

# Strategies and Techniques for Teaching Contracts

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# Strategies and Techniques for Teaching Contracts

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# Strategies and Techniques for Teaching Contracts



## Introduction

Contract law can be a delight to teach and learn. Because most law schools include Contracts in the required first-year curriculum, professors can expect to encounter the unbounded enthusiasm of law students just beginning their studies. Contracts permeate daily life, and students rejoice whenever they see their studies play out in the real world. There is good reason that professors at many schools vie to teach Contracts, yet the course can prove unwieldy for the unwary. There are students who approach it with apprehension. Some, unacquainted with the scope of the course, expect it to be highly technical, consisting largely of the review of dry documents. Others fear they do not have the business background to understand the subject. Contracts is neither dull nor inaccessible, but it is best for the professor to enter the course prepared. This book is designed to help you do just that.

There are many ways to approach a course in Contracts. Every professor brings his or her own perspectives and talents to the enterprise. The course has a greater chance of being successful, however, if the professor makes deliberate and informed choices about objectives, and communicates those objectives to the students often and well. This book is intended to help you think about what choices to make as you look ahead to teaching your own Contracts course. It also provides suggestions about how to implement your choices as you make advance preparations for the course, as well as in your day-to-day conduct of the classroom.

This book is a companion to a more general book, *Strategies and Techniques of Law School Teaching*, by Howard E. Katz and Kevin Francis O'Neill. Its purpose is to complement the introduction to law school teaching contained in that volume and to provide specific suggestions for the professor who will be teaching first-year Contracts. Although the two books present the points of view and preferences of their respective authors, they share common themes. At heart, both emphasize planning and transparency. As we have made some efforts not to duplicate specific content, you may find it helpful to read the books in tandem.

This book is written largely with the needs of those new to teaching in mind. Much of its advice is appropriate for professors who, although familiar with contract law generally, would not consider themselves experts in the field. It is my hope, however, that

any professor considering teaching Contracts will find something of use in these pages.

The organization of this book is largely chronological. Part I begins with a discussion of the most fundamental task you undertake when you prepare to teach a course: the task of setting your course objectives. I describe some of the objectives a Contracts course might achieve and provide advice for choosing among them. From there, Part II discusses some steps you can take to lay the foundation for successful planning. In this part of the book, I outline how to gain a quick orientation to the Contracts landscape. Part III gives a brief overview of the field and, in particular, details the doctrinal coverage of the typical first-year Contracts course. Part IV provides specific guidance on course design: it suggests factors to consider when choosing materials, sketching out your coverage, and developing a syllabus. In Part V, I suggest strategies to implement your objectives and advance planning in the day-to-day conduct of your classroom. Part V also includes a discussion of assessment methods. Although the organization of the book is chronological, you will see that I advocate thinking ahead to where you hope to end up before you teach your first class. Accordingly, you may find it helpful to read through the book before your class begins and return to specific sections as appropriate over the course of the semester or year.

## **Part I. Choosing Objectives for Your Contracts Course**

Most lawyers claim familiarity with contracts. At a minimum, almost all lawyers studied contract law in law school and wrestled with it on the bar exam. But most lawyers encounter contracts in their practices as well. Criminal lawyers negotiate plea agreements. Civil litigators resolve contract disputes, but they also use contract law to settle a broad range of controversies that are not themselves contractual in nature. Specialists in specific substantive areas find that clients, regulators, and courts resort to contract law to establish and interpret relationships and resolve otherwise unanswered questions. And of course, many lawyers help their clients review, draft, negotiate, enter, and manage contracts as a core component of their practices. In a market economy, contracts are ubiquitous, and lawyers must prepare to confront them at every turn.



The familiarity of the subject matter should be comforting to the new professor of Contracts. Yet there is truth to the saying that you never realize how little you know about a subject until you first attempt to teach it to others. Even the experienced contracts lawyer may encounter new dimensions to the field when teaching it for the first time. A Contracts course, however, will call on you to do more than fill the gaps in your subject matter expertise. Most would agree that an effective Contracts course achieves more than the mere communication of doctrine. Some might even claim that the course should deemphasize the communication of doctrine, and instead should expose students to legal analysis, practice skills, or contract theory as its main object. As you prepare to teach Contracts for the first time, I encourage you to consider carefully what you hope to achieve with your course. In doing so, you will want to think broadly about the role the course plays in the law school curriculum, and to plan strategically the best ways to satisfy the needs of your students.

## A. POSSIBLE OBJECTIVES FOR CONTRACTS

First-year Contracts provides a suitable vehicle to pursue a broad array of learning objectives—so many, in fact, that it is simply not possible to achieve them all in any given course. Although it may be tempting to be ambitious in your goals, too much ambition can muddle your message and ultimately decrease your teaching effectiveness.

Conversely, if you fail to think about where you are going, you squander the opportunity to design a course that will be conducive to optimal learning. If you yourself have not settled on what you want your students to learn from your course and why, you can expect that the students will notice your aimlessness. Students may not realize that you are teaching Contracts on the fly, but they are likely to feel confused, frustrated, or dissatisfied if they cannot readily discern what they are supposed to get out of the course.

The ideal is to aim for the middle between the two extremes. Identify a few, and just a few, core objectives that are important to you and your students. Resolve to communicate them to your students. Then pursue them consistently throughout your course.

At first, you may want to think in very general terms. You can always refine your objectives as you plan and teach your course. But

recognize if you set off in a particular direction, it may prove difficult to change direction entirely. Your objectives can inform your choice of a text, the way you structure your course, and the content of the syllabus you give to your students. It may affect the way you conduct your first class, the activities you plan for your students, and the means of assessment you choose. Once made and communicated to the students, these choices are difficult to reverse.

You already may have a sense of what you would like your students to gain from your course. If you are new to teaching and relatively new to contract law as well, you may not yet have had a chance to think about these issues in any depth. Irrespective of what stage of your thinking process you are in, it is helpful to consider the broad array of objectives a course in Contracts could serve, and then proceed to narrow your options carefully.

Below, I describe some of the objectives Contracts might achieve. This list is by no means comprehensive; there may be other objectives you consider appropriate for you, your students, and your school. To spur your thinking, here are some possibilities:

*Doctrinal Coverage.* Most professors consider it important to provide fairly comprehensive coverage of the major doctrinal themes of contract law. This may consist of a treatment of the core concepts in general terms, a thorough study of black letter rules, or both. Doctrine, standing alone, is seldom illuminating. Knowledge of doctrine is incomplete if the students do not also gain an appreciation for how the rules of law can or should be applied to various sets of facts.

*Case Analysis.* Because Contracts is largely a common law subject, it is an ideal context for learning about case analysis. Students can analyze judicial reasoning to distill rules of law and to better appreciate how judges apply rules of law to facts to reach holdings. Students can also learn about the judicial system and, in particular, examine the use (and misuse) of precedent.

*Statutory Analysis.* The Contracts course also provides an opportunity to introduce students to statutory analysis. Because sales of goods are largely governed by statutes in our legal system, comparison of the common law of contracts with the rules of Article 2 of the Uniform Commercial Code (UCC) provides an opportunity to contrast common law analysis with statutory reading and interpretation skills.

*Comparative Analysis.* If a professor weaves a treatment of UCC Article 2 into a broader study of contract law, there will be many opportunities to compare how common law and statutory law address similar issues. Students can speculate about the reasons for any differences and can debate the relative merits of the two approaches. Where there are similarities, students can muse about the symbiotic influential relationship between the competing bodies of law. Further, the domestic law of contracts is largely state law. Accordingly, Contracts provides an opportunity to examine how different states may have developed varying rules of law and to consider what factors might have shaped that evolution. Some professors may wish to contrast common law approaches and civil law approaches to analogous issues. A professor who chooses to allude to the Convention on the International Sale of Goods (CISG) or the UNIDROIT Principles on International Commercial Contracts may add transnational perspectives as well.

*Litigation and Advocacy Skills.* Because the study of contract law often relies heavily on the analysis of case law, students naturally gravitate toward viewing the subject through the lens of litigation. The Contracts classroom thus may provide an opportunity to introduce students to litigation skills. For instance, students might explore how a lawyer develops a theory of a contracts case from the raw facts and how that theory evolves as the lawsuit progresses. The students might consider how to exercise judgment about when to pursue a contracts cause of action, when to settle ongoing litigation, and when to appeal an adverse judgment. And, of course, the students might hone their advocacy skills in the context of contract law issues.

*Preventative Skills.* Through a study of contract law, students can examine the role lawyers can play in anticipating and preventing disputes. They might explore how lawyers help parties use contracts to clarify rights and responsibilities before disputes arise. After a dispute arises, students might consider whether and how a contract could help resolve the dispute fairly and efficiently. Once students have analyzed a judicial opinion in a litigated dispute, students might speculate about what the parties (or their lawyers) might have done differently to avoid the dispute in the first place, or to resolve it more fairly or at an earlier stage.

*Transactional Skills.* Perhaps more so than any other course in the traditional first-year curriculum, Contracts provides an opportunity to explore the skills involved in transactional practice. Professors may wish to expose students to the skills involved in counseling, due diligence, document review, drafting, negotiation, or management of ongoing contractual relationships.

*Professionalism and Professional Skills.* Contracts allows students to think deeply about the lawyer's role in a business transaction or in contract litigation, and to explore the ethical dimensions of transactional or litigation practice. The course can also emphasize the general professional skills that contribute to effective lawyering. For instance, the course could stress the importance of being prepared, the responsibility to meet deadlines, the need for effective communication, and the value of collaboration and teamwork. The course could also provide specific opportunities to practice these skills.

*Historical Perspectives.* Contract law enjoys a long and rich tradition. For this reason, students can learn a great deal about the historical development of the law through a study of Contracts.

*Economic Perspectives.* Some of the major objectives of contract law are to allow a mechanism for parties to consensually identify, minimize, and allocate risk; to allocate goods and services efficiently; and to achieve wealth. As such, contract law provides an ideal context to consider law and economics.

*Practical or "Real World" Perspectives.* Because contracts are so ubiquitous, students will bring great insight into the question of how their own contractual relationships have played out in the shadow of the law. Contracts, as it spans both personal and commercial contexts, also provides an excellent opportunity to gently introduce those students who have no prior background to business concerns. Before entering law school, some students may have had little exposure to commercial transactions and may gain a great deal from closer study of how legal issues arise in the business world. Each time a case arises in a commercial context, a professor might provide insight into the likely business motivations of the parties. Students might seek examples related to their studies in the business press or in other nonlegal publications. Whether the subject matter is personal

or commercial, contract law provides an ideal context to explore legal realism, or “law in action.”

*Critical Perspectives.* Members of all sectors of society enter into contracts, and their stories and travails populate the case reports. Professors who wish to draw out themes related to race, gender, or class will find extensive raw material in the law of contracts.

Within the confines of a first-year course, it is simply not possible to do everything and do it well. If you are not only new to teaching Contracts but new to teaching generally, it is particularly important to be modest in your choice of objectives. To provide focus to your course and your teaching, you should identify those objectives you consider essential. I suggest you settle on a maximum of two or three core objectives to provide focus for your course. If, upon reflection, two or three of the objectives listed here seem indispensable to you—that is, your course must accomplish those objectives if it is to achieve anything—you may already have a sense of what your core objectives will be. Others may be enticing, but ultimately you may decide it would be best to incorporate them lightly from time to time, rather than having them serve as the focus of your course. Still other objectives, although desirable in theory, may prove impractical given your law school, the needs of your students, and the other objectives you decide to pursue. Although it may be difficult to let go of some of your ambitions, in the end you don’t want to sacrifice the objectives you consider the most important for those that are less so. The next section suggests some factors you might consider as you prioritize the objectives for your course.

## B. CHOOSING YOUR OBJECTIVES

As you consider what your objectives will be, many factors may influence your decision. If you are new to the school at which you will be teaching, you will want to investigate the structural constraints that will affect your choices. You may decide to learn more about your students, at least in general terms. This isn’t to say that your own background and passions are irrelevant. Effective teachers have relevant expertise and exhibit enthusiasm for the subject matter, so it is also important to consider what you bring to the enterprise. Ultimately, the choices you make as you design and teach your course

will affect your students' learning directly. It is important to keep their needs paramount.

## 1. Consider Your Law School

Because first-year Contracts is a required course at most (if not all) law schools, you are likely to be operating within well-established institutional expectations. If you are not already acquainted with the operations of your law school, a conversation or two with the chair of your school's curriculum committee or with other knowledgeable colleagues should prove illuminating. This is a basic point, but an important one—the way that the Contracts course is structured at your school can dictate some of the choices you make when planning it. Further, it would be helpful to have a sense for the place Contracts occupies in the broader first-year curriculum. It is also useful to consider what upper-division courses rely on knowledge gained in the Contracts course or provide additional exposure to the subject matter. It would be an overwhelming task to try to coordinate your Contracts course with the entire law school curriculum, and I'm not suggesting that you try. Nevertheless, if you are able to get a sense for the lay of the land before you plan your course, you will find you have a better basis on which to make hard choices.

Schools vary significantly in their requirements for Contracts. At some law schools, Contracts spans two semesters and may represent as much as seven credit hours. Sometimes the same professor teaches both semesters; sometimes different professors do. If different professors teach the two semesters, they may teach the courses relatively independently, or they may share the same materials, with one picking up where the other left off. If you are sharing your Contracts course with another, more experienced professor, many of your choices may have been made for you already as a practical matter. At a minimum, coordination between the two of you will be essential.

Increasingly, much to the dismay of many Contracts professors, law schools are reducing Contracts to a semester-long course. Typically, the one-semester course represents four credit hours; some schools even limit it to three credit hours. Of those schools that offer Contracts for only one semester, some do so in the fall semester, while others offer it in the spring.

Some schools have specific pedagogical expectations for the Contracts course. For instance, if first-year classes are typically large, a school might endeavor to provide at least one course in which the students are in a smaller group. Your Contracts course may be one of those. If so, there may be specific institutional objectives for the smaller-group classes that you will be expected to incorporate into your course. Alternatively, the school may expect that Contracts contain specific content beyond contract law and theory. For instance, some schools expect a module that contains a legal writing component, a practical skills component, or a professionalism component in one or more first-year courses.

The structure of the Contracts course at your school may be one of the most significant factors for you to take into account as you settle on objectives for your course. You can afford to be more ambitious in the scope and depth of your objectives if you teach a two-semester Contracts course. If you teach a semester-long course, particularly in the first semester of the students' law school career, you may have time to do little more than introduce core doctrinal concepts and practice basic legal analysis skills. Likewise, a class of twenty students may be conducive to objectives that would prove impractical in a class of ninety and vice versa. If your school has established objectives for your course beyond the teaching of contract law and theory, naturally you will want to plan your course accordingly. Suffice it to say, if you don't know how Contracts is structured at your school, you should find out.

Initially, you may identify more objectives than you can feasibly pursue, given the length, size, and structure of your course. Luckily, Contracts does not operate in a vacuum. As you think about how to narrow your choices, it's helpful to consider what students will be learning elsewhere in the first-year curriculum. The first-year courses by necessity share the burden of acclimating students to legal doctrine, analysis, and theory, and some reinforcement of basic concepts and skills from class to class is desirable. Nevertheless, if you face some hard choices about what to include in your course and what to leave out, you might consider what your students can gain elsewhere and what only Contracts can provide.

Although there are some commonalities, the specifics of the first-year curriculum vary a great deal across institutions. For instance, there is some variation in the specific doctrinal courses law schools require in the first year. In addition to specific doctrinal courses,

almost all law schools offer some variation of a Legal Writing course. The content of the Legal Writing course may differ from school to school. At most schools, this course focuses significant attention on case analysis and is often taught from a litigation perspective. At other schools, the course incorporates transactional or other lawyering perspectives.

Beyond the Legal Writing course, some schools provide simulations, clinics, or other forms of practice opportunities to first-year students. Yet others offer Introduction to Law or similar courses, which may introduce students to the basic structure of the legal system, expose students to professional responsibility issues, explore jurisprudential perspectives, or all three. Again, someone who has been involved in curriculum issues at your school should be able to give you a quick insider's guide to the first-year curriculum.

The key is to remember that you don't have to do it all. If students get a large dose of case analysis in Torts and Legal Writing, their skills will build quickly, and you may have room to pursue additional objectives in Contracts. (By the way, I do not recommend deemphasizing case analysis altogether, no matter what. In my view, case analysis is one of the central contributions Contracts makes to the typical first-year curriculum, and it should feature prominently in the course. I recognize, however, that not all professors agree with this perspective.) If students don't gain any exposure to statutory interpretation elsewhere in the first-year curriculum, you may decide to spend more time on UCC Article 2 than you might otherwise. If the students are likely to view issues from a litigation perspective in Civil Procedure, Criminal Law, and Constitutional Law courses, you may decide to infuse a transactional perspective in yours. If you take a broad view of the first-year curriculum, it will help you think about what peculiar contributions your Contracts course can make to the students' overall experience.

At most schools, the first-year course is the only Contracts course that is required of all students. If there is something about contract law or theory you believe every law student should learn, they may have to learn it in your course or not at all. Still, you may gain some useful insights from considering upper-division contracts-related courses and other programs that are available to students at your school. For instance, your school may offer a course in advanced contracts, commercial law, sales, or international business transactions. There may be courses in jurisprudence, law and economics, and legal



history that consider contract law and theory in depth. Students at your school may gain exposure to the practice of contract law through transactional clinics, courses in transactional drafting, or other practical skills offerings.

Keep in mind that elective courses may be offered sporadically, and even then, they may attract only a segment of the student body. You should not assume that all students will have an opportunity to take those courses or, if given the opportunity, will take advantage of it. If the professors who teach these courses or who run related programs have certain expectations about the material that is covered in the first-year Contracts course, however, it would be helpful for you to know that. Likewise, if there are certain subjects or skills that are covered extensively in the advanced elective courses, you may have the luxury to deemphasize them in your first-year course if you so choose. It may suffice to provide a teaser in your course; if the students gain an appreciation for what further study might entail, those who are intrigued can pursue their interests later in their law school careers.

In my experience, you need not worry too much about overlapping with the content of advanced courses. In my first-year Contracts course, for instance, students gain significant exposure to UCC Article 2. I find that by the time students reach the Advanced Contracts course (which I also teach), the details of what they learned in the first year have largely slipped away. Nevertheless, the general ways of thinking that the students gain from studying the UCC in the first year allow them to approach the UCC with greater rigor and depth in the advanced course. For this reason and others, I continue to expose students to UCC Article 2 in my first-year course, even though I know a substantial proportion of them will encounter the UCC again before they graduate.

As you prepare to teach Contracts for the first time, educating yourself about your own institution's structure, culture, and expectations will prove invaluable as you narrow down your objectives to a manageable few. New professors bring fresh insights and energy to a law school. There is no good reason for you to teach your Contracts course exactly as your colleagues teach it, or as others have taught it in the past. Nevertheless, it is wise to be conservative about radically departing from what others at your school have done before you. Your choices may have implications elsewhere in the curriculum that are difficult for you to appreciate at first. Once you have a year or two of teaching under your belt and have gained a more

thorough knowledge of your school, you will be in a better position to introduce more extensive innovations should you so desire.

## 2. Consider Your Students

Effective teachers are able to connect what they are teaching to the experiences and capabilities of their students. As you think about what objectives to choose for your Contracts course, keep in mind the demographics of your student body. Although you will have students with differing experiences and capabilities in your class, you probably have or can gain a sense of the range of students who typically attend your law school.

The skills students bring to your class will affect their approach to your course and their learning. If analytical thinking is new to most of the students, or if they have been away from educational environments for a while, they will find it frustrating and unproductive to leap directly to theory. Even if they have stellar academic credentials and recently completed a rigorous undergraduate or graduate program, they will still require class time to acclimate to the legal environment. You may find, however, that their study habits are sharper, and that legal analysis skills and theory come more readily to them. The students' life experiences will also affect their learning. If they tend to be older, with a number of years of professional experience behind them, they may bring subtle insights into the workings of the business world to your classroom. If they are fresh from their undergraduate studies, they may find mystifying the commercial context of many contract law issues. It may take some attention on your part to provide the business background they need to feel sufficiently comfortable with the contract law issues you seek to explore.

It is also illuminating to understand what types of practice settings your students are likely to inhabit once they graduate. If they are likely to obtain academic positions, judicial clerkships, or jobs at large law firms, the content and structure of your course may differ from what you would offer if your students were likely to practice as solo practitioners, in small firms, or in public-interest environments. Likewise, if students tend to practice in the local community when they graduate, you may wish to emphasize local law to a greater degree than if students disperse widely.

In considering the needs of your students, one uncomfortable fact merits emphasis. The bar exam of every state regularly tests students' knowledge of contract doctrine (with the possible exception of Louisiana, depending on how you define the field). You may feel confident that your students can learn what they need to know for the bar exam from bar review courses or individual study. That may have been the way you did it, after all. Some schools, however, struggle with their bar passage rates, and some students need more exposure to bar-related topics than they can obtain outside law school. If you think your school or your students might fall into these categories, you should consider what your course can do to help prepare students to pass the bar.

This is not to say that you should seek to replicate a bar review course in your classroom. Exclusive focus on the details of black letter rules is counterproductive in the first-year Contracts course. By the time students graduate two or three years later, those details are a distant memory. If you are able to help students internalize a way of thinking about contract law, though, you will have done them a great service. If a sensible approach to contract law becomes second nature to students by the end of your course, their broad understanding of the field should allow them to resurrect and apply the details of doctrine as they study for the bar. If, however, you choose to be overly selective in your subject-matter coverage, or if you abandon the systematic study of doctrine in favor of an emphasis on practical skills or theoretical perspectives alone, you may find that students struggle to master what is required of them once the bar exam rolls around.

In short, you should not assume that your students' backgrounds, abilities, and prospects are similar to your own. Nor should you expect that the same things that interest and engage you will interest and engage them. You will want your course to be suitable for a diverse group of students, but if you have a sense of what the distribution and range of that diversity is likely to be, it should inform your choices. Your Contracts course will be more effective if you choose your objectives so as to resonate with the students who are likely to populate your class. You will then be able to plan and teach your course to provide the training and perspectives they lack, yet will find of use in their futures.

### 3. Consider Yourself

Your own background and interests are certainly important factors to consider as you settle on course objectives. If you served as a judicial clerk or engaged in appellate litigation, you have different expertise and a different perspective on contract law than someone who was a trial lawyer or a transactional attorney. If you have already developed a scholarly interest in legal history, law and economics, “law in action,” or some aspect of critical legal studies, you are likely to bring those insights into your teaching. Think about what it is about contract law and the Contracts course that fascinates you, and consider choosing objectives that resonate with those interests. Identify areas where your experiences give you unusual insight, as well as areas you may wish to investigate as a scholar. If you bring authentic insight and enthusiasm about the subject matter to your teaching, your students will respond accordingly.

## Part II. Orienting Yourself

Some will have the luxury of spending a few months preparing to teach Contracts for the first time. Others accept the challenge of teaching the course with little notice and have minimal time for advance preparation. No matter how much time you have to spend on this task, you can expect that it will not feel like enough. Even if you are entering teaching from practice and have significant expertise in contract law, it is unrealistic to expect to master the intricacies of the doctrine, gain full facility with theoretical perspectives, and fully outline practical exercises before the course begins. Although it may be nerve-wracking to face the prospect of entering a classroom without full mastery of doctrine, practice, and theory, recognize that this state of affairs is inevitable. Indeed, many experienced professors of Contracts will tell you that they particularly enjoy the subject matter because it yields new insights every time they teach it, even if they have been teaching for decades.

As you prepare to teach the course, it will prove important to be efficient. It is helpful to refresh your memory as to the fundamentals of contract doctrine and theory before you make irreversible decisions about your course. So I suggest you make an effort to reorient yourself to the field before you settle on your objectives, choose materials,

or sketch out your coverage. The key here is to focus on the big picture. So the semester doesn't catch you unaware, you will want to get down to the nuts and bolts of course design relatively quickly. At many schools, for instance, you will need to commit to a text and other assigned materials well in advance of the beginning of the semester, because there is lead time involved in ordering and shipping the books students will need for the course.

