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CARDOZO AND POSNER: A STUDY IN CONTRACTS

LAWRENCE A. CUNNINGHAM*

There is a line among the fragments of the Greek poet Archilochus which says: "The fox knows many things, but the hedgehog knows one big thing."

—Isaiah Berlin
The Hedgehog and the Fox

Every American law student is well acquainted with the writing and thought of Benjamin N. Cardozo, the fox of American contract law. For over seventy years, his opinions have formed the basis for many discussions of doctrine, method, and policy in the traditional first-year curriculum.¹ The current generation is also becoming well acquainted with the hedgehog of American contract law—Richard A. Posner, whose opinions have been entering the domain of the core first-year curriculum in the past decade.²

With the 1989 publication of the second edition of their casebook on contracts, Professors Calamari, Perillo, and Bender announced that, as a partial reflection of continuing changes in law and legal analysis, "the number of opinions by Richard Posner reproduced in this volume outnumber those of Benjamin

* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Many of the insights in this Article, but none of the errors, are ultimately due to one or more of my mentors and colleagues in contracts, Bill Bratton, Lester Brickman, and Paul Shupack, to whom I owe special thanks. For helpful comments on drafts of this Article, thanks to them and to Randy Barnett, David Carlson, The Honorable Stanley Fuld, Robin Grant, Milton Handler, Eva Hanks, Michael Herz, Arthur Jacobson, Peter Linzer, Dean Frank Macchiarola, Jeanne Schroeder, Stewart Sterk, and Chuck Yablon. For excellent research assistance, thanks to Kim Abraham, MaLora Mathis, and Cliff Olshaker.

1. See *infra* app. (listing Cardozo opinions republished in various contracts casebooks).

2. See *infra* app. (listing Posner opinions republished in various contracts casebooks).

Cardozo."³ In 1988, Professors Farnsworth and Young had done the same thing, though without the fanfare.⁴ In 1992, Professors Hamilton, Rau, and Weintraub also quietly fell in line.⁵ While nine other contracts casebooks published since 1989 have kept Cardozo in the lead, a number of opinions by Judge Posner appear in most of them.⁶ Undoubtedly, Posner has made a mark on contracts scholarship and is increasingly making significant contributions to the doctrinal shape and texture of the contract law taught each year to virtually every law student across the country.

Despite Posner's growing reputation, however, Cardozo remains the judicial cynosure of contracts, having displaced Oliver Wendell Holmes as the avatar of the American common law of contracts⁷ and having exerted an influence on the law and teaching of the subject unmatched by any other modern jurist, including Stanley Fuld, Learned Hand, and Roger Traynor. Indeed, Posner recently published an elegant meditation on judicial eminence confirming that Cardozo is a judicial titan, the reasons for which Posner elucidated with characteristic erudition.⁸ Posner identified his work as a new genre called the critical judicial study, which he urged others to undertake.⁹ Posner's book, along with his own prominence in the law and teaching of contracts, provokes this comparative critique of the leading contracts opinions written by Judges Cardozo and Posner, each of whom has contributed significantly to the law and teaching of contracts.¹⁰

3. JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS xxi (2d ed. 1989). This casebook reproduces six Posner opinions and four Cardozo opinions.

4. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (4th ed. 1988). This casebook reproduces three Posner opinions and two Cardozo opinions.

5. ROBERT W. HAMILTON ET AL., CONTRACTS (2d ed. 1992). This casebook reproduces three Posner opinions and one Cardozo opinion.

6. See *infra* app.

7. See Bernard L. Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597, 597 (1930).

8. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990). The book has been widely reviewed. *E.g.*, Book Reviews, 12 CARDOZO L. REV. 1914 (1991) (containing six separate reviews).

9. POSNER, *supra* note 8, at 150.

10. While this Article focuses on the comparative contributions of Cardozo and Posner to the law of contracts, it bears observing that each judge contributed to the

Cardozo's judicial contributions to the law and teaching of contracts, including the good faith obligation¹¹ and the doctrine of substantial performance,¹² were achieved using a thickly textured doctrinalism involving conscious mediation amongst the competing values at stake in the law of contracts. His opinions reveal a capacious juridical framework capable of harmonizing the many contending concerns of contract law, including commercial certainty, freedom of contract, good faith, protecting the reasonable expectations of parties, and forfending interparty exploitation. Cardozo was at once master of the incremental evolution of the common law and servant of the imperative to adapt law to the needs of those it governs, evincing in his contracts opinions a fluid sense of doctrine and an animating principle of justice broadly conceived.¹³ The hallmark of his contracts opinions is balance. He was an intellectual fox.

Posner, of course, is still making contributions to the law of contracts, and it would be foolhardy to predict how important those contributions will turn out to be. Given his swift rise to prominence, however, his contributions likely will be important. In many cases, however, Posner's views are opposed to Cardozo's, or at least in tension with them. For example, whereas Cardozo minted the implied covenant of good faith in the performance of contracts,¹⁴ Posner is averse to any such implication and strongly resists recognizing any obligation of good faith, even where it is imposed by statute. Posner's contracts opinions are far less textured than Cardozo's, showing a reluctance to mediate amongst the many contending values contract law has traditionally implicated and instead putting into the mix only one primary concern—efficiency through freedom of contract. Posner is an intellectual hedgehog.

law of torts as well. *See, e.g.,* *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Cardozo discussing proximate causation); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo discussing negligence and duty of care); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982) (Posner discussing contributory negligence and damages assessment). A comprehensive comparison of those contributions is yet to be published.

11. *See, e.g.,* *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

12. *See, e.g.,* *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

13. *See, e.g.,* POSNER, *supra* note 8, at 125-43.

14. *Wood*, 118 N.E. at 214.

Because the Posnerian framework is stricter and less capacious than the Cardozoan framework, this comparison of Cardozo and Posner is primarily a study in contrasts, as a matter of doctrine, theory, and style. Contracts opinions by Posner and Cardozo resemble one another in their creativity and ingenuity, but they employ the judicial craft within very different frameworks and with distinct normative ends. Cardozo and Posner are judicial antipodes. Indeed, were Posner's contributions to the law of contracts to rise to the level of Cardozo's, many of Cardozo's contributions, both substantive and textural, would have to be jettisoned. Although attempting to forecast the future path of contract law is replete with obvious and insurmountable problems, one thing is clear. Should Posner's contributions to the law of contracts achieve the broad acceptance and application that Cardozo's have, the texture and substance of contract law will be very different indeed.

Whether that evolution of contract law should be welcomed or thwarted ultimately depends on one's own normative views. For example, and at the risk of oversimplifying, one may prefer a conception of contract that limits itself to interests in freedom of contract and efficiency, one that presupposes that people behave, or can be made to behave, as rational economic actors and therefore prefer a Posnerian approach. Or one may prefer a conception of contract that seeks to balance values, such as good faith, fairness, or reasonable expectations, in addition to freedom of contract and efficiency and that conceives of people as socialized actors and therefore prefer a Cardozoan approach. It should be recognized, however, that such preferences entail significant consequences for the way contract law is understood and taught and that the widespread and continued reproduction of Posner's opinions in the casebooks stands both to reflect and shape that understanding. This comparative critique is written in the spirit of opening up perspectives about such consequences.¹⁵ Along the way, moreover, this discussion is also an opportunity to explore many interesting aspects of contract doctrine and theory,

15. The critique leads the Author to believe that the great contemporary judge would combine the virtues of Cardozo and Posner, putting Posner's economic reasoning to work in Cardozo's more capacious framework.

treated in very different ways by two of this century's most luminous judges.

Before beginning the comparative critique, Part I first presents statistical evidence of Cardozo's and Posner's prominence in the law and teaching of contracts. This evidence is drawn from a survey of contracts opinions reproduced in contemporary contracts casebooks.¹⁶ It shows that Cardozo is the most important judge in the law and teaching of contracts, followed by Roger Traynor and then Posner.¹⁷ Cardozo's lofty perch and Posner's ascendancy make comparative critiques like the one that follows Part I particularly important.

I. A STATISTICAL COMPARISON OF JUDICIAL CONTRIBUTIONS

This Part identifies those judges who have made the most significant contributions to the basic structure and texture of contract law. It is based on a tabulation of the number of opinions by all judges reproduced as main cases in current contracts casebooks. The survey includes majority as well as dissenting and concurring opinions, but it excludes cases that are only cited or summarized rather than being reprinted substantially in full. The results of this survey are set forth in the Appendix on a judge-by-judge basis.¹⁸

As a measure of judicial prominence, this method of casebook analysis may seem arbitrary. However, it reveals most acutely the influence particular judges have on the shape and texture of contract law, the manner in which that law is taught, and hence some of the core skills and knowledge imparted to first year law students and shared by most lawyers.¹⁹ As a matter of statistics, this method may seem to lack significance; this limitation is not disputed. Indeed, the method shares the statistical limitations of the methodology that Posner uses in his study of Cardozo. But, as Posner also noted, the method does furnish at least a reasonable proxy for quantifying judicial contributions.²⁰

16. See *infra* app. (setting out survey results).

17. This determination is based solely on the statistical analysis of contemporary contracts casebooks. See *infra* app.

18. The protocol of this method is detailed further in the Appendix.

19. See *infra* notes 40-58 and accompanying text.

20. POSNER, *supra* note 8, at 91 (Posner's statistical evidence is "not conclusive,

A. *Results of the Survey*

Using this method, Cardozo has made the most important contributions to the substance and teaching of contemporary contract law: current contracts casebooks republish an average of 4.07 Cardozo opinions, substantially more than any other single judge.²¹ Cardozo's preeminence will come as no surprise to anyone who has taken a first year course in contracts or perhaps to anyone even vaguely familiar with modern jurisprudence. After all, in short lists of the most important jurists of the twentieth century, Cardozo (1870-1938) is virtually always cited, usually along with Louis Brandeis (1856-1941), Oliver Wendell Holmes (1841-1935), and Learned Hand (1872-1961).²²

Of course, not all prominent jurists have made contributions specifically to the law of contracts, although virtually all judges who have made broad contributions to the law of contracts are also counted among the greats. Thus, although short lists of the most important modern jurists contributing to the law of contracts routinely include Cardozo, Hand, and Holmes, they do not include Brandeis.²³ This count of the number and frequency of opinions reproduced in contracts casebooks confirmed this impression.²⁴ Hand averages 1.00 opinion per casebook and Holmes averages 0.46 opinions per casebook.²⁵ Out of all the

but it tends to confirm the high repute in which, by casual impression, Cardozo is held").

21. See *infra* app.

22. In his magisterial biography of Learned Hand, for example, Professor Gunther lists these four as the greatest judges of the modern era. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, at xv (1994). In Posner's book on reputation, he collects Holmes, Brandeis, and Cardozo together in several short lists. POSNER, *supra* note 8, at 79, 138. Other evidence includes the naming of a university for Brandeis and a law school for Cardozo. A law school is also named for Thomas Cooley, although, perhaps surprisingly, his judicial contributions to the law of contracts are not as significant as those of other judges as measured by this survey. See *infra* app.

23. E.g., E. ALLAN FARNSWORTH, *CONTRACTS* 957-60 (2d ed. 1990) (containing a "thumbnail" biographical index of persons "who have had a special influence on contract law" that lists the following modern jurists: Cardozo, Hand, Holmes, Peters, Posner, and Traynor); see also JOHN DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* (6th ed. 1993) (including photographs of three modern jurists: Cardozo, Hand, and Holmes; it also includes photographs of William Murray, Earl of Mansfield; Arthur Corbin; and Karl Llewellyn).

24. See *infra* app.

25. See *infra* app. For reasons adverted to at *infra* note 31, no computation of

contracts casebooks surveyed, however, a Brandeis opinion is reproduced only once.²⁶

Using this method, the next most important judges contributing to the law and teaching of contracts are Roger J. Traynor (1900-1983), averaging 2.62 opinions per casebook; Posner (born 1939), averaging 2.46; Irving Lehman (1876-1945), averaging 1.76; and Stanley H. Fuld (born 1903), averaging 1.69.²⁷ Other judges having an average of one or more opinions per casebook are Frederick E. Crane (1869-1947), averaging 1.62 opinions per casebook; Cuthbert W. Pound (1864-1935), averaging 1.38; Henry J. Friendly (1903-1986), averaging 1.08; and Charles D. Brietel (1908-1991), and Ellen A. Peters (born 1930), each averaging 1.00.²⁸ Somewhat surprisingly, other judges whose prominence is not doubted as a general matter, have by this measure made lesser contributions to the law and teaching of contracts: Charles Edward Clark (1889-1963) averages 0.46 and Jerome Frank (1889-1957) averages 0.38 opinions per casebook.²⁹

Of a different order stand the ancients, who undoubtedly left a definitive mark on contracts. Jurists such as Edward Coke (1552-1634), James Kent (1763-1847), Lord Mansfield (1705-1793), and Joseph Story (1779-1845) certainly left a definitive mark on the law and teaching of contracts. Yet, through a process known as obliteration, the particular contributions of these luminaries are now so integral a part of the fabric of the law of

excerpts from books written by judges has been made, although excerpts from Holmes' *THE COMMON LAW* are widely reprinted in contracts casebooks. See, e.g., FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 50 (3d ed. 1986).

26. FARNSWORTH & YOUNG, *supra* note 4, at 701 (reproducing *United States v. Spearin*, 248 U.S. 132 (1918)).

27. See *infra* app.

28. See *infra* app. Among working judges today other than Peters and Posner, none has achieved widespread prominence measured in this way. Among other judges, however, casebook editors are picking up opinions by Frank H. Easterbrook (born 1948), see, e.g., ARTHUR ROSETT, *CONTRACT LAW AND ITS APPLICATION* 533 (5th ed. 1994) (reproducing *Empro Mfg. Co. v. Ball-Co. Mfg., Inc.*, 870 F.2d 423 (7th Cir. 1989)); DAWSON ET AL., *supra* note 23, at 357 (same), and Judith S. Kaye (born 1938), see, e.g., *id.* at 151 (reproducing *Van Wagner Advertising Corp. v. S & M Enters.*, 492 N.E.2d 756 (N.Y. 1986)).

29. See *infra* app. Numerous other prominent judges are represented in current casebooks by only one opinion and are therefore not reported in the survey. See *infra* app.

contracts that their unique roles in its evolution have been obscured.³⁰ Thus while it is possible to draw comparisons among the contributions of Cardozo, Fuld, Hand, Posner, Traynor, and the other modern jurists, it would be much more difficult (and far less meaningful) to compare their influence on the law and teaching of contracts with those of our ancient elders.³¹

What is remarkable is that Posner ascended to the top of this rarified list in such a short time, while remaining one of the most productive judges (and scholars) in the country. During Posner's fourteen-year judicial tenure, he has written over one

30. On the concept of obliteration in the history of thought, see Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1543-44 (1985) ("The work of some writers is so influential that it becomes integrated into the common body of knowledge to the point that scholars no longer feel it necessary to cite it explicitly.").

31. It similarly would be difficult to draw comparisons between judges and the impact of judicial opinions on the one hand and those who contributed to the law and teaching of contracts exclusively through scholarship and commentary (and teaching). Other than in broad thematic terms, it would be difficult to compare, for example, Cardozo, Posner, or the others with such luminaries as Arthur Corbin (1874-1967), John Dawson (1902-1985), Lon Fuller (1902-1978), Grant Gilmore (1910-1982), Karl Llewellyn (1893-1962), or Samuel Williston (1861-1963). For the many other scholars who might be included in this list, see the handsome volume edited by Professor Peter Linzer, *A CONTRACTS ANTHOLOGY* (Peter Linzer ed., 1989) [hereinafter *CONTRACTS ANTHOLOGY*]. Moreover, evaluating the influence of those who contributed to contract law through code drafting, such as Gilmore and Llewellyn, would require a different methodology altogether.

The noncomparability between judges and professors arises primarily because of the very different contexts in which judges and professors work. See POSNER, *supra* note 8, at 133-34. Unlike professors, judges have neither the luxury of choosing the subjects of their research and writing nor the leisure of time and latitude in scope of pursuing those chosen subjects. See *id.* Thus, for example, while Corbin and Williston prepared multi-volume treatises on contracts covering virtually every nook and cranny of the subject, Cardozo wrote approximately one hundred opinions on discrete aspects of the subject chosen for him, in effect, by litigants. See Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 39 COLUM. L. REV. 56 (1939) (also appearing at 52 HARV. L. REV. 408 (1939), 48 YALE L.J. 426 (1939)).

In yet another group are those who practiced, taught, and judged at different times in their legal careers. Holmes, for example, published *The Common Law* before teaching or judging, contributing to contract law the bargain theory of consideration, the objective theory of contract formation, and the right to perform or to pay damages. See E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1412 (1987). As Professor Farnsworth observed, Holmes later unabashedly advanced these positions when he became a judge. *Id.* Notice the resemblance to Posner.

thousand opinions, including several hundred involving the law of contracts³² and, during that time, has kept current his most famous and enduring work, *Economic Analysis of Law*,³³ and written numerous other books.³⁴ In the first seven years of Posner's judgeship, three of his contracts opinions were republished in a few casebooks, and, using the measure of contracts casebook prominence, he follows only Cardozo and, by a small margin, Traynor.³⁵ Not since Cardozo have the contracts opinions of any single judge achieved such widespread notice so promptly,³⁶ although admittedly Cardozo's rise to prominence was uniquely meteoric, as Posner's study reveals.³⁷

32. These figures are based on a LEXIS search using the protocol to retrieve all opinions written by a particular judge. The search "writtenby (Posner)" conducted on June 5, 1994, yielded 1,005 opinions in the United States Court of Appeals file, and when modified with "and contract!" the search yielded 379 opinions. In contrast, Cardozo wrote approximately 700 opinions during his entire judicial career. This is based on a LEXIS search "writtenby (Cardozo)" also conducted on June 5, 1994, which yielded 558 opinions in the New York Courts file and 128 opinions in the United States Supreme Court file.

33. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

34. Posner's numerous other books include *THE ECONOMICS OF JUSTICE* (1981) [hereinafter POSNER, *ECONOMICS*]; *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) [hereinafter POSNER, *CRISIS*]; *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) [hereinafter POSNER, *LITERATURE*]; *THE PROBLEMS OF JURISPRUDENCE* (1990). Posner's publications draw vast, and often critical, attention. See, e.g., Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378 (1985) (reviewing POSNER, *CRISIS*, *supra*); Robin F. Grant, Note, *Judge Richard Posner's Wealth Maximization Principle: Another Form of Utilitarianism?*, 10 CARDOZO L. REV. 815 (1989) (critiquing POSNER, *ECONOMICS*, *supra*); Richard H. Weisberg, *Entering With a Vengeance: Posner on Law and Literature*, 41 STAN. L. REV. 1597 (1989) (reviewing POSNER, *LITERATURE*, *supra*).

35. See *infra* app.

36. In contrast to Cardozo and Posner, whose famous opinions came very early in their judicial tenures, Traynor's most famous opinions were not written until late in his tenure, see *infra* app., and no judge other than Traynor enjoys the same stature as Cardozo and Posner, measured by opinion reproduction in contracts casebooks, see *infra* app. For an analysis and appraisal of Traynor's contributions to the law of contracts, see Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

37. For example, Cardozo's opinions in his very first year on the bench "are cited considerably more often than those of his colleagues, all of whom were more experienced judges than he." POSNER, *supra* note 8, at 81. Posner continued: "What is more, the pattern of citations is established in his first decade, long before his reputation received any boost from appointment to the Supreme Court." *Id.*

It is equally remarkable that Cardozo's opinions have proven so resilient. Three generations since their original appearances, his opinions in *Jacob & Youngs, Inc. v. Kent*,³⁸ *Wood v. Lucy, Lady Duff-Gordon*,³⁹ *Allegheny College v. National Chautauqua County Bank*,⁴⁰ and other cases remain standard fare in contracts courses, and many are regarded as classroom favorites.⁴¹ Long after the first year of law school, lawyers recognize these cases and recall their salient facts, Cardozo's language, and their importance.⁴²

B. Casebook Case Selection

Consideration of casebook reproduction is important because the cases selected for full reproduction in contemporary casebooks for first year courses occupy a unique position in American law.⁴³ They form an integral part of the intellectual foundation upon which American law students meet the law and develop their analytical skills. The core cases common to many casebooks reflect and reinforce the doctrinal structure of the law, as well as the law's historical, cultural, economic, and policy context. Equally important, these cases introduce students to the common law—case reading, reconciliation, and synthesis—as well as the role and limits of the case law system and how it can be used effectively to meet various policy objectives.⁴⁴ As such, the cases not only depict the doctrinal structure of the law, but, in an important sense, are a measure of the shape of the legal mind and the discourse and method that the profession's members share at a fundamental level.⁴⁵

38. 129 N.E. 889 (N.Y. 1921). The impact of *Jacob & Youngs* on the law of contracts is discussed *infra* part IV.A-B.

39. 118 N.E. 214 (N.Y. 1917). The impact of *Wood* on the law of contracts is discussed *infra* part II.A.

40. 159 N.E. 173 (N.Y. 1927). The impact of *Allegheny College* on the law of contracts is discussed *infra* part II.A.

41. See *infra* app.

42. Indeed, as Posner has shown, Cardozo's opinions have generally possessed "more staying power than those of his colleagues—they depreciate less rapidly." POSNER, *supra* note 8, at 83.

43. See, Farnsworth, *supra* note 31, at 1426 ("[T]he casebook itself [is] the common denominator of legal instruction.").

44. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH*, 39-76 (1930).

45. These observations seem to apply equally to all traditional first-year courses,

Cases are selected for a variety of reasons.⁴⁶ Because the purpose of a contracts casebook is to facilitate the teaching and study of legal method and of an introductory body of law, both pedagogical value and substantive merit are the key determinants of selection.⁴⁷ Whether a case meets these criteria in turn depends on its usefulness as a reflection of the doctrinal structure of the law, the principles underlying the doctrine, and the way in which a judge's exploration of these matters reveals at once the stability and fluidity of the common law process.⁴⁸

Apart from reasons of pedagogy and professorial craft, the economics of casebook production and distribution plays a role in case selection. While the editors' reputations, notes, and questions are an important feature of the casebook as a product, the cases reproduced in full are a critical factor in sales.⁴⁹ Maximizing sales requires a balance between maintaining old cases and adding new cases. The old chestnuts add color to the contracts course and lend a sense of tradition to the casebook.⁵⁰ New cases call for new editions, thus reducing the negative impact of

including civil procedure, legal method (or elements of the law), property, and torts, although many believe the contracts course to be particularly adapted for these purposes. See FARNSWORTH & YOUNG, *supra* note 4, at xix.

