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TEACHING LAW THROUGH CONTRACTS AND CARDOZO*

CHRISTOPHER L. EISGRUBER**

Contracts might be regarded as the most durable of first-year law school subjects. After all, it was through contracts that Christopher Langdell introduced the case method.¹ More than a century later, contracts remains a required course not only at Harvard, where Langdell taught, but at virtually every other American law school. Yet, contracts might also be regarded as the least durable of first-year subjects. Nearly three decades ago Grant Gilmore examined contracts and, in a brilliant essay, pronounced it dead.² It is not clear how Gilmore's claim should be interpreted or whether it is true. But this much seems undeniable: many of the subjects that were once encompassed within the common law of contracts have been hived off into separate domains, often governed by statute and treated in specialized law school courses. Some of the classic common law cases that still populate contracts casebooks would today be regarded as falling under the rubric of sales, employment law, insurance law, consumer protection law, family law, real estate law, and so on.

If prone to dramatics, one might say that the guiding ambition of classical contract law—namely, to produce a unified doctrine applicable to all agreements and promises, regardless of either their subject matter or the identity of their makers—is a manifest failure. Why should every American law student be required to take a long course on a failed doctrine? I have two answers to that question (I don't mean to suggest that every contracts teacher should answer the same way). First, the *issues* addressed by the common law of contracts endure even when the common law's *resolution* of those issues does not. For example, in any area (sales, employment, real estate, and so on)

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** Professor of Law, New York University School of Law. I am grateful to Rudy Delson, Lewis Kornhauser and Liam Murphy for comments on previous drafts of this essay, and to Harvey Dale, Bill Nelson and Larry Sager for helpful conversations about its topic. I would also like to thank the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at the New York University School of Law, which provided generous support for this project. Finally, I would like to thank my students at NYU, who for the last ten years have taught me much and made Contracts a delight to teach. To them I dedicate this essay.

1. GRANT GILMORE, *THE DEATH OF CONTRACT* 12-14 (1974). As Gilmore's showed, it is arguable that Langdell not only invented the case method through contracts, but invented contracts through the case method. *Id.*

2. *Id.*

where parties may bind themselves by mutual agreement, issues will arise if one party makes an offer, and the other responds affirmatively but varies the terms. Have the parties “agreed” on something sufficient to produce legally binding obligations? Or does the variation in terms mean that the parties have no agreement at all? The common law, of course, treated these issues through the rather inflexible “mirror-image rule,” pursuant to which a putative “acceptance” that varied the terms of an offer was not an acceptance at all, but a counter-offer and a rejection of the original offer. I do not know whether that ancient rule would provide sound guidance to a lawyer today facing an issue about whether, say, in the state of New Jersey minor discrepancies between offer and acceptance will vitiate an apparent contract for the sale of real estate. But that’s not the point. Having encountered the old common law cases, a competent lawyer will hit the books (or boot up the computer) to find out whether in New Jersey there are special rules applicable to real estate contracts, whether or not the “mirror-image rule” is strictly observed, and so on. Once a lawyer recognizes that an issue exists, the process of identifying relevant statutes and rules is, if not always easy, nonetheless pedestrian. The trick is to see the issue in the first place.

The second objective for my contracts course is deeper and more interesting—or it’s more interesting to me, at any rate. As part of the first-year curriculum, contracts introduces not only the particular issues that surround the making and enforcement of private agreements, but also more general questions about the nature of law. It participates, along with other first-year courses, in the famous and mysterious task of teaching students to “think like lawyers.” That project has many facets, but one important component is to teach students what sorts of claims will and won’t fly as legal arguments. More precisely, students must acquire a feel for what arguments might be persuasive to judges, or more precisely still, for what arguments *other lawyers* might regard as plausibly persuasive to judges, since legal arguments will carry weight to the extent that somebody (even if wrongly) believes that those arguments have a chance to convince some judge (or another authoritative legal decision-maker) to do something. And how are students supposed to anticipate what judges might find persuasive? They have to put themselves in the judge’s shoes; less metaphorically, they have to imagine themselves as judges. To “think like lawyers,” students must first try to “think like judges.”

Students don’t always feel comfortable imagining themselves as judges. To be sure, some of them may hope eventually to be judges; they may even harbor a secret ambition to be Supreme Court justices. When they study the law, though, they often do so from the standpoint of “rule-followers” or “instruction-takers.” They imagine themselves not as judges but as first-year associates or even as soon-to-be-takers-of-the-bar-exam. They assume that judges, by experience and training, “know the law.” The students accordingly suppose that they cannot hope to “think like judges” until after they learn the

law. And, of course, to some extent the students are correct; there are indeed things that judges know which students don't. For example, judges (unlike students) know that there is a doctrine which travels under the name "the parol evidence rule" and which has something to say about the circumstances under which written contracts will trump or exclude other agreements. But, in general, it gets things backward to suppose that one must first "know the law" in order to learn to "think like a judge." Students can easily be informed about the existence of rules and doctrines. The hard part, for judges as well as for students, is figuring out what it means to know the rule or doctrine—figuring out, in other words, how the doctrine might be applied, when exceptions might be created, and so on. To do that, one must take some position about how judges do and should use the discretion granted them within the American political system. Judges' approaches to that problem will undoubtedly be influenced by their experience, and some of that experience will undoubtedly come from aspects of legal practice which are familiar to most judges but foreign to virtually all students. Nevertheless, a large part of legal education in general, and first-year legal education in particular, involves equipping students with insights and theories through which they can comprehend the goals, concerns and impulses which shape judicial creativity.

Therein lies one often overlooked purpose behind the case method. Students must, of course, learn how to separate "holding" from "*dictum*," since they will need that skill in practice. Still, if the point of assigning cases were to communicate their "holdings," the case method would be crushingly inefficient. Why have students scour multiple pages, highlighters poised-and-ready, looking for the crucial passage, when we could assign books and articles that state the point more baldly? The case method, however, accomplishes more. A great aid in getting students to "think like judges" is the fact that judges write opinions which purport to explain their decision-making process. Properly applied, the case method capitalizes on this opportunity. By careful dissection of judicial opinions, students begin to appreciate the variety of ways in which the judicial mind works. They learn what sorts of creativity the legal community expects and accepts from judges, since the reasons which judges offer in opinions are submitted to that community with the hope that the arguments will be deemed legitimate. And students are also provoked to speculate, when judges write opinions that seem disingenuous, about why judges wrote in the way they did—about, in other words, what might really be going on "behind the scenes." Students thereby (whether they realize it or not) use judicial opinions as windows upon judicial creativity, and hence as guides to possibilities for creative legal argument in general.

Learning to "think like judges" means, among other things, coming to appreciate the variety of objectives that judges might have when they decide a case. Judges might try to produce a just result in the particular controversy before them. They may try to set a precedent that produces good results in the

future. And, of course, there are a variety of criteria that might be used to assess what counts as “good results.” We might hope that the legal system would resolve controversies in ways that are substantively desirable, consistent with democratic principles, predictable, and reasonably cheap. In practice, of course, people will disagree both about what these goals mean (which results are “substantively desirable?”) and about what to do when the goals come into conflict or tension with one another, as they inevitably do.