Here, I suggest how you might obtain a quick and dirty refresher on contract law, history, and theory before you make some of those decisions. (In Parts III and IV, I follow with some more specific pointers on conventional coverage and course design.) Depending on your background and the time you have available, you might decide to compress, expand, or reorder some of these suggestions. If you are wondering how to proceed, however, this provides one possible roadmap.

Good teaching always involves some adjustments as the capabilities and personalities of the students reveal themselves. It is inevitable that you will refine some aspects of your course once it gets underway, especially if you are new to teaching or to the subject matter. As you prepare to teach your course, your goal should be to orient yourself generally to the field and to establish a strong and sensible skeleton for your course. You can then add meat as you gain teaching experience and develop deeper subject matter expertise over the course of the semester or year. If you do what you can to gain an appreciation for the big picture, make sound choices about how you will conduct the course, and commit yourself to learning the details along with your students, you will position yourself for a successful first year.

Let's suppose you are going to be teaching Contracts for the first time in an upcoming semester. Whether you have a few months to prepare or only a few weeks, the first thing I suggest you do is orient yourself to the field. This is true whether you are relatively new to contract law or already have significant expertise. In either case, you will benefit if you refresh your memory as to some of the fundamentals of contract doctrine. You may also wish to expose (or re-expose) yourself to some of the currents in contract theory or contracts history. Again, I suggest you keep your focus general. The idea is to give yourself a sufficient refresher to inform some of the decisions you will need to make regarding course design. You will

have more time later—your entire academic career—to flesh out your expertise.

## A. CONTRACT DOCTRINE

A logical first step is to find a resource to give you a quick overview of the fundamentals of contract law. In Part III, I will provide a brief overview of the doctrinal areas typically included in a first-year Contracts course. Ideally, the resource you choose would cover most of these doctrinal areas, and would do so in a way that was straightforward, interesting to read, and presented at a relatively high level of generality. There are a number of excellent books designed to provide additional guidance to students who are studying Contracts, and you shouldn't be embarrassed to start there.<sup>1</sup> As a side benefit, you can expect your students to ask you to recommend materials to supplement those you assign. By reading one of the more substantive student treatises or study aids as your reentry into the academic world of Contracts, you will be in a position to speak knowledgeably about the book to your students. As you read the resource you have chosen, make note of the general subjects it covers, and identify for further exploration any areas that seem particularly stale, foreign, or obscure to you.

You may feel the urge to do deeper and broader reading to expand your expertise in contract law before you proceed to course design. Recognize that this may not be practical in the time available to you. For instance, there are several well-respected treatises in the Contracts realm.<sup>2</sup> I know a few new professors who attempted to read one or more of them, cover to cover, before teaching Contracts

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1 Two excellent choices are Brian A. Blum, *Contracts: Examples & Explanations* (5th ed., Aspen Publishers 2011), and Robert A. Hillman, *Principles of Contract Law* (2d ed., Thomson Reuters 2009). Both of these give a relatively comprehensive, yet general, overview of contract law, and both are clear and digestible.

2 Perhaps the best-known single-volume treatises are E. Allan Farnsworth, *Contracts* (4th ed., Aspen Publishers 2004), Joseph M. Perillo, *Calamari and Perillo on Contracts* (6th ed., Thomson Reuters 2009) and John E. Murray, Jr., *Murray on Contracts* (5th ed., LexisNexis 2011). There are also a number of classic multi-volume treatises, which are kept current by periodic updates. The most prominent are Arthur Linton Corbin, *Corbin on Contracts* (Joseph M. Perillo ed., rev. ed., West 1993) and Samuel Williston, *A Treatise on the Law of Contracts* (Richard A. Lord, ed. 4th ed., West 1990).

for the first time. Each of them ultimately abandoned the effort. The level of detail, even in the slimmer volumes, proved impractical to digest in the time available.

If you give yourself license to consult treatises selectively, however, they can serve as an important resource as you prepare your course. In your general reading, for instance, you may have identified some concepts that you did not encounter in practice, and that you do not recall studying in any detail in law school. For instance, although the basic concepts of consideration, promissory estoppel, and unjust enrichment may be familiar, it would not be unusual for a contracts lawyer to have little experience researching, analyzing, or litigating issues related to those theories of obligation. You could read up on one or more of them, in more detail, in the contracts treatise of your choice. A transactional attorney, expert at drafting and interpreting contracts, may have had little exposure to contract remedies and, in particular, may never have studied or rarely thought about the appropriate measurement of contract damages. A treatise could provide more exposure to this area in a relatively short period of time. So if you identify a few areas of contract law that are unfamiliar to you, you will reduce your burden during the term if you read up on them in advance.

Here again, my advice is to tread lightly. It is helpful to have a basic grasp of all of the central concepts regularly taught in first-year Contracts, if only so you can make intelligent choices about which materials to assign and how to structure your course. Also, if questions come up during the conduct of your course that do not relate to the subject matter at hand, it is helpful to be able to give students a general answer and a sense for when you will be returning to the specifics. It is easier to do this effectively if you have a good grasp of the big picture before you start teaching the course. However, even if you read broadly in a treatise or other resources in the initial stages of your preparation, unless you are already quite familiar with the concepts, you are not likely to remember much of the detail by the time you start teaching your course. A more efficient strategy would be to defer any extensive reading of treatises or other doctrinal sources until you make your way through the course. You could then resort to the treatise or other resources when you encounter areas where you yourself are finding the material difficult to grasp, or where you feel more detail would help you explain concepts to your students.

## B. CONTRACT THEORY AND HISTORY

So far, the recommendations in this part of the book have concerned refreshing your memory about the doctrinal outlines of contract law. In your initial orientation to the field, however, don't neglect theory and history. Even if you plan to teach a course that is largely doctrinal or skills-oriented, your teaching will benefit if you expose yourself to some of the most influential thinking in contracts theory and history. Again, unless you are an established scholar of contract law (and perhaps even if you are), you cannot expect to gain comprehensive exposure to contracts theory and history before you teach the course. Instead, as part of your initial preparations, you might choose to read one book, a few selections in an anthology, or perhaps a handful of particularly influential law review articles. The idea here is to get in the habit of thinking about contract law on many levels, not to master the field.

Although I think it is helpful to pay some attention to theory and history in your preparations, recognize that you are much more likely than the average law student to be interested in approaching contract law on these planes. Unless you decide to take an admittedly theoretical or historical approach to your Contracts course, you are likely to refer to the academic literature only in relatively general terms. Yet as a matter of legal cultural literacy, all students should gain some exposure to the academic currents and intellectual history of contract law. As a professor preparing to teach the course for the first time, you should too.

It would be dangerous to provide a definitive list of the most influential writing in contracts theory. I would not dream of attempting to do so here. Yet if you were to ask friends and colleagues who teach Contracts what books and other writings belong on that list, I suspect there are a few that would appear with some regularity. One classic, which has the added benefit of being a quick, interesting, and provocative read, is Grant Gilmore's *The Death of Contract*.<sup>3</sup> This book, growing out of a series of lectures, predicted the ultimate decline of contract as a theory of recovery. Although many contemporary scholars dispute Gilmore's premises and the accuracy of some of his claims, most contract law scholars are familiar with his work. Few discussions of promissory estoppel or reliance as a basis of recovery, for instance, omit mention of Gilmore's book. Another

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3 Grant Gilmore, *The Death of Contract* (Ronald K. L. Collins ed., 2d ed., Ohio St. U. Press 1995).



work that can claim status as a classic is Charles Fried's *Contract as Promise*.<sup>4</sup> In this book, Fried argues that the philosophical basis of contract is essentially a moral one, and he systematically examines examples from contract law to support his point. In the process, Fried also introduces alternative (and competing) philosophies, so the book provides broad exposure to many of the prominent themes of contract theory. Those who are particularly interested in economic perspectives on contract law might choose to read excerpts from Richard Posner's *The Economic Analysis of Law*.<sup>5</sup> Chapter 4, which addresses contract rights and remedies, is particularly relevant.

If you would like to gain some exposure to the history of contract law, any number of influential works might provide a starting point. Lawrence Friedman's *Contract Law in America*<sup>6</sup> has recently been reissued in a new edition, and it provides a fascinating look at the development of American contract law through the lens of specific case studies. A few longer works explore the earlier development of contract law, including, most notably, A. W. B. Simpson's *A History of the Common Law of Contract*<sup>7</sup> and P. S. Atiyah's *The Rise and Fall of Freedom of Contract*.<sup>8</sup> It would represent quite an undertaking to read either of these latter volumes in its entirety—an undertaking that might best be deferred until the basics of class preparation are well underway—but selections from either would provide interesting fodder for the historically minded.

If you would like to gain broader exposure to contract theory or history than any one work might provide, you might browse a selection of shorter pieces instead. One idea, for instance, would be to flip through one of the available anthologies on contract theory or history, and read a selection of the excerpts that seem intriguing to you.<sup>9</sup> Alternatively, you could ask one or two of your Contracts

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4 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard U. Press 1981).

5 Richard A. Posner, *Economic Analysis of Law* (8th ed., Aspen Publishers 2011).

6 Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (2d ed., Quid Pro Books 2011).

7 A. W. B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford U. Press 1975).

8 P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford U. Press 1979).

9 Some examples include Randy E. Barnett, *Perspectives on Contract Law* (4th ed., Aspen Publishers 2009), Richard Craswell & Alan Schwartz, *Foundations of Contract Law* (Foundation Press 2000), and Peter Linzer, *A Contracts Anthology* (2d ed., Anderson Publishers 1995).

colleagues to recommend their favorite books or law review articles on contract theory or history, and then proceed to read a small selection.

Again, you probably won't have time at this stage of your preparations to immerse yourself in contract theory or history. My recommendation, rather, is to expose yourself to a handful of new ideas. If you establish the habit early of thinking and reading about contract law on many levels—practical, doctrinal, and theoretical—ultimately, you will be able to bring all those perspectives to bear on your teaching. In the short run, however, the semester will approach rapidly, and it soon will be time to focus on the details of course design.

And it is to the details of course design that I now turn. Once you have oriented yourself to contract doctrine and have touched on theory or history, you will be better prepared to refine the objectives for your course. You will also have the tools to make some specific decisions, such as choosing materials, sketching out your coverage, and preparing a syllabus. If you still have time after you have attended to the details of course design, you might choose to read further regarding contract doctrine, theory, or history. However, course design is a serious enterprise that itself requires significant attention and time. It is advisable to turn to course design as soon as you feel as though you have reoriented yourself generally to the field.

To provide context for the discussion of course design that follows, the next part describes in general terms the doctrinal coverage of the conventional first-year Contracts course. From there, Part IV proceeds to more specific issues of course design.

### **Part III. Doctrinal Coverage of the Conventional Contracts Course**

Many issues in contract law are interrelated. Even if you plan to focus on doctrine in your course, however, you need not cover all subjects at the same level of depth to achieve comprehensive understanding. In fact, even if you teach a year-long course, you may not have time to cover comprehensively all areas of doctrine that are conventionally included in the course without sacrificing the other objectives you have set for your students. You will inevitably need to

make some decisions about which doctrinal areas to emphasize, and which ones you can afford to touch on lightly or omit altogether.

To help you think about doctrinal coverage decisions, I survey the major areas of contract law conventionally addressed in the first-year course. (This treatment is by necessity a generalization; there is significant diversity in the topics professors choose to include and omit.) Along the way, I mention which areas tend to be difficult for students. I also share some perspectives on how one might reduce coverage in certain areas and the consequences of doing so. As you start to review materials in anticipation of choosing a text or other materials, sketching out your coverage, and preparing a syllabus, my hope is this brief introduction will help you to compare the advantages and attributes of the available choices. In Part IV, I provide some specific ideas for adapting your materials and coverage to the particular objectives you may have chosen for your course.

## A. SCOPE AND APPLICABLE LAW

Generally, the first-year Contracts course focuses on the common law of contracts. Some of the classic cases are from England; typically, other cases are drawn from a broad range of U.S. jurisdictions. The course will by necessity include some discussion of what common law is and how it differs from statutory law (or common law interpretation of statutory law). Some professors also include a comparison of some of the principles included in Article 2 of the UCC. Sometimes professors include a brief study of other federal or state statutes particularly relevant to contractual transactions or disputes, but typically, these treatments are isolated and largely for the students' information. Occasionally, professors infuse international or foreign law perspectives, but if so, they typically do it with a light hand.

One function of first-year Contracts may be to introduce students to the reality of competing bodies of law. Generally, the details of how to decide what state's law applies to a particular transaction or dispute are left to an advanced course in Conflicts or Choice of Law. The concepts of binding and nonbinding precedent, however, tend to figure prominently in the first-year course.

If a professor plans to expose students to UCC Article 2, it would be typical to include some discussion of the nature of the UCC as a source of law. This might include some treatment of the origin

and revision of model laws generally, as well as some discussion of the evolution of UCC Article 2 in particular. Students learn that the Official Text of Article 2 is itself not law, but rather must be adopted by a legislature to become part of the statutory law of a state. That having been said, most professors teach the Official Text of the UCC and introduce non-uniform amendments only when they seem particularly relevant to the students, the cases, or the subject at hand. It is also common to discuss the scope of UCC Article 2 and the degree to which common law principles supplement those of the UCC.

The scope of UCC Article 2 proves surprisingly elusive for some students. I introduce the UCC early and often in my course, yet a certain proportion of the class remains in a state of confusion about when it applies. A particularly common confusion is to limit the application of Article 2 to merchants, a confusion that I'm sad to say rears its head in cases from time to time. Over the years, I have learned to emphasize those occasions where students encounter the UCC in contexts where the parties *are not* merchants so as to bring home the breadth of the UCC's scope.

## B. THEORIES OF OBLIGATION

A central enterprise of contract law is to distinguish which promises or other like obligations the law should enforce. Although much of the first-year course focuses on traditional contracts supported by consideration, it has become common to treat general (and arguably broader) theories of obligation at some point during the course. Most prominently, this would include a study of promissory estoppel (or detrimental reliance) as a basis of recovery. Some professors also include a brief discussion of unjust enrichment, especially in contexts where a court construes the facts to create a "contract implied-in-law" or "quasi-contract." Some professors contrast enforcement of non-contractual promises under a theory of "material benefit" or "moral obligation," often keying off the classic yet eccentric case of *Webb v. McGowin*.<sup>10</sup>

Most professors include some treatment of theories of obligation in their first-year Contracts course, and consideration doctrine is often the centerpiece of that treatment. Consideration doctrine is

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<sup>10</sup> *Webb v. McGowin*, 232 Ala. 374, 168 So. 199 (1936).

notoriously difficult to teach and learn. The modern rule is fairly easy to articulate—an enforceable contract requires a “bargained for” exchange of legal detriments. Application of that rule to a broad variety of fact patterns, however, reveals that courts are inconsistent and sometimes incoherent in their analyses. One gets the sense that competing policy considerations are lurking in the wings, policy considerations the courts do not always articulate. Students who struggle mightily to learn the intricacies of traditional doctrine may find the indeterminacy of results frustrating. That frustration can bloom into outright despair when other theories of obligation, such as promissory estoppel, unjust enrichment, or the material benefit rule so often overturn the consequences of consideration doctrine.

If you consider comprehensive doctrinal coverage to be important, or if you choose to emphasize jurisprudential or historical themes in your course, you almost certainly will want to pay extensive attention to the theories of obligation. If you choose other objectives for your course, you may decide to downplay theories of obligation and focus on other aspects of contract law, practice, or theory. Some professors feel that consideration doctrine in particular is merely an illogical accident of history and is unlikely to be relevant in transactions of any commercial significance. These professors may conclude that the game is not worth the candle and elect not to teach the details of consideration doctrine in the first-year Contracts course at all.

I would approach with caution any temptation to omit or largely deemphasize theories of obligation in your course. Irrespective of your course objectives, there are many significant things students can learn from theories of obligation and, in particular, from studying consideration doctrine. To reduce frustration, you can be candid with your students about the limitations of the doctrine in this arena, but also explain to them why you feel its study is important. Below, I detail some of the merits of a study of consideration doctrine in particular.

Common law cases often speak of consideration as if it is a natural requirement of a contract. Many cases, for instance, state without further explanation something like “a contract, of course, arises from offer, acceptance, and consideration.” Whether you teach consideration doctrine or not, students will inevitably encounter the concept and will be curious about its meaning. Worse yet, they will assume they understand its meaning, and will conclude that it is an obvious and logical requirement for the existence of consensual legal obliga-

tion. Consideration doctrine is peculiar to common law legal systems. The civilian concept of *causa*, for instance, may serve similar functions to consideration doctrine, but its history and outlines are quite different. As a matter of legal literacy, it is useful for American law students not only to understand what consideration means, but to appreciate that consideration doctrine is a distinctive feature of our legal system and is not present in many other well-established legal systems.

Consideration doctrine also provides an opportunity to think deeply about the evolution of law. Consideration, as a concept, began to emerge in England before the legal system recognized distinctly contractual causes of action. Although many of the limitations and formalities of the writ pleading system fell away over time, consideration persisted as a distinct feature of a contract or contract-like claim. Although courts and scholars debated its functions and efficacy, the general concept persisted as a requisite for enforceability and evolved a specific shape. One view of more recent theories of obligation—most notably promissory estoppel—is that they address some of the perceived injustices of consideration doctrine operating in isolation. Nevertheless, consideration doctrine remains at the core of the traditional notion of contract. Given that its purposes are not entirely clear and its effectiveness at achieving those purposes is subject to substantial debate, students might question why common law courts have not simply done away with the doctrine altogether and substituted something clearer and more defensible in its place. Classroom discussion of questions such as this one encourages a subtle appreciation of the processes of legal change in general and the nature of common law in particular.

One of the most important reasons to include significant study of consideration in the first-year Contracts course is a philosophical one. A fundamental question contract law must answer is which obligations are worthy of judicial enforcement. Contracts scholars have debated this question for decades and continue to debate it to this day. Consideration doctrine, for better or worse, is one of a web of doctrines that has helped to answer that question in our legal system. By learning about the complexity and inconsistencies of the alternative we have chosen, students are in a better position to muse about the alternatives we haven't chosen, at least not yet. In my view, we do our students a disservice if we unduly shield them from the

complexity of the legal enterprise and suggest that the law is always clear, rational, and neat.

If you do decide to include significant study of theories of obligation in your Contracts course, you may still choose to deemphasize certain aspects. (I note some specific suggestions in this regard in Part IV of this book, in the discussion of course design.) If you teach consideration at all, I encourage you to teach promissory estoppel as well. Ideally, you would also at least expose the students to unjust enrichment and the material benefit rule as theories of obligation. Modern consideration doctrine can best be appreciated in the context of these other theories of obligation. Even if you give only light treatment to all four sources of obligation, students will gain some appreciation for the factors that lead to enforceability of contractual and contract-like obligations in our legal system.

## C. CONTRACT FORMATION

The first-year Contracts course typically includes a study of contract formation. Generally, this consists of an introduction to offer and acceptance under classical doctrine. Many professors also include some exposure to more fluid notions of contract formation, including contract formation in the context of electronic commerce and under UCC Article 2. Further, a study of contract formation may include some exposure to preliminary, indefinite, and incomplete agreements and courts' willingness (or unwillingness) to enforce them.

### 1. Offer and Acceptance

Students generally enjoy studying the classical rules of offer and acceptance. Typically, professors delve into the distinction between preliminary negotiations and a contractual offer and, in particular, address when advertisements are mere solicitations and when they constitute offers. Some classic contracts cases, both new and old, fall into this realm—from Leonard's ill-fated attempt to obtain a Harrier Jet through a Pepsi Stuff promotion<sup>11</sup> to Mrs. Carlill's likewise ill-fated yet ultimately more profitable attempt to stave off influenza through use of the Carbolic Smoke Ball.<sup>12</sup> Cases that address the race

11 *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F. 3d 88 (2d Cir. 2000).

12 *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256 (C. A.).

between an acceptance and an event that terminates the power of acceptance (such as a revocation) are also great fun. They often exude the liveliness of a heated ping pong match. There is a deceptive clarity to the black letter rules in this arena, and students gain confidence in their analysis skills working with them.

Students often spin hypotheticals to test their newfound mastery of offer and acceptance doctrine, sometimes with great enthusiasm. The challenge to the professor is to keep the issues in perspective and not give them undue weight, especially in the face of the students' curiosity. For instance, over the years I have resolved periodically to deemphasize the mailbox rule.<sup>13</sup> I have come to believe it has limited continuing practical importance and, as a doctrinal matter, rarely merits the extensive treatment it sometimes receives. Nevertheless, year after year, when I mention the general rule, note that there are some exceptions, and then attempt to move on, students raise questions to press the ultimate boundaries of the doctrine.

The questions are many. What happens, for instance, if the offeree sends her acceptance not by the U.S. mail, but instead via Federal Express? Or what happens if the offeree sends her acceptance not by mail, but by e-mail, text message, or tweet? Or what happens if the offeree dispatches an acceptance by mail but calls to reject the offer before the acceptance arrives? Or what if the offeree leaves the acceptance in the mailbox at her house for the mailman to pick up, but the offeror calls to revoke the offer before the mailman comes? Or what if a seemingly endless array of other permutations should occur? Often, I find that the answer is that there is no modern case law on point, and in fact little case law at all. Where there is relevant case law on one of these questions, it can be inconsistent or difficult to justify.

The students sometimes express frustration that such simple and natural questions admit to no easy answer. Ultimately, I have learned to let these discussions flow where they may. Even if the doctrine may be relatively insignificant in terms of its practical impact, there are significant lessons to be learned about the nature of common law, the elusive search for clarity and predictability in the law, and the relative unimportance of litigation in the broader contractual

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13 The mailbox rule, for those who mercifully have forgotten it, consists of the general proposition that when sending an acceptance by mail is a reasonable means of accepting an offer, the acceptance is effective when mailed, not when received.



context. A professor can draw out these lessons by making these points explicitly.

## 2. Erosions to the Classical Model of Offer and Acceptance

Some professors also address more fluid models of contract formation in the first-year course. Often, these discussions revolve around the challenges that standard-form contracting pose to the classical model of contract formation. Conventionally, this might include some treatment of the notion of assent to adhesion contracts or other standardized terms supplied by one party to the transaction. Electronic commerce has created a particularly fertile context for disputes over assent to standardized terms, and some professors include discussions of “shrink-wrap,” “browse-wrap,” and “click-wrap” contracting in their first-year Contracts courses. *ProCD v. Zeidenberg* or one of its progeny may serve as the centerpiece of this discussion.<sup>14</sup> Especially for professors who include a substantial dose of the UCC in their courses, discussion might also extend to the various and complicated approaches the law takes to contract formation when the parties exchange standardized forms. Professors may emphasize standard-form contracting to greater or lesser degrees, depending on the objectives they have chosen for their course. In my view, however, no first-year Contracts course is complete unless it at least alludes to some of the challenges the use of standard terms poses to the classical model.

The classical model of offer and acceptance can be an ill fit for mass market transactions.<sup>15</sup> Students have undoubtedly clicked on a thousand boxes to signify “I have read and understood the terms of this license,” yet never once read nor understood them. Nevertheless, they may wonder if they will be fully bound to those terms, irrespective of what those terms are. Yet the challenges posed by electronic commerce are not new. Contract law has long struggled

14 *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

15 On this point, I love Professor Gordon’s “honest” course description for the first-year Contracts course:

*Contracts*. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879.

James D. Gordon III, *How Not to Succeed in Law School*, 100 Yale L.J. 1679, 1696 (1991).

with the tension between vendors' needs to set the terms on which they do business and the very real prospect of vendor overreaching in this context. One area in which this tension has manifested itself is in the area of contract formation.

Karl Llewellyn once famously wrote that assent to form or boilerplate agreements is not really assent at all. Instead, it should be understood as assent "to the few dickered terms, and the broad type of transaction, and one thing more. That one thing more is a blanket assent . . . to any not unreasonable or indecent terms the seller may have on his form. . . ."<sup>16</sup> Llewellyn was principally concerned about vendor overreaching when customers signed forms without reading them. Increasingly, courts have been giving effect to standard terms when the customer doesn't discuss, read, or sign anything at all.

