Teaching Law: Thoughts on Retirement

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In 1982, I published an article entitled *Teaching Law: Advice for the New Professor*,[1] which gained some currency in legal education circles. Alas, it has become dated by time,[2] though I stand by many of its basic precepts. I will not repeat here my original advice on many topics, such as how to choose a casebook and how to get ready for your first class or your first exam, but I would like to elaborate on some of the advice I gave twenty-five years ago and then add a new thought or two.

In 2004, after more than three decades in law teaching, I retired from the Ohio State University Moritz College of Law (though I have returned as an adjunct professor to teach the odd course here and there). Retirement is an interesting experience, and very pleasurable (there have to be *some* advantages to growing old), but inevitably leads to introspection and summation on that which has gone before. What follows are my conclusions about the professional side of a teacher's life,[3] addressed to the teacher-reader in the second person.

I. THE CLASSROOM

In the original article, I emphasized the folly of focusing on yourself, the teacher, and not on the students, and this is still important guidance for

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[1] *See* Douglas Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125 (1982).

[2] Professor Gary Monserud of the New England School of Law has updated my article in an expanded exploration of the same theme. *See* Gary Monserud, *An Essay on Teaching Contracts and Commercial Law for the First Time (Even if You Have Taught These Courses Many Times Before)*, 82 N.D. L. REV. 113 (2006).

[3] I repeat the statement I made in the original article that I have no formal training in education (well, there was one survey course in college, but let that pass). That said, I have written—and currently maintain—several casebooks, three *Gilbert Law Summaries*, and four *Sum & Substance* audio tapes, all on commercial law and its various aspects, thus demonstrating that I have prostituted my talents in an embarrassing number of ways. There have been other publications, including some law review articles which are still cited here and there. Finally, I will immodestly mention that I am the recipient of eight awards for outstanding teaching from three different law schools. All this is used as justification for having the audacity to write this Article.

Given the above, my reputation is not that of a scholar (though my resume includes some traditional scholarship), nor an original thinker (though, again, I can claim to have said one or two new things). What I am is a *teacher*, and for that I make no apology—it is a source of pride. Indeed, I overdo it, as my friends will readily tell you. Teaching, for me, is a compulsion, and what reputation I have comes from an ability to take complicated matters and explain them in a way that others can understand.

enriching the students' classroom experience.[4] Rereading the article, I find that I didn't stress this point enough. Let me do that now.

At all stages of the process, the *students* should be the teacher's central concern. They've paid a great deal of money to take this course at this school, and are entitled to get their money's worth. Your students are preparing for a career where they will take the knowledge given them and use it to solve the myriad of problems arising in their professional lives. You, the teacher, face the important task of servicing their needs. It is not about you. It's about them.

In preparing for class, I try to read the assignment and see it through the eyes of my students, who are (frequently at the same moment) attempting to make sense of the material in front of them. Ask yourself what will confuse them as they study. What topics will need further explanation? Is this assignment so mind-warpingly dull that some of them throw up their hands and lament that it's too late to go into medicine? What can you say on the morrow that will bring it all into focus, make it something worth knowing, rev up their enthusiasm for the material?

If you yourself are the author of the materials, this must ever be your overarching question as you create whatever the students will read. I discuss this daunting task in detail in the second part of this Article.

You need to think through the *structure* of the coming class, and this includes not only the obvious questions (Will it be clear? Manageable? Etc?), but how to keep it interesting. When the course hits a dry patch, consider what you can do to liven things up. A good war story or a digression that is not far off point, or a discussion of how the students should be studying to pace themselves for the coming exam,[5] might energize the class. One of my favorite professors from law school once told me that sometimes you have to get out your cane and hat and dance for the students.

That said, I tell them it's a mistake to let their attention wander just because the current subject doesn't make their hearts beat faster. To illustrate what I mean, I call on a student and, playing the part of the future client, present them with an issue directly raising the dry topic currently under consideration. I mention that the senior partner emphasized that getting this right was very important to the firm, and, of course, to the client. Much money is at stake, or perhaps even the fate of the client's company. "Avoid malpractice—don't mess this up," the partner counseled, unhelpfully. If the student has no cogent response, I've known to wait while he/she concocts one. "There could be a real client asking you this question. Soon. What are

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[4] *See* Whaley, *supra* note 1, at 131.

[5] Anytime you want the students' undivided attention, the word "exam" works like magic.

you going to say?"[6] If the student remains stumped, I give the rest of the class a chance to jump into the discussion. "Suppose you are all members of the firm. What would you say if Mr./Ms. [student's last name] called you in for consultation?"

Shaking things up from time to time is a good idea. Because everyone in the classroom has an entrenched understanding of their roles (they are the students, you the professor), it is very easy to get caught in a monotonous routine that strips everyone of their common humanity. Keep reminding yourself that your students are *individuals*, and that they should be approached as such. Is one more cocky and lippy than the others? If so, he/she can be treated differently than the shy foreign student whose English does not well service a splendid intellect. The first can be pushed and challenged in a manner that mirrors the come-and-get-me attitude of the student. The second should be approached cautiously, and eased into the discussion. I hasten to add the obvious: all students should be treated with respect and free from any form of discrimination.[7]

You are not required to teach the same way you yourself were taught. This is important to say to yourself because it leads to innovations, big and small. For example, early in my teaching career I decided that I hated being tethered to the lectern, and thus began my peripatetics (which take me to every corner of the classroom as I lecture or converse with the students).[8] I can lose track of where I am during these wanderings, sometimes finding myself at the very back of the classroom talking up a windstorm. Needless to say, this jolts the students out of their complacency—I have invaded their

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[6] Silence in the classroom is as uncomfortable as "dead air" is on the radio. That doesn't mean it can't be useful. It brings everyone awake and gives them an incentive to speak up. Professor Robert Lynn of the Ohio State law faculty, now retired, whenever he was asked a question he decided he needed to think carefully about before replying, would put his head down on the desk (like a first grader taking a nap), and ponder the issue until he came up with an answer that pleased him. According to students who actually time him, a *minute or more* could go by before he spoke again. That's a long time in a silent classroom. I don't have the courage to do this myself, but I've always admired Bob Lynn's commitment to getting his answer right. (I should mention that he was always a very popular teacher, and the students were willing to grant him a leeway that, with a lesser teacher, might have led to student complaints to the Dean.)

[7] At one Ohio State retreat focusing on discrimination against African-American law students, I was surprised to learn that some of those students thought that the faculty did not interrogate them with as much rigor as was done to other students in the class (as if they were not capable of being tested by the same standard). I asked myself if I were guilty of this unintended slight, and decided I was not. Nonetheless, from then on I made very sure that when working our way through a Socratic dialogue I pressed on all students equally.

[8] Aristotle is famous for this. He regularly gave lectures while pacing around the classroom in his Lyceum, and this led him to be known as the father of the Peripatetic school of teaching ("pateo" is the Greek word for "walk").

space, something we've all been programmed to take seriously since the dawn of time.

In today's "smart" classrooms, technology allows many innovative possibilities for creative teaching. Some of you reading this are experts at power point presentations. I am not, but I've seen wonderful uses of that splendid tool. As part of my school's routine evaluation process, I once sat through a couple of classes where a young colleague effortlessly moved back and forth from a very carefully prepared power point presentation to a spontaneous Socratic dialogue with the students. I am not sure how he did this, and I sat there in awe and envy of his twenty-first-century talents.

In my all-too-comfortable role as an old fogey, I eschewed such innovations until I was introduced to the wonders of a document camera. Since the courses I teach rely heavily on statutes, I have become very fond of this device, which projects onto a large screen anything I lay flat on the camera. Before class I take a pen and underline or write marginal notes next to the text I want to project on the screen. That allows the students to see the statute through my experienced eyes, and they are most grateful for this guidance. I've also purchased a laser pointer with a red beam, which permits me (in my wanderings) to turn around and highlight a key word or phrase in the statute up on the large screen. Indeed, the document camera is such an effective device for conveying any written material to the students that I've abandoned the use of the blackboard entirely. Anything that I used to write on it (assignments, spontaneous diagrams, etc.) can now be written on a sheet of paper, placed under the camera, and immediately be accessible by the students.

Let us turn to the matter of calling on students. However good a lecturer you are, you should have major interaction with your students in almost every class. That will not only keep them involved, it will prevent your going stale. You cannot say the same things in the same ways for decades without starting to emit an odor of academic decay.

