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A FOOTNOTE FOR JACK DAWSON

James J. White and David A. Peters***

Jack Dawson, known to many at Michigan as Black Jack, taught at the Law School from 1927 to 1958. Much of his work was published in the *Michigan Law Review*, where he served as a student editor during the 1923-24 academic year. We revisit his work and provide a footnote to his elegant writing on mistake and supervening events.

In Part I, we talk a little about Jack the man. In Part II, we recite the nature and significance of his scholarly work. Part III deals briefly with the cases decided in the last twenty years by American courts on impracticability, impossibility, mistake and frustration of purpose. We focus particularly on the afterlife of the notorious *Alcoa* case that was the subject of Jack's last articles. Part IV concludes with some speculation on the reasons for the different responses of German and American courts to claims of mistake or supervening events.

I. A SPLENDID PIECE OF WORK

As a Contracts student, I¹ first met Jack Dawson vicariously in the fall of 1959. We studied contracts from *Dawson and Harvey* in mimeograph. That Contracts casebook first brought remedies to the front of contracts books and to the early weeks in contract courses. It so asserted that remedies were at least as important as any other part of contract doctrine and more important than most.

I did not meet Jack in the flesh until almost fifteen years later when I was a visiting Professor at Harvard. Having taught for well over a decade at Harvard, Jack was teaching at Boston University in 1973. On a snowy Sunday morning I was in my office at Harvard when Jack Dawson invited me next door and, with a sly grin, pulled out a bottle of whisky and two glasses. I think that was the most extraordinary offer of a drink that I have ever had. It confirmed my fantasies about Jack and made plausible all of the stories about his delightful eccentricities. What stories could not be true of one who offers Scotch neat at nine on Sunday morning?

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1. "I" means White; "We" means Peters and White.

Jack came to the faculty in 1927 and served on the faculty until 1958. Stories have it that he was offered a salary of something like 3,000 dollars when he was hired in 1927, but that the Dean shortly told him that the school could pay only 2,000 dollars. He came anyway. Jack's normal fare was Equity and Contracts, but he also taught Legal History and Comparative Law.

Many legends attend Jack's time on the faculty here. One can imagine that a Sunday morning offeror of whisky might have his notions about school rules. Evidently Jack's attire once deviated so far from the acceptable that the Dean spoke to him about it (he may have neglected to wear a suit coat to class on a warm day). In the next class Jack showed up in a white tie and tails. I suspect that this is merely representative of Jack's attitude toward rules he thought to be foolish.

As a Democrat on a staunchly Republican faculty Jack was even more deviant than a Republican is today. And Jack was not merely a Democrat; he was a candidate for the House of Representatives on the Democratic ticket in 1950 and 1952. It must have rankled him that some of his colleagues signed a newspaper advertisement opposing his election. Ann Arbor was then as Republican as it is now Democrat, and he was never elected to office.

His closest approach to elective office was by appointment. In the spring of 1951, Senator Arthur Vandenberg of Grand Rapids was on his deathbed. Governor G. Mennen "Soapy" Williams, a student and friend of Jack's,² allegedly proposed to appoint Jack as Vandenberg's replacement, but told Jack that it could be done only if it were done quickly and before the influential people in the Democratic party insisted otherwise.³ Supposedly Jack told the Dean and bought a blue suit appropriate for a swearing in after speaking to Soapy. It never happened. Whether others intervened or Soapy changed his mind cannot be confirmed.⁴

He later declined an opportunity to be appointed to the Michigan Supreme Court.⁵ Though Jack had served admirably as both Chief of the Middle East division of the Foreign Economic Administration

2. See FRANK MCNAUGHTON, *MENNEN WILLIAMS OF MICHIGAN: FIGHTER FOR PROGRESS* 60 (1960). After Williams's election as governor in 1950, Jack helped him put together a panel of policy advisors to craft his social programs. *Id.* at 139-40.

3. We are grateful to Professor Gareth Jones for confirming this anecdote. Personal Communication with Gareth Jones, Visiting Professor, University of Michigan Law School, in Ann Arbor, Mich. (Apr. 30, 2002) [hereinafter Personal Communication with Professor Jones (Apr. 30, 2002)].

4. Ultimately, the position went to Blair Moody, a prominent journalist for the Detroit News. See *Vandenberg's Successor*, *TIME*, Apr. 30, 1951, at 22 (suggesting that union pressure and a desire to promote Williams's national ambitions contributed to the appointment of Moody). Despite Moody's name recognition, however, he lost his bid for re-election during the 1952 Eisenhower landslide. HELEN WASHBURN BERTHELOT, *WIN SOME, LOSE SOME: G. MENNEN WILLIAMS AND THE NEW DEMOCRATS* 119 (1995).

5. *John Philip Dawson 1902-1985*, *HARV. L. SCHOOL BULL.* 36, 37 (1986).

during World War II and later as an advisor to the Greek government as a representative of the Foreign Trade Administration, "to him, there was nothing like the classroom."⁶

Jack was early and always a serious scholar. His first publication in the *Review* must have been the product of his research in England where he studied as a Rhodes scholar. Even in his post retirement service at Boston University, he continued to write. By today's standards, and even more by the standards of the time, he was prolific. By any standard his writing and thinking were powerful. Jack's writing was always felicitous and, as his writing about *Alcoa* shows, it was informed by a passion.

Jack Dawson was not only a fine and rigorous teacher and scholar, he was also a politician, a teaching innovator, a fine colleague, and, best of all, a judge of fine whisky.

II. JACK DAWSON THE SCHOLAR

As a scholar, Jack Dawson was a man ahead of his times. A Rhodes scholar after he graduated from Michigan Law School, he earned his D.Phil. from Oxford before returning to Michigan to teach.⁷ These days, elite law faculties overflow with multiple degrees, but in 1931 a law professor with a doctorate was a rare bird. His interest in the law did not end at the water's edge, nor did he limit himself to the legal world of the English-speaking peoples; from the very first, his articles reflected a knowledge of both German and French law.⁸ Dawson was also willing to travel into the past to explore the roots of modern doctrine and draw on history to provide lessons for contemporary law.⁹

6. *Id.*

7. For those interested in Jack's scholarly genealogy, he studied with Sir Paul Vinogradoff, whose own work covered much the same intellectual terrain as Jack's. . Personal Communication with Professor Jones (Apr. 30, 2002). We thank Professor Gareth Jones for this insight.

8. See, e.g., John P. Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924*, 33 MICH. L. REV. 171 (1934) [hereinafter Dawson, *Effects of Inflation in Germany*]. For a list of most (though not all) of Dawson's publications, see *Appendix: The Writings of John Philip Dawson*, 99 HARV. L. REV. 1126 (1986) [hereinafter *Appendix*]. His most important work, JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968), based on the Cooley lectures he gave in Ann Arbor in 1959, distills his knowledge of European law, tracing Roman, French and German law and comparing them to the Common Law tradition. An impressive piece of legal history, it also reflects Dawson's understanding of the craft of judging and the ways in which tradition disciplines the judicial process. His other books often drew on comparative law to explore the ways in which different systems addressed similar problems. See, e.g., JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* (1960); JOHN P. DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* (1980); JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951).

9. See, e.g., John P. Dawson & Frank E. Cooper, *The Effect of Inflation on Private Contracts: United States, 1861-1879* (pts. 1 & 2), 33 MICH. L. REV. 706, 852 (1935) [hereinafter Dawson, *Effects of Inflation in the United States*]; John P. Dawson, *Coke and Ellesmere Disinterred: An Attack on the Chancery in 1616*, 36 U. ILL. L. REV. 127 (1941); John P. Dawson,

In an era when professors might publish only a few articles during a career, the quantity of Jack Dawson's publications is all the more impressive.¹⁰ In many of these articles, with their historical depth and transnational breadth, an underlying question recurs: when and to what extent should judges do more than award damages in contract disputes?

Answering this question took Jack into a number of different areas in the law. In an early work, he explored estoppel and its relation to statutes of limitation.¹¹ He maintained that though the law could allow parties to contract away their rights under statutes of limitations, it should be willing to step in when one of the parties sought to abuse its rights under the contract. The courts should step in to help parties whose good faith attempts to resolve disputes amicably were repaid by knavery.¹² From estoppel he moved on to mistake, arguing that rescission or reform of a contract for mistake was the "enforcement of an intention defectively expressed."¹³ He noted that while courts need not necessarily enforce statutes of limitations to bar remedies for mistake, the longer an agreement continues (or the longer the period since value changed hands), the more a claim of mistake begins to look like a case of buyer's remorse.¹⁴

Dawson's interest in remedies was a product of his focus on the various ways in which parties sought the upper hand in contracting through the exertion of economic power. The mid-1930s was not too far removed from the heyday of doctrinal freedom of contract made so infamous in *Lochner*. For Dawson (and many of his peers), the question became how best to move from a "world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond to reality,"¹⁵ towards a realm of contract law that could control the worst abuses of economic power. As any first-year contract student learns, duress emerged from the Roman conception of *laesio enormis*, and Dawson followed the development of that idea from Rome through medieval Christendom to its fruition in modern French and German law in the

The Privy Council and Private Law in the Tudor and Stuart Periods (pts. 1 & 2), 48 MICH. L. REV. 393, 627 (1950).