An exploration of electronic commerce challenges students to consider what actions (or inactions) constitute assent, and more broadly, how contract law should best balance the competing interests involved in this type of transaction. *ProCD v. Zeidenberg* was a landmark case in this arena. Although commentators debate the precise meaning and implications of the *ProCD* case, some cite it as the source of the "rolling contracts" or "cash now, terms later" model of contract formation. Many commentators agree that *ProCD* represents a departure from the classical model of offer and acceptance.

Consider, for instance, a transaction in which a customer purchases an item for cash at a retail outlet. Classically, most courts would conclude that the sales contract was concluded by the time the customer paid for the product. The offer might consist of displaying the product for sale and the acceptance being the customer's tender of payment. Or the offer might be the customer presenting the product to the cashier, and the acceptance being the cashier's act of ringing it up. Alternatively, the cashier's act of ringing it up might be the offer and the customer's payment the acceptance. Except in rare instances, the exact moment of contract formation was immaterial: conventional wisdom was a contract had been entered by the time money changed hands and the customer left the store. The terms of the contract would include those in the reasonable expectations of both parties at that time.

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16 Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (Little, Brown & Co. 1960).

*ProCD* suggests that the vendor can delay contract formation until after the purchase, simply by saying so in the terms included in the product's packaging. Through this device, the vendor can include all the terms it wants to govern the relationship in the packaging and need not make them apparent to the customer before the purchase. Instead, the vendor can, again in its standard terms included in the packaging, allow the customer a period of time to review the terms, and if the customer does not object, deem the contract formed at the end of that period of time. Through this device, the vendor is spared the inconvenience and impracticality of making all its terms available to its customers in advance, yet at the same time can be assured that it can do business in the way it wants. Although *ProCD* involved a retail purchase, and although it denominated itself as a decision under UCC Article 2, some suggest its analysis need not be limited either to transactions taking a particular form or transactions involving the sale of goods. In fact, the opinion has proven highly influential in a variety of contexts.

*ProCD* and its progeny have inspired a spate of controversy—a controversy that is far from settled in many jurisdictions. As noted previously, contract law has long struggled with the challenges that standard terms pose to the classical model of contract formation. The early “shrink-wrap” cases extended this controversy to the electronic context. The notion of “rolling” or “cash now, terms later” contracts may simply represent the latest phase in this evolution. Consequently, exposure to electronic commerce generally and rolling contracts specifically aligns naturally with a discussion of assent to standard form contracts, which has long been a staple of the conventional first-year Contracts course. Further, study of standard form contracts, electronic commerce and rolling contracts coordinates nicely with the varied and conflicting approaches contract law takes to the battle of the forms, described next.

When parties attempt to contract through the exchange of standard forms, the legal consequences are sometimes captured by the phrase “the battle of the forms.” Some professors elect to teach the battle of the forms in all its glory; others do not. The battle of the forms stems from the fact that the standard terms contained in the two forms are likely to conflict. Yet the parties conducting the transaction may not read their own forms, much less those they receive from others, and so may be oblivious to any such conflict. Whether the parties have a contract under these circumstances and,

if so, what its terms might be is a matter of some complexity and controversy.

Under classical contract doctrine, an acceptance must be the “mirror image” of an offer. Accordingly, when one party initiates a business transaction through use of a standard form and the other responds with a standard form of its own, two seemingly perverse consequences flow. The parties may think that they have a deal, but their forms may not establish a contract under common law. Alternatively, if the parties go on to perform, the performance may act as acceptance of the last form to be sent, thus creating a contract on its terms. Thus, the last party to send a form before performance begins gains the advantage, a result that commentators sometimes describe as the “last shot” doctrine.

The drafters of UCC Article 2 set out to craft a better solution. They concluded that the commercial expectations of the parties did not justify the legal consequences of the “mirror image” rule and the “last shot” doctrine. So they attempted to create a legal rule that would allow contracting to be effected through conflicting standardized forms, yet would not give undue advantage to a party based on the order in which it sent its form. The result of this effort is UCC 2-207—a section widely conceded to be among the most complicated, poorly drafted, and ultimately unsatisfying provisions in the UCC.

Needless to say, students struggle mightily with UCC 2-207. I teach it because I see the value in teaching students how to survive and conquer a statutory snake pit. I also believe this is an area where snake pits are to be expected—easy resolution of conflicting concerns often proves elusive. After a thorough study of UCC 2-207, students understand that it may not be possible to reconcile the needs of transactional efficiency with the parties’ respective desires to do business on their own terms. UCC 2-207 is also, for better or worse, a favorite subject for bar examiners. Nevertheless, this is not the sort of subject that admits to light treatment, and it takes a substantial amount of time to teach it well. Professors who decide to deemphasize the UCC specifically or statutory interpretation generally in their course may choose to omit UCC 2-207 altogether. If you omit it, you might take some solace in the suspicion that with the emergence of electronic communications, parties may be moving away from this manner of doing business in any case.

### 3. Preliminary, Incomplete, and Indefinite Agreements

Generally, for an agreement to be enforceable as a contract, it must exhibit both the requisite intention to be bound and sufficiently definite terms. Sometimes courts refuse to enforce agreements that lack either of these attributes. Yet the task of determining what constitutes the requisite intention to be bound and what suffices in terms of definiteness is an enterprise fraught with difficulty. For instance, there are many controversies that involve parties who are disappointed when contractual negotiations break down. Some of those parties argue that agreements that arose in the course of the negotiations should themselves be open to legal enforcement. Even when the parties reach formal agreement, they may later dispute whether that agreement manifests sufficient intention to be bound or delineates the terms to which they have agreed with sufficient definiteness. The first-year Contracts course may include some exposure to when preliminary, incomplete, or indefinite agreements are enforceable as contracts and when they are not.

The issues raised by preliminary, incomplete, and indefinite agreements have synergies with issues that may arise elsewhere in the course. Professors who would like to draw out those synergies may choose to teach the topics in some depth. Professors who feel they cannot afford full coverage can probably make cuts in this area without significantly undermining students' exposure to the central themes of contract law. Here, I outline the more significant topics related to preliminary, incomplete, and indefinite agreements that are often included in the first-year Contracts course. I also note how these materials are closely tied to issues that arise elsewhere.

Agreements that arise in the course of contract negotiations may or may not themselves be enforceable as contracts. Parties perennially dispute the legal effect of letters of intent, for instance. Courts sometimes construe letters of intent to constitute mere conveniences; their purpose is to facilitate negotiations, not to create legal obligations, and they should be treated as such. Some courts have construed letters of intent to establish enforceable obligations to negotiate in good faith toward a successful conclusion, but not to evidence any commitment to be bound to the ultimate transaction. In some instances, courts have found letters of intent in and of themselves to evidence the existence of fully binding contracts. Also problematic are situations where the parties seem to reach agreement on the terms of their relations, yet contemplate

the later execution of a more formal writing. If the formal writing never materializes, courts have had to decide whether and under what circumstances they should nevertheless enforce the preliminary agreement as a contract. Because both subjects deal with potential liability for precontractual negotiations, there are parallels between the enforceability of preliminary agreements as contracts and the use of promissory estoppel to enforce promises made in this context. Many professors include some discussion of these controversies in their first-year course, whether as part of their treatment of theories of obligation, part of their discussion of contract formation, or both.

Even if the parties enter into an agreement that seems final, it may still fail for indefiniteness if essential terms are left to be agreed, or if the terms are so indefinite as to leave a court without an appropriate basis for a remedy. Courts that invalidate such agreements may conclude that “agreements to agree are unenforceable” or that certain agreements are “void for vagueness.” Here, too, there are synergies with materials that may be covered elsewhere in the first-year course. As with preliminary agreements, in some jurisdictions, promissory estoppel may allow compensation to a party who relies to its detriment on an agreement that would otherwise be too incomplete or indefinite to enforce under conventional contract doctrine. In addition, as discussed later, professors who teach contract interpretation in some detail may spend significant time discussing how to deal with ambiguities and gaps in the express agreement of the parties. In particular, professors may address default rules of law and the role of common law and statutory gap-fillers. Contract interpretation raises questions of whether the law should provide default terms when the parties do not expressly address a certain matter and, if so, what those terms should be. These questions are directly related to the question of whether courts should enforce incomplete or indefinite agreements at all. Again, professors who wish to draw out the synergies may choose to teach all related materials; those who feel they must make cuts may choose to omit or deemphasize the separate treatment of the general enforceability of incomplete or indefinite agreements.

#### D. LIMITS ON ENFORCEABILITY

Beyond including a treatment of contract formation, it is conventional for the first-year Contracts course to include the study

of some of the doctrines that limit the enforceability of contracts. This study typically extends to relevant statutes of frauds, avoidance doctrines based on defects in the bargaining process, and general limitations on enforceability due to illegality, public policy, or lack of contractual capacity.

These doctrines differ not only in content but in mood. Yet there are certain themes that run throughout. Underlying each is the notion that contracts may be enforceable in some circumstances but not in others, depending on who is suing whom and depending further on the circumstances surrounding the contract and its performance to date. Where the doctrines operate to limit the enforceability of a contract, application of the doctrines often implicates conflicting policies. This allows students to explore whether the doctrine appropriately balances or reconciles those policies. The remedial consequences of the doctrines can be subtle and complicated and are themselves worthy of study and debate.

The doctrines admit to varying levels of attention, and your coverage can be adapted easily to your course objectives. Professors who have the time explore most of these limits on enforceability. They may play out the policy implications of the various limits, as well as their remedial aspects. Professors who are interested in reducing coverage can focus on those doctrines that align most directly with their course objectives, while omitting others altogether or covering them in a summary fashion.

## 1. The Statute of Frauds

The phrase “statute of frauds” has come to refer to any requirement that an agreement, to be enforceable, be evidenced by writing, signed by the party against whom enforcement is sought. The name derives from the “Act for the Prevention of Frauds and Perjuries,” passed by the English parliament in 1677. To bring an action based on an obligation falling into any one of six specific categories, the Act required that the agreement giving rise to the obligation (or a note or memorandum thereof) be in writing and signed by the party to be charged. The content of this Act was adopted into the statutory law of nearly every U.S. jurisdiction, and although the statutes have evolved over the years, many of the original categories and much of the statutory language have proven remarkably durable. Writing requirements are now sprinkled throughout federal and state law;

however, the first-year Contracts course typically focuses on those statutes that devolve from the original 1677 Act. Three modern analogues of the original six categories tend to get the most attention: contracts relating to transfers of an interest in land, contracts not to be performed within one year of the making thereof, and contracts for the sale of goods. Although sales of goods were one of the original six categories, the statutes of frauds related to transactions in goods now reside in the states' versions of UCC 2-201, rather than in their more general statutes devolving from the original 1677 Act.

Unless a professor chooses to focus on the statute of frauds as adopted in a particular state, any study of writing requirements is likely to consist of an abstraction of general principles. Since so many states retain many of the original categories, often in nearly identical language, some generalization is practical. Nevertheless, courts in different states have interpreted their respective statutes of frauds with varying degrees of rigor. Generally, professors seek to illuminate the range of approaches various states have taken, rather than to focus on the details of doctrine in any one state. Accordingly, the study of the statute of frauds need not be extensive; it may consist of little more than introducing students to the traditional categories of contracts covered by the statute, a general discussion of the types of writings and signatures that might satisfy the statute, and some exposure to judicially crafted exceptions to the statute. Professors who cover the UCC in their course, however, may go into some detail about the scope of UCC 2-201 and its requirements and exceptions.

A careful study of the statute of frauds can dispel two common confusions. First, many students enter the first-year Contracts course believing that a contract must be in writing to be enforceable. A study of the statute of frauds emphasizes that writing requirements actually apply to a rather narrow range of contracts, and in fact, the general rule is the contrary—a contract need not be in writing to be enforceable. Through this discussion, students learn to distinguish the legal requirement of a writing from the practical benefits of reducing an agreement to writing. In the process, they learn to avoid the mistake of conflating legal requirements with problems of proof. Second, once introduced to the statute of frauds, students sometimes assume that the analysis of whether a writing satisfies the statute is equivalent to the analysis of whether the writing establishes the existence and terms of a contract. In fact, the two issues are analytically distinct. A signed writing may be sufficient to satisfy the statute of frauds, but



standing alone, it may be insufficient to establish the existence of a contract or conclusively establish its terms. Likewise, a party may have competent evidence of the existence of a contract but may not be able to produce a signed writing that satisfies an applicable statute of frauds. Students sometimes struggle with these distinctions, and they bear repeating.

## 2. Avoidance Based on Bargaining Misbehavior or Other Deficiencies in the Bargaining Process

Often the first-year Contracts course exposes students to one of the many doctrines that allow a party to avoid the consequences of a contract due to bargaining misbehavior or other deficiencies in the bargaining process. For instance, a party whose assent was induced by a misrepresentation or outright fraud may be able to avoid the contract when the true state of affairs becomes apparent. So, too, might a party who entered a contract under duress or as a result of undue influence. Typically, when a party avoids a contract on the basis of misrepresentation, fraud, duress, or undue influence, this means that the court refuses to enforce the contract against the party and instead orders both parties to make mutual restitution of the benefits they received under the contract. Misrepresentation, fraud, duress, and undue influence may also give rise to affirmative causes of action under tort law. These doctrines may receive little if any attention in the first-year Torts course, so Contracts professors generally need not fear excessive duplication. However, if your Torts colleagues tell you that they address some of these doctrines in their first-year courses, this may give you further license to deemphasize the doctrines in your Contracts course, should you be searching for opportunities to reduce your course coverage.

A doctrine that is more peculiar to contract law, and thus is often addressed in detail in the first-year Contracts course, is unconscionability. If a contract or one of its terms is deemed unconscionable, a court may refuse to enforce the contract altogether, it may excise the unconscionable term, or it may reform the unconscionable term to eliminate its unconscionable effect. Generally, a contract or one of its terms may be deemed unconscionable if one of the parties to the transaction imposes unduly harsh terms on the other through oppressive or unfair bargaining tactics. Sometimes, particularly if there are significant power or sophistication disparities

between the parties, courts deem a one-sided contract term to be unconscionable merely because it is presented to the disadvantaged party on a take-it-or-leave-it basis. Accordingly, treatment of standard-term contracting in the context of contract formation invites discussion of unconscionability doctrine as well.

Misrepresentation, fraud, duress, undue influence, and unconscionability, as theories of avoidance, all rest on bargaining misbehavior that influences the victim to enter the contract. Misunderstanding (sometimes called “complete misunderstanding”) and mistake are two avoidance doctrines that rest instead on other deficiencies in the bargaining process. Misunderstanding is closely aligned to issues of contract interpretation, while mistake is closely related to doctrines that allow for excuse of contract performance due to impossibility, impracticability or frustration of purpose. The names of both doctrines are potentially misleading, because in common parlance, the words “misunderstanding” and “mistake” connote much broader application than the doctrines carrying such names actually enjoy. It simply isn’t the case that a party can freely avoid enforcement of a contract because the party misunderstood the contract’s terms or committed some sort of mistake in entering it. Both doctrines are exceptional and allow relief only in narrow circumstances.

A court may refuse to enforce a contract on the basis of misunderstanding in some instances if the parties attach different meanings to a central term of their agreement, and neither makes its own meaning clear to the other. If the court can resolve the ambiguity through normal processes of interpretation, it may hold a party to a meaning it did not understand and did not intend. But where the ambiguity is latent and neither party’s professed meaning is more reasonable under the circumstances, a court may decline to enforce the contract altogether. The classic case of refusing to enforce a contract on this basis is *Raffles v. Wichelhaus*.<sup>17</sup> In that case, the buyer agreed to purchase cotton arriving from India on a ship named *Peerless*. The dispute arose because there were at least two ships called *Peerless* at sea, and they arrived at different times. In a fluctuating cotton market, the buyer refused the later shipment. Although the parties seemed to have agreed on the terms of their transaction, the court found there was no agreement in fact on the crucial issue of which ship they meant, and so it refused to enforce the contract.

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<sup>17</sup> *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

Cases of this sort do not seem to arise very often. More usually, when a term in a contract is open to more than one interpretation, a court refers to contextual or other factors to prefer one interpretation over the other and enforces the contract accordingly. Because the concepts are interrelated, professors who teach contract interpretation in some depth may wish to include some treatment of misunderstanding as well. Professors who tread lightly on interpretation may wish to mention misunderstanding only in passing or even omit it altogether.

Mistake is a doctrine that allows a party to avoid enforcement of a contract in some circumstances if it was mistaken as to a basic assumption of fact underlying the contract. Typically, in the absence of bargaining misbehavior, the doctrine allows avoidance only if both parties were mistaken as to the underlying fact. The classic pairing of cases in this arena is *Sherwood v. Walker*<sup>18</sup> and *Wood v. Boynton*.<sup>19</sup> Neither case illuminates modern doctrine very well, but the facts of both are delightful. In *Sherwood*, Hiram Walker (of whiskey fame) agreed to sell a cow to Sherwood, telling Sherwood that he believed the cow to be barren and setting the price accordingly. When it became apparent that the cow was in fact pregnant, Walker refused to deliver the cow. In the ensuing legal battle, the court allowed Walker to avoid the contract on the basis of mistake. *Wood*, on the contrary, refused to allow avoidance on the grounds of mistake. In that case, the buyer agreed to purchase a stone of uncertain quality and value for \$1. When the stone turned out to be a diamond worth approximately \$700, the seller sought to avoid the contract.

Mistake doctrine provides a marvelous context to explore the risk allocation function of contracts, and in particular the outer limits of courts' willingness to enforce contracts to allocate unknown or unanticipated risks. Excuses due to impossibility, impracticability, or frustration of purpose, discussed later, also deal directly with the outer limits of risk allocation. The excuse doctrines typically relate to events that occur after contract formation rather than facts that were in existence at the time of contract formation. Otherwise, there are many parallels in analysis and result between the two areas of law. Some may wish to draw out these parallels by teaching both mistake and excuse in some depth. Others may decide that there isn't sufficient time to teach both mistake and excuse in the first-year

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18 *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

19 *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885).

course and either choose to teach one and merely allude to the other or omit them both altogether.

### 3. Avoidance Based on Broader Notions of Public Policy

Sometimes courts refuse to enforce contracts not because of some misbehavior or other defect in the bargaining process, but rather due to broader notions of public policy. Consider what court, for instance, would allow remedies for breach of a contract to commit murder for hire. Even if a contract or its performance is not a crime or otherwise illegal *per se*, a court may find that it offends some strong public policy and thus may decline to enforce it. Further, if one of the parties to a contract lacks capacity due to minority, mental illness, or judgment that has been severely impaired through use of alcohol or drugs, in some instances, the contract may be avoidable by that party. Although illegality, public policy, and incapacity are often categorized as doctrines of contract law, they rest on a grab bag of statutes, regulations, and judicially created policies that lie outside the general realm of contracts. It is difficult to give students a comprehensive view of the situations in which a court may invalidate a contract for reasons of this sort. Nevertheless, some professors choose to expose students to situations in which illegality, public policy, or incapacity renders contracts unenforceable. Other professors omit these topics altogether from the first-year Contracts course.

The remedial implications of these doctrines are subtle and quite different from those based on bargaining misbehavior or other deficiencies in the bargaining process. In the case of illegal contracts, contracts that violate public policy, or contracts where one of the parties lacks contractual capacity, there is not always a clear perpetrator or a clear victim. Sometimes, both parties are complicit in wrongdoing. Other times, one or both of the parties may be innocent of any misbehavior and may have given value or otherwise relied on the contract. Sometimes courts will enforce contracts to effectuate the underlying public policies or protect legitimate interests of innocent parties; sometimes they will refuse to do so. Professors who teach a sampling of these doctrines will often pay significant attention to their remedial implications.

## E. THE CONTENT OF CONTRACTUAL OBLIGATIONS

If a dispute arises under an enforceable contract, the dispute may revolve around what the terms of the contract are. Although interpretation issues permeate contract law, many professors pay separate attention in the first-year course to the interpretation and construction of contract obligations. Although the distinction between interpretation and construction is not clearly defined, interpretation generally refers to the process of determining the express or implied content of the parties' agreement, while construction refers to the obligations a court deems to constitute part of the agreement by virtue of rules of law or policy.

A study of interpretation investigates how courts discern the content of parties' agreements. This might include, for instance, a study of the nature of agreements that arise from oral discussions or writings, or contextual evidence that provides content to the parties' reasonable expectations, such as course of dealing, course of performance, and usage of trade. To provide some insight into how courts construe agreements of the parties to arrive at their full legal obligations, professors might introduce students to the notion of default and mandatory rules of law. Some professors choose to discuss illustrative examples of common law or statutory gap-fillers. Other professors approach the topic of default rules on a more theoretical plane, and encourage students to consider what type of terms the law should provide when the parties fail to do so, and why. In the context of mandatory rules of law, professors often explore the nature and scope of obligations such as good faith, fair dealing, or reasonableness.

Some lawyers complain that they completed their first-year Contracts course without ever seeing a real contract. Some professors take this criticism seriously and make efforts to introduce students to the structure and content of a typical commercial contract. This might include, for instance, a discussion of the various types of clauses that typically make up such a contract, such as recitals, definitions, representations and warranties, affirmative and negative covenants, conditions, defaults and agreed remedies, and common boilerplate. It is usual, however, to defer in-depth discussion of the structure and content of a typical commercial contract to advanced courses. However, most professors at least introduce students to the distinction between promises and conditions.

In my experience, many students intuitively understand the notion of a promise but struggle with the concept of a condition. Students may gain some exposure to conditions in the first-year Property course, but sometimes this exposure itself can lead to confusion when students encounter analogous concepts in Contracts. The implications of conditions in the real estate context differ from those in the contractual context, and courts sometimes use the terminology in different ways. If a professor pays careful attention to terminology and goes slowly in the Contracts course, it is possible to dispel this confusion.

In the contractual context, the terminology is technical and multi-faceted. Conditions may have promissory content or not. They may be express, implied, or constructive. There are conditions precedent, conditions subsequent, and concurrent conditions. Each characterization of a condition carries its own set of legal consequences. Students find the distinctions difficult, and they particularly seem to struggle with the concept of promises that also constitute constructive conditions of exchange. It doesn't help that some of the classic cases in this arena speak in terms that are no longer in common legal parlance.<sup>20</sup> Even if students come to understand the basic terminology, in their analyses they often lose track of what the condition at issue is and what performance or other consequence depends on satisfaction of that condition.

It is not easy to omit or gloss over the topic of conditions. An understanding of conditions is critical to an understanding of performance, breach, and even certain remedies. If a professor hopes to provide fairly comprehensive doctrinal coverage in the first-year Contracts course, a study of conditions is likely to be essential. Conditions are also one of the primary tools lawyers use to allocate risk in a transactional setting. Accordingly, conditions are also a key topic for those professors who seek to infuse planning, preventative, or transactional perspectives into their courses.

No discussion of the content of contractual obligations is complete without some reference to the dreaded parol evidence rule. When the parties memorialize their agreement in a writing or series of writings, the parol evidence rule may restrict the fact-finder's ability to resort to evidence extrinsic to the writing to determine the content of the parties' agreement. Although it is a staple of the first-year Contracts

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<sup>20</sup> *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921), in which the court speaks largely of dependent and independent promises, comes to mind.

course and a favorite of bar examiners everywhere, the parol evidence rule is confused and confusing. A number of factors contribute to this confusion. Different jurisdictions take decidedly varied approaches to the parol evidence rule. Some articulate a “four corners” approach, while others rely on a more “contextual” approach. Even if students understand that the case law is inconsistent on this point, they often find the practical differences between the two approaches to be mysterious.

Under any approach, application of the parol evidence rule requires several levels of distinction and admits to much uncertainty. There are distinctions among a fully integrated writing, a partially integrated writing, and a writing that isn’t integrated at all; among evidence that explains a writing, evidence that supplements it, and evidence that contradicts it; and among evidence of prior agreements, contemporaneous agreements, course of dealing, course of performance, and usage of trade. The bases on which courts make these distinctions often prove elusive. And further sources of confusion abound. Some courts and commentators consider interpretation of a writing (be it under a “plain meaning” or more contextual approach) to be a component of the parol evidence rule; other courts and commentators consider it a distinct, albeit related, legal issue. Professors who choose to teach the UCC’s version of the parol evidence rule, UCC 2-202, infuse one additional layer of complexity into the terminology and analysis. Nevertheless, the parol evidence rule retains significant bite in many jurisdictions, and most professors consider some treatment of it an essential component of the first-year Contracts course.