Law teachers have long believed—rightly we think—that contract law offers a body of precepts and problems exceptionally well suited to the development of the student's "legal mind": respect for sources, skepticism toward easy generalizations, and disciplined creativity in the use of legal materials for the accomplishment of practical professional tasks.

Id.

46. According to Posner, who has edited a leading casebook on antitrust, "opinions are selected for inclusion in casebooks for their teachability as well as for their intrinsic merit or their influence." POSNER, *supra* note 8, at 91.

47. Posner argues that Cardozo's "primary impact . . . may well have been pedagogical . . . and [this] is reflected in his deserved popularity among authors of legal teaching materials." *Id.* at 126.

48. More particularly, of course, the cases speak to broader themes in contract law. These include depicting contract as a method of allocating risk, the primary (yet limited) role of the intentions of the parties (as well as the roles of assent and reliance), the tension between contractual freedom and social control, and the role of counsel in the contracting process.

49. Other factors, such as marketing and distribution, also play a role, but these are in an important sense beyond the editors' power of control.

50. For example, *Hadley v. Baxendale*, 154 Eng. Rep. 145 (1859), is the most frequently reprinted opinion among the major casebooks, despite having been decided some 140 years ago.

used book sales on revenues. But new cases can be added only in moderate numbers because substantial revisions to existing books create the risk of losing market share. Substantially revised new editions also increase the marginal costs of preparation to professors who have prepared their class materials for a particular book and flow of cases. Faced with such increased marginal costs, some professors may decide to switch to another book entirely.

As the market for contracts casebooks has become increasingly saturated in the past decade,⁵¹ some editors may be seen as entrepreneurs attempting to exploit market niches.⁵² By departing significantly from the canon of inherited classics and from traditional Socratic case pairing, the casebooks of Professors Closen,⁵³ Macaulay,⁵⁴ and their respective colleagues may be able to gain dominance in a part of the market. Even if that segment of the market is small, given fewer competitors, overall sales may be higher.⁵⁵

Emphasizing a law and economics perspective also may be understood in these terms because the easiest new cases to justify are those offering a new perspective or paradigm in thought. As a founding father and pioneer in the field of law and economics, Posner's opinions therefore make excellent candidates for casebook reprinting.⁵⁶ Posner's opinions also make excellent candidates for inclusion in casebooks because they tend to have a scholarly character, laying out competing approaches to vari-

51. "There are now so many good casebooks on the subject of Contracts that there is truly an embarrassment of riches." Farnsworth, *supra* note 31, at 1428.

52. *See id.* at 1429 ("In an expanding market, casebook editors made overt attempts to achieve product differentiation.").

53. MICHAEL L. CLOSEN ET AL., *CONTRACTS: CONTEMPORARY CASES, COMMENTS AND PROBLEMS* (1984).

54. STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1993-94 ed.).

55. McLean's toothpaste used this strategy in the marketing wars of the 1960s. McLean's public opinion polls showed that nearly 80% of consumers sought the toothpaste that would promote dental hygiene and less than 10% preferred the paste that whitened their teeth. While other major toothpaste manufacturers were competing for small parts of the 80% by pitching hygiene, McLean's campaigned for all of the 10% on the whiten-your-teeth slogan.

56. From this perspective, the prefatory remarks of Professors Calamari, Perillo, and Bender in their casebook constitute a very sensible sales pitch. *See supra* text accompanying note 3.

ous problems or elucidating theoretical bases for the analysis that Posner chooses to conduct.⁵⁷

Many of Cardozo's opinions are chestnuts in the law of contracts and so well known that editors may feel constrained to include them.⁵⁸ Also, they reveal a master common law judge wrestling with difficult questions in contract law while showing that the difficulties are manageable.⁵⁹ Accordingly, opinions of Cardozo and Posner may be selected either for reasons of pedagogy, marketing, or both. For whatever reasons they are included, however, the increasing prominence and widespread inclusion of Posner's opinions in contracts casebooks, as compared to Cardozo's, portend significant consequences for contract doctrine, theory, and pedagogy. The following critique seeks to understand and appraise those consequences.

II. THE BASIS OF CONTRACT

Cardozo's opinions on the subject of contract formation, including problems of definiteness and consideration, offer insights on method, invoking traditional contract doctrines to reach legal conclusions that others would have been hard pressed to see.⁶⁰ Characteristically, those opinions are presented in the terms of ordinary experience and in the vocabulary of moral discourse, a resonant literary mode that contributes much to the distinctive character of Cardozo's opinions.⁶¹ The doctrinal emphasis centers on the behavior of the promisor and recognizes norms of conduct requiring contracting parties to observe basic principles

57. See *infra* note 405.

58. See POSNER, *supra* note 8, at 125 (noting that Cardozo's deserved fame may outweigh his actual influence on the development of the law).

59. Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637-38 (1962) (describing Cardozo's ability, in difficult cases such as *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), to lead the reader to "the conclusion that the case has to come out one way . . . [and] that [the cases] fit into a legal frame that says 'How comfortable it will be to bring it out that way. No trouble at all. No trouble at all.'").

60. See, e.g., *infra* note 92 and accompanying text (discussing the then-innovative nature of *Wood*).

61. POSNER, *supra* note 8, at 127 ("[Cardozo's] opinions have a charm that is literary, essayistic—at times theatrical and even musical.").

of good faith, even when not agreed to explicitly.⁶² This focus, in turn, expresses Cardozo's underlying concern as a positive and aspirational ideal to achieve an open-textured balancing of the many competing principles implicated by the law of contracts, including not only freedom of contract but also commercial certainty, good faith, fair dealing, and protecting the reasonable expectations of parties.⁶³

Posner's opinions concerning the basis of contract have a very different quality, being concerned nearly exclusively with freedom of contract and efficiency and evincing an essentially negative concern to limit economically exploitive and opportunistic conduct.⁶⁴ Doctrinally, Posner's analysis leads to an emphasis on the promisee. Rather than recognizing a generalized obligation of good faith upon contracting parties that would have the effect of imposing threshold standards of conduct, with the initial focus therefore resting on the promisor, Posner investigates whether the result of any conduct has the effect of exploiting the promisee. This shift in emphasis renders Posner's framework more confining, with the economic reasoning focusing narrowly on opportunism rather than on a mediation of broader concerns. By enjoining dealing in bad faith rather than promoting dealing in good faith, moreover, Posner turns Cardozo's approach upside-down.⁶⁵

62. See *infra* notes 91, 221-42 and accompanying text.

63. In that sense Cardozo's approach conforms to Professor Rosenfeld's thesis that the law's conception of freedom of contract and the philosopher's social contract are mutually dependent and complementary. See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 814-19 (1985) (locating this reconciliation in the dual process of abstraction of the particular and particularization of the abstract). Professor Rosenfeld traces the rise and subsequent decline of freedom of contract and rationalizes it on the basis of this dual process as well. *Id.* at 820-32.

64. See, e.g., *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (discussed *infra* part II.B); *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983) (discussed *infra* part II.B).

65. See *infra* part II.B.

A. Cardozo's Affirmative Obligation of Good Faith

*Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*⁶⁶ offers a good introduction to Cardozo's mediation between freedom of contract and other competing social values.⁶⁷ A buyer sued a seller for failure to deliver under a contract calling for the delivery of one thousand tons of paper per month for sixteen months.⁶⁸ Prices were specified for the first four months.⁶⁹ Thereafter, the parties were to agree on a price and the length of time that the price would apply.⁷⁰ The price and time period were to be set fifteen days before the expiration of each period, and the price was never to exceed the contract price charged by a third party dealing in the goods.⁷¹

According to traditional understanding, Cardozo held that because the writing failed to provide a time term for the duration of the price that was to apply in the absence of an agreed-upon price, the contract was nothing more than an "agreement to agree."⁷² In later explaining *Sun Printing*, for example, Cardozo emphasized the "overmastering need of certainty in the transactions of commercial life" and the attendant need to see contracts as the "will outwardly revealed in the spoken or written word" rather than some "hypothetical, imaginary will."⁷³ According to Judge Crane's dissent, moreover, the par-

66. 139 N.E. 470 (N.Y. 1923).

67. This despite the fact that Cardozo may have regarded the opinion as one of his most embarrassing. See *infra* note 76.

68. *Sun Printing*, 139 N.E. at 470.

69. *Id.*

70. *Id.*

71. *Id.*

72. See, e.g., FARNSWORTH, *supra* note 23, § 3.29 at 221. *Sun Printing* is more accurately understood as a pleadings case, however. What divided Cardozo from the dissent was the willingness of the dissent to assume facts about a particular commodity market which, Cardozo said, must be pleaded so that, if the parties have a disagreement, the issue can be drawn. In his opinion, Cardozo admonished the buyer on what he needed to plead: "If we misconceive the course of dealing, the plaintiff by amendment of its pleading can correct our misconception." *Sun Printing*, 139 N.E. at 472. The buyer did later amend its pleadings, but the lower court dismissed the case and no appeal was taken. Shientag, *supra* note 7, at 630 n.84. I owe this perspective on *Sun Printing* to my colleague Paul Shupack.

73. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 111 (1924). On the uncertain desirability of certainty in the common law, see Charles M. Yablon, *Poison Pills and Litigation Uncertainty*, 1989 DUKE L.J. 54.

ties thought that they had entered into a binding contract, and the duration issue could have been filled either by adopting the price in effect for one year or by doing so monthly because the contract called for monthly shipments.⁷⁴ In the dissent's view, "the law should do here what it has done in so many other cases, apply the rule of reason and compel parties to contract in the light of fair dealing."⁷⁵ In terms of classical contract theory, therefore, Crane would have countenanced judicial making of the contract for the parties in light of the court's notions of fairness.⁷⁶

One might therefore understand Cardozo to have taken an antipaternalistic view by refusing to make a contract for the parties.⁷⁷ Equally, however, his underlying concern may have been the risk of opportunism presented by the writing as drafted. If the writing were taken to mean that the buyer had agreed to pay the specified ceiling price, the seller would have been "at the mercy of the buyer" with respect to the duration of that price.⁷⁸ For example, the buyer could have insisted on paying the ceiling price for so long as it was favorable, and when it became unfavorable, the buyer could then have refused to do so. In short, under the contract as written, the seller had no basis

74. *Sun Printing*, 139 N.E. at 473 (Crane, J. dissenting).

75. *Id.*

76. While the dissent's approach in *Sun Printing* was resisted at common law, it has been expressly sanctioned by the UCC. See 1 CORBIN ON CONTRACTS, § 4.3, at 568 n.5 (Joseph M. Perillo ed., rev. ed. 1993) [hereinafter CORBIN ON CONTRACTS] ("It was precisely cases such as [*Sun Printing*] that UCC § 2-305 . . . was designed to overturn."); cf. *infra* part II.B (discussing *Goldstick v. ICM Reality*, 788 F.2d 456 (7th Cir. 1986)). Cardozo predicted this development in the law. See CARDOZO, *supra* note 73, at 110-11 ("Perhaps, with a higher conception of business and its needs, the time will come when even revision [of contracts by courts] will be permitted if it is revision in consonance with established standards of fair dealing, but the time is not yet.").

77. Many have observed that it was peculiar for Cardozo, widely regarded as a "contract maker," to have refused to find a contract worth enforcing in *Sun Printing*. See, e.g., Corbin, *supra* note 31, at 57-58 n.1. For example, Cardozo could have accepted the buyer's argument that the parties had entered into one or more option contracts and enforced the contract in these terms very easily. Accordingly, something else must have led Cardozo to act as a "contract breaker." Corbin hinted at one possibility: "Was Cardozo less moved to cure defects in the work of the well-paid lawyers of two rich corporations?" *Id.* at 57 n.1.

78. *Sun Printing*, 139 N.E. at 471.

for knowing the duration of the price.⁷⁹ Thus, while it would be correct to understand Cardozo's decision in *Sun Printing* as a refusal to make contracts for the parties and therefore to embrace the principle of freedom of contract, the case warrants a finer reading. It also reflects an unwillingness to countenance exploitive terms to which the parties would most likely not have agreed.

Whereas, in *Sun Printing*, Cardozo eliminated the opportunity for exploitation by refusing to imply a term, in *Wood v. Lucy, Lady Duff-Gordon*,⁸⁰ he insisted on implying a term because failure to do so would countenance exploitation. In *Wood*, the case virtually every contracts student reads⁸¹ and long remembers, an exclusive sales agent sued his principal for breach of contract. The memorable facts of the case can be expressed best by excerpting the first passage from Cardozo's opinion:

The defendant styles herself a "creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of all "profits and revenues" derived from any contracts he might make.⁸²

The exclusive agent sued, alleging that the principal had breached this exclusivity commitment by granting rights in her designs to others.⁸³ The principal defended on the ground that there was no consideration for her promise of exclusivity because the agent had made no express commitment to market the de-

79. *Id.*

80. 118 N.E. 214 (N.Y. 1917). For further discussion of *Wood*, see Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988).

81. See *infra* app. (indicating that *Wood* is reprinted in 12 leading casebooks).

82. *Wood*, 118 N.E. at 214; see Llewellyn, *supra* note 59, at 637-38 (discussing the impact of Cardozo's subtle advocacy in this seemingly innocuous introduction).

83. *Wood*, 118 N.E. at 214.

signs.⁸⁴ In the language of nineteenth-century common law, the issue was therefore whether the parties' agreement created mutuality of obligation. The appellate division answered no and dismissed the case.⁸⁵

Writing for the court of appeals, Cardozo reversed. The agreement was supported by consideration, according to Cardozo, because the agent had impliedly promised to use reasonable efforts to market the principal's designs and endorsements—the contract was “instinct with an obligation, imperfectly expressed.”⁸⁶ Cardozo's principal concern again was with the risks of interparty exploitation and the judicial need to balance freedom of contract with other social values:

We are not to suppose that one party was to be placed at the mercy of the other The implication [of language in the agreement] is that the [agent's] business organization will be used for the purpose for which it is adapted. But the terms of the [principal's] compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the [agent's] efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business “efficacy as both parties must have intended that at all events it should have.”⁸⁷

By emphasizing the necessity of this interpretation to achieve the business efficacy of the transaction, Cardozo underscored the paramount place of freedom of contract.⁸⁸ At the same time, however, he recognized that contract is also a principle of order⁸⁹ that should be unshackled from an outmoded and

84. *Id.*

85. *Wood v. Duff-Gordon*, 164 N.Y.S. 576 (App. Div.), *rev'd* 118 N.E. 214 (N.Y. 1917).

86. This phrase is widely attributed to Cardozo and certainly is one characteristic of his rhetoric, but, in fact, he was quoting in *Wood* from an earlier New York case. *Wood*, 118 N.E. at 214 (quoting Scott, J., in *McCall Co. v. Wright*, 117 N.Y.S. 775 (1909); *Moran v. Standard Oil Co.*, 105 N.E. 217 (N.Y. 1914)).

87. *Id.* at 214-15 (citations omitted).

88. *Id.* at 214.

89. This phrase is Professor Kessler's. See KESSLER ET AL., *supra* note 25, at 1 (making a “compare” citation to Lon L. Fuller, *The Principles of Order*, in *THE PROBLEMS OF JURISPRUDENCE* 693 (1949)).

primitive formalism "when the precise word was the sovereign talisman, and every slip was fatal."⁹⁰ To achieve the balance between freedom of contract and social order in *Wood*, Cardozo found an implied promise by the agent to use reasonable efforts, a forerunner of what became the implied duty of good-faith performance.⁹¹ Doctrinally, that implied promise furnished consideration. As a matter of both doctrine and policy, Cardozo's conclusion may now seem so intuitive as to be commonplace, yet, at the time, the opinion amounted to an extraordinary innovation.⁹²

Indeed, the *Wood* opinion may be seen as a common-law attempt to keep law congruent with commercial reality.⁹³ The turn of the century witnessed the dramatic transition from simple markets, characterized by face-to-face dealings and relative stability, to complex commercial society, impersonal economic exchange, greater uncertainty, and market volatility. Contract law adapted to these changing circumstances, the contours of which were apparent in *Wood*.⁹⁴ From this perspective, Cardozo

90. *Wood*, 118 N.E. at 214.

91. See *infra* text accompanying notes 221-27 (discussing meaning and evolution of good faith in contract law). For the classic article showing that an implied obligation of good faith is not only consistent with freedom of contract but necessary for its preservation, see Friedrich Kessler & Edith Fine, *Culpa In Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

92. See Pratt, *supra* note 80, at 419 ("What may seem in the 1980s to be an easy decision was far from easy early in the century, as is apparent from the divisions within the New York courts."). The rationale of *Wood* has been widely adopted. See, e.g., UCC § 2-306(2) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 77 (1977).

93. POSNER, *supra* note 8, at 97 ("Cardozo's project of bringing law into phase with commercial necessity works [well] in . . . [*Wood*]."). Hadley v. Baxendale, 154 Eng. Rep. 145 (1854), is another common law example. See RICHARD DANZIG, *THE CAPABILITY PROBLEM* 84-85 (1978). Karl Llewellyn sought to render law congruent with business reality in developing Article 2 of the UCC. He recognized the need to adapt law from its roots, which addressed what he called the farmer's sale or one-stroke transaction, to relational contracting, which he called the mercantile sale.

94. Pratt, *supra* note 80, at 432-38. Professor Pratt concluded:

In a society so dominated by commercial values, it bordered on the heretical for a court even to imply that any part of the relationship between buyer and seller in an output contract resembled that of the fiduciary. Yet that is precisely what the New York [court] did at the time of [*Wood*].

Id. at 460. Professor Pratt's summary seems to overstate what the court in *Wood*

in *Wood* at once reflected and defined the evolution of contractual relationships required by a changing society. The opinion protects the reasonable expectations of contracting parties even while it necessarily locates those expectations outside the four corners of the written agreement. In that feat we have evidence of what Posner has called Cardozo's "pragmatism"⁹⁵ or what may better be called Cardozo's Burkean traditionalism.⁹⁶

On a more simplistic level, *Wood* is also often seen as an example of the craft of finding bargained-for consideration in circumstances where others would have failed. But while Cardozo is routinely and properly credited with this skill, the finding of consideration is really only a subsidiary kernel of the opinion and just one illustration of Cardozo's wider ability to work within the received doctrine and to achieve a richer balance of both fairness and the efficacy of consensual exchange. This willingness to engage in conscious acts of judicial interpretation is also present in *DeCicco v. Schweizer*.⁹⁷

A couple, Miss Blanche Josephine Schweizer and Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, were engaged to be married.⁹⁸ Miss Schweizer's parents agreed with the Count (but not with Miss Schweizer) to pay Miss Schweizer \$2,500 a year every year of her life.⁹⁹ Four days after this agreement was signed, the Count and Miss Schweizer were mar-

had done. See *infra* text accompanying notes 221-27 (discussing meaning and evolution of good faith in contract law).

95. POSNER, *supra* note 8, at viii-ix.

96. See Kathleen M. Sullivan, *The Supreme Court—1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 116 ("Central to Burkean traditionalism is the view that human beings are situated in and constructed by their social practices in the course of cultural development over time.").

More critically, *Wood* may be seen as an easy case and Cardozo as having failed to recognize the difficulties that his rule could produce. See Arthur J. Jacobson, *The Equitable Administration of Long-Term Relations: An Appreciation of Judge Clark's Opinion in Parev Products*, in JUDGE CHARLES EDWARD CLARK 450 n.11 (Peninah R.Y. Petruck ed., 1991). According to Professor Jacobson, because the agent was suing the principal in *Wood*, Cardozo did not need to measure the agent's efforts, which the principal apparently did not contest. *Id.* The hard case, Jacobson points out, would involve the principal suing the agent, requiring the judge to measure reasonable efforts. *Id.*

97. 117 N.E. 807 (N.Y. 1917).

98. *Id.* at 808.

99. *Id.*

ried,¹⁰⁰ and the lovebirds thereafter assigned their rights under this agreement. The parents honored the agreement for ten years and then met up with a lawsuit by the assignees after payment was not made in the eleventh year.¹⁰¹

An engagement to marry was at that time a binding contract under New York law,¹⁰² and accordingly, the parents' promise arguably lacked consideration. The affianced couple were agreeing to do what they were already legally obligated to do.¹⁰³ As such, many judges would have concluded that the case had to be dismissed under the pre-existing duty rule. In a series of cunning doctrinal moves that emphasized the role of promise rather than the role of reliance, however, Cardozo reached the opposite result.

Cardozo held that the promise was given in exchange for the agreement by Miss Schweizer and the Count not to rescind their original agreement.¹⁰⁴ Cardozo's doctrinal analysis observed that a promise from *A* to *B*, for *B* not to break a contract with *C* is unenforceable.¹⁰⁵ In contrast, a promise from *A* to *B* and to *C* jointly "to induce them not to *rescind* or *modify* a contract

100. *Id.*

101. *Id.* The decision Cardozo was reviewing in *DeCicco* was rendered without an opinion, *DeCicco v. Schweizer*, 152 N.Y.S. 1106 (App. Div. 1915), so the broader factual setting of the case requires speculation. Reading between the factual lines suggests the equities were with the plaintiff, however. As assignee, one can assume he had purchased the contract on an annuity basis, paying, in effect, the discounted present value of the future income stream. If so, then, even if the couple had split such that the father's purchase of a title had been ultimately disappointed, it is understandable why Cardozo would set for himself the task of finding an enforceable contract.

102. This rule has since been abolished. N.Y. CIV. RIGHTS LAW § 80-a (Consol. 1983).

103. *DeCicco*, 117 N.E. at 808.

