correct. [Laughs.]

R: That's great. Oh, don't worry—I'm not gonna—

[Shuffling papers.]

P: No, you can—

R: I'm just interested in the—

P: Yeah, sure. Did you want to take these?

R: Sure—that's great.

P: And uh—I don't know if you want this—it's a public document so you can have that. It's filed with the court.

R: Sure. Thank you. That's fantastic.

P: You're very welcome.

R: That's great! Um well, this has been—?? [58:40.0] so I'll just ask one last kind of question—just—do you have any um—do you have any sort of feelings or thoughts about where the—where legal education is going—any concerns, reasons for optimism, ideas—just any—any sort of—broader thoughts?

P: Uh—well, I mean I guess to me—ongoing legal education is an ongoing conversation. I think we always have to be willing to ask ourselves, “What are we doing? How are we doing it? How can we do it better?” And I think there's—there has to be like a—a sincere humility in that questioning. I'm also quite a traditionalist in the sense that—uh—I like this course. I like that we're—that I'm teaching some of the old cases—some of the new cases—some of the cases that are well-reasoned and some that are not well-reasoned. So to me this is like—in the zone? Uh—and then I think it—because it gives you this excellent foundation—and then what you do with it—so you can bring in practice-based points. You can bring in ethical points. You can build around it and to me you're always looking and always being alive to opportunities to—to uh develop the course. It's an ongoing project.

R: I know I said that was the last question, but I have one more.

P: Yeah.

R: Why do you think contracts is like a core element of the first year curriculum?
P: Well you know, sometimes—I guess there’s an internal logic to contracts that is um—are really founded in—I think anyone who teaches this subject would say so because once you know your subject well, you would say this—that there’s an internal logic to contracts that ref—that reflects a form of legal thinking that’s extremely important. And—you know, sometimes I even refer to it as LSAT logic. Right? So they have these rules in contracts—and you know we know why we have contracts—I won’t make a big deal about that—but the—the contracts law can do this or it can do that. There’s a logic to it. It could have gone—it could have done something different, so I don’t mean to say that it’s—it’s inevitably one way or the other, but to the extent that it is a certain way, you can follow the logic.

R: Hm.

P: Yeah. You might dispute it, you might say we can do better, um—but—and I think that classical understanding of legal reasoning is really, really important.

R: Mm.

P: Someone told me—I had a student who was a—had a PhD in English literature—[redacted (one line)]

R: Hm.

P: —and then I came to law after that. But she—she said to me, um, that there is this like beautiful formalism in contracts law—which I agree with. It’s illusory in many cases, but it is still there and we can describe it. And she said, “Yeah, it’s like a—you peel an onion and there’s another layer.” And I said, “Yeah, and by the end, you’re in tears!”

R: [Laughs.]

P: And she said—[laughs]—she—but anyway—there’s a—there’s a formal logic to it. Now, we have to—push back against that because it doesn’t really essentially always work that way, but there is a legal form of reasoning that is—encapsulated by contracts which is very important.

R: And—and why is that important?

P: Because that’s what—uh for its own sake, and also that’s what lawyers do. That’s what lawyers do. That’s how you marshal your arguments. And I say to the class too, “These cases—especially the classic cases that we talk about—these are—this is how lawyers communicate with each other in litigation and this is how we communicate with judges in litigation. We talk to each other through these cases. We’ve all studied them. It could be different cases but these are the ones we use. They’re good.” Yeah, I guess these are like little avatars or something—

R: [Laughs.]

P: —they’re like little avatars. [Laughs.]
R: Well this has been so interesting. Thank—

[Recording ends 1:02:58.2]
Figure 3. Sample Image of Composite Coding Data (see Chapter 1, VII(E)).
## Table 1. Selected Participant Data.

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<th>Total # of Written Materials provided</th>
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* handwritten notes of interview

**contemporaneously typed notes of interview
Appendix D – Default Informed Consent Form

Informed consent

David Sandomierski
Graduate Unit, Faculty of Law, University of Toronto
78 Queen’s Park Cres., Toronto ON M5S 2C5
(647) 989-0229; david.sandomierski@mail.utoronto.ca

September, 2016

As a professor or lecturer at a North American law faculty, you are being invited to participate in a study on legal education. The study is being conducted by David Sandomierski in pursuance of the S.J.D. degree at the Faculty of Law, University of Toronto.

Format and Purpose of Study
Your participation will involve an audio-recorded interview of approximately one hour in length, either in-person or by telephone, about a range of issues pertaining to legal education. You will also have the opportunity to provide written responses to the questions posed to you. The purpose of the interview is to obtain your views about legal education. The study aims to draw generalizations about participants’ views, form insights, and make recommendations about legal education. In addition, you may also be asked whether David Sandomierski can conduct a classroom observation and you may be asked to provide course materials. Neither your consent to the classroom observation nor provision of course materials is required for participation in the study.

