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A Property Law Instructor Looks at the Contract Law Course

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INTRODUCTION

My colleagues at Saint Louis University School of Law may wonder why I have ventured to write a commentary on teaching contract law. They know me as a professor of property law, a course I have taught for about twenty-five years. But I began my career in teaching with Contracts in 1969 and taught it during my first three years. I have also taught the first semester of Contracts from time to time over the years in our summer institute for persons from minority and disadvantaged backgrounds. I am returning to teaching Contracts to fill in for two colleagues who are on sabbatical. Whether I will stay in Contracts or return to Property remains to be seen. However, I presume to try my hands at this commentary because I believe there are great similarities between the two courses, particularly in the opportunities the two courses offer to explore non-adversarial dispute resolution techniques, as well as ethics and professional responsibility issues confronted daily by transactional lawyers.

Virtually everyone coming to law school has some experience with contract and property law. Apartment leases, contracts to purchase homes and automobiles, employment contracts, credit card transactions and bank loans are just a few examples where contract and property law may be experienced by people in their everyday lives. But the law has its own terminology, and the rules of law do not always track lay peoples' expectations when they engage in what to them are routine transactions. Thus, the first-year law student often is surprised when he or she confronts the concepts of *caveat emptor*, contracts of adhesion, equitable servitudes, the parol evidence rule and other classic contract and property law doctrines.

To me the most exciting aspects of contract law are the concept of promises and the question of the extent the law should inject itself into private relationships founded on the moral underpinnings of promises. While many

* McDonnell Professor of Justice, Saint Louis University School of Law. Many thanks are due my colleagues, Susan FitzGibbon, Joel Goldstein and Vincent Immel, for their encouragement, and Jeremy Johnson, 2L, for his suggestions drawn from his experience in the contracts law course.

contracts law professors begin their courses with a discussion of the range of remedies available for a breach of contract, I begin with a discussion of promises. I learned contracts that way as a law student, and I began my teaching career with that emphasis because, like most of us, I started with the contract law that I had learned in law school. While one group of contracts professors begins with remedies and another group begins with promises, most of us wind up covering the same topics: contract formation, voluntary vs. involuntary promises, consideration, the parol evidence rule, the Statute of Frauds, conditions, performance and breach, remedies, and relationships with third parties. In this essay, I discuss my reasons for beginning with promises and my belief that students can and should be exposed to alternative dispute resolution techniques, as well as ethics and professional responsibility issues, within the context of traditional first-year contract and property law courses.

A. Promises v. Remedies

In returning to teaching the contracts course, I looked at the alternative approach that emphasizes remedies. A number of instructors begin with the famous "hairy hand" case, *Hawkins v. McGee*.[1] This case takes an egregious set of facts about a surgery gone terribly wrong and uses it to explore the range of remedies available in a contract case—as distinguished from a tort case.[2]

1. 146 A. 641 (N.H. 1929).

2. My former colleague, Chris Frost, Brown Todd and Heyburn Professor of Law, University of Kentucky College of Law, has contributed a very persuasive argument to this symposium for the remedies approach, including a fascinating discussion of how he uses the *Hawkins* case. Christopher W. Frost, *Reconsidering the Reliance Interest*, 44 ST. LOUIS U. L.J. 1361 (2000).

Professor Daniel J. Bussel, co-author of one of the leading Contracts casebooks, ARTHUR ROSETT & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION, (6th ed. 1999), offers the following rationale:

> The remedies materials put front and center the economic efficiency and wealth maximization objectives that are central to contract law viewed as a means of organizing economic activity and facilitating commercial exchange. Starting with remedies also focuses students on the practical limitations to the relief afforded injured parties through litigation, and the liquidated damages and arbitration materials can be used effectively to introduce the student to the planning perspective early on. Finally, the connection between contract interpretation and the expectancy interest drives home in a practical way the importance of determining the objective meaning of the parties' agreement. This latter point can be made with the consideration and related materials as well, but perhaps more aridly and theoretically.
>
> To deal with student complaints that it is perverse to start at the "end," i.e. with remedies, rather than say offer and acceptance, I point out the seamless web quality of the law and that one needs to cover all the material and see it as part of an integrated whole in any event. You can climb up the mountain, ending up with remedies, or start at the top of the mountain and ski down. Either way you have to explore the terrain from top to bottom.

But the more I thought about it, the more I concluded that I would have great difficulty in presenting to incoming students a contracts rationale that focuses initially on the back end of a transaction: after it has gone sour. Instead, I begin the course at the front end of the transaction, focusing on the question of what is a promise.[3] I use a set of old cases,[4] including *Snell v. Kresge Co.*,[5] *Laux v. Bekins Van and Storage Co.*,[6] *Silverman v. Imperial London Hotels, Ltd.*,[7] *Foley v. Classique Coaches, Ltd*,[8] and *Wood v. Lucy, Lady Duff-Gordon*[9] to explore the concepts of a promise and a contract as a legally enforceable promise.