Regardless of their objectives, judges also face a more technical set of concerns. They must decide among means as well as ends; they must, in other words, select which legal or judicial “techniques” to employ in pursuit of their objectives.³ If, for example, a judge wants to bring about a particular result in the case before her, she will often be able to do so either through a factual determination or through a legal ruling. Which route she chooses will, of course, have an impact both upon possibilities for appeal (unless the judge sits on a court of last resort) and upon how her decision will affect future cases. A judge who wishes to influence subsequent cases will want to emphasize legal, rather than factual, issues. She will have to choose among multiple ways of framing her disposition. She can propose a flexible standard, which openly invites the exercise of discretion by later judges (e.g., “a promisee’s reliance will not render a promise enforceable unless the reliance was reasonable and injustice would result if the promise were not enforced”). Or she can attempt to articulate a mechanical test, which seeks to limit the discretion of her successors (e.g., “reliance, no matter how reasonable, will never render a promise binding in the absence of bargained-for consideration”). Regardless of whether her proposed rule is flexible or mechanical, the judge may define its domain broadly or narrowly: she may announce a rule that purports to govern all contracts of any kind, or she may announce a rule limited to sales contracts between merchants.

These questions of legal technique are crucial to the process of “thinking like a judge,” and they are uncharted territory for most non-lawyers, including new students freshly arrived at law school. Acquainting students with these problems, and providing them with a set of theoretical tools by which to analyze the problems, is one crucial component of a first-year legal education. For that purpose, contracts is splendid. To begin with, the substantive policy interests at stake in contract law are relatively muted. Contract law provides parties with an opportunity to establish what legally binding norms will govern their relationship—the parties can, in a sense, make law for themselves. Contract litigation usually arises because, in one way or another, parties failed to take advantage of that opportunity: either the parties arguably never entered

3. I borrow the concept of “judicial techniques” from P.S. Atiyah’s excellent essay, *Judicial Techniques and the Law of Contract*, in P.S. ATIYAH, *ESSAYS ON CONTRACT* 244-74 (1986), which I assign during the second semester of my contracts course.

into a contract at all, or they entered into a contract but did not address some issue which later became the focal point of a dispute. In a setting where (by hypothesis) the parties were free to allocate some risk in whatever way they chose, and where (again by hypothesis) neither party insisted on a clear allocation of that risk, it will be rare that justice or economic policy will generate strong reasons to allocate the risk one way or the other. No doubt some of the contributors to this symposium will disagree, but I find that the equities in contracts cases are rarely poignant enough to set my blood boiling, save for those exceptional instances where there is a strong smell of deceit or where the court proposes (rightly or, more often, wrongly) to ignore the parties' intentions.⁴ Perhaps it is simply the "whiff of fraud" (or, if not fraud, then some other sort of malfeasance) that makes these cases provocative, rather than the courts' decision to frame the cases in terms of whether or not the parties' intentions should be honored. The latter choice is itself a matter of judicial technique; it's always possible, and often easy, to recharacterize the cases in other ways. So, for example, *Peevyhouse v. Garland Coal & Mining Co.* can be recharacterized as a "mistake" or an "implied term" case, in which the issue is how to deal with a risk (namely, that the re-grading project would be very expensive) not specifically addressed in the contract, and *Williams v. Walker-Thomas Furniture Co.* can be recharacterized as an "offer-and-acceptance" case about whether Mrs. Williams consented to the fine print in an adhesion contract. In the vast run of cases, though, the point of contract law will be to produce a predictable pattern of decisions (thereby reducing the cost of adjudication, and providing guidance for parties who care to seek it⁵) and to

4. Controversial cases in which courts allowed public policy to trump an agreement between the parties include *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (refusing to enforce mining company's obligation to re-grade land; according to the court, the obligation would have involved gross "economic waste"); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (refusing to enforce a contract between a cohabiting couple on the ground that to do so would undermine the institution of marriage); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (refusing to enforce the "add-on" clause of an installment purchase contract on the ground that the clause was unconscionable). Interestingly, one might find a "whiff of fraud" in all three of these cases; one might suspect that the mining company never intended to regrade the land in *Peevyhouse*, that the "husband" in *Hewitt* tricked his "wife" into believing that a formal marriage was unnecessary, and that Walker-Thomas never explained its "add-on" clause to Mrs. Williams. What's more, in two of the three cases—*Peevyhouse* and *Hewitt*—the "tortfeasor" (if there was one) actually benefited from the court's departure from ordinary contract principles!

5. Since most contracts are performed rather than litigated, and since there are costs both to researching the law and to raising the possibility of breach in the course of negotiations, parties may not care what the law says. One especially striking illustration of these incentives is supplied by Stuart Macaulay's famous article, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) in which he reported that house counsel in the paper business continued to employ a standard clause which they all knew had been held unenforceable by Benjamin Cardozo and the New York Court of Appeals. *Id.* at 60.

protect whatever modest reliance interests might be deemed “reasonable” despite the fact that the relying party could have protected itself by negotiating a contractual term but did not.

With substantive concerns thus bounded, technical issues become the principal focus of judicial creativity in contract law. Judges must figure out how best to devise a legal doctrine which is stable and predictable and which can accommodate whatever intuitions they (and their colleagues and successors) have about reasonable reliance interests and other “equities of the case.” That challenge is what provoked the quest for a stable, unified common law doctrine of Contracts. It has seemed natural to many judges and lawyers—and it seems natural, I find, to most first-year law students—to suppose that the contract law should consist mostly of formal rules that apply to all promises without regard to their content or their maker. After all, we permit people to make contracts about almost anything, and most of us believe that there is some general duty to keep promises. Moreover, if (as I have suggested) concerns about morality or economic policy are destined to have only modest bite in contracts cases, then perhaps we can craft general rules without worrying too much about the exceptional cases which the rule gets “wrong.” The “wrong” will be relatively minor since parties will be able to protect themselves by contracting around the rule; hence we can live with the “wrong” in exchange for the benefit of a clear rule.

Yet, however plausible all this might sound in the abstract, contract law has always been dogged by, and has often yielded to, arguments in favor of special exceptions and fact-sensitive judgments. We may say that “a promise is a promise,” but when confronted with particular cases, our reactions often vary depending on who promised what to whom and under what circumstances. And while broad, bright-line rules may be cheap and easy to apply, they turn out to be fragile.⁶ If a blunt rule seems to produce unjust results, judges will be tempted to abandon, limit, modify, or circumvent it.

6. Karl Llewellyn criticized contract professors for supposing that one could draw “safe conclusions as to business cases of the more ordinary variety” on the basis of “what courts or scholars rule about the idiosyncratic desires of one A to see one B climb a fifty-foot greased flagpole or push a peanut across the Brooklyn Bridge.” Karl N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance* (pt. 2), 48 *YALE L. J.* 779, 785-86 (1939). Llewellyn cautioned against assuming that identical principles would apply in family settings and in business settings, and he suggested that “[t]he influence of the facts relative to the influence of the normally applicable rule increases roughly with the square of the peculiarity of the facts.” *Id.* After these sensible observations, however, Llewellyn concluded that “if a peculiar case is decided in true accordance with a rule *in use* in normal cases, that is excellent indication of the living power of that normal rule; it has overcome even tough and troublesome facts.” *Id.* I am not so sure. The unflinching application of a rule to facts it does not fit may eventually generate criticism of the rule, criticism that might weaken even the core applications of the rule. If I were interested in the longevity of a legal doctrine, I would want to confine it to that domain in which it seemed to produce reasonable results.

