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## Metaphors, Models, and Meaning in Contract Law

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## Articles

# Metaphors, Models, and Meaning in Contract Law

Jeffrey M. Lipshaw\*

### ABSTRACT

Why does there seem to be such a wide gap between the subject matter of the usual first-year contracts course and what practitioners (particularly transactional lawyers) actually experience? This article is an attempt to bridge the gap, combining insights from academic theory and real-world law practice. My claim is that the law as discipline has developed its own powerful but self-contained conceptual framework—in the coinage of one noted scholar, “an epistemic trap.” The subject matter of contract law, something that is largely the creation of private parties and not the state, requires dealing with legal *truth* not just as a coherent body of normative doctrine, but also correspondent in some

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way to the parties' actual self-legislation. In other words, the exercise of understanding the law relating to transactions is not wholly descriptive—"to what did the parties agree"? Nor is it wholly normative—"what should be done when the parties dispute the nature or terms of their agreement after the fact?" Much of the difficulty of the first-year contract law enterprise lies in this conflation of the law's usual after-the-fact normative focus (as, say, in tort or criminal law) with an inquiry into what private law the parties actually meant to create before the fact.

I propose escaping the epistemic trap with a turn to metaphor theory. The underlying metaphor common to prevailing conceptions of contract law, and which demands some form of correspondent truth from the contract (and contract law), is "contract as model of the transaction." I suggest alternative metaphors of categories as containers, ideas as objects, and the transaction lifecycle as a journey. The goal is to focus on the "subjective to objective" process of the transactional lifecycle, and to consider the perspectives of the participants in or observers of that process. In particular, I consider the models and metaphors that shape the conceptual frames from within which those participants and observers perceive, make use of, and derive meaning from what end up as contracts, which are best thought of as the objective manifestations of inter-subjective agreements.

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## INTRODUCTION

There is probably no better example of the frustrating gap between academic law and the practice than the indoctrination first-year students receive in contract law. Although the casebooks vary in their approaches, by early December, the typical student has been bamboozled by elements of doctrine that experienced practitioners know almost never come up. The practitioner might ask why we study consideration and offer-and-acceptance when those are rarely issues in the real world. Indeed, it is a fair observation that only a tiny portion of the first-year contracts course involves the issue of contract interpretation. Yet practitioners know that the real world of contracts is almost exclusively about negotiating and writing documents and perhaps interpreting them later (whether or not they get litigated), and almost never about the vast majority of doctrinal issues—consideration, offer and acceptance, defenses, impossibility—covered by the course.<sup>1</sup>

The classical scholars who sought to organize the study of contract law scientifically over one hundred years ago created a powerful theoretical paradigm that lives on in the traditional first year contract law course.<sup>2</sup> There is nothing either unusual or wrong with powerful theoretical paradigms; raw experience only becomes meaningful and useful when minds process it.<sup>3</sup> The downside of these paradigms of legal theory and pedagogy, however, is the power to channel thought in what Elizabeth Mertz describes as “language forms.”<sup>4</sup> The focus on the forms

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1. This is an empirically testable claim, and I admit upfront that I assert it based on the laboratory of my twenty-six years of real-world experience as a litigator, “deal” lawyer, and general counsel. I do not think most practitioners of my vintage would seriously contest it.

2. And that paradigm—Langdellian formalism—has been the subject of theoretical attack by, among others, legal realists, critical legal scholars, and others ever since.

3. Indeed, how human beings integrate perception and conception has been a subject of philosophy of mind and science since Kant. Karl Popper summarized the idea neatly:

It is not these sense-data but our own intellect, the organization of the digestive system of our mind, which is responsible for our theories. Nature as we know it, with its order and its laws, is thus largely a product of the assimilating and ordering activities of our mind. In Kant’s own striking formulation of this view, “Our intellect does not draw its laws from nature, but imposes its laws upon nature.”

KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 244 (Routledge ed., 2008) (1963) (footnotes omitted).

4. In particular, as noted by Mertz:

[The] adversarial process is the means by which legal truths and facts are ascertained, and it is the means by which law obtains legitimacy in the wider society, by ensuring that both sides are represented, using seemingly neutral legal categories. Thought, identity, truth, and legitimacy are packaged powerfully together through meta-linguistic structure.

of argumentation as the core of pedagogy “creates a closed linguistic system that is capable of devouring all manner of social detail, but without budging in its core assumptions.”<sup>5</sup> These language forms and the classification system designed to make sense of them were immensely powerful,<sup>6</sup> developed by those working inside the legal institution<sup>7</sup> and based upon legal propositions developed through the lens of after-the-fact litigation.

Above all, the categories and classifications of legal propositions within the system were contingent, reflecting the minds of the brilliant theorists who shaped the modern contracts curriculum more than any necessary reason the propositions needed to be organized in the categories they created.<sup>8</sup> For example, my contracts class reads Judge Skelly Wright’s landmark 1965 opinion in *Williams v. Walker-Thomas Furniture Co.*,<sup>9</sup> in which the court deemed a cumulative financing scheme directed at low-income buyers to be unconscionable and unenforceable. A student asked whether *Batsakis v. Demotsis*,<sup>10</sup> which we had studied earlier, was relevant to the discussion. In *Batsakis*, a case decided sixteen years prior to *Williams*, the court declined to inquire into the unfairness of the consideration, even though it was clear that the contract was grossly unfair and the result of wartime profiteering. Why, asked the student, had *Batsakis* not been considered as an “unconscionability” case? The student’s observation was profound: there was no logical reason that the lawyers could not have argued

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Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 504 (2007). For a book book-length report of Professor Mertz’s empirical study of first-year law school classrooms, see ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

5. Mertz, *Inside the Law School Classroom*, *supra* note 4, at 504.

6. See Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 49 n.178 (1983) (“There have been occasional moments of realization [among modern theorists] that the Langdellian structuring of the first-year legal curriculum decisively shapes the legal consciousness of students, with subsequent unsuccessful flurries of effort at designing the curriculum along ‘functional’ lines.”) (citations omitted).

7. See *id.* at 6 (“Classical orthodoxy was a particular kind of legal theory—a set of ideas to be put to work from *inside* by those who operate legal institutions, not a set of ideas about those institutions reflecting an *outside* perspective, whether a sociological, historical or economic explanation of legal phenomena.”).

8. Categorization itself is an evolutionarily adaptive behavior; creatures categorize in order to avoid being overwhelmed by variety (and, likely, to be able to separate threats from non-threats). Mark Turner, *Categories and Analogies*, in *ANALOGICAL REASONING* 3 (David H. Helman ed., 1988). Category structures evolve within cultures, and cultures optimize category structures as a matter of fitness. As Arthur Leff surmised, “[P]eople classify for the same reason that tigers hunt and most animals copulate, which is *not* solely to have food and children, respectively.” Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 134 n.11 (1970).

9. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

10. *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949).

unconscionability in *Batsakis*, but either they did not or the court declined to consider it. Nonetheless, *Batsakis* regularly appears in casebook chapters on consideration because the basis of the decision is a legal proposition about consideration, even though the sense of unfairness that caused the litigation is equally relevant to legal propositions about unconscionability.

A closed system of language and classification is another way of expressing what legal sociologist Gunther Teubner calls law's "epistemic trap."<sup>11</sup> Law as a social institution develops its own models and constructs of reality. Its "cognitive operations . . . construct idiosyncratic images of reality and move them away from the world constructions of everyday life and from those of scientific discourse."<sup>12</sup> This is particularly true in contract law. Much of the standard pedagogy is the presentation of classical formalism as the straw man to be knocked down by the theoretical responses that developed over the course of the 20<sup>th</sup> century.<sup>13</sup> Those alternative conceptions of the law did not eliminate the trap; even Legal Realism is still *legal* in the sense that it is a vision from within the community of lawyers about how its closed linguistic system should best reflect the outside world.

The epistemic trap is particularly pronounced in the law of contracts (and hence in the first-year contracts class) because the subject matter demands dealing with legal *truth* in an exceptional way and applies particular conceptual structures to arrive at such truth. As in all other areas of the law, theorists and students need to come to terms with what makes legal propositions true or correct as applied in particular cases. That process is not markedly different in litigation over contracts and property on one hand, versus, say, torts or criminal law on the other. Indeed, to the extent that the coherence of the propositions is an indication of their truth or correctness, as Karl Llewellyn observed eighty years ago, the work of a lawyer or judge in determining the law in the case method proceeds on the assumption "that all the cases everywhere can stand together. It is unquestionably the assumption you must make, at first. If they can be brought together, you must bring them."<sup>14</sup>

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11. Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 742 (1989).

12. *Id.*

13. Grey, *supra* note 6, at 3 (stating that "classical orthodoxy is the thesis to which modern American legal thought has been the antithesis"). It is not my intention to wade into the current historical and normative debates, and the raft of literature, about formalism and its critics. I do acknowledge that the scholars to whom classical formalism is attributed, Langdell, Williston, and others, did not so refer to themselves, and I apologize to them for adopting what was a pejorative label.

14. K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 50 (1960). It is the assumption required "at first" because it is possible that the cases may not be

Contract law demands not just truth as normative coherence—a system of rules that do not contradict one another—but also truth as descriptive correspondence to the independent reality that was the underlying transaction.<sup>15</sup> The received wisdom among most academic theorists and “lawyers’ lawyers” is that rational actors will shape their voluntary agreements before the fact in light of their expectation of how the system will resolve disputes after the fact. The body of contract law propositions thus provides a default reconstruction of the entire transactional lifecycle, but it does so only through the lens of the after-the-fact adjudication that sets the normative rules. The theoretical debates in contract law over the last one hundred years have revolved around the relationship of after-the-fact normativity to before-the-fact description. Ironically, the most vigorous modern academic defense of classical contract law formalism comes from contract theorists using rational actor welfare economics to posit an ideal (but admittedly unachievable) “complete contract”<sup>16</sup> that wholly eliminates the

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reconcilable. “Hence, in your matching of cases, you may, as a last resort when unable to make the cases fit together, fall back upon the answer: here there is a conflict; these cases represent two different points of view.” *Id.* at 51. One hallmark of the epistemic trap is that the legal system demands its own internal consistency, at the same time that other societal interests force inconsistencies upon it. See Oren Perez, *Law in the Air: A Prologue to the World of Legal Paradoxes*, in PARADOXES AND INCONSISTENCIES IN THE LAW 3, 7 (Oren Perez & Gunther Teubner eds., 2006).

15. My sense is this is also true of much of property law, but my discussion here is confined to the subject I happen to teach.

16. A contract is complete in this sense if it anticipates all future states of the world. Everyone agrees that “[a]ll contracts are incomplete. There are infinite states of the world and the capacities of contracting parties to condition their future performance on each possible state are finite.” Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641 (2003). There is substantial law-and-economics literature seeking to understand, in rational terms, why and how contracting parties leave contracts incomplete (as though the ideal complete contract were indeed obtainable, much less conceivable). See, e.g., Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323; Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335 (1993); Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91 (2000); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 731 (1992); George G. Triantis, *The Efficiency of Vague Contract Terms: A Response to The Schwartz-Scott Theory of U.C.C. Article 2*, 62 LA. L. REV. 1065 (2002); Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329 (2003); DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 109-21 (1994) (insights of game theory applied to renegotiation of incomplete contracts); Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496 (2004).

possibility of opportunism<sup>17</sup> among otherwise “boundedly rational” contracting parties.<sup>18</sup> The modern defense of the contending school of legal realism in contract law is no less rational in the effort to reconstruct what the parties supposedly intended (maximizing their joint economic surplus) from the totality of the circumstances, including the formal document they created.<sup>19</sup>

In either case, the prevailing (and powerful) metaphor for the contract is either as a model of the ideal transaction or some notional “meeting of the minds.” Is that metaphor appropriate? My answer is: often yes, but perhaps not as often as the “rationalists” of contract law would like to think.<sup>20</sup> Does the contract “map” either the ideal or the actuality of a transaction? Sometimes it does map, particularly in the provisions that are constitutive of the deal structure itself, like the price, the structure of merger or stock transfer, or the mechanics of the post-closing adjustment in acquisition agreements. Sometimes it does not map, as in the provisions negotiated in the wee hours of the morning, allocating the perceived risk of some remote contingency that seems to loom heavily and which requires *some* agreement to satisfy the parties, even if they are not quite sure what the agreement means. Sometimes it does map the transaction, in the price and description on the front side of the break-apart triplicate form; sometimes it does not map it, as in most of the boilerplate (even between sophisticated purchasers and sellers) on the back. Moreover, the rational conception of a contract as a check on

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17. As stated by Armen A. Alchian and Susan Woodward:

Opportunism follows from bounded rationality plus self-interest. When a conflict arises between what people want and what they have agreed to do for others, they will act in their own self-interest insofar as it is costly for others to know their behavior. . . . Opportunism . . . includes honest disagreements. Even when both parties recognize the genuine goodwill of the other, different but honest perceptions can lead to disputes that are costly to resolve.

Armen A. Alchian & Susan Woodward, *The Firm is Dead; Long Live the Firm: A Review of Oliver E. Williamson's The Economic Institutions of Capitalism*, 26 J. ECON. LIT. 65, 66 (1988).

18. “Bounded rationality refers to human behavior that is ‘intendedly rational only limitedly so.’ . . . Simon observes in this connection that ‘it is only because individual human beings are limited in knowledge, foresight, skill and time that organizations are useful instruments for the achievement of human purpose.’” OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 21 (1975) (quoting H.A. SIMON, *ADMINISTRATIVE BEHAVIOR* xxiv (1961), and H.A. SIMON, *MODELS OF MAN* 199 (1957)).

19. Juliet P. Kostritsky, *Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, ELON L. REV. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1725467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725467).

20. I have previously made it clear that I believe a search for “meeting of the minds” or “shared intention” in contract interpretation litigation, where the parties each have colorable positions, is chasing a chimera. Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99 (2005).



after-the-fact opportunism is one more honored in academic theory than in practice. Why do law-and-economics scholars insist that contracts are a necessary safeguard against opportunism (which would otherwise reduce the incentive to invest)<sup>21</sup> when clients regularly ask their lawyers how to “break” a contract, and lawyers manage regularly to come up with an interpretation of the language and events colorable enough to take a good swing at it?<sup>22</sup>

The million-dollar question is: just what are the litigating parties and courts reconstructing? The usual dialectics in contract theory—formalism versus realism, textualism versus contextualism, moral versus welfare-based theoretical justifications, and so on—arise out of the same metaphoric image of contracts as rationally created models of before-the-fact inter-subjective events and understandings from which models after-the-fact observers ought to be able to reconstruct some version of the before-the-fact transaction. I want to challenge how we think about theoretical and doctrinal classifications in contract law, and I want to propose alternative metaphors to deal with the after-the-fact litigation reconstructions and the before-the-fact transactional realities.

Part I provides a brief primer on the metaphor theory I use throughout this analysis, particularly the concept of physical analogs in which categories are metaphoric containers, ideas are metaphoric objects, and the transactional lifecycle is a journey. The lesson to be taken from Part I is that metaphoric thinking is pre-logical and pre-propositional; it is the best explanation of the source of the “aha” moment of inspiration or understanding in which we hypothesize the possibility of an answer. In law, it is the essence of issue spotting—a metaphoric leap that precedes the articulation of a result by way of legal propositions.