I will not let students refuse to participate, and this rule sometimes calls for creative ways to deal with students who are recalcitrant, slow, lazy, troubled, or whatever. Sometimes I've taken them aside and explained that they will be called on in the next class. Others can be dealt with in situations where preparation is not necessary. Let's take an example.

Chapter Nine of the Contracts casebook[9] I wrote with Thomas Crandall deals with third-party beneficiary law and begins with a problem (with no text at all preceding it). Here it is:

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[9] THOMAS CRANDALL & DOUGLAS WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 767 (4th ed. 2004).

> Judge Hardy promised his son Andy that he would buy him the used car that Andy had been admiring down at MGM Motors if Andy would agree to go to law school instead of pursuing a career in the theater. Andy did go to law school, which, of course, he loved so much he gave up any further thoughts of an alternative career. Judge Hardy failed to buy the promised car, but Andy was so happy in his studies that he didn't care. MGM Motors cared, however, and it brought suit against Judge Hardy for failing to buy the car from the dealership. MGM claimed to be a third party beneficiary of the promise Judge Hardy made to Andy. Should this suit succeed? Try to articulate your reasons for deciding either way.[10]

The ability to work through this problem in no way depends on knowledge of the law. Instead, all that is at issue is what's fair and what's not. If the student (alas, this will happen) concludes that MGM Motors should be able to prevail, take the inquiry to the next level. I might ask the student: "Did you ever sell a car? Buy a car? How many times would you suspect that prospective buyers in showrooms say that they are going to buy a car but—for whatever reason—change their mind and don't sign the paperwork? Should the car dealer have the right to keep buyers from changing their mind during the stage where the deal is still being negotiated?" This should put almost all students on the side of the angels, but if your particular student is still lost in error, get him/her help by asking the class for other opinions. If no one raises a hand to volunteer, call on someone you know is clever enough to answer correctly and get the train moving again.

If the issue you are dealing with does require the student to know the law, tell a student who has panicked to relax—you are going to explain it to him/her. Then do so. Granted, this can be like pulling teeth, but sometimes that is the only solution. If there's a statute to be explored, walk the student through its text and then begin the Socratic dialogue. If the student looks blank when asked something, highlight the relevant rule of law or point to the portion of the statute that answers the question, and pull that tooth.

For example, suppose that the statute to be explored is Uniform Commercial Code § 3-204(d), which deals with checks on which the payee's

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[10] *Id.* Here is what the Teacher's Manual to the casebook has to say about this problem:

> Of course, MGM Motors is merely an incidental third party beneficiary and has no right to sue. The students will feel this is the probable result, though they do not yet have the jargon to articulate it. Most likely they will say things like 'the law doesn't stretch this far' or 'it would be unfair to let MGM sue.' Try to point them in the direction of the intention of the parties.

THOMAS CRANDALL & DOUGLAS WHALEY, TEACHER'S MANUAL TO CASES, PROBLEMS AND MATERIALS ON CONTRACTS 139 (2004) (on file with author).

name is misspelled. It says: "If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection."[11] The Official Comment to this section explains that "because an indorsement in a name different from that used in the instrument may raise a question about its validity and an indorsement in a name that is not the correct name of the payee may raise a problem of identifying the indorser, the accepted commercial practice is to indorse in both names."[12] Here is problem 14 from my Payment Law book:

> When Portia Moot received her first paycheck from the law firm that recently hired her, she was annoyed to discover that it was made out to 'Portia *Mort.*' When she took the check to her bank to cash it, she mentioned the problem to the bank clerk, who promptly called you, the bank's attorney. What steps would you suggest the bank follow in this situation? See § 3-204(d) and its Official Comment 3.[13]

Most students will have no difficulty with a problem this simple, but suppose the student you call on is too scared to think clearly. First I would read the problem out loud to the student (or summarize it), and then ask what advice the student-come-attorney would give the bank. If the student comes up with the wrong answer, I ask him/her to read me the statute out loud. When the student reaches the word "both," I say, "Stop! What did you just say?" Thus hand-held, even the dullest student usually surfaces with the answer that the "indorsement" can be made in either the right or misspelled name, at which point I ask, "Can the bank demand both, just for its own protection?" If the student gets this wrong, I make him/her continue reading in the statute until the recitation of the ending reveals the correct answer. Having thus (painfully) negotiated through what should have been a no-brainer, I will call on a different student for the next problem (to the relief of everyone in the room).

Sometimes, life being what it is, the student you call on will be unprepared. In my later years of teaching I've handled this by creating a "Pass" list. I announce on the first day of class that a student electing to pass will be placed on this special list and called on in a future class when we come up against particularly difficult material. They accept this well enough, and it is a pleasure to have a very prepared student when complicated issues roll around.

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[11] Uniform Commercial Code § 3-204(d) (2007).

[12] *Id.* (Official Comment).

[13] DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON PAYMENT LAW 33 (6th ed. 2003).

Interestingly, I have become more demanding of students as the years have gone by, and currently emphasize a somewhat different focus than I had in my early days of teaching. I now try to see absolutely *everything* that happens in the classroom from the point of view of the students. What are they thinking? What are they hearing? I am much interested in what is *really* going on and making sure nothing gets in the way of the information exchange. Every sentence I utter should be filtered through the question of how will it sound to them. The issue is not what I say, but what they hear. Similarly, when students are talking or answering, what do their peers hear, think?

I once taught an "Introduction to Law" class that was designed to help the performance of students who were doing poorly. Among the things I tried in this quest was to bring in the top student in the graduating class to talk to them about what things she had found useful in honing her considerable skills. One of her most perceptive remarks was this one: "It is comparatively easy to pay attention to what the professor is saying, but a much harder trick to actually listen to your fellow students. Very often the real insight comes from hearing others express what they are learning." This observation contained a valuable lesson. It never occurs to most students that they can teach one another.

If the student is confused or embarrassed or nervous at being called on, I hone in on that particular problem, bring it to the forefront, and address it out loud. "Mr. Smith—look at me, Mr. Smith—you're not thinking about the question I just asked you. You're thinking about what you can remember from last night's study session, or how scary it is to be called on, etc. Forget that. Just think about the question and how it would be answered in the real world."

If you then repeat the question, but get no coherent answer, try and personalize the situation. Play a role, but start simply and then work up to the hard part. If, for example, the issue is whether a retailer can use both current inventory and inventory acquired in the future as collateral for a loan, try the following sequence.

"Look, pretend that you are a bank, and I come to you asking for a loan. If my financial situation was shaky, would you loan me money without taking collateral?" Even the most frightened student will say no. "If I offer you my inventory as collateral, so that you could seize it in the event I don't pay, would that be satisfactory if the inventory were currently worth a lot more than the amount of the loan?" Sure. "Would it be smart for you, the lender, to take a security interest only in the inventory that was on hand at the moment of the loan?" Uh, I don't know. "Inventory turns over constantly—the old inventory is sold, new inventory acquired, then it is sold. If you were the lender, would you want just the inventory that was there when the loan was made, or would you want it all?" All. "So, Mr. Smith, let's return to the

original question. Can a lender take a security interest not only in current inventory, but also after-acquired inventory?"(Slight pause—Mr. Smith would rather be anywhere else on the planet, but is hoping that all this will be over if he gives the most logical answer.). Yes. "That's right, and doing this creates a floating lien over the inventory so that the lender is secured by it all, even as its component parts are in constant flux. Now let's move on to . . . ."

Reminding the students that the real world must be served by their answers is very useful. I'm fond of asking students to consider the "person passing by on the street" test. How would such an outsider answer a pollster's question about the matter at hand, based on his/her general sense of how life works and not on rules of law learned from a book? Our law is not so perverse that its rules differ wildly from common suppositions, and pointing this out can give the students a grounding from which to work.

In recent years, I have become fond of having the students *vote* on answers to the questions. My typical patter goes like this: "How many of you think the answer is Yes?" Show of hands. "How many of you think the answer is No?" Another show of hands. Pause. "How many of you are sitting there in ignorance?" Small guilty laugh. I then ask for defenses of the Yes/No answers, and then I finally clear up the matter, making sure before we move on that the sitting-in-ignorance group has dissipated. "Are you with me?" I ask, staring hard at the students. "Its my job to make this clear to you. Let me hear from you if you still have questions.[14]

Far too many students are just plodding through it all, hoping to survive, graduate, and get on with life. That is a terrible attitude, and it's the teacher's duty to change it. Some years ago, when I became annoyed at the degree of lethargy that all too many students brought to the classroom, I decided to try something new. I empowered them.