Over the course of the twentieth century contract law moved in two particularistic directions, fragmenting into multiple domains defined by subject-matter (such as sales or employment law) and embracing openly substantive standards which invite judges to assess the equities of cases one-by-one (such as the doctrine of promissory estoppel or the Restatement Second's remarkably flexible provisions governing mistake and impracticability).⁷

Contracts may be, as Gilmore suggested, dead. The quest for a grand unified common law doctrine of contracts may be a failure. For pedagogical purposes, it does not really matter: even if contracts is dead, there is good reason to teach twentieth century contracts common law to first-year law students in the twenty-first century. The story of American contract law's evolution is a wonderful vehicle for teaching students about judicial techniques. That narrative is made richer and more compelling because populated by judges and other law-makers who were brilliantly self-conscious about questions of judicial technique: Oliver Wendell Holmes, Benjamin Cardozo, Arthur Corbin, Jerome Frank, and Karl Llewellyn, among others.⁸

For sheer legal brilliance, my favorites among these are Llewellyn and Corbin, but for teaching purposes my favorite is Cardozo, because he was so acutely sensitive to the requirements of the judicial role and because he wanted so much (too much, as I shall shortly explain) from contracts doctrine. Among Cardozo's opinions, my favorite is *Allegheny College v. National Chautauqua County Bank of Jamestown*.⁹ *Allegheny College* is the focal point of my first-semester syllabus. Cardozo's opinion is puzzling and provocative in a way that virtually compels students to wonder what the great common law judge was up to. And—as I hope to convince you in a moment—once they ask that question, the opinion pulls them in deeper and deeper, begetting ever more sophisticated questions and hypotheses about the judicial role.

If you've read this far in an article about teaching contracts, you probably know *Allegheny College* well—but I'll provide a brief summary, just in case

7. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (promissory estoppel), §§ 151-58 (mistake) and §§ 261-81 (impossibility and frustration) (1979). Although her deconstructive approach is not generally to my liking, Clare Dalton does a nice job pointing up the complete indeterminacy of the Restatement provisions on mistake, impossibility, and frustration. Clare Dalton, *The Deconstruction of Contract*, 94 YALE L.J. 997, 1063-65 (1985).

8. Here I want to throw a bouquet to the wonderful editing of FRIEDRICH KESSLER, GRANT GILMORE AND ANTHONY T. KRONMAN, *CONTRACTS: CASES AND MATERIALS* (3d ed. 1986). The book has preserved both the rich wit and insight of minds like Cardozo, Corbin and Llewellyn, supplemented them with the editors' own distinctive perspectives, and provided students with ample exposure to the challenging (sometimes quirky) cases and doctrines that provoked those thinkers. The result is an intellectually challenging, and uniquely rewarding, set of materials from which to teach contracts. There are rumblings from Aspen about a new edition; I, for one, hope that any changes will be very modest indeed.

9. 159 N.E. 173 (N.Y. 1927).

you've forsaken it in favor of more modern and "relevant" decisions, or in case you are, perhaps, that elusive "generalist" reader whom law reviews always aspire to reach! In 1921, Mary Yates Johnston had pledged to give \$5000 to Allegheny College. Johnston made her promise in a formal written instrument; it provided, among other things, that her pledge would be fulfilled not later than thirty days after her death, that it should be known as the "Mary Yates Johnston Memorial Fund," and that it should be used to "educate students preparing for the Ministry." Johnston made a \$1000 payment to the College during her lifetime (this fact, as we shall see, took on great importance in Cardozo's construction of the case), but changed her will prior to her death and left nothing more to the College. The College sued her estate seeking the balance of the pledge. The question was whether Johnston's promise to the College was unenforceable for want of consideration.

Cardozo labored mightily to demonstrate that there was consideration for the promise. His analysis was intricate and difficult to grasp, but, as Professor Alfred Konefsky has demonstrated,¹⁰ the skeleton of Cardozo's reasoning can be summarized relatively briefly. Cardozo endorsed a demanding formulation of the bargain theory of consideration, pursuant to which "[t]he promise and the consideration must purport to be the motive each for the other."¹¹ In other words, Johnston's promise was enforceable only if she gave it in order to get something that she wanted from the College, and only if the College would not have given her what she wanted had she not made her promise. This formulation of the consideration doctrine might seem devastating to the College's case, since charitable pledges are generally regarded as gifts, for which donors demand nothing. But Cardozo went on to hold that the bargain formula was not so hard to satisfy as it first seemed. In the past, he said, various considerations, including "conceptions of public policy" had "more or less subconsciously" led judges to soften the doctrine's application.¹² Some precedents invoked or pointed to "the innovation of promissory estoppel."¹³ According to Cardozo, the upshot of all these "irregularities of form"¹⁴ in the consideration doctrine was that its elements might sometimes be deemed satisfied by implication from normative concerns about moral duty or social policy, rather than on the basis of more nakedly factual argument about what the parties had done. Hence, in particular, the College might be able to show

10. Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 654 (1987). My summary here differs from Konefsky's only with regard to minor expositional points; I think that Konefsky's doctrinal analysis is correct.

11. *Allegheny College*, 159 N.E. at 174 (quoting the opinion of Oliver Wendell Holmes in *Wisc. & Mich. Ry. Co. v. Powers*, 191 U.S. 379, 386 (1903)).

12. *Id.* at 175.

13. *Id.*

14. *Id.*

on the basis of “implications inherent in [the social practice of] subscription and acceptance”¹⁵ that Johnston had gotten something in exchange for her promise. And, indeed, Cardozo went on to imply both that Johnston had demanded that the College should publicize her gift in order “to perpetuate her name,” and next to imply that the College had promised to provide such publicity when it accepted the \$1000 which Johnston donated before her death.¹⁶ The College’s implied promise, made in response to Johnston’s implied demand, provided the consideration, which rendered her promise enforceable. Cardozo gave no indication that these conclusions depended in any way upon triable issues of fact about whether Mary Yates Johnston was really interested in “perpetuat[ing] her name”; on the contrary, the implications were apparently sustainable as a matter of law. In any event, Cardozo not only reversed the trial and intermediate appellate court decisions dismissing the College’s complaint, but entered judgment on the College’s behalf.