104. This insight posed a problem of precedent, however, because of *Shadwell v. Shadwell*, 99 E.C.L. 158, "[t]he storm-centre about which th[e] controversy ha[d] raged." *DeCicco*, 117 N.E. at 808. In *Shadwell*, an uncle promised his nephew to pay him an annuity if he married. At the time, the nephew was already engaged. While the *Shadwell* court enforced the promise on other grounds, the dissent observed that since the nephew already was obligated to marry, consideration was lacking. For Cardozo, there were "elements of difference in the two cases, which raise new problems" but which gave him "a point of departure and a method of approach." *Id.*

105. *DeCicco*, 117 N.E. at 808. It is a simple problem of past consideration: *B* is already bound, so no consideration, because *B* suffers no detriment.

which they are free to abandon" is a different matter.¹⁰⁶ That promise is enforceable because nonperformance (rescission or modification) is within their *joint* right, so they are not *jointly* bound to perform.¹⁰⁷ In short, they give something up—they incur a detriment.¹⁰⁸

Cardozo finally disposed of the argument that the couple does not incur a detriment unless one party wants to back out of the agreement so that a risk of rescission or modification exists. In an essay seeking to show the bargain manifest in this transaction, and focusing primarily on the role of promise rather than reliance, Cardozo argued that there was little doubt that the promised benefit was intended to influence the conduct of the couple (and that it did have this effect). For example, Cardozo observed that "one does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver."¹⁰⁹ In short, the promise was deliberate, intended, and therefore enforceable.

Judge Crane concurred in a separate opinion, effectively saying that Cardozo's approach was unnecessary. Crane saw the

106. *Id.* at 808-09.

107. *Id.* at 809.

108. *Id.* Cardozo then had to confront the fact that, in *DeCicco*, Miss Schweizer was not a party to the annuity agreement. Cardozo made two moves to surmount this apparent obstacle. First, he characterized the contract as unilateral, under which the parents offered payment in return for performance. Second, because it takes two to marry, Cardozo decided that the annuity was intended not only to induce the Count to perform, but also to bring Miss Schweizer to the altar. Citing *Lawrence v. Fox*, 20 N.Y. 268 (1859), Cardozo concluded that, when the promise came to Miss Schweizer's attention, "she had the right to adopt and enforce it." *DeCicco*, 117 N.E. at 809. When she did so, "she made herself a party to the contract." *Id.*

109. *DeCicco*, 117 N.E. at 809. To fortify these cunning claims, Cardozo gave final deference to the findings of the trial court, saying: "In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was not designed to benefit. Certainly we cannot draw that inference as one of law. . . . If conflicting inferences were possible, [the trial court] chose those favorable to the plaintiff." *Id.* at 810. Cardozo's typically engaging prose is muddled in this passage by his use of four negatives. While the opacity may have been a deliberate rhetorical device required by the jurisdictional posture or the equities of the case, it is certainly no model of windowpane clarity. See George Orwell, *Politics and the English Language*, in *COLLECTED ESSAYS* 337, 343 (1946).

case as a family case, the instrument being a marriage settlement.¹¹⁰ Because it was then well-settled law that, in marriage settlements, the "strict legal definition of consideration" need not be met, the case was far simpler than Cardozo's complex analysis would reveal.¹¹¹ Although Crane's challenge is convincing, the analysis Cardozo conducted is not only consistent with contract doctrine,¹¹² it also proceeds from an insight that the parents' promise was not strictly gratuitous but was indeed given in exchange for a return performance and therefore should be enforced.¹¹³ For the same reason, although there had been reliance by the promisee, there was no need in this context to look to reliance alone to support enforcement of the obligation.

This understanding of contract law as being primarily focused on the actions and spoken words of the promisor, with questions of reliance being secondary rather than primary, is also at the core of what many consider to be a companion case to *DeCicco*, the case of *Allegheny College v. National Chautauqua County Bank of Jamestown*.¹¹⁴ A donor made a monetary pledge to the college, payable on her death, as a named fund for a particular purpose.¹¹⁵ During her life, the donor had paid one fifth of the pledge but repudiated one year later.¹¹⁶ After her death, the college sued the donor's estate to recover the unpaid balance of the pledge.¹¹⁷ The executor denied liability, claiming lack of consideration.¹¹⁸

Cardozo first observed that New York courts had refused to

110. *DeCicco*, 117 N.E. at 810 (Crane, J., concurring).

111. *Id.* at 810.

112. Giving up the right to rescind one's own contract is detriment because it is the abandonment of a legal right. When bargained for in exchange for a promise, that abandonment qualifies as consideration under all traditional tests. Seeing Miss Schweizer as a third-party beneficiary is also consistent with the principles of that doctrine because she was intended to enjoy that benefit.

113. *DeCicco*, 117 N.E. at 809.

114. 159 N.E. 173 (N.Y. 1927). For an interesting line-by-line analysis of *Allegheny College*, see Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645 (1987).

115. *Allegheny College*, 159 N.E. at 174 (noting that the money was to be used "to educate students preparing for the ministry").

116. *Id.*

117. *Id.*

118. *Id.*

enforce charitable promises unsupported by consideration but had also held that such subscriptions sometimes contained consideration "where the general law of contract, at least as then declared, would have said that it was absent."¹¹⁹ On these facts, Cardozo found that the case "can be fitted within the mould of consideration as established by tradition."¹²⁰ By accepting partial payment under the circumstances created by the original pledge—naming the fund and dedicating it to a particular purpose—the college *impliedly* assumed the duty of making known in "customary ways" the existence and purpose of the fund.¹²¹ In exchange for this promise, the donor *impliedly* promised to fulfill the pledge. These two implications created a bilateral contract, consisting as it did of mutual promises.¹²²

Cardozo's analysis in *Allegheny College* is regularly criticized as contrived and artificial.¹²³ It has been seen as straining the consideration doctrine or unduly pushing contract into tort by imposing standards of conduct not agreed to.¹²⁴ While such arguments have merit, the opinion is nevertheless instructive on the capaciousness of Cardozo's Burkean approach. Cardozo drew on traditional norms to enforce the contract. The relationship between the parties existed in a context informed by custom—the college was to make known the existence, name, and special purpose of the fund in "customary ways."¹²⁵ The duties that Cardozo implied may be seen as arising outside the parties' express agreement and therefore to resemble tort, yet Cardozo seemed to recognize that, in resolving a dispute between contracting parties, the judicial role demands sensitivity to the social context in which the parties operated. Cardozo thus may be seen as having attempted a delicate balance between freedom of contract and social control, constraining parties to live by

119. *Id.*

120. *Id.* at 175.

121. *Id.*

122. *Id.* at 176.

123. POSNER, *supra* note 8, at 14 (noting that Cardozo's implications in *Allegheny College* are "generally and rightly considered too clever by half"); Konefsky, *supra* note 114, at 686 n.83 (characterizing Cardozo's moves as "fancy dancing").

124. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 62-64 (1974).

125. *Allegheny College*, 159 N.E. at 175.

their agreements in a context defined by social custom.

Cardozo could not, however, convince Judge Kellogg of this point. Kellogg asserted in his dissent in *Allegheny College* that Cardozo was acting to strain a gift into a trade,¹²⁶ a criticism repeated over the years, most recently by Posner.¹²⁷ Karl Llewellyn, for example, echoed this criticism when he argued that reasoning and analysis suitable to commercial cases cannot be grafted onto noncommercial cases.¹²⁸ This criticism seems to get things backwards, however. Cardozo's contracts opinions do tend to unite the doctrines governing gifts and trades, but the union is better seen as having been formed by introducing gift concepts into trade doctrine, rather than the other way around. In effect, *Wood* and *Allegheny College* together suggest that Cardozo understood that the traditional norm of good faith inherent in the making of gratuitous promises has a role to play in the enforcement of commercial transactions as well.¹²⁹ Seen this way, neither Kellogg nor Llewellyn fully grasped Cardozo's enterprise and, as we shall see, Posner sees things very differently indeed.¹³⁰

Finally, in *Allegheny College*, Cardozo impliedly emphasized the primary role of promise, rather than reliance in contractual relationships.¹³¹ The focus was again on the obligation of promisors to act in good faith, with the role of the promisee's reliance being secondary. Thus Cardozo said:

126. *Id.* at 177 (Kellogg, J., dissenting).

127. POSNER, *supra* note 8, at 14-15.

128. Karl N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 YALE L.J. 779, 785 (1939).

129. Llewellyn was also critical of this kind of unification. *Id.*

130. *See infra* part II.B.

131. As a matter of judicial technique and craft, moreover, two additional observations about *Allegheny College* are noteworthy. First, the technique of implying duties echoes that used in *Wood* but with an important twist. In *Allegheny College*, we have Cardozo conducting a dual implication. He implies both the promise to "make known" the Fund and the promise to fund. Second, as compared to *DeCicco*, notice Cardozo's treatment of the contract as bilateral. This treatment was necessary to respond to Kellogg's dissent. If the donor's offer (to fund) had been for an act (to make known), the offer could not have been performed prior to the offeror's death, and the offeror's death revokes the offer. As a result, the case is unlike *DeCicco*, where the contract was seen as unilateral so that Miss Schweizer and the Count could accept the offer by the act of marrying. *See supra* note 108.

[T]here has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel." Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as *Siegel v. Spear* and *DeCicco v. Schweizer* may be signposts on the road.¹³²

Cardozo did not resort to the doctrine of promissory estoppel in *Allegheny College*, however. That doctrine requires both promise and reliance, while consideration requires only an exchange of promises (or performances), the rendering of which is coupled with customary duties of good faith and fair dealing that make the reliance element unnecessary.¹³³ Because the element of reliance often will be lacking in noncommercial contexts such as marriage settlements and charitable subscriptions, the requirements of promissory estoppel often will be unsatisfied.¹³⁴ As a result, the consideration doctrine, with its primary emphasis on promise and not reliance, will better protect the reasonable expectations of the parties as of the time of contracting.¹³⁵

Despite Cardozo's expressed resistance toward the doctrine of promissory estoppel, *DeCicco* and *Allegheny College* contributed to the doctrine's evolution and eventual broad acceptance in American contract law.¹³⁶ Indeed, just as Cardozo's contract

132. *Allegheny College v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173, 175 (N.Y. 1927) (citations omitted) (quoting SAMUEL WILLISTON, *CONTRACTS* §§ 139, 116).

133. *See id.* at 176.

134. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 6-2, at 280 (3d ed. 1987).

135. For an incisive discussion and analysis of the underpinnings of the doctrine of promissory estoppel, see Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations*, 15 *HOFSTRA L. REV.* 443 (1987).

136. *See* CALAMARI & PERILLO, *supra* note 134, § 6-2, at 275-81; POSNER, *supra* note 8, at 14-15 n.20. Indeed, Posner has seen *Allegheny College* as an illustration of "relaxing the requirement of consideration (or reliance) in connection with promises of charitable donations, often to the point where the requirement seems to disappear." Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 *J. LEG. STUD.* 411, 420 (1977). Gilmore went further, arguing that Cardozo had so broadened the consideration doctrine so as to render it meaningless. GILMORE, *supra* note 124,

opinions tended to unify treatment of commercial and noncommercial doctrine, the doctrine of promissory estoppel for the past several decades has been widely applicable not only to gratuitous promises, but also to commercial cases.¹³⁷ Furthermore, the doctrine of promissory estoppel is also now seen as a "primary basis" for liability, rather than an alternative basis when consideration cannot be found.¹³⁸

During Cardozo's tenure on the New York Court of Appeals, he and his brethren developed a theory of contract located between the strict bargain theory of consideration advocated by Williston and the reliance theory underlying promissory estoppel doctrine. Led by what Kessler and Gilmore called Cardozo's "characteristically Byzantine subtlety," this bench was convinced that there were "no promises for which a supporting consideration cannot be found, provided that a sufficiently relaxed view of consideration theory is taken."¹³⁹ In many cases throughout this period, including *Wood*, *DeCicco*, and *Allegheny College*, Cardozo and the court found liability without resorting to the promissory estoppel theory,¹⁴⁰ a conception of contract made possible by Cardozo's rich doctrinalism, which refused to be nar-

at 62, 129 n.145.

137. See Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

138. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 908 (1985).

139. FRIEDRICH KESSLER & GRANT GILMORE, *TEACHER'S MANUAL FOR CONTRACTS: CASES AND MATERIALS* 57 (1971).

140. In one notable instance in *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919), Cardozo refused to find liability where a nephew sought to enforce against his aunt's estate a promissory note she had executed some years prior to her death. On the facts of that case, the court must not have been able to see the justification in finding liability, for, if it were justified, they surely would have found consideration. As Corbin noted in words that could have been inspired by a study of the New York court led by Cardozo:

The fact is that the function of the courts is not to create a definition and a rule and then to apply them mechanically and dogmatically by a process of severe deductive logic; instead, it is to determine whether a sound and sufficient reason exists for the enforcement of the promise. When the court finds such a reason, it cheerfully calls it a sufficient consideration. The real question for the courts is what promises shall be enforced, not what is a sufficient consideration.

Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 454 (1937) (quoted in KESSLER & GILMORE, *supra* note 139, at 57-58).

rowly constrained by only one or two values but instead recognized and attempted to harmonize the many competing values at stake in the law of contracts. If that centrifugal tendency implies that Cardozo is the intellectual fox of American contract law, then Posner's centripetal tendencies make him its hedgehog, tendencies that are epitomized by Posner's resistance to recognizing any obligation of good faith in contract law.

B. Posner's Negative Injunction Against Bad Faith

Posner faced facts analogous to those in *Sun Printing in Goldstick v. ICM Realty*.¹⁴¹ Two lawyers sought legal fees for getting real estate taxes reduced on property managed by Kusmiersky on behalf of a corporation.¹⁴² In negotiating a sale of Kusmiersky's interest in the property, a potential buyer insisted on two conditions: that the corporation pay remaining past due taxes, which the lawyers had reduced, and that the lawyers give a release of any claim that they had against the corporation for the resulting legal fees.¹⁴³

The first draft of the release provided for a reduced legal fee of \$250,000, payable over ten years with an annual interest rate of seven percent.¹⁴⁴ After extensive dickering, a different release was signed providing that the lawyers would be paid the reduced fee over time, but only to the extent of any profits from the property.¹⁴⁵ The lawyers acceded to these terms only after Kusmiersky assured them that the corporation "was honorable and that something would be worked out."¹⁴⁶ The lawyers understood this to mean they would be repaid regardless of the property's profitability.¹⁴⁷ Discussions about payment of the fee after the sale closed went nowhere; the corporation "held steadfastly to the position that the payment of the fee would have to be out of the profits, if any, of the property."¹⁴⁸ The property

141. 788 F.2d 456 (7th Cir. 1986).

142. *Id.* at 457-58.

143. *Id.* at 459.

144. *Id.* at 461.

145. *Id.* at 459.

146. *Id.*

147. *Id.*

148. *Id.*

produced no profits.¹⁴⁹

The lawyers claimed that they had a contract with the corporation to be paid the reduced fee in exchange for giving the release.¹⁵⁰ Posner disagreed because the terms of the reduced fee in any such alleged contract were "hopelessly vague,"¹⁵¹ resting as they ultimately did on the statement that "something would be worked out."¹⁵² Echoing Cardozo in *Sun Printing*, Posner concluded: "If people want the courts to enforce their contracts they have to take the time to fix the terms with reasonable definiteness so that the courts are not put to an undue burden of figuring out what the parties would have agreed to had they completed their negotiations."¹⁵³ Moving then to the language of economics, Posner justified this position on the following grounds: "The parties have the comparative advantage over the court in deciding on what terms a voluntary transaction is value-maximizing; that is a premise of a free-enterprise system."¹⁵⁴

At best, therefore, the parties made an agreement to agree, just as in *Sun Printing*. However, the received understanding of *Sun Printing*—holding that a contract that does not fix a price term is unenforceable—had been reversed by section 2-305 of the Uniform Commercial Code (UCC).¹⁵⁵ Posner avoided this problem, as a matter of law, by observing that this limitation is intended "to make contracts for the sale of goods at whatever the market price is on the day when the goods are delivered enforceable, and in such a case the court has an objective basis for determining the contract price."¹⁵⁶ Beyond that, however, "[t]he common law principle that a contract cannot be enforced if its terms are indefinite . . . retains a core of vitality."¹⁵⁷

It may be that the UCC's explicit change of the common law

149. *Id.*

150. *Id.* at 461.

151. *Id.*

152. *Id.* ("An offer must be more definite to create an enforceable contract") (citations omitted).

153. *Id.*

154. *Id.*

155. *See supra* note 76.

156. *Goldstick*, 788 F.2d at 461.

157. *Id.* (citation omitted).

rested on the assumption of the availability of an "objective basis" for setting a missing price term. But such an objective basis will not always be available in sales-of-goods cases and will sometimes be available in other contracts cases. The other basis on which the section proceeded, and the basis for the similar announcement of the modern rule in Restatement sections 33 and 34, is whether the parties intended to contract,¹⁵⁸ and the parties in *Goldstick* almost certainly did. While Posner gave numerous examples to show, implicitly, that no such objective basis was available in *Goldstick*,¹⁵⁹ he refused to note this second strand, usually understood to mean that an agreement to agree creates at least a duty to negotiate in good faith.¹⁶⁰ In *Goldstick*, Kusmiersky could be seen as expressly undertaking such a good faith obligation with the result that the subsequent discussions in which the corporation "held steadfastly to [its] position"¹⁶¹ breached that obligation.¹⁶²

Although Posner refused to entertain any implied obligation of good faith on the part of the promisors in *Goldstick*, he had more sympathy for the lawyers' alternative theory of reliance. That argument claimed that Kusmiersky's promise of "working

158. CALAMARI & PERILLO, *supra* note 134, § 4.3 at 65-67; CORBIN ON CONTRACTS, *supra* note 76, at 580; JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 142 (3d ed. 1988).

159. *Goldstick*, 788 F.2d at 461. Posner was troubled by the numerous possible interpretations of the alleged agreement:

We cannot know whether, faced with [a] proposal to make payment conditional [on the property's turning a profit], [the lawyers] would gladly have embraced Kusmiersky's previous offer, for payment over 10 years; or whether he would have accepted payment over this period only if the fee was restored to its original level . . . ; or whether he would have insisted on much more if it was to be paid over 10 years

Id.

160. See CALAMARI & PERILLO, *supra* note 134, § 2-9, at 64 (discussing *Kier v. Condrat*, 478 P.2d 327 (Utah 1970)); CORBIN ON CONTRACTS, *supra* note 76, § 4.3, at 579; see also *Venture Assocs. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 433 (7th Cir. 1993); *Itek Corp. v. Chicago Aerial Indus.*, 248 A.2d 625 (Del. 1968). Indeed, Cardozo noted in *Sun Printing* that no one had argued that the parties had failed to negotiate in good faith, which he indicated was an obligation the parties had undertaken by their agreement to agree. *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470, 472 (N.Y. 1923).

161. *Goldstick*, 788 F.2d at 459.

162. See *id.* at 462 (stating that "there is no question that in these negotiations Kusmiersky was [the corporation's] agent").

something out" induced reliance by the lawyers in issuing the release.¹⁶³ Posner decided that this was plausible because the promise to "work something out" could be seen as a waiver of the condition that the property turn a profit.¹⁶⁴ Indeed, Posner decided that "Kusmiersky could be understood to be promising to do better than his previous offer of \$250,000 over 10 years with interest at 7 percent."¹⁶⁵ While the matter was far from certain, Posner concluded, "[a]t least this is sufficiently plausible to create a triable issue of reliance as well as of the existence of a promise."¹⁶⁶

Posner thus turns Cardozo's approach upside-down.¹⁶⁷ While Cardozo's inquiries, illustrated in the series of cases discussed above, centered on the promise and the promisor's attendant obligation of good faith, Posner's inquiry looks past the promise, ignores any obligation of good faith, and centers instead strictly on the promisee's reliance. In measuring damages, however, Posner returned to focus on the promise, rather than the reliance. In choosing whether to treat damages under promissory estoppel as a tort doctrine (in which the measure of damages is based on reliance)¹⁶⁸ or a contract doctrine (in which the measure of damages is based on the value of the promise), Posner decided, "[t]here is much to be said for using the value of the promise as the measure of damages, simply on grounds of simplicity."¹⁶⁹ But after bypassing the good faith element of the

163. *Id.* at 461.

164. *See id.*

165. *Id.* at 462.

166. *Id.* at 463.

167. Cardozo's dissenting opinion in *Varney v. Ditmars*, 111 N.E. 822, 834 (N.Y. 1916), also suggests he would have decided *Goldstick* differently (and that Posner disagrees with Cardozo's views in *Varney*). In *Varney*, an employee was promised a "fair share of the profits" in addition to a stated salary. *Id.* at 823. Cardozo disagreed with the majority's conclusion that the agreement failed for indefiniteness, arguing that the employee was entitled to the stated salary for the agreed term and that the "fair share" of profits might be determined according to usage and trade practice. *Id.* at 826.

168. Under the tort measure, the lawyers "would not necessarily be able to recover the value of the promise It would seem they would have to show their actual damages: what they gave up . . . in reliance on [the] promise." *Goldstick*, 788 F.2d at 463.

169. *Id.* In addition to avoiding the need to "reconstruct the hypothetical bargaining" between the parties which here constituted "a classic bilateral monopoly situa-

promise in order to examine the reliance, when Posner shifted back to the promise to measure damages, the value of that promise lacks the element of a good faith obligation.

In effect, where Cardozo viewed the promise as both the source of the obligation and the measure of the remedy, including its good faith component, Posner finds the source of the obligation in the reliance and the measure of the remedy in the promise, now stripped of any element of good faith.¹⁷⁰ In this way, while Cardozo and Posner both measure damages based on the expectancy interest rather than the reliance interest, what the promisee could reasonably have expected will differ significantly. The time at which expectancy damages are measured shifts forward in Posner's reliance framework, away from Cardozo's conventional method of measuring reasonable expectations as of the time of contracting.