Section 2(1) of the Restatement (Second) of Contracts defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[10] I use these introductory cases to explore when what one person does justifies a second person to understand that the first person has made a commitment. From there I move to the definition of a contract: "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[11] Rather than examining the rules to determine what type of remedy should be granted or when performance should be ordered, these cases enable me to pose the question to students of why a court gets involved in relationships created by private communications between or among individuals and groups. At bottom, the answer appears to be because people need an environment of stability with respect to their business transactions and personal relationships if society is to progress in a democratic manner.

Thomas Friedman, in his superb discussion of globalization, *The Lexus and the Olive Tree*,[12] argues that one of the essential elements of success for a developing country is a stable legal system, so people will have confidence that if they make an effort to produce new things, invest in new ideas or strive for personal growth, their commitments—whether financial, physical or emotional—will be honored by the people who have made commitments in return. Friedman, using a computer analogy, characterizes the rule of law as a country's "software" that enables its economic system, or "hardware," and

Letter from Daniel J. Bussel to the author (October 5, 2000) (on file with author).

3. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).
4. Don't we all start with old cases?
5. 263 N.W. 493 (Iowa 1937).
6. 169 P. 1012 (Cal. 1917).
7. 137 L.T.R. 57 (K.B. 1927).
8. 2 K.B. 1 (C.A. 1934).
9. 118 N.E. 214 (N.Y. 1917).
10. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).
11. *Id.* § 1.
12. THOMAS J. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000).

macroeconomic policies, or "operating system," to function properly. Friedman states: "Software is a measure of the quality of a country's legal and regulatory systems, and the degree to which its officials, bureaucrats and citizens understand its laws, embrace them and know how to make them work."[13] Whether commitments are made by people in local, national or international settings, the rules of contract law play a crucial role in establishing an environment of stability. Students must have a sense of the role contract law plays in establishing this environment in order to better appreciate the use of the range of possible remedies when the rules are violated.

In addition to the economics rationale for enforcing contracts, the notion of justice plays an important role in the enforcement decision. John Rawls argues persuasively that the concept of justice as fairness is an essential element of a free society.[14] Decisions to enforce promises flow from the moral principle of fairness. A promise voluntarily made in "circumstances . . . and [with] excusing conditions . . . defined so as to preserve the equal liberty of the parties and to make the practice a rational means [for entering into and stabilizing] cooperative agreements for mutual advantages" becomes a moral duty under the principle of fairness. "The obligations to keep a promise is a consequence of the principle of fairness."[15]

The initial focus on promises also is a useful way of emphasizing the importance of careful reading of cases and careful drafting of legal documents. The essence of the promise or promises at stake in a legal relationship may not always be revealed clearly by the parties in their words and deeds, or by the authors of the judicial opinions students study. Students need to be able to extract the promise at issue in order to apply effectively the rules for determining whether the promise should be enforced as a contract. Consequently, I spend a lot of time, particularly in the early part of the contracts course, engaging students in discussions about promises.

B. Adding Alternative Dispute Resolution Techniques

During my years as a property law professor, I attempted to integrate into the course, and into a casebook I co-authored,[16] a discussion of alternative dispute resolution techniques, along with ethics and professional responsibility issues. In reflecting on that effort, I believe that one of the reasons the property law course is so amenable to such materials is that so much of it involves promissory relationships among private individuals who wish to

13. *Id.* at 151-52.

14. JOHN RAWLS, A THEORY OF JUSTICE 3-53 (1971).

15. *Id.* at 344-46.

16. SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER & MICHAEL BRAUNSTEIN, PROPERTY LAW (2d ed. 1998).

maintain their relationship while resolving a dispute. For example, estate planning transactions, landlord/tenant relationships, real estate contracts, and private covenants respecting land use all involve relationships founded on some type of promise.

1. Estate Planning Transactions

One of my favorite cases for raising questions of alternative dispute resolution and lawyers' professional responsibility is *Pigg v. Haley*.[17] In this case, the Virginia Supreme Court was asked to rule on the validity of an agreement that had been executed to resolve uncertainties triggered by a will. The Haleys were married for forty years. During that time they purchased and managed a 152-acre farm. In addition, Mr. Haley, the decedent, maintained a close personal relationship with his fourth cousin, Garland Pigg, who was discovered by Mr. Haley in the 1940s when he was doing a genealogical study. Because the Haleys had no children, Mr. Haley took in Garland Pigg and treated him as if he was his own son. The controversy began when Mr. Haley died and a holographic will was discovered in his genealogical papers. To the great surprise of his surviving spouse, Eva Haley, the will included Garland Pigg as a beneficiary. Instead of leaving all his property to his wife, Mr. Haley left his land to his wife only for the duration of her life. Upon her death all real and personal property, which "she has not consumed or disposed of," was to become the property of Garland Pigg as a beneficiary.[18]