Early in the course (almost always the first day) I warn the students that it is a mistake for them to just give up if I have explained something and they still don't understand it. The students are the *paying customers*, and I'm taking their money to make sure they understand the material. If they don't resolve their confusion on any given point, they aren't getting their money's worth, and they are cheating their future clients of the expertise they should acquire now when there was an expert on tap to make sure they got it right. All of them are entitled to understand *everything* that is said. They should settle for nothing less.

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[14] As this went to press, I have begun the exciting experiment of using "clickers" in the classroom. The students are given remote controls at random (which protects their anonymity) and asked to "vote" on a series of questions using Yes/No/Abstain as the possible choices. The results are immediately displayed on a large screen. The advantage of this over the mundane practice of asking for a show of hands is that a larger number of students will participate if they don't have to publicly expose their choice. (More complicated uses of the clickers are possible, but I am not the one to explain them.)

For the same reason, I don't take attendance (and never did). I tell the students that I'm not their monitor and this is not high school. They are adults who have paid for this course. They can study or not, attend or not, learn or not, all according to their own choices. Law school is expensive, and they should be very interested in getting their money's worth. Clients who need their expertise are coming soon, their families will expect to be fed, malpractice actions can ruin their careers. The students pay for what happens one way or another, and I make sure they know this.

For those who are struggling with difficult material, I remind them that one doesn't always get to do easy things in life. Sometimes we must all tackle hard things, and surely none of them assumed law school would be a walk in the park. That said, if after diligent effort some students still don't understand the material, I'm the one who is failing, not them. I encourage them to see me after class, come by my office, send me e-mails, call my home.[15] However it gets done, their questions must be answered.

Your students will be interested in you as a *person*, and, over the course of the class, you should tell them something about yourself, and particularly about your real-life legal experiences. They are hungry for such knowledge, and will pay careful attention. This can lead to off-the-topic discussions that are nonetheless valuable learning tools.

For example, at some point in the course, I tell them a story about an early litigation experience in Chicago when one of the lawyers in charge of training me announced one morning: "Okay, today we learn how to bribe the sheriff so he'll serve your papers." (This was Cook County, Illinois, after all, famous for its institutional corruption.) I was not anxious to enter such an ethical jungle, and fortunately never had to, but to this day I worry about what I would have done if ordered to bribe the sheriff (Quit? Do it? Pretend to be ill?). This leads to a standard lecture I have about ethical dilemmas, reprinted in the footnote.[16]

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[15] Of course, you have to set limits. For example, I am not a morning person, so I tell the students that they may call only between 10 a.m. and 10 p.m. If they catch me at an inconvenient moment, I give them a time when they should call me back. If they reach my answering machine, they are instructed to leave their number. I also set a time limit on the day before the exam after which I will take no further calls or look at my emails.

[16] I tell the students that it is all too easy to ask yourself the *wrong* questions when faced with an ethical choice—questions that will end in disaster. The first of these is: "can I justify to myself what I'm about to do?" The problem with this as a guideline is that we can usually justify whatever we are about to do (my clients papers need to be served, so I have to bribe the sheriff), and ultimately the question doesn't help at all. The second wrong (but very compelling) question is: "what are the other attorneys doing?" (They are bribing the sheriff, so I can too.) But the fact that a lot of lemmings will go over the cliff together doesn't in any way soften the fall—it just means that there will be a mass perishing.

The students will be interested in hearing as much of your life story as is arguably relevant to the course (how you got your first job, etc.), though, like anything else, this can be overdone. Nonetheless, you are a human being, and the students will profit from realizing that.

Even more important, your *students* are human beings too, and your classes will go much better if you get to know them as individuals. How is this done? Some contact can be made outside of class at law school events, and you should attend your share of these and experience how the school looks from the point of view of law students.[17] You should certainly attend the major school events in their lives, most particularly graduation.

But more can be done to learn their stories and understand their concerns. In all the classes I teach with 50 or fewer students (and in Contracts, no matter what its size), I memorize the seating chart. This drudgery is no fun, but there is a large return for the time invested. I once had a student remark on an evaluation that he put more energy into a class where the professor knew his name. Moreover, mastering their names will amaze the students and make them all feel included in your attention. If the instructor knows who they are, it's harder for any of them to hide, avoid involvement, escape your ministrations.

The first-year students should be encouraged from the beginning to get to know *each other*. Early on, I give a mini-lecture about the importance of this, saying things like, "Law school is difficult, and going to law school completely alone increases the problem. You're going to need *friends*, and the time to make them is now, early in the course." "Did you miss a class? Get notes from someone who was there." "Not understand something? Bouncing ideas off a fellow student frequently clears up the issue and leads

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The question I *do* urge my students to consider comes from what I call the "Ugly Headline" test. Suppose, I tell them, that your name is going to be featured in a headline written by some reporter who doesn't like you and then splashed all over the place ("Attorney X Does Y"). If the headlines get ugly enough, down you go. It doesn't matter that you are the President of the United States (Richard Nixon found this out—Bill Clinton had trouble with it as well). So I advise my students to contemplate what that headline is going to look like when everything finally comes to light and then decide if they can live with the resulting notoriety. (I've had more than one former student say that this advice kept them out of major trouble when difficult decisions came up in actual practice.)

[17] As a visitor at Hastings Law School back in the 1980s, I was invited by my Contracts students to a viewing of the movie *The Paper Chase*. A good time was had by all as the students booed Professor Kingsfield, while I jokingly applauded his more outrageous moves. The next day I brought a roll of dimes to the class and displayed it for the students. (You have to view the movie to appreciate this drollery.)

to a deeper understanding." "Getting ready for an exam? Studying with someone whose knowledge you trust will frequently pay huge dividends."[18]

To help them in this endeavor, I have an exercise I use in my Contracts class (when, of course, they are all strangers to one another). I tell them that when they are first called on, I will ask them to stand and give us all some minimal information: their name, where they're from, where they went to school, and something interesting about themselves. Some students, when asked to do this, will say that there is *nothing* interesting about them. That is unacceptable and leads to a Socratic dialogue about their lives: "Mr. Smith, what do you do in your free time? Have hobbies? Have traveled the world? Ever been in danger?" If students are warned there is no escaping my questions, they typically do come up with something to say, and that can lead to the creation of immediate friendships. For example, one of my students commented that he routinely formed a barbershop quartet wherever he moved; he had a new one by the end of the day.[19]

Let me repeat my central message: in the end, it is not about the teacher. It's about the students. Not you. Them. (I considered, but vetoed, the idea of subtitling this article "Not You—Them.") Seeing everything from their

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[18] I cannot resist two personal stories here. While at law school at the University of Texas (class of 1968), I routinely studied with two different students, both of whom are still good friends. The first, Student A, is now a highly respected law professor. We were seated alphabetically next to each other in the first semester, and that proved to be a very happy coincidence for me. Student A would eventually graduate at the top of our large class, and by trying to keep up with him (we were roommates for most of law school), I myself finished with a respectable academic record. Both now and then, when it comes to handling abstract ideas, he has always been the most impressive person I've ever met, and this, of course, made him an ideal study partner. Things would happen like this: I'd be sitting on the couch reading *Mad Magazine*, and he would interrupt my reverie by saying something like, "Whaley, agency law is flawed at its very *core*!" Try as I might to shoo him off, we would end up in an hours-long discussion of his most recent insight, and by the time we reached the classroom, we were loaded for bear.

The opposite of this were my studies with Student B, currently a major player in the field of television journalism. Alas, he did not like law school, and resisted with fierce determination any attempt to learn the subject at hand. At exam time, however, he would panic, and I would get the "Help me, Whaley!" call, to which I routinely responded. With Student B, there was no time for subtleties; working with him meant a drilling on the basics, over and over. That gave me a rock solid foundation for the course, always a good thing.

Both of these extremes were wonderful training for me. Either way, there was a valuable exchange of information at work.

When I relate to my students, I advise them (only half in jest) that it is best to study with someone who knows either *more* or *less* than you do about the material. If you study only with someone who mirrors your existing knowledge, it's harder to learn new things. You mostly end up just confirming your current understanding of some things and pooling your ignorance of the others.