Posner's move to the reliance zone thus enables him to limit the ambit of liability generally while still finding liability in a case where injury was clear and where denying liability would yield an absurd result. At the same time, it also enables him to limit the extent of the resulting damages once injury is clearly shown. These results reflect an important element of the Posnerian framework, which believes that the most important thing contract law does is to "facilitate exchanges that are not simultaneous by preventing either party from taking advantage of the vulnerabilities to which sequential performance may give rise."¹⁷¹ To that end, this framework insists on imposing the smallest possible measure of damages and the narrowest possi-

tion" posing numerous indeterminacies, this approach had the advantage that the "expectation measure of damages will frequently cover opportunity costs (which are real, but not out-of-pocket, costs) that the reliance measure would miss." *Id.* Citing the Restatement (Second), Posner concluded that "the value of the promise is the presumptive measure of damages for promissory estoppel, to be rejected only if awarding so much would be inequitable." *Id.* at 464.

170. Cf. Patrick Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193 (1978) (critiquing basis for awarding expectancy damages to promisees who have not relied on the promise).

171. *Wisconsin Knife v. National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986); see also POSNER, *supra* note 33, at 117; *infra* notes 182-94 and accompanying text (discussion of *Selmer*).

ble scope of liability necessary to achieve that facilitation.¹⁷² Cardozo's willingness to interpret or construct duties has the opposite effect on both the ambit of liability and the extent of damages, in tension with Posnerian efficiency and therefore out of place in the Posnerian framework. Similarly, Cardozo's construction required him to impose norms on the parties, in tension with freedom of contract and therefore also out of place in the Posnerian framework.

Beyond this dramatic difference in Cardozo's and Posner's frameworks, consider a final contrast between Cardozo in *Sun Printing* and Posner in *Goldstick*. Cardozo's concern in *Sun Printing* (at least as he later explained it) is for the certainty of commercial transactions. The central, articulated rationale of the definiteness branch of *Goldstick* is that the parties have a "comparative advantage" over courts in specifying the terms of their deals.¹⁷³ Setting aside the potential ambiguity of this phrase,¹⁷⁴ most people would presumably agree that parties are better able than courts to make their deals. Taken at face value, however, the renouncement also implies an interpretive literalism—an unwillingness to fill gaps, imply terms, or invoke any public policies to interpret and enforce contracts demanding such steps. After all, as Posner's discussion of the promissory estoppel theory suggests, the parties in *Goldstick* had made a deal.

Cardozo's approaches in the cases discussed above all may be understood to have reflected either what the parties would have done, what the parties should have done, or both.¹⁷⁵ While Cardozo made those choices,¹⁷⁶ which may be characterized as

172. See POSNER, *supra* note 33, at 117-18.

173. *Goldstick*, 788 F.2d at 467.

174. See *infra* note 179.

175. *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927) (enforcing the pledge agreement drawing in part on custom); *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (refusing to imply a term to enforce an exploitive contract); *DeCicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917) (enforcing the marriage settlement under the bargain principle); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (implying an obligation of good faith).

176. And critics such as Grant Gilmore mocked him for it. See GILMORE, *supra* note 124, at 62.

gap-filling respect for the parties' intentions (what the parties would have agreed to) or invoking other public or social values (what the parties should have agreed to),¹⁷⁷ in *Goldstick*, Posner refused to do any of it, justifying his reluctance by pointing to the doctrine of comparative advantage.¹⁷⁸ In using that doctrine, Posner implies the plausible claim of a lack of judicial expertise.¹⁷⁹ Yet the doctrine also implies that the judge should resist introducing his own normative views into the private contractual relation. While the act of refusing to conduct the kind of interpretation Cardozo engaged in is itself an exercise of normative choice, it requires making only one choice rather than a series of choices. It is more nearly Benthamite than Burkean.

The choice Posner makes is essentially utilitarian and is revealed in *Selmer Co. v. Blakeslee-Midwest Co.*¹⁸⁰ and *Wisconsin Knife Works v. National Metal Crafters*.¹⁸¹ Posner's Benthamite focus on efficiency contrasts with Cardozo's more complex framework, which connected the value of utility with the practice of virtue in its quest to protect reasonable expectations of the parties as of the time of contracting. In other words, whereas Cardozo envisioned an open-textured role for contract that took a broader view of interparty conduct, stressing the centrality of ex ante fairness, Posner looks instead to ex post consequences of opportunism.

Selmer illustrates the transformation from the common law pre-existing duty rule to the modern doctrine of economic duress. A subcontractor was to receive \$210,000 under a contract that the general contractor breached.¹⁸² Instead of exercising

177. These ideas exist in a range and often overlap, as Cardozo observed in *Kent*, saying that "[c]onsiderations partly of justice and partly of presumable intention" must guide the interpretation of contracts. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242 (1921) (discussed *infra* part IV.A-B).

178. *Goldstick v. ICM Realty*, 788 F.2d 456, 461 (7th Cir. 1986).

179. *Id.* Understood in this intuitive way, Posner is using the phrase "comparative advantage" in a nontechnical sense. By it, he means judges are less able than parties to decide the terms of a contract that should bind them. See also POSNER, *supra* note 33, at 97. In economics, the term means that each party should concentrate on what he or she does best, even if someone else can do it better.

180. 704 F.2d 924 (7th Cir. 1983).

181. 781 F.2d 1280 (7th Cir. 1986) (discussed *infra* notes 199-224 and accompanying text).

182. *Selmer*, 704 F.2d at 926.

its right to terminate upon that breach, the sub orally agreed with the general to complete the work, provided the general would pay the sub for the extra costs of completion due to the general's defaults.¹⁸³ Upon completion, the general paid the sub \$67,000 for the additional expenses.¹⁸⁴ The sub had sought \$120,000 for those expenses but agreed to take less because it was facing financial difficulties.¹⁸⁵ Two and one-half years later, the sub sued the general, seeking additional compensation for the extra costs and alleging that the earlier settlement agreement was invalid because it had been induced by economic duress.¹⁸⁶

Posner rejected the sub's claim, explaining that if the claim were accepted, "[a] vast number of contract settlements would be subject to being ripped open upon an allegation of duress."¹⁸⁷ In reaching this conclusion, Posner drew on the classic case of *Alaska Packers Ass'n v. Domenico*,¹⁸⁸ which denied effect to a modification increasing laborers' wages under the pre-existing duty rule. Posner observed that, although *Alaska Packers* was expressly decided on the grounds of an absence of additional consideration for a modification of an agreement, the court's concern "that the modified agreement had been procured by duress in the form of the threat to break the original contract" ultimately motivated the result.¹⁸⁹ In approving this understanding of *Alaska Packers*, Posner essayed as follows:

It undermines the institution of contract to allow a contract party to use the threat of breach to get the contract modified in his favor not because anything has happened to require modification in the mutual interest of the parties but simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy. If contractual provisions are illusory, people will be reluctant to make contracts. Allowing contract

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 927.

188. 117 F. 99 (9th Cir. 1902).

189. *Selmer*, 704 F.2d at 927; Posner, *supra* note 136, at 423-24.

modifications to be voided in circumstances such as those in *Alaska Packers' Ass'n* assures prospective contract parties that signing a contract is not stepping into a trap, and by thus encouraging people to make contracts promotes the efficient allocation of resources.¹⁹⁰

In the context of dispute settlements, that the party challenging a contract modification suffered financial difficulties at the time of the modification is, by itself, insufficient to refuse enforcing the modification on efficiency grounds. According to Posner, such circumstances require the absence of a genuine dispute being settled, as would be indicated by the promisor's admitting liability and/or a settlement of only pennies on the dollar.¹⁹¹ There must, in sum, be a "confluence" of such factors showing duress and exploitation, rather than the settlement of a genuine dispute.¹⁹² Under this test, *Selmer* is an easy case. Because the only such factor present was the promisee's impaired financial condition,¹⁹³ avoiding the modification on the grounds of duress would not be efficient. To do so, Posner explained, would limit such a party's right to settle—"[they] would be unable to settle, because they could not enter into a *binding* settlement."¹⁹⁴

From the common law to today, the central point in modification cases is precisely the question Posner identified: whether "anything has happened to require modification."¹⁹⁵ While the common law addressed this problem by invoking the consideration requirement and the pre-existing duty rule, modern courts determine whether the modification was the product of changed circumstances or, instead, a result of duress. Posner explained that this concern results from a desire to promote contractual relationships that in turn "promote[] the efficient allocation of resources."¹⁹⁶

190. *Selmer*, 704 F.2d at 927.

191. *Id.* at 928 (discussing *Capps v. Georgia Pac. Corp.*, 453 P.2d 935 (Or. 1969)).

192. *Id.* at 927.

193. *Id.* at 926. After all, the sub was getting more than 50 cents on the dollar, and the promisor had not admitted liability for the full amount.

194. *Id.* at 928. In short, according to Posner: "It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding commitment." *Id.*

195. *Id.* at 927.

196. *Id.*

Posner thus works within a framework more narrow than the traditional one that Cardozo would have embraced. In the traditional framework, the issue of changed circumstances is central not because of efficiency concerns alone but also to respect the elements of fair dealing and good faith.¹⁹⁷ In the doctrine of duress, these values traditionally are particularized as the absence of indicia of deprivation of free will, determined according to the standards of conduct reasonably expected of actors in the relevant contracting context.¹⁹⁸

Posner's efficiency-based subordination of good faith or free will is also revealed in *Wisconsin Knife Works v. National Metal Crafters*,¹⁹⁹ where Posner dealt with modification issues under the UCC. In *Wisconsin Knife*, a buyer sued a seller under a contract formed on the basis of a series of purchase orders containing a no-oral-modification (NOM) clause.²⁰⁰ Seller missed delivery deadlines, but buyer continued to send purchase orders and accept goods.²⁰¹ Only thereafter did buyer declare the contract terminated and sue, alleging violation of the delivery terms.²⁰² The dispute therefore centered on the effect of the NOM clause in light of buyer's conduct.²⁰³ More broadly, and as in *Selmer*,

197. The modern trend away from the pre-existing duty rule and toward the concept of economic duress is richly articulated in Fuld's opinion in *Austin Instr., Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971). Focusing on issues of both efficiency and fairness, Fuld held that duress makes a contract voidable when a threat deprives a party of free will; that threat is insufficient to a buyer unless the alternate supplier of goods is nonexistent. See also *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Servs. Co.*, 584 P.2d 15 (Alaska 1978).

198. Such indicia are usually determined on a subjective basis, except that in the context of economic duress courts usually also insist on objective indicia. CALAMARI & PERILLO, *supra* note 134, § 9-2, at 337. If efficiency were the only criterion, moreover, then some modifications induced by duress would have to be enforced, while some modifications freely entered into would go unenforced. Under this approach, freedom of contract would be subordinated, paradoxically, to the social control of efficiency maximization, judicially determined.

199. 781 F.2d 1280 (7th Cir. 1986).

200. *Id.* at 1283.

201. *Id.*

202. *Id.* The seller also counterclaimed, but that was not at issue on appeal.

203. *Id.* Before discussing the effect of the clause, Posner first separately analyzed its validity. Because the contract was between "merchants" (which Posner interpreted to mean "commercially sophisticated parties") the clause need not be separately signed under UCC § 2-209, although the contract containing the clause must be signed by the party against whom enforcement is sought. *Id.* at 1284. The purchase

the dispute raised the problem of vulnerability inherent in mid-course modifications of contracts calling for sequential performance.²⁰⁴

Citing *Selmer* and *Alaska Packers*, Posner observed that the common law dealt with this problem by refusing to enforce modifications unsupported by consideration.²⁰⁵ Observing further that this requirement was both overinclusive (because it prohibited modifications that were not coercive) and underinclusive (because peppercorns are no guarantee of lack of coercion), Posner noted that the UCC takes "a fresh approach" to this problem of fresh consideration.²⁰⁶ Under the UCC, modifications are enforceable even if unsupported by consideration, and the UCC "look[s] to the doctrines of duress and *bad faith* for the main protection against exploitive or opportunistic attempts at modification."²⁰⁷ Given that the UCC expressly addresses the problem of modification through the generalized obligation of *good faith* in section 1-203, explicitly referred to in the com-

orders qualified for this purpose. *Id.* at 1284 (citing UCC § 2-207(3)).

204. *Id.* at 1285 ("[T]he most important thing which [the law of contracts] does is to facilitate exchanges that are not simultaneous by preventing either party from taking advantage of the vulnerabilities to which sequential performance may give rise.").

205. *Id.*

206. *Id.*

207. *Id.* at 1286 (citations omitted) (emphasis added). UCC § 2-209 provides as follows:

§ 2-209. MODIFICATION, RESCISSION AND WAIVER

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

UCC § 2-209 (1978).

ments to section 2-209 governing modifications,²⁰⁸ Posner's reference to a "doctrine of bad faith" is studied and revealing. Before considering the implications of Posner's characterization, however, first consider the rest of Posner's doctrinal analysis in *Wisconsin Knife*.

Posner observed that the common law did not enforce NOM clauses on the ground that the parties could always take back what they had agreed to.²⁰⁹ Posner speculated that the underlying reason for the common law's refusal to enforce these clauses may have been that the pre-existing duty rule in effect made such clauses unnecessary—any oral modification would have to be supported by consideration to be enforceable.²¹⁰ By abandoning the consideration requirement for modifications, the UCC at the same time effectively replaced it and its cautionary and evidentiary functions with section 2-209(2), expressly permitting the parties to exclude oral modifications.²¹¹

In short, Posner gave a very symmetrical reading and analysis

208. UCC § 2-209 cmt. 2.

209. *Wisconsin Knife*, 781 F.2d at 1286. Posner quoted the following common law articulation of this idea from *Wagner v. Graziano Constr. Co.*, 136 A.2d 82, 83-84 (Pa. 1957): "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof." *Id.* Of this Posner said: "This is not reasoning; it is a conclusion disguised as a metaphor." *Wisconsin Knife*, 781 F.2d at 1286. Compare Cardozo's related admonition, that metaphors in law, "starting as devices to liberate thought, . . . end often by enslaving it." *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926).

210. *Wisconsin Knife*, 781 F.2d at 1286. This traditional view was also perhaps based on concern "that such clauses, buried in the fine print . . . were traps for the unwary" or that they could effectively allow parties to extend application of the Statute of Frauds. *Id.*

211. *Id.* Posner wrote:

[A]s part and parcel of rejecting the requirement of consideration for modifications, [the UCC drafters] must have rejected the traditional view; must have believed that the protection which the doctrines of duress and bad faith give against extortionate modifications might need reinforcement—if not from a requirement of consideration, which had proved ineffective, then from a grant of power to include a clause requiring modifications to be in writing and signed. . . . [W]ith the consideration no longer required for modification, it is natural to give the parties some means of providing a substitute for the cautionary and evidentiary function that the requirement of consideration provides; and the means chosen was to allow them to exclude oral modifications.

Id.

of the changes from the common law to the UCC.²¹² The common law required consideration for modifications and correlatively refused to enforce NOM clauses.²¹³ The UCC abandoned the requirement of consideration for modifications and correlatively expressly permits enforcement of NOM clauses.²¹⁴ Accordingly, the NOM clause in *Wisconsin Knife* was effective and the attempted modification ineffective, subject, however, to the seller's next argument—that UCC section 2-209(4) allows an unwritten modification to operate as a waiver.²¹⁵

Turning to whether buyer's actions constituted a waiver under 2-209(4), Posner observed that if the section "is interpreted so broadly that *any* oral modification is effective as a waiver, notwithstanding section 2-209(2), both provisions become superfluous, and we are back in the common law—only without even a requirement of consideration to reduce the likelihood of fabricated or unintended oral modifications."²¹⁶ Posner found reconciliation of the sections in the precise wording of section 2-209(4): "It does not say that an attempted modification 'is' a waiver; it says that 'it can operate as a waiver.'"²¹⁷ To reconcile these two sections, then, Posner read the words "can operate" as identifying the circumstance of reliance—an attempted modification under 2-209(2) would operate as a waiver under 2-209(4) if the other party relied on it as such.²¹⁸

Although Posner's analysis of the evolution from the common law position on modification to the UCC position was superb, his analysis again elevates the role of reliance above the element of promise and ignores the role of good faith in performance. His emphasis on reliance seemed justified to furnish the evidentiary function formerly attributed to the consideration doctrine—the promisee's expenditure of funds or time in reliance evidences his

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1287.

218. *Id.* Because the jury had not been given any instructions on whether the seller had relied sufficiently to treat the ineffective attempted modification as a waiver, Posner remanded for submission to the jury. *Id.* at 1288.

belief in a bargain having been struck in a more credible way than would his ex post claims of bargain.²¹⁹ Posner followed this analysis because the central concern of his opinion was how the UCC would be capable of dealing with threats of opportunistic conduct. While Posner resolves this by looking to the promisee's reliance, as noted above the Code itself expressly addresses the problem through the generalized obligation of commercial good faith set forth in section 1-203 and specifically referred to in the comments to section 2-209.²²⁰ Thus, if section 2-209(4) is interpreted as broadly as Posner feared, we may be somewhere nearer to the common law but with the important limitation of good faith. The focus, then, would be on the promisor's conduct measured against its obligation to perform in good faith.

This of course brings things back to Cardozo's articulation of the good faith obligation in *Wood* which, as Justice Scalia has observed, though novel when announced, now constitutes a gen-

219. The approach therefore evokes Professor Barnett's consent theory of contract liability. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Randy E. Barnett, Book Review, 97 HARV. L. REV. 1223, 1243 & n.68 (1984).

Under a consent theory, the enforcement of an obligation because of reliance or formalities would not be an *exception* to a regime of bargained-for exchange. Instead, some instances of reliance, like formalities, would demonstrate that the other party had in fact consented to transfer rights even absent the conclusion of a "bargain."

Id. at 1243 (citation omitted).

220. UCC § 2-209 cmt. 2. Judge Easterbrook made this point in his dissent, although he also disagreed with Posner on the technical statutory aspects, including the conclusion that reliance was necessary to make a waiver under § 2-209(4) out of an ineffective attempted modification under § 2-209(2). *Wisconsin Knife*, 781 F.2d at 1290 (Easterbrook, J., dissenting). Easterbrook knew "of [no] branch of the law—common, statutory or constitutional—in which a renunciation of a legal entitlement is effective only if the other party relies to his detriment." *Id.* Pointing to § 2-209(5), see *supra* note 207, which deals expressly with reliance, Easterbrook argued that waiver and reliance are different and not otherwise connected concepts under the UCC and that Posner's analysis did not adequately reflect this distinction. Professors White and Summers seem to agree with Posner's interpretation of § 2-209(4). See WHITE & SUMMERS, *supra* note 158, at 58 (concluding, after a brief discussion, that "[t]he *Wisconsin Knife Works* approach finds support in the wording of 2-209(4)" but not discussing Easterbrook's dissenting opinion). Apart from the good faith issue, Posner's opinion is also consistent with revised UCC § 2-209. See Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1333 n.145 (1994).

eralized obligation in contract that is widely adopted.²²¹ An adequate definition of good faith remains elusive largely because it is situational rather than unitary. Yet, according to received doctrine, which holds that the main purpose of contract is the realization of the reasonable expectations of parties,²²² the contours of good faith must be delineated because the ideal captures a zone of expectations between parties contracting relationally that warrants respect.²²³ The UCC emphasizes this need generally and with particularity in the context of contract modifications.²²⁴

The operative definition of good faith in the common law for relational contracts stems originally from *Kirk LaShelle Co. v. Paul Armstrong Co.*²²⁵ A party has a duty to avoid conduct un-

221. See *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984).

[T]he authorities that invoke, with increasing frequency, an all-purpose doctrine of "good faith" are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v. Lucy, Lady Duff-Gordon*, . . . when he found that an agreement which did not recite a particular duty was nonetheless "instinct with [. . .] an obligation,' imperfectly expressed."

Id. (citations omitted). The good faith obligation in law dates to Cicero, but Cardozo's pronouncement was novel in the commercial context. See 3A CORBIN ON CONTRACTS, *supra* note 76, § 654A, at 89 (Supp. 1993). It was thereafter routinely recognized by New York and California courts but did not gain widespread acceptance until the late 1950s and early 1960s. See *id.*

222. See 1 CORBIN ON CONTRACTS, *supra* note 76, § 1.1, at 2.

223. In one-stroke transactions, the good-faith obligation is a cipher.

224. See Steven J. Burton, *Good Faith in Articles 1 and 2 of the UCC: The Practice View*, 35 WM. & MARY L. REV. 1533 (1994). Compare Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (discussing good faith in general and, specifically, in § 205 of the RESTATEMENT (SECOND) OF CONTRACTS) with Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) (rebutting Professor Summers' thesis that the good faith doctrine "overrides" the parties' agreement and asserting that the doctrine furthers the intentions and expectations of the parties).

225. 188 N.E. 163, 167 (N.Y. 1933). For a discussion of the good-faith doctrine in relational contracts, see William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084, 1122-24 (1993). Professor Bratton explains:

Contract law responds to a range of situations, from the simple sale of goods for money to long-term, open-ended situations of supply or co-ownership. Contract cases range between discrete and relational transactions, and between arm's-length and interdependent postures on the actors' parts. The reactions of decision makers dealing with relationships

necessary to realizing that party's reasonable expectations if that conduct would impair a counterparty's reasonable expectations.²²⁶ This statement reflects Cardozo's understanding of good faith in the law of contracts.²²⁷ A central element of his theory of contract lies in putting the primary focus on promise and the promisor, while viewing the main purpose of contract law as the realization of the parties' reasonable expectations. The aspirational character of the good-faith obligation does not merely attempt to nip opportunistic behavior in the bud. Rather, it takes further steps to promote the opposite—fair dealing. In contrast, Posner uses a wait-and-see approach by taking an ex post look at the degree of adverse impact that the promisor's conduct has on the promisee and viewing the facilitation of exchange in the face of vulnerabilities created by sequential performance as the main purpose of contract.

Posner applies his ex post perspective by invoking the negative injunction to refrain from bad-faith conduct,²²⁸ while Cardozo (like the UCC) invoked the affirmative obligation to observe standards of good faith and fair dealing.²²⁹ Recall that, in so doing, Cardozo used the obligation of good faith to effec-

falling along these ranges tend to be colored by their respective individualistic or altruistic dispositions. As a result, norms of selflessness have a volatile pattern of application. In practice, the "good faith" mandate is not taken as a directive to recognize limitations on self-interested value maximization. It merely invites consideration of the possibility. In many situations, the presumption remains against the party requesting that self-interest be constrained, even though the *Restatement (Second) of Contracts* lays down good faith as an absolute value attaching to all contracts.