## F. PERFORMANCE AND BREACH

Contract disputes sometimes concern whether either party unjustifiably failed to perform the terms of the contract. In the first-year course, students typically learn about the concept of material breach and its implications. They may compare the “perfect tender” standard of UCC Article 2 and explore how the UCC departs generally from common law notions of performance and breach. It is also conventional to cover excuse doctrines such as impossibility, impracticability, and frustration of purpose. Some professors also include some discussion of anticipatory repudiation and related

doctrines under common law, under the UCC, or both. All these topics are amenable to being compressed or expanded, depending on the time available and the professor's objectives. In my experience, it is rarely practical to teach both the common law and the UCC approaches to all these issues in depth. Often the details of the analysis and theory are left to advanced courses.

The core concept in the area of performance and breach at common law is the distinction between material breach and substantial performance. The distinction in theory is not terribly complex, and students tend to grasp it readily. Its implications, however are more subtle and sometimes take some time to unravel. If there is a material breach at common law that is not (or cannot be) cured, then the aggrieved party is relieved of its own obligations conditioned on the breached performance. If there is a breach but it does not rise to this level, the aggrieved party may have a claim for damages but generally is not relieved of its own obligations. Accordingly, it is important for students to understand the concept of material breach to be able to sort out who may owe remedies to whom. The nature of the breach may also influence the measurement of damages for that breach, as well as the availability of certain remedies (such as rescission). Professors who decide to treat the subject lightly may introduce the concept of material breach and its general implications but may decide not to cover complexities related to divisible and entire contracts and the like.

UCC Article 2 contains a web of rules relating to contract performance. Instead of resting on a distinction between material breach and substantial performance, the UCC rules set up a series of options that parties may take to resolve concerns about the other party's performance. These are the rules that relate to tender, acceptance, rejection, revocation of acceptance, and cure. Although the UCC nominally sets up a "perfect tender" standard—in most circumstances, the buyer is entitled to reject goods if they fail in any respect to conform to the contract—the seller often has options that allow it to respond to that rejection and cure defects in its performance. (Installment contracts are an exception to the "perfect tender" standard; in that context, the UCC establishes a standard roughly analogous to the common law concept of material breach.) A general understanding of performance under the UCC is useful to students, especially if they are going to study UCC damage calculations elsewhere in the course. It is difficult to sort out which measure of damages



is appropriate under what circumstances unless one has a basic understanding of the UCC rules relating to acceptance and rejection, for instance. There is a great deal of specificity in the UCC rules, however, and it is often impractical to cover them comprehensively in the first-year course. Due to the unfortunate overlap in terminology, students sometimes confuse the concepts of acceptance and rejection of goods with acceptance and rejection of offers, and it is worthwhile to emphasize that these concepts are entirely distinct and relate to very different aspects of contract law. Beyond taking some care to dispel any misunderstanding in terminology, it may suffice to summarize the general UCC concepts and move on.

Excuse doctrines are also conventional fodder for the first-year Contracts course. As noted in the previous discussion of mistake, they create a marvelous opportunity to discuss risk allocation, and students are often surprised at just how rarely the doctrines provide justification for failure to perform. The historical development of these doctrines is also rich, and professors who hope to draw out historical themes in their courses will probably want to make sure they address excuse. Nevertheless, as the doctrines are rather narrow in their application, professors who feel they have to make cuts in coverage sometimes allude to these doctrines in passing or omit them altogether.

It is possible to address anticipatory repudiation and similar doctrines in a very summary fashion without losing sense. Students intuitively understand the need for the doctrines and generally do not struggle with their outlines or implications. Nevertheless, this area allows for particularly subtle discussions of the difficulty of legal decision-making and the importance of legal clarity. For instance, the cases often posit situations where one party indicated it might not be able to perform, and the other reacted by ceasing its own performance. The ultimate result may depend on who was in breach under these circumstances. Professors who wish to stress counseling or planning perspectives might ask students to put themselves in the position of the parties at the time problems first began to arise. Students might consider what, if anything, they could have done to improve or clarify their legal positions at that point. They might also consider the degree to which the parties were likely to be considering legal (rather than practical) considerations at this stage of their relations. There are clear legal and practical hazards associated with overreacting or demanding too much in these situations. The exercise of sound legal and factual judgment might allow for resolution of

the dispute. If the relationship breaks down, sound judgment might also mean the difference between obtaining remedies for breach or, instead, being liable for damages.

Topics related to performance and breach flow directly from discussion of contract terms. They also lead directly into contract remedies. So they provide an important component to a general understanding of contract law, practice, and theory. At bottom, however, they are quite amenable to treatment at varying levels of depth and comprehensiveness.

## G. REMEDIES

Remedial issues are omnipresent in the Contracts course. Professors who choose to teach remedies at the beginning of their courses will have many opportunities to reinforce those themes as the course progresses. Professors who defer a discussion of remedies to the end of their courses will find that students are already familiar with many of the core concepts. Accordingly, remedies as a separate topic of discussion also admits of coverage at varying levels of depth.

Some discussion of specific performance is useful early in the course. Many students assume that enforcement of a contract consists of forcing the parties to carry out its terms. Although specific performance is, of course, available in some circumstances, it is not the core contract remedy in our legal system. Instead, the remedy for breach of contract is typically the payment of damages. It is useful to dispel this confusion early, even if more detailed study of specific performance is deferred until later in the course or omitted altogether.

In the first-year course, many professors introduce the general distinctions among expectation damages, reliance damages, and restitution. The role of expectation damages, at least in theory, is to place the aggrieved party in the economic position it would have enjoyed if the contract had been performed as agreed. In the first-year course, students often learn about the efficient breach hypothesis; that is, the law should be neutral between contract performance and contract breach so long as the breaching party compensates the other for its lost expectation. This hypothesis often inspires heartfelt disagreement, and a thorough understanding of expectation damages informs the resulting debate.

Reliance damages, instead, seek to compensate the aggrieved party for any damage it has suffered in reliance on the contract. That is, the aim of reliance damages is to put the aggrieved party in the economic position it would have been in had it not entered the contract at all. Discussion of reliance damages as a contract remedy has strong synergies with a treatment of promissory estoppel because promissory estoppel as a theory of recovery often depends on the extent to which the plaintiff relied to its detriment on the promise at issue.

Restitution as a remedy for breach of contract focuses on returning to the aggrieved party any economic benefit it may have conferred on the other party under the contract, whether through rescinding the contract or otherwise. Restitution as a contract remedy echoes themes that arise elsewhere in the course, particularly in the treatments of unjust enrichment and contract avoidance.

It can be quite difficult to distinguish among these types of recovery in practice, and in any given controversy, courts may allow some combination of them all. Although most students become comfortable with the concepts, they often struggle with their application. Accordingly, professors who have the luxury to do so may spend a significant amount of time introducing students to the measurement of the various types of recoveries. In particular, in the context of expectation damages, it is common to address damages based on market values, damages based on substitute transactions, and damages based on profits the aggrieved party would have received from the breached transaction. It is also typical to introduce the distinctions among direct damages, incidental damages, and consequential damages. Professors who address UCC Article 2 in their courses may also cover the UCC damage calculations. Students often find the UCC formulae to be illuminating because they concretely illustrate expectation measures under a broad range of circumstances.

The subject of contract remedies often extends to the limitations on a party's ability to collect damages. Generally, damages will not be recoverable if they cannot be established with reasonable certainty. Further, if the damages were not within the reasonable contemplation of the parties at the time the parties entered into the contract, their recovery may be limited accordingly. This limitation, often phrased in terms of "foreseeability," traces back to the classic case of *Hadley v. Baxendale*.<sup>21</sup> *Hadley* has inspired and continues to inspire vibrant

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21 *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

academic debate, both as to its meaning and as to the justification for its result, and it is a staple of most first-year Contracts courses. Finally, the defendant may seek to demonstrate that the plaintiff failed to use reasonable efforts to mitigate damages. The degree to which aggrieved parties should have the responsibility to minimize their losses in the event of a breach can inspire sharp disagreement and lively debate among students.

Some professors also explore more advanced topics in the arena of remedies. For instance, cases that address the availability of emotional distress damages or punitive damages are often compelling and provide new perspective on the purposes and effects of contract law. Professors who emphasize transactional perspectives may choose to address contractual limitations on remedy and liquidated damages at some length. Others may choose to address the availability not only of specific performance, but of prohibitory injunctions as a contract remedy. If there is limited time, however, many of these topics can easily be deferred to an advanced course in remedies or commercial law.

## **Part IV. Course Design**

This part provides ideas to help you translate your objectives into a concrete plan for teaching your course. As a practical matter, the first decision that confronts you is to settle on the materials that you will require or recommend your students purchase for your course. Once you have decided on your materials, you can begin to sketch out your coverage and think more broadly about the structure and content of your course. Throughout, I suggest you use your objectives as a lodestar and return to them repeatedly whenever you need to make a decision about course design.

### **A. CHOOSING COURSE MATERIALS**

There is no shortage of excellent Contracts casebooks and other contracts-related materials suitable for classroom adoption. In fact, the array is quite staggering. If you haven't already done so, you should contact each of the major law publishers and ask to be added to their list of law professors who teach in the contracts field.

Upon request, they will send you examination copies of each of the Contracts casebooks they publish, as well as samples of supplementary materials for your consideration. There may be someone at your law school who has already done this for you or will do so if you ask.

Once you have received a good selection of texts and other materials, you will be in a position to review them and to try to narrow your choices to the ones you will adopt or recommend. If you have an opportunity to do so, it can be very helpful to speak to the sales representatives of the various publishers who are responsible for your region. Often, they have broad knowledge of the books in the field and have spoken with professors who have used each of them. They can quickly tune you into the advantages, attributes, and personalities of the books their company publishes. You may be able to narrow your options to a manageable few based on their advice alone. Ultimately, however, only you can decide which materials will best serve the objectives you have chosen for your course.

Typically, you will choose a Contracts casebook to serve as the basis of study and discussions in class. You may also decide to require or recommend materials to supplement the casebook. I address each of these decisions in turn.

## 1. Choosing Your Casebook

As you choose among casebooks, there are many considerations to take into account. The organization of the book should make sense to you and should dovetail with your course objectives. The coverage of the text should be appropriate, both in scope and in depth. The emphasis and style of the book should appeal to you as well—you don't want to spend your course fighting against the authors' point of view or explanatory style. Especially if you are new to teaching or new to Contracts as a field, it's difficult to overstate the importance of a strong teacher's manual. Choice of a casebook is a very personal decision, and you will have to live with the ramifications of it for some time to come. So it is a decision worthy of careful consideration.

### *a. Organization*

The organization of a Contracts casebook typically falls into one of three general categories: those that begin with contract formation, those that begin with theories of obligation, and those that begin with remedies. Opinions differ as to which approach makes the best sense

and why. Issues of contract law are interrelated, and it is difficult, if not impossible, to approach and understand them in a purely linear fashion. So there is no one logical place to begin. As you consider which organization would work the best for you, keep your course objectives in mind. They may militate in favor of one organization over the others.

A professor who seeks to gain comprehensive coverage of doctrine while still achieving adequate exposure to case analysis skills may choose to begin with contract formation, and in particular with the concepts of offer and acceptance. The doctrine in this area is more clear-cut than the doctrine relating to theories of obligation or remedies. The very notion of an offer hints at some of the complexity to come, as an offer contemplates a bargain and the concept of a bargain is at the heart of consideration doctrine. Nevertheless, students generally have little difficulty grasping the general sense of the concept of an offer, even if they have not yet studied the details of consideration. The converse is not necessarily the case. Without any prior exposure to the mechanics of contract formation (and, as I suggested in Part III, even with some prior exposure to the mechanics of contract formation), students find consideration doctrine obscure and sometimes incoherent. If they miss the subtleties of the theories of obligation early in their study, they often are not able to recapture them later in the course. If you choose to begin with the analytically simpler concepts of offer and acceptance, this allows you to focus on case analysis in the early weeks of the course without too much fear that the subtleties of the doctrine will escape the students. By the time the students reach the conceptually more difficult materials, they already will have developed strong case analysis skills and will be ready to focus on the more nuanced topics at hand.

Some professors prefer to begin with theories of obligation. Doctrines such as consideration, promissory estoppel, and unjust enrichment directly address the foundational question of what promises and similar obligations the law should enforce. The theories of obligation also provide a rich context in which to introduce themes of contract theory and history, and professors who choose to emphasize such themes in their courses may wish to raise them early. For instance, professors who choose to draw out issues of gender, race, or class may find this area a fruitful place to begin. The cases in this arena are highly policy-driven and raise all sorts of questions about why and to what extent the commercial should be preferred

over the personal. There is merit to beginning a course with treatment of a central concern of the law, especially if it highlights a theme you hope to emphasize in your course. However, especially if you will be teaching in the fall semester, you should be aware of the pedagogical challenges inherent in beginning with the theories of obligation.

Some professors believe it is optimal, instead, to begin the course with a study of remedies. Especially if a professor emphasizes a litigation perspective on contract law, remedies may best illustrate the point of the exercise. To appreciate the importance of either contract formation principles or more general theories of obligation, it is helpful to understand what the legal consequences of a contract are. Further, a study of remedies, like a study of the theories of obligation, provides a clear entrée into theoretical and historical perspectives on contract law. Professors who seek to emphasize economic themes in their course, for instance, may choose to begin with remedies. A study of remedies puts the purposes and functions of contract law into sharp relief and provides a natural opportunity to introduce students to economic analysis of law. It also provides opportunities to explore the historical evolution of the doctrine. So a professor hoping to emphasize theoretical or historical themes can use a study of remedies to introduce them early in the course. In my experience, although they are complex, the cases raising remedial concerns are not quite as inaccessible as some of the central cases exploring theories of obligation. So although remedies do pose some pedagogical challenges for the beginning law student, they are not as severe as those presented by the theories of obligation.

Although my own preference is to begin with offer and acceptance, suffice it to say there is no one right way to organize the material or the course. The considerations described previously are meant to be illustrative; you may think of other reasons why one organization makes more sense for you than others. Do remember, however, that your students will be novice learners. However you order your materials, you should expect that it will take the students some time to orient themselves and begin to develop essential skills. The key point is to consider how you can organize your coverage to best achieve your course objectives while keeping in mind the pedagogical needs of your students. If practical, aim to choose a casebook that works well with that organization.

Although it is possible to assign materials in a different order from that in which they are presented in the casebook, this strategy

can pose hidden traps and is best avoided, at least in your first time through. For instance, later materials may continue themes developed in earlier materials or may cross-reference prior cases or discussions. Further, some authors attempt to graduate the difficulty of the materials they include in their casebooks, beginning with more straightforward materials and proceeding to more advanced ones. These aspects of the materials may not be visible until you actually teach them. As you gain familiarity with the casebook, the subject matter and your own approach to teaching, you may be able to reorder materials without too much difficulty. But if you are new to teaching generally and new to Contracts specifically, things will go more smoothly if you are able to follow the general organization of the casebook that you choose.

There are a few casebooks and other forms of teaching materials that are not organized along the general lines described previously. Instead, they adopt an organization and include content that better reflect the authors' own conceptions of contract law, practice, or theory. Although these materials can be excellent for some purposes, they pose a real challenge to the new professor of Contracts. Unless you are already very familiar with the field, it may prove difficult to separate broadly accepted themes of contract law from the authors' own scholarly interests or theories. And you may be well into the book before you are able to tell if the book's organization or content makes sense to you or serves your students well. Even if the organization or content of the materials is insightful, it may not dovetail well with treatises or other supplementary resources that you or your students might consult to gain further exposure to the subject matter. If such a book intrigues you, you might consider assigning a casebook with more conventional organization and content to your students and using the other as a "shadow source" to provide insights and ideas as you teach the course.<sup>22</sup>

### *b. Scope and Depth*

Most Contracts casebooks are suitable for a year-long course. Accordingly, most of them contain more than enough material to

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22 In their general book *Strategies and Techniques of Law School Teaching*, Howard Katz and Kevin O'Neill suggest selecting a secondary casebook or two that might serve as a "shadow source" as you teach your course. I agree that this is an excellent suggestion and submit that this might be one instance where a shadow source might prove particularly useful to you.



fill two semesters. Irrespective of the length of your course, it is almost inevitable that you will have to trim the materials somewhere. Nevertheless, it is worthwhile to consider how deeply you will have to pare back the materials. Students will wonder what they are missing if you assign them a sketchy patchwork of excerpts from a lengthy tome. Further, just as it can prove difficult to reorder materials, it can be challenging to omit too many materials without losing coherence. Although you should expect to make some omissions, the array of available Contracts casebooks is so rich and varied that you should be able to find one that meets most of your needs without extensive supplementation.

Evaluating the selection of cases may be one of the most difficult aspects of choosing a casebook. Unless you are an experienced professor of Contracts, it is challenging to determine how well the cases will teach until you have taught them. However, you can probably get the flavor of the case selection by browsing through a book. So as to best illustrate the breadth of doctrine, some books include heavily edited snippets of many cases. Other books are more selective in their coverage but include longer cases or focus on deeper treatment of particular issues. If your core objective is to gain comprehensive doctrinal coverage, you may prefer the former type of book; if you wish to focus heavily on case analysis skills, you may prefer the latter. Some books rely principally on classic, seminal cases, while others lean toward more modern cases. If you hope to draw out historical themes, you may prefer the former type of book; if you hope to illustrate how law plays out in contemporary society, you may prefer the latter. (Most books contain a good sampling of the chestnuts, so your students are likely to see some of the older cases in any event.) Some books include cases from a broad range of contexts—both personal and commercial—while others focus on disputes of economic significance. If you hope to highlight issues of gender, race, or class, the first type of book might be more to your liking; if you plan to discuss law and economics or introduce students to the complexities of business contracts, the second might suit you better.

The content of a casebook, beyond the cases themselves, is another factor to consider. Some books consist largely of cases with little to no explanatory text. In my experience, especially in a first-year course, this type of book proves challenging for the new professor. With a book like this, students learn largely through a process of induction. At the beginning of their law studies, they don't yet know

how to read or interpret a case. Unless the professor is very adept at drawing out the essential content of the cases, as well as putting the cases in context and exploring their implications, students gain an understanding that is fragmented at best. Professors may not realize how little students are getting from the materials until well into the semester.

A book that provides some useful questions, commentary, and problems is much more forgiving. The students gain a baseline understanding of the material from reading the book and have the opportunity to think about some of the central themes before ever coming to class. With that platform, they are prepared to engage in more subtle and nuanced discussions in class. Even after the inevitable teaching disaster, which we all experience from time to time, students can return to the book to achieve more clarity or reinforce their understanding.

Of course, it is important to achieve some balance. It is less than ideal if your casebook's supplementary materials are so extensive that there will be no realistic opportunity to address them in class. If you aren't going to discuss materials in class, it's best to avoid the temptation of assigning them anyway. Although students sometimes appreciate background information, the press of their workload often leads them to perform a form of law school triage. If you don't pay attention to materials in class, overwhelmed students soon will learn to ignore them whether you assign them or not. Dense notes summarizing the results of numerous cases prove particularly annoying, as do long strings of rhetorical questions that admit to no easy answer. All other things being equal, it would be best to choose a casebook that omitted such surplusage altogether.

Beyond commentary, questions, and problems, some texts include additional source materials. Some incorporate relevant extracts from the Restatement (Second) of Contracts or the Official Text of the UCC. If you expect to refer heavily to the Restatement or to teach the UCC in any depth, inclusion of this material constitutes a true convenience because it may obviate the need to require the students to purchase a separate supplement. It also increases the chances that the students will focus on those Restatement or UCC sections you choose to assign and will have them at the ready during class discussions. (I discuss this aspect further in Section 2.a.) Some casebooks include extensive excerpts from law review articles or other scholarly materials; others include background factual material. Again, I suggest you evaluate

the usefulness of this content in view of the objectives you have set for your course.

### *c. Emphasis and Style*

Some Contracts casebooks display a strong emphasis; others are more neutral in tone. Sometimes even the title of the book reveals the authors' emphasis. You can typically pick up if a book has a strong emphasis from reading the introduction and flipping through the remainder of the text. If you notice, for instance, extensive theoretical, historical, or factual materials, you might discern some common themes. Some emphasize law and economics, while some present "law in action" or critical perspectives. Some take a decidedly transactional approach, while others focus largely on litigation perspectives. Other books don't seem to express as much of a point of view and may contain a variety of materials.

If your casebook is relatively neutral, it is likely to admit to a broad range of teaching objectives. If you are not yet sure about the degree to which you plan to take a particular "slant" on contract law, practice, or theory, it might be best to choose a book that is more neutral. If one of your core objectives is to provide a particular perspective on contract law, a casebook that aligns with that perspective could be a useful teaching tool. Do not feel, however, that the book has to do everything: you can always provide your own spin through supplementary materials, through the way you conduct your classes, or otherwise. At a minimum, you will want to avoid choosing a casebook that requires you to fight against its point of view.

As you browse the available options, also take note of the authors' explanatory style. Some explanations set a friendly, helpful, and clear tone. Some come across as erudite or sophisticated. Others may appear overly simplistic or impenetrably complex. Some books use humor. Others do not. Some casebooks include graphics or charts, while others rely principally on text. As you narrow your choices, consider which styles would both appeal to students and meld with your own preferences.

### *d. Teacher's Manual*

A strong teacher's manual can be invaluable the first time you teach Contracts. Most (but not all) Contracts casebooks have teacher's manuals, but they vary in scope and quality. As you are choosing among casebooks, be sure to look at their respective

teacher's manuals. A strong teacher's manual will explain why certain cases are in the book and will provide suggestions for teaching them. Further, it will give answers (or at least suggest approaches) to any questions or problems contained in the book. It may include sample syllabi or otherwise provide suggestions for adapting coverage to suit different needs. Some teacher's manuals even include supplementary problems or materials for professors who choose to go into greater depth on certain topics.

*e. Making Your Final Choice*

Suppose you have narrowed down your options to a few casebooks. One way to make your final decision is to give each of your candidates a test run. Choose one or two of the relatively difficult topics you plan to cover in your course. For instance, you might choose consideration, misrepresentation and fraud, or the parol evidence rule. Find where each book first treats the topics you have chosen, and assign yourself the amount of reading you think would be feasible to cover in one class period. Generally, at the most, this would be fifteen to twenty pages or two to three cases per class hour. Read each assignment you have chosen and note your reactions. Do you think students would find the assignment engaging, or does it seem flat or dull? Does the material give you the platform you need to pursue your objectives, or does it leave out essential concepts or go off on unnecessary tangents? Do the materials inspire ideas about how you might teach the subject, or are you left wondering what you would do with your class time? Keeping in mind the amount of time you might have to teach the topic at hand, did the assignment cover the right amount of ground, or rather too little or too much? After you have read each assignment, read the portion of the teacher's manual that corresponds to that assignment. Is it clear and thoughtful? Does it answer all the questions the assignment raised for you, or at least suggest directions you might take? Does it provide helpful guidance on how you might teach the materials? A side-by-side comparison of the way that the various casebooks and teacher's manuals approach similar topics may prove very revealing. All told, a fairly thorough test run of two or three casebooks shouldn't take you more than a day and should help you hone in on your final choice.

## 2. Supplementary Materials

Whether you require or recommend supplementary materials may depend on the casebook you have chosen and the objectives you have set for your course. Supplementary materials generally fall into three categories: resource supplements, supplementary teaching materials, and student treatises and study aids. If you require or recommend supplementary materials, many first-year students will buy them as a matter of course—but that doesn't mean they will use them. If you plan to refer to them in class on an occasional basis, unless you remind them, the students may not bring the materials with them on the day in question. If students do use them, they may use them in lieu of reading the casebook carefully, reviewing their notes, or practicing their analysis skills. Before you require or recommend that students purchase anything beyond your casebook, consider what the purpose of the supplementary materials will be and the degree to which you are likely to integrate them into your teaching. Their value to the students may justify requiring or recommending them, or they may instead serve as an unnecessary expense or distraction.