Following the probating of the will, an attorney told the widow that she had only a life estate in her husband's estate. He told her: "You own nothing; you have the use of the property, the use of the farm; the proceeds of the farm until you die; and you have the interest from the money until you die."[19] Mrs. Haley and the Piggs then consulted a bookkeeping tax service proprietor, who told Mrs. Haley that she "will receive the interest from the money and the proceeds from the farm." He recommended she consult another lawyer.[20] The second lawyer recommended asking a court to construe the will. When Mrs. Haley objected to going to court, the lawyer drafted a short agreement in consultation with Mrs. Haley and Garland Pigg, which specified that: (1) all personal property was to go to Eva Haley with the complete right to dispose of it; and (2) all real estate went to Eva Haley for life "with the remainder over to Garland D. Pigg, upon her death, in fee simple and absolutely."[21] About twenty months later, Mrs. Haley signed a real estate contract to sell thirty acres of the 152-acre farm to some relatives. The widow and the relatives then filed

17. 294 S.E.2d 851 (Va. 1982).
18. *Id.* at 853-55.
19. *Id*. at 855.
20. *Id*.
21. *Id*.

suit against Mr. Pigg for construction of the Haley-Pigg agreement, claiming that they had an equitable fee interest in the thirty acres.[22]

Pigg v. Haley is a beautiful intersection of property and contract law. In the property law course, I use the case to focus on the concept of a life estate and its limitations. The life estate is an ownership interest for an indefinite period of time. Within the common law system of estates in land, which is based on the concept of ownership spread over a plane of time, the life estate is a very limited estate because no one knows when someone will die; it could be in 100 years or it could be five minutes from now.

With respect to contract law, the fundamental issue in the case was the validity of the agreement between Eva Haley and Garland Pigg. To answer that question, the required contractual element of consideration had to be identified. But to evaluate the purported consideration, the will had to be evaluated to determine what property interests had been transferred. In addition, the court had to consider whether the promises exchanged were not voluntary because of a mutual mistake of material fact.[23] The Virginia Supreme Court approached the problem by first examining the property interests conveyed by Edward Haley's will. In construing two provisions of the Virginia Code[24] and applying them to the case, the court held that Garland Pigg had received the equivalent of a contingent remainder in the personal property. Since Pigg's decision to give up his contingent interest in the personal property in return for a vested remainder in the realty was a sufficient legal detriment, it constituted consideration to support the agreement. The court also held that the mutual mistake rule had no application to agreements designed to compromise and settle disputes.[25]

The case also is very useful for introducing students to alternative dispute resolution techniques.[26] I recall attending a conference on dispute resolution several years ago in which one of the speakers suggested that, for the world outside the sphere of influence of Anglo-American law, litigation was the alternative rather than the predominate technique. In the *Pigg* case, a lawyer attempted unsuccessfully to mediate and help Eva Haley and Garland Pigg negotiate an agreement settling a growing dispute between them. In recreating

22. *Pigg*, 294 S.E.2d at 854-55.

23. *Id*. at 853, 859.

24. *See* VA. CODE ANN. § 55-7 (Michie 1950) (validating remainder interests when life tenants also receive the power to dispose); *Id*. § 55-11 (presuming that the grantor conveys all property owned unless the contrary intent is evidenced).

25. *Pigg*, 294 S.E.2d at 858-59.

26. The term, alternative dispute resolution (ADR) was coined to distinguish arbitration, conciliation, mediation and other private dispute resolution techniques from litigation, the predominant public one. Advocates of ADR now refer to it as "appropriate dispute resolution." Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 802 (1999).

the scene from the opinion, it appears that the agreement triggering the litigation was dictated by the attorney following suggestions from the widow about the contract terms. The attorney dictated the language to his secretary, in the presence of the widow and the Piggs. After the secretary typed the document and brought it back in, the attorney asked the parties whether they understood the document and whether "these were the terms [they] wanted."[27] According to the case report, the widow responded "yes," and Mr. Pigg stated, "[i]f that's what she wants, that's okay with me."[28]

The case also illustrates the lawyer's professional responsibility to identify and be loyal to his or her client while also serving the public. In this case the questions whether or not the lawyer accurately determined which of the two persons in his office was his client and whether the lawyer was able, in the context of this tense family situation, to provide adequate professional services to both of them are presented. The property casebook I co-authored includes, in the notes after *Pigg*, section 3-912 of the Uniform Probate Code, which provides: "[S]uccessors may agree among themselves to alter the interest, shares, or amounts to which they are entitled under the will of the decedent . . . in any way that they provide in a written contract."[29] The notes also include Rule 2.2 of the American Bar Association's Model Rules of Professional Conduct identifying "the lawyer as intermediary" function and setting down the requirements for acting in that role. Rule 2.2 requires lawyers serving as mediators to make certain that all parties understand the process and consent to the mediation process. The lawyer also must make an informed judgment that the common and individual interests of the parties will be served by the lawyer acting as a mediator. Finally, the lawyer must conclude after reflection that he or she is able to do the job.[30]

In examining those provisions and applying them to the *Haley* case, I use the casebook notes to ask the students whether the attorney ever got to the source of Mrs. Haley's unhappiness. Did the formal setting of the law office, with the lawyer dictating to his secretary, in front of Mrs. Haley and Mr. Pigg, a document full of legal terminology intimidate Mrs. Haley into saying yes? Was the heart of this controversy Mrs. Haley's disappointment that Mr. Haley had not consulted her before drafting his will, and apparently did not have confidence in her ability to manage the farm and did not trust her to provide for Mr. Pigg? Did the lawyer focus simply on the legal problem the parties brought to him? Should he have been more sensitive to the complex family dynamics underneath the dispute? *Pigg v. Haley* provides a wonderful

27. *Pigg*, 294 S.E.2d at 856.
28. *Id*.
29. UNIF. PROBATE CODE § 3-912 (amended 1993).
30. MODEL RULES OF PROFESSIONAL CONDUCT § 2.2 (1984).

opportunity to explore these issues of dispute resolution and professionalism in both courses.