Cardozo bobbed and wove. He articulated a tough test—the bargain theory of consideration, in full Holmesian rigor—but then held that its elements might be satisfied by “implication.”¹⁷ He nodded in the direction of the controversial doctrine of promissory estoppel, but then declared that the case could be decided without “recourse to th[at] innovation.”¹⁸ At the end of his article, Professor Konefsky identified, without endeavoring to answer, the crucial question raised by Cardozo’s circuitous path: “What was Cardozo’s larger purpose in this and similar enterprises?”¹⁹ Why, in other words, did Cardozo offer so complicated an argument when he could easily have crafted much simpler ones? A prominent school of thought supposes that Cardozo was skillfully but somewhat deceptively manipulating doctrine to disguise a creative effort to improve contract law. Grant Gilmore observed about Cardozo that, although he was “a truly innovative judge[,]” he “was accustomed to hide his light under a bushel. The more innovative the decision to which he had persuaded his brethren on the court, the more his opinion strained to prove that no novelty—not the slightest departure from prior law—was involved.”²⁰ Leon Lipson analogized Cardozo’s opinion in *Allegheny College* to an optical illusion. According to Lipson, Cardozo’s “problem was that on the consideration side he had a solid rule but shaky facts; on the

15. *Id.*

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

17. *Id.* at 176.

18. *Id.* at 175.

19. Konefsky, *supra* note 10, at 686 n.83. As Konefsky’s formulation of the question suggests, Cardozo’s intricate style in *Allegheny College* was not unique to that case; it characterized many of his other contracts and torts opinions. On the other hand, Cardozo could sometimes be breathtakingly direct and to-the-point—as in, for example, *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

20. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977).

promissory-estoppel side he had a shaky rule but (potentially) solid facts.” Lipson suggested that, in effect, Cardozo “twirled” the facts and the law “to give the impression that he had solid facts fitting a solid rule.”²¹

Even if these descriptions were fully accurate (and I’m pretty sure that they are not), Cardozo’s opinion would be a wonderful vehicle for inspiring students to ponder what it means to “think like a judge.” First of all, if Cardozo’s goal in *Allegheny College* was to manipulate doctrine in order to bring about an innovation, why not forthrightly announce a new rule? What did he hope to gain from so much complexity and subtlety? Was he just hoping to confuse lawyers? If so, were lawyers actually duped by Cardozo? Or could they see what he was up to? These questions are made all the more compelling by the fact that Cardozo is revered by many lawyers as the greatest American common law judge of the twentieth century. In the classroom at NYU, I point out the window, and remind my students that there’s a rather good law school up the street named after this fellow.²² If *Allegheny College* is a self-conscious act of deception, why do lawyers hold Cardozo in such esteem? Is deceit what we want from judges? If so, what would that tell us about the judicial role and the nature of judicial creativity? If not, is there some better way to understand why Cardozo chose the strategy he did?

Moreover, if we view *Allegheny College* as an outcome-oriented effort to manipulate legal doctrine, it turns out to be remarkably hard—and theoretically intriguing—to specify the “outcome” that drove Cardozo’s reasoning. One possibility is that he was trying to do justice in the individual case before him. That’s possible, but I have doubts. I said earlier that the equities rarely strike me as especially compelling in contracts cases, and *Allegheny College* is no exception to the rule. Cardozo recited no evidence whatsoever to suggest that the College suffered special harm when Johnston defaulted on her pledge. As far as we know, for example, the College had not relied on Johnston’s gift to hire new faculty, start new programs, begin new construction projects, or anything else. From what the opinion tells us, the College was simply out the gift, which made the College no different from any other disappointed donee. If the College was not specially harmed, was Mary Johnston guilty of some moral delict? Perhaps Cardozo thought so. He certainly invited a negative judgment upon her behavior. He embraced, for example, an earlier court’s assertion that revocations of charitable pledges amount to “breaches of faith

21. Leon Lipson, *The Allegheny College Case*, 23 YALE L. REP. 8, 11 (1977). Lipson’s witty and elegant observations are excerpted in KESSLER, GILMORE & KRONMAN, *supra* note 8, at 509-10.

22. Richard Posner has engaged in a highly statistical “citation analysis” in order to conclude that Cardozo in fact enjoys a high reputation. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 74-91 (1990). Isn’t a single law school named after Cardozo better evidence of high reputation than a boatload of citations?

toward the public.”²³ Yet, not every revocation of a promise to a charity deserves moral censure. Cardozo, if he knew anything about the circumstances that led Mary Johnston to change her mind, said nothing. As it happens, she might have had good cause. Richard Danzig, in unpublished research reported by Alfred Konefsky,²⁴ unearthed evidence that puts Johnston in a favorable light. Danzig interviewed Johnston’s acquaintances, and they told him that Johnston had withdrawn the pledge because she feared she could not otherwise provide properly for her impoverished cousins. Moreover, Johnston may have believed that her \$1000 payment to the College, far from being a down-payment on her legacy (which is the way Cardozo construed it), was instead negotiated with College representatives as a release payment: Johnston thought that the College had accepted \$1000 immediately in lieu of the right to receive \$5000 after her death.²⁵

Let’s try another hypothesis. Perhaps Cardozo was not driven by the desire to produce an equitable outcome in *Allegheny College* itself, but rather by a more forward-looking objective: perhaps he wanted to create a better rule to govern later cases involving charitable pledges. If so, then Cardozo’s plan of attack immediately provokes interesting questions for anybody interested in judicial techniques. If one wishes to affect the disposition of cases about charitable pledges, then an obvious strategy would be to articulate a rule tailored specifically to that subject. That was apparently the approach of prior New York case law; Cardozo noted that the consideration doctrine had not been strictly applied in cases involving promises to aid a charity.²⁶ It is also the approach adopted by the Restatement Second, which declares charitable subscriptions enforceable even in the absence of reliance.²⁷ But Cardozo framed *Allegheny College* in terms of very general questions about the nature of consideration, rather than questions about exceptions to, or exceptional sub-categories within, the broader doctrine.

What’s more, Cardozo’s holding in *Allegheny College* seems poorly calculated to provide charities with enforceable rights. His reasoning emphasized, first, that Mary Johnston had stipulated that her gift “should be ‘known as the Mary Yates Johnston Memorial Fund’”²⁸ (from which fact Cardozo inferred that she wanted the College to publicize her name) and, second, that the College had already accepted a portion of the gift (from which fact Cardozo inferred that the College had taken on a duty to publicize the gift). The first of these facts might be relatively common—many (though

23. *Allegheny College*, 159 N.E. at 175 (quoting *Barnes v. Perine*, 12 N.Y. 18, 24 (1854)).

24. Konefsky, *supra* note 10, at 657.

25. *Id.*

26. *Allegheny College*, 159 N.E. at 174-75.

27. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

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

certainly not all) donors want a particular name (often their own, or a relative's) attached to their gifts. But the second fact—that the College had already received part of the gift—seems an accident. If it is taken seriously as a prerequisite to recovery, then *Allegheny College* would benefit charities in a relatively narrow, and arbitrarily selected, range of cases. Of course, one might suppose that Cardozo's emphasis on the down payment was mere window-dressing; confronted with different facts in the future, he would have modified the doctrine in some clever way, and the charity would have won again. Yet, not every charity was guaranteed that Cardozo himself would decide its case—and, what's more, some careful readers of Cardozo (including his biographer, Andrew Kaufman) believe that he genuinely wanted to limit the circumstances in which charitable bequests would be enforceable.²⁹

Finally, if Cardozo's goal was to produce a rule that would help charities, then his project compels us to think about the complex ways in which legal rules create incentives for private behavior. Let's assume that government should encourage people to give to charities. There are various ways for the law to do that—such as, for example, by making charitable contributions tax-deductible. But there are at least two reasons to doubt how much charities would benefit from a rule that allows them to sue when donors get cold feet.³⁰ First, to the extent that donors know about the rule, it may discourage them from promising gifts in the first place: people may be less willing to make pledges to charities if they believe that by doing so they expose themselves (or their heirs) to the possibility of a lawsuit.³¹ Second, most charities depend upon the future good will of potential donors. One wonders how many college fund-raising offices would follow the model of Allegheny College and sue donors who withdraw gifts. Would alums be eager to pledge money to a college that sues its benefactors?³² A charity that litigates against its donors risks killing the goose that lays the golden egg.³³

29. ANDREW L. KAUFMAN, *CARDOZO* 334 (1998) (“[T]he fact that [Cardozo] strived so hard to find consideration . . . suggests that he was still not ready to enforce a pure pledge.”). Kaufman also suggests that Cardozo wanted to send “a message to charities about the necessity of honoring their obligations to donors.” *Id.* at 335.

30. Not all courts have been persuaded that there are compelling reasons of social policy to enforce charitable requests in the absence of substantial reliance by the charity on the promise. *See, e.g.,* *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989) (in the absence of reliance, “there is no injustice in declining to enforce the decedent’s promise”); the general issue is discussed in the excellent treatise of E. ALLAN FARNSWORTH, *CONTRACTS* 97-98 & n. 38 (3d ed. 1999).

31. The brief for the Johnston estate in *Allegheny College*—a brief signed by, among others, future Supreme Court Justice Robert H. Jackson—emphasized that the College’s pledge form did not announce itself to be a “‘contract’ or ‘promissory note.’ Many a cautious widow would shy at that!” Konefsky, *supra* note 10, at 698-99.

32. Imagine, for example, that (as Danzig’s research suggested, *see supra*, note 24 and accompanying text) Mary Johnston withdrew her bequest because she wanted to care for an

Is there any other way to conceive of Cardozo's objective in *Allegheny College*? Perhaps his goal was more abstract: perhaps he meant to improve the law of consideration in general, rather than to fashion a better rule regarding the enforceability of charitable bequests. Perhaps, for example, Cardozo intended to legitimate some version of promissory estoppel.³⁴ His opinion probably had that effect.³⁵ Cardozo adverted to the doctrine of promissory estoppel in order to justify his conclusion that elements of the consideration doctrine might be deemed satisfied by "implication"; he treated those decisions with approval, and thereby endowed the doctrine with a patina derived from the reputations of both Cardozo himself and the New York Court of Appeals, the nation's most distinguished common law court. But if Cardozo's desired "outcome" in *Allegheny College* was to buttress the doctrine of "promissory estoppel," then the case is odd in two ways. First, *Allegheny College* is a bizarre vehicle for Cardozo's purpose. Professor Lipson was way off the mark when he said that with promissory estoppel Cardozo had "a shaky rule but (potentially) solid facts."³⁶ Much more the reverse is true. The rule wasn't so shaky. According to Cardozo himself, New York had already "adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions."³⁷ The problem with the promissory estoppel doctrine, as with the consideration doctrine, was that the facts were bad for the College. In the old New York cases on charitable subscriptions and promissory estoppel, there was clear evidence of reliance. In *Barnes v. Perine*,³⁸ for example, a religious society had demolished its old

impoverished relative. The College would risk a rather unflattering newspaper story—Konefsky suggests the headline, "Grasping College Decimates Old Woman's Estate"—that would embarrass its fund-raising efforts in general. Konefsky, *supra* note 10, at 683.

33. Mary Frances Budig, Gordon T. Butler and Lynne M. Murphy, who believe that charities should pursue more aggressive litigation policies against donors who try to back out of pledges, nevertheless observe that in practice, "[w]hen it comes to enforcing pledges, charities have demonstrated a timidity not characteristic of their solicitation practices." BUDIG, BUTLER & MURPHY, *Pledges to Non-Profit Organizations: Are They Enforceable and Must They Be Enforced?*, 2 TOPICS IN PHILANTHROPY 3 (1993). According to the authors, "[c]harities seem to fear the loss of subscribers if it became the practice to sue to enforce the subscriptions." Still, to say that charities have been "timid" about bringing suit does not mean that they have never or rarely done so, and Budig et. al. compile an impressive list of cases in which charities have brought suit. The list is powerful evidence that rights of the sort created by Cardozo in *Allegheny College* have been deemed valuable by some charities—and, presumably, the threat of suit may be valuable even under circumstances where, if push came to shove, the charity would retreat rather than sue.

34. For a forceful presentation of this view, see generally Mike Townsend, *Cardozo's Allegheny College Opinion: A Case Study in Law as Art*, 33 HOUS. L. REV. 1103 (1996).

35. *Id.* at 1144.

36. KESSLER, GILMORE & KRONMAN, *supra* note 8, at 510.

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

38. 12 N.Y. 18 (1854).

church in reliance upon pledges of money to build a replacement. One can understand why judges in *that* case would be sympathetic to the charity's plight! As we have already noticed, Cardozo presented no evidence of detrimental reliance by Allegheny College. Run the facts of *Allegheny College* through today's leading formulation of promissory estoppel—section 90(1) of the Restatement (Second) of Contracts—and the College almost certainly loses.³⁹

If your goal is to highlight the need to reform the law so that reasonable reliance will render a promise enforceable, then *Allegheny College* is a lousy case to use: there's no reliance, and if there were reliance, there would be no need for reform, since existing precedents would suffice. If the "outcome" Cardozo was after was the legitimation of "promissory estoppel" or reliance-based theories of recovery in general, then why not do it in a case like *Siegel v. Spear*,⁴⁰ where detrimental reliance really was the core of the plaintiff's claim and where the plaintiff could not invoke that theory absent significant reform to the law?⁴¹ Perhaps Cardozo was worried that *Allegheny College* was the best chance he would get. During Cardozo's tenure, the New York Court of Appeals assigned cases through a rotation system.⁴² Hence Cardozo could not claim the assignment in *Siegel* (although he could presumably have concurred separately, as he did in some other cases), and, if another case involving detrimental reliance came along, there was no guarantee that Cardozo would get the opinion. So even if *Allegheny College* wasn't a *perfect* case for the job, it was at least *Cardozo's* case, and that was nothing to sneeze at.

39. As has already been mentioned, the Restatement (Second) contains an entirely separate provision, § 90(2), to render charitable subscriptions enforceable on facts like those of *Allegheny College*.

40. 138 N.E. 414 (N.Y. 1923).