Id. at 1123.

226. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979) (Friendly, J.); *Parev Products Co. v. Rokeach & Sons*, 124 F.2d 147, 149 (2d Cir. 1941) (Clark, J.); see also 3A CORBIN ON CONTRACTS, *supra* note 76, § 654A, at 87 (Supp. 1993) ("Good faith in contracting is the obligation to preserve the spirit of the bargain rather than the letter, the adherence to the substance rather than the form."); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 900; Arthur J. Jacobson, *Capturing Fiduciary Obligation: Shepherd's Law of Fiduciaries*, 3 CARDOZO L. REV. 519 (1982) (book review).

227. It is less strict than Cardozo's fiduciary obligation, which demands "the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

228. See *supra* text accompanying notes 207-08.

229. See *supra* part II.A.

tively unite the law of contracts applicable to commercial and non-commercial cases. While Llewellyn was critical of this union,²³⁰ Posner seems willing to tolerate it but with a very different emphasis. Posner believes that no obligation of good faith should be imposed in either context. Instead, and at most, parties should be enjoined from acting in bad faith.²³¹

Posner's invocation of a doctrine of bad faith eviscerates any concept of good faith by limiting itself to circumstances in which a party inflicts injury on another, much as actions in tort do. In other words, the presence of good faith is not the same thing as the absence of bad faith. But, by employing the phrase "bad faith," Posner gives the appearance of operating within the con-

230. See *supra* notes 128-29 and accompanying text.

231. Posner also discussed the relationship between the doctrine of consideration and the problem of modification and duress in *United States v. Stump Home Specialties Mfg.*, 905 F.2d 1117 (7th Cir. 1990). Again, he did not recognize the good faith obligation:

The rule that modifications are unenforceable unless supported by consideration strengthens A's position by reducing B's incentive to seek a modification. But it strengthens it feebly, as we pointed out in *Wisconsin Knife . . .*. The law does not require that consideration be adequate—that it be commensurate with what the party accepting it is giving up. Slight consideration, therefore, will suffice to make a contract or a contract modification enforceable. . . . And slight consideration is consistent with coercion. To surrender one's contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing.

The sensible course would be to enforce contract modifications (at least if written) regardless of consideration and rely on the defense of duress to prevent abuse. . . . All coercive modifications would then be unenforceable, and there would be no need to worry about consideration, an inadequate safeguard against duress.

Id. at 1122. It is worth comparing Posner's approach with Cardozo's concurring opinion in *Imperator Realty Co. v. Tull*, 127 N.E. 263 (N.Y. 1920) (Cardozo, J., concurring). Although of course not a Code case, *Imperator* raised a similar question of the enforceability of an oral waiver under a written contract. The defendant claimed that the contract was within the Statute of Frauds and therefore the oral modification was unenforceable. *Id.* at 264. The court, with Cardozo concurring separately, held that the defendant was estopped to deny the validity of the oral waiver. *Id.* at 265. Cardozo explained that "we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *Id.* at 266. Again, Cardozo gives us an open-textured role for contract that takes a broader view of interparty conduct, laying stress on the centrality of ex ante fairness rather than on ex post consequences of opportunism.

ventional framework, while hijacking it to advance his normative view. In this sense, his method resembles Cardozo's.²³² The normative difference is that Posner sets virtually no limits on self-interest while Cardozo insisted on self-abnegation where reasonable expectations would otherwise be dashed. The judges thus deploy antipodal conceptions of contract. Cardozo's framework had a Burkean flavor and drew on an affirmative obligation of good faith to at once cultivate and mediate between competing values;²³³ Posner's framework has a Benthamite flavor and requires only a negative injunction against bad faith because the only values at stake are individualism and efficiency.²³⁴

Imagine Judge Posner deciding *Wood* in Chicago in 1995. A written contract specifies nothing about either party's obligation but only that "the agent possesses a business organization adapted to the placing of such indorsements as the principal has approved."²³⁵ The contract also lacks specifics with respect to compensation, saying only that the principal's "sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the agent's efforts."²³⁶ Arguing before Posner, the agent faces an uphill battle in his claim against the principal. Given *Selmer* and *Wisconsin Knife*, he likely would lose on a good-faith theory. After *Goldstick*, the agent would be advised to prepare to face the doctrine of comparative advantage that would derail his case on indefiniteness grounds. Although the agent may have better luck arguing a reliance theory under *Goldstick*, he will face difficulty identifying the requisite promise on the facts. Even if the reliance theory were a winner, damages

232. Posner denies that he engages in any sort of subtle, doctrinal maneuvering to mask normative views. See Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 794-95 (1994) (quoting a letter from Posner to the Chicago Council of Lawyers in which Posner states that he gives "a full and candid explanation of the reasons for [his] disposition. . . . [He says] outright what other judges prefer to keep under their hat.").

233. See *supra* part II.B.

234. See *supra* text accompanying notes 227-28.

235. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (paraphrasing a recital of the parties' contract).

236. *Id.*

would be limited to his costs and expenses.

Imagine now that Judge Posner had decided *Wood* in New York in 1917. If his style of reasoning in contract law were dominant in that era rather than Cardozo's, whither neoclassical contract during the realist period? Or, back to the future, if Posner's framework displaces Cardozo's, we would move from protecting parties' reasonable expectations by recognizing an affirmative obligation of good faith to policing the vulnerabilities that sequential performance creates by recognizing only a negative injunction against bad faith.²³⁷

III. CONTRACT AND RISK ALLOCATION

Although Posner would not follow Cardozo's statement in *Wood* that contracts are "'instinct with an obligation,' imperfectly expressed,"²³⁸ he has followed Cardozo closely in applying the *Hadley*²³⁹ foreseeability limitation in the context of consequential damages. In doing so, however, Posner also refined Cardozo's approach, producing opinions whose surface similarity masks important differences. In particular, just as Posner's approach to the basis of contract cases has the effect of limiting the scope of liability, his refinement of Cardozo's approach to *Hadley* has the effect of limiting consequential damages for breach of contract.

237. Proposals to revise UCC Article 8 suggest that this change may be forthcoming. Under the personal property conveyancing law in each Article of the UCC, a first-in-time claimant to property prevails unless the second-in-time claimant can establish elements giving a preferred status, usually including purchase for value and some element of good faith. *E.g.*, UCC §§ 8-301, 8-302. Proposed revisions to Article 8 of the UCC would reverse this structure so that a second-in-time claimant to property prevails unless the first-in-time claimant can establish elements giving a preferred status, including that the second-in-time claimant acted in bad faith. *See* Proposed Revision to Article 8, Revised § 8-503 (establishing that the second-in-time claimant takes unless the first-in-time claimant can show that the second-in-time claimant "acted in collusion with the securities intermediary in violating the securities intermediary's obligation"). Professor Schroeder has severely criticized this proposal, which would substitute a Posnerian position for a Cardozoan position. Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291.

238. *Wood*, 118 N.E. at 214 (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909), *aff'd*, 91 N.E. 516 (N.Y. 1910)).

239. *See Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

A. Cardozo and Posner on Foreseeability

*Kerr Steamship Co. v. Radio Corp. of America*²⁴⁰ and *EVRA Corp. v. Swiss Bank Corp.*²⁴¹ involved analytically identical fact situations in which a customer sued for lost profits radically disproportionate to the cost of some ministerial service handled negligently. In *Kerr*, the customer sought nearly \$7,000 from a telegram company for failure to transmit a coded message to be sent for a charge of about twenty-seven dollars.²⁴² In *EVRA*, the customer sought over two million dollars from its bank for failure to effect a requested funds transfer of \$27,000.²⁴³ Three aspects of both judge's opinions in these cases are highlighted: the role of notice or assent, the objective of efficient risk allocation, and the confluence of tort and contract principles expressed in the concept of foreseeability.

In *Kerr*, Cardozo held that, under the "settled" application of *Hadley v. Baxendale*,²⁴⁴ the telegram company would be liable if the message to be carried had disclosed the nature of the transaction.²⁴⁵ Because the message was written in cipher, however, only the identities of the sender and recipient were disclosed, permitting only the inference that the topic of the message was some business transaction.²⁴⁶ That inference was an insufficient basis on which to impose consequential damages in the event of a failure to transmit.²⁴⁷ Posner stated the *Hadley* rule in a similar way in *EVRA*, writing that "consequential damages will not be awarded unless the defendant was put on notice

240. 157 N.E. 140 (N.Y.), *cert. denied*, 275 U.S. 557 (1927).

241. 673 F.2d 951 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

242. *Kerr*, 157 N.E. at 140-41.

243. *EVRA*, 673 F.2d at 953-54.

244. 156 Eng. Rep. 145 (1854).

245. *Kerr*, 157 N.E. at 141.

246. *Id.* It has been pointed out that the code book was sitting on the counter at the telegraph company's office and claimed that Cardozo's ignoring this fact is an indictment of his candor. See E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1207 n.261 (1970). Posner has refuted this criticism on the grounds that the code book was there for customer use and not to permit the telegraph company to decode encrypted messages. POSNER, *supra* note 8, at 116. Other charges against Cardozo for playing loose with the facts still stand, however, as noted below. See *infra* part IV.A (discussing *Kent*).

247. *Kerr*, 157 N.E. at 142.

of the special circumstances giving rise to them."²⁴⁸ In *EVRA*, the bank knew that the customer was attempting to pay a particular party for a particular purpose, but it knew virtually nothing else about the customer's special circumstances.²⁴⁹

These approaches thus reject Holmes' approach in *Globe Refining Co. v. Landa Cotton Oil Co.*,²⁵⁰ which built the foreseeability limitation in contract on failure of consent.²⁵¹ For Holmes, consequential damages would not be awarded unless the breaching party had made a "tacit agreement" to be liable for them, an approach that has since been rejected as too narrow.²⁵² In contrast, Cardozo's and Posner's approaches build directly on the question of notice.²⁵³ If, and only if, the breaching party knew or had reason to know of the special circumstances, liability is imposed.²⁵⁴

The judges thus step above Holmes' tacit bargaining model and approach the question from a broader perspective. Cardozo continued with the following explanation of one of the fundamental premises of the *Hadley* rule:

Much may be said in favor of the social policy of a rule whereby the companies have been relieved of liabilities that might otherwise be crushing. The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great. The total burden is not heavy since it is distributed among many, and can be proportioned in any instance to the loss likely to ensue. The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided. To pay for this unknown risk, it will be driven to increase the rates payable by all,

248. *EVRA Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955-56 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

249. *See id.* at 956. The bank did not know when payment was due, the terms of the other contract, that those terms were extremely favorable to the customer, or that the customer's counterparty had been seeking to terminate that contract and would probably succeed if the customer's payment to that party was late. *Id.*

250. 190 U.S. 540 (1903).

251. *See id.* at 543.

252. *E.g.*, UCC § 2-715, cmt. 2; RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1979).

253. *See EVRA*, 673 F.2d at 956; *Kerr*, 157 N.E. at 141.

254. This approach is now standard. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351.

though the increase is likely to result in the protection of a few.²⁵⁵

Here Cardozo gives us the second strand of analysis—risk allocation. A default rule that allocates the risk of loss to each sender reduces the total costs (the “total burden”). Each sender is in the best position to determine the particular risks and can “proportion” in each case “the loss likely to ensue.” In contrast, the company is in no position to calculate the risk, and allocating the risk of loss to it drives up the costs for everyone while only producing a benefit in a few cases. The theme is, of course, what economists have since labelled the least cost avoider. Although that phrase does not occur to Cardozo, his analysis is no worse off without it. The problem involves a cost-benefit calculus, but using that phrase is neither necessary nor particularly helpful to an understanding or resolution of the problem posed.

Indeed, Posner demonstrated his contentment with this approach to the least cost avoider analysis by simply quoting the foregoing excerpts from *Kerr* in his *EVRA* opinion.²⁵⁶ Posner may be tacitly admitting that applying such an “economic” test does not render the outcome determinate. Instead, prior policy choices must be made according to the goals that any chosen test should promote.²⁵⁷ In the *Hadley* context, the underlying

255. *Kerr*, 157 N.E. at 142.

256. See *Eura*, 673 F.2d at 958-59. In this connection, consider Posner's analysis of this aspect of Cardozo's opinions:

[F]act and policy are opaque and elusive without a framework, and what Cardozo principally lacked in wrestling with cases in which intuitions of substantive justice ran out was an incisive framework for, or technique of, policy analysis such as modern economic analysis provides. He can hardly be blamed for failing to use tools developed long after his death, however, and we can find intimations of the economic approach

POSNER, *supra* note 8, at 116-17. Posner goes on to characterize some of Cardozo's opinions as illustrating a “proto-economic analysis.” *Id.* at 118. It is open to question whether Posner is correct that the “tools” of modern economic analysis were “developed long after [Cardozo's] death.” After all, Marshallian microeconomics has been around since just after the turn of the century, and its basic insights have not changed dramatically. It is true, on the other hand, that modern legal theory has adapted those insights and applied them in a way and on a scale that would have been alien to Cardozo's contemporaries.

257. See Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 631-33 (1987) (arguing that formalized least-cost-avoider analyses such as the Learned Hand negligence formula do not lead to economically determi-

policy question of the foreseeability limitation is whether imposing liability will induce similarly situated parties to respond to the risk of loss by altering conduct in a way that minimizes that risk. That policy choice in turn generates the final strand of the analysis—the objective of responsiveness in which Cardozo and Posner both unify contract and tort principles.²⁵⁸

Both the *Kerr* and *EVRA* plaintiffs raised a tort theory and therefore argued that *Hadley* did not apply.²⁵⁹ Cardozo observed that “[t]hrough the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty.”²⁶⁰ According to Cardozo, the *Hadley* rule might have differed had it originated in the context of tort rather than contract. However, he concluded that “there is little trace of a disposition to make the measure of the liability dependent on the form of action.”²⁶¹ Posner followed suit in *EVRA*, saying that under *Hadley* “the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so.”²⁶² Posner thus united tort and contract principles, identifying the central goal in either context as allocating the risk of loss to the “least

nate judgments but require making prior value choices concerning who is to bear the risk of harm).

258. In this connection, consider Cardozo’s opinion in *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928)—a third party beneficiary case that also raised the problem of the justifiable scope of liability for damages. A water supply company promised a city to supply water. *Id.* at 896. When plaintiff’s warehouse burned as a result of the supplier’s failure to supply water to put out the fire, it sued the supplier for damages. *Id.* at 896-97. In the course of rejecting the third party beneficiary theory, Cardozo analyzed the problem under tort and contract principles with little distinction. In each context, the question is simply and solely the permissible scope of liability. Cardozo emphasized this point once in the contract discussion and once in the tort discussion by quoting a prior Supreme Court opinion twice: “The law does not spread its protection so far.” *Id.* at 897, 899 (quoting from *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927)). Again, there is the effective cost-benefit analysis, although less formally put: “A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming [as a city burning to the ground] for any trivial reward.” *Id.* at 898. The issue, above all else, is whether imposing liability will reduce the likelihood that injuries of the kind at stake will occur in the future.

259. See *EVRA*, 673 F.2d at 957; *Kerr*, 157 N.E. at 142.

260. *Kerr*, 157 N.E. at 143.

261. *Id.*

262. *EVRA*, 673 F.2d at 957.

cost averter."²⁶³

Posner also noted that "*Hadley v. Baxendale* links up with tort concepts in another way."²⁶⁴ Each limits liability to that which is foreseeable, implying that "[t]he amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care."²⁶⁵ Citing Cardozo in *Palsgraf v. Long Island Railroad*,²⁶⁶ Posner viewed the bank's circumstances as similar to those of the railroad in *Palsgraf*—the potential for harm was so remote as to negate any possibility that liability would influence the care taken.²⁶⁷

Because the opinions of Cardozo and Posner in *Kerr* and *EVRA* respectively are thus far analytically identical, one might conclude that the judges share the same view concerning the proper ambit of liability under the foreseeability test. Not so. Posner proceeded to identify and analyze yet another aspect of the confluence of contract and tort principles. Embellishing this connection, Posner noted the "affinity between the rule of *Hadley v. Baxendale* and the doctrine, which is one of tort as well as contract law . . . , of avoidable consequences."²⁶⁸ In *EVRA*, that doctrine meant that the plaintiff lost because its actions had been imprudent in connection with virtually every step of the transaction.²⁶⁹

Posner's supplemental support from tort law in this context underscores an important aspect of Posner's objective. First, from a conventional doctrinal perspective, there was no reason to invoke the avoidable consequences doctrine in *EVRA*.²⁷⁰ Indeed, doing so is problematic because it implicates difficult ex post judicial calculations and hunches.²⁷¹ It also implies that

263. See *id.* at 957-58.

264. *Id.* at 958.

265. *Id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.)).

266. 162 N.E. 99 (N.Y. 1928).

267. *EVRA*, 673 F.2d at 958.

268. *Id.* at 957-58.

269. *Id.* at 957.

270. The connection between the *Hadley* rule and the avoidable consequences doctrine is approved in *CALAMARI & PERILLO*, *supra* note 134, § 14-15.

271. See Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the*

the investigation should focus on the relative fault of the parties with respect to risks under their control. Although the customer's failure to attempt to minimize the consequences of the bank's failure to transfer was imprudent, a contributory negligence theory logically requires accounting for the fact that the bank was in a better position to assure that it made the transfer.²⁷²

Second, the overlap between contracts and torts (Gilmore's contorts)²⁷³ has always been understood to imply an expansion of the scope of liability, making Posner's use of tort concepts in what was essentially a contracts case seem counterintuitive. While a culpability problem always has lurked in the foreseeability contract cases, it ordinarily arises with placing the drafting burden on the complaining party to establish foreseeability. Invoking the avoidable consequences doctrine in *EVRA* makes this element explicit. It also has the effect of reducing the scope of liability.

In this sense, Posner's disposition to emphasize the tort aspects of the risk allocation problem recalls his emphasis on the promisee and reliance rather than the promisor and good faith in the basis of contract cases.²⁷⁴ That shift in focus enabled Posner to find liability in a case where it would be absurd not to find it, but, at the same time, it allowed him to limit the ambit of liability generally and the extent of the resulting damages.²⁷⁵ Posner's move here is a doctrinal method of strictly containing the ambit of liability. It is "contorts" with a twist. It restricts the ambit of liability to a narrower zone than would exist

Law of Contract, 18 J. LEGAL STUD. 105, 133-34 (1989) (criticizing this branch of Posner's analysis in *EVRA* on the grounds that contributory negligence requires costly ex post judicial tailoring).

272. See Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63 (1987).

[*EVRA*] fails to recognize that the situation involved bilateral precaution—the bank was in a better position to avoid losing the telex, and the customer was in a better position to avoid the unusual consequences of the loss. Exempting the bank from all liability fails to take account of this.

Id. at 93 n.113.

273. GILMORE, *supra* note 124, at 90.

274. See *supra* notes 167-72 and accompanying text.

275. See *supra* notes 141-66 and accompanying text (discussing *Goldstick*).

under Cardozo's formulation of the foreseeability test erected in *Kerr*, just as Posner's moves in the basis of contracts cases narrows the zone of liability from that which Cardozo had established. In each case, restricting the ambit of liability and the scope of damages fulfills the Posnerian view that efficiency is promoted by imposing the "least severe remedy" necessary to facilitate exchange in the face of the vulnerabilities created by sequential performance—that is, opportunism.²⁷⁶

B. Cardozo and Posner on Impossibility

Surface similarities masked an important difference between Cardozo's opinion in *Kerr* and Posner's opinion in *EVRA*, and this same phenomenon characterizes a pair of their impossibility opinions. The point of surface consonance in the impossibility cases is that each judge examines the structure of the transaction, rather than relying solely on the written contract, to determine how a risk had been allocated. The point of disguised difference is that whereas Cardozo used this approach, which was characteristic of his opinions, to determine the just result in the face of competing values, Posner used this approach, which is uncharacteristic of his opinions, to advance a single value—a deep philosophical commitment to freedom of contract.

The contract Cardozo confronted in *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*²⁷⁷ called for the purchase and sale of 1.5 million gallons of molasses from a named refinery.²⁷⁸ The refinery produced about one-half million gallons and supplied the seller with about one-third million gallons, which the seller delivered to the buyer.²⁷⁹ The buyer then sued for breach, and the seller defended on the grounds of impossibility, citing the refinery's low output.²⁸⁰

Cardozo first observed that various forms of force majeure would have excused the seller's obligations under the common law had they occurred.²⁸¹ The seller also would have been ex-

276. See POSNER, *supra* note 33, at 117-18.

277. 179 N.E. 383 (N.Y. 1932).

278. *Id.* at 384.

279. *Id.*

280. *Id.* at 383-84.

281. *Id.* at 384. These included destruction of the refinery, failure of the sugar

cused if the contract had identified a particular contract between the seller and its supplier that itself had been breached through no fault of the seller.²⁸² The risk of the occurrence of such events was not within the seller's control and, at least arguably, would not have been allocated to the seller. With respect to the seller's impossibility claim, however, Cardozo refused to excuse the seller based on the refinery's low output because there was nothing "to show that the [seller] would have been unable by a timely contract with the refinery to have assured itself of a supply sufficient for its needs."²⁸³

Neither the buyer-seller contract nor anything else prevented the seller from making such a supply contract, and the seller therefore bore the resulting risks. Because the seller acted as a middleman, the buyer agreed to pay more under its contract with the seller than if it had agreed directly with the refinery.²⁸⁴ In effect, the buyer bought the right to allocate the risk of low refinery output to the seller. Seen from this perspective, the result was certainly correct and reflects one of Cardozo's themes. To excuse the seller from performance would countenance its lack of good faith in charging for a risk that it then would have been freed from assuming. More importantly, it also exemplifies Cardozo's characteristic inclination to favor interpretation in reaching a just outcome.

Posner has described *Dunbar Molasses* as a "baffling case[.]"²⁸⁵ Perhaps this characterization is due to Posner's general view that judicial acts of interpretation, implication, and construction are perverse.²⁸⁶ Yet Posner conducted a similar exercise, although for different reasons, in *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,²⁸⁷ a case involv-

crop, war, and unavoidable labor strikes.