10. The *Harvard Law Review* lists some thirty-one articles along with eleven books. See *Appendix, supra* note 8, at 1126-27.

11. John P. Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935).

12. *Id.* at 14.

13. John P. Dawson, *Mistake and Statutes of Limitations*, 20 MINN. L. REV. 481, 486 (1936).

14. *Id.* at 487. ("The longer these [justifiable] expectations have existed unchallenged, the more entitled they should be to judicial protection.")

15. John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (pt. 1), 11 TUL. L. REV. 345, 345 (1937).

early nineteenth century.¹⁶ He rooted his understanding of modern duress in Christian condemnation of usury but noted that usury, with its blanket condemnation of interest, was an easier standard to apply than judicial investigation of the discrete circumstances of a single inequitable bargain.¹⁷ His comparative study of French and German doctrine introduced not only the historical antecedents of the doctrine, but offered a comparative analysis of the pitfalls of too broad a vision of duress.¹⁸

Moving from the European to the American context, after World War II Dawson wrote a body of seminal work on duress in the United States, all published in the *Michigan Law Review*. In the first piece, he traced the historical evolution of the concept of duress, observing that what had come to be considered a full-fledged doctrine was in reality a reflection of, "the convergence of several lines of growth [The result of which] has certainly not been a coherent body of doctrine, unified around some central proposition; on the contrary, the conflict and confusion in results of decided cases seem greater than ever before."¹⁹

He sought to instill order into a morass of doctrine by distilling from it, in the style of American Legal Realism, some core notion open to broad application. Looking into the tort roots of duress, Dawson found that contemporary economic duress focused upon, "situations in which an unequal exchange of values has been coerced by taking advantage of a superior bargaining position."²⁰ This insight permitted him to assert that a more expansive notion of duress was consonant with the policing function of the courts, providing judges a legitimate way to intervene in private bargains to shore up the foundations of a market society.²¹

This vision of state as impartial policeman led him to discuss litigation as a form of duress.²² Although Dawson recognized the right of parties to seek redress in court, he also observed that, "[t]he sanctions of civil procedure constitute a system of state-organized coercion, supplied to private individuals for the specific purpose of enabling them to

16. *Id.* at 364-76.

17. John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (pt. 2), 12 TUL. L. REV. 42, 45 (1937).

18. *Id.* at 61 ("[T]he experience of German courts with processes of valuation amply reveals the manifold difficulties in judicial determination of a 'just price'. . . . Nevertheless, these difficulties, when seen and fully understood, do not prove insurmountable.").

19. John P. Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253, 288 (1947).

20. *Id.* at 285.

21. *See id.* at 281.

22. John P. Dawson, *Duress Through Civil Litigation* (pts. 1 & 2), 45 MICH. L. REV. 571, 679 (1947).

effectuate their demands.”²³ Though in mid-century America criminal law was no longer a legitimate means of encouraging recalcitrant debtors to pay up, Dawson was troubled by the ability of parties to use the threat of civil litigation as a tool for obtaining more in private settlement than they would otherwise realize in the courts.²⁴ This concern with duress was in part motivated by a genuine fear of the ability of parties with superior bargaining power to shift the burdens of risk and uncertainty onto the weak.²⁵ Jack found the idea that the state as neutral policeman should intervene to grant the strong the benefit of unforeseen circumstances too much to stomach.

This solicitude for the weak and desire to ferret out the true basis of every bargain informed the other major strand of Dawson’s research. From the first, he was interested in the impact of inflation upon the law of contracts. As a Rhodes Scholar in the mid-1920s, he had a ringside seat for the hyper-inflation that destroyed the German middle-class and set the stage for the rise of Hitler. His very first publications in the *Michigan Law Review* investigated judicial attempts to reform contracts in the face of inflation.²⁶ Looking at the German courts in the period from 1915-24, he concluded that they had done everything in their power to ameliorate the impact of inflation, failing only when the German economic system finally collapsed completely.²⁷ Moreover, he noted that the judicial experiments in stemming inflation helped guide legislative responses to the crisis.²⁸ He also studied American history during the Civil War period in an effort to glean from it some insight into the proper judicial role in curbing the impact of inflation on contracting parties.²⁹ Distinguishing the hyperinflation of the Confederate and Weimar periods from less dramatic instances of monetary depreciation, he recognized the importance of inflation as a policy tool that could be used as a means of debt relief (a significant issue if you consider that he was writing in 1935).³⁰ Thus, judicial intervention that might be warranted in a period of excessive inflation might, if inflation were moderate, be an impediment to effective legislative or administrative policy.³¹ Because judicial remedies for inflation undermine the “security of transaction” necessary to the legitimacy of the contract system, judges should refrain from intervening

23. *Id.* at 573.

24. *Id.* at 577.

25. *Id.* at 687-93.

26. Dawson, *Effects of Inflation in Germany*, *supra* note 8.

27. *Id.* at 238.

28. *Id.* at 219-36.

29. Dawson, *Effects of Inflation in the United States*, *supra* note 9.

30. *Id.* at 909.

31. *Id.* at 912.

unless "the influence on prices of purely monetary factors [emerges] as a factor independent of ordinary influences of supply and demand."³²

Jack's work did not end with his exploration of the substantive law, however. He was also keenly interested in the craft of judging and the development of the role of the judge over time. His *History of Lay Judges*³³ investigates the (to the contemporary observer) curious tradition of lay judges in Western legal systems. In pre-modern societies, lacking a clearly expressed vision of separation of powers, "it was common to fuse with dispute-settlement some rule-making and executive functions."³⁴ The overlapping functions of those entrusted with settling social disputes meant that there was less demand for officials whose sole function was the definition and application of the law. Though increasingly complex societies demand greater specialization, a residual interest in ensuring the legitimacy of law through popular participation in part explains the continued vitality of lay participation in the judicial process.³⁵ That lay participation also permits the court to draw on the expertise of others in making its decisions, based on, "an assumption that law is better administered if it draws on the good sense and practical wisdom of persons in whom these qualities have not been severely warped by excessive exposure to the law."³⁶ The warping effects of a legal education aside, Jack pointed out that the essence of judging lies in the legitimacy of the process as well as the efficacy of the decisions that emerge from it.

Though much of Jack's work was ground-breaking, his magnum opus was *Oracles of the Law*.³⁷ Turning his attention from lay judges to the history of the professional judiciary and its role in the case law system, he emphasized the "creative role of adjudication."³⁸ While the primary role of judicial process, particularly in earlier periods, was the peaceful resolution of social conflict "conflict itself, though potentially dangerous, is a major source of growth and change."³⁹ For Jack, an increased separation of judicial from administrative and legislative functions still "requires the legal order to take account of new values and human needs that in society as in our private lives conflict can be creative."⁴⁰ This creativity, however, had its limits; turning his comparativist's eye on France, Jack argued that when the French courts exceeded

32. *Id.* at 913.

33. *See supra* note 8.

34. *Id.* at 1.

35. *See id.* at 288-91.

36. *Id.* at 293.

37. JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968).

38. *Id.* at xiii.

39. *Id.*

40. *Id.*

their powers (even in the cause of opposition to authoritarianism) they provoked a political reaction that sought to rein in the power of the judges.⁴¹

If for Jack judges could undermine themselves by being on the one hand too timid to apply their creative powers to new situations and on the other too bold in the incursions upon the realm of the political, where did the happy medium lie? Ultimately, he found it in Rome.

The extraordinary achievement of the Roman jurists owed much, it seems, to their own self-imposed limitations. They were conservatives and traditionalists, with profound respect for the inherited tools of their craft. Through the conflicts of opinion that were numerous among them they perfected these tools and used them with increasing precision Most of their attention was directed, not to theoretical synthesis, but to the consistent and orderly treatment of individual cases Their assumptions were fixed, the main purposes of the social and political order were not to be called in question, the system of legal ideas was too well known to require much discussion. They were problem-solvers, working within this system and not called upon to solve the ultimate problems of mankind's needs and destiny. They work case by case, with patience and acumen and profound respect for inherited tradition. Despite the long centuries that have intervened, despite our vastly different hopes for mankind and its future, we in the twentieth century can still profit from their work. Those who should feel the strongest affinity for them are persons trained in American case law.⁴²

Taking nothing away from the wisdom and intelligence of modern judges, Jack recognized that they stand on the shoulders of giants. Moreover, the range of issues they have to deal with include matters far outside their ken; better to defer to tradition, precedent, and the knowledge of experts.