In Part II, I propose escaping the epistemic trap of legal propositions and classifications by confronting the standard approaches to contract theory and doctrine, almost all of which employ the “contract as rational model of the transaction” metaphor. The alternative metaphor is of a journey that begins with wholly internal and subjective wants of individual parties. The parties engage in inter-subjective transactions that have objective manifestations. Sometimes those manifestations include objectified documentation of the parties’ inter-subjective transactions: the contract, which is the object or thing that the parties have created. Sometimes an arbiter must resolve a dispute arising

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21. Kostritsky, *supra* note 16, at 327-30.

22. See Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT L. REV. 29 (2001) (identifying all of these concerns and engaging in an ambitious multi-disciplinary reconciliation).

between the parties because they do not agree about the consequences of their inter-subjective transaction or the objective document they created.

Part II also addresses an implication of the alternative metaphor. Seen as a part of the entire transactional lifecycle, the traditional debates in contract theory—whether courts adopt Langdellian textualism or Corbinian contextualism, or justify their after-the-fact adjudication of contract disputes on moral or efficiency grounds—are of less consequence than one would think. The metaphor of “contract as linguistic model” suggests not only coherent legal truth in the adjudicative process, but correspondent truth as well; that the mutual intention of the parties is something discoverable as though we were scientists seeking explanations of the physical world. That is an overstatement. The point of seeing the transactional lifecycle as a process or journey from individual and subjective desires to a written document is to understand that the objectification is an end in itself. Each observer of or participant in the transactional lifecycle has a stake in the outcome and a view from somewhere. The metaphor of process or journey allows theorists and students to take account of those divergent incentives and perspectives for both the before-the-fact transaction and the after-the-fact dispute resolution.

Part III addresses the use of pre-propositional metaphors as the source of intuitive judgments among competing algorithms of contract law. If the language of the law in doctrinal analysis creates the epistemic trap, then we break free of the trap when we identify the conceptual frames, models, and metaphors with which the participants in and observers of the transactional journey perceive and make use of the rules. The metaphoric approach to cognition suggests that our ability to perceive concepts, categories, and classifications, and thus to judge whether a particular circumstance fits within a general rule, precedes the ability to express the reasons for that judgment. The participants and observers in the contract dispute resolution process apply the language of legal reasoning in a motivated way, framed by prototypes within competing concepts and categories. Legal argument about whether a promise is enforceable as a contract, for example, occurs by way of the application of propositions setting forth conditions of enforceability, such as the definiteness of the promise, the existence of consideration or reliance, and so on. Here too the rule-based argument is the tail of the dog; what precedes it are competing prototypical images of a gift and an arm’s-length negotiated bargain. The real question is the extent to which

those prototypes exert a metaphoric pull on the facts of the case under adjudication.<sup>23</sup>

### I. CONCEPTUAL METAPHORS, CLASSIFICATIONS, AND CONTAINERS

Both the academic and practicing arms of the legal profession take, as an article of faith, the conception of a rational linkage between before-the-fact and after-the-fact aspects of transactional lifecycles. Like all other litigation, contract litigation concerns historical facts that are static even if they are discoverable. By contrast, before-the-fact transactional lawyering deals with dynamic circumstances occurring in real time and affected by what lawyers and their clients do in framing, negotiating, and documenting the transaction. The paradigm of effective lawyering within this conception is the creation of private law before the fact that, in the event of an after-the-fact dispute, will govern the parties' rights, duties, and obligations. A transactional lawyer in this conception serves her client by creating the optimal formal model of the transaction, the essence of which is that it be correct yet contain substantially less than all of the information constituting the parties' relationship, lest every contract be of infinite length.

Conceiving of contracts as optimal formal models is an implicit choice of a particular conceptual metaphor that gives meaning to a contract from an after-the-fact perspective: the contract that exists after the fact is a linguistic model of the before-the-fact transaction. That metaphor is not nonsense but it *is* a metaphor. How the law characterizes the transactional lifecycle is rife with such unexamined conceptual metaphors. Confronting those metaphors explicitly as a matter of theory and pedagogy provides a more complete and coherent understanding not only of the role of contract law and lawyers in the transactional lifecycle, but also of the traditional doctrinal issues like the plain meaning rule or implied terms.

The first task is to state what I mean by conceptual metaphors, as conceived of (somewhat controversially) in cognitive science, and to distinguish metaphoric thinking from propositional thinking. The conceptual metaphor theory<sup>24</sup> holds that metaphor is "not simply an ornamental aspect of language, but a fundamental scheme by which

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23. Indeed, the metaphoric image for the debate itself is a tug of war. I have an old satirical cartoon in my office (that I purchased at the Old Curiosity Shoppe in London) of two litigants, labeled the "Plaintiff" and the "Defendant," each pulling on the opposite end of a cow labeled "Litigation," behind which stands the "Judge," and below which "Lawyer" sits on a stool doing the milking.

24. For the leading discussion of metaphor theory as applied to law, see STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE AND MIND* (2001).

people conceptualize the world and their own activities.”<sup>25</sup> “The essence of metaphor is understanding and experiencing one thing in terms of another;” metaphors are the means by which humans impart meaning to new experiences (the target) from past experiences (the source).<sup>26</sup> A conceptual metaphor is more than a mere literal statement of comparison; it is “an utterance with two components in tension, where the irreducible cognitive meaning of the metaphor arises from the interplay between these components understood as systems.”<sup>27</sup>

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25. Raymond W. Gibbs, Jr., *Metaphor and Thought: The State of the Art*, in THE CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT 3 (Raymond W. Gibbs, Jr. ed., 2008).

26. SANFORD SCHANE, LANGUAGE AND THE LAW 72-74 (2006) (quoting GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980)).

27. STEPHEN H. KELLERT, BORROWED KNOWLEDGE: CHAOS THEORY AND THE CHALLENGE OF LEARNING ACROSS DISCIPLINES 105 (2008) (citing EVA FEDER KITTAY, METAPHOR: ITS COGNITIVE FORCE AND LINGUISTIC STRUCTURE 22-23 (1987)).

Metaphor theory is the subject of substantial debate among philosophers of mind and cognitive scientists. Donald Davidson and Richard Rorty famously asserted that metaphors carry no meaning beyond the literal statement. On this account, language divides into semantics, which is meaning, and pragmatics, which are the flourishes and filigrees by which speakers draw attention to their literal utterances. Thus, Romeo's statement “Juliet is the sun” does not really convey meaning about Juliet, but “is like using italics, or illustrations, or odd punctuation or formats.” RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 18 (1989). See also Donald Davison, *What Metaphors Mean*, 5 CRITICAL INQUIRY 31 (1978). For a summary of the deflationary accounts of metaphor, and a response, see Mark Johnson, *Philosophy's Debt to Metaphor*, in THE CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT 39-52 (Raymond W. Gibbs, Jr. ed., 2008).

At the other extreme, the pioneers of metaphor theory, George Lakoff and Mark Johnson, proposed that metaphors arising out of the physical experience of embodied minds explains all of thinking, such that even propositional thinking (logic and mathematics, for example) is metaphoric. On this account, there are no transcendent or universal concepts, nor is there any truly abstract reasoning; instead, minds, reason, and thought are “shaped crucially by the peculiarities of our human bodies, by the remarkable details of the neural structure of our brains, and by the specifics of our everyday functioning in the world.” GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 3-5 (1999). Lakoff and Johnson (as well as Professor Winter) reject not only Cartesian mind-body dualism, but also, among other concepts, (a) the Kantian concept of autonomous freedom, to the extent such “freedom” means there is any noumenal or transcendent of physical experience, and (b) the idea that we have any a priori or reasoned access to the workings of our own minds. For a summary of Lakoff's updated Neural Theory of Language, which postdates his work with Johnson, see George Lakoff, *The Neural Theory of Metaphor*, in THE CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT 17-38 (Raymond W. Gibbs, Jr. ed., 2008).

For reasons more fully articulated by Steven Pinker, it is not necessary to adopt the extreme view of the pioneers of metaphor theory that *every* concept derives from a metaphor of embodied physical experience in order to use the insights better to understand how we frame and interpret the transactional lifecycle. STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 235-78 (2007). I have previously summarized this view. Jeffrey M. Lipshaw, *The Financial Crisis of*

As a result of our interactions with the physical world, our brains have evolved so that we recognize and generalize from recurring patterns. The patterns themselves are capable of description as “image-schemas” by which we conceive of abstractions in physical terms. The critical aspect of this process is the “conduit” metaphor, “a systematic set of mappings from the source domain of physical objects to the target domain of mental operations.”<sup>28</sup> As Professor Winter describes it:

In this conceptual mapping, a concept or idea is understood as an object subject to inspection, physical manipulation, and transportation; words are vehicles for conveying this ideational “content”; and the resulting cognitive operation is understood as an acquisition or “taking in” of that object.<sup>29</sup>

Such mappings are implicit in metaphors like “ideas are objects,” “action is motion,” “understanding is grasping,” “categories are containers,” “purposes are destinations,” and “life is a journey.”<sup>30</sup>

The prevailing conceptual metaphor in legal theory, not unique to contract law, is that law exists as a thing.<sup>31</sup> It is a metaphoric body of doctrinal propositions capable of metaphoric speech and demands. We see this in common expressions like “the law says . . .” or “the law requires that . . .” Within that metaphor body, those doctrinal propositions are objects that can be classified and studied as a physical scientist studies phyla and species. As Dean Langdell observed in the foreword to his revolutionary casebook on contracts:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.<sup>32</sup>

Scientific understanding and use of legal doctrine is a matter of classifying and arranging the principles so as to reduce the number of truly fundamental ones. In contract law, in particular, Langdell saw it as “possible without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important

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2008-09: *Capitalism Didn't Fail, But the Metaphors Got a "C"*, 95 MINN. L. REV. 1532 (2011).

28. WINTER, *supra* note 24, at 52.

29. *Id.* at 53.

30. *Id.* at 15-16.

31. See generally STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

32. C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871).

degree to the growth, development, or establishment of any of its essential doctrines.”<sup>33</sup>

The classification metaphor is of containers or buckets for legal propositions and legal consequences, themselves a series of “if-then” propositions or algorithms akin to computer programs, into which one inserts the appropriate answers and reaches the appropriate conclusions. For example, not every statement about the future creates a legal obligation on the part of the speaker with regard to the substance of the statement. There is an algorithm with a series of “if-then” propositions. As a necessary but not sufficient condition of legal enforcement, the statement must be a promise. Did the speaker make a commitment to act in the future? If she did, then that statement falls within the “promise” container, and if bargained for or relied upon that statement might be binding. Did she instead make a statement about her present intention to act in the future? If so, it is outside the promise container.<sup>34</sup>

The key distinction for purposes of my re-conception of contract law is between the cognitive capabilities reflected in metaphor theory

33. *Id.* at vii.

34. For example, I have used the following as examples of the “algorithms” of sections 71 and 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1981), respectively, the “classical” and “reliance” formulations for the formation of a binding obligation. Section 71 works as follows:

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10 QUESTION "Is there a promise?" ANSWER(A): [YES] [NO]
20 IF ANSWER(A)=NO, GO TO 30, IF ANSWER(A)=YES, GO TO 40
30 PRINT "There is no legal claim, goodbye."
40 QUESTION "Was there a performance or promise in return for the
   promise?" ANSWER(B): [YES] [NO]
50 IF ANSWER(B)=NO, GO TO 30, IF ANSWER(B)=YES, GO TO 60
60 QUESTION "Was the performance or return promise sought by the
   promisor in exchange for his promise?" ANSWER(C): [YES] [NO]
70 IF ANSWER(C)=NO, GO TO 30, IF ANSWER(C)=YES, GO TO 80
80 QUESTION "Was the performance or return promise given by the
   promisee in exchange for the promisor's promise?" ANSWER(D): [YES]
   [NO]
90 IF ANSWER(D)=NO, GO TO 30, IF ANSWER(D)=YES, GO TO 100
100 PRINT "Congratulations. The promise is supported by consideration."
Compare that to the "algorithm" for promissory estoppel under section 90:
10 QUESTION "Is there a promise?" ANSWER(A): [YES] [NO]
20 IF ANSWER(A)=NO, GO TO 30, IF ANSWER(A)=YES, GO TO 40
30 PRINT "There is no legal claim, goodbye."
40 QUESTION "Should the promisor reasonably have expected the
   promise to induce reliance?" ANSWER(B): [YES] [NO]
50 IF ANSWER(B)=NO, GO TO 30, IF ANSWER(B)=YES, GO TO 60
60 QUESTION "Did the promise actually induce reliance?" ANSWER(C):
   [YES] [NO]
70 IF ANSWER(C)=NO, GO TO 30, IF ANSWER(C)=YES, GO TO 80
80 QUESTION "Is it necessary to enforce the promise to avoid injustice?"
90 IF ANSWER(D)=NO, GO TO 30, IF ANSWER(D)=YES, GO TO 100
100 PRINT "Congratulations. The promise will be enforced."

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and propositional thinking. Analogies and metaphors put pressure on category structures by “unmask[ing], captur[ing], or invent[ing] connections absent from or upstaged by one’s category structures.”<sup>35</sup> In that respect they are pre-logical and pre-propositional. They are at work in that irreducible “aha” moment of freedom,<sup>36</sup> when somebody like my thoughtful student reading a case like *Batsakis* faces a new situation and there is no decision path that demands to be followed.<sup>37</sup> Is this a consideration issue to which the consideration algorithms apply, or is this an unconscionability issue to which the unconscionability algorithms apply? The analogy in law (and the ability my student demonstrated) to the creative “aha” moment is “issue-spotting.” There is a similar moment in science, which is the mystery of the source of hypotheses. Charles Sanders Peirce coined the term “abductive reasoning,” or inference to the best fit, for the cognitive process that creates hypotheses; in other words, the intuition that there is something common to the data from which we might predict the next instance according to the rule of the hypothesis.<sup>38</sup> It is the intuitional moment in which we decide that a particular result ought to obtain, even before we state the propositions that take us to that conclusion.

Metaphoric thinking is simply the best approximation of what is happening in the “aha” moment of hypothesis, whether it is a matter of scientific theory or legal argument.<sup>39</sup> The chemist Kekulé was inspired to hypothesize the ring structure of benzene when staring into a fire; Kepler’s theory of planetary motion arose from “his interest in a mystical doctrine about numbers and a passion to demonstrate the music of the

35. Turner, *supra* note 8, at 3.

36. Professor Winter refers to the “aha” moment as “the clearing in the forest.” See WINTER, *supra* note 24, at 1-3.

37. See Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1, 23-24 (2011).

38. For a detailed discussion of abductive reasoning from its first articulation by Charles Sanders Peirce, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 945-49 (1996).

39. The philosopher Carl Hempel noted the relationship between the judgment leading to the hypothesis and its later confirmation by way of induction:

There are . . . no generally applicable “rules of induction,” by which hypotheses or theories can be mechanically derived or inferred from empirical data. The transition from data to theory requires creative imagination. Scientific hypotheses and theories are not *derived* from observed facts, but *invented* in order to account for them. They constitute guesses at the connections that might obtain between the phenomena under study, at uniformities and patterns that might underlie their occurrence.