282. *Id.*

283. *Id.*

284. *Id.*

285. POSNER, *supra* note 8, at 97.

286. *See, e.g., supra* notes 175-78 and accompanying text.

287. 799 F.2d 265 (7th Cir. 1986). This case is analyzed in Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1161-64 (1987), and in Susan E. Wuorinen, Comment, *Northern Indiana Public Service Company v. Carbon County Coal Company: Risk Assumption in Claims of Impossibility, Impracticability, and*

ing a twenty-year supply contract of a fixed quantity of coal at a fixed price per ton, subject to upward adjustment.²⁸⁸ Fuel prices declined below the contract price, and the buyer, a public utility, was effectively prohibited by the public service commission from passing on the excess costs under this contract to consumers.²⁸⁹ As a result, it refused to take further deliveries and sought a declaration excusing its performance under either a contractual force majeure clause or, alternatively, under the doctrines of frustration or impossibility.²⁹⁰ The seller counterclaimed for breach, seeking specific performance or damages.²⁹¹ Following a jury trial, the seller was awarded judgment in the amount of \$181 million.²⁹²

The buyer argued that its performance was excused pursuant to a force majeure clause in the contract permitting it to refuse delivery for specified events beyond its reasonable control, including acts of civil authorities that "wholly or partly prevent . . . the utilizing . . . of the coal."²⁹³ Observing that the contract fixed a minimum price for the coal and permitted escalations in that price, Posner concluded that the buyer "gambled that fuel costs would rise rather than fall over the life of the contract; for if they rose, the contract price would give it an advantage over its (hypothetical) competitors who would have to buy fuel at the current market price."²⁹⁴ To read the force majeure clause as the buyer argued would therefore "nullify a cen-

Frustration of Purpose, 50 OHIO ST. L.J. 163 (1989).

288. *Northern Ind.*, 799 F.2d at 267.

289. *Id.*

290. *Id.* at 267-68. The buyer also predicated its claim on the further alternative grounds that the contract was illegal under a federal statute prohibiting mining company affiliations with railroads. Although the seller had an interest in the Union Pacific Railroad, *id.* at 268, Posner rejected the buyer's argument after weighing its "pros and cons," *id.* at 270-74.

291. *Id.* at 268.

292. *Id.*

293. *Id.* at 274.

294. *Id.* at 275. Posner included the parenthetical word "hypothetical" because, given that the buyer operated in a regulated industry, there were no competitors. Indeed, Posner's opinion evinced a rather dim view of public utility regulation. He described how regulation attempts to serve as a surrogate for competition but can never do so exactly. *Id.*

tral term of the contract."²⁹⁵

Turning next to the buyer's argument that it was excused from performance on the grounds of frustration or impossibility, Posner observed: "Since impossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk, they have no place when the contract explicitly assigns a particular risk to one party or the other."²⁹⁶ Recalling his rejection of buyer's force majeure argument, Posner concluded:

[A] fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer, and the assignment of the latter risk to the buyer is even clearer where, as in this case, the contract places a floor under price but allows for escalation. If, as is also the case here, the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines.²⁹⁷

As in the force majeure branch of his opinion, Posner denies the impossibility claim on the grounds that "the very purpose of a fixed-price agreement is to place the risk of increased costs on the promisor (and the risk of decreased costs on the promisee)."²⁹⁸ Although Posner was correct, his conclusion is necessarily based on an interpretive move. Posner makes the point that the contract's force majeure clause, at least as the buyer urged that it be read, was inconsistent with the pricing provision.²⁹⁹ No express contract language governed the consequences that should follow if the public service commission refused to

295. *Id.*

296. *Id.* at 278. Before reaching this conclusion, Posner also gave a succinct and lucid history of the evolution of the common law's position on impossibility from the emergence of force majeure clauses to the development of the doctrine of frustration. *Id.* at 276-78.

297. *Id.* at 278.

298. *Id.* (quoting *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 453 (E.D. Va. 1981)).

299. *Id.* at 275.

permit the buyer to raise rates when its supply costs escalated. In other words, Posner's insistence that the risk allocation was "explicit" is true only as a result of an act of judicial construction based on the structure of the transaction and not a literal allocation of that risk. In effect, by refusing to construe the force majeure clause broadly and recognizing the "whole purpose of a fixed-price contract,"³⁰⁰ Posner permits himself to let the judicially perceived economic structure of the transaction control the outcome.

Posner is probably content to engage in this relaxation of his ordinary interpretive literalism because of an underlying concern about the risks of collusion in the public utility context between the buyer under the contract and the public service commission.³⁰¹ In his opinion, for example, Posner evinces a critical stance toward the regulatory framework in which the contract before him was entered into.³⁰² This criticism and the implicit suspicion of collusion lead to an understanding that Posner's disposition of the case deeply favors an abstract notion of freedom of contract. Thus again, a surface similarity in Posner's approach in *Northern Indiana* to Cardozo's approach in *Dunbar Molasses* masks an important difference. Whereas Cardozo engaged in his usual acts of judicial construction to do justice in *Dunbar Molasses*, Posner departs from his usual interpretive literalism in *Northern Indiana* to protect a deep normative disposition toward freedom of contract.

IV. CONDITIONS, PERFORMANCE, AND BREACH

Posner's willingness to draw on Cardozo's opinions in *Palsgraf* and *Kerr* and the surface similarity of the approaches that the judges took in the impossibility cases therefore should not be understood to suggest a close affinity between Cardozo and Posner. Indeed, just as Posner could not have reached the decision Cardozo reached in *Wood* (and would never say contracts

300. *Id.*

301. I owe this insight to my colleague, Bill Bratton.

302. See *Northern Ind.*, 799 F.2d at 276 (noting that the risk that the buyer took may have been prudent or excessive, but that these matters were between the buyer and the public utility commission); *supra* note 294.

are "instinct with an obligation,' imperfectly expressed")³⁰³ nor could he follow much of what Cardozo did in *Jacob & Youngs, Inc. v. Kent*³⁰⁴ and certainly would not be heard to say, as Cardozo did, that the "willful transgressor must accept the penalty of his transgression."³⁰⁵ Moreover, although both judges have excused express contractual conditions, Cardozo in *Kent* did so by owning up to a conscious mediation between freedom of contract and considerations of justice, whereas Posner in *Morin Building Products Co. v. Baystone Construction, Inc.*³⁰⁶ denied that he was striking at the foundations of freedom of contract.³⁰⁷

A. Posner and Cardozo on Conditions

In *Morin*, a subcontractor agreed with a general contractor to supply and erect aluminum walls for an addition to a manufacturing plant.³⁰⁸ The contract, which was governed by Indiana law, specified the materials to be used and called for "a mill finish and stucco embossed surface texture to match finish and texture of existing metal siding."³⁰⁹ It also specified that all work was subject to final approval of the owner, whose decisions with respect to "artistic effect" and other matters of "quality or fitness" would be final.³¹⁰ The owner rejected the work because

303. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (1909)).

304. 129 N.E. 889 (N.Y. 1921).

305. *Id.* at 891.

306. 717 F.2d 413 (7th Cir. 1983).

307. *Id.* at 417.

308. *Id.* at 414.

309. *Id.*

310. The contract also provided "that all work shall be done subject to the final approval of the Architect or Owner's . . . authorized agent, and his decision in matters relating to artistic effect shall be final, if within the terms of the Contract Documents"; and that "should any dispute arise as to the quality or fitness of materials or workmanship, the decision as to acceptability shall rest strictly with the Owner, based on the requirement that all work done or materials furnished shall be first class in every respect. What is usual or customary in erecting other buildings shall in no wise enter into any consideration or decision."

Id.

the walls did not give the impression of a unified finish.³¹¹ The general had them removed and rebuilt by another party and refused the sub's request for payment on the balance of the contract price.³¹² Posner had to decide the correctness of a jury instruction that quoted the satisfaction condition of the contract but also said that, despite that language, the general rule applied in these cases is whether a reasonable owner would have regarded the result as satisfactory.³¹³

Posner identified two judicial positions in the satisfaction cases. The minority view holds that, if the contract provides for buyer's satisfaction, then his rejection, however unreasonable, is not a breach of contract "unless the rejection is in bad faith."³¹⁴ The majority view, set forth in Restatement section 228 and followed by Indiana courts, imposes the test of whether a reasonable person would have been satisfied.³¹⁵ Following Indiana law, Posner upheld the application of that test as reflected in the jury instruction.³¹⁶ In reaching this conclusion, however, Posner took pains to argue that he was neither embracing paternalism³¹⁷ nor impairing freedom of contract.³¹⁸

With respect to paternalism, Posner first observed that such a judicial gesture would be "out of place in a case such as this, where the subcontractor is a substantial multistate enterprise."³¹⁹ Second, the requirement of reasonableness is not paternalistic in any event because it is read into the contract "not to protect the weaker party but to approximate what the parties would have expressly provided with respect to a contingency that they did not foresee, if they had foreseen it."³²⁰ It is only read into those contracts where doing so is "a reliable guide to the parties' intentions."³²¹

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 415.

315. *Id.*

316. *Id.* at 416-17.

317. *Id.* at 415.

318. *Id.* at 417.

319. *Id.* at 415.

320. *Id.*

321. *Id.*

Posner's task was thus to determine whether these parties had intended for the owner to act reasonably or whether they intended it to have the freedom of action that it now insisted was its right. Posner observed that cases involving contracts where qualities of personal aesthetics or artistic effect are important justify permitting the satisfaction condition to be tested by subjective criteria, as in the painting of a portrait.³²² In contrast, it would be "fantastic" to believe that a buyer of pig iron, for example, could reject a shipment "because he did not think the pigs had a pretty shape."³²³ Because *Morin* involved siding produced by a factory, "not usually intended to be a thing of beauty,"³²⁴ it was a case of the second class and using objective criteria in assessing the rejection was practicable.³²⁵

However, the contract language was quite explicit in its references to "artistic effect," "quality or fitness" and "decision as to acceptability."³²⁶ Posner dealt with this language by noting that the contract was on a standard pre-printed form—a "general purpose" contract.³²⁷ Given the context and subject matter of the contract, Posner concluded that this language in the contract was not intended to mean what it said.³²⁸ From the nature of the transaction, Posner felt able to assess the presumable intentions of the parties, and he doubted that the express contract terms were intended to cover the "aesthetics of a mill-finish aluminum factory wall."³²⁹

322. *Id.* (citing *Gibson v. Cranage*, 39 Mich. 49 (1878)).

323. *Id.*

324. *Id.*

325. *Id.* at 415-16. Posner said that the only question in cases where personal aesthetics were important is whether the buyer acted in good faith in rejecting the goods. *Id.* at 415. Two paragraphs earlier in the opinion, Posner announced that if the reasonableness standard were inapplicable, then a new trial would be required "to determine whether [the owner] really was dissatisfied, or whether he was not and the rejection therefore was in bad faith." *Id.* at 414. Posner thus again equated the presence of good faith with the absence of bad faith, enabling him to give the appearance of operating within the conventional framework while advancing a normative view at variance with the traditional good faith obligation. *See supra* part II.B.

326. *Morin*, 717 F.2d at 414; *see supra* note 310.

327. *Morin*, 717 F.2d at 416.

328. *Id.*

329. *Id.* Posner further justified his use of the reasonableness test on the grounds that (1) the parties probably would have adopted that test if they had foreseen this

Anticipating critics who might accuse Judge Posner of straying from the fold, he was also careful to insist that this result did not "strike at the foundations of freedom of contract."³³⁰ Posner emphasized that "if it appeared from the language or circumstances of the contract that the parties really intended [the owner] to have the right to reject [the] work for failure to satisfy the private aesthetic taste of [the owner],"³³¹ then freedom of contract would have permitted the owner to reject the work even if that rejection were unreasonable.³³² Posner's contention that his position did not strike at the foundations of freedom of contract is peculiar, implying at a minimum an extraordinarily narrow view of freedom of contract. As Corbin made plain long ago, courts sometimes set aside an express condition calling for personal satisfaction

by indulging in a process of pseudo-interpretation, finding that the language used means the "satisfaction of a reasonable man." When this is in fact what is done, it is a substitution by the court of a reasonable condition precedent in place of what seems to the court an unreasonable condition precedent. Such pseudo-interpretation as this constitutes a judicial limitation upon the freedom of contract of the parties.³³³

Corbin might have tolerated the fashioning of some remedy in cases where the condition arose as a result of inequality in bargaining power, but he emphasized that this remedy would still constitute judicial restriction on freedom of contract.³³⁴ And, of

dispute, (2) it would have been difficult to achieve a uniform mill finish, and (3) the owner had apparently paid no premium for the freedom of action claimed. *Id.* But Posner noted that all this was conjecture on his part and thus created doubts on a difficult issue of state law. *Id.* Because of that difficulty, finally, deference was due to the district court. *Id.* at 416-17. Posner's final disposition evokes Cardozo's similar move in *DeCicco*, where despite clever doctrinal footwork, Cardozo finally decided simply to defer to the inferences drawn by the trial court. *See supra* note 109.

330. *Morin*, 717 F.2d at 417.

331. *Id.*

332. *Id.*

333. 3A CORBIN ON CONTRACTS, *supra* note 76, § 648 (footnote omitted).

334. *See id.*

Such pseudo-interpretation . . . may perhaps be justifiable at times, because of inequality in the economic bargaining power of the parties at the time they make the contract. Such inequality, however, has not yet consciously and openly been recognized by the courts as a reason for

course, Posner had already announced that no such inequality existed in *Morin* and therefore he was not prepared to act paternalistically toward the subcontractor.³³⁵

Posner's dubious assertion that he was not impairing freedom of contract in *Morin* recalls a criticism often levelled against Cardozo's opinion in *Kent*. In the course of excusing a condition in a construction contract calling for the use of Reading Pipe when some other brand was used, Cardozo declared that his ruling was "not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery."³³⁶ Many have seen this statement as disingenuous in light of a contract term, which Cardozo does not cite in *Kent*, stating that any material not fully in accordance with the specifications in every respect would be removed and replaced in accordance with the actual specifications.³³⁷

Cardozo set for himself in *Kent* the task of choosing to characterize the specifications as a condition or as a promise, noting that this choice could not be rendered by any formulaic means.³³⁸ Instead, such determinations must be based on

limiting freedom of contract and for depriving the party in the superior economic position of some of the advantages that would be his by the express terms of the agreement. Moreover, in a particular case there may have been no inequality in economic bargaining power; or, if there was, it may have had nothing at all to do with the inclusion of the condition of personal satisfaction in the contract. It should be remembered that there are effective methods of preventing injustice other than by making false interpretations or by limiting freedom of contract.

Id.

335. *Morin*, 717 F.2d at 415.

336. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

337. The record in the case showed the following clause in the contract:

Any work furnished by the Contractor, the material or workmanship of which is defective or which is not fully in accordance with the drawings and specifications, in every respect, will be rejected and is to be immediately torn down, removed and remade or replaced in accordance with the drawings and specifications, whenever discovered.

DAWSON ET AL., *supra* note 23, at 841. It also showed a clause in the contract providing that the contractor was to be paid only upon certificates of a designated architect. RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* 110-11 (1978).

338. *Kent*, 129 N.E. at 890-91.

"[c]onsiderations partly of justice and partly of presumable intention."³³⁹ This phrase expresses the overlap between freedom of contract and other social values.³⁴⁰ Presumable intention is a basis for justifying gap filling in incomplete contracts by attempting to judge what the parties would have agreed to had they consciously considered the contingency. This concept, as Posner emphasized in *Morin*,³⁴¹ recognizes the value of freedom of contract. The concept "considerations of justice," which Posner does not advert to in *Morin*, recognizes the role of courts in interpreting contracts with reference to broader social concerns. Social justice injects an element of mediation into the interpretive process, and, although the balancing of these elements may seem "wavering and blurred,"³⁴² as Cardozo said, it is necessary to the "practical adaptation to the attainment of a just result."³⁴³

Posner and Cardozo thus choose to emphasize or minimize different aspects of the decisionmaking process in crafting their opinions in *Morin* and *Kent*. Posner sets forth the contract language for all to see but emphasizes the context of the transaction and the use of a standard-form contract to deny that he is invading freedom of contract in refusing to enforce its express terms. Cardozo sets the explicit contract term to the side and, treating the specifications in the abstract, confronts the tensions by announcing the need to mediate between freedom of contract and considerations of justice.

Although *Kent* may have come out the same way if Posner had decided it, and *Morin* may have come out the same way had Cardozo decided it, the opinions display very different meanings of freedom of contract and its value. By his mediation, Cardozo recognizes an expansive meaning of freedom of contract but admits that this value is subject to attenuated protection when competing values outweigh it. By denying that he was invading freedom of contract in *Morin*, Posner necessarily (and paradoxi-

339. *Id.* at 890.

340. It also distinguishes between implied-in-fact and implied-in-law contracts.

341. *Morin Bldg. Prods. Co. v. Baystone Constr. Inc.*, 717 F.2d 413, 417 (7th Cir. 1983).

342. *Kent*, 129 N.E. at 891.

343. *Id.*

cally) implies a narrow definition of that freedom. Now we have Cardozo as the conscious fox, and we have Posner as the stalwart hedgehog. Cardozo's Burkean-like doctrinalism is more capacious than Posner's Bentham-like economic formalism—the former permitting mediation, the latter requiring denial.

B. Cardozo's Willful Transgressor and Posner's Efficient Breacher

The other branch of *Kent* concerned the measure of damages for breach of the promise to use Reading Pipe. Here Cardozo met up with the judicial forfeiture rule of *Smith v. Brady*,³⁴⁴ where Judge Comstock had insisted that a contractor's failure to meet exacting building specifications prevented his recovery on the contract.³⁴⁵ *Smith* thus did not recognize a doctrine of substantial performance and would have measured the owner's damages in terms of the cost of completion of the contract³⁴⁶—in *Kent*, a measure based on tearing down the nonconforming pipe and rebuilding the house "cellar to roof."³⁴⁷ Cardozo could not accept such a measure of damages in *Kent* because, although such a measure may be proper in most cases, where it would be "grossly and unfairly out of proportion to the good to be attained,"³⁴⁸ the proper measure is the difference in value.³⁴⁹

This doctrine of substantial performance is one of Cardozo's most important contributions to the law of contracts, having been showcased in a Restatement section soon after it was handed down and having been widely adopted ever since.³⁵⁰ But to create that doctrine in *Kent*, Cardozo had to square his result with *Smith*. Cardozo did so by noting that the contractor's breach in *Kent* was inadvertent and minting his oft-quoted dictum that, in contrast to an unintentionally breaching party, "the willful transgressor must accept the penalty of his transgres-

344. 17 N.Y. 173 (1858).

345. *Id.* at 187.

346. *Id.* at 189.

347. *Kent*, 129 N.E. at 891.

348. *Id.*

349. *Id.*

350. RESTATEMENT (SECOND) OF CONTRACTS § 241.

sion.”³⁵¹ Cardozo implies by that dictum that the “willful transgressor” would not be entitled to invoke the doctrine of substantial performance—an implication criticized by Corbin³⁵² and rejected in the Restatement (Second)’s formulation of the doctrine of substantial performance.³⁵³ Corbin argued not only that “willful” is too vague a notion to apply to breaches but also that even willful breaches should not necessarily be penalized.³⁵⁴ While these criticisms of the implication of Cardozo’s statement regarding the willful transgressor are apt, Cardozo’s use of the phrase served more narrow purposes in his opinion.³⁵⁵

The phrase was used implicitly to distinguish *Smith*, where the contractor’s noncompliance with the contract specifications was willful,³⁵⁶ from *Kent* where the breach was due to oversight and inattention. Without willful transgression, the doctrine of substantial performance applied, and the owner was entitled to an allowance for damages equal only to the diminution in value, not the cost of completion.³⁵⁷ In effect, therefore, the minted phrase is a rhetorical device for distinguishing *Kent* from *Smith*. Given that the dissenting opinion in this four-to-three decision seized on *Smith* as the controlling precedent, conceivably, Cardozo’s statement was necessary to win a majority of the court.³⁵⁸ Indeed, the rhetorical use of this phrase had particular purchase because it is arguably anchored in the general obligation of good faith performance implied into all contracts. Viewed as refining the good faith obligation, Cardozo meant “willful” not in the sense of merely conscious, deliberate, or in-

351. *Kent*, 129 N.E. at 891.

352. 3A CORBIN ON CONTRACTS, *supra* note 76, § 707.

353. RESTATEMENT (SECOND) OF CONTRACTS § 241(e) & cmt. f. The Restatement has adopted Corbin’s view, announcing that a willful breach does not bar recovery, although a breaching party’s motive may be relevant in determining whether performance was substantial. *Id.*

354. 3A CORBIN ON CONTRACTS, *supra* note 76, at § 707.

355. His later collaboration with Corbin in formulating the Restatement’s substantial performance doctrine demonstrates that he ultimately agreed with Corbin.

356. *Smith v. Brady*, 17 N.Y. 173, 182 (1858).

357. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

358. Indeed, the dissenting opinion ultimately disagreed with Cardozo’s characterization of the contractor’s conduct. The dissent viewed the breaching party’s conduct as intentional or grossly negligent; it too would have excused his conduct—at least to some extent—if it had been minor and due to inadvertence. *Id.* at 892.

tentional but rather in the sense of conduct unnecessary to realizing one's reasonable expectations that impairs a counterparty's reasonable expectations.³⁵⁹

Kent reflects Cardozo's broad view of contract and the judicial role in his mediation between private contract and public enforcement. He recognized the reasonableness of a crafted outcome and then adopted it as against the harshness of an outcome that would be justified by a literal interpretation of the contract. The opinion's prominence, therefore, despite fair criticism for obscuring facts and rhetorical overstatement, goes to its normative base: a judge taking responsibility for identifying and enforcing what wisdom and justice seem to call for in light of many competing values.

