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FOREWORD

HADLEY V. BAXENDALE AND THE SEAMLESS WEB OF LAW

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I. INTRODUCTION

Through a happy serendipity Frank Snyder, of Texas Wesleyan University School of Law, happened to be doing some research on the web when he ran across documents suggesting that an urban renewal project was rebuilding a flour mill in Gloucester, England. After some additional research, he concluded that this building, long known as "Priday's Mill," was, in fact, Joseph and Jonah Hadley's old City Flour Mills. By coincidence this happened to be on the eve of the 150th anniversary of the case in which that mill figured prominently, *Hadley v. Baxendale*.[1] Though the case is likely known by name to most lawyers (as in "the rule of . . ."), Gloucester officials, and even local historians were oblivious to the connection between their mill and this monument of contract law—until, that is, the fertile and creative Frank raised with them the possibility of co-sponsoring the sparkling conference on *Hadley*, "The Common Law of Contracts as a World Force in Two Ages of Revolution," that Frank organized in Gloucester in the summer of 2004.

† Professor of Law, University of Houston Law Center. A.B., Cornell, 1960; J.D., 1963. Editorial Reviser, Restatement (Second) of Contracts. Editing the Second Restatement gave me the great opportunity to work closely with its Reporter, Professor E. Allan Farnsworth, who had been my teacher and became my friend. Allan died this year, and I am honored to dedicate this Essay to him.

1. 156 Eng. Rep. 145 (Ex. 1854).

If I tried to discuss all the papers, I would give them only a superficial reference; there are too many to cover with any depth. I did, however, want to discuss some fine examples of the conference and then consider the broader issues that they raise about *Hadley* as an artifact of the common law, both the common law of the mid-nineteenth century and the common law of the early twenty-first. As the title of the conference suggests, *Hadley* illustrates how wide-ranging and intertwined the common law is, both in geographic and cultural terms and in terms of its flexibility as the world around us changes.

II. *HADLEY*—AND THE INFLUENCE OF CONTEXT (HEREIN OF RICHARD DANZIG, PRYOR & HOSHAUER, JOSEPH PERILLO AND JOSEPH POTHIER)

At the risk of stating the obvious for many readers, please allow me to review *Hadley* briefly. On May 12, 1853, Joseph and Jonah Hadley, trading as the City Flour Mills, discovered that the crank shaft on their mill had broken, and the next day gave it to Pickford & Co., "the well-known carriers," to transport it across England to Greenwich "as a pattern for a new one."[2] Pickfords misconsigned the shaft and delayed its replacement by five days, causing the Hadleys a considerable loss of profits. The Hadleys sued Pickfords's managing director, Joseph Baxendale, claiming damages of £300. Witnesses testified to a £120 loss, the jury gave damages of £50, and the Court of Exchequer, on a rule *nisi* (essentially a motion for new trial), gave a rule absolute, and remanded the case for a new trial, directing the trial judge to instruct the jury that "they ought not to take the loss of profits into consideration at all in estimating the damages."[3]

To justify this instruction the court put forth the famous rule of *Hadley v. Baxendale*:

> [T]he [Hadleys'] loss of profits . . . cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants.[4]

In today's words of the Restatement Second of Contracts:

2. *Id.* at 147.

3. *Id.* at 147–48. Baxendale had paid £25 into court, apparently conceding liability. *Id.* at 147.

4. *Id.* at 151.

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as the probable result of the breach when the contract was made.
(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  (a) in the ordinary course of events, or
  (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
. . . .[5]

The papers in this issue discuss the substance and historical context of *Hadley* at length, but any contextual discussion of *Hadley* must also consider the contribution of Richard Danzig. Danzig—in various embodiments Stanford law professor, Secretary of the Navy, and Washington insider—wrote a famous paper thirty years ago[6] that showed how *Hadley* reflected the Industrial Revolution, which was then at its peak in transforming England from the bucolic, traditional, small scale and status-based villages of Jane Austen to the commercial, dynamic, teeming and contract-based cities of Charles Dickens. Danzig's thesis is that the pre-industrial English legal system, with only fifteen royal judges for the whole country[7] and many decisions like the assessment of damages left to the discretion of local juries, had to be reined in by rules to create the uniformity and predictability needed by the new national economy.

III. Pryor and Hoshauer, Puritanism and the Development of English Contract Law

In the present collection of papers, C. Scott Pryor and Glenn M. Hoshauer question the thesis of several writers that contract was strongly influenced by English Protestantism in general and Puritanism in particular.[8] They suggest that most of the changes in contract during the years before the eighteenth century were due less to the Puritan Revolution than to changes in forms and court jurisdiction, together with pressures from contract practice. They agree with Danzig about the need for centralization in light of the small number of royal judges and an industrial (as well as religious) revolution.

5. Restatement (Second) of Contracts § 351 (1981).

6. Richard Danzig, Hadley v. Baxendale*: A Study in the Industrialization of the Law*, 4 J. Legal Stud. 249 (1975).

7. The three "Superior Courts," Common Pleas, Queen's Bench, and Exchequer—each with five judges—handled only about 2,400 cases per year, many in London and some at Assizes held in major provincial towns for about eight weeks a year. The inferior County Courts handled nearly 750,000, and while many of these were routine debt collections, Danzig estimates that the County Courts handled many times the non-routine cases handled by the royal judges at Assizes. *Id.* at 267–70.

8. C. Scott Pryor & Glenn M. Hoshauer, *The Puritan Revolution and the Law of Contract*, 11 Tex. Wesleyan L. Rev. 291 (2005).