2. Landlord-Tenant Lease Transactions

Another area of intersection between property and contract law is landlord-tenant law. Leases are both contracts and conveyances of the property. Students often have difficulty when they first encounter the dual concepts of a lease. Leases can be used to teach the non-freehold estates in land concept of property ownership. They can also be used to teach the transactional aspect and contractual nature of the relationship. Landlords and tenants exchange promises. Many of the changes in landlord-tenant law over the last thirty years revolve around interpretation of the commitments that the two parties make in that exchange.[31]

In the famous implied warranty of habitability case, *Javins v. First National Realty Corp.*,[32] Judge J. Skelly Wright spent a considerable amount of time exploring the contractual relationship of landlord and tenant. He noted that under modern contract law, "the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure the goods and services purchased are of adequate quality."[33] He also introduced the notion that urban residential landlords and tenants essentially were bargaining for a "package of goods and services" rather than a property interest in land.[34] Thus the case, while a staple of property law courses, could also be used in contract law courses to examine the concept of implied promise and the relationships created by buyers and sellers of goods and services.

Because of the transactional nature of landlord and tenant relationships, this topic also provides an excellent opportunity to examine alternative dispute resolution techniques and lawyer's professional responsibility. A popular video, *The Red Devil Dog Lease Problem*, produced by the Center for Dispute Resolution at the University of Missouri-Columbia School of Law, introduces both mediation and negotiation techniques in a property law setting with a landlord-tenant problem.[35] That same video can be usefully shown in a

31. *See, e.g.*, Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16. URB. L. ANN. 3 (1979).

32. 428 F.2d 1071 (D.C. Cir. 1978).

33. *Id*. at 1075. Courts have sought to "protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for quality of goods and services through implied warranties of fitness and merchant ability." *Id.*

34. *Id.* at 1074.

35. Dale A. Whitman, *The Missing Tenant: A Negotiation Exercise for Property Law*, *in* LEONARD L. RISKIN & JAMES E. WESTBROOK, INSTRUCTOR'S MANUAL WITH SIMULATION AND

contracts course. In the property law course, I have used the materials in two ways. First, students are divided into teams and given the basic facts of the *Red Devil Dog Lease Problem* and are asked to negotiate an agreement between a commercial landlord who had previously entered a lease with a young woman who wanted to open a franchise restaurant and the young woman who had signed the lease and now wants to get out of it because the franchiser who was going to help finance her venture has declared bankruptcy. The students are then asked to turn in a memo indicating the details of their agreement or reasons why they were unable to agree. After the students have completed this exercise, they watch the videotape showing a mediation of this problem. If time does not allow for the mock negotiation exercise, showing the video is useful in its own right.

A second negotiation exercise that my colleague Professor Alan Weinberger and I have used in our Real Estate Transactions course is a contract negotiation problem involving the purchase and sale of a house. This problem is based on problem 2 in Paul Goldstein's and Gerald Korngold's *Real Estate Transactions: Statute, Form and Problem Supplement*.[36] We divide students into teams and ask them to negotiate the basic elements of a contract. Again, they submit either a signed agreement or a signed memorandum indicating why they were unable to reach an agreement. There is no reason why these problems cannot be used in the first-year contract law course to raise the same points about negotiation, mediation and the importance of a lawyer's sensitivity to the needs and aspirations of all parties.

In introducing students to these negotiation and mediation problems, I am helped immeasurably by an article written by the late Professor Curtis Berger, *Hard Leases Make Bad Law*,[37] and by a series of articles by an experienced real estate practitioner, Emanuel Halper: *Can You Find A Fair Lease?*,[38] *Magic Words*[39] and *Lawyers Doing Battle*.[40] Professor Berger's article was based on

PROBLEM MATERIALS TO ACCOMPANY DISPUTE RESOLUTION AND LAWYERS 200-14 (1987), and an accompanying videotape now reprinted in part 4A, INSTRUCTORS MANUAL FOR DISPUTE RESOLUTION ON LAWYERS (2d ed. 1997). Professor Nancy Rodgers of Ohio State University prepared simulation materials based upon the videotape *The Red Devil Dog Lease Mediation*, part 4B, INSTRUCTORS MANUAL FOR DISPUTE RESOLUTION ON LAWYERS (2d ed. 1997).

36. PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS: STATUTE, FORM AND PROBLEM SUPPLEMENT 262-64 (Rev. 3d ed. 1997). I also used this problem for a negotiation exercise in my first-year Real Property II section while a visitor at Pepperdine Law School during the spring semester, 2000.

37. Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974).

38. Emanuel B. Halper, *Can You Find a Fair Lease?*, 14 REAL EST. L. J. 99 (1985) (hereinafter *Can You Find a Fair Lease?*).

39. Emanuel B. Halper, *Magic Words*, 27 REAL EST. REV. 86 (1997) (hereinafter *Magic Words*).

40. Emanuel B. Halper, *Lawyers Doing Battle*, 27 REAL EST. REV. 62 (1998) (hereinafter *Lawyers Doing Battle*).

a study of 103 reported landlord-tenant cases in New York courts from 1970 to 1972, about evenly divided between commercial and residential tenancies and involving standard form printed leases heavily stacked in favor of the landlord.[41] He wrote that he was not surprised to find that judges were reluctant to give landlords what they asked for and, in most cases, literally deserved. In concluding his study, he posed a question concerning what he calls the issue of "contract integrity"—the integrity of the paper that seals the bargain. "Here I use 'integrity' in a dual sense. I refer both to the honesty or fairness of the contract and to its even-handed completeness."[42] He distinguished between contract integrity and contract unconscionability, arguing that they occupied the "opposing ends of the spectrum." The doctrine of unconscionability, which we study in the first semester of contracts law, represents to him "a doctrine of last resort," thus "virtually any contract that does not shock the conscience is presumptably valid." He then concludes by suggesting that the legal system "should espouse a higher norm . . . . Each party who signs an agreement should sense its truth and essential fairness and should believe that the paper fully states his rights and remedies, that it captures both parties' understanding, that it conceals no hookers, and that it is understandable."[43]

Manny Halper writes from the perspective of over forty years of practice of real estate law in and around the New York metropolitan area. He primarily argues that lawyers who negotiate and draft real estate contracts should emphasize and strive for a fair agreement. While admitting that he has drafted one-sided leases, he stresses that "[t]he main advantage of drafting a fair lease is that you might get it signed."[44] He also argues that "[r]eal estate documents are much too hard to read"[45] and recommends that lawyers should pay more attention to "writing understandable documents."[46] Finally, he advocates that lawyers attempt to "change the atmosphere."[47]

> When I read the first draft of a contract, mortgage, or lease that someone sends to my client, I usually get the feeling that the drafter hates us. *Hates*, not abstractly, but deeply, really, vituperatively. I often read leases prepared by a landlord's lawyer. As I wade through its turgid prose down to the last run-on sentence, I sometimes wonder whether my client (the tenant) really has the right to occupy the premises . . . . When my client is the landlord, reviewing a

41. Berger, *supra* note 37, at 792.

42. *Id.* at 814.

43. *Id.* at 815. *See also* Peter Siviglia, *Teaching the Drafting of Contracts*, 70-Jun. N.Y. ST. B.J. 46, 47, 49 (1998) ("Contracts . . . are about relationships: . . . There is no shame in drafting a fair agreement.").

44. *Can You Find a Fair Lease?*, *supra* note 38, at 121.

45. *Magic Words*, *supra* note 39, at 86.

46. *Id.* at 87.

47. *Id.*

> form lease prepared by a powerful tenant can also leave me incredulous. Some tenant form leases provide for so many opportunities to withhold rent payments that I wonder whether the tenant is really willing to pay any rent at all . . . . Since most lawyers don't litigate, and they spend most of their lives negotiating, it would seem a particularly good idea for them to discard old notions and to rethink their role in society. They are professional negotiators . . . .[48]

These readings and this discussion also can be added to the contract law course to emphasize the importance of good planning and good drafting in both the contracts and property areas.

C. Ethics and Professional Responsibility

I also use *Pigg v. Haley* to explore the lawyer's responsibility to develop a rapport with a client, to understand fully the underlying concerns that a client may have, and to be loyal to that client while serving the public interest. For example, we ask whether Mrs. Haley understood what she was giving up when she accepted the agreement the lawyer had dictated. It is hard to believe that she did understand because within twenty months she acted as though she owned a fee simple interest in the property. Also, did the lawyer discover perhaps the underlying problem—Mrs. Haley's disappointment at her husband's apparent lack of confidence in her management abilities?

The importance of these questions was dramatized to me several years ago. I was a moderator of a panel discussion on New Developments in property law at a meeting of the Real Property, Probate and Trust Law Section of the American Bar Association. One of the speakers, who was reviewing cases on the estates and trust side, focused on the rules of professional responsibility and the importance of ascertaining whether a married couple engaged in estate planning are in agreement on the plan. He was asked a question based on the following incident. The questioner had helped a couple negotiate an estate plan because they were leaving on a cruise. They spent a considerable amount of time over several days working on drafts and discussing them. Finally the couple agreed on a particular draft and the attorney had the couple come down to his office to sign the documents. The attorney said he liked to offer a glass of champagne after a couple had signed their papers. In this case, when the papers were signed and the attorney moved to pick up the champagne glasses, one of the clients picked up the papers, tore them up and stormed out the door. When the story was told, the speaker's response was: "You are the third person who has told me they experienced that particular problem."