### *a. Resource Supplements*

Most professors include some coverage of the Restatement (Second) of Contracts in their courses. Many also touch on UCC Article 2, some in significant depth. As noted previously, some casebooks include relevant Restatement and UCC provisions in the body of the book, and that may be an attractive feature to consider as you choose your casebook. Others, however, do not. If you choose a casebook that does not include the text of relevant Restatement or UCC provisions, you may wish to require a supplement that does. There are two main categories of resource supplements: those tailored specifically for the first-year Contracts course, and those that contain statutory and other resource materials that go beyond the scope of the typical first-year course. The legal publishers can send you examination copies of both types along with the casebooks they provide to you. There are advantages and disadvantages to both types, some of which I detail next.

Generally, the supplements designed specifically for Contracts include a selection of Restatement provisions and a selection of UCC provisions (sometimes with their Official Comments and sometimes without). Some of them also include other supplementary materials

potentially useful in the Contracts course. The disadvantage of these supplements is that they are not complete, and their coverage may not fully coincide with the exposure you would like your students to gain. Their editors, however, have compiled them with the needs of the typical first-year Contracts course in mind. Unless you expect to deviate significantly from conventional coverage, they may serve the purposes of your course just fine. They are generally quite slim and relatively inexpensive.

Several publishers also offer more extensive statutory and regulatory compilations. Those created for commercial law courses, for instance, typically include the full Official Text of the UCC, complete with Official Comments, as well as the full text of the CISG. Although these compilations contain materials beyond the scope of the typical first-year Contracts course, if students purchase them for your course, they may be able to reuse them in advanced contracts or commercial law courses as well. If you do decide to require one of these compilations, it may be worthwhile to coordinate with the professors who teach the advanced courses at your school to see which materials they typically require or recommend, and then align your choices accordingly. One disadvantage of these compilations, however, is that they typically do not contain Restatement provisions. If your casebook doesn't include Restatement provisions and you would like your students to have them, you may need to provide them separately.

### *b. Supplementary Teaching Materials*

There are a number of supplementary books designed to provide additional dimensions to the first-year Contracts course. Some of them provide background information on influential cases. Others provide theoretical perspectives on contract law. Still others address drafting or other skills particularly relevant to the practice of contract law. One or two provide global perspectives on contract law issues. Again, you may have received examination copies of many of these books from the legal publishers. It is worthwhile to look closely at these supplementary teaching materials as you plan and teach your course. They can serve as rich sources of information and inspiration.

Although many of these books are informative, interesting, and useful, that doesn't necessarily mean you should require them or recommend them to your students. It is easy to overestimate your students' ability to absorb additional materials. As noted before, it

is difficult to cover fully the content contained in most Contracts casebooks, even in a year-long course. Until you have gained some experience with your casebook and your own teaching style, you may wish to be conservative about requiring or recommending additional teaching materials to your students. However if you have chosen a casebook that is excellent in other respects but you feel is lacking a dimension you consider essential to achieving your objectives, one of these supplements may provide a ready-made way to correct that deficiency. To incorporate added dimensions meaningfully into your course, recognize you will undoubtedly have to reduce coverage of the materials in your casebook further.

### *c. Student Treatises and Study Aids*

Student treatises and study aids come in a broad range of formats and quality. Student treatises and study aids are a boon or a curse, depending on your perspective, and many professors have a love-hate relationship with them. If they are appropriate in coverage and depth, they can give students another take on the materials and provide reassurance to those who aren't sure they are picking up the material from class or the casebook. If they are inappropriate either in terms of coverage or depth, they can overwhelm and confuse students or alternatively lull them into a false sense of complacency.

Even if you remain silent or recommend against student treatises or study aids, a certain subset of students is likely to seek them out. If you have read a particular treatise or study aid and consider it an excellent supplement to your class materials, you may decide to recommend it to your class as a whole. If nothing else, this strategy may direct students toward the resource you consider the most helpful and away from those that are less so. Not all students are likely to have the same needs, however. Instead of recommending one resource to the class as a whole, you might choose to familiarize yourself with some of the Contracts-related treatises and study aids and offer to guide students to appropriate ones on a case-by-case basis according to their individual needs.

## 3. A Caution on Preparing Your Own Materials

You may have ambitions to create your own materials, either in lieu of a casebook or to supplement one. Although this may be a feasible long-term goal, it is not likely to prove practical to any

significant degree during your first year of teaching. Even if you have ample lead time, it is difficult to craft effective teaching materials before you have a solid sense of the capabilities and backgrounds of your students and have some experience teaching the subject. So it will be difficult to prepare materials in advance. During the term, you will seldom have time to devote significant attention to the development of course materials. Even if you are able to produce materials that are appropriate in concept and excellent in execution, you may find it difficult to get them to the students sufficiently in advance of the class in which you hope to use them. Further, any time you spend developing materials is time you will not have available to gain background in the field, prepare for class, reflect on your teaching, or counsel your students. Contracts is not a subject in which there is a shortage of excellent teaching materials; even if the readily available choices do not ultimately prove ideal for your purposes, on balance they are likely to prove superior to materials you prepare without sufficient attention.

Occasionally, you may feel that it would be helpful to design an exercise or provide a limited supplement to the materials you have chosen. You can experiment by adding them to your chosen materials as your needs and schedule permits. Again, however, I recommend that you do this cautiously, and do not commit in advance to anything you may not be able to deliver. As the years pass, you may amass sufficient teaching exercises and supplements to make creation of your own materials practical and worthwhile. But for the time being, it is advisable to rest principally on the efforts of others and devote your energies to developing your skills as a classroom teacher.

## B. SKETCHING OUT YOUR COVERAGE AND STRUCTURING YOUR COURSE

Once you have settled on a casebook and other materials, you are ready to start sketching out your coverage and structuring your course. In selecting your casebook, you have probably already made some initial decisions about the order in which you plan to address the broad areas of contract law. (In Section IV.A.1, I suggest some of the usual approaches casebook authors take.) To sketch out your specific coverage, you will want to determine which individual topics you will cover (as well as those you will omit), and whether you



should make any adjustments to the ordering of the topics from that presented in your casebook. You may also make some initial choices as to the aspects of those topics you will emphasize. In addition, you might put some thought into how to best teach those topics.

To allow yourself to learn from experience, I suggest you keep your advance planning open-ended, and do not overstructure your course. You will undoubtedly need to make adjustments as the course progresses. However, if you start your planning with your objectives firmly in mind, you will be able to make some sensible decisions early, which will prevent you from drifting and will increase your effectiveness. I address coverage decisions and course structuring decisions in turn.

### 1. Sketching Out Your Coverage

As you think ahead to course coverage, keep in mind the need to preserve flexibility. It is helpful to plan in general terms what topics you will cover and what ones you will omit. Because most professors will not be able to cover all topics included in their casebooks, optimally you would choose what to cover so as to best achieve your objectives, rather than simply marching through the materials until you run out of time. That having been said, it can be difficult to judge in advance how long it will take to teach certain materials. Some may take longer than expected; students may master others with surprising ease. Further, as your course progresses, you may find that there are certain topics or skills that interest and engage the students, and you may want to spend more time on them than you originally planned. Likewise, there may be others that do not seem as important as they appeared when you initially sketched out your coverage. Accordingly, in my view, the best practice is to outline a plan in advance of teaching your course, but recognize that it is equally important to adjust and modify it during the conduct of your course to respond to the needs of your students.

With your materials in hand, you may wish to begin by determining in general terms which topics you plan to cover and which you will omit. For a list of possible topics, the table of contents of your casebook may provide a helpful starting point. The table of contents will not only survey the general subjects addressed in your materials, it also will give you a sense of how much emphasis each one receives in the materials you have chosen. If you teach a year-long course and

hope to have a strong doctrinal emphasis, you may have the luxury of teaching most of the topics included in your materials. If you teach a shorter course or hope to achieve objectives beyond mastery of doctrine, you may need to choose among the topics included in your materials, and omit some altogether. The short description of the doctrinal coverage of the conventional Contracts course in Part III might help you make some decisions about which topics are particularly relevant to your objectives, and which might be omitted without too significant a sacrifice.

Even within a certain topic, your objectives may influence the aspects of that topic you choose to emphasize and those you decide to deemphasize or omit altogether. For instance, consider how you might adapt your coverage of theories of obligation to best achieve your objectives. Suppose you decide to emphasize issues of race, class, or gender in your course. You might decide to include materials on the basics of consideration doctrine and use them as a vehicle to question why promises made in a commercial context are often enforceable, but gift promises among friends and family often are not. You may decide that you need only touch on the preexisting duty rule lightly, and perhaps omit all but a general mention of the many judicial and legislative erosions to that rule. Instead, you may decide to include a more extensive and textured discussion of promissory estoppel, a context where promises made in noncommercial contexts tend to play a starring role. Alternatively, if you decide to emphasize transactional perspectives in your course, you may choose to treat the preexisting duty rule in some depth, particularly as it applies to modification of contracts. Further, in the context of promissory estoppel, you may decide to emphasize the use of the theory in the context of precontractual negotiations and deemphasize promissory estoppel in charitable or family contexts. Again, it may not be necessary to make exhaustive and definitive coverage decisions as part of your initial planning, but if you keep your objectives in mind throughout, you may see some opportunities to craft your coverage accordingly.

A possible goal is to rough out a list of the pages in your materials you hope to cover during the term. To check how realistic your coverage goals are, you might estimate the page count of the materials you have isolated and compare it to the total number of class hours you will have available. At this stage of your planning, it may only be possible to come up with a sense of whether the gross

number of pages you have identified approximates the appropriate range, or whether you should consider adding or deleting topics from your overall plan.

To make this comparison, you will need to develop an initial estimate of how much material in your casebook would constitute a feasible assignment for an average class period. Recognize that casebooks differ a great deal in their density, and how long it takes to teach particular material depends on what you plan to do with it. A good teacher's manual may provide some suggestions about appropriate assignment lengths, but at best these suggestions are only that and may prove inappropriate for your teaching style or students. In my experience, it is unrealistic to expect students to absorb more than fifteen to twenty pages of the average casebook per class-hour. In addition, unless you plan to give them summary treatment, it is challenging to discuss more than two or three cases in any given class-hour, even if they are relatively short. Problems, although often very effective teaching tools, can be deceptively dense, and sometimes they take a significant amount of class time to explore fully. So you should assume that any estimate you make contains a healthy margin of error. If you develop an informed estimate for an average assignment, however, it will allow you to do two things: assess how realistic your overall plan is and give you a benchmark to compare against your actual experience as you begin teaching your course.

## 2. Structuring Your Course

As you sketch out the coverage for your course, you are settling on *what* you hope the students will learn. As you turn to course structure, you are focusing instead on the *how*; that is, how you can teach and students can learn the subject matter to best attain the objectives you have set for the course. A course structure may be very simple—for instance, you might plan to assign readings in advance of class, lecture and discuss the materials in class, and test the students' mastery at the end of the course by way of a traditional law school exam. Alternatively, you may decide to establish a more elaborate structure. For instance, you may create varied methods for the students to participate, build in periodic exercises or simulations, or plan multiple opportunities to provide feedback or assess students' progress. Many specific decisions about teaching methodologies are best made as you prepare for individual classes and gauge students'

needs at that time. However, there are decisions you can make at the planning stages that can sharpen the outlines of your course and help communicate your objectives and expectations to the students.

If you are new to teaching, I strongly suggest that you err on the side of simplicity. This advice may seem counterintuitive. Learning theory suggests that students master and retain material more readily if they are actively engaged in their learning, receive regular feedback, and have multiple opportunities to practice and apply what they have learned. This might suggest that the best course design would be one that required students to participate in various ways, provided structured opportunities to submit work product and receive feedback, and assessed students' performance on all aspects of their learning. However, the practical reality is that effective systems for requiring and assessing active engagement are difficult to develop and monitor. It often proves particularly challenging to give qualitative and evaluative feedback that is timely, supportive, helpful, and fair. In your first year of teaching, you can expect that substantive class preparation will consume much of the time you have available to dedicate to your teaching. You may set yourself up for failure if you structure your course in such a way that you are required to perform extensive administrative and evaluative tasks during the term.

I encourage you to think of the task of structuring your course as a multi-year enterprise. In this, your first year of teaching, consider whether you can develop a system for conducting your course during the term that encourages active learning but doesn't require you to keep track of participation or evaluate the quality of students' ongoing engagement. For instance, you can suggest certain activities for the students, but not require them. Often, first-year students approach their law studies with such enthusiasm that they complete all tasks suggested to them, whether there are consequences associated with completing those tasks or not. If you suggest, for instance, that posting a weekly comment to the course website is a good way to engage with the subject matter, many students will endeavor to do just that, whether or not you require it or include it as a component in their course grades. Or you could require certain activities, but grade them on the basis of completion rather than quality. For instance, you could indicate that students who post a minimum of ten comments on the course website over the course of a semester might be eligible for a small bump upward in their course grades. In either case, you could resolve to respond to as many

student comments as your schedule permits, so as to give a limited form of reinforcement and feedback, without necessarily promising in advance to do so. As you gain more experience with the structure you have developed, you can then determine whether there are certain aspects of it that could be expanded in future years to allow for more formalized feedback, or whether there are others that might permit more qualitative assessment.

Perhaps a counterexample might help to illustrate the hazards of overstructuring your course. If you develop an elaborate series of activities and assign consequences to them, you will have little flexibility if the activities prove unduly time-consuming, unwieldy, or difficult to assess. Suppose, for instance, you decide to assign a series of written assignments and base the students' course grades on those assignments. As you get into the semester, you realize how time-consuming it will be to give the students feedback on the assignments as they complete them. Nevertheless, you pull out all the stops and give them extensive written feedback on their first written assignment. But you find that the students perceive your feedback not as helpful, but rather as overly critical and harsh. The students develop anxiety about their course grades, and negative attitudes toward you infect the classroom dynamic. You find it a challenge to restructure the next few assignments to lead to better results.

Suppose instead you are less ambitious in your requirements. For instance, you might give the students a practice problem and suggest they spend no more than an hour completing it. You could ask that they turn in their work product to you, but clarify that you will attach no consequences to it. You read a sampling of the student analyses and provide some collective feedback to the class as a whole. Perhaps you even prepare an example analysis of your own to hand out. The students have a limited amount of time invested in the enterprise, and their grades don't depend on it, so their anxiety levels are likely to be low. Yet they gain some experience writing an analysis, a skill they may need to exhibit on your final exam. The feedback they receive is helpful, yet it doesn't take an enormous effort on your part to provide. If the process as a whole does not seem worthwhile after you do it once, you need not repeat it. At least until you have gained more experience with teaching and with the subject matter, I suggest the more modest approach is not only easier on you, but ultimately more effective for the students. At bottom, when it comes to course structure, I suggest you start small and resolve to structure your

course in such a way that you preserve the flexibility to change things if need be.

Although I advocate flexibility, you may still wish to plan specific components to include in your course. In particular, I suggest you consider whether there are some small steps you can take to embed your objectives into your course structure, and give some examples in the next subsection. For each component you choose to include, you will want to think about what expectations you will convey to the students, as well as how much class time you should set aside to carry out your plan. Irrespective of your objectives, you will want to determine what your expectations will be regarding class preparation, attendance, and participation. Further, if you plan to ask the students to complete any out-of-class tasks above and beyond regular class preparation, attendance, and participation, you might sketch out what the nature and timing of those tasks might be. Finally, you will want to think about what will provide the basis of the students' grades in your course. In particular, if you decide to grade students on anything other than their performance on a final exam, you should determine how and when you will perform that assessment and structure it into your course. I address each of these possible components in turn. I also discuss possible means of assessment in more detail in Section V.D.

#### *a. Embedding Your Objectives in Your Course Structure*

There may be some small things you can do in your course structure to make your objectives visible to your students and to help set the mood or the tone for more specific teaching and learning activities. For instance, suppose you have decided to emphasize historical themes in your course. You might decide to ask the students to create, over the course of a semester or a year, a contracts timeline. This could be an individual exercise or a collaborative effort of the class of the whole. As you proceed through the course, you could ask the students to place the cases you study into their proper historical context, possibly adding a detail or two based on their own research about what was happening (legally or more generally) at the time. At the beginning of the course, you could provide the students with an electronic or paper template, you could set up a webpage where students could add their own events or reflections, or you could leave it up to the students' creativity to determine the form the timeline should take.

Alternatively, suppose you have decided to emphasize the practice of contract law, professionalism, or broader notions of collaboration and teamwork. On the first day of class, you might divide the students into “law firms” of three or four students each, and throughout the course, ask the law firms to discuss certain matters, work collaboratively on analyses or other projects, or play the role of advocating for or counseling a client. These meetings could go on during class time or outside of class, as appropriate.

Or suppose you have decided to emphasize critical perspectives on contract law and hope to draw out issues of race, gender, or class. You might establish a class “back story” archive and encourage students to investigate the background of some of the disputes that led to the cases you study throughout the course. Every time a student located information about one of the litigants or controversies involved in your course, he or she could disseminate it to the other students in the class or provide it to you to place in the archive. You might even suggest that the “back story” archive be created to serve as a resource for future classes, or even a broader audience through publication on a website.

You may have some other ideas for ongoing class activities that resonate with the objectives you have chosen for your own course. To serve their purposes, none of these projects need be extensive. Nor need they be mandatory or contribute to the students’ grades. The idea is to provide a relevant context for the themes you hope to draw out and to provide an alternative means for the students to engage with the subject matter. If you do choose to include a component like this in your course, however, you will probably want to introduce it to the students early and emphasize it often.

### *b. Attendance, Preparation, and Participation*

The American Bar Association accreditation standards for law schools require that students regularly attend the courses in which they are registered. The degree to which this requirement is monitored differs a great deal from school to school, and even from class to class at the same school. In my experience, attendance tends not to be a problem in first-year courses. However, individual students may have family or other issues that lead them to miss or be late to class on a regular basis. You may wish to think about how you will deal with students who experience these sorts of attendance problems. Some professors request that students inform them in advance if

they are going to miss class or, in case of an emergency, follow up to explain their absence as soon as practicable after missing class. Other professors take attendance. (An easy and nondisruptive way to do this in a large class is to print out a sheet with all the students' names on it and pass it around at the beginning of class. Each student who is present can either highlight his or her name or else sign in an indicated space.)

If you do plan to track attendance, you should think about what the consequences will be if a student is late to or misses a significant number of classes. Some professors are quite draconian; they set a limited number of permissible late arrivals or absences, and if a student exceeds that limit, the student is required to withdraw from the course. Other professors follow up with students who are not attending regularly and determine appropriate actions on a case-by-case basis when the circumstances surrounding the absences become clear. Yet other professors believe it is a student's responsibility to attend class on a regular basis; if a student chooses not to, it isn't the professor's concern. In determining what your approach will be, it may be worthwhile to consult with the Dean of Faculty, Registrar, or other appropriate person at your school to see if your school has established policies or procedures regarding student attendance. Again, whatever your policy, consider whether, how, and when you should communicate it to your students.

Although many first-year students are diligent and responsible in the extreme, you can expect that some students will occasionally attend class without having completed the assigned reading. If you call on students randomly, you may find that some are not ready to participate in the discussion. If you rely largely on volunteers or assigned experts for your class discussions, you may or may not be aware of the other students' level of preparation. As a matter of teaching pedagogy, you will develop methods to deal with any lack of preparation as it arises. But you may wish to build some components into the structure of your course to alert the students as to your expectations.

Some professors indicate that they expect students to be prepared, period. Others tell students that there may be times that they may not be able to prepare, but that the student should inform the professor in advance should that happen. Others may give each student a limited number of "free passes" or otherwise establish a mechanism for allowing students to opt out of class discussions on occasion.



One system that sets a somewhat more positive tone asks students to highlight their names or sign a class list if they are present, have made a good-faith effort to prepare for class, and are game to participate in the discussion to the best of their abilities. If professors use one of these systems, they may give some sort of reward (grade-based or otherwise) for an excellent record, may attach negative consequences to a poor record, or both. Some professors set up a system for encouraging preparation but attach no consequences to it, believing that the existence of the system itself will establish the professor's expectations and encourage students to behave appropriately.

Beyond mere attendance or even preparation, some professors seek to encourage or reward active class participation. There are many pedagogical techniques you can use to encourage class participation. Especially in the first-year Contracts course, however, there are some hazards to including an explicit class participation component. First-year students can be quite enthusiastic. Sometimes the challenge is to contain discussion rather than encourage it. Other students are unduly intimidated by the law school environment and take some time to acclimate. A requirement that these students participate in a public, individual way may only serve to increase their anxiety and ultimately impede their learning.

So if you establish a system to encourage class participation, you may find that the system is counterproductive. If you use a quantitative measure to assess participation, you encourage the talkative among your students to dominate class time and risk charges of unfairness by those who are not able to insert themselves into the discussion. Alternatively, if you seek to assess the quality of class participation, you may find that it is very difficult to do so in a manner that is consistent, transparent, and unbiased. Students who are reticent to speak up in any case may be even more so if they feel the quality of their comments is under review. The task of evaluating either the quantity or the quality of students' participation may also distract you from other aspects of your teaching. It can prove a challenge to remember who made particular comments or provided other contributions to class discussions. Further, there is some evidence that gender and ethnicity contribute to varying communication styles, and some measures of class participation may unfairly favor certain student demographics.

If you feel strongly that participation should be a part of your course structure, there may be ways to address the challenges I have

identified. Some professors, for instance, ameliorate some of these challenges by including participation in an online forum or other discrete, recordable exercises as a component of class participation. Although reasonable minds differ on the subject of class participation systems, my view is that they are difficult to design and administer, and there is little need for them in the first-year Contracts course. It may be enough to value broad participation and to exhibit an expectation that students remain actively engaged in classroom activities.

### *c. Student Work Product and Assessment*

In your first run-through, you may decide that you will teach the materials as they arise, and you will not require any tangible work product from students other than an end-of-semester exam. If, however, you want to ask students to complete other work product during the term, or if you plan to conduct significant simulations or other exercises during class time, you should sketch out those plans in advance. As you get down to the nuts and bolts of determining your assignments, you will want to allocate time for these activities and possibly reduce your subject matter coverage accordingly. Ideally, you would also be as transparent as practical with the students and tell them at the beginning of the course what they should expect in terms of workload. Particularly if any portion of the students' grades depend on activities conducted or work product produced during the term, the students should know that from the outset.

Here again, I suggest you maintain some flexibility in your planning. You should settle on enough details to ensure that you reserve appropriate amounts of time and give students sufficient notice, but you should not hem yourself into plans that may prove unworkable once you enter the semester. For instance, suppose you decide you would like students to engage in various exercises during class time. Perhaps you decide you would like to allocate one class to a drafting exercise, one to a negotiation exercise, and one to an advocacy exercise. If you design the exercises to require little in terms of additional preparation and if you do not grade the students' participation in them, there may be no need to inform the students of the details of your plans in advance. If your initial plans prove unworkable or overly ambitious in practice, you can always scale them down with no disruption in the students' expectations. However, if the students will be required to do substantial work outside of class to prepare for the exercises, or if a portion of their

grade will depend on their completion of the exercise, it would be appropriate to give them more extensive notice of what to expect and when. This would limit your flexibility to change up your plans should the first exercise be less than successful or should it take more time than you think it merits. Again, I would counsel that you err on the side of informality and flexibility until you have some experience designing and conducting extensive in-class exercises.

The same advice goes for out-of-class projects or exercises. For instance, you might want to give the students multiple opportunities to practice their written analysis skills. One way to do this would be to plan a few short exercises that the students could complete outside of class time, but which you would refer to or discuss during class. Although you might make it a course requirement to complete the exercises, you might decide not to grade them. This plan would allow you significant flexibility: it might be enough to tell students that there will be a few ungraded out-of-class exercises from time to time, none of which will require an excessive investment of time. You could then continue to flesh out the nature of the exercises, their timing, and the use to which you will put them as the semester progresses. If, instead, the written assignments are substantial or if they are part of the basis on which you plan to evaluate the students, you will probably want to settle on your expectations early so you can communicate them to the students and they can plan their schedules accordingly.