In his last major scholarly publication, Jack revisited the question of inflation and frustration of contract, this time in the context of the *Alcoa* case;⁴³ he brought to bear both his knowledge of substantive law and his vision of the proper role of the judge in rebuking the judge for overstepping the bounds of prudence and the law.

The facts of *Alcoa* are, for the 1970s, not particularly unusual. In the mid-1960s, Essex Wire decided to increase its production of aluminum wire products.⁴⁴ In the spring of 1967, Alcoa and Essex Wire entered into a contract that provided for Essex wire to supply Alcoa with alumina which Alcoa would then smelt into [aluminum].⁴⁵ The price

41. *Id.* at 370-71.

42. *Id.* at 114-15.

43. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980). See generally, John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1 (1984) [hereinafter *Judicial Revision in the United States*].

44. *Alcoa*, 499 F. Supp. at 55.

45. *Id.* at 56.

clauses of the contract included an escalator clause providing for changes in price based on both the Wholesale Price Index ("WPI") and the average labor wages of Alcoa employees at the plant in which the smelting was done.⁴⁶ As a result of the 1973 OPEC oil embargo, however, the price of oil-fired electricity (the single largest non-labor cost factor in aluminum conversion) rose dramatically and, "[a]s a result, [Alcoa's] production costs rose greatly and unforeseeably beyond the indexed increase in the contract price."⁴⁷ In the face of this inflation and a loss on the contract in 1978 (the last year of performance before the suit) of over eight million dollars, Alcoa sought reformation of the contract on the grounds of mistake, frustration, and impracticability.⁴⁸

Finding in favor of Alcoa, Judge Teitelbaum reasoned that the parties had in fact made a mutual mistake of fact by agreeing that the WPI indexing formula would prove suitable to meet their expectations.⁴⁹ On the same facts, the court held that Alcoa had also proved its case with regard to frustration and impracticability.⁵⁰ In fashioning a remedy, however, the judge threw caution to the wind.⁵¹ Reasoning that "[t]his case is novel," the court was willing to impose its remedy out of fear that parties might otherwise refuse to enter into long-term contracts.⁵² The court rejected "the hoary maxim that the courts will not make a contract for the parties."⁵³ Reasoning that "in this dispute the Court has information from hindsight far superior to that which the parties had when they made their contract," Judge Teitelbaum concluded that, "the parties may both be better served by an informed judicial decision based on the known circumstances than by a decision wrenched from words of the contract which were not chosen with a

46. *Id.* Alcoa developed its indexing system with the aid of now-Federal Reserve Chairman Alan Greenspan. *Id.* at 58.

47. *Id.*

48. *Id.* at 59. Interestingly, Alcoa had to that point made a net profit of nine million dollars on the contract (inclusive of its losses). *Id.* at 65-66.

49. *Id.* at 63 ("Both [parties] knew that Essex sought an objective pricing formula and that [Alcoa] sought a formula which would cover its out of pocket costs over the years and which would yield it a return of around four cents a pound The testimony was clear that each assumed the Index was adequate to fulfill its purpose. This mistaken assumption was essentially a present actuarial error.").

50. *Id.* at 72.

51. *See id.* at 80. The Court imposed a new scheme that made the contract price the lesser of either 1) the contract ceiling price as calculated under the original indexing clause or 2) the greater of either that contract price calculated according to the terms of the contract or "that price which yields [Alcoa] a profit of one cent per pound of aluminum converted." *Id.*

52. *Id.* at 89.

53. *Id.* at 91.

prevision of today's circumstances."⁵⁴ His later observation that, "[t]he Court gladly concedes that the parties might today evolve a better working arrangement by negotiation than the Court can impose,"⁵⁵ proved far more prescient; Alcoa and Essex Wire settled before the case was heard on appeal.⁵⁶

In analyzing *Alcoa*, Jack drew on his comparative study of the German legal system,⁵⁷ this time as an example of what not to do in providing a remedy.⁵⁸ He claimed that the *Alcoa* court, in trying to solve the contract problem posed by the inflation of the mid-1970s, had violated three basic precepts of contract. First, the judge intervened not to provide a remedy for past injustice, but to impose a prospective solution upon the parties that failed to give form to their original intent.⁵⁹ Second, the judge, in fashioning this relief, gave the parties a club with which to bash one another until they came to terms on their own.⁶⁰ Third, such drastic judicial intervention in the contracting process both undermines public faith in the legal system and absolves the parties of any responsibility to negotiate over risks that are predictable but the exact impact of which is unforeseeable.⁶¹ In Dawson's view, parties should be forced to take account of all but the most extreme inflation, and even in those cases, remedies should be limited to returning the injured party to the status *ex ante facto*.

III. AFTER ALCOA

In his article about the postwar German experience with impracticability, frustration, mistake and the like, Jack criticizes the German courts for so freely rewriting contracts that had failed because of mistake or changed circumstances.⁶² In his first Boston article he traces the German courts' reaction to the contract dislocations that attended the astronomical inflation suffered by the Germans after World War I.⁶³ He notes how the German courts, behaving like extremely naughty common law courts, began to free parties from contracts because of

54. *Id.* at 91.

55. *Id.*

56. Dawson, *Judicial Revision in the United States*, *supra* note 43, at 28.

57. John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U. L. REV. 1039 (1983) [hereinafter Dawson, *Judicial Revision in Germany*].

58. Dawson, *Judicial Revision in the United States*, *supra* note 43, at 29.

59. *Id.* at 27.

60. *Id.* at 28. This is reminiscent of Dawson's discussion of duress in civil litigation, and makes the court almost an active participant in that part of the process.

61. *Id.* at 33.

62. Dawson, *Judicial Revision in Germany*, *supra* note 57.

63. See generally Dawson, *Effects of Inflation in Germany*, *supra* note 8.

supervening causes, despite the conscious and severe restrictions in the German Code of 1900 on freeing parties from their contracts on such grounds.⁶⁴

In one of the early German cases a seller had contracted in 1921 to sell iron bars and to deliver half of them in 1922.⁶⁵ When the seller failed to deliver, the buyer sued for specific performance in return for his payment of the original contract price in marks. By the time the case came before the appellate court in 1924, the buyer's entire payment would have been worth less than a penny. Accordingly the court ordered the contract "revalorized" (*i.e.*, ordered the lower court to require the buyer to pay something that was roughly equivalent to the value of the iron at the time of delivery).⁶⁶ This case and many more like it were still fresh in the minds of judges and lawyers after World War II.

The same kind of inflation that followed the First did not follow the Second World War; instead, Anglo-American bombing, the Allied conquest, and the sticky fingers of the Russians nearly ruined the German economy. Jack tells of an early postwar case that set the tone for contract revisions. In that case, two buyers had made down payments on Volkswagens in 1938 or 1939. Urged on by one of Hitler's dreams, they and more than 300,000 other Germans had paid more than 250 million marks to the company that was to manufacture the peoples' car.⁶⁷ Part of that money had been used to build a plant to manufacture the Volkswagen. The factory was taken over for the war effort, mostly destroyed by American bombing, and the Russians expropriated the trust account that contained all of the down payments that had not been used to build the plant. When it became clear that a postwar Volkswagen would cost 4,400 marks, not the contracted 990, and that the remaining down payments had been expropriated and the plant destroyed, one might have expected the court to turn the plaintiffs away. It did not. The high court agreed with both parties that the "foundations" of these contracts had been "destroyed," but instead of avoiding the contracts the court sent the case back to the lower court to determine how many of the 300,000 potential plaintiffs could still pay or wanted Volkswagens and what they should now pay — in addition to their down payments. Despite the multiple problems associated with 300,000 different potential plaintiffs (some of whom wanted a car and some who did not), the need to set a new price for the contracts and to apportion the loss of the trust funds, the lower court was to rewrite and then enforce the rewritten contracts.

64. *Id.* at 1041-70.

65. *Id.* at 1060.