[19] They performed at graduation.

perspective has made me a better teacher, and focusing on your students' viewpoint will make you one too. I just wish I'd known how much that was true when I wrote the original article.[20]

II. WRITING CASEBOOKS

A. *Teaching Commercial Law in the 1970s*

I wrote my first casebook in 1980,[21] and I did it because I thought the available texts in the 1970s were all substandard as teaching devices. In those days, the materials mostly consisted of one appellate court decision after another, interspersed with learned commentary. Those cases were informative (often too much so) about the one particular issue being litigated, but they did not allow the coverage of much of the relevant statutes, and they were typically dry as a bone to read, the sort of thing that Mark Twain once called "chloroform in print."[22] No wonder that Commercial Paper (and, indeed, the other subjects exploring the Uniform Commercial Code) was commonly known as one of the "dogs" of the curriculum, more or less dreaded by all involved, including the instructor.

I had the opposite opinion. How checks move around, how payment is made, what happens when the forger strikes, are matters of importance, and, with some effort, can be made to be fascinating. The students have almost all signed promissory notes to pay for their education, and that is a useful example—they become very interested in what can happen when they realize they qualify as what the Uniform Commercial Code calls "makers."[23] Students have checking accounts, too, as well as debit and credit cards. Wire transfers involve millions of dollars, and the lawyer in charge of making the legal decisions about such transfers, much used in the business world, will not sleep well at night if he/she has no clear understanding of the relevant law. The key, then, is to bring it all home to the student and tie the rules to the realities of their lives. Of course, it also helps that in many states the

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[20] This is good advice for how to *handle* any conversation with another person, even discussions having nothing to do with law. For example, I advise my students that in job interviews they should see everything from the point of view of the interviewer, and that it really helps to ask the interviewer about his/her job/life/expectations, etc. Most people are delighted to talk about themselves and/or the things that interest them, and will think highly of someone who appears to be curious about these matters. The biggest mistake most people make when talking to someone else is to focus internally and keep oneself as the central topic. Not only is that shallow and offensive, its counterproductive.

[21] DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON NEGOTIABLE INSTRUMENTS (1981).

[22] *See* MARK TWAIN, ROUGHING IT 110 (1913).

[23] U.C.C. § 3-103(a)(7) (2007).

Uniform Commercial Code subjects are heavily tested on most bar exams, itself a fact worth mentioning.

It seemed obvious to me that, to cover a statutory course with any thoroughness, there would have to be a way to focus on a large number of the relevant statutes, even those that were important but had never generated appellate attention. The use of problems was the answer, so I wrote materials that were heavily weighted with such problems, interspersed with appellate court opinions and my own commentary to clear up other matters or bridge gaps. This formula proved quite popular, and one book led to another, until I now have seven casebooks, all with this basic schema.[24] What follows is my advice on how to structure such books.

B. *Writing Teaching Materials*

Whatever kind of teaching materials you are writing—casebooks, problems, student outlines—you need to decide what to include and what to leave out entirely, or treat only in passing. This question actually pervades all of teaching, including the subject matter of any classroom discussion. In my opinion, there are a number of basic mistakes to avoid.

One impossible goal is to teach everything. Not only can it not be done, but the attempt is bound to end in failure, producing a book that is too big, too mind-numbing, too unintelligible, to adequately prepare the students for a useful command of the subject. Make peace with the idea that you will have to leave out a great deal.

Casebook writers (and, alas, this includes me) tend to put too much in the book, piling onerous loads on the poor students who must study the material, reason it out, and be prepared to discuss it in class. If you, the writer, force them to do this for matters that could have been omitted, you are committing educational malpractice. They have enough to learn that really is central to a solid legal education.

What then to include? What to leave out?

There are a number of missteps to avoid as you make your selections. After you've concluded that you can't teach everything, take yourself firmly in hand and make the hard choices. Do not include a topic just because it fascinates you, you once wrote a law review article on point, it advances a pet theory of yours, or even because it is inherently interesting. Nor should

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[24] *See, e.g.*, DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW (9th ed. 2008); DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON PAYMENT LAW (8th ed. 2008); DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS (6th ed. 2006); DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON THE SALE AND LEASE OF GOODS (4th ed. 2004); THOMAS CRANDALL & DOUGLAS WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS (5th ed. 2008); JEFFREY MORRIS & DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON DEBTOR-CREDITOR LAW (3d ed. 2006).

you cover a topic merely because it is dealt with in a statute or is part of the common law at issue.

Here is the basic guideline. My overarching goal in deciding what to teach is this: give the students enough understanding that they know the basics and can avoid malpractice by looking up the subtleties when they arise later in life. If you teach too many details, the students end up overloaded and top heavy, so that the basics elude them.

Having said that, the materials should be a mixture of textual explanations, cases, questions, and problems. All of this should be as interesting as you can make it (many casebooks are soporifically dull, almost as if the author were proud of being dry), and when considering the issue, make a deliberate attempt to add something entertaining to each lesson. Of course, you can go too far with this (I have been accused of that very thing), but a wide-awake student brain absorbs a great deal more than one struggling through the material while on the verge of unconsciousness. Clever phrasing, novel approaches, fascinating snippets of history, and appropriate humor should all be part of the mixture.

Many casebooks go seriously wrong in their selection of cases. Suppose, for example, that the hottest new case handed down in years has just attracted the rapt attention of the legal cognoscenti in this field. Does that mean it should be prominently featured in the next edition of your casebook? Maybe, but also maybe not. No matter how fascinating it is, ask yourself this: Is it worth the students' valuable time to have them read the whole thing? Can it be edited to make it pithier, more accessible? Can it be profitably turned into a problem with a citation at the end to this case? Might the case be reduced to a sentence or two, or (gulp!) omitted entirely? Just because it is the darling of the hour does not mean it should be the darling of the students' late-night hour.

As an example, take the important matter of whether cigarette manufacturers should be liable for the sale of a product that kills its users in truly horrible ways. In the Sales course, this comes up as a question of the breach of the implied warranty of merchantability. Volumes have been written on this, and there is a wealth of case law starting at the United States Supreme Court and working down to the state trial level. A casebook writer has a choice here: a lot or a little. I thought long and hard about this, and here is my entire treatment of the subject (from my Sales book segment on merchantability):

Problem 24

> Are cigarettes that cause lung cancer if used over a period of years merchantable? See Annot. 80 A.L.R.2d 681 (1961); White & Summers § 9-8. If the seller's advertisements had stated that the cigarettes were "mild," would that create an express warranty?[25]

As you can see, I opted for no better than a lick and a promise in my final decision. Here's why: by the time the issue comes up in the text, the students have begun to have a good grasp of what merchantability entails (goods must be fit for their "ordinary purpose"[26]), and the above problem is enough to launch a splendid student discussion about cigarettes and the warranty. Indeed, it is my experience that this matter can get heated as the smokers and the non-smokers begin to duke it out verbally (and I then blow the whistle and insist that we move on). The case law has no definitive answer (as the cited article demonstrates), and so my conclusion is that highlighting the basic issue and knowing that much more can be said about it is enough for a course in Sales.[27] Again, my touchstone is whether the materials give the students enough guidance that they will avoid malpractice when the issue is presented by real clients knocking on their doors. Lawyers who have been exposed to this problem and the classroom discussion that follows will see the issue, understand that it is complex, and know that major research is necessary to handle the lawsuit. Having gotten the students/lawyers that far, my job is well done.

It is all too true that most cases make poor teaching vehicles. They are too long, involve facts that are too complicated (given that the point can be made in a simpler way), deal with irrelevant issues that are hard to excise from the decision, or are densely or poorly written. When I am choosing cases, I look for the following attributes: the case should make one basic point (or tie two important ones together), doing so in an interesting and comprehensible fact pattern, all the while explaining the relevant law lucidly in not more than a couple of pages. As you can well imagine, this summarily eliminates most cases from consideration for inclusion. Exceptions to these criteria exist (my books are filled with such exceptions), but anytime I myself stray, there has to be a very good reason for doing so: the case is a classic example that students should know (the hairy hand case, for example, where

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[25] WHALEY, PROBLEMS AND MATERIALS ON THE SALE AND LEASE OF GOODS, *supra* note 24, at 76.

[26] *See* U.C.C. § 2-314(2)(c) (2007).

[27] Were the course in strict product liability, I would have made the opposite choice. The materials would then include the most recent comprehensive case on point, plenty of text, and a problem or two. In such a course, the issue is positioned at center stage, and there is time for an extended exploration of the current state of the law.

the rule of law must be teased out of the students in the traditional fashion),[28] or make the point in a dramatic[29] or humorous[30] way.