It is particularly important to give some serious thought to assessment. You should have a clear idea before the course begins of the basis on which you plan to grade the students. Some students are understandably anxious about any aspect of the Contracts course that carries a grade with it. The earlier you can give students notice of your expectations and plans, the more you will dispel undue anxiety. To the extent you plan to grade students on any work product they produce during the term, it will be necessary to give the students time to complete it during the semester and reserve time in your schedule to develop the project and grade the students' work. For instance, if you plan to give a mid-term exam, you may want to determine the date on which that exam will occur and the general format the exam will take. In doing so, take into account how much time it will take you to develop the exam, as well as how much time it will take you to grade it. Also consider whether the exam will occur during class time or whether you will allow students to complete it online or otherwise outside of class time. Recognize that in the few classes leading up to

the exam, the students are likely to be preoccupied with preparing for it and may deemphasize their participation in class as a result. You are also likely to spend some class time after the exam debriefing or otherwise dealing with questions students have regarding the exam. None of this is to suggest that providing multiple assessment opportunities is a bad idea; in fact, as a matter of pedagogical theory, I would argue the contrary. However, you should recognize that there are administrative and time constraints on your capacity to assess students' progress through formal assessment tools. In your first year of teaching, it may be wise to be modest in your goals. As to the content of any assessment tools you plan to use, I discuss assessment further in Section V.D.

### C. PREPARING YOUR SYLLABUS

You will probably want to prepare a syllabus or other short handout introducing the students to your Contracts course. Students are anxious to plunge into their studies and find it anticlimactic if the first class consists largely of a discussion of course logistics. A carefully crafted syllabus allows you to address course logistics efficiently without squandering excessive class time. Further, it is useful to elaborate basic information about the course in a handout, so students can refer back to that information during the semester if need be. The syllabus might also give a general description of contract law, explain your "take" on the subject matter, or reveal your objectives for the course.

Your syllabus is your first opportunity to be transparent about your course design and expectations. Among other things, you might want to confirm the required materials for the course and tell the students how they will receive their reading assignments. You might want to convey your expectations as to attendance, preparation, and participation. You might forewarn students of any significant in-class or out-of-class exercises you plan to assign during the term, and (at least in general terms) alert them to the method you plan to use to assess them at the end of the course. You could direct students to a course website and invite them to contribute to it as the course progresses. You might also want to list your office hours, phone number, and e-mail address. Finally, you could convey that you welcome opportunities to discuss any questions students may have about the course or about law school generally.

Many professors include their reading assignments for the semester in their initial syllabus. Especially in your early years of teaching Contracts, I caution against this approach. For your own reference, you will probably want to sketch out the semester's reading assignments before the course begins. I strongly suggest, however, that you view your sketch as your own private working plan, and refrain from giving it to the students at the beginning of your course. You should expect that you will need to adjust and modify your sketch as the semester progresses. It is very difficult to predict how long it will take to teach certain materials. Even as you gain experience with your teaching materials, you may find that each group of students has a personality of its own, and pacing can (and perhaps should) differ from year to year. Students can become frustrated if reading assignments, once given, are constantly adjusted. Even if you omit dates and just progress along the listed assignments in order, students may become anxious if, as the semester progresses, it appears that you will never reach large chunks of material at the end of the syllabus. Yet it is not advisable to rigidly stay the course and press to complete all assignments as scheduled, whether or not the students are along for the journey. Instead of including a semester's worth of assignments in your initial syllabus, I suggest you provide a description of what students can expect in general terms, along with a maximum of two to three weeks' worth of assignments. This approach will give students adequate time to prepare. But it will also allow you the flexibility to find the pace that is appropriate for the class with minimal disruption to the students' expectations.

## **Part V. Teaching Your Contracts Course**

During the process of designing your course, you have already thought about how coverage and structure can facilitate fulfilling the objectives you have identified. This part of the book provides some suggestions about how to implement those choices in the day-to-day conduct of your class.

I begin by discussing various ways you might approach the first few classes of the semester. From there, I give some suggestions for ways to implement your objectives during the semester and include a brief discussion of how you might incorporate technology into your teaching. I close with some additional words about exams and other means of assessment.

## A. WHAT TO DO WITH YOUR FIRST CLASS OR TWO

Especially if you teach Contracts in the first semester, law students will approach your first class with curiosity, enthusiasm, and, quite likely, some level of anxiety. Some professors assign material from the text they have chosen and plunge right into analyzing the first case or two. Others spend the first class discussing course logistics. Whatever you choose to do, you should aim to treat the first class as the exciting event that it is and to use it as a vehicle to set the tone for your course as a whole. As you think about what you would like to do during your first class, consider how to best introduce the students to the objectives you have chosen for your course, while at the same time conveying the information you think they need to participate effectively.

### 1. Course Logistics

As I mentioned in Part IV, students appreciate it if you describe the logistical details of your course in a syllabus or other handout and provide it to them on or before the first day of class. Unless you plan to devote a significant portion of your first class discussing logistics, you may want to assign your syllabus as part of the reading for your first class. Even if you do this, however, you may wish to touch on some of the highlights in class and invite the students to raise any questions they might have.

### 2. Setting the Scene

One function of your first class might be to set the scene, and in particular to highlight one or more of your main objectives for the course. Suppose, for instance, that one of the objectives you have chosen for your course is to connect Contracts to the students' own experiences and provide opportunities for them to envision their own futures as lawyers. To emphasize the students' connections to the subject matter, you might structure your first class as a thought experiment, drawing largely on the students' own instincts and perspectives to explore materials related to contract law. Instead of introducing students to the law of contracts as it is, you could invite them to imagine how they think it should be.

One type of thought experiment provides the students with facts and asks them to speculate about the law. For instance, you could

choose some raw materials concerning a recent contracts dispute and assign them as advance reading. The raw materials might consist of some news articles about a brewing dispute, some pleadings from a recent lawsuit alleging breach of contract, or the facts of a recent yet colorful case. Then you could invite the students to brainstorm about the facts, and in particular, to discuss how they think a legal system should deal with them. You can generally complete an exercise such as this one in thirty to forty minutes, which will leave time for a general introduction to the course and a discussion of course logistics as well, if you so desire.

To give a specific example of this technique, on a few instances I have assigned the complaint from the *Kim v. Son* case as readings for my first Contracts class.<sup>23</sup> The controversy involved an investment deal gone bad. The protagonists were two Korean businessmen, and their dispute centered on the enforceability of a drunken promise by one of them to make the other whole for his losses. A copy of the promise, which was written in Korean and in blood, was attached to the complaint. However, the complaint neither translated nor explained the import of the attachment. Overall, the complaint was gloriously obscure, and it is difficult to ascertain what the plaintiff alleged happened and when. But there is enough detail to allow for speculation. When I assigned the complaint, I included a brief description of what a complaint is and the function it serves in a lawsuit, and I also posed some questions for the students to consider in advance of class.

In class, we engaged in a free-for-all brainstorming session. I told the students that this might be the last time they would have the luxury of musing about the law without the burden of any specific legal knowledge, and I encouraged them to bring their own experiences and perspectives to bear on the exercise. I asked them to reconstruct what might have happened, given the plaintiff's account in the complaint. If the facts were as they imagined them to be, I encouraged them to decide how the law should best resolve the

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23 This controversy resulted in an unreported written opinion, *Kim v. Son*, not reported in *Cal. Rptr. 3d*, 2009 WL 597232 (Cal. App. 4th Dist.). The case was decided on consideration grounds. I have never actually assigned the opinion in my course, but in years when I have used it on the first day of class, once we got to consideration later in the semester, I reminded the students of the exercise and noted how the case was resolved. I obtained the complaint from a gracious Contracts colleague who posted it to the Contracts professors' list-serv a few years ago.

dispute. I refrained from imposing my own views about the facts or explaining what I thought the legal issues were; I let this first class be all about the students and their thoughts. What I found was that students regularly shared insights from their own backgrounds that were directly relevant to the dispute. For instance, one year, a law student from Korea offered to translate the language of the blood contract for the benefit of the other students, and she also spoke a bit about Korean culture and how she thought it factored into the relationship between the parties. Some students questioned how serious people can be if they meet to discuss matters in a bar. Others stressed the importance of understanding the relationship between the parties before deciding what legal obligations they should owe to each other. It was useful to allow students to react to the fact pattern based on their own backgrounds and experiences and to reveal the diversity of views represented in the room.

If you choose to conduct an exercise like this one, you should be prepared with tidbits to salt into the conversation. For instance, you might have additional facts ready to keep things going should the conversation flag. For instance, you might reveal some facts that weren't apparent from the materials you gave to the students (you may not have been able to tell that this promise is written in blood—does that matter, do you think?) or various permutations on the facts (we don't know the background of these two men—would it matter to you if the promisee was known by the other to be a gangster?). If you choose an interesting controversy that resonates with the students, you may have to say little; the conversation likely will take off on its own.

You can conclude the exercise by suggesting that the students have raised some excellent questions and have anticipated some of the major themes of contract law, and they will be spending the rest of their time together in the class addressing those questions and exploring those themes. The point of the exercise is to emphasize that the experiences, perspectives, and capabilities students bring to law school can inform their study and deepen their understanding, and they should not lose sight of what they already know. If you refer back later in the course to the insights specific students raised during this initial class, you can reinforce this point as the semester progresses.

An exercise such as this one can be fun, and with the enthusiasm of first-year students, it is unlikely to fall flat. Because it can be styled



as a brainstorming exercise, and you can make it clear that you don't expect the students to have any answers at this point, it can dispel some of the natural anxiety associated with speaking up in a large group. It can build confidence because it suggests that students' own experiences and perspectives are relevant to the study of law. And it can be productive; you can expect to walk away from class with specific comments students have made that you can use in future classes to introduce the main themes of the course.

If you choose to do something like this, I suggest you find a controversy that raises some of the broader questions of contract law and at the same time resonates with the themes you hope to emphasize in your course. It need not necessarily raise the first issue you are planning to discuss in your course; instead, it can provide context for the course as a whole. For advance reading, I like the idea of assigning lawyers' work product associated with a real controversy because it adds an air of reality to the exercise and gets students thinking about the role that lawyers play in shaping legal disputes. News articles could serve the same purpose. If your objectives are different than mine, you might want to adapt the materials you give your students accordingly. For instance, you might choose a case that raises themes that you hope to emphasize and adapt the facts of that case into a hypothetical. For instance, the facts of the Baby M case<sup>24</sup> raise the question of what promises the law should enforce, but also allow for discussion of issues of gender and class. The facts of *Hawkins v. McGee*<sup>25</sup> and *Sullivan v. O'Connor*<sup>26</sup> focus instead on what it means to enforce a contract, and in particular what the proper measure of contract damages should be. Such remedial issues may be particularly well adapted to introduce an economic approach to contract law. The central idea of the exercise, then, is to start from facts, and allow students to speculate freely and broadly about the law.

### 3. Establishing a Conceptual Map

If you do start your course with a discussion of logistics or an exercise similar to the one I describe here (or both), you will probably be anxious to get down to business in your second class. Some

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24 *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988), *on remand*, 225 N.J. Super. 267, 542 A.2d 52 (Ch. Div. 1988).

25 *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

26 *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E.2d 183 (1973).

professors like to give a brief overview of contract law in a lecture, in the belief that it is helpful for students to have a sense for the field as a whole before they begin their in-depth study. Others like to start with the first case or two in their materials and proceed to engage in close analysis of judicial opinions. It is also possible to blend the two techniques by using an introductory case or two to help students build a “conceptual map” of the subject matter.

I use the phrase “conceptual map” to mean a series of five or six questions which, taken together, subsume most of the subjects you plan to address over the length of your course. In Part III, I described some of the major doctrinal areas included in the conventional Contracts course. If you plan to emphasize legal doctrine and at least touch on all of the areas summarized earlier, a conceptual map might consist of something like the following:

1. What body or bodies of law apply?
2. Under applicable law, do the parties have an enforceable contract or contract-like obligation?
3. If so, what are the terms of this obligation?
4. Has either party unjustifiably failed to perform those terms?
5. If so, what remedies are available to the aggrieved party?

There may be some subjects you plan to address that don’t fit neatly into these five questions. And it may not make sense to ask and answer them all, or in this order, in any given situation. Nevertheless, the questions provide a way to think about contract doctrine that allows students to organize details as they learn them and to keep track of how the subject at hand fits into the bigger picture.

An illustration might help explain how to use one of the first classes to establish a conceptual map. The first case in the book I have used for Contracts in recent years is the Minnesota Supreme Court’s decision in *Cohen v. Cowles Media Co.*<sup>27</sup> This case concerns the enforceability of a newspaper’s promise to keep the identity of a source confidential. The opinion is admittedly somewhat incoherent in its analysis, and it is almost entirely devoid of doctrinal detail. One gets the sense that policy considerations are lurking below the surface of the court’s opinion, so it is a perfect vehicle to introduce students to the complexity of case analysis.

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<sup>27</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990).

Suppose you assigned the case (or one like it) as the first case the students read. You might call on a student or ask for a volunteer to help the class talk through the case. You might expect the student to appear nervous, as he or she may have little idea of what to expect. As a way to allow the student some time to calm down and focus, you might briefly introduce the case to the class, and then ask the student general questions that do not necessarily require a close reading or understanding of the court's specific analysis.

For instance, you might say something like the following:

This case, of course, involves the enforceability of a newspaper's promise to keep a source's identity confidential. The court's analysis is somewhat obscure, but in the end, it concludes that under these circumstances, the promise of confidentiality should not be enforceable as a contract. Before we get into the specifics of the case, why don't you help us put it in context? Imagine you represented Mr. Cohen before this case went to trial. What sorts of questions do you think he should have to answer in order to be able to win the lawsuit? That is, what do you think he should have to prove?

Almost anything the student says in response can be useful; with some gentle nudging, this student may go a long way toward raising all the questions you might include in a conceptual map for your course. As the student raises relevant questions, you could put them on the board, largely in the student's own words, in an order you think makes sense. If the student doesn't identify all the questions you'd like to use in your map, you might take other suggestions from the class as a whole, or you might fill in a few questions yourself. When you get to the point that you have outlined a sensible conceptual map on the board, you might identify it by the student's name (e.g., "Brad's enormously useful roadmap" or "Sadie's five essential questions"). If the class as a whole contributes or if you have to fill in some of the questions, you might give it a more general yet somewhat whimsical title (e.g., "Our Five Giant Questions in the Sky" or "Our Guide to the Secrets of the Contracts Universe"). Once you and the students have developed the map, you could turn to a closer analysis of the assigned cases in the remaining class time.

It may be appropriate to spend quite a bit of time on this exercise, especially if you choose to use the map as the primary organizational device for your course. As soon as you have completed the map and have given it a name, it becomes a tool you can use over and over.

Whenever you want to discuss where an issue falls into a broader analysis, you might refer back to the map. Likewise, when you reach significant crossroads in the course, you might signal that to the students by telling them that they have just completed their treatment of a particular question (or word) on the map, and they will now be proceeding to another. If students raise questions in class that you feel are best addressed later in the course, you might congratulate them on raising excellent and important questions, give them a general answer, and state that they will study the questions in more detail when you reach the relevant portion of the map later in the course. When you summarize the class at the end of the term or the year, you might do it following the structure of the map. In my view, if students learn nothing else from my class (gulp), they will have internalized something of value if they instinctively think about contract law issues with reference to a sensible conceptual map.

Use of this general technique can set the scene for your course, irrespective of your course objectives. If you plan to deemphasize doctrine and focus largely on skills or theory, you might develop an exercise that allows you to map the central components of your course, as you have envisioned them. Alternatively, you may wish to give students a more substantive introduction to the outlines and content of contract law, practice or theory, especially if you decide they will need the background to go where you would like to take them later in the course. It may be efficient and effective to do this via assigned background reading or an introductory lecture. However, for many purposes, a simple and general roadmap of the doctrine, skills, or theory you will be developing during your course will suffice at the beginning. If you can think of a way to give students a role in creating a conceptual map, they are more likely to internalize it and use it as the course proceeds.

## **B. IMPLEMENTING YOUR OBJECTIVES AND COURSE DESIGN IN THE CLASSROOM**

As you move from the excitement of the first few classes, it is time to put your planning into action. On a day-to-day level, you will necessarily be concentrating on the intricacies of the materials at hand. But it is helpful to keep in mind your course objectives, as well as the pedagogical needs of your students.

Law students are learning the information, skills, and theory to enable them to become experts in their field. Yet they do not begin their studies as experts. Especially during the first year, the learning curve is very steep. Keep in mind that students will not be able to approach Contracts with the same level of sophistication at the beginning of the semester as they will at the end. It makes sense to break your objectives down into components and to consider which components are accessible to novice learners and which might best be left for the end of the course.

If you want what you are teaching to stick, repetition is important. So it may make sense to approach matters at the beginning of your course at a very high degree of generality, and then return to the specifics to give them careful and deeper attention as the course progresses. Contracts is very amenable to this approach because Contracts issues are interrelated and difficult to understand in isolation. If you give students a glimpse of the web at the beginning of your course, later you can hone in on the strands without losing coherence. If you don't give students a glimpse of the web at the beginning, you may find they will have nowhere to store the details as the course progresses.

At bottom, I suggest you begin by introducing core concepts at a basic level. Then proceed to expand and deepen students' learning as you proceed to new material. With each new class, look for opportunities to reinforce and synthesize concepts you have taught in previous classes. Aim to complete the course in such a way that students feel like they have achieved an integrated and nuanced understanding of the whole.

Next, I provide some specific strategies to help you prepare for class, to conduct the class you have prepared, and to reflect on the results you achieved. For the most part, these suggestions are geared to professors who decide to teach a conventional Contracts course, and who choose to focus largely on contract doctrine, legal analysis, and general notions of contract policy. Nevertheless, professors who establish other objectives for their courses may be able to adapt some of these suggestions for their own purposes or may find that some of these suggestions inspire other ideas of strategies or techniques that might be more useful to them. This discussion is in no way intended to provide a roadmap that is suitable for all people, or for all purposes. There is no one correct way to approach teaching Contracts or any other course, and it is the thought and creativity

that you bring to the enterprise that most directly contributes to your effectiveness. As you gain experience with your own strengths and style, you will undoubtedly develop techniques that work well for you. Please consider this section not as a prescription, but rather as a grab bag of ideas to help spur your own thinking.

## 1. Preparing for Class

Class preparation comprises many varied aspects. Suppose the topic for a particular class is promissory estoppel. First, you may want to gain greater expertise in the topic before you enter the classroom. For instance, you may want to deepen your own understanding of promissory estoppel doctrine through reading cases or treatises. Or you may hope to understand better the history or theory of promissory estoppel and resolve to consult law review articles, books, or other theoretical commentary to help you do so. Second, you will undoubtedly strive to become thoroughly familiar with the reading you have assigned to the students. You will want to read it closely yourself so you will have the factual and analytical details ready when you teach the class. You will seek to identify and attempt to answer any questions it raises so you will be prepared to discuss those questions in class. And third, you will determine the methods and strategies you will use to conduct your class and will identify the information, insights, and skills you hope students will gain from the class. A common pattern among new professors, in my view, is to spend far too much time and effort on the first task, just about the right amount on the second, and far too little on the third.

Although we all hope to be expert in the subject matters we teach, there are limits to how quickly and deeply we can develop that expertise. It can be counterproductive to spend too much of your class preparation time exposing yourself to the details of doctrine and theory. You may find the intricacies of your study to be fascinating, but recognize that the students will be at a much more elementary stage in their learning. Especially in the beginning of their first year, without your help, many students will struggle to understand the basics of the materials you assign to them. Although students may ask questions that require you to go more deeply into certain issues than the materials do, it is rarely necessary to go into great detail in your answers. In fact, if you do, many students will not be prepared to follow where you lead them. As Contracts is largely a common law

subject, developed at the state level, clear and definitive answers are often elusive. However, it is not sound pedagogy to provide novice learners with complex and indeterminate answers to basic questions. It is generally better to give a general answer, note that the specifics are complex and you may return to them later in the course, and move on.

It can prove difficult to keep your answers at the appropriate level of depth if you have spent the bulk of your class preparation time wallowing in the details of doctrine and theory. You need not fear the occasional gap in your expertise. If the students ask questions you are not prepared to answer at all, they will respect your honesty if you admit that they have raised an interesting question without an obvious answer, and promise to get back to them. If you then proceed to get back to them with an answer that is appropriate for their level of study, they will appreciate your interest in their learning.

When I first began teaching, someone (forgive me, I can't remember who) advised me to read no more than one law review article or other resource as part of my class preparation on a particular topic, but to do so every time I taught that topic. In the short run, this technique would prove sufficient for class preparation purposes; and over time, it would lead to ever-increasing expertise in the subject matter. Although I haven't always followed this advice, I do think it sound. Give yourself license to deepen your expertise over time, and recognize that the process is never complete. Although I have been practicing and teaching Contracts for several decades now, students still continue to ask me questions that I've never thought about before. I try to communicate the joy of inquiry and discovery to my students, and have learned to overcome any anxiety I might feel about appearing less than expert in their eyes.

It is necessary to be fully conversant with the materials you assign to the students. It is good practice to read and brief fully every case you assign in advance of the class in which you teach it. Even if the legal principles the case represents are thoroughly familiar to you, in the press of class discussion, the details of the names of the parties, the procedural posture, and the analysis can slip away. You may want to develop a system for recording such details for classroom use. If a detail escapes you, it is helpful to have notes, a chart, or some other tool that you can glance at quickly to refresh your memory.

As you read the cases, try to view them through the eyes of a novice learner. As a new professor, this is one area where you have

an advantage over your more experienced colleagues. Because some of the material may be relatively new to you, you may have a better sense for what aspects of a case will be arcane, hyper-technical, or impenetrable to students. Recognize that even if the materials are new to you, you still approach them with the eyes of an experienced legal professional. Some of your students may have only a vague idea of the difference between a plaintiff and a defendant. Many of them may have had no exposure to procedural issues, standards of review, or the difference between legal issues and factual issues. The court may use terminology that is second nature to you but foreign to many of your students. It is helpful to try to identify any aspects of the opinion that might confuse or mislead the students and be prepared to address those aspects in class.

It's particularly important to be prepared to put questions that are not central to the purpose of the case into proper perspective so you can focus on the aspects of the case you consider to be the most important. For instance, if you are teaching a case to introduce the distinction between a mere advertisement and a contractual offer, it would be unfortunate to spend most of your class time struggling to explain what a demurrer is or why the plaintiff was seeking payment of post-judgment interest. You may immediately recognize that such questions are of marginal relevance to the Contracts issues in the case, and so gloss over them in your preparation, but you cannot expect students to do the same. The easiest way to address such questions when they arise is to answer them generally and quickly, explain why they aren't central to the Contracts issues at hand, and return to the substance of the discussion you hoped to pursue.

The most important component of class preparation is to consider the strategies you will use to conduct your class. You should have a good sense of what you want students to gain from the class. In particular, think about what information they should glean from the readings and from class discussion. Beyond information, consider what skills you would like them to build during this particular class. You might also think about how the information and skills that form the basis of this class relate to materials you have taught earlier in the course and (to the extent you know) the materials yet to come. Once you have a sense for what you would like students to gain from the class, you should develop a strategy to make that happen. For instance, you might sketch out how you will present the material



so as to engage students, emphasize the information you want them to have, and work on the skills you would like them to develop. Although some professors have a natural gift for engaging students, presenting relevant information, and building appropriate skills, most of us have to work at it.

There are a number of different techniques that can help you focus on the strategies you will use to conduct your class. Some professors write out a script for the class. Although they may refer to the script only in passing during the actual conduct of the class, the process of writing it allows them to think through how the class will proceed. Other professors prepare Microsoft PowerPoint slides, discussion questions, or other aids to help provide structure to their classes. Yet others sketch out a brief outline of the points they plan to cover and how they plan to address them, and let the class flow where it may within that loose structure. I encourage you to experiment and find the technique that works best for you.