I thought about *Pigg v. Haley* when I heard that discussion. The contracts aspect of these kinds of cases offer beautiful illustrations to first-year law students of how complicated the personal dynamics of a transaction can be. It

48. *Lawyers Doing Battle*, *supra* note 40, at 62-64.

also demonstrates the importance for a lawyer to be sensitive to the personal dynamics and to develop techniques for creating a relationship with a client that produces the necessary trust and confidence for effective collaboration. In *Pigg v. Haley*, the lawyer, I believe, was surprised by the fact that the agreement broke down. Mrs. Haley had been surprised by her husband's will and had not been able to respond effectively to it. Then, she was surprised to find out that she did not have what she thought she had.

This case also could be an excellent addition to the contract law course because the court had to decide what the meaning of the agreement was in order to decide who owned what property interest. Thus, questions of clarity in drafting, as well as the transactional aspect of the process, can be highlighted. The contract law doctrine of consideration was applied to the court's construction of the agreement to determine its enforceability.

D. Lawyers' Multiple Roles

Observations by experienced academicians and practitioners noted above[49] give me an opportunity in the first-year courses to introduce law students to the reality that most of the time they will be engaged in negotiations—and the number of times they appear in court as a result of those negotiations will be relatively small unless, of course, they opt for careers in either criminal or tort law.[50] Our teaching materials are extraordinarily rich and efficient because our tradition of reported appellate opinions offers a gold mine of materials. Our use of the broad "Socratic" case method of instruction, i.e., "both an unwillingness to take the soundness of any judicial opinion for granted . . . and a commitment to place the conflicting positions that each lawsuit presents in their most attractive light,"[51] is an extraordinarily efficient way to expose students to broad legal principles and the adversarial method of dispute resolution.

Unfortunately, as has been noted in a variety of studies of the law school experience,[52] these same materials may create a false impression in the minds

49. *See supra* notes 31-48 and accompanying text.

50. I recall my disappointment at a comment made during a conversation on the first day I reported for work with a large private law firm in St. Louis in the summer of 1967. As was the custom of the firm, two senior lawyers took me to lunch at a high-class local restaurant. During the course of the conversation, the two lawyers (both of whom specialized in real estate practice) began talking about how they approached their practice. One of them commented matter-of-factly that if he had to go to court he felt like he had failed his client. The other partner agreed, saying that the last thing in the world he wanted to do was wind up in court. I remember thinking to myself, "What have I been doing for the last several years in law school?" We studied reported cases from appellate courts, and I had the impression that's what lawyers did—they went to court.

51. ANTHONY T. KRONMAN, THE LOST LAWYER 110 (1993).

52. *See, e.g.*, AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM, (1996) REPORT AND SYMPOSIUM (1997); LEGAL EDUCATION AND PROFESSIONAL

of inexperienced law students. They may conclude that the lawyer's main role is to litigate and that litigation is the favorite means of resolving disputes peacefully.[53] This impression may begin to take hold when we introduce new students to our jury system by comparing it to the medieval "trial by battle" or "trial by ordeal," or by describing it as an alternative to "the gunfight at the O.K. Corral" or the "shoot out at high noon." Even the term "alternative dispute resolution" can contribute to this notion.[54]

One way to dispel this notion is to introduce students early to the variety of roles that lawyers play. Property and contract law courses both lend themselves very well to this because of the transactional nature of much of property and contractual law practice. In their book, *Lawyers, Clients, and Moral Responsibility*,[55] Professors Tom Shaffer and Bob Cochran identify four roles that lawyers play and four corresponding approaches to moral choices concerning the question "whether the lawyer and client should take actions that will work to the disadvantage of other people."[56]

(1) The lawyer as godfather, in which the lawyer is in control and the goal is a victory for the client;
(2) The lawyer as hired gun, in which the client is in control and client autonomy is the goal;
(3) The lawyer as guru, in which the lawyer is in control and the goal is client rectitude, and
(4) The lawyer as friend, in which the emphasis is on collaborative discourse between the lawyer and the client and the goal is client goodness, or more specifically, achieving a good result.[57]

DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) and CONFERENCE PROCEEDINGS (1994).

53. Of course, litigation is peaceful only in the physical sense. It can be extremely violent in an emotional or psychological sense.

54. I attended a conference on ADR a number of years ago at which a speaker commented wryly that from the rest of the world's perspective, litigation is the "alternative" technique. Professor Carrie Menkel-Meadow notes that advocates of ADR now refer to conciliatory techniques as Appropriate Dispute Resolution. She argues that lawyers should shift their frame of reference from advocate/adversary to creative problem-solvers and peacemakers who seek "Pareto-optional solutions . . . the best possible solution for each party without harming the other side." Menkel-Meadow, *supra* note 26, at 791-92, 802.

55. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994).

56. *Id.* at 3.

57. *Id.* at 5-54. An alternative categorization of lawyers—"trickster," "hero" and "helper"—is found in Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177. Professor Scott Burnham suggests giving students such "paradigms of lawyer types" and asking students "how each would resolve specific problems." Scott J. Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105, 107 (1991) (citing Mindes & Acock).