C. *Writing Problems*

Just as with text and cases, it is possible to put too much in the problems you create. Once again, the overarching question is whether the problem exposes the students to the basics so that when the matter comes up in their future practice they will recognize it and be able to do detailed research from that point, thus educating themselves on the more complicated issues. Thus, you should keep problems as simple as you can, remembering that from the student's point of view they may not be simple at all. Most problems are exposing students to a foreign world, so take it slow.

I once explored the possibility of writing a Commercial Paper casebook with a professor who was a noted name in the field when I was still a newbie. Jumping into the project with avidity, he drafted the first chapter of the proposed book and filled it with intricate problems. The very first problem in the book raised issues of negotiability, negotiation, holding in due course, even (GAK!) the imposter rule (one of the hardest concepts for students to master). I was appalled. A student trying to work through such a tangled maze would drop the course while there was still time. I wrote my incipient co-author a letter explaining in some detail why I thought this was a mistake, and suggesting more of a buildup, working through these issues one at a time, and certainly postponing the complicated matter of forgery until late in the book. I must have offended him with my criticism as I never heard from him again, and the project died aborning. I then wrote my own book.

One wise thing to do is to progress from easy problems to more complicated ones, allowing the student to use knowledge gained from the early problems to reach a solution of those that follow. Assuming you are interested in a detailed example, consider the Uniform Commercial Code's treatment of a payment-in-full check.[31] Such a check is a useful device for settling disputes of all kinds (including those having nothing to do with commercial law). Section 3-311 is reprinted below, and as you read it and its Official Comment, consider how you would develop a problem or problems

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[28] *See* Hawkins v. McGee, 146 A. 641 (N.H. 1929).

[29] *See, e.g.*, Leichtamer v. Am. Motors Corp., 424 N.E. 2d 568, 574–577 (Ohio 1981) (a strict product liability case involving a horrible jeep rollover at an "off-the-road" recreation facility; too long, but containing a very readable discussion of the law).

[30] *See, e.g.*, Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674–76 (N.Y. App. Div. 1991) (involving the sale of a haunted house; the case has an over-the-top discussion of the law of fraud, filled with bad puns).

[31] U.C.C. § 3-311 (2007).

to teach the rules to your students, and then compare your solution to mine (which follows the statute). Section 3-311, "Accord and Satisfaction by Use of Instrument," provides:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:
>
> (1) The claimant, if an organization, proves that (i) within reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
>
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).
>
> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.[32]

The Official Comment to § 3-311 provides:

> 1. This section deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case there is a dispute concerning the amount that is owed on a claim.
>
> Case #1. The claim is for the price of goods or services sold to a consumer who asserts that he or she is not obliged to pay the full price

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[32] *Id.*

for which the consumer was billed because of a defect or breach of warranty with respect to the goods or services.

Case #2. A claim is made on an insurance policy. The insurance company alleges that it is not liable under the policy for the amount of the claim.

In either case the person against whom the claim is asserted may attempt an accord and satisfaction of the disputed claim by tendering a check to the claimant for some amount less than the full amount claimed by the claimant. A statement will be included on the check or in a communication accompanying the check to the effect that the check is offered as full payment of full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered. Before enactment of revised Article 3, the case law was in conflict over the question of whether obtaining payment of the check had the effect of an agreement to the settlement proposed by the debtor. This issue was governed by a common law rule, but some courts hold that the common law was modified by former Section 1-207 which they interpreted as applying to full settlement checks.

2. Comment d to Restatement of Contracts, Section 281 discusses the full satisfaction check and the applicable common law rule. In a case like Case #1, the buyer can propose a settlement of the disputed bill by a clear notation on the check indicating that the check is tendered as full satisfaction of the bill. Under the common law rule the seller, by obtaining payment of the check accepts the offer of compromise by the buyer. The result is the same if the seller adds a notation to the check indicating that the check is accepted under protest or in only partial satisfaction of the claim. Under the common law rule the seller can refuse the check or can accept it subject to the condition stated by the buyer, but the seller can't accept the check and refuse to be bound by the condition. The rule applies only to an unliquidated claim or a claim disputed in good faith by the buyer. The dispute in the courts was whether Section 1-207 changed the common law rule. The Restatement states that section "need not be read as changing this well-established rule."

3. As part of the revision of Article 3, Section 1-207 has been amended to add subsection (2) stating that Section 1-207 "does not apply to an accord and satisfaction." Because of that amendment and revised Article 3, Section 3-311 governs full satisfaction checks. Section 3-311 follows the common law rule with some minor variations to reflect modern business conditions. In cases covered by Section 3-311 there will often be an individual on one side of the dispute and a business organization on the other. This section is not designed to favor either the individual or the business organization. In Case #1 the person seeking the accord and satisfaction is an individual. In Case #2 the person seeking the accord and satisfaction is an insurance company. Section 3-311 is based on a belief that the common law rule

produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

4. Subsection (a) states three requirements for application of Section 3-311. "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(6) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from tender. Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute. Subsection (a)(ii). Other law applies to cases in which a debtor is seeking discharge of such a debt by paying less than the amount owed. For the purpose of subsection (a)(iii) obtaining acceptance of a check is considered to be obtaining payment of the check. The person seeking the accord and satisfaction must prove that the requirements of subsection (a) are met. If that person also proves that the statement required by subsection (b) was given, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. "Conspicuous" is defined in Section 1-201(10). The statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it." If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally indorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's indorsement of the check, the claimant "ought to have noticed" the statement.

5. Subsection (c)(1) is a limitation on subsection (b) in cases in which the claimant is an organization. It is designed to protect the claimant against

inadvertent accord and satisfaction. If the claimant is an organization payment of the check might be obtained without notice to the personnel of the organization concerned with the disputed claim. Some business organizations have claims against very large numbers of customers. Examples are department stores, public utilities and the like. These claims are normally paid by checks sent by customers to a designated office at which clerks employed by the claimant or a bank acting for the claimant process the checks and record the amounts paid. If the processing office is not designed to deal with communications extraneous to recording the amount of the check and the account number of the customer, payment of a full satisfaction check can easily be obtained without knowledge by the claimant of the existence of the full satisfaction statement. This is particularly true if the statement is written on the reverse side of the check in the area in which indorsements are usually written. Normally, the clerks of the claimant have no reason to look at the reverse side of checks. Indorsement by the claimant normally is done by mechanical means or there may be no indorsement at all. Section 4-205(a). Subsection (c)(1) allows the claimant to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. The statement must be given to the customer within a reasonable time before the tender is made. This requirement is designed to assure that the customer has reasonable notice that the full satisfaction check must be sent to a particular place. The reasonable time requirement could be satisfied by a notice on the billing statement sent to the customer. If the full satisfaction check is sent to the designated destination and the check is paid, the claim is discharged. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies.

6. Subsection (c)(2) is also designed to prevent inadvertent accord and satisfaction. It can be used by a claimant other than an organization or by a claimant as an alternative to subsection (c)(1). Some organizations may be reluctant to use subsection (c)(1) because it may result in confusion of customers that causes checks to be routinely sent to the special designated person, office, or place. Thus, much of the benefit of rapid processing of checks may be lost. An organization that chooses not to send a notice complying with subsection (c)(1)(i) may prevent an inadvertent accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