Benefits and Risks
It is hoped that by participating in this interview, you will have the opportunity to share your views on legal education and that this may be of benefit to you in helping to stimulate reflections on your professional role. While there are no major risks to this study, it is possible that members of the public, including colleagues, will read excerpts or paraphrases of your interview and written comments. To minimize any risk of adverse consequences to you as a result of publication, your name will be withheld in any publication unless you elect otherwise.

Confidentiality and Personal Information
The following personal information will be obtained: your Name, Gender, Institution, Position, Research Areas, Courses Taught, and level of experience teaching. Of these, your Name will be kept confidential, unless you elect otherwise (see below under “Voluntary Attribution of Your Name/ Waiver of Confidentiality”). You may also indicate at any time prior to December 31, 2016, orally, as an appendix to this form, or via email, whether you would like to keep confidential any additional personal information. The non-confidential personal information may be paired with excerpts from transcripts of the interviews or your written comments in publications of, or publications derived from, the study. The researcher will make best efforts to ensure that your identity cannot be inferred from the non-confidential personal information published. Only the researcher will have access to the confidential information, which will be stored in an encrypted file on a password-protected laptop computer and backed up via a personal external hard drive (also using an encrypted file).

Public Use of Data
The study may produce a public data set, which will consist of transcripts of interviews. All personal information will be redacted from the transcripts that form part of the public data set. If you do not want the transcript of your interview to form part of the public data set, or if you have additional requests regarding redaction, please indicate this on this form or by email. Requests made after December 31, 2016 will be honoured on a best-efforts basis.

Voluntary Attribution of Your Name/ Waiver of Confidentiality
Some participants may wish their views to be attributed to them personally. If you would like to do so, you may indicate this by indicating below or by sending David Sandomierski an email at any time; the effect will be to permit the researcher to include your name in connection with excerpts from your interview or written comments. This is not required for participation in the study. If you elect to be attributed, David Sandomierski will contact you to confirm any attributed quotations prior to submission of the dissertation or publication. If no response is received from you within two weeks of initial attempts to confirm, your approval will be deemed.
Voluntary Participation
Your participation is voluntary. It may be withdrawn at any time by contacting David Sandomierski via email and you may refuse to answer any questions, all without any negative consequences to you. If you withdraw after December 31, 2016, the researcher will use best efforts to remove your information from the study, but complete exclusion of data may not be possible. If you have questions about your rights as a participant, you may contact the University of Toronto Office of Research Ethics at ethics.review@utoronto.ca or 416-946-3273.

Access to Information and Publication of Results
The results of the study will be written in David Sandomierski’s SJD thesis, which may be adapted for publication in article or book form. Information obtained in the study, including transcripts, written comments and non-confidential personal information, may also be published in books, academic articles, and periodicals, and may be presented at academic conferences. To obtain a copy of the thesis, or a bibliography of published results, please email David Sandomierski.

Consent Form (required for participation in study)
I have read and understood the above description of David Sandomierski’s study on legal education. I understand that I will participate in an interview of approximately one hour on the subject of legal education, which may be audio-recorded and transcribed, and that certain personal information other than my name may be published along with excerpts from my interview or written comments. I also understand that transcripts of my interview, with personal information redacted, may form a public data set. If I consent to a classroom observation by indicating below (or by indicating as such in another manner at a later date), I understand that transcripts of comments made in class may be reproduced in the same manner as those from the interview and that David Sandomierski may also report on his comments and observations made in class. If I consent to a classroom observation I will also inform students of David Sandomierski’s presence and activities as specified. If I provide David Sandomierski with course materials I consent to these being reproduced in the study. I have had the opportunity to ask questions about this study and these questions have been answered to my satisfaction. By signing below, I hereby consent to participate in the study, understanding that my participation may be withdrawn at any time. Requests to exclude information provided in this study made after December 31, 2016 will be honoured on a best-efforts basis.

______________________ ______________________  __________________________
Signature   Name     Date

Classroom Observation (not required for participation in study)

☐ I hereby consent to a classroom observation. Initial: _______

Voluntary Attribution/ Waiver of Confidentiality (not required for participation in study)
I hereby waive confidentiality of my Name. This waiver grants permission to the researcher to include my name in the write-up or publication of the study or publications derived from the study and to attribute quotations to me. I understand I will be given the opportunity to verify attributed quotations. If I do not respond within two weeks of being contacted for a verification I will be deemed to have approved the quotation. I may withdraw this waiver at any time before December 31, 2016 by emailing David Sandomierski. Requests to withdraw the waiver after this date will be complied with on a best-efforts basis.

_______________________ ________________________ ___________________________
Signature   Preferred Name for attribution Date