66. *Id.*

67. For a discussion of the Volkswagen case, see *id.* at 1083-87.

Following the Volkswagen case, it must have seemed child's play to rewrite other contracts that had only two parties and called merely for setting proper mortgage payments or adjusting sales prices. Shortly, German judges and litigants accepted revision of contracts as a conventional remedy.⁶⁸ Jack concludes his summary of the German experience with this dismal description:

[I]t seems plain that from every point of view court-ordered 'adjustment' of frustrated contracts, as it has now been established in Germany, is a major impairment of freedom of contract, carried into areas for which, by hypothesis, the contracting parties did *not* provide and in which uninhibited freedom is more than usually needed.⁶⁹

Jack commends one German scholar's "rear guard action" against an enemy when the "main battle was lost more than fifty years ago."⁷⁰ The Germans remembered too well their appropriate rewriting of contracts in response to the inflation of the 1920s and applied too readily to the different issues of the 1950s.

A. *Alcoa*

Jack's discussion of *Alcoa*⁷¹ is even sharper.⁷² He notes that the parties had negotiated an elaborate escalation clause and that the case was hardly one of mistake — despite the judge's asserting to the contrary. But he was most offended by the judge's claim to have the power and knowledge not merely to avoid the contract but to draft a new and elaborate contract for the remaining *seven years* of the Essex-Alcoa deal. The professorial advocates of *Alcoa's* approach get a small share of Jack's anger.⁷³

His unhappiness with *Alcoa* arises from the fear that other courts, encouraged by such a prominent decision and by the professors' in-dorsement,⁷⁴ would not only enlarge the grounds for avoidance of con-

68. *Id.* at 1087.

69. *Id.* at 1089 (emphasis in original).

70. *Id.* at 1098. Jack was generally an admirer of the German legal system; even here, he identified a number of scholars who took issue with the German Courts' treatment of inflation in the post World War II period. *See id.* at 1096-98.

71. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

72. *See generally* Dawson, *Judicial Revision in the United States*, *supra* note 43.

73. *See id.* at 28-30. Dawson critically mentions Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981); Michael N. Zundel, Comment, *Equitable Reformation of Long-Term Contracts — The "New Spirit" of ALCOA*, 1982 UTAH L. REV. 985; and Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U. L. REV. 575 (1980).

74. Dawson, *Judicial Revision in the United States*, *supra* note 43, at 31 ("The troublesome question for me at least, is — how far would the *Alcoa* case and the glosses like this that are being written to praise it carry us along the route that German courts have travelled?").

tracts but also embrace Judge Teitelbaum's claim that courts can and should fashion new contract terms for the remaining periods in contracts that had not yet expired when suit was filed. Undoubtedly Jack's fears were fed by his knowledge of the German cases which he had studied in the 1930s and again in the 1980s. If the intellectual German judges, trained in a civil law and members of a society famous for its strict obedience to rules could ignore the directions of their Code and so easily slip down the slope of contract revision, surely the Americans who cared less for rules and were not bound by a Code would slip quicker and farther.⁷⁵

He was wrong. American courts have not only refused to rewrite contracts, they appear to have held the line at avoiding them. The decisions of the last twenty years show Jack's fears to have been ill founded.

B. *American Cases After Alcoa*

Since *Alcoa* there have been several disruptions of commodity markets that have given the courts hundreds of opportunities to hear parties' pleas to be freed from contract obligations because of mistake or supervening causes. *Alcoa* itself arose out of an increase in electricity rates that was caused by the rise in oil prices after the Arab oil embargo.⁷⁶ It was preceded by the Uranium bubble that was ended by the accident at Three Mile Island and followed by disruptions in the markets for natural gas, coal, and electricity.

The disruption in the natural gas markets was a direct result of government regulation of that market.⁷⁷ In 1970, the Congress passed the Economic Stabilization Act.⁷⁸ That Act fixed prices for gas sold in

75. *Id.* at 1-2.

76. *Id.* at 26-27.

77. Regulation over pipelines was established by the Natural Gas Act ("NGA") of 1938. In 1954 the Supreme Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), construed the NGA to give the Federal Power Commission authority over gas producers. See David Crump, *Natural Gas Price Escalation Clauses: A Legal and Economic Analysis*, 70 MINN. L. REV. 61 (1985); Richard J. Pierce, Jr., *Natural Gas Regulation, Deregulation and Contracts*, 68 VA. L. REV. 63, 64 (1982) (showing ways in which gas regulation, phased deregulation and long-term contracts interact for "results that are both inequitable and inefficient"); Susan Morris, Comment, *Gas Purchase Contracts: Equitable Remedies For Breach*, 24 HOUS. L. REV. 991, 996 (1987); see also *Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1532, 1532 n.3 (8th Cir. 1993) (noting deregulatory effects exacerbated by party overreaching and breach of contract causing a "confusing morass").

78. See 12 U.S.C.A. § 1904 (Supp. 1971) which codified Title II of Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, "known as the 'Economic Stabilization Act of 1970', authorized the President, within an established procedural framework, to stabilize prices, rents, wages, salaries, interest rates, dividends and similar transfers, and establish priorities for use and allocation of supplies of petroleum products, including crude oil, and to issue standards to serve as a guide for determining levels of wages, prices, etc., which would allow for adjustments, exceptions and variations to prevent inequities, taking into account changes in productivity, cost of living and other pertinent factors."

the interstate market.⁷⁹ Because the fixed prices did not justify exploration for and development of sufficient gas reserves to satisfy demand⁸⁰ the controls shortly led to shortages⁸¹ and, in some cases, to threats by public officials in the Midwest and East to punish the gas pipelines if they did not provide enough natural gas to heat hospitals and schools.⁸² The market was also distorted by the fact the intrastate gas was not controlled,⁸³ so it was in the interest of producers to sell at free market prices into the local market.⁸⁴

When the gas controls were lifted over a phased period by new legislation,⁸⁵ pipeline buyers agreed to buy gas in long-term contracts at what proved to be improvidently high prices.⁸⁶ When the market escaped entirely from the price controls and particularly when the Federal Energy Regulatory Commission ("FERC") released utility buyers from their long-term contracts,⁸⁷ the pipelines had long-term high cost contracts to purchase gas but no long-term buyers for the high priced gas so purchased. Those circumstances caused Columbia Gas to file bankruptcy in order to escape more than 4,000 long-term gas purchase

79. The Economic Stabilization Act instituted price controls over a number of subjects (rent, wages, etc.), including commodities. For natural gas, the ESA worked in conjunction with the Natural Gas Act of 1938 as amended. 15 U.S.C.A. § 717-717w (1976).

80. Gary D. Allison, *Energy Sectionalism: Economic Origins And Legal Responses*, 38 Sw. L.J. 703, 714 n.41 (1984) (noting that the 1978 Natural Gas Policy Act established higher price ceilings for 'newer' gas).

81. Professor Richard Pierce reports that "[r]eserves declined from 198.1 trillion cubic feet in 1967 to 134.3 trillion cubic feet in 1973" and by 1977 the shortfall grew to 26.2% from 3.4%. Richard Pierce, *Natural Gas Regulation, Deregulation and Contracts*, 68 VA. L. REV. 63 n.18 (1982).

82. See James J. White, *Gas Sale Contracts Under the Uniform Commercial Code*, 47 INST. ON OIL & GAS L. & TAX'N § 9.01, § 9.02 (1996).

83. 15 U.S.C. § 717(c) (2000).

84. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 414 n.19 (1983) (citing a Federal Trade Commission Staff Report).

85. The new legislation was the National Gas Policy Act of 1978, Pub. L. 95-621, Title I, Repealed by Pub. L. 101-60, § 2(b), July 26, 1989; see also *Texaco Inc. v. Duhe*, 274 F.3d 911 (5th Cir. 2001). See generally J. David Hughes, *Indefinite Escalators: 1985 Does FERC Have a 'Stairway' Down?*, 4 ENERGY L.J. 189, 190 (1983).

86. See *Consol. Edison Co. of New York, Inc. v. F.E.R.C.*, 823 F.2d 630, 640 n.13 (D.C. Cir. 1987) (litigation rising from FERC's market manipulations intended to alleviate the high-cost of take-or-pay contracts once supplies became plentiful).

87. Federal Energy Regulatory Commission ("FERC") Order No. 380 effective June 1, 1985. *But see* *Atl. Richfield Co. v. ANR Pipeline Co.*, 768 S.W.2d 777 (Tex. App 1989) (relieving pipeline company of take-or-pay obligations under force majeure clause where customers were released from obligations by FERC Order 380); see also Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 18 C.F.R. §§ 2, 157, 250, 284, 375, 381 (1985); Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 18 C.F.R. §§ 2, 284 (1987); Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 18 C.F.R. § 284 (1992).

contracts at prices that far exceeded the free market price.⁸⁸ These circumstances also caused many buyers to breach their "take or pay" obligations and resulted in lawsuits all over the West.⁸⁹

The abrupt end to the licensing of new nuclear plants, the shortage of natural gas and the rise in oil prices made utilities turn back to coal for generating electricity.⁹⁰ The environmental risks from soft eastern coal made utilities use low sulfur western coal. Now well aware of the risks of under-pricing a commodity in a long-term contract, coal sellers seem to have achieved escalation clauses that caused the price of western coal in those contracts to rise well above the short-term market price. This caused buyers to make a series of fruitless challenges to their contracts.