7. Subsection (c) is subject to subsection (d). If a person against whom a claim is asserted proves that the claimant obtained payment of a check known to have been tendered in full satisfaction of the claim by "the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation," the claim is discharged even if (i) the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1), or (ii) the claimant tendered repayment of

the amount of the check in compliance with subsection (c)(2). A claimant knows that a check was tendered in full satisfaction of a claim when the claimant has "actual knowledge" of that fact. Section 1-201(25). Under Section 1-201(27), if the claimant is an organization, it has knowledge that a check was tendered in full satisfaction of the claim when that is "brought to the attention of the individual conducting that transaction, and in any event when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information." With respect to an attempted accord and satisfaction the "individual conducting the transaction" is an employee or other agent of the organization having direct responsibility with respect to the dispute. For example, if the check and communication are received by a collection agency acting for the claimant to collect the disputed claim, obtaining payment of the check will result in an accord and satisfaction even if the claimant gave notice, pursuant to subsection (c)(1), that full satisfaction checks be sent to some other office. Similarly, if a customer asserting a claim for breach of warranty with respect to defective goods purchased in a retail outlet of a large chain store delivers the full satisfaction check to the manager of the retail outlet at which the goods were purchased, obtaining payment of the check will also result in an accord and satisfaction. On the other hand, if the check is mailed to the chief executive officer of the chain store subsection (d) would probably not be satisfied. The chief executive officer of a large corporation may have general responsibility for operations of the company, but does not normally have direct responsibility for resolving a small disputed bill to a customer. A check for a relatively small amount mailed to a high executive officer of a large organization is not likely to receive the executive's personal attention. Rather, the check would normally be routinely sent to the appropriate office for deposit and credit to the customer's account. If the check does receive the personal attention of the high executive officer and the officer is aware of the full-satisfaction language, collection of the check will result in an accord and satisfaction because subsection (d) applies. In this case the officer has assumed direct responsibility with respect to the disputed transaction. If a full satisfaction check is sent to a lock box or other office processing checks sent to the claimant, it is irrelevant whether the clerk processing the check did or did not see the statement that the check was tendered as full satisfaction of the claim. Knowledge of the clerk is not imputed to the organization because the clerk has no responsibility with respect to an accord or satisfaction. Moreover, there is no failure of "due diligence" under Section 1-201(27) if the claimant does not require its clerks to look for full satisfaction statements on checks or accompanying communications. Nor is there any duty of the claimant to assign that duty to its clerks. Section 3-311(c) is

> intended to allow a claimant to avoid an inadvertent accord and satisfaction by complying with either subsection (c)(1) or (2) without burdening the check-processing operation with extraneous and wasteful additional duties.
>
> 8. In some cases the disputed claim may have been assigned to a finance company or bank as part of a financing arrangement with respect to the accounts receivable. If the account debtor was notified of the assignment, the claimant is the assignee of the account receivable and the "agent of the claimant" in subsection (d) refers to an agent of the assignee.[33]

How do you translate this into a meaningful explanation for your students' benefit? Assuming you decide to turn the statute into a problem or series of problems, what would they look like? What details of the statute and its Official Comment should they cover?

I've tackled the law of payment-in-full checks in two of my casebooks. The more detailed version is from the Consumer Law casebook, and the text looks like this:

> If you, the consumer, receive a bill from a credit card issuer and it contains an entry you believe to be an error, what remedy do you have? Prior to 1975, and the Fair Credit Billing Act (which became Chapter 4 of the Truth in Lending Act, §§ 161 to 171), the common law offered very little relief, though consumers could sometimes make much of "payment in full" checks and the idea of an accord and satisfaction.
>
> A little reminder of the law of Contracts: an "accord" is the offer of something that is *different* from that which was originally due under the terms of the contract; a "satisfaction" is the agreement to take it. Thus if you and I are in a contract by which I have agreed to perform a magic act at your child's party for which you will pay me $100, and I call you up and tell you that in place of the magic act I will do a juggling act, I have made an offer of an *accord*; your agreement would be the *satisfaction*, and by this process we would work a modification of the contract.
>
> Section 3-311 of the Uniform Commercial Code now regulates payment in full checks as they relate to an accord and satisfaction. Use that section to resolve the following Problems.[34]

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[33] *Id.* (Official Comment).

[34] DOUGLAS WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 293 (4th ed. 2006) (internal citation omitted) (referring to Gregory G. Sarno, Annotation, *Credit Card Issuer's Liability, Under State Laws, for Wrongful Billing, Cancellation, Dishonor, or Disclosure*, 53 A.L.R. 4th 231 (1987)).

Problem 44

Hazel Flagg was disgusted when the new sofa she had purchased was delivered dirty. She had it professionally cleaned, which cost her $50, so she deducted this amount from the amount she was billed for the sofa ($1000), and sent the seller, Furniture of Tomorrow, a check for $950, along with a letter explaining the reason for the deduction, and stating, "This check is sent as full payment for the sofa."

a. If the check had been conspicuously marked "Payment in Full," would the payee avoid the accord and satisfaction by scratching this language off the check before cashing it?

b. Furniture of Tomorrow cashed the check on May 1. Two days later someone in the Consumer Complaint Department read Hazel's letter. Has an accord and satisfaction occurred? Is there any way to undo it and preserve the dispute over the $50? See § 3-311(c)(2).[35]

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[35] WHALEY *supra* note 34, at 295. The answer to problem 44 from the Teacher's Manual is:

a. "The common law answer to this Problem was that the cashing of a payment-in-full check where there was a good faith dispute as to the debt did work an "accord and satisfaction" (a complete agreement) that was binding on both parties. Being that this is so, such a check is a powerful weapon for any attorney to have in/her arsenal; it can be used to settle many a dispute, as here. At common law there was no way for the payee to take the check stripped of the condition under which it was tendered, so the payee's attempt to cash the check after scoring the payment-in-full language was unavailing. An accord and satisfaction arose nonetheless. At common law, the only way that the payee could avoid the accord and satisfaction was to send the check back immediately. Some courts found that retention of the check without cashing it even worked an accord and satisfaction since the check was an offer and created a "duty to speak" if the payee was not willing to accept the offer, so that retention plus silence created an acceptance. *See* Hoffman v. Ralston Purina Co., 86 Wis. 2d 445, 273 N.W.2d 214 (1951). Of course, returning a check on which one is the payee goes against human nature. In the second edition of their treatise on the Uniform Commercial Code, Professors White and Summers rightly called a payment-in-full check "an exquisite form of commercial torture." *See* JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 13-21 (2d ed. 1980). The revised version of Articles 3 UCC deals with the issue in § 3-311, which allows payment-in-full checks in good faith disputes to work an accord and satisfaction, but does not allow the payee to simply scratch off the payment in full language and avoid the accord and satisfaction (note § 1-207(b) and that section's Official Comment 3, and § 3-311's Official Comment 2). The seller wishing to avoid the accord and satisfaction should send the check back, hard as that is to do.

b. The cited section permits the accord and satisfaction to be undone even after the payee has cashed the check if (a) the payee repays the money within 90 days after the payment, and (b) had no idea at the time of the payment that the check was tendered in full satisfaction of the debt. The sender of the check must prove that the

Problem 45

The head of the Consumer Complaint Department at Furniture of Tomorrow calls you, the company's attorney, with the following dilemma. Buyers often have complaints and send in "payment in full" checks, but the corporate setup is such that the checks are routinely cashed before any investigation occurs. Refunding the money is time consuming (and sometimes the company does not realize the necessity for doing so for four or more months), and you are asked to set up a system whereby the company can avoid cashing the checks. What can it do? See § 3-311(c)(1).[36]

Problem 46

The bill that came with Hazel's sofa stated "Send disputed payments to Consumer Complaint Department (address)." Is it all right to bury this information in the fine print? Assume that this language is prominently printed on the bill. Hazel did send the disputed check to that department, which immediately cashed it by accident. The head of Consumer Complaint calls you, the company attorney. Can the company still refund the money per § 3-311(c)(2) and revive the dispute.[37]

Problem 47

When Hazel got the dirty sofa, she was so furious that she phoned the company and said that she was not going to pay a cent. The company sent

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check was tendered with a conspicuous statement to the effect that this check is intended to work a payment-in-full.

DOUGLAS WHALEY, TEACHER'S MANUAL, PROBLEMS AND MATERIALS ON CONSUMER LAW 44 (4th 2006) (on file with author).

[36] WHALEY, CONSUMER LAW, *supra* note 34, at 295–96. The answer to problem 45 from the Teacher's Manual is: "The solution suggested by the statute is to tell the customers that such checks must be sent to a designated complaint department where they will get the consideration they deserve, and if the customers send the check to the wrong place, it acts as partial payment and nothing more." WHALEY, TEACHER'S MANUAL, *supra* note 35, at 45.

[37] WHALEY, CONSUMER LAW, *supra* note 34, at 296. The answer to problem 46 from the Teacher's Manual is:

> Subsection (c)(1) requires that the direction to the customer be conspicuous (for obvious reasons). If Helen does send the check to the correct department, which accidentally cashes the check, there is no right to use the 90 day repayment period of § 3-311(c)(2)—see the last sentence. If the payee has set up a department to handle disputed checks, that department's initial decision binds it and if the check is cashed an accord and satisfaction discharges the debt.