41. *Siegel* is the first case I assign each year; it is wonderfully terse and rich. I use it to teach students how to read a judicial opinion, and I often spend two full weeks poring over its intricacies. In brief, Siegel had stored his furniture with the Spear company; he forebore from purchasing insurance in reliance upon a promise by Spear's agent, McGrath, to get the insurance for him. The Court of Appeals held that there was consideration for the promise. The opinion is murky, but one thing that court said clearly was that, on its chosen rationale (whatever that was!), there was no need to "determine whether the plaintiff, in refraining from insuring through his own agent at the suggestion of McGrath surrendered any right which would furnish a consideration for McGrath's promise." *Id.* at 416. The court's refusal to adopt a reliance-based theory becomes especially provocative if one compares it to the rationale adopted by the intermediate appellate court, which explicitly vetted the issue of promissory estoppel: the majority ruled for Siegel on the ground that "plaintiff's abandonment of his purpose to insure, in reliance on the defendant's promise, was a sufficient consideration for the defendant's promise," *Siegel v. Spear & Co.*, 195 A.D. 845, 847 (N.Y. App. Div. 1921), and the dissent objected that this amounted to "an application of what is spoken of in the text books as a promissory estoppel." *Id.* at 848 (Smith, J., dissenting).

42. Townsend, *supra* note 34 at 1134; KAUFMAN, *supra* note 29, at 132.

But if Cardozo's desired "outcome" was to legitimate promissory estoppel, there's another oddity about *Allegheny College*. The opinion's judgment about promissory estoppel is highly ambiguous. At a minimum, it is quite certain that, as Konefsky says, Cardozo after "having twice raised the issue of promissory estoppel, dismissed it as a ground of decision."⁴³ It is certainly arguable that, as Gilmore wrote, "Cardozo's opinion . . . was essentially a demonstration that the broad New York consideration theory made promissory estoppel an unnecessary and undesirable refinement."⁴⁴ In any event, Cardozo's opinion left it unclear whether or not promissory estoppel was good law in the state of New York.⁴⁵

Gilmore's characterization of *Allegheny College* suggests another, still more abstract "outcome" which might have motivated Cardozo. Perhaps his objective was to produce a kind of judicial "restatement" of the law of consideration. We are now getting closer to the truth about *Allegheny College*. Yet, to say that Cardozo wanted to produce a "restatement" of consideration only pushes the question back a level: why would anybody want to do that? "Well, to clarify the law and guide future decisions," one might say. A fair enough answer for a different judge and a different opinion—but not for Cardozo and *Allegheny College*! Gilmore wrote that although "Cardozo succeeded to an extraordinary degree in freeing up . . . the law of New York . . . he went about doing this in such an elliptical, convoluted, at times incomprehensible, fashion that the less gifted lower court New York judges were frequently at a loss to understand what they were being told."⁴⁶ No opinion illustrates Gilmore's statement better than does *Allegheny College*.

The idea that Cardozo wanted to produce a "restatement" of the law is made even more mysterious by the fact that its topic was the arcane consideration doctrine. This isn't, after all, products liability and *MacPherson v. Buick Motor Co.*⁴⁷ It is possible, I suppose, to believe that there are major social policy stakes involved in the fine points of legal doctrine governing the enforceability of gratuitous promises—but that seems implausible, and all the more so when one notices that the landmark cases involve such matters as an uncle's promise to reward his nephew for steering clear of billiard halls,⁴⁸ or an

43. Konefsky, *supra* note 10, at 649.

44. *Id.*

45. The most thorough review of the New York cases is William E. Nelson, *A Man's Word and Making Money: Contract Law in New York, 1920-60*, 19 *MISS. C. L. REV.* 1, 30-32 (1998). The state of the law is sufficiently confusing that contracts casebooks have taken inconsistent positions about whether New York courts have adopted the doctrine of promissory estoppel. Townsend, *supra* note 34, at 1146 & n. 276.

46. Gilmore, *supra* note 20, at 75.

47. 111 N.E. 1050 (N.Y. 1916). A classic treatment of *MacPherson* and its impact is EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 20-25 (1949).

48. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

Italian court's effort to collect a marriage gift from his American father-in-law.⁴⁹ Of course, Cardozo was not the only person agitated by the issue—at the time, the country's finest legal minds had passionate opinions one way or the other about consideration and promissory estoppel.⁵⁰ But that historical fact only deepens the mystery. What was everybody so excited about?

The answer to that question will lead us toward what is, in my judgment, Cardozo's real objective and away from the mistaken idea that Cardozo's reasoning was designed to deceive or trick his readers. But, insofar as we are interested in the capacity of *Allegheny College* to teach students about how to “think like a judge,” we should notice how far we have already come. We have been pursuing the common opinion that Cardozo manipulated doctrine in *Allegheny College* to achieve an outcome he desired. To make sense of that hypothesis, we have had to identify a series of increasingly abstract and subtle “outcomes” which Cardozo might have pursued. Goals like “legitimizing promissory estoppel” or “restating contract law” will come as surprising discoveries to many students: they have never imagined goals of this kind, much less that such goals might provide the moving force behind judicial decisions. Even if *Allegheny College* were an outcome-oriented manipulation of doctrine, it would have a lot to teach—by the nature both of its “manipulation” and its “outcomes”—about judicial creativity and what it means to “think like a judge.”

We have pending, though, an important question: why were so many lawyers, Cardozo included, so excited about consideration and promissory estoppel? As I've already indicated, I do not think that the social policy stakes were anywhere close to high enough to explain the intense controversy over these issues. The stakes were more distinctively jurisprudential: to take a position about promissory estoppel, one had to take a position on the more general question of whether and how it might be possible to offer a genuinely “legal,” as opposed to essentially legislative or simply political, resolution to a contested question of law. This meant, among other things, developing a theory about what “precedent” was, and about whether it should (or even could) control judicial decision-making.

These are, of course, among the perennial questions of Anglo-American legal philosophy, and they were being pressed vigorously around the time of *Allegheny College* by the American legal realists.⁵¹ Because the challenges posed by legal realism were so general, there is obviously no reason why they

49. *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917). *De Cicco* is, of course, another one of Cardozo's opinions, and it has delights to match those of *Allegheny College*. See generally Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993).

50. Townsend, *supra* note 34, at 1132-33.

51. Cardozo vigorously repudiated legal realism. John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1451-52 (1993).

had to be fought out in the arena of consideration doctrine—and, of course, that was not the only place where realists and their critics joined issue. So why would consideration doctrine occasion such intense argument? Sheer historical coincidence no doubt plays a part in the answer, but one can identify some of the fuel for the fire. First, Langdell and Holmes had taken firm positions about the content of the “scientific” or “rigorous” consideration doctrine.⁵² Intentionally or not, they thereby drew a line in the sand. Second, as Mike Townsend has recently observed, at the time of *Allegheny College* Cardozo and the American legal community were immersed in controversy over the American Law Institute’s Restatement project.⁵³ That project forced people to decide how (if at all) it was possible to bring order to the divergent common law precedents emerging from American state courts⁵⁴ and, more specifically, how to describe the consideration doctrine. Third, in the United States Supreme Court, the distinction between law and (other forms of) politics was being contested via cases about “the liberty of contract.” Now, obviously, there is no doctrinal connection between the meaning of the Due Process Clause on the one hand and the consideration doctrine on the other. The issues are joined, however, not only nominally (as questions about contractual rights) but at the level of political theory: to the extent that some lawyers and judges regarded contractual rights as somehow “natural,” “pre-political,” or determinable through “legal science” (and hence apolitical), that view could have implications both for the meaning of contractual liberty and for the content of contract doctrine.⁵⁵ Fourth, in one important respect the consideration doctrine was vastly different from the constitutional debates about “liberty of contract” and the Due Process Clause: the policy stakes in the consideration debate were, as I have already noted, probably quite small. Absent any clear moral or economic reason to prefer one view of the consideration doctrine over another, arguments about *stare decisis* and the nature of legal reasoning (which might in other circumstances yield in the face of blunt policy concerns) proved decisive. The consideration doctrine therefore involved an odd fusion of the intensely practical (judges and the American Law Institute had to take a stand one way or another on the question) and the purely jurisprudential (abstract convictions about judicial

52. Holmes had said, “It would cut up the doctrine of consideration by the roots if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it.” *Commonwealth v. Scituate Savings Bank*, 137 Mass. 301, 302 (1883). On Langdell, Holmes, and consideration in general, see GILMORE, *supra* note 1, at 12-22.