The contracts for the long-term sale of electricity that were made by California, and perhaps by other western buyers, in the summer of 2001 have yet to yield their judicial fruit, but one can be sure that the fruit is in the bud.⁹¹ In the fall of 2001 California was reported to be

88. *In re Columbia Gas Sys. Inc.*, 997 F.2d 1039, 1052 (3rd Cir. 1993).

89. See J. Michael Medina et al., *Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185, 187-92 (1987).

90. This trend was boosted by Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (1974), which mandated that "the oil- and gas-burning electric utilities of the nation would, where feasible, have to convert to the use of coal." Robert Meltz, *The Esca Coal Conversion Program: Saving Oil The Hard Way*, 5 ENVTL. L. REP. 50146 (1975); see also Richard J. Pierce, Jr., *The Regulatory Treatment Of Mistakes In Retrospect: Canceled Plants And Excess Capacity*, 132 U. PA. L. REV. 497 (1984); Mark Sievers, *An Economic Analysis Of Utility-Coal Company Relationships*, 8 J. ENERGY L. & POL'Y 27 (1987); Michael Evan Stern & Margaret M. Mlynzack Stern, *A Critical Overview Of The Economic And Environmental Consequences Of The Deregulation Of The U.S. Electric Power Industry*, 4 ENVTL. LAW. 79, 86 (1997); Joseph P. Tomain, *Electricity Restructuring: A Case Study In Government Regulation*, 33 TULSA L.J. 827 (1998); Joseph P. Tomain, *Focus On Natural Resources Theory The Dominant Model Of United States Energy Policy*, 61 U. COLO. L. REV. 355 (1990) (a 100-year history of U.S. energy policy); Brent L. Vanderlinden, Note, *Bidding Farewell To The Social Costs Of Electricity Production: Pricing Alternative Energy Under The Public Utility Regulatory Policies Act*, 13 J. CORP. L. 1011, 1015 (1988); Note, *Captive Coal Pricing And The Regulation Of Utility-Affiliate Transactions*, 68 VA. L. REV. 1409, 1415 n.31 (1982).

91. In 1996 California Governor Republican Pete Wilson deregulated electricity wholesale prices but retained caps on retail prices. When the wholesale prices skyrocketed, yet retail prices could not be raised, electrical companies went so close to bankruptcy that out-of-state sellers refused to sell on credit. Governor Gray Davis then spent \$6.2 billion, most if it from the general fund, in the period from January to May of 2001, and in June borrowed \$4.2 billion more. By July, the State had negotiated thirty-eight long-term contracts worth \$43 billion over ten years with suppliers; and wholesale prices then plunged. This prompted "buyers remorse" with the expected amount of finger pointing and demands that the contracts be renegotiated, or breached and damages paid. To avoid insolvency, California is trying to float a \$13.2 billion dollar bond so there is money to pay for hospitals and schools, yet critics charge the bond does nothing to get California out from under the long-term contracts. Gray Davis claims that signing the long-term contracts is the act that drove the spot-market down. See Mitchel Benson, *California Controller Is Raising Concerns On Big Bond Sale*, WALL ST. J., May 24, 2001, at A12; A.G. Block, *If Davis Fails, Bush May Be White Knight*, L.A. TIMES, Jan. 14, 2001, at M1; Dan Morain, *Concern Over Price of Long-Term Power Pacts Grows Embedded Costs May Yield More Rate Hikes, Critics Say, and the \$43-Billion Total Could Complicate Plans to Rescue Edison*, L.A. TIMES, July 9, 2001, at B7;

selling electricity on the spot market at as little as one dollar per megawatt-hour that it had bought in long-term contracts for an average of \$290 per megawatt-hour. With that kind of discrepancy between long-term prices and spot prices, litigation cannot be far behind.⁹²

Added to the cases from contracts between buyers and sellers of commodities in long-term contracts are the mine-run real estate lease cases.⁹³ These, of course, have been around for more than a century, but they too offer possibilities for a court to free one of the parties from his lease because of unexpected circumstances.

So, have the courts gone soft, as Jack feared? We do not think they have. Of course, the legal doctrines have hardly changed at all. We received the doctrines of mistake, impossibility and frustration long ago from 19th century English law. The Restatement,⁹⁴ Article 2 of the UCC,⁹⁵ and our case law have expanded impossibility into impracticability, but there has been little other change in the *law as written*.⁹⁶

George Skelton, *Davis' Critics Should Wake Up, Smell the Kilowatts*, L.A. TIMES, June 21, 2001, at B8.

92. California and electricity sellers are already in arbitration over the long-term contracts. Ricardo Alonso-Zaldivar; *Dan Morain, Davis Open to Noncash Ways to Repay State for Overcharges Energy*, L.A. TIMES, July 7, 2001, at A13. California renegotiated its long-term contracts with power suppliers in exchange for settling market-manipulation suits it was pursuing against those suppliers, Calpine and Constellation. *Power Plays Energise Electricity Industry*, FIN. TIMES, Apr. 26, 2002, at 24. Obviously, state governments (particularly one as large as California) have more arrows in their quiver than private actors; recent revelations about market manipulations by Enron and others suggest that a certain amount of reregulation may be in the offing. See James Flanigan, *Regulation, the Cure for Energy Ills, is Coming*, L.A. TIMES, May 12, 2002, Pt. 3, at 1.

93. See, e.g., *Freidco of Wilmington, Ltd. v. Farmers Bank of Del.*, 529 F. Supp. 822, 830 n.9 (D. Del. 1981) (in a case regarding a private lease, the lessor demanded that the court eliminate a price cap because the 1970s oil embargo had driven the cost of utilities for a commercial building far above the cap. While the court refused plaintiff's demand on failure to prove impracticability, it noted in footnote nine that it certainly had the authority for this remedy); *George Backer Mgmt. Corp. v. Acme Quilting Co., Inc.*, 385 N.E.2d 1062, 1066 (N.Y. 1978) (rent escalation clause tied to tenants income).

94. The RESTATEMENT (SECOND) OF CONTRACTS § 11, Reporter's Note states:

This Chapter . . . adopts the central notion of Uniform Commercial Code s 2-615 of 'a contingency the non-occurrence of which was a basic assumption on which the contract was made' in dealing with both impracticability and frustration. As to the former, it substitutes the term 'impracticability' for 'impossibility' as better expressing the extent of the increased burden that is required.

RESTATEMENT (SECOND) CONTRACTS § 11 (261) deals with Impracticability in general arising after contract formation. § 11 (262-64) define three specific fact circumstances: *Death Or Incapacity Of Person Necessary For Performance*, *Destruction, Deterioration Or Failure To Come Into Existence Of Thing Necessary For Performance*, and *Prevention By Governmental Regulation Or Order*, respectively. Section 11(266(1)) deals with impracticability existing at the time of contracting:

Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

95. See Article 2-615(a), which states:

Of course, the law written is seldom the law applied. And any reader of a few cases on mistake or supervening causes appreciates how sloppy the standards on what is a sufficient mistake, an adequate frustration, or a large enough impracticability to void a contract really are. One man's frustration is another's hard bargain. Without a more extensive reading of the cases than we have had time to do, one cannot be sure that the practice is the same as before *Alcoa*, but we see no evidence of any general willingness to void contracts that would have been enforced before *Alcoa*.⁹⁷

In the take or pay cases, almost every court held buyers to their contracts.⁹⁸ Witness the desperate act of the Columbia Gas Pipeline

Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (emphasis added).

96. For cases in various circumstances where the defense of impracticability was ineffective, see *Arabian Score v. Lasma Arabian Ltd.*, 814 F.2d 529 (8th Cir. 1987) (death is a foreseeable risk when purchasing a horse); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966) (engineering difficulties); *General Motors Corp. v. Paramount Metal Prods. Co.*, 90 F. Supp. 2d 861 (E.D. Mich. 2000) (seller of automobile frames not excused where performance would bankrupt the seller); *Power Eng'g & Mfg., Ltd. v. Krug Intern.*, 501 N.W.2d 490 (Iowa 1993) (1993 embargo of Iraq); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo.App. 1979) (profitability immaterial for obligations under long-term coal contract); and *Thaddeus Davids Co. v. Hoffman-La Roche Chem. Works*, 178 A.D. 855, 166 N.Y.S. 179 (N.Y.A.D. 1917) (delivery of chemicals after World War I broke out). Cf. *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985) (excused from refusal of delivery of military aircraft parts to Iran after the 1979 revolution, pursuant to Air Force order).