WHALEY, TEACHER'S MANUAL, *supra* note 35, at 46.

her numerous bills, but she ignored them. Finally the company turned the matter over to Trash Collection Agency, which contacted Hazel directly and made threats about her credit rating. To get them out of her life, Hazel sent Trash Collection Agency a check for $950, marking it "payment in full." She did this in spite of the fact that all of the bills the company had sent her required disputed payments to be sent to the company's Consumer Complaint Department, giving an address for same. Trash Collection turned the check over to the collection department of Furniture of Tomorrow, which cashed it. A few days later, the head of Consumer Complaint finds all this out, and calls you, the company's attorney. Has an accord and satisfaction occurred? Can the company still refund the money per § 3-311(c)(2) and revive the dispute?[38]

Problem 48

Assume instead that when Hazel upset by the dirty sofa she sat down and wrote a letter to Albert Furniture, the President of Furniture of Tomorrow, explaining that the $950 check enclosed was tendered in full settlement of the dispute. She ignored the instruction to send complaints to the Consumer Complaint Department and mailed the check and accompanying letter directly to Albert Furniture at the main office of the company. Albert's secretary sent the check off to the collections department and the letter to Consumer Complaint. Two weeks later, at the bidding of the latter, the company refunded Hazel's $950 and demanded payment in full. Has an accord and satisfaction occurred? Does it help in answering these Problems if the company can prove that the reason that the sofa was dirty was not because it was delivered in that condition, but that Hazel's large dogs had climbed all over it while wet from a romp outdoors?[39]

All of the statute and its Official Comment are covered by the treatment above, and that much detail is appropriate in a Consumer Law course where the subject is central to the resolution of many consumer disputes (witness Hazel and her sofa). When writing the material, I worked to include

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[38] WHALEY, CONSUMER LAW, *supra* note 34, at 296. The answer to problem 47 from the Teacher's Manual states: "Here is an example of § 3-311(d), where a responsible agent of the payee knows what is going on and cashes the check anyway, thereby discharging the remaining debt. See Official Comment 7 to § 3-311, which specifically mentions debt collectors as being encompassed by the rule." WHALEY, TEACHER'S MANUAL, *supra* note 35, at 47.

[39] WHALEY, CONSUMER LAW, *supra* note 34, at 296–97. The answer to problem 48 from the Teacher's Manual states: "That same Official Comment also answers this one: the president of the company (unless he/she actually saw the check and made a deliberate decision regarding it) is not an appropriate person to handle bill collections, and thus § 3-311(d)'s rule is not triggered. The company may still refund the money and keep the dispute alive." WHALEY, TEACHER'S MANUAL, *supra* note 35, at 48.

everything because I thought it was important for the students to understand it all, and thereafter to be completely unafraid of a § 3-311 dispute.

However, in other courses the issue can also arise, and a truncated treatment is appropriate. Here is how we did it in the Contracts casebook:

Problem 60

Robert Startup picked out a beautiful Persian rug for his living room when he visited the carpet department of Merchandise World, agreeing to pay $5,500 for it. He charged it on his Merchandise World credit card. When the rug was delivered, he was annoyed to discover that it was badly wrinkled, apparently because it had been rolled up and stored in the delivery truck under much heavier items. He immediately complained to Merchandise World, but got no satisfactory resolution of the problem, so he had the rug professionally cleaned, which cost him $150. When he received his credit card bill from Merchandise World, he sent back a check for $5, 350, along with a cover letter explaining what had happened, stating in the letter that the check was tendered as "payment in full" for the rug. The check was routinely cashed by the credit card department.

(a) The next month Merchandise World sent him a bill for $150. Must he pay it? See §3-311(c)(2).

(b) Is it too late for Merchandise World to do anything to avoid the accord and satisfaction? See §3-311(c)(2).

(c) You are the attorney for Merchandise World. Alice Mayberry, the head of the credit card department wants a realistic chance to avoid the accidental settlement of these disputes. She asks if there is any way for checks like these to be sent to her office for her personal consideration? See § 3-111(c)(1).

(d) Alice also asks if, when she gets such checks, she can just scratch off the "payment in full" language on the check, write "cashed under protest, all rights reserved," and avoid settling the dispute? See § 1-209.[40]

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[40] CRANDALL & WHALEY, *supra* note 9, at 188–89. The answer to problem 60 from the Teacher's Manual states:

Section 3-311 of the Uniform Commercial Code settles this issue, which had much plagued the courts. It provides that when a good faith dispute over an unliquidated amount results in the tender of an instrument clearly marked (the statute says it must contain a "conspicuous statement") as payment-in-full of the dispute, the payment of the instrument discharges the debt.

(a) That being so, he need not pay the next month's bill, but should send them a letter explaining the law and telling them if they report him adversely to a credit bureau he will sue them for defamation. The company should never have cashed the payment-in-full check if it didn't intend this result.

(b) Whether or not the payee is an organization, it can avoid the accord and satisfaction if it repays the tendered amount within 90 days after payment thereof.

(c) Where the payee is an organization and has given the person tendering the instrument prior notice that payment-in-full instruments must be sent to a particular

This explores the same material in a more condensed form. As such, it won't require as much work from the student to produce satisfactory answers to the questions it asks. The problem also drops consideration of some portions of the statute, but what of that? Having mastered the basics, the Contracts student, entering the statute in his/her practice, will be familiar enough with its concepts to tease the finer points from a closer reading of § 3-311 and its Official Comment.

In either case, the goal of teaching the future lawyer enough to avoid malpractice has been achieved (or so I hope), and the subject of payment-in-full checks demystified and made an ally.

What follows next is how I would teach this same material in the classroom.

D. *Teaching Problems*

In the classroom and using my own books, I start each segment with a short introductory lecture putting the coming issue into context. If the subject has an interesting history, it is useful to run through that if it is not complicated and has some bearing on the current state of the law. For a Consumer Law class discussing the payment in full check, I might say something like this:

> White and Summers once called the payment in full check "an exquisite form of commercial torture."[41] This is because the payee of such a check (who is, ironically, frequently one of the big guys—say a creditor) is faced with an agonizing dilemma when the check arrives in the mail: cash it (which would end the dispute) or send it back. Returning money goes against the grain of all human nature. If you are the recipient of such a check, and written right on it is your name as payee, with the amount clearly stated, it's hard to avoid cashing it. Even if the payee *means* to send it back, strange things have been known to happen. The payee, looking at

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person, office, or place, and this was not done, no settlement of the underlying dispute occurs *unless* the tenderer proves that payment was obtained by a responsible person (a debt collector, for example) with full knowledge that the instrument was tendered in full knowledge that the instrument was tendered in full satisfaction of the debt; § 3-311(c)(1) and (d).

(d) The one thing that is perfectly clear (though attorneys have a rough time getting it through their heads) is that striking the payment-in-full language will *not* preserve the dispute, and § 1-207 makes this point (the issue was unsettled under the prior version of § 1-207. The attorneys for the payee will really, really want to do this, so you must make it clear that it really, really won't work, and advising a client to try it would be malpractice (except in New York, where the 1990 version of Article 3 has not been adopted as of this writing in early 2004).

CRANDALL & WHALEY, TEACHER'S MANUAL, *supra* note 10, at 60.

[41] JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 13-21 (2d ed. 1980).

the check, begins to tremble, blacks out, and on coming to, mysteriously discovers that the check has been cashed and the dispute is over.[42]

A payment in full check is the offer of an accord and satisfaction. Let's review the law of accord and satisfaction, which I know you all remember from Contracts. An "accord" is the offer of something different than that which was due under the terms of the original contract. Lord Coke once gave the example of: I owe you fifty pounds and ask you if you will accept my hawk instead. The "satisfaction" is the agreement to take it.[43] So an "accord and satisfaction" means a compromise.

Originally, § 1-209 of the Uniform Commercial Code caused some problems here. It allowed someone in a dispute to perform 'under protest,' while reserving the right to contest the matter later. Some jurisdictions allowed payees to use this section to strike the "payment in full" language, write "cashed under protest—all rights reserved," and avoid the accord and satisfaction that would otherwise follow. In 1990, § 1-209 was rewritten to make it clear it does not apply to an accord and satisfaction, so that section is of no use to the payee on a payment in full check. I mention this because there are some old cases out there reaching the pre-1990 result, and I don't want you to be seduced by their siren song should you happen upon them. They have been overruled by more recent revisions of the Uniform Commercial Code.