CARL G. HEMPEL, *PHILOSOPHY OF NATURAL SCIENCE* 15 (1966).

spheres.”<sup>40</sup> In any case, speculative reason proposes, *a priori*, what ought to be the general rule explaining the particular set of data, and the rule is accepted as an explanation if it remains consistent with, and not contradicted by, *a posteriori* experience. There are no mechanical rules one applies to the mass of antecedent data in order to draw scientific conclusions. “Induction rules of the kind here envisaged would therefore have to provide a mechanical routine for constructing, on the basis of the given data, a hypothesis or theory stated in terms of some quite novel concepts, which are nowhere used in the description of the data themselves.”<sup>41</sup> Rather, the physical or social science theorist proceeds “by inventing hypotheses as tentative answers to a problem under study, and then subjecting these to empirical test.”<sup>42</sup> Just under the surface of routine and methodical advancements in physical and social science is some process of creativity or inspiration that is not mere observation of experience, and is not the process of confirming or disproving the hypotheses by further observation or experiment. The development of the most mundane hypothesis to explain data has some element of intuition that cannot be the product of the data itself.

Philosophers have long observed that propositions, whether scientific hypotheses or legal conclusions, only follow on a more basic pre-prepositional ability to perceive that non-identical things fall or do not fall within concepts, categories, and classifications.<sup>43</sup> For example,

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40. *Id.* at 16.

41. *Id.* at 14.

42. *Id.* at 17.

43. The problem with propositions also surfaces in what appear to be oxymorons like “void contract.” Section 1 of the Second Restatement of Contracts defines a contract as a promise or set of promises the breach of which gives a remedy, or the performance of which is a duty. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). The term “void contract,” however, often constitutes a classification of purported contracts that are deemed after-the-fact never to have created the right to a remedy or the duty to perform. If that is so, then the term “void contract” should be either meaningless or a contradiction in terms, but intuitively we understand it. Section 1 comment a and section 7 comment a of the Second Restatement wrestle with this conundrum, acknowledging the possibility that the word “contract” may not mean the same thing in each context. That is, “contract” means both the legal consequence of a particular kind of commitment, as well as a form of interpersonal communication that has the appearance of a legally binding commitment, but is not. See *id.* §§ 1 cmt. a, 7 cmt. a. This particular conundrum played out in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006), in which Justice Scalia’s majority opinion held that the arbitration provision in an agreement was enforceable under the Federal Arbitration Act, even though the plaintiff’s claim was that the contract as a whole was illegal and void. The criticism of at least one commentator that Justice Scalia’s reasoning was patently circular depends on this “in or out” view of the word “contract” in the law: how can a clause in a “void contract” have legal effect, when the very definition of a void contract is that it does not have legal effect? See JAMES F. HOGG, CARTER G. BISHOP, & DANIEL D. BARNHIZER, *CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION* 492 (2008).



we need not have studied section 2 of the Second Restatement of Contracts to know the difference between something that is a promise and something that is not. Promises and gifts have cultural meanings that precede their significance in contract law. Thus, we can judge whether a particular circumstance fits within a classification even before we are able to express the propositional reasons for that judgment. This is an ancient dilemma: Socrates tormented Meno until they arrived at the eponymous paradox: one seemingly could not reduce virtue to its essential nature merely from examples of virtue without first having some idea of what constituted virtue.<sup>44</sup>

John Searle begins his seminal monograph on speech acts with an analysis that captures this idea.<sup>45</sup> He responds to the advocates, like Quine, of a pure empiricism that is skeptical of conceptual distinction such as that between analytic and synthetic knowledge. The empiricist criticism of the conceptual distinction is that it lacks criteria, and hence the notion is “illegitimate, defective, incoherent, unempirical, or the like.”<sup>46</sup> Thus, the skeptics about the conceptual distinction will pose a proposition that sits on the border between analytic and synthetic, noting that the criteria are insufficient to categorize it. Searle observes that our very recognition of puzzling cases, “far from showing that we do not have any adequate notion of analyticity, tends to show precisely the reverse. We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.”<sup>47</sup>

Our brains process images and associations as a basis for seeing likeness among things (and therefore inclusion within the particular category) before they rationalize distinctions among those things by way of deductive and inductive propositions. The source of the hypothetical judgment is a previously observed pattern posited as the explanation of the new circumstance. In the scheme of human rationality, “the brain is . . . primarily associative and adaptive rather than propositional and truth-conditional.”<sup>48</sup> Professor Winter suggests that this is the source of

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44. PLATO, PROTAGORAS AND MENO (W.K.C. Guthrie trans., Penguin 1977). The *inductive* process is Socrates' attempt to have Meno find “something in common” among all the examples of virtue, so as to distill its essence. *Id.* at 103. Finally, Meno concluded as follows:

But how will you look for something when you don't in the least know what it is? How on earth are you going to set up something you don't know as the object of your search? To put it another way, even if you come right up against it, how will you know that what you have found is the thing you didn't know?

*Id.* at 128.

45. JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 5 (1969).

46. *Id.*

47. *Id.* at 8.

48. WINTER, *supra* note 24, at 36.

what Karl Llewellyn called “situation sense.” As Professor Winter observes, “[T]he brain thinks in terms of its situation, forms its categories in contact with its experience, and modifies that situation and that experience by the meaning it constitutes.”<sup>49</sup>

Classification is therefore associative and imagistic before it is rational and propositional. By contrast, the traditional approach of contract law theory and pedagogy is rational and propositional. Traditional contract theory proceeds through a series of cases that purport to reveal how the law is a complex but coherent system of rules governing the formation, enforceability, execution, interpretation, and breach of private agreements, all as one casebook puts it, “an integrated whole.”<sup>50</sup> The hallmark of the case method is to look at the subject from a particular perspective—that of an objective observer after the fact of a dispute.<sup>51</sup> The basic analytic framework is austere; those objective observers (scientists of the law, as it were) can derive from the contract itself or from the law of contracts a set of propositional formulas or algorithms that constitute a coherent system of rules to which contracting (or allegedly contracting) parties will be subject if a dispute arises. As I discuss in the next section, however, this framework itself arises from particular metaphoric conceptions. These metaphoric conceptions are powerful and meaningful enough to have prevailed for over one hundred years notwithstanding the distortions and paradoxes they create. Their very power, however, overwhelms and masks other, perhaps equally meaningful conceptions.

## II. RETHINKING THE METAPHORS OF CONTRACT LAW AND THE TRANSACTIONAL LIFECYCLE

### A. *Maps, Models, and Journeys as Alternative Metaphors*

The source of much of the traditional dichotomy and paradox in contract law is the culturally ingrained metaphor from which all subsequent propositional content springs. The metaphor for the event that the contract depicts is “the meeting of the minds;” the contract is a mapping, model, or representation of that meeting. Textualism and

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49. *Id.* at 218-221.

50. JAMES F. HOGG, CARTER G. BISHOP & DANIEL D. BARNHIZER, *CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION* 3 (2008).

51. See Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 468-71, 491-94 (2002) (arguing, in the context of constitutional interpretation, that the separation between subject and object to which scientific method aspires is impossible; there is no “Objective Truth” in interpretation; and it is incoherent to speak of the words of a text abstracted not just from the context of its creation, but from the situation from which the particular interpreter projects).

contextualism are each deeply rooted in a particular conception of the contract, namely the rational linguistic model, and each offers its own theory of the rational linkage between the before-the-fact bargain and the after-the-fact litigation.<sup>52</sup> My assessment is unabashedly pluralistic. Sometimes the map or model metaphor is appropriate and sometimes it is not. It depends on who is acting in or perceiving the process by which the parties created the contract and the object that is the contract itself. The problem is that most of the theory and pedagogy is *not* pluralistic, clinging instead exclusively to the map or model metaphor.

Contracts are linguistic structures. As philosopher Max Black observed, all language, not just contract language, “is necessarily a system of conventional signs which we have learned to interpret as intended.”<sup>53</sup> While sometimes we do choose our words carefully (and thus consciously select the symbols for our thoughts as though donning a garment), more typically words are the primary conveyors of their own meaning—“a conception of thought as *immanent* or indwelling in its adequate symbolic expression”<sup>54</sup>—as musical notes are the primary conveyors of a melody. As with a map of the earth’s surface, language depends on convention and is adequate if it supplies correct information for the particular use. Hence, a map “cannot result from a quixotic attempt to reproduce reality”; in other words, to be so complete as to lose its effectiveness as a map.<sup>55</sup> Black excoriates the inclination “to evade the difficult search for the meanings in words, in favour of an exploration of the never-never land of ‘mental life.’”<sup>56</sup>

Thus, instead of renewed attempts at a rich and imaginative understanding of the text before us, whether it be a casual utterance or a poem, we get speculative theories, usually impossible to verify, about “what is really going on” in the speaker’s mind, or about the motives that led him to say what he did. And thus attention is

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52. See K.N. Llewellyn, *Our Case Law of Contract: Offer-and-Acceptance*, I, 48 YALE L.J. 1 (1938). As stated by Llewellyn:

[I]n the particular field of Offer and Acceptance, [business people] are not much guided in their “operative” action by the rules.

But even if this be true beyond its cautious statement, Offer and Acceptance is part of Contract Law. . . . And our ideology of Contract Law is that “It” is one for A and B and for *any* of the deals of *any* A and B. By necessary psychological contagion . . . even situations or whole portions of the Contract field in which advance knowledge of the negotiators is both unnecessary and absent in fact will nonetheless be affected by the held ideology that *rules must be framed to guide transactions in advance*.

*Id.* at 19 n.38.

53. MAX BLACK, *THE LABYRINTH OF LANGUAGE* 46 (1968).

54. *Id.* at 69.

55. *Id.* at 46-47.

56. *Id.* at 69.

diverted from what in the end really matters, the articulated expression of thought.<sup>57</sup>

Speech is economical. As Max Black notes, "A trivial amount of energy expended by a speaker produces comparatively massive changes in the hearer: spoken words have a 'triggering' effect."<sup>58</sup> The problem with speech is that it is also evanescent; the signals perish as soon as the speaker produces them. Hence, "the transition from evanescent sound-signals to relatively permanent substitutes in the form of script . . . marks a radical revolution in culture."<sup>59</sup> It is not surprising, then, that lawyers, judges, and law professors conceive of the document under review in terms of Black's "garment" metaphor. Under this metaphor, the parties "clothe" their mutual thoughts in the document, and the observer's task is decoding the message to derive the mutually intended meaning. There is nothing unique about this conception of the relationship of language to thought, however. As Black points out, the "model of the garment" dominated the discussion of the relationship of all speech, written or oral, for at least 2,000 years.<sup>60</sup> This model separates words from meaning on the assumption that the word user "had to rehearse to himself what he then proceeded to expose in public."<sup>61</sup>

What are the implications of calling something a model? The word itself evokes concrete models, as in the scale model of a ship or an automobile, or metaphoric theoretical models, as in Bohr's conception of the atom.<sup>62</sup> Max Black has suggested the characteristics of a physical scale model: it is a model *of* something, it has a purpose, and it is "a representation of the real or imaginary thing for which it stands: its use is for 'reading off' properties of the original from the directly presented properties of the model."<sup>63</sup> Ideas are not physical objects, so it would be inappropriate to think of a contract as a scale model of the deal, but

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57. *Id.*

58. *Id.* at 60. See also Adam Kramer, *Common Sense Principles of Contract Interpretation (and How We've Been Using Them All Along)*, 23 OXFORD J. LEGAL STUD. 173, 182-83 (2003) (stating that "[l]inguistic encoding is an efficient and reliable way of communicating: efficient because languages have evolved for the sole purpose of facilitating communicating, and reliable because, since everyone in a society learns their language, mutual knowledge of a large body of linguistic norms can be reliably inferred on very little evidence . . .").

59. BLACK, *supra* note 53, at 60. This may explain why, at the end of the semester, I invite students with review questions to see me in my office or to post their questions on a TWEN forum to which I post answers available to all, but refuse to answer individual written e-mail questions with individual written answers.

60. *Id.* at 67.

61. *Id.*

62. Max Black, *Models and Archetypes*, in *MODEL AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY* 219 (1962).

63. *Id.* at 220.

analogue models are metaphoric extensions of scale models, and ideas can be metaphoric objects. In Black's conception,

An analogue model is some material object, system, or process designed to reproduce as faithfully as possible in some new medium the structure or web of relationships in the original. . . . The analogue model, like the scale model, is a symbolic representation of some real or imaginary original, subject to rules of interpretation for making accurate inferences from relevant features of the model.<sup>64</sup>

Black spoke of scientific analogue models, but his assessment of their implications and problems echo what lawyers, judges, and scholars deal with in the interpretation of contracts. The analogue model does not wholly reproduce an image of the original. Rather, it has "the more abstract aim of reproducing the *structure* of the original."<sup>65</sup> As to what the model does replicate, it aims for truth: "[T]here must be rules for translating the terminology applicable to the model in such a way as to conserve truth value."<sup>66</sup> Moreover, the analogue model's powerful abstractions also create "the risks of fallacious inference from inevitable irrelevancies and distortions in the model."<sup>67</sup> Hence, "analogue models furnish plausible hypotheses, not proofs."<sup>68</sup> If ideas are metaphoric objects—things that have "seeds," can "germinate," can "grow," are capable of being "grasped," being "held," being "conveyed," or being "discarded,"<sup>69</sup>—then it is hardly a metaphoric stretch to understand a contract as an analogue model of the metaphoric meeting of the minds. Indeed, the doctrinal disputes over matters like the parol evidence rule, plain meaning, and implied terms are equivalent to arguments over the ability of a computer program to create an accurate analogue model of a football game, a weather system, or the process by which a human brain makes a moral decision.

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64. *Id.* at 222.

65. *Id.*

66. *Id.*

67. *Id.* at 223.