The phrase "willful transgressor" would seem out of place in a Posner opinion even if used as a rhetorical device or if understood in the narrow sense, suggested above, of reflecting a general obligation of good faith in contractual relations. The phrase has no place in Posner's theory of efficient breach, expounded in his opinions in *Patton v. Mid-Continent Systems, Inc.*³⁶⁰ and *Lake River v. Carborandum Co.*³⁶¹

The plaintiffs in *Patton* operated a truck stop franchise under an agreement with the defendant that gave plaintiffs an exclu-

359. See *supra* text accompanying notes 221-27; see also *Vencenzi v. Cerro*, 442 A.2d 1352, 1354 (Conn. 1982) ("The pertinent inquiry is not simply whether the breach was 'wilful' but whether the behavior of the party in default 'comports with the standards of good faith and fair dealing.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 241(e)); RESTATEMENT (SECOND) OF CONTRACTS § 241 (providing that significant factors in determining whether performance was substantial are the defaulting party's conformity to standards of good faith and fair dealing). This view also reconciles Cardozo's approach with Traynor's view that "to deny the remedy of restitution because a breach is wilful would create an anomalous situation." *Freedman v. Rector of St. Mathias Parish*, 230 P.2d 629, 632 (Cal. 1951).

360. 841 F.2d 742 (7th Cir. 1988).

361. 769 F.2d 1284 (7th Cir. 1985); see *infra* notes 387-403 and accompanying text. Law and economics has made its greatest contributions to the law of contracts through the theory of efficient breach. See CONTRACTS ANTHOLOGY, *supra* note 31, at 55. While the first formal development of the theory of efficient breach seems to be Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977), Posner had previously expressed similar views, POSNER, *supra* note 33, at 55-60, and has, of course, since then heralded efficient breach theory.

sive territory.³⁶² A jury found that defendants had breached the exclusivity provision by granting franchises to other truck stop operators in the territory, awarding compensatory as well as punitive damages.³⁶³ On appeal, Posner considered the availability of punitive damages for breach of contract under Indiana law.³⁶⁴

Posner observed that "liability for breach of contract is, *prima facie*, strict liability. . . . [A promisor is liable] even though the failure may have been beyond [the promisor's] power to prevent and therefore in no way blameworthy."³⁶⁵ Strict liability applies because "contracts often contain an insurance component."³⁶⁶ Evoking Holmes, Posner explained that a promisor agrees "to perform or to compensate the promisee for the cost of nonperformance; and one who voluntarily assumes a risk will not be relieved of the consequences if the risk materializes."³⁶⁷ Invoking the theory of efficient breaches, Posner continued as follows:

Even if the breach is deliberate it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.³⁶⁸

Posner went on to caution that "[n]ot all breaches of contract are involuntary or otherwise efficient."³⁶⁹ For example, opportunism may arise, as where the promisor "wants the benefit of

362. *Patton*, 841 F.2d at 744.

363. *Id.*

364. *Id.* at 750-51. Before reaching that question, Posner analyzed a number of other issues, including the applicability of the parol evidence rule, the law of conditions, the correctness of the measure of the compensatory damages awarded below, and the law applicable to the punitive damages question. *Id.* at 745-50. Although the contract provided that Arkansas law governed, the district court had decided Indiana law applied, and the parties acquiesced in that determination. *Id.* at 749-50.

365. *Id.* at 750.

366. *Id.*

367. *Id.*

368. *Id.* (citation omitted).

369. *Id.* at 751.

the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies."³⁷⁰ This element of opportunism, it seemed to Posner, is what unites the Indiana cases allowing punitive damages for breach of contract.³⁷¹ Further, Posner rejoined, "whatever the exact dimensions of the rule, the facts of the present case are pretty clearly outside it" because there was no evidence that the franchiser's actions were "opportunistic or even deliberate."³⁷² Instead, it seemed to be an "honest mistake resulting from the ambiguous description of the territory" in the agreement.³⁷³ Once the franchisee alerted the franchiser of the "mistake," however, this "innocent" breach became "deliberate."³⁷⁴ To award punitive damages in a contract case under Indiana law, however, the breach must be "mingled" with "elements of fraud, malice, gross negligence or oppression."³⁷⁵ Because "no clear and convincing evidence" showed these elements, Posner denied punitive damages.³⁷⁶

Posner, therefore, only narrowly escapes a result he could not have condoned by characterizing the facts as not meeting the evidentiary standard. That factual issue troubled Posner in *Patton* because a finding that fraud, malice, gross negligence, or oppression were present would have led him to affirm the imposition of punitive damages, but such damages have virtually no place in Posner's theory of efficient breach.³⁷⁷ The only time that they are justified is when a party acts "opportunistically," which *Patton* implies must be extreme behavior, bordering on

370. *Id.* Posner continued, "the major inadequacies being that pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account and that the winning party cannot recover his attorney's fees." *Id.*

371. *Id.* ("This seems the common element in most of the Indiana cases that have allowed punitive damages to be awarded in breach of contract cases; see the discussion of cases in *Travelers Indemnity Co. v. Armstrong*," 442 N.E.2d 349, 359 (Ind. 1982)).

372. *Patton*, 841 F.2d at 751.

373. *Id.*

374. *Id.*

375. *Id.* at 750 (quoting *Travelers*, 442 N.E.2d at 359) (citations omitted).

376. *Id.* at 751.

377. See POSNER, *supra* note 33, at 117.

theft;³⁷⁸ it certainly did not include merely deliberate acts, continued after notice, that were apparently not even argued by the franchiser to constitute a Posnerian efficient breach.³⁷⁹ Posner's trouble in *Patton* may therefore be seen as arising from his resistance to supracompensatory damages in a contracts case, requiring him to unite Indiana cases along lines consistent with that resistance.³⁸⁰

Under Cardozo's more capacious framework, in contrast, a judge would have no trouble reaching the legal conclusion that would follow from a determination that the facts put the case on one side of interpretations of Indiana law or the other. For example, that framework could recognize that compensatory damages in contracts cases are usually both fair and efficient because, if the breaching party breaches to exploit a more advantageous arrangement, that measure will leave no one worse off.³⁸¹ The aggrieved party's expectations are protected, the breaching party gains, and society is better off.³⁸² On the other hand, if the breach is accompanied by proscribed conduct (not necessarily limited to opportunism in the Posnerian sense), the fair as well as the efficient rule could impose supracompensatory damages (and the label punitive may not be apt), so long as those damages are set no higher than the gains from breach.³⁸³ The breaching party would be made no worse off, the aggrieved party would be allocated the gains from the breach, and society is again better off.³⁸⁴ This is thickly textured Cardocean

378. *See id.*

379. *See id.* at 118.

380. Posner was right to retreat from his characterization of the Indiana contract cases awarding punitive damages as being united by a concern for opportunism. *See supra* text accompanying notes 371-72. The leading Indiana case Posner cites, *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982), does not discuss the idea of opportunism at all and never once mentions the idea of efficient breach (or efficiency). Indeed, that opinion was rather more devoted to determining the applicable standard of proof of some quasi-tortious conduct that the law wants to deter by awarding punitive damages than to a delineation of what that conduct is. *See id.* at 361-65.

381. Stewart E. Sterk, *Enforceability of Agreements To Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 532 n.188 (1981).

382. *Id.*

383. *Id.*

384. *Id.* (citing Goetz & Scott, *supra* note 361, at 558-59).

doctrinalism, fashioning a remedy that takes cognizance not solely of one form of efficiency but that also looks to fairness and good faith.³⁸⁵

Whereas Posner was able to escape the bite of *Erie*³⁸⁶ in *Patton* by interpretation of the Indiana cases, the constraint caused him more trouble in *Lake River Corp. v. Carborundum Co.*,³⁸⁷ Posner's most important and widely-reprinted contracts opinion.³⁸⁸ Here Posner gave an extended lecture to the state courts on the indefensibility of the liquidated damages versus penalty distinction and amplified the theory of efficient breach,³⁸⁹ highlighting a significant difference in the style (and effect) of contracts opinions by Cardozo and Posner. Ultimately, however, Posner could not succeed in achieving his stated optimal results. This shortcoming is certainly partly due to *Erie*, but it also results from the more confining framework within which Posner addresses contract issues—in this case involving a tension between freedom of contract and economic theory.³⁹⁰

The contract in *Lake River* was between the manufacturer of an abrasive powder used in making steel and a distributor engaged to bag and ship that powder for marketing to the manufacturer's customers in the Midwest.³⁹¹ The manufacturer insisted that the distributor install specialized equipment for processing the powder.³⁹² To assure that it would recoup the expense of that installation, the distributor in turn insisted that

385. See also Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982). Professor Macneil observes that efficient breach theory assumes that the savings from breach belong to the breaching party rather than to the aggrieved party. See *id.* at 948-49. While the common law of remedies for breach of contract has always treated expectancy damages as the rule and specific performance as the exception, Macneil points out that there is no a priori reason this should be so, and certainly not on efficiency grounds. *Id.* at 968. For example, the losses arising from resolving the damages dispute may be greater than the costs of a negotiation induced through a regime of specific performance that recognizes the aggrieved party's claim to at least a portion of the gains from breach. See *id.* at 968-69.

386. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

387. 769 F.2d 1284 (7th Cir. 1985).

388. See *infra* app.

389. See *Lake River*, 769 F.2d at 1289-93.

390. See *id.*

391. *Id.* at 1286.

392. *Id.*

a minimum quantity of powder be channeled to it under the contract.³⁹³ As a result of a sharp decline in demand for the powder during the contract term, the manufacturer did not meet the minimum quantity specified.³⁹⁴ The distributor's lawsuit against the manufacturer thus centered on whether the minimum quantity clause imposed a penalty for breach of contract or was an effective liquidated damages clause.³⁹⁵

In amplifying the theory of efficient breach, Posner wrote an illuminating essay, tailor-made for reproduction in standard contracts casebooks and perhaps in law-and-economics textbooks as well. Posner first observed that the minimum-quantity guarantee in this case enhanced the manufacturer's credibility of performance with the distributor—the manufacturer agreed to sell or pay anyway.³⁹⁶ Posner also noted that a penalty clause raises the cost of breaching a contract and therefore “may discourage efficient as well as inefficient breaches of contract.”³⁹⁷ Echoing his analysis of the problem of punitive damages in *Patton*, Posner gave the following example:

Suppose a breach would cost the promisee \$12,000 in actual damages but would yield the promisor \$20,000 in additional profits. Then there would be a net social gain from breach. After being fully compensated for his loss the promisee would be no worse off than if the contract had been performed, while the promisor would be better off by \$8,000. But now suppose the contract contains a penalty clause under which the promisor if he breaks his promise must pay the promisee \$25,000. The promisor will be discouraged from breaking the

393. *Id.* In effect, the parties included a sell-or-pay clause, the functional equivalent of the take-or-pay clauses common in energy and mineral production contracts. See *id.* at 1292.

394. *Id.*

395. *Id.*

396. *Id.* at 1287.

397. *Id.* at 1289. Posner dismissed as “makeweights” other proffered rationales for refusing to enforce penalty clauses, including that they may increase risks to the breaching party's other creditors; increase the risk of bankruptcy, which is more worrisome since “bankruptcy imposes ‘deadweight’ social costs”; and “amplify the business cycle by increasing the number of bankruptcies in bad times.” *Id.* These arguments were makeweights because “little effort is made to prevent businessmen from assuming risks.” *Id.* But see POSNER, *supra* note 33, at 117 (presenting these reasons).

contract, since \$25,000, the penalty, is greater than \$20,000, the profits of the breach; and a transaction that would have increased value will be foregone.³⁹⁸

This illustration illuminates the theory of efficient breach, but it at once reveals its narrowness. For example, it assumes that judges and contracting parties can easily and objectively determine the amount or value of damages incurred and the amount or value of profits saved. As cases such as *Peevyhouse v. Oakland Coal and Mining Co.*³⁹⁹ and *Groves v. John Wunder Co.*⁴⁰⁰ instruct, these are not incidental assumptions.⁴⁰¹ In addition, the illustration assumes no transactions costs, including the costs of negotiation, search, and dispute resolution, also a non-trivial assumption. Finally, it denies both the possibility of any social gain that may accrue through an institution of contract rooted in promise⁴⁰² and the hortatory function of judicial opinions—values that contributed an important dimension to the texture and enduring appeal of Cardozo's contracts opinions.

Posner did not need to wrestle with these problems of efficient breach theory, however, because, as he lamented, the common law of Illinois "continues steadfastly to insist on the distinction between penalties and liquidated damages," without regard to efficiency concerns but instead based solely on what Posner characterized as paternalism.⁴⁰³ As in *Northern Indiana*, Posner was therefore remitted to applying a rule he disfavors to the facts at hand. In doing so in *Lake River*, however, Posner could not find an escape hatch as he had in *Northern Indiana*. Instead, Posner simply observed that the clause "is designed always to assure [the distributor] more than its actual damages.

398. *Lake River*, 769 F.2d at 1289.

399. 382 P.2d 109 (Pa. 1963).

400. 286 N.W. 235 (Minn. 1939).

401. In both cases, the cost of remedial work required by contract significantly exceeded the resulting increase in value to the land. *Peevyhouse*, 382 P.2d at 111; *Groves*, 286 N.W. at 236. Obviously, the value of damages claimed by the contracting parties in these two cases differed significantly. See *Peevyhouse*, 382 P.2d at 109; *Groves*, 286 N.W. at 236.

402. Cf. Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981) (arguing that there is no dichotomy between economic efficiency and a morality of keeping promises).

403. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985).

The formula—full contract price minus the amount already invoiced to [the manufacturer]—is invariant to the gravity of the breach.⁴⁰⁴ It was therefore unenforceable.

Posner's critical discussion of the liquidated damages versus penalty distinction and his elaboration of the theory of efficient breach therefore ultimately became irrelevant to the case. This excursion, though interesting and illuminating to the contracts scholar, did not in any way aid his analysis or disposition of the case. In effect, Posner was appealing to state courts to take up the theory of efficient breach and reject the hoary distinction between liquidated damages and penalties. In contrast, Cardozo's essays and even his occasional pyrotechnics had the virtue of moving his analysis along and assisting him and the reader in seeing the sense of his results.⁴⁰⁵

404. *Id.* at 1290. Posner went on to address the distributor's argument to rescue the penal component of the clause on the grounds that it would have a duty to mitigate damages. *Id.* at 1291. Posner first observed that this was an erroneous belief because the mitigation principle is invoked as a common-law determination of judicial remedies; the attempt to liquidate damages is a party determination that displaces the judicial principle of mitigation. *Id.* at 1291-92. In any event, Posner noted further that mitigation in this case would at best have meant reselling the specialized equipment, the result of which would still yield the distributor an amount in damages equal to over four times its actual lost profits from the breach. *Id.* at 1290.

405. Posner's opinions often assume the characteristics of a law review article rather than a traditional judicial opinion. See Chicago Council of Lawyers, *supra* note 232, at 795 (Posner "frequently reaches out to comment on, and decide, issues not presented by the parties or even by the record."). This scholarly style sometimes leads to *Erie* problems, evident in a recent Posner opinion concerning a typical battle-of-the-forms question. The case, *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173 (7th Cir. 1994), is a likely candidate for inclusion in future contracts casebooks. In *Northrop*, an offer contained a warranty for a limited time and the acceptance contained a warranty for an unlimited time but did not make assent to that different/additional term expressly conditional. *Id.* at 1176.

Posner recounted three lines of authority dealing with treatment of different or additional terms in acceptances under UCC § 2-207. See *id.* at 1178. The majority view holds that "the discrepant terms fall out and are replaced by a suitable UCC gap-filler." *Id.* The "leading minority view," according to Posner, holds that the "discrepant terms in the acceptance are to be ignored." *Id.* (citing *Valtrol, Inc. v. General Connectors Corp.*, 884 F.2d 149, 155 (4th Cir. 1989); *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 588 F. Supp. 1280, 1289 (E.D. Pa. 1984)). Finally, Posner announced that "[o]ur own preferred view—the view that assimilates 'different' to 'additional,' so that the terms in the offer prevail over the different terms in the acceptance only if the latter are materially different, has as yet been adopted by only one state, California." *Id.* (citing *Steiner v. Mobil Oil Corp.*, 569

This difference should not be understood as solely attributable to the *Erie* constraint under which Posner operated. Posner's analysis of the merits of the state law issue in *Lake River*, concluding that the minimum-quantity formula was "invariant to the gravity of the breach,"⁴⁰⁶ has been criticized. Although the basis of Posner's conclusion was that the distributor had "incurred only a fraction of its costs before performance began,"⁴⁰⁷ it does not necessarily follow that the minimum-quantity provision was penal. In a critique of *Lake River*, for example, Professor Schwartz characterized as irrelevant Posner's point that the distributor incurred "only a fraction of its costs before performance began."⁴⁰⁸ According to Professor Schwartz:

P.2d 751, 759 n.5 (1977)). Under both these latter views, the contract contained the warranty term for a limited time, under the leading minority view because the discrepant terms in the acceptance drop out and under the "preferred view" because the warranty term in the acceptance was "materially different." *Id.*

Despite this "preferred view," Posner was constrained to forecast how the Illinois courts would resolve this problem. *See id.* Because Illinois courts tend to adopt majority rules in UCC cases, Posner started with the presumption that Illinois would follow the majority and decided the presumption was not rebutted. *Id.* As a result, the warranty term was to be supplied by reference to gap-filling rules in the UCC, according to Posner, "courtesy the court." *Id.* at 1179. Consequently, the contract contained a term providing warranty for a "reasonable time" under UCC § 2-207(2). *Id.*

Judge Ripple concurred but declined "to express, by way of an opinion of this court, a view on whether the majority interpretation of 2-207 is preferable to the other interpretations." *Id.* at 1180 (Ripple, J., concurring). Taking care to emphasize *Erie* constraints, Judge Ripple observed that the federal courts must respect the "constitutional prerogative of the states to determine the course of their jurisprudence" which in turn requires that the court "refrain from taking an *institutional* position as a court on such matters." *Id.*

A more egregious recent example of a violation of *Erie* principles is *Winter Panel Corp. v. Reichhold Chemicals, Inc.*, 823 F. Supp. 963 (D. Mass. 1993), where a Massachusetts federal district court decided that it was bound to follow *Roto-lith*, a First Circuit opinion, despite acknowledging widespread criticism of the case, *id.* at 969. In light of *Erie*, the criticism of *Roto-lith*, and its rejection by most other courts who face the problem, *e.g.*, *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 323 (N.M. 1993) (decided 16 days before *Winter Panel* and rejecting argument to accept and apply *Roto-lith*), the Massachusetts district court should have attempted to forecast how the Massachusetts state courts would treat *Roto-lith* but failed to do so. *See* Nikiforos Mathews, Note, *Circuit Court Errors and the District Court's Dilemma: From Roto-lith and the Mirror Image Rule to Octagon Gas and Asset Securitization*, 17 CARDOZO L. REV. (forthcoming 1995).

406. *Lake River*, 769 F.2d at 1290.

407. *Id.* at 1292.

408. Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies:*

The formula for creating the minimum quantity is chosen so that the specific performance damages under the contract equal the contract market differential for the larger amount the parties expected to trade. Thus damages under take-or-pay clauses are not penal. Hence, a judge as expert in economics and friendly to freedom of contract as Judge Posner created a precedent that, if generalized, would outlaw an efficient practice in several industries (take-or-pay clauses are used in natural gas, coal and electricity contracts).⁴⁰⁹

Professor Schwartz's critique implies that Posner's central concern with efficiency, in addition to obscuring broader concerns in which Cardozo was interested, also offers no assurance of an accurate conclusion on its own terms.⁴¹⁰

Professor Schwartz's critique of *Lake River* also points to another, potentially larger, problem Posner had to contend with in *Lake River*, a tension between freedom of contract and efficient breach theory in the stipulated-damages context. One could simply respect whatever stipulated-damages clause that the contracting parties had agreed to in the name of freedom of contract. To the extent such damages are punitive, however, *Patton* shows that it would be inefficient to do so.⁴¹¹ Thus is Posner conflicted in *Lake River*.⁴¹² Posner's analytical approach from

An Analysis of Contracting for Damage Measures, 100 YALE L.J. 369, 386 n.33 (1990) (quoting *Lake River*, 769 F.2d at 1292).

409. *Id.* at 386 (footnotes omitted). *Lake River* has not been (and is not likely to be) generalized in the way Professor Schwartz feared, for there is a well-developed body of case law governing true take-or-pay clauses in the energy and mineral production industries (as distinguished from the sell-or-pay clause arising in the mundane setting of *Lake River*). See, e.g., *Universal Resources Corp. v. Panhandle E. Pipeline Co.*, 813 F.2d 77 (5th Cir. 1987); *Colorado Interstate Gas Co. v. Chemco, Inc.*, 854 P.2d 1232 (Colo. 1993); cf. *Superfos Invs. Ltd. v. Firstmiss Fertilizer, Inc.*, 821 F. Supp. 432 (S.D. Miss. 1993) (citing a dozen cases in energy or mineral production contexts enforcing take-or-pay clauses but refusing to enforce the punitive take-or-pay clause in a contract for purchase and sale of liquid fertilizer on the grounds that it was not a true alternative performance contract of the kind commonly used in other such industries).

410. Cf. White, *supra* note 257, at 589-94, 614-16 (employing the theory of the second best to argue that Posner's application of Coasean economic analysis to assigning property rights does not improve overall efficiency and may reduce it).

411. See *supra* notes 365-68 and accompanying text.

412. Deep as the hostility to penalty clauses runs in the common law, we still might be inclined to question if we thought ourselves free to do so,

economic theory can be a useful adjunct to traditional doctrinal analysis for evaluating efficiency concerns, but, alone, it cannot resolve important tensions such as whether to privilege freedom of contract or efficiency when these two values collide.⁴¹³

Resolving such tensions can be accomplished through the kind of thickly textured doctrinalism and the intuitions about substantive justice that characterize Cardozo's opinions.⁴¹⁴ For example, Cardozo would have been capable of resolving *Lake River* whichever way the pivotal fact pointed—that is, whether or not the distributor had recouped its investment in the specialized equipment that the manufacturer requested be installed. Rather than being confined by the tension between freedom of contract and efficiency, in other words, Cardozo could have recognized that if the distributor had recouped those costs then the contract clause should not be enforced because the law is also interested in preventing forfeitures and windfalls. This interest may or may not have anything to do with efficiency, and it is a value that would prevail over freedom of contract in most cases and certainly on this interpretation of the facts in *Lake River*. Contrariwise, if the distributor had not recouped those costs, then freedom of contract would prevail and the penalty problem could be avoided by noting, as Professor Schwartz did,⁴¹⁵ that the minimum-quantity clause entailed no penalty.