In their discussion of the lawyer as friend, Professors Shaffer and Cochran use the term "friend" in the Aristotelian sense of a collaborator in doing good.[58] They argue that this understanding of friend differs in "important aspects from the way that people commonly understand friendship today."[59] They quote Robert Bellah on the difference between the traditional and modern understandings of friendship:

> [T]he traditional idea of friendship had three essential components. Friends must enjoy one another's company, they must be useful to one another, and they must share a common commitment to the good. Today we tend to define friendship most in terms of the first component: friends are those we take pleasure in being with.[60]

Professors Shaffer and Cochran argue that lawyers "should be concerned primarily with the third and most neglected aspect, the moral aspect of the relationship between friends . . . ."[61]

This question of the appropriate role that lawyers should play can and should be introduced in the first year. It can be introduced profitably in both the property and the contract law courses because in both there is a wide variety of settings in which people come to lawyers in order to enter into transactions with other people. Both *Pigg v. Haley*, discussed earlier,[62] and *Stare v. Tate*,[63] are good examples of these opportunities. In *Stare*, a case that usually is located in contract law casebooks under the heading of "Misunderstanding and Mistake," the former wife sought to reform a property settlement agreement because of a mistake in computation made by the former wife's attorney when drafting the settlement proposal. The mistake in computation was about $70,000, and that mistake gave the husband essentially what he had been arguing for throughout the protracted negotiations. The husband's accountant discovered the mistake while helping the husband's attorney prepare a counteroffer. The accountant brought it to the attention of the attorney, who did not call the mistake to the attention of his client or the wife's attorney, but instead decided to accept the mistaken proposal because the result was approximately what the husband had been seeking. The mistake did not come to light until after the property settlement agreement had been signed. When the former husband learned of the mistake, he could not resist getting the "exquisite last word." After he found out about the mistake he

58. *Id.* at 45 (citing ARISTOTLE, NICOMACHEAN ETHICS 8 (Martin Ostwald trans., 1962)).

59. *Id.* at 45.

60. SHAFFER & COCHRAN, *supra* note 55, at 45 (quoting ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 115 (1985)).

61. *Id.* at 45-46.

62. *See generally supra* notes 17-30 and accompanying text.

63. 98 Cal. Rptr. 264 (Cal. Ct. App. 1971). Professor Scott Burnham features *Stare v. Tate* in his extremely helpful article on adding ethics issues in the contracts course. *See* Burnham, *supra* note 57, at 114.

mailed his former wife a copy of the offer that contained the mistake in computation. On top of the page he wrote: "PLEASE NOTE THE $100,000 MISTAKE IN YOUR FIGURES." The former wife filed a lawsuit one month later seeking reformation. She lost at the trial court but won at the appellate court level.[64]

In addition to being a useful mechanism for examining the circumstances in which courts will intervene to enable parties to correct mistakes in signed agreements, the case is an extremely valuable illustration of professional responsibility issues and an interesting commentary on human nature. What should the attorney for the husband have done when he discovered the mistake in computation? What role did he play in taking the action that he took? Was it the appropriate role? Could he have served his client better in the long run by taking a different attitude about the mistake? These are questions that can and should be posed to first-year law students. They enrich the course because they move beyond the technician level of learning the rules of law, and introduce students to the concept of the reflective practitioner.[65]

The reflective practitioner is distinguished from the (legal) expert in a variety of ways, including less interest in client deference and greater interest in collaborating with the client in problem solving.[66] The reflective practitioner focuses on solving problems in "indeterminate" situations made so "because the facts are ambiguous or hard to ascertain, because the client is confused or ambivalent, or because the law is unclear, [o]r the situation . . . is unique."[67] Such a professional "reflects in action." This reflective conversation with the situation "takes place in the midst of action, . . . and it need not employ the medium of words . . . . The term conversation is, in this usage, metaphorical. It does not refer to a literal conversation about the

64. *Id.* at 433-37.

65. The term "reflective practitioner" was used by the late Donald A. Schon, a former professor at MIT's School of Architecture and Planning, in seminal studies across the professions. DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983) and EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987). For a discussion of Schon's work, see Richard K. Neumann, Jr., *Donald A. Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

66. *See* Neumann, *supra* note 65, at 411-12 (citing SCHON, THE REFLECTIVE PRACTITIONER, *supra* note 65, at 290-307). Professor Neumann also cites an interesting study of personal injury cases in which the attorney-client relationship was categorized as either "traditionally hierarchical (the lawyer as an authority figure) or participatory (lawyer and client working together to solve problems)." *Id.* at 411 n.57; *see generally* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974). On average, participatory relationships achieved slightly better results. Neumann, *supra* note 65, at 411 n.58.