68. *Id.*

69. WINTER, *supra* note 24, at 52-54.

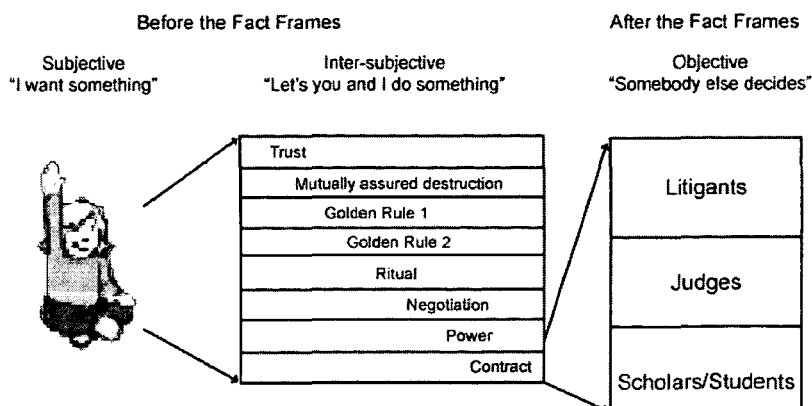


Figure 1

The “contract as model” is, however, only one of many possible metaphoric frames available when contracting parties deal with each other before the fact. We might organize our voluntary interactions, transactions, and relationships on bases other than a contract, such as trust, love, power, ritual, or negotiation.<sup>70</sup> Sometimes these other metaphoric frames do a better job of explaining some aspects of bargain creation. Sometimes it is unclear what metaphoric frame best captures the purpose of the contract. A contract may appear to the after-the-fact objective observer to be an analogue model of a meeting of the minds, a model of the salient points of the deal, all to be interpreted in the traditionally rational way that the case law and Restatement rules anticipate. But it may well be that such a conception often misunderstands the role of the contract in the parties’ relationship. Indeed, that often seems to be case, and a number of scholars have suggested alternative metaphoric frames by which to understand the role of contracts in transactions. In 1984, Ronald Gilson proposed that complex transaction contracts were the product of lawyers acting to facilitate deals as transaction cost engineers; more recently, the

70. See, e.g., John Debryshire, *A Failure of the Free Market*, NAT’L REV. ONLINE (Oct. 7, 2010, 9:22 AM), <http://www.nationalreview.com/corner/249038/failure-free-market-john-debryshire> (telling the story of taking a bicycle ride along the beach in Long Island’s Caumsett State Park. He hears the sound of a helicopter. A young woman appears and says that he can’t ride any further because “they are filming.” The writer observes to her that it is a public beach and her company has no authority to keep him off. She says they are just asking people. He offers to turn around if her company pays him \$1,000. She says she doesn’t have that kind of money, so he reduces his demand to \$500. She says, “I can’t do that. We’re just asking people to be nice.”). See also *supra* Figure 1. “Golden Rule 1” is the usual moral imperative: “What is hateful to you, do not do unto others.” “Golden Rule 2” is a more common commercial rule of thumb: “He who has the gold, rules.”

metaphors for contracting behavior have included communities,<sup>71</sup> plans,<sup>72</sup> organizations,<sup>73</sup> social artifacts,<sup>74</sup> and ritual or narrative.<sup>75</sup>

One of the first and most profound metaphoric conceptions of contract, however, appeared over forty years ago. In an iconic (and delightful) article, Arthur Leff asked fundamental questions about the paper that passed between seller and buyer in a typical consumer purchase.<sup>76</sup> Leff suggested that there was something awry in the way this paper came to be included within the classification “contract.”<sup>77</sup> Of possible class-identifying characteristics of the prototypical contract that documents a (metaphoric) horse trade—bargaining, agreement, dickering, process, a piece of paper—the only one shared between the prototype and a consumer contract was the last one: it was a physical thing that contained legal terms.<sup>78</sup> The reason a non-negotiated consumer transaction document should be considered a contract (even one of adhesion) spoke more to the power of the brilliant theoretical classification system wrought by legal scholars over the twentieth century than to the practical and policy implications that sprang from the classification. Leff proposed to substitute the metaphoric image of “thing” rather than of “horse trade,” eliminating the underlying suggestion that there was anything freely negotiated in terms of the document and easing the road to substantive government regulation of the terms.<sup>79</sup>

Professor Leff’s primary concern was with consumer transactions and the very real possibility that the words of typical boilerplates simply

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71. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

72. See Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341 (2009). In a recent book, Scott Shapiro extended the metaphor of “plan” not just to contracts, but also to all of law. SCOTT SHAPIRO, *LEGALITY* (2010).

73. See D. Gordon Smith & Braydon G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1 (2009).

74. See Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC’Y REV. 91 (2003).

75. See Jeffrey M. Lipshaw, *Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation*, 46 WILLAMETTE L. REV. 139 (2009); see also Hill, *supra* note 22, at 56.

76. Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

77. Leff viewed “contract” as “a method of segregating, for a particular and predictable treatment, contemplated trading transactions between free-willed persons in an assumedly free enterprise, free market economic system.” *Id.* at 137-38. He also proposed class-identifying criteria to identify contracts—they are species of interpersonal behavior that are more or less communicative, deal with the future and bear on the speakers’ role in it, smell of bargain or trade, create a bordered or limited relationship, and involve a process of dealing. *Id.*

78. *Id.* at 147.

79. *Id.* at 147-50.

convey no meaning between the parties as would normally be expected if the metaphor for the transaction were a horse trade. Leff did not concern himself (at least in his article) with contracts that actually documented arm's-length deals dickered between parties with commensurate bargaining power. I think Professor Leff's metaphoric insight was profound even when applied to the horse trade contracts. I liken the dickered contracting process to a journey; Leff made a similar point in describing an attribute of the thing called contract as "process aura."

Contract seems to presuppose not only a deal, but dealing. It is the product of a joint creative effort. At least classically, the idea seems to have been that the parties combine their impulses and desires into a resulting product which is a harmonization of their initial positions. What results is neither's will; it is somehow a combination of their desires, the product of an ad hoc vector diagram the resulting arrow of which is "the contract."<sup>80</sup>

The value of this conception is that we know the contract is not always a model; sometimes, the contract is a thing unto itself. There is no doubt, for example, that parties insert weasel words ("the parties shall use reasonable efforts"), agreements to agree ("the parties will meet and resolve the issue in good faith"), non or partially negotiated and often boilerplate (the "choice of law" provision), and negotiated ambiguities in order merely to have a contract that will close the deal. Those provisions cannot possibly be a model of antecedent reality; the meeting of the minds, as it were, was to document that the parties valued having a deal more than an agreement on that point. In short, the contract itself as "object" is the object. In those cases, the focus on anything other than merely the melody of words conveying their own conventional meaning is, in Max Black's coinage, pursuit of a never-never land of mental images and a diversion from what really matters: the articulated expression of thought.

In the "contract as model" metaphor, the dichotomy between the objective words on the page and the unwritten communications or unspoken thoughts of the parties surfaces in the contending schools of formalism and realism. Under the journey metaphor, that dichotomy fades. In our ordinary and transactional before-the-fact discourse we are always held to an objective standard. We use the objective medium of language to communicate, and we learn to live with it. As represented in Figure 1, on the journey, transactions proceed in a continuum of objectification from first person desires ("I want something") to a second

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80. *Id.* at 138.



person inter-subjective exchange (“let’s you and I make a deal”).<sup>81</sup> We use language as an objective linguistic code along with pragmatic inferences in which to express our subjective desires first to ourselves and then to others.<sup>82</sup> The contract is in turn another step in the journey, an enhanced objectification of the “you and I” relationship but now capable of being interpreted by third parties or later by the parties themselves.

Both the textual and contextual approaches to contract meaning are idealized models. To give credit to the protagonists in the Williston-Corbin debate, they each have a view as to how the legal system might accomplish after-the-fact justice given that the parties themselves created the law of the case before the fact. The differences between the competing conceptions of that linkage are almost beside the point. Formalism posits a contract as a rationally created and coherent language model, a set of self-contained algorithms designed to allocate risk and generate the parties’ future rights and duties. Contextualism posits contract language as a garment in which the agreement—the meeting of the minds or the shared intention—has been clothed. The metaphors have this much in common: they are language-based, rational, and objective, because that is the epistemic trap within which the profession operates. Under either approach, the correct answer is discoverable. Whereas contextualists have ridiculed classical formalism as “feeble dogma,”<sup>83</sup> formalists might well have ridiculed the contextualists’ quixotic attempts to reproduce the whole of reality in place of the map. The point is that most of us understand before the fact that contract documentation is an imperfect exercise at best. As in many games, how we fare will be a combination of skill and luck. To employ another metaphor, one (but not the only) task of a contract drafter is to give her

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81. Professor Kramer offers an apt description of this process:

Interpretation in cases of communication is no less a pragmatic process involving presumptions and hypotheses, since without telepathy the interpretation remains a project of guesswork built upon the assumption that the utterance is a rational means to an end. However what is special about nonnatural meaning is that the communicator meets the interpreter half-way. Essentially, the two parties cooperate in the joint venture of trying to get the interpreter to recognize what the communicator is trying to communicate. Providing the communicator and the interpreter can share the same method of interpretation, the interpreter can merely apply the method of interpretation and be confident of gleaning the meaning that the communicator intended her to glean.

Kramer, *supra* note 58, at 175.

82. Kramer, *supra* note 58, at 175.

83. Grey, *supra* note 6, at 5 (“[A]s we should guess from the very persistence and intensity of the polemical assault on classical orthodoxy, when taken as a whole, it was a powerful and appealing legal theory, not the feeble dogma portrayed in the critics’ parodies.”).

client the best possible hand to play in the game of after-the-fact legal argumentation. It is a mistake before the fact to get co-opted by the overstated after-the-fact dichotomy of text versus context.

Those of us who have been before-the-fact lawyers and business counselors know intuitively that far less turns on these competing after-the-fact idealizations than meets the scholarly eye. The debates over plain meaning versus contextual meaning or the economists' concerns about achieving completeness are a tempest in a teapot, albeit a significant storm if you happen to live and work in the teapot. The "law-in-action" movement understood this, and developed a theory that explained ongoing relationships in business that existed apart from the embodiment of the relationship in a contract.<sup>84</sup> Nevertheless, I have spent much of my professional life negotiating and documenting hugely complex one-time transactions without coming to the conclusion that I have wasted my life. As a result, I am not prepared wholly to abandon the lawyerly impulse toward formality and conceptual order, even if I think the idea of complete contract in the economists' sense is so much of a theoretical dream as to be nonsense. Thus, there is still some work to be done in understanding why lawyers do what they do before the fact in transactions, and how that bears on the after-the-fact dispute resolution that is the primary matter of contract doctrine and pedagogy. One of the first tasks when teaching traditional contract doctrine, then, is to frame it where it belongs and with the appropriate caveats about its ability to reconstruct the entire transactional lifecycle.

Why? It is first because lawyers and their clients understand that a goal of contract creation is the orderly objectification itself even apart from the content of the contract. By writing a contract, you and I have agreed at the very least that the terms of our inter-subjective agreement might be the subject of someone else's interpretation (or our own when memories have faded). Whether we are held to an objective standard of plain meaning, or an objective standard given all the facts and circumstances including subjective intentions, is of far less significance than the fact that there will be, ultimately, an objective adjudication. Do we care before the fact which standard? Sometimes we do and sometimes we do not. Do we care after the fact which standard? The answer is almost certainly if our oxen, as we perceive them at the time of the dispute, are gored by one or the other.<sup>85</sup>

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84. See generally 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (3d ed. 2010).

85. From time to time in practice I thought about it in this way. If you are a lawyer representing the seller in a complex business acquisition, and you are really serious about the integration clause you inserted into the representations and warranties and about the

*B. Before-the-Fact and After-the-Fact Linkage in the Model Metaphor*

Under the prevailing “contract as model” metaphor, lawyers create rational constructs in language in order to anticipate and control future contingencies. This is often expressed as the *ex ante* perspective. Before the fact, lawyers know the rules that will be applied in the event of a dispute, and they create contracts that anticipate those rules. This is consistent with the prevailing conception that contracts are themselves not merely instruments of a non-contradictory system of legal rules (as, for example, we would expect of tort law or criminal law), but should actually describe the transaction.

My issue with the “contract as model” metaphor arises from the fact that lawyers, who so dominate the after-the-fact litigation, are only one (even if important) part of the before-the-fact bargain-creating team. Even the formalist-realist debate took the metaphor as a given. Within the discipline of contract law, the dialectic played out in terms of which approach provided the best avenue to after-the-fact reconstruction of the meaning of the contract. Formalism and realism in contract law were thus simply competing idealizations, undertaken in the context of after-the-fact disputes, of the before-the-fact transaction. In my experience, the debate between formalism and realism is somewhat beside the point. The metaphor of a rational linkage is meaningful, but not as meaningful as the lawyers (practicing and academic) make it out to be.

My take on this debate is undoubtedly a product of my own experience. I was a contract and commercial litigator for ten years and then a deal lawyer and general counsel for the next sixteen. I have described the sense of my career move from litigation to transactional lawyering largely as one of turf. When I was a litigator, dealing with matters after the fact, business people played on my turf. The games were largely consistent with what I had learned in law school. We used the raw factual material the business gave us, and those static facts formed the basis for the construction of our argument why, under the inductive and deductive propositions constituting the “law,” our clients should prevail. It was a comfortable turf, largely self-contained with the rules of the games well defined. When we interacted with business people, it was to train them in *our* particular (and peculiar) language games of deposition and trial testimony.

When I became a transactional lawyer, I moved to playing on the business turf. There, the work of lawyers was only a small part of the business as a whole, or even of the deal for which the lawyers’ work in

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plain meaning, do you dispose of all of your files containing prior drafts and notes from the negotiations?

structuring and drafting documents was the skeleton. Moreover, on the business turf, while inductive and deductive propositions were part of the language of deal making, there was more as well: power, leverage, greed, impatience, and wishful thinking, among other things.

The first component in the linkage is reliance not solely on typical prescriptive and normative regulations of a legal system, but on rules in a different and scientific sense: rules that are not prescriptive at all but are generalizations and classifications of observed behavior that allow for prediction and control. The second component in this linkage is its origination in the after-the-fact perspective. In traditional pedagogy, lawyers stand at the center of the universe. They observe the transactional universe from their particular perspective. And the observers are not just any lawyers. They are the litigators who focus solely on the resolution of after-the-fact disputes through the instrumental assertion of prescriptive rules such as “if the offeree did not accept the offer before the offeror revoked it, there was no contract.”

The linkage between “before-the-fact” and “after-the-fact” in contract law invokes two conceptions of what makes propositions true: coherence and correspondence. The coherence theory holds “that the truth of any (true) proposition consists in its coherence with some specified set of propositions.”<sup>86</sup> The correspondence theory holds that “the truth conditions of propositions are not (in general) propositions, but rather objective features of the world.”<sup>87</sup> For a proposition to be true under correspondence theory it need not correspond exactly to the objective feature of the world; the theory incorporates “any view explicitly embracing the idea that truth consists in a relation to reality, i.e., that truth is a relational property involving a characteristic relation (to be specified) to some portion of reality (to be specified).”<sup>88</sup> The rules

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86. James O. Young, *The Coherence Theory of Truth*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 9, 2008), <http://plato.stanford.edu/archives/fall2008/entries/truth-coherence/>. In the words of Louis Wolcher:

According to the coherence theory, to say that a statement (usually called a judgment) is true or false is to say that it coheres or fails to cohere with a system of other statements; [and] that it is a member of a system whose elements are related to each other by ties of logical implication as the elements in a system of pure mathematics are related.

Louis E. Wolcher, *What We Do Not Doubt—A Critical Legal Perspective*, 46 HASTINGS L.J. 1783, 1853 n.95 (1995) (quoting 2 THE ENCYCLOPEDIA OF PHILOSOPHY 130 (Paul Edwards ed., 1967)).

87. See Young, *supra* note 86.

88. Marian David, *The Correspondence Theory of Truth*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 2, 2009), <http://plato.stanford.edu/archives/fall2009/entries/truth-correspondence/>. The family of correspondence theories “employ[s] various concepts for the relevant relation (correspondence, conformity, congruence, agreement, accordance, copying, picturing, signification, representation, reference, satisfaction).” *Id.*

of contract law are meaningful in their *ex post* application, not just because they reflect a coherent adjudicative system, but also because they are thought to have some correspondence either to an idealized vision of how transactions occur or to the history of the parties' self-legislation of rules in the specific case. Almost nothing in pedagogy undercuts this after-the-fact, lawyer-centric perspective. Moreover, the theoretical and doctrinal debates between the formalists and the realists were not merely over coherence within the classical formal system of law, but the extent to which that formal system actually corresponded to the external reality of transactions.

The implication of the "contract as rational model" metaphor is a search for objective *correspondent* truth either between the document and an idealized transaction as contemplated by the formalists, or between the document and the real deal as contemplated by the realists.<sup>89</sup> In seeking after-the-fact correspondent truth in contract litigation, scholars and students alike aspire, in the coinage of philosopher Thomas Nagel, to truth as the "view from nowhere."<sup>90</sup> This refers to the paradox of subjectivity and objectivity that human beings experience. We are not passive recipients of the empirical reality of the world. We structure and give meaning to experience by way of *a priori* concepts—substance, space, time, and causality—that are "the substrate of our conscious experience."<sup>91</sup> We are capable of taking an abstract and impersonal view of the world, one that transcends our own experience or self-interest. The paradox is that, simultaneously, all of our perception of experience occurs privately and subjectively in our own minds, and we can never really have a view from nowhere. In contract law, the hallmark of the epistemic trap is the assumption (passed on to students) that the legal rules either do reflect or ought to reflect the underlying idealization or reality of contract formation, existence, performance, interpretation, breach, and avoidance in the real world.