Here, then, the hedgehog meets the fox with a vengeance, and

whether a modern court should refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments.

Lake River, 769 F.2d at 1288-89 (citation omitted).

413. Professor Schwartz would have elevated freedom of contract, asserting that to make determinations concerning whether a stipulated damages clause, at least in the take-or-pay context, is efficient or inefficient requires knowing demand and cost curves that courts should not attempt to reconstruct. Schwartz, *supra* note 408, at 386 n.33. In short, according to Professor Schwartz, "Judge Posner's difficulty probably stemmed from the fact that he had made no study of liquidated damage clauses generally and neither party mentioned take-or-pay clauses during the case. That courts and lawyers seldom are industry experts is the reason why courts generally do not review contract clauses." *Id.*

414. *Cf. supra* note 256 (quoting Posner's critique that Cardozo lacked an analytical framework to enable him to wrestle with issues when "intuitions of substantive justice ran out").

415. *See supra* note 409 and accompanying text.

a denouement. The common law respects values in addition to efficiency. Freedom of contract is one such value. Avoiding forfeitures is another. Because these and other values sometimes clash, the judicial role demands balancing these competing interests. It is the fox, not the hedgehog, who can do so.

CONCLUSION

Cardozo saw promise as the basis of contract, investing the act of contracting with traditional norms of good faith. He mediated between freedom of contract and other social values with fluid notions of justice, equity, and fairness—all with a view toward protecting the reasonable expectations of the parties. Cardozo explicitly balanced considerations of justice with the presumable intentions of the parties, always giving a thick texture to the doctrinal framework. His opinions sometimes strained the doctrine, stretched the facts, and deployed other tools of the judicial craft, but the animating spirit of the opinions was to harmonize the many competing values implicated by the law of contracts.

Posner is more apt to locate the basis of contract in reliance and has employed that doctrine in clever ways to limit the scope of liability in contract. He brings to contract law an interpretive literalism that resists implication or the construction of standards of conduct based on traditional norms such as good faith as unjustifiable paternalism. Posner is deeply, philosophically committed to freedom of contract and seizes on judicial opportunities to advance this principle. When he confronts the inevitable tension between freedom of contract and other values, he nevertheless sticks to his guns, at least rhetorically, stressing that he is respecting freedom of contract even when that is debatable. Posner takes these positions and supports them with the help of economic reasoning, putting into his framework efficiency as the primary value.

The explicit economic reasoning in Posner's opinions make the opinions interesting and important. Posner's opinions are full of novel ideas and reveal a particular way of understanding and analyzing problems in contract law and, indeed, a particular way of understanding freedom of contract and efficiency. Whether because of *Erie* constraints or occasional difficulties in recon-

ciling his theory with judicial case resolution, Posner's opinions are made all the more interesting by his disposition toward scholarly prose and analysis. These characteristics make Posner's opinions excellent vehicles for traditional contracts pedagogy. However, the disproportionate emphasis on economic reasoning gives the opinions a negative quality, evoking Willistonian formalism.

Great contemporary contracts casebooks could pair opinions by Cardozo and Posner, perhaps along the lines suggested by this comparative critique.⁴¹⁶ Such books would stimulate lively classroom discussion and facilitate effective pedagogy. Great contemporary judges would take Posner's economic reasoning and put it to work in the more capacious framework of Cardozo's thickly textured doctrinalism.⁴¹⁷

416. No current casebooks pair opinions by Cardozo and Posner in the manner discussed in this comparative critique, though a teacher can easily tailor a syllabus to do so. For example, the Author has taught the Kessler, Gilmore & Kronman casebook—which reprints 10 Cardozo opinions but no Posner opinions—and has supplemented the syllabus at appropriate places with many of the Posner opinions discussed in this Article. The placement of these opinions is so natural that one feels, eerily, that Posner has written them with casebook placement in mind.

417. Such judges are yet to be discovered by current contracts casebook editors, although Posner himself seems to be heading in this direction because his more recent writings and opinions have been seen to reveal an evolution to a broader and more balanced jurisprudence and legal philosophy. See David A. Logan, *The Man in the Mirror*, 90 MICH. L. REV. 1739 (1992) (reviewing POSNER, *supra* note 8). Perhaps Posner is becoming a fox.

APPENDIX

Only cases reprinted as "main cases" in casebooks are counted. "Main cases" include concurring and dissenting opinions but exclude "note cases"—those that are summarized or paraphrased rather than reprinted substantially in full (with editing). It also ignores cases that are merely cited. Stars (*) in the tables denote the reprinting of such main cases, and dissenting and concurring opinions are denoted by (d) and (c), respectively. The survey reports on judges having more than one opinion reprinted, out of the total pool of opinions in all the casebooks, and who have at least one opinion reprinted in more than one casebook. This method had the effect of excluding many prominent judges, including Andrews, Brandeis, Breyer, Cooley, Easterbrook, Goodrich, Gus Hand, Kaye, Kellogg, Medina, Shaeffer, Skelly-Wright, Souter, and Swan. In the case of Andrews and Kellogg, this is particularly noteworthy because their major opinions, *Mitchill v. Lath*⁴¹⁸ and *Petterson v. Pattberg*,⁴¹⁹ are reproduced so often (9 and 10 times, respectively), that their averages are higher than a number of the judges included in the report below (Holmes, Clark, and Frank).

With respect to casebook selection, the casebooks surveyed were all those provided to the author in response to his letters requesting review copies of current contracts casebooks for purposes of teaching contracts, written in June, 1994, to the major law book publishing companies (Foundation; Little, Brown; Michie; and West). The survey therefore excluded McNeil's 1980 book, Vernon's 1980 book (Matthew Bender), and Fessler & Loiseaux's book (1982), which is just as well since they were published before Posner ascended to the bench. It also excluded a couple of particularly innovative casebooks such as Stewart Macaulay et al., *Contracts: Law in Action* (1993-94 ed.); and Michael L. Closen et al., *Contracts: Contemporary Cases, Comments and Problems* (1984 ed.). But these books reproduce few of the classic cases and virtually no opinions by either Cardozo or

418. 160 N.E. 646 (N.Y. 1928).

419. 161 N.E. 428 (N.Y. 1928).

Posner. It also excluded casebooks that combine contracts with sales, such as William McGovern & Lary Lawrence, *Contracts and Sales* (1986). This exclusion also has little effect because their rather different focus also calls for special attention to space limits that would skew the results.

In the following tables, the casebooks are listed, left to right, in chronological order, the abbreviations denoting the following books:

FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* (3d ed. 1986) [hereinafter KGK].

E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* (4th ed. 1988) [hereinafter FY].

JOHN D. CALAMARI ET AL., *CASES AND PROBLEMS ON CONTRACTS* (2d ed. 1989) [hereinafter CPB].

LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* (5th ed. 1990) [hereinafter FE].

JOHN E. MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* (4th ed. 1991) [hereinafter M].

EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* (4th ed. 1991) [hereinafter MS].

ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* (2d ed. 1992) [hereinafter SH].

ROBERT W. HAMILTON ET AL., *CASES AND MATERIALS ON CONTRACTS* (2d ed. 1992) [hereinafter HRW].

CHARLES C. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (3d ed. 1993) [hereinafter KC].

THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* (2d ed. 1993) [hereinafter CW].

JOHN P. DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* (6th ed. 1993) [hereinafter DHH].

ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* (2d ed. 1993) [hereinafter SL].

ARTHUR ROSETT, *CONTRACT LAW AND ITS APPLICATION* (5th ed. 1994) [hereinafter R].

BENJAMIN N. CARDOZO

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
Wood ⁴²⁰	86	88	89	90	91	91	92	92	93	93	93	93	94	
Kent ⁴²¹	*	*	*	*	*	*	*	*	*	*	*	*	*	12
H.R. Moch ⁴²²	*		*				*			*	*	*		6
Allegheny ⁴²³	*				*	*			*	*	*			6
Dunbar ⁴²⁴	*					*	*					*	*	5
DeCicco ⁴²⁵	*		*	*						*				4
Dougherty ⁴²⁶				*			*		*					3
Kerr ⁴²⁷	*													1
Hudson ⁴²⁸	*													1
Sun ⁴²⁹	*													1
Varney (d) ⁴³⁰						*								1
Mut. Life ⁴³¹				*										1
O'Meara (d) ⁴³²	*													1
	10	2	4	5	2	5	5	1	4	5	3	4	3	53
	AVG: 4.07													

420. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

421. Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921).

422. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928).

423. Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927).

424. Canadian Indus. Alcohol v. Dunbar Molasses, 179 N.E. 383 (N.Y. 1932).

425. DeCicco v. Schweizer, 117 N.E. 807 (N.Y. 1917).

426. Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919).

427. Kerr S.S. Co. v. Radio Corp. of Am., 157 N.E. 140 (N.Y. 1927).

428. Hudson v. Yonkers Fruit Co., 179 N.E. 373 (N.Y. 1932).

429. Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 139 N.E. 470 (N.Y. 1923).

430. Varney v. Ditmars, 111 N.E. 822 (N.Y. 1916) (Cardozo, J. dissenting).

431. Mut. Life Ins. Co. v. Johnson, 293 U.S. 335 (1934).

432. Maurice O'Meara Co. v. Nat'l Park Bank, 146 N.E. 639 (N.Y. 1925) (Cardozo, J. dissenting).

ROGER J. TRAYNOR

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Drennan ⁴³³	*	*	*	*		*	*	*	*		*	*	*	11
Pac. Gas ⁴³⁴		*	*	*		*	*			*	*	*	*	9
Masterson ⁴³⁵		*		*	*	*	*					*		6
Lloyd ⁴³⁶	*						*				*	*		4
Monarco ⁴³⁷		*												1
Parsons ⁴³⁸											*			1
Holid.Inns ⁴³⁹							*							1
S. Cal. ⁴⁴⁰	*													1
	3	4	2	3	1	3	5	1	1	1	4	4	2	34
AVG: 2.62														

433. Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958).

434. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968).

435. Masterson v. Sine, 436 P.2d 561 (Cal. 1968).

436. Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944).

437. Monarco v. Lo Greco, 220 P.2d 737 (Cal. 1950).

438. Parsons v. Bristol Dev. Co., 402 P.2d 839 (Cal. 1965).

439. Holiday Inns of Am., Inc. v. Knight, 450 P.2d 42 (Cal. 1969).

440. Southern Cal. Acoustics Co. v. C.V. Holder, Inc., 456 P.2d 975 (Cal. 1969) (en banc).

RICHARD A. POSNER

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Lake River ⁴⁴¹		*	*	*				*	*	*		*	*	8
Wis. Knife ⁴⁴²		*	*	*	*			*					*	6
N. Indiana ⁴⁴³		*	*			*		*						4
Morin ⁴⁴⁴				*					*					2
EVRA ⁴⁴⁵			*		*									2
Sal.Bea.(d) ⁴⁴⁶						*			*					2
Selmer ⁴⁴⁷							*						*	2
Goldstick ⁴⁴⁸			*											1
Autotrol ⁴⁴⁹							*							1
Stump ⁴⁵⁰							*							1
Comp. Acc. ⁴⁵¹										*				1
DF Activ. ⁴⁵²						*								1
Patton ⁴⁵³			*											1
	0	3	6	3	2	3	3	3	3	2	0	1	3	32
	AVG: 2.46													

441. Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985).

442. Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986).

443. Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986).

444. Morin Bldg. Prod. v. Baystone Constr., 717 F.2d 413 (7th Cir. 1983).

445. EVRA Corp. v. Swiss Bank Corp. 673 F.2d 951 (7th Cir. 1982).

446. Sally Beauty Co. v. Nexxus Prod. Co., 801 F.2d 1001 (7th Cir. 1986) (Posner, J. dissenting).

447. Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983).

448. Goldstick v. ICM Realty, 788 F.2d 456 (7th Cir. 1986).

449. Autotrol Corp. v. Continental Water Sys. Corp., 918 F.2d 689 (7th Cir. 1990).

450. United States v. Stump Home Specialities Mfg., 905 F.2d 1117 (7th Cir. 1990).

451. Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138 (7th Cir. 1985).

452. DF Activities Corp. v. Brown, 851 F.2d 920 (7th Cir. 1988).

453. Patton v. Mid-Continent Sys., Inc., 841 F.2d 742 (7th Cir. 1988).

IRVING LEHMAN

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Petterson (d) ⁴⁵⁴	*		*	*	*	*	*	*	*	*	*			10
Mitchill (d) ⁴⁵⁵	*		*	*	*	*	*	*		*	*	*		10
Mascioni ⁴⁵⁶			*								*			2
Van Iderst ⁴⁵⁷			*											1
	2	0	4	2	2	2	2	2	1	2	3	1	0	23
AVG: 1.76														

STANLEY H. FULD

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Aust. Inst. ⁴⁵⁸	*	*	*			*	*				*	*		7
Crabtree ⁴⁵⁹	*		*			*			*	*				5
Hicks ⁴⁶⁰		*	*	*										3
Karpinski ⁴⁶¹			*				*							2
Danann (d) ⁴⁶²	*			*										2
Channel ⁴⁶³	*													1
N.Shore ⁴⁶⁴						*								1
Sillman (d) ⁴⁶⁵	*													1
	5	2	4	2	0	3	2	0	1	1	1	1	0	22
AVG: 1.69														

454. Petterson v. Pattberg, 161 N.E. 428 (N.Y. 1928) (Lehman, J. dissenting).

455. Mitchill v. Lath, 160 N.E. 646 (N.Y. 1928) (Lehman, J. dissenting).

456. Masconi v. I.B. Miller, Inc., 184 N.E. 473 (N.Y. 1933).

457. Van Iderstine Co. v. Barnet Leather Co., 152 N.E. 250 (N.Y. 1926).

458. Austin Instr., Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971).

459. Crabtree v. Elizabeth Arden Sales Corp., 110 N.E.2d 551 (N.Y. 1953).

460. Hicks v. Bush, 180 N.E.2d 425 (N.Y. 1962).

461. Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971).

462. Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959) (Fuld, J. dissenting).

463. Channel Master Corp. v. Aluminum Ltd. Sales, 151 N.E.2d 833 (N.Y. 1958).

464. North Shore Bottling Co. v. C. Schmidt and Sons, Inc., 239 N.E.2d 189 (N.Y. 1968).

465. Sillman v. Twentieth Century Fox Film Corp., 144 N.E.2d 387 (1957) (Fuld, J. dissenting).

FREDERICK E. CRANE

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Stewart ⁴⁶⁶		*	*	*		*	*	*			*	*		8
Schwartzr. ⁴⁶⁷	*	*	*				*		*				*	6
DeCicco (c) ⁴⁶⁸	*		*							*				3
Siegel ⁴⁶⁹	*						*							2
Sun (d) ⁴⁷⁰	*													1
Watts (d) ⁴⁷¹												*		1
	4	2	3	1	0	1	3	1	1	1	1	2	1	21
AVG: 1.62														

CUTHBERT W. POUND

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Seaver ⁴⁷²	*	*	*	*			*	*		*	*	*		9
Langel ⁴⁷³	*		*	*	*	*	*	*		*	*			9
	2	1	2	2	1	1	2	2	0	2	2	1	0	18
AVG: 1.38														

HENRY J. FRIENDLY

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Frigalimint ⁴⁷⁴		*			*	*		*	*			*	*	7
Bloor ⁴⁷⁵		*	*	*				*				*		5
Int'l Tele.(c) ⁴⁷⁶												*		1
Wegematic ⁴⁷⁷						*								1
	0	2	1	1	1	2	0	2	1	0	0	3	1	14
AVG: 1.08														

466. *Stewart v. Newbury*, 115 N.E. 984 (N.Y. 1917).467. *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887 (N.Y. 1921).468. *DeCicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917) (Crane, J. concurring).469. *Siegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923).470. *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (Crane, J. dissenting).471. *Watts v. Malatesta*, 186 N.E. 210 (N.Y. 1933) (Crane, J. dissenting).472. *Seaver v. Ransom*, 120 N.E. 639 (N.Y. 1918).473. *Langel v. Betz*, 164 N.E. 890 (N.Y. 1928).474. *Frigalimint Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).475. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979).476. *International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49 (2d Cir. 1979) (Friendly, J. concurring).477. *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

ELLEN A. PETERS

	KGK 86	FY 88	CPB 89	FE 90	M 91	MS 91	SH 92	HRW 92	KC 93	CW 93	DHH 93	SL 93	R 94	Total
Cherwell ⁴⁷⁸					*						*	*	*	4
Vines ⁴⁷⁹											*	*		2
Barrett ⁴⁸⁰											*			1
Sheets ⁴⁸¹											*			1
Healy ⁴⁸²											*			1
Grenier ⁴⁸³											*			1
Aetna ⁴⁸⁴						*								1
Dills ⁴⁸⁵						*								1
Bernstein ⁴⁸⁶						*								1
	0	0	0	0	1	3	0	0	0	0	6	2	1	13
AVG: 1.00														

478. Cherwell-Ralli, Inc., v. Rytman Grain Co., 433 A.2d 984 (Conn. 1980).

479. Vines v. Orchard Hills, Inc., 435 A.2d 1022 (Conn. 1980).

480. Barrett Builders v. Miller, 576 A.2d 455 (Conn. 1990).

481. Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980).

482. Johnson v. Healy, 405 A.2d 54 (Conn. 1978).

483. Grenier v. Compratt Constr. Co., 454 A.2d 1289 (Conn. 1983).

484. Aetna Casualty & Surety Co. v. Murphy, 538 A.2d 219 (Conn. 1988).

485. Dills v. Town of Enfield, 557 A.2d 517 (Conn. 1989).

486. Bernstein v. Nemeyer, 570 A.2d 164 (Conn. 1990).

CHARLES D. BRIETEL

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Garrity ⁴⁸⁷	*		*										*	3
Ortelere ⁴⁸⁸		*	*										*	3
JNA (d) ⁴⁸⁹				*			*		*					3
Goldbard ⁴⁹⁰	*		*											2
407 East ⁴⁹¹			*											1
City of Rye ⁴⁹²											*			1
	2	1	4	1	0	0	1	0	1	0	1	0	2	13
AVG: 1.00														

LEARNED HAND

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Baird ⁴⁹³	*					*	*	*	*	*	*	*		8
Albert ⁴⁹⁴	*				*	*						*		4
Ricketts ⁴⁹⁵	*													1
	3	0	0	0	1	2	1	1	1	1	1	2	0	13
AVG: 1.00														

SOL M. WACHTLER

	KGK	FY	CPB	FE	M	MS	SH	HRW	KC	CW	DHH	SL	R	Total
	86	88	89	90	91	91	92	92	93	93	93	93	94	
Star Credit ⁴⁹⁶	*	*				*	*			*				5
JNA Realty ⁴⁹⁷				*			*		*					3
Maxton ⁴⁹⁸						*								1
	1	1	0	1	0	2	2	0	1	1	0	0	0	9
AVG: 0.69														

487. Garrity v. Lyle Stuart, Inc., 353 N.E. 2d 793 (N.Y. 1976).

488. Ortelere v. Teachers' Retirement Bd., 250 N.E.2d 460 (N.Y. 1969).

489. J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc. 366 N.E.2d 1313 (N.Y. 1977) (Brietal, J. dissenting).

490. Goldbard v. Empire State Mut. Life Ins. Co., 171 N.Y.S.2d 194 (N.Y. App. Div. 1958).

491. 407 E. 61st Garage Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37 (N.Y. 1968).

492. City of Rye v. Public Serv. Mut. Ins. Co., 315 N.E. 2d 458 (N.Y. 1974).

493. James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

494. L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949).

495. Ricketts v. Pennsylvania R.R., 153 F.2d 757 (2d Cir. 1946).

496. Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (N.Y. App. Div. 1969).

497. J.N.A. Realty v. Cross Bay Chelsea, Inc., 366 N.E.2d 1313 (N.Y. 1977).

498. Maxton Builders, Inc. v. Lo Galbo, 502 N.E.2d 184 (N.Y. 1986).

OLIVER WENDELL HOLMES

	KGK 86	FY 88	CPB 89	FE 90	M 91	MS 91	SH 92	HRW 92	KC 93	CW 93	DHH 93	SL 93	R 94	Total
Globe ⁴⁹⁹	*											*	*	3
Hobbs ⁵⁰⁰			*								*			2
Krell v. Cod ⁵⁰¹	*													1
	2	0	1	0	0	0	0	0	0	0	1	1	1	6
AVG: 0.46														

CHARLES EDWARD CLARK

	KGK 86	FY 88	CPB 89	FE 90	M 91	MS 91	SH 92	HRW 92	KC 93	CW 93	DHH 93	SL 93	R 94	Total
Parev ⁵⁰²				*									*	2
Zara ⁵⁰³							*					*		2
Vandad. ⁵⁰⁴				*		*								2
	0	0	0	2	0	1	1	0	0	0	0	1	1	6
AVG: 0.46														

JEROME NEW FRANK

	KGK 86	FY 88	CPB 89	FE 90	M 91	MS 91	SH 92	HRW 92	KC 93	CW 93	DHH 93	SL 93	R 94	Total
Zell ⁵⁰⁵	*									*			*	3
Martin ⁵⁰⁶	*													1
Ricketts (c) ⁵⁰⁷	*													1
	3	0	0	0	0	0	0	0	0	1	0	0	1	5
AVG: 0.38														

499. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

500. *Hobbs v. Massasoit Whip Co.*, 33 N.E. 495 (Mass. 1893).

501. *Krell v. Codman*, 28 N.E. 578 (Mass. 1891).

502. *Parev Prod. Co. v. I. Rokeach & Sons*, 124 F.2d 147 (2d Cir. 1941).

503. *United States v. Zara Contracting Co.*, 146 F.2d 606 (2d Cir. 1944).

504. *Vandadium Corp. of Am. v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947).

505. *Zell v. American Seating Co.*, 138 F.2d 641 (2d Cir. 1943).

506. *Martin v. Campanaro*, 156 F.2d 127 (2d Cir. 1946).

507. *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946) (Frank, J., concurring).