53. Townsend, *supra* note 34, at 1118-21.

54. John C.P. Goldberg, *Community and the Common Law Judge*, 65 N.Y.U. L. REV. 1324, 1329 (1990) (discussing Cardozo’s hope that the American Law Institute could bring order to the growing diversity of American precedents); see also Townsend, *supra* note 34, at 1119 (same).

55. Some of these connections are explored in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1936* 33-39 (1992).

technique may actually have played a decisive role in determining most people's positions).

In any event, I think that Cardozo's complex analysis in *Allegheny College* can best be understood if we regard it as driven by, and as endeavoring to elaborate, a particular theory about what judges should do when confronted with inconsistent and apparently irreconcilable precedents. The theory is this: the judge should endeavor to be faithful to *everything* and to produce some sort of dialectical synthesis of competing positions. If this synthesis were done right, it would both be guided by policy judgments and also be a guide to social policy. Cardozo seemed to imagine, in quasi-Aristotelian fashion,⁵⁶ that competing legal precedents, doctrines, and theories all contained some part of the truth, and that the task of the common law judge was to distill the truth out of these positions by synthesizing them in a way that recognized and preserved what was valuable in each of them.⁵⁷

That, I think, is what Cardozo was getting at in a pair of elegant paragraphs discussing the relationship between "half truths" and "whole truths" in legal doctrine. Cardozo began with what he called a "classic form of statement"⁵⁸ about consideration from the old case of *Hamer v. Sidway*.⁵⁹ Yet immediately he did an about-face: according to Cardozo, *Hamer's* "classic . . . statement" was "little more than a half truth" which required "many a supplementary gloss" in order to arrive at the "classic doctrine."⁶⁰ Cardozo next quoted the classic doctrine according to Holmes, Langdell, and Williston: "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting."⁶¹ But, Cardozo continued, "[t]he half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another."⁶² The consideration doctrine was no exception; indeed, said Cardozo, Holmes had noted in 1881 that some courts had departed from the "classic doctrine" of consideration, and Cardozo added that this "tendency toward effacement had

56. "[A]ll men lay hold on justice of some sort, but they only advance to a certain point, and do not express the principle of absolute justice in its entirety." ARISTOTLE, POLITICS 211 (H. Rackham trans. 1977).

57. In a discussion of Cardozo's more overtly jurisprudential writing, John C. P. Goldberg described Cardozo as a "philosophical magpie" who gathered together "assemblages of quotations from a diverse group of legal scholars and philosophers." Goldberg, *supra* note 54, at 1324.

58. *Allegheny College*, 159 N.E. at 174.

59. 27 N.E. 256 (N.Y. 1891).

60. *Allegheny College*, 159 N.E. at 174.

61. *Id.* (quoting a Supreme Court opinion by Holmes, and citing to both Williston and Langdell).

62. *Id.*

not lessened with the years.”⁶³ Cardozo then launched his famous (famous among contracts teachers, at least!) discussion of promissory estoppel, and concluded by saying:

[d]ecisions which have stood for so long and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure.⁶⁴

“The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another”—so what is the “whole truth” about consideration and which are the “half truths”? There are at least two ways to answer that question. The most obvious is to construe Cardozo to say that Holmes, Langdell, and Williston had articulated the “whole truth” about consideration. That interpretation would appeal to lawyers schooled in the “classic doctrine.” Viewed this way, Cardozo’s opinion sets up a contrast between messy precedent and pristine theory (the “whole truth”), and comes down on the side of respecting precedent, even at the expense of theoretical “whole truth.” But there is another, quite different, and in my view more compelling, way to interpret Cardozo’s chain of argument. What “whole truth” are we looking for? The “whole truth” about consideration. And since consideration is a legal doctrine, it seems implausible that any theory can give us the “whole truth” if it fails to account for significant lines of precedent. On this reading, the classical Holmesian theory is not the “whole truth”—it’s just another “half truth.” The “whole truth” is what Cardozo himself produces: an account of consideration which tries to synthesize and preserve some part of everything—*Hamer v. Sidway*, the “classic [but only half true] doctrine” of Holmes and Langdell and Williston, and the welter of common law precedents that were inconsistent with the “classic doctrine.” How was it possible to incorporate the “classic doctrine” and inconsistent cases into a single theory? By retaining the form of the Holmesian half truth but allowing its elements to be proven through “implication.” That is why Cardozo struggled to come up with a line of reasoning which turned out to be so complicated that it befuddled and perplexed several generations of students, lawyers, judges, and contracts professors!

Cardozo’s effort was Herculean, not just in the general sense that it involved almost super-human feats of legal strength, but because Cardozo exemplified a judicial method which Ronald Dworkin later described by reference to a hypothetical judge named Hercules.⁶⁵ Like Dworkin,⁶⁶ Cardozo

63. *Id.*

64. *Id.* at 175.

65. RONALD M. DWORIN, TAKING RIGHTS SERIOUSLY 105 (1977); RONALD M. DWORIN, LAW’S EMPIRE 239 (1986).

sought a middle ground between the formalist ideal of a legal science and the realist prescription that hard cases should be decided on the basis of social policy.⁶⁷ Like Dworkin,⁶⁸ Cardozo found that middle ground in an effort simultaneously to “fit” and “justify” legal precedent. And like Dworkin,⁶⁹ Cardozo viewed the relevant domain of legal precedent very broadly—so that, for example, in *Allegheny College* Cardozo’s ruminations encompassed all of consideration doctrine, not just the cases most directly concerned with charitable subscriptions. It is fitting that Dworkin used a Cardozo opinion to illustrate the jurisprudential protocol he favored.⁷⁰ But if perhaps Cardozo helped inspire Dworkin, it bears notice that Dworkin’s theory improves upon Cardozo’s practice in at least one important respect. Cardozo asked too much on the dimension of “fit.” He tried to reconcile the irreconcilable. In *Allegheny College*, Cardozo attempted to preserve both the Holmesian bargain theory and cases inconsistent with that theory. In the end, his effort strikes me as unpersuasive, and I have the impression that most readers (and certainly most students) find it altogether baffling. Perhaps because Cardozo wanted so much from fit, his references to “justification” were understated.⁷¹ Dworkin, by contrast, makes clear that his Hercules must sometimes reject precedents as “mistakes,” and, more fundamentally, that Hercules will have to choose among multiple plausible interpretations of the law on the basis of normative judgments about social justice.⁷²

There is thus a sense in which Gilmore was right when he suggested that Cardozo “was accustomed to hide his light under a bushel.” If Gilmore meant only to describe the *effect* of Cardozo’s method, he was right—Cardozo’s

66. DWORKIN, *LAW’S EMPIRE*, *supra* note 65, at 228.

67. Professor Goldberg is one of the few scholars who treats Cardozo’s legal reasoning as sincere, rather than as an outcome-oriented rhetorical exercise; Goldberg persuasively characterizes Cardozo as “both an anti-formalist and an anti-realist.” Goldberg, *supra* note 54, at 1455.