Contract litigation is an after-the-fact reconstruction of before-the-fact reasons. It seeks answers about propositions of law—the parties' mutually agreed self-legislation as applied to a set of facts that has arisen since the formation of the contract. Whether or not legal propositions are capable of truth, the argumentation process in any litigation is an exercise not in truth seeking for the parties, but in the coherent application of rules. Professor Patterson correctly notes that evidence of the age of the witness in a will contest in a sense renders that empirical fact intelligible not by subsumption under causal laws, but "by clarifying

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89. I use "realism" and "contextualism" interchangeably.

90. THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1987).

91. PINKER, *supra* note 27, at 233.

its *meaning*, elucidating its *goal* and the *reasons* for performing it.”<sup>92</sup> His position is unimpeachable, I think, when it comes to determining whether a proposition of law (i.e., legal consequence of an undisputed set of facts) is true. At best, what the judge tries to do after argumentation is to make legal propositions as coherent as possible.<sup>93</sup> It cannot sensibly be the case, however, that truth is merely a matter of legal argumentation when the underlying factual issues are sense impressions of the physical world. There may be a dispute whether John Doe’s car had stopped before Mary Smith went through the intersection, but there will be an underlying truth: it had either stopped or not. The point is well-taken, however, that as we move from simple knowledge based on sense impressions of the physical world to causal explanations even of matters of objective fact, the question of the truth of a proposition in law becomes more difficult.<sup>94</sup> As has been clear since the work of Thomas

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92. DENNIS PATTERSON, LAW & TRUTH 91 n.122 (1996) (quoting G.P. BAKER & P.M.S. HACKER, LANGUAGE, SENSE & NONSENSE 257-58 (1984)). For Professor Patterson’s treatment of the applicability of his “forms of argumentation as truth” thesis to contract law, see Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235 (1993).

93. For a view that the search for doctrinal coherence of any kind in contract law is fruitless, see Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 505 (2008). Professor Alces addressed the ongoing debate among contract theorists over the normative justification for the institution of contract law, i.e., the state’s enforcement of private voluntary agreements. See *id.* He suggests that one of the reasons a unifying normative theory is so elusive is that “Contract may be best understood as an amalgam of normative inclinations, with pure deontology and pure consequentialism as poles at the ends of a continuum.” *Id.* at 552. Understandably, Professor Alces did not focus at all on descriptive theories (as opposed to historical or interpretive theories) as a means of justification of the institution itself. See *id.* at 510 n.20 (citing STEPHEN A. SMITH, CONTRACT THEORY 4-5 (2004)). See also Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1652 (2007). My thesis here is not that descriptive theory has a role in the *justification* of contract doctrine, but that it has a role in how contract doctrine *works*.

94. Professor Patterson provides an excellent example of the kind of case that tends to baffle students: the Cardozo majority and the McLaughlin dissent in *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921). See Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 282 (1993). There is simply no basis for concluding normatively whether Cardozo’s position on substantial performance was truer or better than McLaughlin’s, which would have held the parties to the strict letter of the contract. Adopting Quine’s concept of the “web of belief” (i.e., all truth is pragmatic and not foundational in the sense that true explanations are the ones that seem to *work*), Professor Patterson contends that, as in science, the legal community decides which forms of argument are acceptable. *Id.* at 285. A decision that abides by the accepted forms states a “true” proposition of law, even if parties could disagree with the substance of the proposition. *Id.* I agree with Professor Patterson’s conclusion that the normative debate over the appropriateness of particular default rules and gap fillers is misguided. See *id.* at 286. There is no “right” answer; “truth” such as it is in after-the-fact contract interpretation litigation is as much a matter of the “forms of argumentation” as in any other area of the law. *Id.* at 285-87. The confusion arises not because after-the-fact contract dispute litigation is different from other kinds of litigation in its

Kuhn and others, even physical science is “theory-laden” in the sense that “there is no pure and pre-theoretical sense experience, no innocent eye.”<sup>95</sup> That is not to say there is no objective world; rather, it is merely to say that each subjective observer makes sense of it from a particular viewpoint.<sup>96</sup> Even in science, as descriptive explanation becomes more theoretical, there is an element of conceptual normativity in descriptive explanation by way of theoretical models the observers bring to their observations.

If we were assessing the truth of a legal characterization of a valid will versus the truth in, say, quantum theory, a clear dichotomy between aspirations to coherence and correspondence might still hold. Contract law doctrine lies somewhere in between. It looks not merely to slap legal consequences on facts (once the facts are determined, as in a tort case), but also to explain the parties’ self-legislation as a matter of attributive cause, or *reasons* for events, as in the reconstruction of history.<sup>97</sup> It may be that there is no subjective evidence of the parties’ self-legislation, or such evidence is inadmissible, in which case the parties argue and courts decide from default generalizations about how transactions usually

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argumentation; it is that the subject of the argumentation is the re-creation of the notional “mutual intention” or “shared manifestation” or “agreement” of the parties.

95. Grey, *supra* note 6, at 21.

96. According to Max Black:

All perception involves, to some extent, the recognition of sameness and difference and, more strikingly, of sameness in difference. We recognize John Doe even in fancy dress; we interpret his shrug as expressing indifference, even though he may never shrug in exactly the same way twice. (We impose a conceptual grid, a “frame of reference,” upon experience).

BLACK, *supra* note 53, at 22.

97. In his essay advocating a common sense application of both textual formalism (as a presumption) and appropriate contextualism, Professor Kramer makes a similar observation:

Given the textual and contextual information, circumscribed by the requirement that such information be mutual, how, then, does the pragmatic method identify the single apparently intended meaning? Given a linguistic meaning that is salient in a particular community, how does the interpreter decide to what extent the interpreter intended to use inference to replace that linguistic meaning, and to what extent the interpreter intended to use inference to supplement that linguistic meaning? In so replacing or supplementing, what shared standard must be used to incorporate the contextual information and fill the apparent gaps?

. . . It is not self-evident which common standard is used to come to mutually predictable inferential conclusions to the above inquiries, but intuition suggests that we use the same standard in non-natural (purposive) interpretation that we use in natural (causational) interpretation. When looking for natural meaning, one decides that smoke means fire and spots mean measles because smoke *usually* means fire and spots *usually* mean measles. Similarly, interpreters of non-natural meaning make an assumption of normality, and use it infer what the communicator meant.

Kramer, *supra* note 58, at 180-81.

occur, or default generalizations from the parties' use of language in a written contract. That is a formalist approach. Or the parties might argue and the courts decide based on an in-depth investigation of all of the facts and circumstances surrounding the transaction in pursuit of "the meeting of the minds." That is a realist or contextual approach. In either case, however, more is involved than merely the application of prescriptive rules to antecedent behavior. Indeed, it involves more than merely a determination of the antecedent facts. The case requires a theoretical determination of what the governing rules themselves were.

The essence of the contextualist or realist objection to formalism in contract law is the extent to which the model corresponds to the antecedent reality of business transactions.<sup>98</sup> There is extensive evidence of the realists' concern about "the most serious shortcoming of the classical model—its failure to acknowledge the actual practices of business persons."<sup>99</sup> Realism's idealization in contract was different but no less aspirational: to reconstruct what the parties actually intended from the totality of the circumstances, including the formal documentation they created, and to create a system of contract law (made concrete in Article 2 of the Uniform Commercial Code) that more accurately corresponded to contracting practices.<sup>100</sup> Realism wanted a search for the reasons the parties did what they did and said what they said. In short, what did the parties *mean*?

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98. See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 402 (2004) (noting that both the "abstract conceptualism" of the classical theorists and the contextualism of realists "have as a focus the determination of the meaning of law"). Conceptualists and contextualists "live in different methodological worlds." *Id.* Conceptualists take the words of the contract themselves as facts, and apply legal precepts applicable to them. *Id.* Contextualists find "true understanding somewhere in the contextual background." *Id.* at 403.

99. Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 169-70 (1989). There is also extensive literature on the intellectual history of the debate as written by the realists themselves, in particular, the extent to which the realists overstated the extent of classical formalism and understated their own normative aspirations. See *id.* at 170 n.6 (citing G. GILMORE, *DEATH OF CONTRACT* 17-18 (1974)). See also BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985); Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007).

100. DiMatteo, *supra* note 98, at 401 ("Instead of being an anti-conceptualist rule-skeptic, [Llewellyn] offered a vision of law and contract interpretation that bridged the conceptual-contextual divide.").



Uncovering truthful reasons for human action is not the same as uncovering reductive causes in the physical sciences.<sup>101</sup> As historian Thomas Haskell observed:

The crux of the misunderstanding [in the application of scientific reductionism to the social sciences] . . . is the notion that there is only one interesting form of causal reasoning, the nomological-deductive. There is, as Weber knew, another mode of causal reasoning, the *attributive* mode, which we take so much for granted that we fail to recognize it for what it is: the very bone and sinew of which common sense is constituted.<sup>102</sup>

Llewellyn captured this sense of attributive meaning in law in his attempt to articulate “situation sense.”<sup>103</sup> The fundamental disputes in contract litigation involve determining just what the parties *meant* when they did what they did or wrote down the words over which they are now fighting. That determination seeks reason in the sense of attributive cause. But what is the point? Are we trying to further the normative goal of upholding the word *qua* commitments?<sup>104</sup> Or are we trying to posit a descriptive economic model of what parties actually do when they write contracts?<sup>105</sup> Might it be both?<sup>106</sup>

101. I mean here “epistemic reduction,” and within that, “explanatory reduction,” defined loosely as “the idea that the knowledge about one scientific domain (typically about higher level processes) can be reduced to another body of scientific knowledge (typically concerning a lower and more fundamental level).” Ingo Brigandt & Alan Love, *Reductionism in Biology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 27, 2008), <http://plato.stanford.edu/entries/reduction-biology>.

102. THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY: EXPLANATORY SCHEMES IN HISTORY 16 (2000).

103. Llewellyn, *supra* note 14, at 31. Arthur Leff has noted as follows:

On the further assumption that like things should be treated in like manner, identifying likeness makes possible the generation of rules, i.e., statements about behavior (intellectual or practical) with respect to more-than-one member sets. Once there is—stated, perceived or felt—a purposive aim and a classificatory criterion (or more) associatable with it (empirical causation being one of the most common associations used), classification becomes “useful” *to that end*.

Leff, *supra* note 76, at 134 (citation omitted).

104. See, e.g., Alces, *supra* note 93, at 506-11; CHARLES FRIED, CONTRACT AS PROMISE (1981); P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981); LON FULLER, THE MORALITY OF LAW (1964); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

105. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003) (“economic analysis has failed to produce an ‘economic theory’ of contract law, and does not seem likely to be able to do so.”).

106. Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 687, 696 (Jules Coleman & Scott Shapiro eds., 2002); see also Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L. J. 77 (2009); Jeffrey M. Lipshaw, *Duty and Consequence: A Non-Conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321 (2006).

The natural extension of the “contract as model” metaphor, with its implication of correspondent truth to something, real or imagined, is the development of a theoretical model for contract law generally. In Max Black’s conception, theoretical models are continuous with analogue models in the sense of a family resemblance.<sup>107</sup> The conditions under which theorists create such a model are an original domain of investigation with observed regularities (here, contracting behavior), a perceived need “for further scientific mastery of the original domain”<sup>108</sup> by way of explanation of the regularities (the formalist enterprise) or connection with disparate fields of knowledge (all “law and . . .” endeavors), the positing of objects, mechanisms, systems, or structure in a less problematic, more familiar, or better-organized secondary domain (for example, neo-classical microeconomics or linguistics) and rules of correlation between the two fields, and the creation of inferences and predictions that can be tested against the data in the original domain.<sup>109</sup> Just as the contract is an analogue model of the deal, academic treatment of contract law in all its forms aspires to theory that “permits assertions made about the secondary domain [N.B.: economics, sociology, linguistics, moral philosophy, logic, physics] to yield insight into the original field of interest.”<sup>110</sup>

An internecine debate among law-and-economics theorists over formalism and contextualism in after-the-fact contract litigation is instructive on attempts to use analogue or theoretical models to yield insights into attributive rather than nomological-deductive cause. All seem to agree that the normative goal of contract law generally is to enhance economic welfare by maximizing the joint economic surplus that arises from the transaction. The attribution of reasons for acting to the participants and, hence, the explanation of the rational linkage between propositions of law and the normative goals, is another matter. Alan Schwartz and Robert Scott contend, for example, that rational businesses prefer a default rule of formalism in contract interpretation because the cost of contextualism—fighting over what the words mean—diminishes the overall joint surplus available in the transaction.<sup>111</sup> Schwartz and Scott suggest there is indeed, in the Corbinian contextualist sense, a real meeting of the minds that is the agreement lying beyond the

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107. Black, *supra* note 6262, at 230.

108. *Id.*

109. *Id.*

110. *Id.* at 230-31.

111. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568-84 (2003) [hereinafter Schwartz & Scott, *Contract Theory*]; see also Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010).

model that is the written contract;<sup>112</sup> the only reason we do not reproduce that reality (or more of it) is simply a matter of cost. Jody Kraus and Robert Scott claim both economic theory and empirical evidence support the contention that sophisticated contracting parties prefer formalism to contextualism.<sup>113</sup> Juliet Kostritsky, on the other hand, contends that contextualism, not formalism of the kind advocated by Kraus and Scott, is more likely to achieve what she presumes the contracting parties wanted regardless of the formal language of the contract—to maximize their joint economic surplus.<sup>114</sup> Her point is that Kraus and Scott have misinterpreted attributive cause: their theory of how parties actually bargain depends on assumptions not borne out by empirical evidence.<sup>115</sup> In short, the debate is over which legal propositions will best serve both a normative goal *and* are accurate descriptive propositions about why people act. It strikes me that this surfaces the latent problem in contract theory: the causal reasoning has to import reasons—i.e. attributive cause—in the reconstruction of the before-the-fact transaction or the exercise is as nonsensical as the attempts to reduce human behavior to objective truth by way of scientific determinism or “covering laws.”

We can see the difference between nomological-deductive cause and attributive cause as part of the descriptive theorization in contract law in a case like *Wood v. Lucy, Lady Duff-Gordon*,<sup>116</sup> in which Judge Cardozo formulated a modern rule on implied terms. From the facts recited in the opinion, we know nothing about the before-the-fact subjective understandings of Lady Duff-Gordon, the “creator of fashions,” or Wood, who was to sell her valuable endorsements to manufacturers of dresses, millinery, and like articles. What we do know objectively after the fact is that they wrote an agreement that gave Wood the exclusive right to place her endorsements, sell her designs, or license others to do the same. The exclusive right had a minimum term of one year, after which it extended from year to year unless terminated on ninety days’ notice, and the parties were to split all profits and revenues from any such contracts Wood might make on Lady Duff-Gordon’s behalf. We also know that Lady Duff-Gordon gave endorsements on her own without Wood’s knowledge and kept the profits for herself. When Wood sued Lady Duff-Gordon for his share of the profits, Lady Duff-

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112. Schwartz & Scott, *Contract Theory*, *supra* note 111, at 570 (“If the parties agree on the language in which their contract was written, the court’s interpretive task is limited to finding what the parties intended that language to say.”).

113. Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009).

114. Kostritsky, *supra* note 19.

115. *Id.* at 22-33.

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

Gordon's defense was that the contract was illusory because Wood never promised to use any efforts (much less reasonable efforts) on her behalf. Judge Cardozo acknowledged the absence of any such express promise, but famously concluded as follows:

We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed.<sup>117</sup>

When I teach this case, I take issue with Judge Cardozo's characterization of the issue as formalism. If formalism in this instance is the idea that we will abide by the meaning derivable from the four corners of the document and objective evidence about the context in which parties used the words, and abjure all evidence of the subjective intention of the parties, then Judge Cardozo's treatment of the case is "formal." There is not a whisper of the parties' subjective intentions. What strikes me as compelling is the difference between the sterile application of a rule and the search for reasons, which here means the search for attributive causes. I interpret Judge Cardozo's statement in the following way: we should not be unnaturally literal in our after-the-fact reconstruction of the before-the-fact transaction merely for the sake of theoretical coherence to some system of nomological-deductive rules when the proponent of that position offers no compelling reason for doing so. If Lady Duff-Gordon wanted after the fact (apparently opportunistically) to try to back out of an agreement appearing to have all the common sense hallmarks of a contract, then she needed to supply a good reason; in other words, that the objectively manifest agreement was something other than what it appeared to be by ordinary community standards.

Of all of the theoretical structures around which contract law pedagogy has been organized, the one least wedded to the correspondent truth of the "contract as model" metaphor is "law-in-action," as reflected in the text, *Contracts: Law in Action*.<sup>118</sup> Stewart Macaulay and his co-authors correctly observe, among other things, "there are large gaps between the law school law of contract, what happens in courts, and what practicing lawyers do" and "contract doctrine clearly is only one part of what lawyers need to understand to serve their clients."<sup>119</sup> They provide an overview of the scholarly justifications for the institution of legally

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117. *Id.* at 214.

118. MACAULAY, *supra* note 84.

119. *Id.* at 15.

enforceable contracts.<sup>120</sup> They also note that contract law doctrine “reflects competing tendencies” and warn against the expectation “that your professors are going to hand you a beautifully worked out, consistent, and coherent system called ‘contract law.’”<sup>121</sup> Contract law is, instead, “a tool that you can use to try to solve your client’s problems, rather than a set of answers to all your questions.”<sup>122</sup>

The “law-in-action” view of contracting behavior is insightful, but it reflects its own theoretical filtering of before-the-fact lawyering and after-the-fact litigation—from its perspective, one that values close attention to “social reality” and derides “doctrinal structure” as no more than comforting dogma. In its desire to convey just how law fits into the complexity of society, law-in-action projects a kind of knowing falseness about “the game [law students] are called upon to play.”<sup>123</sup> There is a “gap between the law on the books and the law in action” reflected in “virtues and vices of symbolic law that declares ideals but hides a reality that is less pleasing.”<sup>124</sup> Macaulay and co-authors make it clear they believe contract law is less a model of transactional reality than a rhetorical system replete with “ambiguities and inconsistencies.”<sup>125</sup> Why then do students learn contract rhetoric? It is because contract rhetoric “will be the accepted vocabulary in negotiation[s] as well as before trial and appellate courts.”<sup>126</sup>

From this view, coherent doctrinal structures established by formalists like Langdell and Williston were simply silly and misguided. The authors quote Elizabeth Mensch: “Perhaps much Willistonian dogma survives simply because it provides a challenging intellectual game to learn and teach in law school—more fun than the close attention to commercial detail required by thorough-going realism.”<sup>127</sup> The problem, of course, is that this leaves open only one possible explanation for the persistence of contract formalism: it is a silly and false system that has somehow been foisted upon us.

My resistance to adopting the law-in-action approach (or the casebook) is my intuition there is indeed more to formalism than meets

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120. *Id.* at 16-17. These justifications include the following: contracts serve as a tool for channeling self-interest into cooperation, contracts providing security for transactions against opportunism and accepted formulae for the creation of binding commitments, contracts announce default remedies that deter wrecked bargains, and contracts symbolizing the importance of commitments. *Id.*

121. *Id.* at 18.

122. *Id.*

123. *Id.* at 2.

124. *Id.* at 25.

125. *Id.* at 18.

126. *Id.*

127. *Id.* (quoting Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 769 (1981)).

the modern scholarly eye, and that it is a mistake to write it off as mere comfort for lazy minds or non-empirical theorists. As Karl Llewellyn noted, “[T]o know [the institution and techniques of legal case resolution] as a fossil, as an instrument of impediment, delay, confusion, is not to remove it from the scene. It is there.”<sup>128</sup> The “law-in-action” approach has the benefit of at least recognizing that the rest of the transactional universe exists and that the legal system planet may not after all be at its center, but it also has its deficiencies. Merely to point out the inconsistencies and contradictions of the formal system, however, is to understate the fact that parties do regularly create objectified records of their transactions in anticipation of somebody, whether it is the parties themselves or a court, trying to make coherent sense of the document. I turn to this subject next.

### C. *Temporal Perspectives on the Contract Journey*

My preference is not to trust the objectivity or truth-generating capability of anyone involved in the after-the-fact reconstruction of what the parties meant, whether by way of theoretical or analogue models that seek correspondent truth from contracts themselves or by the legal propositions that have developed in litigation about them. Contract law gets made when private parties employ the legal system (and contract law itself) as an instrumentality to their subjective ends. They have no particular interest in justice or in the coherence of the system of rules as an integrated whole. All they care about is winning. Judges do care about coherence, because even the most ardent legal realist would likely agree that legal argumentation and judicial opinions seek to justify the particular result as the natural consequence of the rules as a coherent system and an integrated whole, whether or not there really is such a natural consequence. And lawyers representing litigants are no fools. They construct their arguments so as to persuade judges that the natural consequence of the rules as a coherent system and integrated whole dictate the result that just happens to benefit their clients. Oddly enough, however, there are at least two lawyers doing so, and each of them is arguing such a natural consequence, but to diametrically opposed results.

When we study cases, the temporal frame in which analysis of the before-the-fact transaction occurs is after-the-fact.<sup>129</sup> The facts are static,

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128. LLEWELLYN, *supra* note 14, at 40.

129. The classic exposition of framing in this context is provided by Amos Tversky and Daniel Kahneman as follows:

We use the term “decision frame” to refer to the decision-maker’s conception of the acts, outcomes, and contingencies associated with a particular choice. The frame that a decision-maker adopts is controlled partly by the formulation of

even if they have to be discovered. They are a matter of the historical record, and do not change. The task of litigants is to cast those facts as fitting (or not fitting) within the liability or guilt concepts provided by the law. The fundamental first-year contracts problem is not only that the predominant perspective on all aspects of bargain creation is after-the-fact, but also that it is somewhat schizophrenically both of instrumentally inclined litigants and of purportedly objective judges and scholars. This is so even when the casebook acknowledges and tries to organize around the transactional context in which contracts are created. In other words, law professors purport to provide the fundamental structure of the before-the-fact “you and I” relationship by presenting “after-the-fact” cases largely organized by those very concepts through which Langdell sought to make the body of contract *dispute* law coherent in the nineteenth century.

The classical algorithmic expression of the before-the-fact “you and I” relationship of contract formation appears in the third chapter of both Restatements of contract law. The issue in an after-the-fact contract formation dispute is not whether you and I know inter-subjectively that we have achieved “mutual assent.”<sup>130</sup> Instead, the question is how to determine whether we manifested such mutual assent sometime after-the-fact when we now either disagree or are unsure whether we had formed any agreement at all. Resort to the law necessarily transforms the inter-subjective exercise of mutual assent into an objective retrospective determination whether such assent ever occurred. It looks like Figure 2.

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the problem and partly by the norms, habits, and personal characteristics of the decision-maker.

It is often possible to frame a given decision problem in more than one way. Alternative frames for a decision problem may be compared to alternative perspectives on a visual scene.

Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Sci.* 453 (1981).

130. RESTATEMENT (SECOND) OF CONTRACTS, §§ 17-19 (1981).

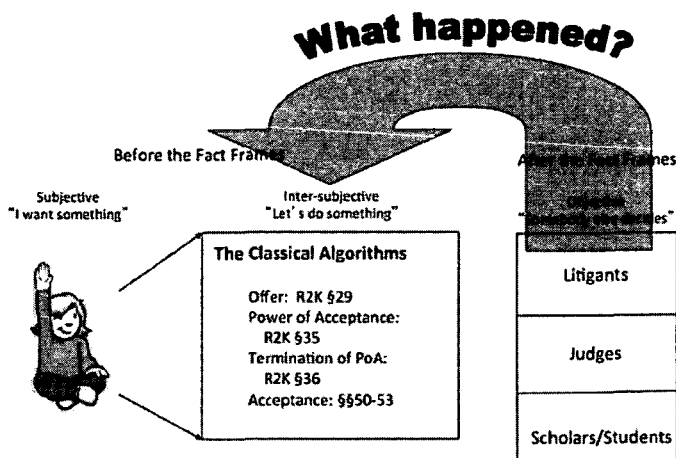


Figure 2

I teach the problems with the “contract as model” metaphor by way of the “popping the question” metaphor. How does one propose marriage? Here is one somewhat antiquated view. A man must get down on one knee. He must ask the question, “Will you marry me?” A woman must respond, “Yes, I accept your proposal.” I then tell the story of how my wife and I came to be engaged. In the summer of 1978, she and I were driving to a baseball game at Tiger Stadium in Detroit with another friend. We drove by an apartment complex and I said something like, “That’s where Alene and I are going to live when we get married.” Later she said to me, “Were you kidding?” I said, “I don’t think so.” She said, “Should we?” And we hugged. That was it. I then ask the students to consider, if we had a dispute after the fact whether there was a proposal of marriage, whether we exhibited mutual assent to being married under the algorithm of the “popping the question” model. I assert that we had an agreement. She disputes it and asks a series of questions. “Did you ever get down on one knee? No. Did you ever ask, ‘Will you marry me?’ No. Did I ever respond, ‘I accept your proposal?’ No. There was no agreement. Q.E.D.”

We know from our lived experience in the before-the-fact frame that we can manifest our mutual assent in all sorts of ways.<sup>131</sup> The

131. According to Adam Kramer:

Communicated meaning is thus ‘an amalgam of linguistically decoded material and pragmatically inferred material.’ Convention is what makes the whole thing work, by fixing which language and which method of pragmatic inference will be used, and this ensuring that the same interpretative method is used by both the communicator and the interpreter.



problem comes when, after the fact, we disagree whether we have actually manifested our mutual assent. You say yes, I say no. At this point, we are going to have to submit our dispute to a third party who has to decide, objectively, did we form an agreement. There is no single model for the answer. How do we decide? The First Restatement of Contracts was quite clear: “The manifestation of mutual assent *almost invariably* takes the form of an offer or proposal by one party accepted by the other party or parties.”<sup>132</sup> It is the equivalent of saying that a proposal of marriage almost invariably takes the form of a man on one knee “popping the question” followed by a woman’s acceptance of the proposal. Holmes said that the life of the law was not logic but experience, and we can see that concretely in this example. Does the failure to follow the prescribed pattern really mean that there was no deal or no proposal of marriage? Maybe it does to a logician, but not to others. The algorithm spits out a result that, while perhaps internally coherent, conflicts with the ordinary sense of the meaning of the interchange.

Later codifications of contract doctrine displayed a greater willingness to accept narrative as the means by which even objective observers might interpret and adjudicate claims. The Second Restatement took the view that the manifestation of mutual assent *ordinarily* takes the form of offer followed by acceptance, but added the observation that “a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.”<sup>133</sup> The Uniform Commercial Code went even further by rejecting the idea that the formalities of offer and acceptance are ordinary.<sup>134</sup>

If we teach anything about the before-the-fact frame in first-year contracts, it is that lawyers need to reverse the arrow and consider how adjudicators will look at this situation when the frame is after the fact. Thinking like a transactional lawyer means anticipating during the “let’s make a deal” experience the algorithms or narratives that will be employed in the objective frame of after-the-fact dispute resolution.<sup>135</sup>

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Kramer, *supra* note 58, at 175 (citations omitted).

132. RESTATEMENT (FIRST) OF CONTRACTS, § 22 (1932) (emphasis added).

133. RESTATEMENT (SECOND) OF CONTRACTS, § 22 (1981).

134. See U.C.C. § 2-204 (2003); see also U.C.C. § 2-207(3) (formerly providing that “[c]onduct by the parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract”).

135. Because it is objective does not necessarily mean that it is a third party employing the algorithms or the narratives. Corporate and transactional lawyers regularly have the experience of a matter arising after the closing and consulting the bound closing books to determine what it was that the parties agreed. In my view, the

The transactional lawyer not only transposes the deal into a linguistic model, but also imagines hypothetical future disputes (usually around issues of risk allocation), and crafts and negotiates contract language designed to have the client prevail if the hypothesized facts obtain.<sup>136</sup> The negative impact of this objective frame is that the lawyer views the hypothetical future disputes as being as real, and therefore as cost-laden, as the present transaction itself. One of the business lawyer's before-the-fact failure modes is failing to appreciate that the norms of the parties are based on an inter-subjective frame other than the prospect of legal enforcement and managing to over-lawyer the deal by way of an exhaustive "contract as model" to its demise. Put in more practical terms, it is one thing to learn how to kill a deal before the fact by creating the ideal "contract as model" to govern issues that may or may not arise after the fact. It is another thing entirely to develop the judgment not to be that kind of deal-killer.

This is an anecdotal example of the transposition of after-the-fact conceptions of "contract as model" to the before-the-fact frame, but it is typical of a business lawyer's experience. Friends who lived in the Chicago area owned a small house in a resort area in Northern Michigan. He was the CEO of a large corporation and she was a retired lawyer. They decided they wanted to knock down the house and rebuild, hired an architect, got zoning approval, and came to an oral understanding with a builder in the area who not only had done many projects with the architects, but had successfully completed a much larger house for one of our friends' cousins. The builder gave our friends his standard four-page contract, which they proceeded to give to their lawyer in Chicago for review. The lawyer not only marked it up, but added a fifteen-page addendum, including a lengthy "Certificate of Limited Warranty," and sent the whole package back to the builder's lawyer. Our friend called to tell me that the builder had received the markup back from his own lawyer, called her, and was "freaking out." There ensued several weeks of negotiation involving our friends, the builder, and their lawyers, in which our friends' lawyer got increasingly annoyed and adversarial with the builder's unwillingness to accept what seemed to the lawyer to be standard Chicago residential construction terms. Shortly thereafter, the builder advised our friends that he had decided to decline the project.

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parties themselves in that exercise approach the agreement from an objective frame. The question at that point, whether a party recalls her subjective intention as contrary to the contract language or not, is whether the rules of contract interpretation foreclose an opportunistic argument that the party is entitled to what she wants. *See generally* Lipshaw, *supra* note 20.

136. Tversky and Kahneman noted particularly the effect of a changing temporal perspective on framing decisions. Tversky & Kahneman, *supra* note 129, at 457-58.

There was nothing wrong with the contract my friends' lawyer was proposing; in the right frame—say, between a commercial developer and a large-scale builder—it would have been a typical contract negotiation. The unreality in this context was the very idea that the risk allocation provisions (including the so-called limited warranty), all of which were dependent on resort to adjudication for resolution, had value. Indeed, because these provisions caused a rift in the relationship between the builder and our friends, they may have had negative value. Nevertheless, the lawyer did exactly what transactional lawyers applying a legal before-the-fact frame of reference are trained to do.