As a new professor, you will probably find it helpful to adopt a technique that encourages you to think through the entire class in some detail. It can be deceptively difficult to pose a clear question, address a case or problem, or summarize a point of law on the fly. We all have those “deer in the headlight” teaching moments when our plan for the day slips away. In such instances, it’s always helpful to have a well-worded question, comment, or transition ready to help you get back on track. That having been said, as in all things, I advocate flexibility in your approach. Do not plan your class so rigidly that you lose track of how the students are reacting to the material. Some of the most glorious teaching moments come from questions or comments you may never have anticipated, and some of the worst confusion stems from rigid adherence to a plan that isn’t working. The best plan is one that helps you anticipate how the material will teach, but allows you the flexibility to consider students as partners in the enterprise.

As you develop your teaching plan, be sure to think about engagement and pacing. My goal, for instance, is to provide an opportunity for every student in the class to be actively engaged at least once during any given class period. I recognize that this goal is often imperfectly realized, but it helps me keep the needs of the students at the forefront. You should also plan to switch up the rhythm several times over the course of the class. Even motivated students find it difficult to

sustain attention to complex material over extended periods of time. Especially if you teach in the first semester, you may find that many of your students need to build “attention endurance,” and one function of your course may be to help them do that.

As a rule of thumb, you can expect that if you remain on the same point or activity for more than twenty minutes, attention will begin to drift. The more complex the material, the more difficult it may be to maintain focus. Something like a short pause, where you ask students to write one question about the material they have just been discussing, can help bring attention back to the matter at hand. Or you can ask them to do something physical—for instance, raise their hands if they agree with a particular proposition, or turn in their chairs to face students on the other side of the classroom to debate a particular point. You, too, can move around the classroom. Nothing brings students back into the thick of things better than having the professor standing just a few feet away. Even introduction of a visual cue, such as a relevant photograph or video clip, can be refreshing.

In my experience, beginnings and endings are particularly important. There is truth to the old public speaking saw, “Tell them what you’re going to tell them, tell them, and then tell them what you told them.” For each class, I suggest you go in with a plan about how you will begin and how you will end the class. Students appreciate a few words at the beginning of class to set the scene. Perhaps you begin by reviewing where you have been, perhaps you summarize where you are going; those first few moments can provide helpful context for the entire class. Endings are equally, if not more, important. No matter where you are in the material, resolve to finish a few minutes early to allow yourself time to pull things together in the way you have planned.

Some professors develop a pattern that they follow with every class. For instance, one of my Torts colleagues started each class with a clip from *The Simpsons* television show, evoking the concept under discussion that day. Some years, I have begun each class with a short note on “contracts in the news,” and have tried to come up with a current event that implicates the subject matter at hand. Other years I simply greet the students, welcome them to Contracts, and state in a sentence or two what I hope they will get from the class to come. You could end each class with a list of “three essential insights” from that class, a “word or phrase” for the day, or a question to provide “food for thought.” Or you could set aside time for students to note the central insight they obtained from that class, one question they

wanted to explore further, or one thought they had during class but didn't express. You could ask students to turn in their thoughts to you or not, as you felt appropriate. The point is to be deliberate in your choices, and to plan ways to begin and end each class so as to provide coherence to your teaching and further your objectives.

## 2. Conducting Class

### a. *General Advice*

It can be a challenge to pitch a class at precisely the right level. Ideally, students will need to read and absorb the materials you have assigned to participate meaningfully in your class. This doesn't mean that you should assume that the students have mastered what you have assigned, and you are free to proceed directly to more abstract or advanced aspects of the subject. Often, students will not know how to master the assigned materials; they will require your guidance and expertise to do so. If you assume too much, students will concentrate on following the concepts you address in class, and they may not even realize that they have not fully grasped the assigned materials. In short, if you do not address assigned materials directly, you should not assume that the students have mastered them. Over time, they may even learn to ignore them. Conversely, your class should not limit itself to summarizing or repeating things that could be ascertained from the reading. Your goal should be to provide reading materials that are useful to prepare students for class, and then, during class, use those materials as a launching pad to help students reach places they are not yet prepared to go on their own.

One of the best ways to gauge if you are conducting class at an appropriate level is to ask. Remain in constant communication with your students. In class, listen to what they have to say. When you see them outside class, ask them how class is going. Recognize that impressions of one student are not necessarily representative of the whole, but nevertheless they can provide useful information. Your colleagues may also be a valuable resource. Some experienced colleagues may be willing to attend your class and give you their reactions to what they have seen. Although it may feel uncomfortable at first, in the long run, you will benefit if you seek opportunities to receive formal and informal feedback on your teaching.

There are many excellent resources that explore particular aspects of conducting a law school class. The general volume in this series,

*Strategies and Techniques of Law School Teaching*, by Howard E. Katz and Kevin Francis O'Neill, contains among other things very helpful discussions of how to orchestrate a discussion, how to handle questions, and how to use hypotheticals and problems. I note in particular that the authors draw some of their examples from the Contracts classroom. The Institute for Law Teaching and Learning, cosponsored by the Gonzaga University School of Law and the Washburn University School of Law, sponsors an annual conference and occasional workshops on law teaching.<sup>28</sup> The Association of American Law Schools (AALS) offers teaching-related programs at its Annual Meeting, and it also periodically offers stand-alone workshops related to teaching in particular fields. Many of the materials from these programs and workshops are available through the AALS website.<sup>29</sup> The association's *Journal of Legal Education* also regularly publishes articles related to teaching and learning in law schools. Further, both the Teaching Methods section and the Contracts section of AALS have active list-serv discussion groups for their members. If you are a member of one of these sections, you can post a question about teaching methods to the section's list-serv and will almost certainly receive immediate suggestions and support from colleagues at other schools. If you find a particular aspect of conducting a law school class to be a challenge, there is likely to be a readily available resource to give you some ideas about how to address that challenge. Further, if you incorporate a review of some of these resources into your regular class preparation, you will quickly build a repertoire of teaching techniques to draw on as appropriate.

Next, I describe a few selected techniques that may prove particularly useful in the Contracts classroom. Some are keyed to teaching doctrine; others focus on the development of legal analysis or practice skills. Many of them can be adapted to serve other purposes as well.

## *b. Selected Techniques for Teaching Contract Doctrine*

### *i. Reengineering Elements*

Most lawyers intuitively break rules of law down into elements and then apply the elements to the relevant facts. The ability to break

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28 The institute also issues a newsletter and maintains a website with information about upcoming conferences, teaching resources, and other useful publications. For more information, see <http://lawteaching.org/>.

29 See <http://www.aals.org/>.

rules of law down into elements is itself a skill that you may wish to teach your students. One way to do this is to articulate the rule of law, and then proceed logically or linguistically to break it down into pieces. This technique is particularly effective where the rule of law is stable; for instance, if students are learning how to apply a particular provision of UCC Article 2. The technique is less illuminating if the rule of law is fluid—that is, relevant doctrine is articulated in various ways by different courts, or even by the same court in different parts of an opinion. In such situations, it can be helpful to work with students to reengineer the elements of a particular doctrinal area with reference to one or more cases.

Consider, for instance, the concept of an offer, often encountered in the first few weeks of Contracts. The students might read a number of cases that attempt to distinguish an offer from a solicitation or other expression that doesn't amount to a contractual offer. One way to abstract the elements of an offer from the cases would be to search for any place where the court articulates the relevant rule of law, and then isolate each of the elements the court addresses. Another approach would be to allow students to brainstorm about the factors that led one court to conclude that an offer was present, while another court reached the opposite conclusion. For instance, one communication might have been directed at a wide audience, while the other was directed at a particular person. One might have been stated in very firm terms, while the other was hedged or conditional. One might have been received in response to a specific request, while the other might have been unsolicited. You might note each of the factors as students raise them. With a little nudging from you and a few counterfactuals thrown in for good measure (in this case, a price was mentioned—would it have mattered if no price had been stated?) you should be able to get a fairly robust list of factors. After you do that, ask students to explain why the factors matter—that is, what the presence or absence of those factors indicates. Ultimately, students should come up with something like a rule of law, except they will couch it in their own terms. If you then compare it to the articulation of the rule of law found in the cases or (for instance) in Restatement (Second) of Contracts §24, students will readily see how their own definition is reflected in, or differs from, the more technical formulations.

There are several benefits to an approach that allows students to reengineer rules of law in this way. It encourages students to understand legal principles, rather than merely memorize them. It helps students think about the purpose of each of the elements, as well as the interrelationships among them. It allows students to practice factual analysis at the same time they are working on legal analysis. And it allows students to recognize and anticipate issues before they have studied them in detail, thus laying the foundation for further exploration.

## ii. Detailing the Conceptual Map

As you isolate rules of law and their elements, you may find that you are addressing the same rules of law at different levels of generality in successive classes. This allows you to reinforce and synthesize materials learned in earlier classes as you proceed to more advanced materials. Once you complete a particular subject, it can be helpful to return to the elements for the basic concepts at a very high level of generality and use them to fill in some of the detail on the conceptual map you drew early in the semester. You can also use them as a device to refer back to your broader discussion of the subject matter as it becomes appropriate later in the course.

Suppose, for instance, that you plan to spend several weeks studying theories of obligation. You might launch this study by stating that the theories of obligation help to answer the question of whether the parties have an enforceable contract or contract-like obligation (Question 2 in the conceptual map I outlined previously). As you teach the theories of obligation, you might try to draw out the commonalities, as well as the differences in emphases among them. For instance, as you work your way through the various theories, you might work with the students to isolate the core elements of each, by reengineering them or otherwise. By the time they complete their study, they might have a chart which compares them all, albeit at a very high degree of generality. Such a chart might look something like the following:

	<b>Consideration</b>	<b>Promissory Estoppel</b>	<b>Unjust Enrichment</b>	<b>Material Benefit Rule</b>
<b>Defendant</b>	Makes promise	Makes promise	Receives benefit	Makes promise on account of benefit received
<b>Plaintiff</b>	Incurs legal detriment	Incurs detriment	Confers benefit	Confers benefit
<b>Relation</b>	"Bargained for"	Reasonable reliance Injustice	Injustice	Injustice
<b>Usual Remedy</b>	Expectation?	May be limited as justice requires: Reliance?	Restitution	Expectation?

Engaging students in the development of the chart is an important part of the exercise. If you were to present this chart to students who had not yet studied theories of obligation, they might consider it gibberish, or worse, might believe it captures everything there is to know. However, if the students help you to develop it in pieces, methodically, over several weeks of study, they may find in the end it allows them to step back and synthesize the details of their study into a relatively coherent whole. Further, if the chart is a product of the students' study, it is unlikely to lull them into a sense of complacency or encourage them to oversimplify the material. No sensible student who has spent a few weeks studying consideration will believe that the eight words on this chart in the "Consideration" column fully or accurately capture the nuances of the subject matter.

Many students will develop charts and other study aids on their own as they review the course and study for the final exam. The technique of adding progressive detail to your conceptual map allows you to model the process for the students. So long as you involve the students, this does not constitute spoon-feeding; rather, it can be a useful classroom technique to organize and synthesize the doctrinal themes of your course.

### *c. Selected Techniques for Teaching Legal Analysis*

If you emphasize legal analysis in your course, you will be modeling analytical techniques every time you discuss a case, pose a hypothetical, or address a problem. Contracts provides an ideal context to work on these skills. Given the indeterminacy of the subject matter, legal analysis reigns supreme. Further, because most of the issues in the course are interrelated, students must develop organizational and synthesis skills to deal fully with many factual situations within the contracts realm.

Even though legal analysis is likely to permeate your course, you may find it useful to be as transparent as possible about what you are doing. There are a number of techniques you can use to help your students identify and develop the specific skills necessary to engage in legal analysis. I find it particularly helpful to give those skills a mnemonic to encourage students to be conscious of the components that go into a strong legal analysis. You may also find it useful to concentrate on the skills serially; that is, to focus on the basic ones first, and as the course progresses, introduce increasingly complex and multi-faceted skills. By way of illustration, I list a number of interrelated legal analysis skills next (along with my somewhat silly mnemonics), and suggest some techniques to make them explicit for the students.

#### **i. Hearing Voices**

Some students have immediate and strong reactions to given fact patterns. They are quick to form a belief about how the law should respond, and they have difficulty imagining how reasonable minds could differ. Other students simply don't know where to begin; they can't come up with questions to ask, and so don't know how to enter an analysis. A professor who is alert to these challenges can help both types of students improve their analytical skills by encouraging them to "hear voices."

The simplest way to encourage students to "hear voices" is to engage in brainstorming exercises. Pose a simple question to the class about an aspect of the material, and challenge students to come up with as many thoughts in response to that question as possible. At the initial stages of the exercise, don't respond to the thoughts or evaluate them; instead, just try to get as many out there as practicable in the time available. Then conclude by saying that there are many



reasonable ways to approach this question, as evidenced by all the thoughts the students shared, and then proceed to analyze how the case at issue or the law more generally has dealt with that question.

You can also turn the exercise into a competition. Suppose, for instance, you have assigned a particular problem as part of your readings for a class. During class, have students break into groups, and ask each group to come up with a collective list of all the questions that would need to be answered to resolve that problem. Offer a prize to the group that comes up with the most questions. (M&Ms are always a popular choice.) You might even ask each group to e-mail its list to you, and then proceed to compile the various lists and disseminate the master list to the class as a whole to illustrate the broad range of questions that occurred to the students. Again, at the initial stages, try to refrain from censoring the questions or evaluating them; the point of the exercise is to get as many ideas on the table before proceeding to more specific discussion of the materials at hand.

The indeterminacy of the subject matter frustrates some Contracts students. Students often seek clarity on issues where clarity is elusive. For instance, many courts that discuss contract issues speak of the reasonable expectations of the parties. Students may ask whether it would be reasonable for the parties to have a certain expectation under the facts at hand. Of course, a definitive answer to such a question is hard to come by. Yet it is somehow unsatisfactory to note that there is no answer; or the answer is “it depends”; or it would be up to the judge or the jury to provide the answer. Instead, the professor might invite the class to engage in a round of lightning brainstorming: let’s hear three reasons why it might be reasonable to have the expectation at issue, and three reasons why it might not. Again, the answers students give are almost beside the point; the idea is to get them in the habit of thinking of things from many different perspectives and justifying those perspectives as best they can with the information they have available at the time. After a round of lightning brainstorming, a statement like “it depends” (or, as noted in the Official Comment to UCC 2-313, “there is no escape from the question of fact”) allows closure of the discussion, without throwing students into the depths of existential despair. Eventually, you will want to help students exercise judgment when answers are not clear. But especially in the early weeks of the course, it may be enough to illuminate that the facts support more than one conclusion.

Beyond brainstorming, another technique that helps students “hear voices” is to associate certain comments and questions with the particular students who raise them. Suppose, for instance, that early on, a student named Mike recognizes that what the parties do after an alleged contract is entered into may affect a court’s view of whether there was a contract in the first place. After Mike makes this comment, you might explain that Mike has identified the concept of “course of performance,” a concept that comes up in many different contexts in contract law. Thereafter, whenever the concept of course of performance comes up, you can refer to it as “Mike’s concept of course of performance.” The first time you do this, the students may struggle a bit to remember what Mike said, and of course, you may find it useful to review the concept if need be. But if you use this technique with sufficient regularity, it will send the message that what students say matters, and it is important to listen to varying voices. I often make this point explicit, telling students that one of their goals should be to internalize the voices of their classmates. The more open they remain to diversity of view and perspective, the more likely they will recognize and address issues thoroughly in their own analyses.

## **ii. Drawing a Continuum**

Of course, not all thoughts are equally persuasive. To become experts, students must develop judgment about which issues are likely to be of legal relevance and what arguments are likely to carry persuasive weight. To help them develop that judgment, you might encourage them to put issues, facts, and arguments “along a continuum.” One way to do this is to use the class as a sounding board. In many instances, this can be done quickly and easily. Say a student asks how a question might be resolved; for instance, whether under certain facts, John can avoid a contract he signed with Mary on the grounds of duress. You think the facts at hand make out a fairly good case of duress, but you don’t think it’s a sure winner. You could simply say that the answer is unclear, perhaps providing your own analysis. But suppose instead you polled the class: “How many of you think John should be able to avoid the contract on the basis of duress? How many of you think he shouldn’t?” You might encourage students to weigh in by raising their hands. If you get a good collection of students on both sides, you could just note, “This is a question on which reasonable minds appear to differ.” If you don’t get a lot of students raising their hands at all, you might say, “It appears many

of you aren't willing to commit; perhaps this is a question on which reasonable minds could differ." If the overwhelming majority of the class weighs in on one side, you might weigh in on the other. The point is to create a visual image (that you can reinforce expressly) suggesting there might be good arguments on both sides.

You can use the same technique when you think the answer to a particular question is fairly clear: with any luck (and with a little prodding on your part), the balance of opinion in the classroom may well mirror how certain you believe the result to be. And if it doesn't, that too may reveal something about the students' perspectives or understanding that will prove useful to you as you continue the discussion.

Occasionally, you may wish to go beyond merely polling the students and stretch the facts or the law to draw the full continuum. For instance, suppose you were discussing a problem where one of the issues was whether one of the parties had acted in good faith in the performance of a contract. You might begin by polling the class to get the students' initial reactions. You might then methodically peel away (or enhance) the facts to push resolution of the issue toward the presence or absence of good faith, repeatedly polling the students along the way. As you move further from the facts as originally given, the balance of opinion in the class should begin to shift. Eventually, irrespective of the definition of good faith any given student applies, you are likely to be able to come up with facts that are sufficiently innocent that there is no question of a party's good faith, or alternatively, so despicable that bad faith is assured. Again, through this technique, you can draw a visual image of where particular facts lie along a continuum.

Alternatively, you could keep the facts stable, and slowly evolve the definitions of good faith to show how legal principles can lie along a continuum as well. (Would the party be acting in good faith under these facts if the definition of good faith was "honesty in fact"? What if the definition of good faith was "honesty in fact and the observance of reasonable commercial standards of fair dealing"? Would your answer differ if good faith simply required an action to be reasonable under the circumstances?) The exercise, whether moving the facts, the law, or both, helps to illustrate why good faith is "at issue" in the problem. Reasonable minds could reach either conclusion, depending on the legal standard they apply and the facts

they consider the most important; the problem lies somewhere in the middle of the relevant continuum.

If you make the skill that you are developing explicit, you can encourage students to practice it as they prepare for class or review their notes. For instance, instead of (or in addition to) briefing a case assigned for a given class, you might ask them to think about where that case lies along a continuum. For instance, you could suggest students choose any one issue discussed in the case and consider what facts would have to be changed to make the court's resolution of that issue so clearly correct that the matter would hardly be worth discussion. Then they might consider what facts would have to be changed to make the court's resolution of that issue so clearly inapposite that, again, the matter would hardly be worth discussion. By practicing the skill of "drawing a continuum" on a regular basis, students gain increased facility at recognizing which issues are genuinely in play under certain facts, and which issues are so likely to be resolved in a given way that they are only worthy of limited attention.

### iii. Wrestling the Octopus

If you practice hearing voices and drawing continua in the early weeks of the semester, most students quickly grow to understand that single answers to questions may prove elusive. Yet it isn't helpful for them to conclude that there is no answer and leave it at that. Lawyers need to operate in conditions of uncertainty, and this itself is a skill. After a particularly challenging discussion of varying approaches to a legal issue, students may ask which approach they should use on an exam. A typical response—use all of them—may not tell the whole story. You might expressly draw students' attention to the fact that dealing appropriately with indeterminacy is itself a skill—a skill they will continue to develop over the course of their law school and professional careers. I call this skill "wrestling the octopus" and encourage the students to embrace the challenge with joy when it presents itself. It is in "wrestling the octopus" that the lawyer puts all his or her legal analysis skills to work.

Once you have drawn students' attention to the challenge, you might create opportunities for them to practice the skill of "wrestling the octopus." A simple application of the skill, for instance, follows directly from some of the exercises you might use to "draw the continuum," as suggested earlier. If a particular issue or fact-pattern

lies somewhere in the middle of a continuum, this suggests it doesn't allow for a clear or definite answer. One way to deal with this indeterminacy is to analogize or distinguish the situation at hand from those situations that do lie on the end-points of the continuum. It is through this process of analogy and distinction that lawyers exercise judgment or attempt to persuade others. Simply asking the students to identify the end-points and then suggest analogies and distinctions helps them to build the skills they need to "wrestle the octopus."

Slightly more refined exercises might ask students to consider what steps should come next. Given that resolution of a particular issue is unclear, what then? You might, for instance, point out places in judicial opinions where courts develop arguments in the alternative, and note that this is one technique that lawyers use to deal with indeterminacy. If the resolution of a particular issue is unclear, it is appropriate to consider the implications that flow from each of the alternative resolutions of the issue. You might encourage students themselves to present and deal with counterarguments in their discussions of particular cases or problems. When a student presents an analysis that leads to one result, encourage that student to imagine what the consequences would be if the analysis would lead instead to the opposite result. You could provide the students with a written example of a linear analysis of an issue, and ask them to expand the analysis to consider counterarguments and alternative conclusions. You could do this as part of a general class discussion, you could break the class into small groups, or you could assign the exercise as written preparation for class discussion. Alternatively, after (or in lieu of) discussing a certain problem in class, you could provide an example of a fully developed analysis of that problem that considers multiple approaches to the issues at hand.

There are any number of topics in the conventional Contracts course that lend themselves beautifully to practicing the skill of "wrestling the octopus." Any arena where there are directly competing rules of law is a prime candidate. If you teach UCC Article 2 in your course, you might draw out those instances where the rules of Article 2 differ markedly from the traditional common law of contracts. Some of those instances include the treatment of standard terms (especially in relation to the battle of the forms), the statute of frauds, firm offers, and contract performance and breach. You might work with your students to model an analysis of a fact pattern raising

one of those issues where application of UCC Article 2 is uncertain and thus requires consideration of both competing bodies of law. Likewise, where different jurisdictions apply similar doctrines but in ways that vary significantly in mood or tone, students may not know how to approach the task of analyzing facts that give rise to those doctrines. For instance, in their study of the parol evidence rule, students learn that some jurisdictions tend to take a “four corners” approach to the question of whether a writing is integrated, while others take a more contextual approach. Further, once the question of integration is settled, courts may differ in their application of the parol evidence rule to the facts—that is, they may come to varying conclusions as to whether particular evidence explains a writing, supplements it, or contradicts it. At least once during the study of the parol evidence rule, it may be worthwhile to fully flesh out an analysis that considers each question that arises in the course of the analysis and treats the consequences of every colorable resolution of each of those questions. Again, I recommend that you make your goals explicit; tell students that the point of the exercise is not so much to find the answer, but rather to practice the skill of grappling with indeterminate legal principles.

#### iv. Enjoying the Journey

Even where the law, the facts, and application of the law to the facts are relatively clear, it is important for students to know how to start their analysis at the beginning and carry it through to the end. Where the law or facts are indeterminate and students must “wrestle the octopus,” it is particularly important for students to apply a methodology that allows them to reach the core issues without getting snarled in the complexities of the analysis. Some students who are trained in other disciplines—for instance, those who are engineers or those who have extensive business backgrounds—may have developed habits that take them directly to the bottom line and discourage them from exploring the paths not taken. These students may need to deliberately retrain themselves to articulate and develop their thought processes rather than simply reasoning to a sound result. I refer to the process of developing a full legal analysis as “enjoying the journey.” As with development of any complex skill, it comes only with practice, and you may want to address it directly in your teaching.

A full legal analysis calls on many competencies. It requires a student to organize his or her thinking, sometimes on the fly. The student must exercise judgment about which issues deserve extensive treatment, which deserve passing mention, and which can be omitted. In the discussion of any given issue, the student should clearly articulate rules of law and apply facts to those rules of law with due attention for arguments and counterarguments. Ultimately, the student should reach a coherent and persuasive conclusion in light of that analysis. Although it is common for Contracts students to practice bits and pieces of this enterprise on a regular basis, unless you make an effort to include it in your teaching, students may rarely have an opportunity to practice integrating those pieces into a coherent whole in the context of your course. Because it is conventional to address specific Contracts topics at different times in the course, unless you engage in regular synthesis, students may rarely consider the interrelationships among the various topics. Although students may study the skill of developing a full legal analysis directly in their Legal Writing course, they do not always think to transfer what they learn in one context to their other classes. Accordingly, especially as the semester or year proceeds, you might find it helpful to include examples of broader legal analyses in your course to reinforce the basic skills students may be studying elsewhere.