67. *See* Neumann, *supra* note 65, at 405-06 (citing SCHON, EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 65, at 12).

situation, but to an inquirer's conversation-like transaction with the materials at hand."[68]

The lawyer-client relationship is a complex personal relationship. The lawyer must establish a rapport with her client that enables the client to have trust and confidence in the lawyer. But the lawyer is also licensed by the state to serve the public interest. Dean Anthony Kronman describes the lawyer ideal as one who has the ability to respond to clients with both "sympathy and detachment," and who possesses the virtues of "prudence and public-spiritedness."[69] *Stare v. Tate* is an excellent vehicle for introducing first-year students to the complexities of that ideal while engaging in the very human act of developing trust and confidence, and understanding what it means to be not only a loyal advocate for one's client, but also a public servant participating in the legal process.

E. Drafting Documents

The contract law course also offers an opportunity to introduce students to an important form of legal writing—drafting documents. When drafting documents, lawyers are functioning as planners—professionals who are endeavoring to help their clients complete transactions. Contracts, loans, property transfers, estate plans and settlement agreements are examples of transactions in which documents are used to define relationships and memorialize expectations of the parties. We spend a lot of time in the contract law course talking about how important it is that a promise be definite, that it be complete, that it provide a source of remedy for breach and that it provide a vehicle for modifying or altering terms if so desired. Most of our teaching materials present these concepts in the format of an after-the-fact dissection of an agreement that was not drafted properly. The Langdellian case method that has dominated the first year of law school for well over a century has enabled law schools to maintain the tradition of large first-year classes, although many schools now offer first-year students at least one small section. The large section tradition has made it extremely difficult for law professors to engage in the time consuming process of reading and commenting on eighty to one hundred documents several times a semester.[70]

68. *See* Neumann, *supra* note 65, at 406 (quoting Donald A. Schon, *The Theory of Inquiry: Dewey's Legacy to Education*, 22 CURRICULUM INQUIRY 119, 125 (1992)).

69. KRONMAN, *supra* note 51, at 131-33, 154-55.

70. I once taught a civil procedure course in a drafting mode to a group of ninety first-year students. It was team-taught with the director of the clinical program. Students were asked to draft litigation documents based on the facts in a hypothetical problem. They began by watching a video of a client interview. From that they drafted a memorandum to the file indicating what they thought the important facts were, what they thought the legal issues were, and what they proposed to do. Following that they were asked to draft a complaint and an answer to another student's complaint. They also drafted motions to make more definite and certain, motions to

Fortunately, Professor Scott Burnham has provided an excellent book, *Drafting Contracts*, now in its second edition.[71] This slim paperback book of just over 300 pages is designed to be used in conjunction with any of the popular contract law books. It offers a series of exercises and commentaries on the drafting of contracts, or as Professor Burnham puts it in his subtitle, *A Guide to the Practical Application of Principals of Contract Law*.[72] Professor Burnham has a pragmatic and, upon second thought, a logical suggestion—one of these "why didn't I think of that earlier?" suggestions. He doesn't read the drafts that students prepare. He likens them to briefs: we all recommend that students brief cases, but we do not collect and read the briefs. He then discusses specific drafting problems using overheads or Powerpoint presentations to engage the students in drafting by showing them a proposed draft and then asking for their reactions, suggestions, additions or deletions. Because I am new to the course this time around, I am recommending that students acquire this book for the first semester; and I am requiring it in the second semester and will assign several drafting exercises during the second semester.

CONCLUSION

While I have had a wonderful time in the property law classroom over the past quarter century, contract law remains, in many respects, my first love in teaching. I enjoy the opportunity to engage students in an examination of the legal, as well as moral and philosophical, underpinnings of the promise concept. The personal and business relationships that are the foundation of a free market economy and democratic society are protected by the basic principles of modern contract law: bargain, commitment, exchange, honesty and fair dealing, and voluntary participation.

Contract and property law are closely connected. Many property interests are created by contracts, while other contracts are entered into to protect property interests. Friedman emphasizes this point in *The Lexus and the Olive Tree*,[73] for contract and property law are transaction-oriented and require

dismiss, a set of interrogatories, and a deposition plan. We read and critiqued the papers weekly. At the end of the course my colleague and I agreed that it was a wonderful experience, but we both were too exhausted to consider trying it again with so many students.

Respondents to a 1993 survey of practitioners in Chicago and in Missouri noted significant gaps between what practitioners considered to be important skills and what they believed law schools taught effectively. The largest gap was in drafting legal documents: 80% believed this to be an important skill, but only 24% believed it had been taught effectively. Franklin M. Schultz, *Teaching Lawyering to First-Year Students: An Experiment in Constructing Legal Competence*, 52 WASH. & LEE L. REV. 1643, 1651-53 (1995).

71. SCOTT J. BURNHAM, DRAFTING CONTRACTS (2d ed. 1993).

72. *Id.*

73. *See* FRIEDMAN, *supra* note 12.

lawyers who are counselors, planners and negotiators. My interest in, and emphasis on, alternative dispute resolution techniques, drafting ethics and professional responsibility are based on this reality.

Finally, contracts law perhaps more than other traditional first-year courses, offers a "modified Socratic" instructor, as I think of myself, the opportunity to join with students in a dialogue about how to resolve problems peacefully. This is an exciting but sobering venture. Helping people solve problems peacefully is the lawyers' highest calling.