Stepping back, however, we can see that adopting the “contract as model” frame was only one of various approaches to the contingency and uncertainty. The operative frame for the builder, working as he did in a small town, was “trust.” My assessment was that anticipating litigation (and therefore constructing complex risk allocation models in the contract) was the wrong frame to have predominated the discussion. It was unrealistic to expect that post-construction dispute resolution had value. Indeed, most of the remedies, it seemed to me, were non-legal. The contract needed to provide that our friends tightly controlled the disbursement process so that the state of completion roughly matched the funds expended and lien waivers obtained. It meant understanding how small residential builders actually work and fitting a model of project supervision to the usual frame (at least in northern Michigan) of trust and the minimally necessary legal rights, rather than forcing the situation into an unrealistic frame of contractual rights, duties, and remedies.

### III. METAPHOR AND MEANING IN CONTRACT LAW DOCTRINE

In addition to providing a more meaningful contextual frame for the contracting process, metaphor also provides an escape from the epistemic trap of traditional propositional analysis in contract doctrine itself. Contract doctrine, as reflected in the two Restatements, is a series of algorithms or formulas that litigants and courts apply to the facts at hand to generate a legal consequence.<sup>137</sup> None of the major approaches over the last hundred years has changed this significantly. The consistent theme, certainly as it comes across to the first-year students, continues to be finding coherence in the doctrine as a whole. In other words, first-year students want to know whether there is a meaningful and non-contradictory way to organize our understanding of the propositions of

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137. Compare RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (providing algorithms that are facially less open-ended in classical theory), with RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (providing algorithms that are more open-ended as contributed by realists). See also *supra* note 34.

contract dispute adjudication so that like cases are treated alike, the propositions do not contradict each other either as stated or applied, and we have some basis for predicting how a dispute on a new set of facts might be decided.

A legal system based on classical formalism, in theory, achieves “like and like” coherence for new cases as to which no existing rule applies by placing the facts of the case within a category and inferring the correct rule from other cases within that category by means of the general principles and concepts.<sup>138</sup> My pedagogical goal is not to reject the necessity to choose between dichotomous conceptual classifications in the doctrine, but to address explicitly the cognitive processes by which those classifications arise. As with the transactional lifecycle as a whole, I believe the pedagogical “gap” problem occurs in our teaching of the doctrine itself because we are not as explicit as we should be with our students about the relationship between the theoretical underpinnings (i.e., how we undertake conceptual ordering of our perceptions of the experience of the world) and meaning. The point of theory, like all conceptual ordering, is to provide meaning to the experience, which itself means to see the experience as having significance in relation to something else. The desire to find meaning in experience is a precondition of reasoned theory; we theorize because we have already been hardwired to seek meaning, and reasoned theory is how we do it. Hence, it is natural to try to read all the rules that purport to be a system as indeed constituting a *coherent* system.<sup>139</sup>

It is no surprise that either theorists or students demand a coherent conceptual structure for the data thrown at them; it is what their minds are hardwired to do. Beginning law students are, by definition, not yet trapped by the closed linguistic system. I have no doubt, given how much our students demand a coherent structure, that in the absence of one proffered by their professors, they will, rightly or wrongly, come up with one themselves. For example, law students invariably prepare for examinations by creating an “outline” that aspires “to impose structure on what seem to be a jumble of case summaries, questions, their fellow students’ attempts at answers, jokes and professional war stories.”<sup>140</sup> By trying to understand the transactional life cycle, or how the substance and

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138. See Grey, *supra* note 6, at 11.

139. See LLEWELLYN, *supra* note 14, at 43 (“Moreover, justice demands, wherever that concept is found, that like men be treated alike in like conditions. Why, I do not know; the fact is given. That calls for general rules and their even application.”); *id.* at 17 (noting that one of the facts inherent in our case law system is that “we require [courts], or they have come to require themselves, not only to decide but to lay down a rule for all ‘like’ cases”). Another way of describing this is that legal propositions are capable of being true or false. See generally PATTERSON, *supra* note 92.

140. STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 2-3 (3d ed. 2010).

procedure of contract fits within it, without addressing the conceptual filters and frames of the litigants, the judges, and we, the scholar-students, seems to me doomed to precisely the confusion the first-year contract class has traditionally created. More importantly, if we describe the transactional life cycle to our students solely from an after-the-fact perspective, they will create a coherent image, whether or not it corresponds to the reality of before-the-fact lawyering. Llewellyn understood the human tendency was to seek a single coherent answer: "Man . . . finds more than one *right* answer hard to conceive of. And if decision is to be 'by rules,' the rules must be dealt with as presaging, nay, forcing, that single one 'right' answer."<sup>141</sup>

The drive among students for conceptual coherence is always most apparent to me in the free-for-all Q&A that constitutes my pre-exam "review session." During these sessions, students display a remarkable ability to spot incoherencies. As noted earlier, *Batsakis v. Demotsis*,<sup>142</sup> a mainstay of the casebooks, holds that courts will not inquire into the sufficiency of consideration even where one party entered into the contract under the strain of wartime financial distress and the other party was aware of those circumstances. In *Berryman v. Kmoch*,<sup>143</sup> another oft-used case, the court held that an option contract was not enforceable, first, because it was insufficient merely to recite and not pay the \$10 consideration for the option, and second, because a promissory estoppel theory did not suffice to make the option contract binding. *Berryman* appears primarily to teach the limits of promissory estoppel in the offer and acceptance setting. A student asked me, however, why the court was willing to go beyond the recitation of consideration in *Berryman* and not in *Batsakis*. We discussed possible distinctions.<sup>144</sup> Nevertheless, it ultimately seemed to me that the attempt to reconcile the cases into coherent doctrine was futile, that the student was correct in sensing the inconsistency, and that the problem was less one of the reality of incoherent doctrine than the human desire to see often incoherent and messy reality as rationally coherent.<sup>145</sup>

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141. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 9 (1934).

142. *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949).

143. *Berryman v. Kmoch*, 559 P.2d 790 (Kan. 1977).

144. For example, one distinction might be the sufficiency of mere recitation versus the sufficiency of the consideration itself.

145. Llewellyn made the same observation more than seventy years ago:

One thing, however, seems sure, and that is that the jurisdiction which has flatly held the recital of a dollar in a land option for a fair price to be conclusive cannot be *relied* on to rule the same way on a recited consideration in a non-negotiable note, nor where gold has been struck during the life of the option, nor where the recited and unpaid dollar is the alleged price for a release from

Similarly, in the first few weeks of contracts class, we study *Kirksey v. Kirksey*,<sup>146</sup> an 1845 Alabama case in which the defendant made the following statement to his sister-in-law:

Poor Henry and one of the kids are dead. If I were you, I'd get control of the land, sell it, and move over here to Talladega. If you come, I will let you have a place to raise the family, and I have more land than I can tend.

Was this a contract or merely a gratuitous promise with a condition, like “if you stop by on Saturday, we’ll go get ice cream cones?” The Alabama Supreme Court held that it was not a contract. A student approached me after class and was troubled by the fact that his intuition about the result was inconsistent with the court’s ruling. In essence, the student was asking, “Why did I get it wrong?”

The drive for coherence reflects the fact that scholars and students still aspire to the philosophers’ aspirational “view from nowhere,” in which the objective observer studies cases in which the parties are fighting after the fact over the consequences of their actions in the before the fact setting.<sup>147</sup> But it is *not* a view from nowhere: when we study the transactional lifecycle by reading opinions in litigated cases, the “somewhere” view of both observers and participants in after the fact reconstruction of the before the fact deal. The source of incoherence—that is, the intuition of the realists and critical legal scholars that judges are making up the law as they go along—is really just confirmation that Kant and Wittgenstein were correct in observing that rules (including the formal rules of classical contract doctrine) will not dictate their own application to particular circumstances. Even an impartial judge must make a seemingly irreducible subjective judgment in order to interpret the rules set forth in a contract and apply what appear to be the parties’ objective manifestations of agreement to the dispute under adjudication. If this is true of the judge, then there really is no “view from nowhere” that is the source of objective justice. Indeed, we are not only all realists, but we are also all opportunists in applying the optimal formal model of the transaction to the circumstances as they confront us.

If the language of the law in doctrinal analysis creates the epistemic trap that Professor Mertz aptly observed,<sup>148</sup> then we break free of the trap

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an injury which then turns out to be really troublesome. In short, we do not know where we are at.

Llewellyn, *supra* note 52, at 24.

146. 8 Ala. 131 (1845).

147. See generally NAGEL, *supra* note 90.

148. See generally Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483 (2007).

when we identify the conceptual frames, models, and metaphors with which the participants in and observers of the legal process perceive and make use of the rules. I do so, once again, with a turn to behavioral psychology and cognitive science, in particular the role of metaphor in preceding propositional analysis. The most significant impact of this approach is that it clarifies the context of the rule-based argumentation that is the source of Professor Mertz's concern. Most law professors understand this intuitively when faced with the question that is the bane of the first-year teaching experience: "can you just tell me what the rules are?" We know that the question is meaningless: the rules arise in a clash of instrumental interests in which competing parties assert competing rules that would dictate competing outcomes, and judges attempt to resolve the disputes in a way that keeps all of those rules coherent and consistent. As Steven Winter notes, "There is regularity in law, but it derives neither from logic nor from rules. We are able to distinguish particular fact situations in which one argument is more plausible than another, and there is nothing mysterious in this."<sup>149</sup>

The classic conception of the system of contract law doctrine followed a particular algorithm of conceptually ordered, abstract yet precise bottom-level rule formulations.<sup>150</sup> As an example of the distinction between abstraction and precision, compare the formalist approach to the enforceability of promises incorporated in section 71 of the Second Restatement of Contracts with the more recently developed concept of promissory estoppel incorporated in section 90.<sup>151</sup> Each fundamental principle is capable of being coded as though in a computer program, except that the last question under section 90 requires a determination of whether the facts as presented give rise to an "injustice." The problem with the incorporation of "injustice" in the doctrinal rule is that it cuts against the precise ranking of conceptual order on which classical formalism is based. Under classical formalism, justice or injustice may be relevant when considering a legal system—"the extent that it fulfills the ideals and desires of those under its jurisdiction."<sup>152</sup> But justice and injustice, in this conception, are simply too imprecise to be elements of the bottom-level rules that judges actually use to decide cases. In other words, the working algorithms of the doctrine need to be expressed in principles that can themselves be applied without significant controversy; "[t]o let considerations of acceptability directly justify a bottom-level rule [as in section 90] or

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149. WINTER, *supra* note 24, at 11-12.

150. Grey, *supra* note 6, at 12-13.

151. RESTATEMENT (SECOND) OF CONTRACTS §§71, 90 (1981). *See also supra* note 34.

152. Grey, *supra* note 6, at 10.

individual decision would violate the requirement of conceptual order, on which the universal formality and completeness of the system depend[s].”<sup>153</sup>

Section 71 is merely a formulation for a rule that says a legally enforceable promise is one that has to be made as part of a bargain. Section 90 is merely a formulation for a rule that says a promise can become legally enforceable if the promisee reasonably relies on it, and injustice would result if the promise were not enforced. The former rule *formulates* that there was a bargain while the latter rule *formulates* that there was justifiable reliance on a promise, but both formulations follow from reasons that the user of the rule would find *meaningful* in enforcing a promise. The rule formulations do not, however, in themselves tell us why the rule is meaningful. For that we turn to the use of the rule in frames and the source of the rule’s meaning in metaphor from prototypes of conventionally accepted concepts. While I do not believe it is necessary to belabor with first-year students whether that pull is the result of analogy or metaphor, I am convinced that reasoning by analogy in law, at least as well-respected thinkers have tried to explain it, accounts for the sense that there is both a single determinate answer to a case in the overlap on one hand and complete indeterminacy on the other. If analogical reasoning is propositional, as Cass Sunstein has argued,<sup>154</sup> then the determinate answers ought to be clearer than they seem to be, and the fact that they are not is a primary source of confusion. I think this is problematic; our initial intuitions or judgments about cases are non-propositional or non-algorithmic, and are themselves better conceptualized as metaphoric frames.

The imaginative application of a rule in context thus precedes the formulation in language of the rule’s applicability. Meanings of rules in an important respect precede their formulation in language, even if the rule has no expression other than in language. Moreover, rules derive meaning only in use. To talk of the meaning of rules, however, is senseless without focusing on whose *meaning* and in what *use*. In short, as most law professors understand, merely teaching a set of sterile rules fails to teach the dynamics of either before-the-fact or after-the-fact lawyering.

I believe the appropriate response is not to attempt an inductive analysis of similarity points, as though we could quantify the similarity of this case to that case. That is precisely what is confusing the student.

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153. *Id.* at 15. Why this was so had to do with the conception of law as a science. *Id.* at 16-20.

154. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 743 n.7 (1993).



If legal reasoning is “inductive analogy,” then the implication is that we ought to be able to come to the correct (and testable) inductive inference. Thus, legal scholars look for the propositional elements of the “aha” moment of analogical reasoning or judgment. Sunstein identifies four “features” of analogical reasoning: “principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction.”<sup>155</sup> The problem with inductive analogy is precisely the problem with induction generally. What is the source of the hypothesis that leads one to think that particular analogy works in the present case? In fairness, Sunstein acknowledged the work on metaphor theory; nevertheless, his focus was on “analogical reasoning that is roughly propositional,” in the sense of “inductive analogy,” and he did not try to incorporate “the growing work dealing with analogy and metaphor at nonpropositional levels.”<sup>156</sup>

The obvious answer, it seems to me, is that the application of doctrine from old cases to new, like scientific theorizing from old patterns to new data, involves not just reductive, inductive, and deductive capabilities, but also the abductive capability discussed previously.<sup>157</sup> The draw of the metaphoric frames is something different than and prior to analogy. Whether or not there is a difference between analogy or metaphor, the propositional implications of the former for law professors seems to make a difference.<sup>158</sup> Analogy might well be the subject of a

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155. *Id.* at 746-49. Fred Schauer's approach is to suggest that the apparent unfairness of case results has to do with the need for the law to generalize beyond the facts of the particular case. Hence, his explanation of the first-year dilemma is one of tension between generalization and particular facts. If we accept the court's decision that rule X applies on the facts of this case, we can create a situation, by way of the traditional Socratic hypotheticals, in which the application of the rule seems unfair. FREDRICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* (2009). It seems to me this also implies that there are propositional answers to the first-year dilemma.

156. Sunstein, *supra* note 154, at 743 n.7. For a similar attempt to reduce judgment in litigated cases to a set of heuristics, see generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006). I have criticized Vermeule's approach. Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgment*, 19 S. CAL. INTERDISC. L.J. 299, 346-50 (2010).

157. *See supra* note 38 and accompanying text.