Until students have a reason to synthesize and review what they have learned, you can expect they will not have complete command of the details of prior study. Accordingly, unless you forewarn them, they may struggle to apply doctrines you studied several weeks ago to current materials. However, it may prove useful for you to pause periodically and engage in a brief retrospective of where you have been, even if you have to remind students of some of the details. One way to do this is to take the facts of a case or problem in the assigned materials and briefly outline the analysis that would lead up to the issue at hand.

An illustration may be in order. Suppose you assign a problem in which a seller of specially designed goods provides a shoddy work product to the buyer, and the problem asks whether the buyer has the right to reject the goods. One way to discuss this situation is to plunge directly into the UCC's treatment of the buyer's right to reject nonconforming goods. Another way to address it is to tell the entire story of the relationship; that is, start the analysis all the way at the beginning and play it out all the way to the end. Depending

on the facts of the problem, you may find that specific issues beyond performance and breach are implicated. For instance, it may be unclear what body of law applies.

Assuming the UCC applies, the facts may raise a statute of frauds issue, or perhaps the parol evidence rule is relevant to determining the terms of the contract. To help students see how issues from various parts of the course can be integrated into a single analysis, you might invite them to imagine that the buyer in the problem had approached them for legal advice in connection with a complaint about the specially designed goods. Then you could model a thought process a lawyer might use to organize and analyze the facts the client recounts. An experienced lawyer, you might suggest, would intuitively know which facts are likely to raise which kinds of issues. But lawyers who are still building their expertise might be a bit more systematic in their analyses.

In particular, you could walk students through the broad outlines of a full analysis, using any conceptual map you may have developed earlier in the semester. For instance, if your conceptual map resembled the one I describe in Section V.A, you would suggest that a lawyer might first consider whether UCC Article 2 applies to the transaction, or whether it is better analyzed under applicable common law principles, tying in some of the relevant facts. Then you could note whether the facts justify any concern about the enforceability of any contract involved, and in particular what issues they raise. Should there be an enforceable contract, you might then describe how a lawyer would determine what the facts of that contract would be. Then, and only then, you might suggest, would the lawyer be in a position to analyze confidently whether the other party had unjustifiably failed to perform the terms of that contract, and if so, what remedies might be available to the aggrieved party.

Through a technique such as this one, even if students do not have the details of earlier subjects of study fresh in their minds, they will see how matters discussed earlier in the course relate to those that arise later. The interconnections may seem obvious to you, but as students often encounter and study issues in isolation, they may not share your broad understanding. If you take a few opportunities to model how to “enjoy the journey,” you can recommend it to students as a technique to synthesize and review what they have learned. You might, for instance, encourage them to prepare written analyses of one or more hypotheticals, being sure to start at the beginning, and



take the analysis all the way to the end. This exercise will be the most illuminating if you also give students some guidance as to what an excellent analysis would look like. (I discuss possible sources of hypotheticals, as well as possible forms of feedback, in more detail in Section V.D.) Finally, you might take your final class to analyze an extended hypothetical, using it to summarize and review the full scope of issues you discussed during the course.

#### *d. Selected Techniques for Teaching Practice Skills*

If your core objectives include teaching students litigation skills, preventative skills, or transactional skills, you may want to put significant thought into how to best introduce students to those skills, provide them opportunities to practice them, and assess them on what they have learned. Even if you do not plan to have skills training serve as a centerpiece of your course, however, you can bring the subject matter to life by creating opportunities for students to see how their newfound understanding of Contracts might translate into a practice environment. In this section, I suggest a few modest steps you might take to integrate practice skills into your course, even if you do not see development of those skills as a primary object of your course.

As Contracts is largely based on case-law, a professor can easily introduce litigation perspectives or skills through the course. Simple role-play exercises can allow students to take on the mantle of an advocate. If you have a large class, you may wish to divide the class into groups and have each group play a role. For instance, you could assign a problem from your casebook (or a hypothetical of your own crafting). Instead of analyzing the problem in a neutral way, you might tell the back row of students that they will serve as “judges,” responsible for deciding the dispute described in the problem. You might then ask the right side of the class to present the arguments for one party, while the left side presents the arguments for the other party. You might tell the judges that they are free to ask follow-up questions of the advocates if they so desire. You might take yourself largely out of the equation and serve merely as a facilitator to draw students who raise their hands into the discussion. After the discussion and arguments run their course, you might give the judges a minute or two to confer, and then ask them to give their ruling from the bench. If the judges disagree, you might even ask for majority and dissenting opinions. If you feel comfortable with a certain level of chaos, this

exercise can be done spontaneously, without prior notice to the students, and need take no longer than twenty to thirty minutes. It is often helpful to circle back to the analysis after the exercise, either to point out where you believe the central issues lie, or to gently correct any misinformation students might have conveyed in their arguments. But generally, I view an exercise such as this one not so much as an opportunity to master doctrine or hone advocacy skills, but rather to allow students to imagine their own futures as lawyers.

If you are more ambitious, you might structure a more formal role-play into your course. One of my colleagues, for instance, has her class brief, argue, and judge the facts of a hypothetical drawn from *Hill v. Gateway 2000, Inc.*<sup>30</sup> Each of the students in her class is assigned a particular role and given significant time to prepare for the exercise. Even though she has grown to value the exercise and believes it is worth the time and effort necessary to do it well, she cautions that she developed it incrementally over a series of years. If you do choose to incorporate something like this in your course, it is advisable to impose sharp limits on the scope of the exercise the first time through. For instance, you will probably want to define the issue presented by the hypothetical narrowly to allow it to be addressed adequately in a reasonable amount of time. Rather than requiring that students perform original research, you might limit them to a selection of arguably relevant cases found in your text. Further, you might decide to impose fairly tight length restrictions on any written work product, and equally tight time limits on oral arguments. Even if you do not grade the exercise, you should expect that students will experience a fairly high degree of anxiety exhibiting their written work product and advocacy skills to their classmates. Accordingly, you might want to consider how to best structure the exercise so that students will take it seriously, yet will not be unduly terrorized or demoralized by its results.

Contracts, more so perhaps than any other course in the conventional first-year curriculum, also provides an excellent context to explore preventative and transactional practice. Again, you need not structure your course around counseling or transactional skills to give students a taste of a planning perspective. In the course of discussing a case, for instance, the professor might engage in a short “unwinding” exercise and have students imagine what the parties might have done differently to avoid the dispute that led to the

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30 *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

litigation. It may be possible to draw skills into the discussion, merely by asking appropriate drafting questions. For instance, if a case involves interpretation of a contract term, you might ask students to draft a term that would unambiguously support the plaintiff's interpretation or, alternatively, a term that would unambiguously support the defendant's interpretation. This need not be done in advance; you might give students three to five minutes of class time to draft the term on the spot, and then draw out some examples in the discussion that follows.

Alternatively, you could ask students to draft a contract clause as part of their preparations for class, and then use the clauses they have drafted as the basis for your classroom activities. For instance, in advance of a class in which you plan to discuss impracticability and frustration of purpose, you might ask students to draft a *force majeure* clause for a client with certain specified concerns. In class, you might ask students to trade clauses with their neighbors, and then have students interpret the clauses to determine how they would handle a series of potentially unexpected results. You could complete the exercise by showing students a sampling of *force majeure* clauses that lead to dramatically different allocations of risk. The purpose of this exercise is not so much to hone the skill of drafting a contract clause (although that may be one side effect); rather, it is to illustrate in a vivid and direct way the role that drafting plays in allocating contractual risks.

It is also possible to introduce more ambitious transactional components into your Contracts course. Again, however, I caution you to develop the components incrementally, with close attention to logistical details. Ultimately, you will want to be quite modest in your expectations about the scope and depth of any given exercise. I teach an advanced contracts course, for instance, in which students work their way through a simulated business transaction. These are students who have already completed a year-long Contracts course and may have had significant exposure to commercial law and practice. Nevertheless, it takes approximately a month of class time (and a harried month at that) to complete a relatively simple commercial transaction involving the sale of goods. If I were to include a simulated transaction in my first-year Contracts course, it would need to be simpler by several orders of magnitude; and

ultimately, I wonder whether the pedagogical results would justify the effort.

Instead, if the idea of simulating transactional practice appeals to you, you might want to begin by including a relatively narrow negotiation and drafting exercise. For instance, in recent years, I have assigned a case in which an airline terminates a contract with a caterer pursuant to a ninety-day termination clause.<sup>31</sup> The issue in the case is whether the termination comported with the implied duty of good faith. Instead of discussing the case in class per se, I ask students to complete a negotiation and drafting exercise spun off the facts of the case.

In advance of class, I provide the students with some basic facts, suggesting that the airline is considering entering into a contract with a new caterer, and the new caterer is seeking to negotiate language to expressly limit the airline's right to terminate the contract during the term. Without giving the students much detail, I suggest that in class, they will represent one of the parties in the resulting negotiations. To prepare for the negotiations, I ask them to review a copy of a basic-form airline catering contract, which I have adapted to include the termination language at issue in the case.

In class, I divide the class into negotiating groups, give the groups representing each party "secret" facts relevant to that party, and then let them have at it. The goal, I tell them, is to reach agreement on relevant contract language before the end of class, and post it to the course website. We don't talk about negotiation or drafting skills as such, and I neither grade the students' work product nor give them individualized feedback. I do, however, make a point of referring back to the exercise and revisiting some of the clauses the students drafted at later points in the course.

Although this exercise takes a full class period, I believe it is well worth it. Every student is engaged, and every student sees how contract theory and doctrine might translate into transactional practice. I often conduct the exercise early in the spring term of my first-year course, and it helps to re-energize those students who are suffering from the inevitable first-semester-grade blues. Over the years, many students have told me that this modest exercise was the genesis of their interest in transactional practice.

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31 The case, for the curious, is *United Airlines, Inc. v. Good Taste, Inc.*, 82 P.2d 1259 (Alaska 1999).

### 3. Reviewing the Class

Just as planning your class is important, so too is reflecting on the results. Although many of us aspire to engage in post-class reflection, in my experience, this task often gets pushed aside by competing priorities. If you are able to establish a practice of reserving a few minutes after class to consider what worked and what didn't, you will find that the habit will inform your planning going forward and will allow you to build your teaching expertise quickly.

Your post-class reflections need not be extensive to be effective. You might just review your plan for the class, and note quickly what seemed to work well and what didn't. You might revisit what you hoped students would gain from the class, and consider whether the class achieved those objectives. You might even write a word or two to introduce your next class, recapping what students have just learned and how it relates to the upcoming subject matter. A suggestion I heard recently which impresses me as an excellent idea (but which I have yet to implement in my own practice) is to jot down any ideas for the exam in your course that were inspired by the class you just completed. One of my colleagues, who includes a multiple-choice component in his end-of-semester exam, even goes so far as to write one multiple-choice question while his memories of a given class are fresh.

When you engage in your post-class reflections, try to dampen your critical voice. Classes sometimes go well; sometimes they don't go so well. And it isn't always obvious into which category a given class falls. After a less-than-satisfactory class, it can be tempting to use the next class to revisit the same materials and teach them better the second time. If you feel you have made a gaffe that was obvious to the students, you might acknowledge it in the next class, perhaps with a mild dose of self-deprecating humor. Unless you have left the students with serious misinformation that you believe requires correction, however, it is usually better just to move on, and resolve to teach the offending materials in a different way the following year. In the rush of the moment, even experienced professors omit materials, go off track, or make mistakes. So long as you treat students with respect, they are likely to allow you some margin of error, and their education will not be compromised if they are missing some small detail of doctrine or theory. It is also important to maintain perspective. Sometimes, what happens in the classroom has nothing to do with you. The students may be completing a major

Legal Writing assignment, may be suffering from a flu epidemic, or may be distracted by the latest campus controversy. Often, if you engage in serious self-reflection after a disappointing class, you may find that it was not nearly as bad as you first thought.

### C. USE OF TECHNOLOGY

Students of the current generation tend to be very comfortable with technology, and in some cases are obsessed by it. On the positive side, this probably means that you can incorporate technology into your teaching if you choose to do so and will encounter little resistance from students. On the negative side, you may find that your teaching competes with technological distractions of every ilk. You may want to devote attention to both the positive and the negative potential of technology and decide what your approach will be.

Many professors have incorporated some level of technology into their Contracts classrooms. For some, this may consist of creating the occasional PowerPoint slide to summarize points, display statutory or other legal language, or add a chart or picture to provide visual interest. On the Internet and elsewhere, you can find some wonderful pictures and even video clips relevant to many of the classic Contracts cases, and showing them to the class can add an engaging dimension to any discussion. Especially at first, however, it can be challenging to integrate a tool like PowerPoint effectively into your teaching. Too much detail on slides often has the effect of dampening discussion and encouraging the students to accept information passively rather than actively engage in the learning activities that you have planned for the class. Likewise, if your slides prove difficult to navigate, they may hem you into a structure that doesn't follow and adapt to the flow of the classroom discussion. Further, especially if you don't already have significant facility with the software, it can prove surprisingly time-consuming to create a set of slides for a given class. I encourage you to think carefully about the value of each slide you produce, and at least at the beginning, err on the side of concluding that less is more. If you do decide to summarize or convey significant amounts of information on your PowerPoint slides, consider whether you will make them available to the students (either before or after class). If you give them access to the slides themselves, you can avoid

the unfortunate classroom dynamic where the students spend most of the class time copying the gist of your slides into their notes.

Students' use of laptops and other electronic devices in class is a source of perennial controversy in law school circles. Ideally, those students who use laptops would do so to take notes and otherwise engage more deeply with the material. Realistically, some students use them to check e-mail, visit social media sites, or play games. Misuse of electronic devices not only affects the particular student doing it, it may also distract other students sitting in the vicinity. The misuse of electronic devices is so ubiquitous that some professors have banned their use altogether during class. Other professors believe that the best defense is a good offense, and try to incorporate laptop use into their teaching. For instance, suppose a question comes up in class as to what a certain legal term means. The professor might ask those students who have laptops open to conduct some quick and dirty research and get back to the class with an answer. Alternatively, the professor might periodically have students break into groups to analyze an issue or problem, and ask that one of the group e-mail the results of their deliberations to the professor on the spot. Helpful as these techniques may be, it is unrealistic to suppose that they will eliminate the distracting use of electronic devices. Many professors concede that some level of inattention is inevitable, and they just accept it as a necessary evil.

Unless you ban laptop use altogether, you should decide whether to discuss the proper use of electronic devices in the classroom with your students before any problem arises. If you are concerned about the issue, you might pose it as one of professionalism. Or you could talk about the need for lawyers to focus on complex matters for extended periods of time, and how the ability to do so itself a skill that can be built only through practice. You could even turn your discussion into a Contracts exercise: allow the class to negotiate a policy that is satisfactory to them, including appropriate enforcement mechanisms, and then resolve to live with it.

You may find it helpful to create a course website to supplement your class. For instance, you could post your syllabus and any class handouts to the course website. You could create a discussion forum, where students could post comments about class discussions, or share Contracts tidbits they have picked up from the news or other sources. Students often send me e-mails recounting interesting Contracts issues they have come across; I always request permission to repost these

e-mails to the course website. If you choose to do so, you can even use a course website to provide online quizzes or other reflection or assessment tools. Even if you do not feel particularly comfortable with technology, you will find that there are several prepackaged options that make it relatively painless to create and maintain a course website. Your law school may support a particular software package, and it may even have personnel who will help you develop and maintain your site. If not, a number of the legal publishers have developed website tools adapted specifically for the law school context. I have used TWEN (sponsored by Westlaw) for many years, and find it accessible, flexible, and fully sufficient for my purposes.

E-mail has also become an increasingly common way for students to communicate with professors, and vice versa. Although I prefer personal contact, I recognize that many students find it more convenient and less intimidating to pose a question to a professor via e-mail. Especially as exam time nears, you may find the volume of e-mail traffic overwhelming. You may want to think in advance about the best way to handle e-mail requests. If a question allows for an easy or short answer, I typically answer it right away. If the question itself is not clear, or if it calls for extended explanation or analysis, I often invite the student to drop by my office. If that doesn't happen, I try to make a point of following up with the student before or after class. Sometimes, if I believe the student has asked a question that would interest the class as a whole, I ask for permission to post the student's question and my response to the course website. Your own approach may depend on your own comfort with e-mail, the number of students in your class, and your schedule. But if used properly, with sufficient attention to response time and tone, e-mail can provide an effective tool to develop and maintain strong relationships with your students.

#### D. ASSESSMENT

At the end of your course, at most schools, you will be assigning grades to your students. Presumably, the grades should reflect the degree to which you believe the students have achieved the objectives you have set for them. Assessment is most meaningful if you assess what you teach. So for instance, if you plan to assess doctrinal mastery, you should teach doctrine. If you plan to assess analysis skills, you should teach analysis skills. If you plan to assess the



quality of students' theoretical thinking, you should teach theory. Further, the learning is deeper and the assessment is more meaningful if students have an opportunity to practice the method of assessment you plan to use, and receive some guidance from you about what you assess and why. In short, if you know what you hope to assess at the end of your course, it will help you decide what to teach during the conduct of your course. Certainly, if you plan to assess students on something other than what you teach, out of fairness, you should make that clear to them at the inception of your course, and at a minimum give them some guidance about how they can achieve the necessary levels of mastery on their own.

Critics often fault law schools for the pervasive practice of basing a course grade on a single exam at the end of a course. As a matter of learning theory, there is no doubt that this critique is justified. Your school may be among the many where this is the typical practice, particularly in required or large-enrollment courses. Although you may resolve to buck the trend, it is important to be realistic about the structural constraints under which you will operate. The development of assessment tools requires a significant investment of time. Depending on the nature of the tools you develop, assessing students' work product and providing meaningful feedback and evaluation is also a substantial task. Especially while you are acclimating to the law school environment and teaching Contracts for the first time, it may simply prove impractical to include multiple assessment opportunities in your course. If you have significant administrative and scholarship responsibilities on top of your teaching responsibilities, it is particularly important to be modest in your goals in the early years of your career. If you have resolved to expand your assessment techniques beyond the traditional, end-of-semester exam, it may be prudent to set that as a long-term goal and take incremental steps toward reaching it over the next few years.

There are several common models of law school exams. As you may recall from your own studies, professors often pose one or more factual hypotheticals and ask students to evaluate the hypothetical in light of the legal principles studied in the course. The hypotheticals are sometimes long and involved, integrating issues from various parts of the course into one fact pattern. These kinds of exam questions (often called "issue spotters") are quite well suited to assessing students' grasp of a broad range of doctrinal principles. However, they call upon students to exhibit organizational and synthesis skills that

often play a minor role in the course itself. They can be difficult for a professor to write because it can prove challenging to integrate a broad range of issues into any one fact pattern. Because even excellent answers exhibit varying levels of scope and depth, it is sometimes problematic to compare answers that are broad in coverage but thin in analysis with those that show greater depth but omit discussion of side issues. As a result, these types of exams can be difficult to grade as well. Especially in the first-year Contracts course, my preference is to include a series of shorter, more pointed hypotheticals. Even if they each pose only a few central issues, they typically provide sufficient organizational and synthesis challenges for students. At the same time, they also allow room for students to work closely with the facts and develop a sophisticated analysis. As such, I believe shorter, more directed questions present a much better tool to assess the depth of students' understanding and the quality of their analysis than longer, "issue spotter" questions do. As an aside, they are also easier exams to write, and the answers allow for clearer comparisons and thus are more straightforward to grade.

Another possibility is to include a multiple-choice component in your exam. Good multiple-choice questions can be very difficult and time-consuming to write. Some professors question whether multiple-choice exams are appropriate for a Contracts course because clear answers to difficult questions are often elusive. In my view, however, multiple-choice questions can be drafted in such a way that one answer is clearly better than the others. They need not test doctrine alone; they can also test judgment or analytical skills. Although they are difficult to write, multiple-choice questions have a number of advantages. They allow for more comprehensive coverage than essays typically do. They are quick and easy to grade. If their secrecy is guarded carefully, they can be refined and tested from year to year.

Especially in the first year, multiple-choice questions can also provide useful feedback. Some students who are disappointed in the results of their essay exams have difficulty diagnosing where they went wrong. They believe they understood the material, yet their understanding was not put to use in a way that produced an essay that lived up to their expectations. Sometimes the difficulty is that they didn't understand the material at the level of depth and subtlety necessary to write an excellent exam. At other times, they in fact had an excellent understanding of the rules of law, but they had not yet developed the analysis skills to put that understanding

to work. In other instances, the analytical skills were there, but the students had difficulty translating their thinking into written essays in an exam situation. One function of multiple-choice questions is to give students a broader range of feedback on their mastery of the material. They test substantive knowledge and analysis skills; writing skills are taken out of the equation.

Even if you feel that you have no choice but to rely on a single, end-of-semester exam, you should endeavor to provide students with opportunities to practice the skills they will need to employ on the exam. For instance, it is unfortunate if the first time a student writes a written analysis in response to a factual hypothetical is on the final exam for your course. A new professor of Contracts may find it challenging to provide meaningful opportunities for students to practice their written analysis skills. Many professors make prior essay exams available to students, so students will have a sense for what to expect on the final exam in those professor's courses. If you are new to teaching, you won't have any examples of prior essay exams to share. You might survey the Contracts exams available to students and suggest ones that are likely to reflect your exam-drafting style. Alternatively, you might prepare two essay exams the first time around: one to give to the students as a sample, "practice" exam, and the other to serve as the actual essay component of the exam in your course. If your text includes meaty problems, you might suggest one or more of them as sample essay questions.

As important as it is to provide opportunities to practice written analysis skills, it is equally critical to give students a sense of what you will expect in an excellent essay. If you provide a sample essay question, at a minimum, you might also provide an issue outline, sketching all the issues you think are legitimately raised by the question, and possibly putting an asterisk by those issues you believe merit the most in-depth discussion. A more ambitious approach would be to attempt to write a "model" answer and make it available to the students after they have had an opportunity to try the essay question themselves. You might even ask a crackerjack research assistant to attempt to write a sample student answer, and then provide a gentle and anonymous critique of that student's work product to the students in your course. Alternatively, you might reserve a class to go over a sample essay question in some detail.

Likewise, if you plan to include a multiple-choice component on your exam, there is no good reason not to provide students with some

sample multiple-choice questions over the course of the semester. You could take class time to go over the questions, or if you prefer, you could provide a handout that explains which answers you believed to be the best ones and why. This approach also allows students to point out ambiguities in the questions that you might not have seen and gives you an opportunity to refine your question-writing skills before the all-important, graded exam you plan to give at the end of the semester.

As for preparing the exam itself, the best advice I can give is to get started early. As noted before, ideally you would include some thoughts about possible exam questions as part of your regular post-class reflections. Once you have a draft of your exam ready, you might want to ask a more experienced Contracts colleague to take a look at it and give you feedback. At a minimum, you will want to complete the exam with sufficient lead time to set it aside and return to it with a fresh eye for a final review. You might even want to set aside some time to take the exam yourself before you give it to the students. This would give you a final opportunity to catch any errors, as well as judge how realistic your expectations are in terms of the length and difficulty of the exam. For instance, if I cannot write what I consider to be a fairly polished essay answer in about two-thirds the amount of time I allow the students, I conclude that the question is either too long or too difficult. So long as you approach your own essay questions with some distance, the answers you write may also serve as a good starting point for the grading rubric you ultimately develop for the questions.

Many professors consider writing and grading exams to be the most onerous part of teaching Contracts. Much as we might like to deny it, however, exams and the resulting grades carry significant practical and emotional consequences for students. It is important to craft an exam that allows you to assess the degree to which students have achieved the objectives you have set for them. This is a task that takes patience, perseverance, and care.

## **Conclusion**

Teaching Contracts is an adventure. It is a complex enterprise that will draw on your intelligence, creativity, diligence, and compassion. The rewards, however, are many. My hope is this book has given

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you some insights that you find useful as you begin your first year as a Contracts professor. Ultimately, though, it will be your own perspectives and ideas that will animate and enrich your teaching. Respect your students, do your best, and know that they will do the same for you.