97. *Marcovich Land Co. v. J. J. Newberry Co.*, 413 N.E.2d 935, 943 (Ind. App. 1980). This Indiana court was flatly derisive of the *Alcoa* court's "purported" interpretation of Indiana doctrine of impracticability. *Id.*

98. See *PGC Pipeline v. Louisiana Intrastate Gas*, 791 F.2d 338 (5th Cir. 1986); *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157 (W.D. Okla. 1989) (where government regulation permitted, but did not require, reduced production, it did not render the producer unable to meet contract: no impracticability); *Universal Res. Corp. v. Panhandle E. Pipeline Co.*, No. CA3-85-0723-R (N.D. Tex. Apr. 1, 1986), *aff'd*, 813 F.2d 77 (5th Cir. 1987); *Koch Indus., Inc. v. Columbia Gas Transmission Corp.*, No. 83-990-A, slip op. at 11 (M.D. La. Mar. 14, 1985); *Sid Richardson Carbon & Gasoline Co. v. InterNorth, Inc.*, 595 F. Supp. 497, 500 (N.D. Tex. 1984); *N. Illinois Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049 (Ill. App. 1984); *Golsen v. ONG Western, Inc.*, 756 P.2d 1209 (Okla. 1988). The contracts from which buyers were released contained force majeure clauses. See Rodrick J. Coffey, *Fairness Is In The Eye Of The Beholder: The Conflicting Interpretations Of The Correct Measure Of Damages For Breaches Of Natural Gas Contracts Containing Take-Or-Pay Provisions*, 14 BYU J. PUB. L. 151 (1999); John Burritt McArthur, *The Take-Or-Pay Crisis: Diagnosis, Treatment, and Cure for Immorality in the Marketplace*, 22 N.M. L. REV. 353 (1992); J. Michael Medina, *The Take-Or-Pay Wars: A Cautionary Analysis for the Future*, 27 TULSA L.J. 283 (1991); A.F. Brooke, Note, *Great Expectations: Assessing the Contract Damages of the Take-or-Pay Producer*, 70 TEXAS L. REV. 1469, 1478 (1992); Ryan E. Griffiths, Comment, *Roye Realty & Developing, Inc. v. Arkla, Inc.: Two Steps Forward and Two Steps Back in the Take-or-Pay Saga*, 20 OKLA. CITY U. L. REV. 219, 234-35 (1996); Marc Ryan Stimpert, Note, *Lenape Resources Corporation v. Tennessee Gas Pipeline Company: Natural Gas Take-Or-Pay Contracts Under The Uniform Commercial Code*, 18 ENERGY L.J. 421 (1997). But see *Atlantic Richfield Co. v. ANR Pipeline Co.*, 768 S.W.2d 777 (Tex. App 1989) (relieving pipeline

that threw itself into chapter 11 because it could find no other way to avoid several thousand losing contracts to buy gas at above market prices.⁹⁹ Buyers of coal fared no better than the buyers of gas. They too were made to pay above market prices when their sellers' clever contracts caused the contract prices to rise far above spot prices.¹⁰⁰ The same holds true for leases and other miscellaneous contracts.¹⁰¹

There is no evidence in the cases of the last two decades that the courts have become more receptive to pleas of mistake or supervening changes.¹⁰² If anything, the lessons of the game theorists may be sinking in. We now appreciate more than before that parties at the time of contracting and later will respond to the events considered here. The manifold shocks to the commodities market since 1960 are now known to every negotiator of a long-term commodity contract. That the courts have not welcomed pleas for avoidance must also be known to these negotiators. With this knowledge any sensible negotiator should reexamine his behavior. Some may eschew long-term contracts¹⁰³ in the gas market, for it is only the long-term that makes price diversions large and unbearable. Others may be more careful or not as greedy in negotiating escalation clauses.¹⁰⁴ And, of course, careful students of the

company of take-or-pay obligations under force majeure clause where customers (MichCon) were released from obligations by FERC Order 380).

99. *In re Columbia Gas Sys., Inc.*, 997 F.2d 1039 (3rd Cir. 1993); *In re Columbia Gas Sys., Inc.*, 133 B.R. 174 (Bankr. D. Del. 1991) (concerning an unsecured creditor's motion to be put on unsecured creditor committee). Columbia evidently did not include "market-out" provisions in its contracts which permit a renegotiation of price terms if gas cannot be resold at marketable rates. See *Office of Consumers' Counsel v. F.E.R.C.*, 783 F.2d 206, 216 n.20 (D.C. Cir. 1986).

100. See, e.g., *Kentucky Utils. Co. v. S.E. Coal Co.*, 836 S.W.2d 392 (Ky. 1992) (finding that U.C.C. provision excusing seller from performance when performance has become commercially impracticable because of unforeseen circumstances did not apply to long-term coal supply contract, where contract contained price review provision permitting readjustment of coal price). See generally Steven Walt, *Expectations, Loss Distribution, and Commercial Impracticability*, 24 IND. L. REV. 65 (1990).

101. For a discussion of impossibility as applied in leases, see Nicholas R. Weiskopf, *Frustration of Contractual Purpose — Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 252-55 (1996).

102. *Marcovich Land Co. v. J. J. Newberry Co.*, 413 N.E.2d 935 (Ind. App. 1980) (declining to excuse landlord from rebuilding commercial building destroyed in fire merely because financing was unavailable).

103. Fereidun Fesharaki & Robert R. Smith, *Environmental Concern To Stimulate Asia-Pacific LNG Use*, OIL & GAS J., July 16, 2001, at 68 (observing that gas contracts must be of shorter duration and take-or-pay clauses must allow greater latitude for LNG to remain competitive with coal and oil).

104. Amy R. Templeton, *Prudence Of Electric Utilities' Coal Contracts and Fuel Procurement Practices: The Impact On Coal Contract Negotiations*, 89 W. VA. L. REV. 715 (1987) (assessing the impact of agency oversight on coal utility contracts with suppliers).

cases might even learn about the kinds of clauses that work and those that do not.¹⁰⁵

Judges' familiarity with the waves of volatility that first roiled the uranium, then the oil, and later the gas, coal and electricity markets, in order, has made them progressively more skeptical about parties' claims of cataclysm. Better than before, the courts appreciate that any judicial outcome — whether it is avoidance or refusal to avoid — is more likely to be followed by renegotiation of the contract than by ruin or bankruptcy. If the contract still makes sense for the parties, they are likely to continue even after a court rules for one or the other. That ruling will affect the form of the renegotiation (with the winner in court getting a larger share of the surplus from the contract), but judicial modification of the contract is not necessary for the parties to carry on.

In these cases we see just a hint that the courts are getting harder, not softer, that they are more, not less, likely to leave the parties in their contract than formerly.¹⁰⁶ Whether this phenomenon is because of the writing of people like Jack Dawson, because the most prominent cases have led the way, or because the courts believe the economists, we don't know, but we see no weakening of the judicial spine.

Jack, of course, was concerned principally with the court's remedy in *Alcoa*, not with that or any other court's conclusion about the presence of mistake, impracticability or the like. But the issues are inseparable; since no offending remedy can be imposed without a finding of mistake, impracticability or the like, the courts' attitude about the latter are bound to the former. No impracticability, mistake or frustration — no basis to rewrite the contract.

105. Industries whose rates must be approved (or are subject to review) by regulatory entities must take added care. See *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 378 (5th Cir. 1981) (holding that indefinite escalator clauses are prohibited under National Gas Act); *Southwestern Elec. Power Co. v. Burlington Northern, Inc.*, 475 F. Supp. 510 (E.D. Tex. 1979) (Interstate Commerce Commission regarding railroad fees); *In re Application of Delmarva Power & Light Co.*, 486 A.2d 19 (Del. Super. 1984), *rev'd*, *Delmarva Power & Light Co. v. Pub. Serv. Comm'n*, 508 A.2d 849 (Del. 1986) (trial court upheld utility commission's refusal to allow price increases under escalator clause new to the coal industry, which was therefore "imprudent" without a price cap; reversed and remanded regarding applicable standard).

106. See R. S. Trigg, *Escalator Clauses In Public Utility Rate Schedules*, 106 U. PA. L. REV. 964 (1958). This article precedes the 1970s energy crisis and reflects the thinking underlying the clauses that were so heavily litigated a decade later. See also Crump, *supra* note 77; Templeton, *supra* note 104; William F. Treanor & Raymond W. Goldfaden, *Challenges To Rent Escalation Clauses In Commercial Leases*, PROB. & PROP., May/June 1990, at 6.