68. DWORKIN, *LAW’S EMPIRE*, *supra* note 65, at 239.

69. *Id.* at 245.

70. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 65, at 118-19 (discussing *MacPherson*).

71. Cardozo himself may not have understood how much his opinions depended upon contestable judgments of value and policy. In an important new book about the New York courts, the legal historian William E. Nelson argues that “[a]lthough we now believe that Cardozo’s [methodology] leaves judges with a vast ‘power of innovation’ amounting to lawmaking freedom, Cardozo did not: in his view, ‘the bulk and pressure of the rules that hedge’ judges ‘on every side’ made their freedom ‘[i]nsignificant.’” NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-80* (forthcoming, U. N. Carol. Press 2001) [manuscript at 37-38; copy on file with the author] (quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 61-63, 65, 78-79 (1924) and BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136-37 (1921)).

72. See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 65, at 247 (on “mistakes”) and at 255 (hard cases will require judges to choose among interpretations on the basis of normative values).

quest to reconcile opposites had the consequence of concealing (not only from readers, but probably from Cardozo himself) the judgments of policy and principle, which were in fact decisive to Cardozo's reasoning. But if Gilmore meant to describe the intent behind Cardozo's machinations, then I think Gilmore was wrong. Cardozo was not using doctrine to disguise innovations or to set up a smoke screen. As John C. P. Goldberg has rightly observed, Cardozo's opinions are "consumed by discussions of . . . concepts like . . . 'consideration' . . . not because he thought such talk would seduce lawyers . . . [but] because he believed that law contains meaningful concepts [which] do and should guide judicial decisions."⁷³ The obscurities of Cardozo's reasoning were the result of a sincere commitment to the impossible goal of fitting everything (or almost everything) in legal precedent, of finding and then preserving value even in theories and doctrinal formulae which Cardozo deemed unsatisfactory.⁷⁴ The fact that this aspiration was doomed to failure does not render it any less interesting or noble. If students can be made to understand why a judge might have such an ambition, and why even a judge so brilliant as Cardozo could not succeed at it, they will have learned a great deal about what it means to "think like a judge," and so about how to "think like a lawyer."

The challenge is to convey to students the subtleties of Cardozo's project. I spend three full class periods on *Allegheny College*. In the first class, we unpack the doctrine of *Allegheny College*. In the second class, we focus upon why Cardozo thought it necessary to treat the issue in such complex fashion. For the third class, I assign Dworkin's article "How Law is Like Literature."⁷⁵ I use Dworkin's argument to provide the students with a theoretical model through which to comprehend Cardozo, and I use Cardozo to introduce students to the questions and insights that animate Dworkin's theory. The three classes are the capstone to a seven-week unit on promissory estoppel and consideration, all of which is designed to set up *Allegheny College*. During the six weeks in the syllabus prior to the *Allegheny College* assignments, students learn competing theories about the enforceability of promises; they read

73. Goldberg, *supra* note 54, at 1452.

74. Professor Goldberg is apparently more optimistic about the success of Cardozo's project than am I; he suggests that "[p]resent-day scholars interested in developing an adequate anti-Realist theory of law . . . could hardly do better than to undertake a careful examination of [Cardozo's] work." *Id.* at 1476. Goldberg's judgment is based on a review of Cardozo's jurisprudential corpus as a whole, with special emphasis on Cardozo's tort law opinions, whereas my argument in this article is derived entirely from *Allegheny College*. It is possible that *Allegheny College* is unrepresentative of Cardozo's more general jurisprudential convictions—although I'm not inclined to think so.

75. RONALD M. DWORKIN, *How Law is Like Literature*, in A MATTER OF PRINCIPLE 146-66 (1985). I believe this essay to be Dworkin's best short statement of his general approach, although I much prefer the title under which it was originally published, "Law as Interpretation."

several of the precedents eventually discussed by Cardozo in *Allegheny College*; they become acquainted with figures like Holmes and Cardozo; and they get an introduction to ideas like the notion of “legal formalism.” Most of all, I try to prod the students to develop a sense of mystery, wonder and curiosity about why judges were so agitated about the possibility that reasonable reliance might render a promise binding in the absence of bargained-for consideration.

Even with all this time, planning and attention, *Allegheny College* remains a tough nut to crack. The jurisprudential context of *Allegheny College* is conceptually demanding. I find, though, that my students at NYU (admittedly, NYU gets exceptionally good students) rise to the challenge. They take pride in their capacity to comprehend ideas and materials which they rightly perceive as difficult. They find satisfaction in the discussion of topics that engage their curiosity and their imagination. They come away with a deepened understanding of what is at stake in legal argument, and many of them come away more excited about their legal education.

It would undoubtedly be possible to achieve these goals outside contracts and without the help of Benjamin Cardozo. Somebody might even suppose that Cardozo is a hindrance. Wouldn't it be better to use more recent exemplars to show students what it means to “think like a judge”? After all, Cardozo's exquisite anxiety about fidelity to legal precedent is not only unique but arguably anachronistic. One might think that today's judges, if they shared Cardozo's sensitivity to questions of justice and social policy, would be more explicit about the relevance of such concerns. That view, however, strikes me as mistaken in two respects, one sociological and the other pedagogical. As a sociological matter, I think that judges today are as worried and confused as they were in Cardozo's day about such things as the notion that “judges should apply the law, not make it.” Hence the need for, and controversial reception of, Dworkin's work. As a pedagogical matter, I think it is a mistake to exaggerate the importance of “contemporary relevance” as a criterion for selecting assigned readings. Readings ought to bring to the classroom something that would not otherwise be present. “Contemporary relevance” is not lacking. My students and I inevitably come to the classroom equipped with contemporary ideological prejudices. Many students believe themselves to be concerned about nothing other than “contemporary relevance,” and of course faculty can count on them to read outlines and study guides even if we do not assign them—even, in fact, if we actively *discourage* students from such reading. In the classroom, what I want from a judicial opinion is the manifestation of another mind, preferably both provocative and deep, though not so different from the students as to be inaccessible. Cardozo's opinions supply that admirably well, and “contemporary relevance” emerges (or at least I hope it does) from the process whereby my students and I collaborate to interrogate his writing.

My own judgment is that Contracts, where issues of judicial technique figure so prominently, and Cardozo, who was so smart and so sophisticated about such questions, provide nearly ideal vehicles for introducing students to the nature of judicial and legal creativity. Perhaps that is one reason why contracts has proven to be such a durable element in the first-year curriculum. It is, in any event, the key to what I consider the most important objective in my own version of the course.