The latest statutory resolution of the problem is § 3-311 of the Code. Turn to it now. Notice the title of the section, "Accord and Satisfaction by Use of Instrument." What is remarkable about this caption is that the words

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[42] On some occasions, I have inserted a war story at this point. It goes like this: I once bought a washer/dryer combination from a major department store, and the first use of the washer dumped a lot of lint down my drain, stopping it up. When I complained to the store about this, I was informed this was a new feature: a "self-cleaning filter." I replied that I didn't think of it as a feature, and that instead it appeared to me to be a breach of the implied warranty of merchantability. The store declined to solve the problem, so I had a plumber come out and unstop my drain. He advised me to put a nylon stocking over the end of the washer's discharge pipe and clean it out once a week (and, happily, this worked).

Within a week, I received a bill for the appliances from the store, so I sent them a cover letter explaining all that had happened, and tendered a payment in full check for the amount due minus the cost of the plumber and the stocking.

Two things occurred shortly thereafter: the store cashed the check (which I was very pleased to see), and then sent me a letter informing me that my letter was being referred to their Complaint Department for resolution, and that they would let me know how it all comes out. I fired back another letter telling them I already knew how it came out, citing the relevant rules of law, and—to the store's credit—they gave up.

[43] Okay, this is not technically correct, but explaining the technicalities here is a needless diversion and adds nothing to the main topic. Most courts hold that the satisfaction occurred on the taking of the accord, but then held that the person offering the accord had to be given a reasonable period of time in which to tender it, and in the meantime the offeree, who had agreed to take the accord, was not free to change his/her mind. *See* Clark v. Elza, 406 A.2d 922, 927–28 (Md. 1979).

> "accord and satisfaction" are neither used in the statute itself, nor explained by the Official Comment. Supposedly we all know instinctively what is meant. Ms. Smith, let us look at problem 44.

I then read it aloud through subpart a, and then ask her the question contained in that subpart—can the payee cross off the "payment in full" language and avoid the accord and satisfaction. Alert student that she is, she will state the obvious reply that the payee cannot do this. I then ask her what the payee should do with the check, hoping for the answer of "send it back." I then might switch to being the payee and ask Ms. Smith to be my lawyer. "Can I just keep the check here at my office and say nothing?" Ms. Smith might say "yes," in which case I remind her that the common law rule is that silence is acceptance if there is a duty to speak (as, arguably, here). Keeping the check, then, might be seen as an agreement to the accord proposed, and there are cases so holding.[44]

Ms. Smith and I then move on to subpart b of the problem, asking if the payee can return the money after cashing the check, and we work our way to the answer that yes, the cited code section does permit this. I ask her why the drafters would have given payees this grace period for undoing the accord and satisfaction, and either she or another volunteer from the class will tell me that many payees are corporate bureaucracies that cannot stop themselves from cashing a customer's remit. At the preliminary stage where the check is received, corporate bureaucracy prevails, no employee (or robot) is stopping to read the details of the letter accompanying the check.

Ms. Smith and I now turn to problem 45, which deserves little time because the problem itself shows the reason why business payees might want all payment in full checks sent to a central office. The next problem makes the student note the word "conspicuous" in § 3-311(c)(1), so that the payee cannot bury this special routing instruction in fine print, and the following paragraph of the problem asks the student whether a check cashed by such a special department can be undone by returning the money in the next ninety days. The answer is no, and I ask Ms. Smith why not. Why shouldn't the payee be able to avail itself of the usual ninety-day period in this situation? Eventually some member of the class raises the § 3-311(d) rule: there is no ninety-day grace period where an agent of the payee has direct responsibility for its own deliberate decisions.

Problems 46 and 47 are elementary explorations of the idea that if the check reaches an agent of the payee who is responsible for dealing with payment in full checks, the check need not be sent to a special office, nor is there a 90-day refund period. The Official Comment answers both of these, and the prepared student should breeze through them. The debt collector is

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[44] *See, e.g.*, Hoffman v. Ralston Purina Co., 273 N.W. 2d 214, 217–19 (Wis. 1979).

intimately involved with the check, so when that check is cashed, the matter is settled. The president of the company, however, won't likely even see the check—it will be intercepted by a secretary and sent off into the company's bureaucracy for handling, and no accord and satisfaction occurs.

The final important point is triggered by the question at the end of problem 47. If the sofa was dirty as a result of a lark by Hazel's dogs, her payment-in-full check is not tendered in good faith (a statutory requirement), and she cannot work an accord and satisfaction by sending such a check, no matter that the payee cashes it. If Ms. Smith fails to produce this answer, I will ask her if § 3-311 would permit her (Ms. Smith) to pay all her creditors *half* one month by sending them payment in full checks, and thus have a very good financial month. Even the dullest student will see the evil of this, and it's a short leap back to the conclusion that Hazel's messy dogs are not the problem of Furniture Tomorrow.

I finish the discussion of § 3-311 with a practical note. Students will rightly want to know why they should *care* about what they learned. Tell them. I may say something like:

> Anytime you, future attorneys, are representing a client who at some point will have to pay a disputed amount (or, as will happen you find yourself doing battle with a creditor of your own), consider sending the other party a payment in full check and see what happens. Such a check can end many disputes abruptly and happily. Whether or not you practice commercial law, this is a valuable weapon to have as part of your legal arsenal.

III. CONCLUSION

Inevitably there will be law professors who are *not* adequate teachers and do *not* enjoy being in the classroom. What they like about law teaching, if anything, is the scholarship, or the prestige, or the entrée it gives them into other fields, but for these members of the faculty, students are something to be endured, not celebrated. What should be said about these individuals?

Of course, we're not all good teachers any more than we're all good scholars or committee members or even human beings. A college of law must maintain balance when selecting its faculty, and I am not saying otherwise. But surely the chief raison d'être for a law school is to *teach law*. Members of the faculty who fail at this most basic of tasks should not be permitted, year after year, to compel students to suffer through their classes. Perhaps naively, I like to think that anyone who has the credentials to get a position on our faculties can, upon devoting diligent attention to the task, become at least an *adequate* teacher, and I hope this Article might be of some help in that important endeavor. But for those who cannot or will not meet the minimal definition of "teacher," I have some very good advice: get a different job. Whatever other rewards come from being a "Professor of

Law," they're not worth devoting one's lifetime to the agony of bad class after bad class after bad class. If an instructor has to take attendance in order to get the students to show up, perhaps that means the classroom experience is not worth the money the students are paying to take it. The true talents of such faux teachers should be applied elsewhere, and it's the job of the Dean to make sure this happens.[45]

On the other hand, if you like your classroom and your students respect and learn from you, teaching law is truly the realization of the good life, one of the best that civilization has to offer. The pay is splendid, your schedule is more or less your own, the vacation days are almost unequaled in other callings, and you'll be much admired simply because of your title. Best of all, you're affording the incredible privilege of helping shape the lawyers who will run society—indeed, some of them will run the world.

In the latter half of my life, I've become very fond of what I call the "deathbed test" for making all major decisions. Under this measurement of things, imagine that you are very old and on your deathbed, with plenty of time to rethink your personal history. What decisions or events will cause you to slap your forehead and mutter, "How could I have been so stupid?" And, the opposite—which will bring a broad smile to your face and an inner glow of pride at your accomplishment? Ask this question when you are at any of life's significant crossroads, and the very inquiry will frequently turn you toward the right result. Certainly for those who have found the classroom a place where they are at home, and who are pleased to have had this exciting occupation, that deathbed smile comes easily to the face.

I have a little ritual I've performed all during my teaching career as a way of keeping myself focused on what is important about my work. Each day, just as I touch the doorknob to go into the classroom, I recite this mantra to myself: "You are very lucky to have this job."

It also has the advantage of being true.

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[45] Horribly, there really are law professors who go beyond merely being incompetent and are actually *mean* to their students. These jerks should be fired. The only time I've ever been deliberately sadistic in the classroom was when I accidentally heard a group of students who liked to come to my Commercial Paper class high on marijuana. Immediately on learning this, I felt steam hissing from my ears. The next day I looked around for these adventurers (I hadn't been given specific names, but they weren't difficult to identify once I understood the issue), and called on the obvious ringleader. He apologized and said he was unprepared, to which I replied, "*Ah, a virgin mind!* Well, Mr. Smith, here is the statute, and you and I are about to work through it together." From my own misspent youth I know that, if someone is high on marijuana, it is possible to concentrate on only *one thing at a time.* It might be the hair on the inside of one's nostrils, or—as in this case—it might be § 3-405 of the Uniform Commercial Code. My victim and I had a Socratic dialogue that went on all class, and was not fun at all for him (or, indeed, for me). The next day I called on other members of the Smith cabal, and everybody was fine—prepared and paying careful attention.