C. Modifying Contracts

Whatever the wisdom of letting *Alcoa* escape the letter of its contract and whatever the propriety of using “mistake” as the theory,¹⁰⁷ the revolutionary part of the *Alcoa* decision was Judge Teitelbaum’s rewriting the contract price formula to give *Alcoa* a small profit per pound. That was the act that made Jack apoplectic, that attracted the academic writers¹⁰⁸ and that put *Alcoa* into most of the contracts casebooks.¹⁰⁹

We have found no case that follows *Alcoa*. Two judges, one concurring in a West Virginia Supreme Court case and one a Federal magistrate judge in New Jersey, embrace the rule.¹¹⁰ In *Unihealth v.*

107. See generally Clayton Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985) (criticizing those commentators who urge courts to rewrite contracts); Medina et al., *supra* note 89.

108. See generally Robert A. Hillman, *Court Adjustment Of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 225 (identifying two situations calling for adjustment: an “agreement model” that accounts for the “relational” realities of many contract settings through a theory of the parties’ implicit risk allocation; and the “gap model,” which is based primarily on the fairness principle that the parties should agree to share unallocated losses); Subha Narasimhan, *Of Expectations, Incomplete Contracting, And The Bargain Principle*, 74 CAL. L. REV. 1123, 1193 *et seq.* (1986); Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981); Zundel, *supra* note 73.

109. *Alcoa*’s first appearance was in E. Allan Farnsworth’s 1980 Contracts casebook, 3rd. ed. Our incomplete survey has shown that most casebooks cover *Alcoa*, and they show few signs of slowing down. The results below indicate which books do and do not include *Alcoa*:

Not included: JOHN D. CALAMARI, JOSEPH M. PERILLO, HELEN HADJIYANNAKIS BENDER, *CASES AND PROBLEMS ON CONTRACTS* (2nd ed. 1989); JOHN P. DAWSON, WILLIAM BURNETT HARVEY, & STANLEY D. HENDERSON, *CASES AND COMMENT ON CONTRACTS* (4th ed. 1982); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* (4th ed. 1981); JOHN H. JACKSON & LEE C. BOLLINGER, *CONTRACT LAW IN MODERN SOCIETY: CASES AND MATERIALS* (2d ed. 1980); FRIEDRICH KESSLER, GRANT GILMORE, & ANTHONY T. KRONMAN, *CONTRACTS: CASES AND MATERIALS* (3rd ed. 1986); JOHN W. WHELAN, *CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS* (1985).

Included: E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* (3d-5th eds. 1980, 1988, 1995); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* (5th-6th eds. 1990, 1996); ROBERT W. HAMILTON, ALAN SCOTT RAU, & RUSSELL J. WEINTRAUB, *CASES AND MATERIALS ON CONTRACTS* (1984) (including nine pages of edited cases plus some glowing commentary); CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS*, (2d-4th eds. 1987, 1993, 1999); ADDISON MUELLER, ARTHUR ROSETT & GERALD P. LOPEZ, *CONTRACT LAW AND ITS APPLICATION* (3d ed. 1983) (including seventeen pages of edited case); EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* (3d-4th eds. 1984, 1991); JOHN EDWARD MURRAY, *CONTRACTS: CASES AND MATERIALS* (5th ed. 2000); ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* (1987).

110. A few others have sympathetic dicta. See, e.g., *Freidco, Ltd. v. Farmers Bank of Del.*, 529 F. Supp. 822, 830 n.9 (D. Del. 1981); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 517 F. Supp. 440, 458 (E.D. Va. 1981); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 135-36 (N.D. Iowa 1978), *rev’d*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *McGinnis v. Cayton*, 312 S.E.2d 765, 779-81 (W. Va. 1984).

U.S. Healthcare,¹¹¹ Magistrate Judge Pisano had to resolve a contract dispute between a hospital and an HMO that had agreed to send its members to the hospital in return a reduction in the hospital's normal fees. Normally, the hospital charged patients according to a flat fee that corresponded to the patient's condition, the patient's "Diagnostic Group" ("DRG"). The DRG provided a flat rate for a service whether the patient required a longer or a shorter stay in the hospital than average or whether the patient required more or less service than the average person with that particular condition or need for treatment. Instead of DRG payments, the HMO bargained for per diem payments. Both the hospital and the HMO believed the per diem payments would be smaller than the DRG billing would be. To protect against an excessive reduction in the payments that it would receive, the hospital bargained for a restriction on the discount that would be enjoyed by the HMO. That clause read as follows: "If the overall discount for all Inpatients exceeds 40% . . . U.S. Healthcare will reimburse [hospital] monies beyond the 40% discount . . ."¹¹²

The parties interpreted the "discount" to mean the difference between the DRG charge and the per diem charge for the same service that was provided in the contract. In 1993 New Jersey abolished the DRG system; that left the discount formula without a minuend from which to subtract the actual per diem charge of the HMO.¹¹³ Using its "normal revenue" charge, in lieu of the DRG charges for 1993, the hospital claimed the HMO owed an adjustment of more than \$500,000 because the "discount" had exceeded 40% by that amount.¹¹⁴ Of course, the higher the normal charges or revenues, the larger the excess of 40%.

Finding that the circumstances fit within Section 265 of the *Second Restatement of Contracts* on Supervening Frustration, the court concludes that "neither party should be subject to the harsh results proposed by the other party, since neither assumed the risk of the repeal [of the DRGs]."¹¹⁵ Seeking a remedy, the court cites Judge Teitelbaum's holding that "the appropriate remedy in a case involving a frustrated contract was to modify the contractual price term."¹¹⁶ Magistrate Pisano also asserts that his case falls "snugly within the ambit of Sections 204 and 272 of the Restatement."¹¹⁷

111. 14 F. Supp. 2d 623 (D. N.J. 1998).

112. *Id.* at 626.

113. *Id.*

114. *Id.* at 627.

115. *Id.* at 632.

116. *Id.* at 638.

117. *Id.* at 640.

The court then exhorts the parties to negotiate a settlement and appoints a master to determine the reasonable value of the hospital's service in 1993 to be used if the parties fail to agree on a number for that year.¹¹⁸

Despite this warm embrace of *Alcoa*, this is not in any sense an *Alcoa* case. First, as the court notes, the case would be perfect for applying Section 2-305 of the UCC by analogy. That section directs a court to apply a "reasonable price" where "the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded."¹¹⁹ This is only the familiar case of a failed formula. Indeed the court's finding of frustration is unnecessary to the conclusion that the price should now be a reasonable price.

The case differs from *Alcoa* in a second important way. Here the parties had performed and the plaintiff was merely asking for an interpretation of the contract that the defendant owed \$500,000. Since the contract had expired, neither party needed rules to govern continued future performance of the contract.

The needless commentary on frustration and *Alcoa* removed, *Unihealth* is a thoroughly conventional case where a judge must decide what a contract means and whether the plaintiff has proved its case. For these reasons it does not bear *Alcoa*'s genes.

Like *Unihealth*, *McGinnis v. Clayton*¹²⁰ has a lot of *Alcoa* talk, but no *Alcoa* holding. In *McGinnis*, the plaintiffs were the successors to a West Virginia landowner who leased his oil and gas in 1893. The lease required the lessee to pay a one eighth royalty on oil but gave the lessee the right to gas for \$100 per year, *which in 1893 had no commercial value*.¹²¹ When a deepened well began to produce commercial quantities of gas in 1978, the lessor's successors sued to void the lease on the ground that it was no longer "commercially reasonable."¹²² The lower court dismissed and the Supreme Court reversed.

Noting the possibility that the plaintiffs might bring themselves within the rule of a 19th century case that avoided a ninety-nine year lease for timber and coal because the parties had been mutually mistaken about the presence of mineable coal on the property, the majority reversed the lower court's dismissal.¹²³ The higher court was particularly careful to make no finding about the continued vitality of the

118. *Id.* at 641-42.

119. *Id.* at 639 n.24.

120. 312 S.E.2d 765, 780 (W.Va. 1984).

121. *Id.* at 767.

122. *Id.*

123. *Id.* at 770.

mutual mistake doctrine in such a case and took pains to explain that it was merely giving the plaintiffs a chance to establish a "record".