158. I suspect that the conceptual categories of “analogy” and “metaphor” are as subject to idealized models and prototypes as any category. On this point, Professor Sunstein has observed that computers will not be able to do legal reasoning because they cannot reason by analogy. Kevin Ashley, Karl Branting, Howard Margolis & Cass R. Sunstein, *Legal Reasoning and Artificial Intelligence: How Computers “Think” Like Lawyers*, 8 U. CHI. L. ROUNDTABLE 1, 18-21 (2001). Eric Engle responded that Sunstein's view was based on notions of static rules of computation, rather than dynamic rules of computation, in which the computer learns from its prior errors. Hence, so-called “neural networks” already allow computers to undertake pattern recognition. These are computer programs design to model the way that brain neurons process patterns. Again, highly oversimplified, these are programs that allow parallel rather than serial processing,

complex algorithm, but it is less likely that a computer can create a metaphor. Hence, metaphoric framing is less about propositional inference than the pull the prototypes exert on the facts at issue in a non-propositional way. We frame differently, and thus two of us can look at the same facts and apply differing framing metaphors, long before we ever get to the point of propositional analysis.<sup>159</sup> That is what makes a hard case hard.

Conceptual metaphor of classification or categories as “container” is a means of getting closer to the intuition of analytic distinctions between cases that precedes lawyerly rationalization of the distinctions in legal propositions.<sup>160</sup> Traditional propositional analysis is the metaphorical equivalent of constructing a box or a container in which things are in or out. I think it is more meaningful to adopt Lakoff’s concept of an “idealized cognitive model” as the one in which human beings organize their experience, with prototypical instantiations of the category at the core of the model, and with less prototypical examples radiating out from the core.<sup>161</sup> Professor Winter applies this to legal

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and contain learning algorithms that allow the program to “learn”—that is, to reject choices available within the program. The program does not just find a solution—it finds the optimal solution (usually the solution that has the lowest cost). Eric Allen Engle, *Smoke and Mirrors or Science? Teaching Law with Computers—A Reply to Cass Sunstein on Artificial Intelligence and Legal Science*, 9 RICH. J.L. & TECH. 9 (2002); see also Eric Allen Engle, *An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victim Protection Act*, 11 RICH. J. L. & TECH. 2 (2004).

My reaction to the debate is that it is likely Sunstein is wrong about programming analogies, for the very reason that a complex program could undertake what he lists as the features of analogical reason. Nevertheless, he is probably right about the inability of computers to make judgments about the application of competing algorithms to facts that sit in the Venn diagram overlap. The reason, I suggest, is the difference between metaphoric framing and “analogical induction.”

159. In order to apply a rule (or an algorithm or a model) to a particular situation, we have to choose the rule. There cannot be a rule or algorithm for selection of the rule, because there would need to be a rule for the rule, and we end up in an infinite regress. This is one reason Roger Penrose has concluded there is a non-algorithmic source of judgment, on which I have previously written. See generally Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1 (2011).

160. Winter, *supra* note 24, at 69-92. For additional examples of metaphor analysis in legal argumentation, see Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169 (2004); J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS’N LEGAL WRITING DIRECTORS 155 (2010).

161. For an interesting discussion of the different possible methods (specified by necessary and sufficient conditions; prototype-centered; and goal-derived) of defining categories for regulatory purposes, and the benefits and problems attendant to each, see Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1185-98 (2010). The authors commend the

reasoning in his critique of the conventional approaches to reasoning by analogy. “Most of what passes for reasoning by analogy is actually the process of radial categorization by means of [idealized cognitive models]. Reasoning by analogy, in other words, is an ordinary mode of category extension.”<sup>162</sup>

Return again to *Batsakis v. Demotsis*,<sup>163</sup> which dealt with whether courts will inquire into the adequacy of consideration in an exchange. There were two legal propositions in conflict. One proposition was that courts will not police the adequacy of consideration. Another proposition was that gross inadequacy of consideration, such that it shocks the conscience, may support a finding of fraud, duress, or oppressive conduct. I give my students two examples of middling cases: (1) the condominium for which I turned out to have grossly overpaid because of the need to do far more renovation work than I expected in order to make it habitable, and (2) a “rent-to-own” contract in which a low-income person commits to pay \$2,500 for a \$900 sofa. Which proposition applies in each case? The problem is that the analog, continuous world does not divide up into neat little boxes in which it is clear that my condo purchase falls on one side of the line, in the box that is labeled “free market, you pays your money and you takes your chances transaction,” and that the rent-to-own contract falls on the other in the box labeled “exploitation.” Langdellian classification works like this. One looks at all the cases and proposes inductive propositions that reduce those cases to their common elements. “A binding contract is one in which there is a promise supported by consideration. Courts inquire only as to the presence of consideration and not its adequacy.” The answer in each case is either “yes” or “no.”

The analog world, as to which we think not just in deductive or inductive terms but also process cognitively by way of metaphor, looks something more like Figure 3 below. We have idealized conceptual models of “bargain” on one hand and “exploitation” on the other, and these arise from physical events in the world for which we have clear and unambiguous prototypes. We make an initial intuitive judgment in each case about how close the salient aspects of the circumstances in question meet the prototype. The question is whether we even look to the proposition in that initial intuitive process. My suspicion is that we do

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intuitive appeal of the prototype-centered conception of categories, but note that using the approach exclusively may still lead to incoherent distinctions in the application of tax rules to specific instances (e.g., what is a charitable deduction?). *Id.* My sense is that a prototype-centered metaphoric approach to explaining the pull of competing doctrinal propositions on the case at hand does not raise an issue of incoherence.

162. WINTER, *supra* note 24, at 223.

163. *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949).

not. Notwithstanding how we have defined a bargain in propositional terms (an “exchange”) or how we have defined exploitation in propositional terms (“shocks the conscience”), we turn not back to the proposition but to prototypical examples of the category the proposition seeks to encapsulate. When I teach the after-the-fact frames to first-year students, I use Venn diagrams like Figure 3.

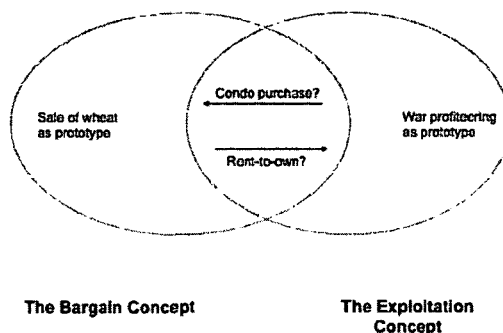


Figure 3

The facts in the case sit in the overlap. Indeed, I ask the students to use another metaphor, one in which there is a tug-of-war between the prototypes, in which the prototypes pull on the facts toward the application of one concept or the other.

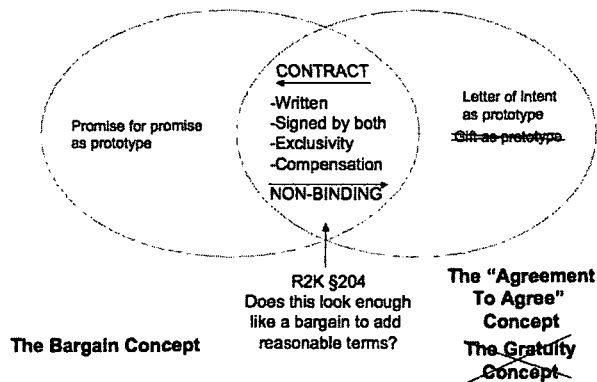
*Wood v. Lucy, Lady Duff-Gordon*<sup>164</sup> is a good example of a case in which one party’s position fails precisely because it cannot identify a viable prototype for a classification *other* than as a contract. I use the diagram in Figure 4 to illustrate this. The prototype of an objectified bargain—a contract—is a promise for a promise. We know what a prototype of a contract looks like even before we supply propositions that define the category. The problem with Lady Duff-Gordon’s attempt to avoid an obligation to Wood was not so much that the agreement bore significant hallmarks of a prototypical contract (it was written, signed by both, and had detailed exclusivity and compensation provisions), but rather that Lady Duff-Gordon asserted a rule formulation without suggesting why that rule would be meaningful in the circumstances. Her position was in essence: “There’s not really a bargain here. A bargain is a promise for a promise, and Wood didn’t promise me anything because there’s no explicit statement he will actually place my indorsements.”

But if the arrangement is not a contract, what is it? Most of the cases dealing with consideration present a tension between two categories with prototypical examples: a bargain and a gift. The facts

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

fall somewhere in between and the prototypes exert a pull. Figure 4 “tries on” competing categories. Arguing that Wood’s relationship was gratuitous, akin to a gift, is specious. There was a commercial relationship, and there was no “giftness” about it. Another concept, one that existed in 1917, was an “agreement to agree,” which under the First Restatement of Contracts would not have been considered a contract because it lacked an essential term.<sup>165</sup> The prototype of a negotiated “agreement to agree” would be a letter of intent: “We intend to execute an agreement to sell the company at a price yet to be negotiated.” That would at least provide some plausible competing, if nevertheless weak, conception of the before-the-fact arrangement (i.e. the prototype of a bargain likely still wins the tug of war against the prototype of an agreement to agree). The reason the case seems easy in retrospect is that even though there is no coherent rule to recite, Lady Duff-Gordon simply failed to offer up a credible competing concept or classification for the parties’ objective relationship. Why would anybody objectively understand, in the context of this relationship, that Mr. Wood was not bound to do anything?

**If the arrangement between LLDG and Wood wasn't a contract, what was it?**



**Figure 4**

Section 204 of the Second Restatement of Contracts, which is consistent with the holding in *Wood*, states that “[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a

165. HOGG, BISHOP & BARNHIZER, *supra* note 5050, at 387.

term which is reasonable in the circumstances is supplied by the court.”<sup>166</sup> This rule formulation depends upon a pre-existing idealized conceptual model of a contract. Comment d to Section 204 provides that “[w]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.” In order to apply the rule, a judge needs to have in mind the prototype of a contract/bargain, and conclude that the instant bargain is “sufficiently defined.” In other words, the judge has to make an intuitive judgment that the instant bargain is one being pulled at by the contract prototype, in which case it is permissible to supply reasonable missing terms.

The reason hard cases are hard is that legal propositions are the tail of the dog, rationalizations of intuitive hypotheses based on metaphoric framing that precedes the analogical application of the rules.

#### CONCLUSION

In this article, I have offered a critique of the traditional theory and pedagogy of contract law, and presented an approach I believe provides a far more satisfying and realistic picture of the transactional life. It is a theoretical synthesis of the valid insights of formalism, realism, and law-in-action. It provides a conceptual framework for contract law teachers and, more importantly, for students. Most importantly, it allows an escape from the epistemic trap of the traditional frames from which academic and practicing lawyers see and talk about the transactional world.

The point for a well-seasoned business lawyer is not to ignore the “thinking like a lawyer” frame, but both to master its techniques and to understand its limitations in expressing understandings or achieving results. The first-year contract law class is just the start of the process by which the academic and practicing arms of the profession turn out a well-seasoned business lawyer. I attempt to make clear to students that the doctrine they are studying is based on a particular “view from somewhere,” namely the frame and perspectives of after-the-fact disputes. But it would be a mistake to use that doctrine to envision the entire transactional lifecycle or to have a sense of what transactional lawyers do. If they want to be great business lawyers, mastery of the doctrine will be a necessary but not sufficient condition.

I am suggesting here that my approach—placing traditional contract doctrine within the transactional lifecycle by way of the “subjective to objective” journey metaphor—provides a far more coherent, complete,

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166. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

and realistic picture. It is a more honest presentation to law students of their future roles in the business world, whether as before-the-fact transactional lawyers or as after-the-fact litigators. First, it incorporates the “law in action” perspective on the legal system’s more limited place in the social institution of before-the-fact bargain creation. Real world contract lawyering involves more than merely anticipating third-party interpretation of objectified arrangements; contract lawyering often is the means by which the parties themselves come to understand their deal. All negotiated contracts go through this objectification process, but few are involved in disputes, and only a small number of those disputed contracts become the subject of litigation.

Second, my approach gives more credit than the legal realists heretofore have given to how lawyers must, as Llewellyn observed,<sup>167</sup> treat the impulse to coherent doctrine as something less than the whole answer but something more than a mere fossil or impediment. Our discourse occurs before the fact in language that is both rule-governed and sufficiently plastic to allow for the objectification of complex transactions. Once we have committed to use language, we have committed to the after-the-fact interpretation of our objectified utterances and agreements within a conventional game or practice “with a code of demanded observance and an associated background of tradition.”<sup>168</sup>

Third, my approach dispels easy answers about the polar extremes of formalism and contextualism that have historically defined academic debates about contract doctrine. The core of this issue is the relatively limited real world experience of adjudication of after-the-fact interpretation disputes. The eminent linguist and legal scholar Sanford Schane correctly noted (and any long-time practitioner will confirm) that even exquisite drafting would not eliminate all later misunderstandings about how to interpret agreements.<sup>169</sup> “Built into the very structure of language are ambiguity and vagueness.”<sup>170</sup> Yet Professor Schane’s reaction to that reality reflects the exclusive after-the-fact perspective

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167. See generally LLEWELLYN, *supra* note 14.

168. BLACK, *supra* note 53, at 56.

169. Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 192 (2002). As noted by Max Black,

problems of clarifying meaning are constantly with us, too pressing to be evaded. If we find it hard to understand well, the fault is not altogether that of the writer or speaker. Even at its most lucid, discourse is inescapably *linear*, doling out scraps of meaning in a fragile thread. But significant thought is seldom linear: cross references and overlapping relationships must be left for the good reader to tease out by himself.

BLACK, *supra* note 53, at 17. Lawrence Solan refers to this as “pernicious ambiguity.” Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859-60 (2004).

170. Schane, *supra* note 169, at 192.

typical of the traditional contract law curriculum. Is it reasonable, he asks, in light of the subtleties of language and the vagaries of usage, “to hold [drafters] responsible for their choice of language?”<sup>171</sup> His response is “no,” the subjective theory of contracts being

more gracious in its treatment of understanding. It does not hold the parties entirely responsible for how the court must ultimately interpret their choice of words. It is more forgiving of inadvertent mistakes, for it seeks to discover the parties’ true intentions. It allows for an exploration of the intricacies of language, without requiring the creators of documents to be fully aware of all possible meanings, nuances, or references.<sup>172</sup>

I disagree. I think we submit to the objective judgment of others in our second-person relationships well before we get around to writing contracts. As subjects using objective language, we take the risk every time we emit an utterance (i.e. merely use words rather than choose them) that we will be misunderstood, but there is no positive law nor law of nature that says we are obliged to grant subjects *carte blanche* to be misunderstood in their ordinary discourse.<sup>173</sup> As Max Black observed,

When partners in a speech transaction use a well-developed language, their immediate purposes and actions are controlled by shared knowledge of the rules and conventions defining that language. . . . [T]he rules of the language institution define what the speaker’s words mean and how, by convention, they are to be understood, regardless of what their users would like them to mean.<sup>174</sup>

Could it be that seemingly formalist anachronisms like the plain meaning rule persist because they indeed are something more than mere lawyerly convenience?

Moreover, we create that objective model in words and phrases that sometimes we merely use without conscious choice and sometimes we interpret as we choose them. Which is which is not always apparent after the fact. Judges are people first and only then lawyers; when the parties before them have used the objective medium of a community-based language, the parties are normally held to be accountable for it. My intuition is that before-the-fact lawyers, at least the good ones, know this. That is not to say that those lawyers do not handle transactions vigorously on behalf of their clients. Rather, it is to observe that good

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171. *Id.* at 193.

172. *Id.*

173. See BLACK, *supra* note 53, at 58 (“[T]here *is* a penalty for deviation from the norm of correct usage—the risk of misunderstanding.”).

174. *Id.* at 18.



lawyers know that less depends upon the doctrinal debate over plain meaning than contract casebooks would have students believe.

“You pays your money and you takes your chances.”