The indorsement of *Alcoa* comes from concurring Justice Harshbarger.¹²⁴ Criticizing the "limited scope" of the majority opinion, Justice Harshbarger ranges widely over commercial impracticability, supervening events, unjust enrichment, and even unconscionability. Citing articles by Professors Macneil and Speidel, Justice Harshbarger suggests that *Alcoa* is merely a form of "equitable adjustment [that] is itself an evolved form of 'reformation.'" ¹²⁵ At least implying that he would use the *Alcoa* theory to change the gas royalty, the Justice reasons that *Alcoa*'s "rationale is useful when applied to a contract such as the *McGuinnises*'." ¹²⁶

Notwithstanding its elegance and wide range, Justice Harshbarger's opinion remains only a concurring opinion. Moreover, it concurs with a majority opinion that is far from encouraging for the plaintiffs. The majority offers only the smallest hope to the plaintiff: "[A]n appellate court's decision to overturn the granting of a [motion for summary judgment] does not reflect an opinion on the ultimate merits of the case."¹²⁷ The majority even casts doubt on the court's own nineteenth century opinion on which the plaintiffs rely:

Although appellants are entitled to a hearing, to prevail they must establish mutual mistake as a legally sufficient ground for rescission or reformation of the contract. It is true that in *Bluestone Coal, supra* we stated that, "Nothing is more clear than the doctrine that a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it". . . . Nevertheless, this Court has not had occasion to address the mutual mistake question in some time, and we note that the doctrine has been applied in disparate ways in other jurisdictions . . . we content ourselves with ruling that appellant's allegations raise a potentially meritorious argument . . . ¹²⁸

A careful listener to the majority opinion might hear the court saying: "Dismissal is the right outcome, but you have to give the fellow a hearing first."

Some of the judicial critics of *Alcoa* have been explicit about their disagreement. In *Printing Industries Association v. International Printing and Graphic Communications Union*,¹²⁹ Judge Battisti states that he is "at odds with the reasoning and result in *ALCOA* The willingness of courts to reform contracts on the basis of subsequent

124. *Id.*

125. *Id.* at 779 (internal quotation omitted).

126. *Id.* at 780.

127. *Id.* at 768.

128. *Id.* at 770 (citing *Bluestone Coal Co. v. Bell*, 18 S.E. 493 (1893)).

129. 584 F. Supp. 990 (N.D. Ohio 1984).

knowledge may undermine the policy of finality which is so essential and revered in the contract law."¹³⁰

In *Wabash v. Avnet*,¹³¹ Judge Shadur speaks to Jack Dawson's concern "[u]nder the logical consequences of that case there would be no predictability or certainty for contracting parties who selected a future variable to measure their contract liability. Whichever way the variable fluctuated, the disappointed party would be free to assert frustrated expectations and seek relief via reformation."¹³² A handful of other cases content themselves with distinguishing *Alcoa*. Most of those do not address the rewriting; they deal with the finding of mistake.

After only seven years one writer found that *Alcoa* had "virtually faded into obscurity. . . ."¹³³ I suspect that the only thing that keeps *Alcoa* on stage is its presence in some of the current casebooks. It remains a favorite of contracts casebook writers; in casebooks the embers often linger long after the fire has subsided elsewhere.

IV. CONCLUSION

Jack Dawson's worry that *Alcoa* was the first of many steps down the path followed by the Germans was wrong, but why? Why have the American courts not followed the Germans? Our judiciary is a conservative institution — but surely not more so than the German judiciary. Let us try two hypotheses.

First the Germans may be the victims of listening too well to Santayana. Remember, "[t]hose who cannot remember the past are condemned to repeat it."¹³⁴ One corollary to that rule is that those who remember the past too well may become its prisoners. As Jack pointed out in *Oracles of the Law*, judicial creativity is a necessity if the law is to retain its vitality; judges must recognize and respond to changing circumstances. Just as armies fight the previous war, Central Banks sometimes do what worked in the previous recession, and businesses revert to strategies that worked the last time. In retrospect, these calls

130. *Id.* at 998.

131. 516 F. Supp. 995 (N.D. Ill. 1981).

132. *Id.* at 999 n.5; see also *Golsen v. ONG Western, Inc.*, 756 P.2d 1209, 1223 (Okla. 1988) (Kauger, J., concurring) (disfavoring *Alcoa*'s "expansive" view of impracticability over UCC 2-615).

133. Sheldon W. Halpern, *Application Of The Doctrine Of Commercial Impracticability: Searching For 'The Wisdom Of Solomon'*, 135 U. PA. L. REV. 1123, 1127 (1987); see also *United States v. Southwestern Elec. Co-op., Inc.*, 869 F.2d 310, 315 n.7 (7th Cir. 1989) (defendant tried to rescind on mutual mistake a twenty-five year requirement contract for electricity by arguing that the actual costs for nuclear power plant construction, which determined electricity price, were ten times greater than estimated costs).

134. GEORGE SANTAYANA, *Reason in Common Sense*, in *THE LIFE OF REASON* 284 (1905).

on history are often found to be misguided because the later circumstances differ from the earlier.

That might also be true of the German judiciary, many of whom must have had personal recollections of the 1920s and 1930s. German courts' revalorizing and other modification of contracts with and without legislative authority during the hyperinflation after the First War was a living precedent. Even Jack Dawson acknowledges that behavior in those circumstances to have been necessary and appropriate.¹³⁵ But the courts of the 1950s ignored the corollary; they applied the lesson of yesterday (1924) to the present (1950) and, at least according to Jack, made a bad mistake.

The American courts have been saved from violating Santayana's corollary not because they are smarter or more insightful students of history than the Germans, but because of their ignorance of and remoteness from comparable American social and legal history. As Dawson's very first publication in this *Review* shows, both Southern and Northern courts revalorized land and otherwise rewrote contracts immediately after the Civil War when contracts made in Confederate currency had to be adjusted first for the decline in that currency's value and then for its abolition.¹³⁶ Even if the post Civil War history were well known, it would not have had as powerful an effect on the American courts as the much more recent experience had on the Germans.¹³⁷ So perhaps we have been saved from the Germans' fate both by our disregard for history and by the remoteness of events.

There is a second hypothesis that might explain American courts' refusal to rewrite contracts in cases where the Germans would do so. Perhaps our shocks — shortages of oil, gas and the like — are of a different magnitude than those that hit Europe in the twentieth century.¹³⁸ Commodity shortages are one thing, fighting across one's soil as the French, Russians, Germans and others did, and suffering the bombing that was experienced by the British and the much of Europe, is something else. If either of the World Wars had been fought on American soil, the stress on our economy would have far exceeded

135. See Dawson, *Judicial Revision in Germany*, *supra* note 57.

136. See Dawson, *Effects of Inflation in the United States*, *supra* note 9. For a discussion of the impact of the Civil War on American society, see JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 1-46, 853-62 (1988) (noting the state of American culture in the mid-nineteenth century and observing the transformation of the United States during the war from an agrarian, pre-industrial value system to a modern, industrial society).

137. Unlike the First World War, which left an already industrialized Germany reeling from out-of-control inflation, the Civil War galvanized American industry and had a number of (arguably) salutary effects on economic management. See generally MCPHERSON, *supra* note 136, at 428-53.

138. Dawson hints at this in *Judicial Revision of Frustrated Contracts: Germany*, noting that the German courts did not consider the impact of the OPEC embargo of 1972-73 sufficient to frustrate performance of contracts. Dawson, *Judicial Revision in Germany*, *supra* note 57, at 1081.

that imposed by rising oil prices.¹³⁹ Having been spared from fighting on our own soil since 1865, we should be slow to claim superiority for our legal doctrine. Had either of the Wars been fought here, we too might have had a recent precedent for appropriate contract rewriting that our courts might have extended to inappropriate cases.

For the time being, the threat to freedom of contract that Jack saw in *Alcoa* has receded. No courts have followed its holding and only a few judges have embraced its reasoning. Even in the law schools it may be losing its hold.¹⁴⁰ Though ignorance may on occasion save us from mechanical application of the lessons of history, it does not excuse willful ignorance of our legal heritage. If we choose, despite Jack's admonitions, to ignore the lesson of *Alcoa*, we cannot be too confident that future, stronger shocks might not resurrect it.

This Article ventures some of our tentative hypotheses about the development of the law of frustration in the United States. Were Jack Dawson still with us, he undoubtedly could bring to bear his legal expertise, depth of historical knowledge, and insight into the vagaries of the human condition. His writing is a testament to hard work and the wisdom born of experience over a six-decade career. If these hypotheses need further refinement, we can imagine no better way to start the process than talking to Jack Dawson over a drink of whisky on a Sunday morning.

139. Those old enough to recall might remember former President Jimmy Carter's donning a cardigan, turning down the thermostat in the White House, and declaring the energy crisis the "moral equivalent of war." Sadly for Carter, this declaration failed to steel the resolve of the American people in the same way that Roosevelt's description of Pearl Harbor as a "date which will live in infamy" did.

140. See *supra* note 109 (surveying textbooks).