However, they place the pressures hundreds of years earlier than Danzig.[9] They show that there was an earlier industrial revolution in Elizabethan times, and that even then—beginning in 1560—the central legal system was challenged,[10] with the London judges imposing rules, particularly about contract conditions, on local juries—the Danzig thesis pushed back by nearly three centuries. While the authors are skeptical about many of the alleged connections between Puritan theology and contracts, they do support the idea that concepts like the foreseeability rule are products of their times and social factors, not just economic ones but cultural ones like religion and politics.

But where did this rule that damages had to be foreseeable come from? In this present collection, Joseph Perillo argues, in detail and persuasively, that it came from the writings of the eighteenth century French treatise writer Robert Joseph Pothier.[11] Professor Perillo shows how Pothier influenced Lord Mansfield, Chancellor Kent, and writers on each side of the Atlantic, before and since *Hadley*, and concludes by musing on the insularity of the modern common law.[12]

Professor Perillo is concerned, as we see, not only with history and legal theory but with the interaction of legal systems. Though the common law is, by far the minority system compared with the civil law, it is increasingly influential in transnational law and the law of developing countries.

IV. Andrew Tettenborn and Foreseeability in Tort and Contract Damages

Andrew Tettenborn is also concerned with interaction, but of a different kind, the relationship of contract and tort, which Grant Gilmore gave the tongue in cheek name "contorts."[13] Professor Tettenborn puts forth a straightforward argument that the rule of *Hadley v. Baxendale* should be applied equally to most tort cases.[14] *Hadley* is the contractual analog to proximate cause. It is the device that cuts off liability despite a clear "but-for" connection. Professor Tettenborn adeptly considers the arguments why different or similar standards should be used in the two areas; he does not discuss the fact that his solution would pretty clearly limit tort liability, thus saving

9. I suspect that Danzig has no disagreement with them on these basic matters.

10. Pryor & Hoshauer, *supra* note 8, at 307–08.

11. Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 Tex. Wesleyan L. Rev. 267 (2005). Danzig had acknowledged A.W. Brian Simpson's earlier argument to this effect, see A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 Law Q. Rev. 247, 276 (1975), but had largely rejected it. See Danzig, *supra* note 6, at 185; Perillo at 276.

12. Perillo, *supra* note 11.

13. *See* Grant Gilmore, The Death of Contract 98 (Ronald K. L. Collins ed., rev. ed. 1995) (1974).

14. Andrew Tettenborn, Hadley v. Baxendale*: Contract Doctrine or Compensation Rule?*, 11 Tex. Wesleyan L. Rev. 505 (2005).

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entrepreneurs money at the expense of accident victims. The political desirability of a contraction of liability is beyond the scope of this Essay. But the question whether there should be one standard of causation sends us to Cardozo's dictum (or should we call it underlying principle?) in *Palsgraf v. Long Island Railroad Co.*[15]: "The risk reasonably to be perceived defines the duty to be obeyed . . . ."[16] This does sound like a tort equivalent of the rule of *Hadley v. Baxendale.*

Palsgraf, as we all learn, is not a proximate cause case at all; it holds that the railroad had no duty of care to a waiting passenger across the tracks and at the other end of the station.[17] But as Judge Andrews showed in his *Palsgraf* dissent, the extent of duty and the limits of proximate cause are two sides of a coin.[18] And the restrictions on consequential liability are, if you like, the edge of the coin. The various aspects have been raised by cases on the borders of tort and contract. In some instances the courts have generally opted for a contract-like approach, like the economic loss cases, where a party tries, generally unsuccessfully, to use strict tort liability or proximate cause to recover what seems more like a breach of warranty claim involving only economic loss.[19] On the other hand, the Second Circuit applied *Palsgraf* and not some variant on *Hadley* in the famous *In re Kinsman Transit Co.*,[20] involving a bizarre set of circumstances in which a barge rammed a bridge, causing a backup of ice that blocked a river and prevented the complaining vessels from plying their trade.

The Second Circuit was bound by *Erie Railroad Co. v. Tompkins*[21] to apply *Palsgraf* in *Kinsman*. That does not mean that the court could not have found a way to hold *Palsgraf* not applicable, given the complicated circumstances, and the fact that it was dealing with a bankruptcy and not a diversity case. The court, however, speaking thorough Judge Henry Friendly, opted to apply *Palsgraf* and found liability.[22] The Colorado Supreme Court was not so bound in *Vanderbeek v. Vernon Corp.*[23] In that case, the court had a case that was very much on the edge between contract and tort, and it did consider *Hadley* as well as issues of proximate cause in the business tort context.[24] The Vanderbeek interests had wrongfully garnished money that the Vernon Corp. claimed it would have used for a profitable investment that it lost because of the delay. The issue, then, was whether the

15. 162 N.E. 99 (N.Y. 1928).
16. *Id.* at 100.
17. *Id.* at 99–101.
18. *See id.* at 101–05 (Andrews, J., dissenting).
19. *See* Craig K. Lawler, *Foreseeability and the Economic Loss Rule* (pt. 1), 33 COLO. LAW. 81 (2004).
20. 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).
21. 304 U.S. 64 (1938).
22. *See In re Kinsman*, 338 F.2d at 722–27.
23. 50 P.3d 866 (Colo. 2002).
24. *Id.* at 873–75.

damages were limited to interest on the money or the much greater consequential loss. While this case literally involved a business tort rather than a breach of contract, the court had described the underlying dispute as coming out of an economic relationship between the parties, thus putting it well within the kind of dealings that could be analyzed using a *Hadley*-type of foreseeability.[25] Business torts are in many ways closer to contract law than tort, and this is the type of case that Professor Tettenborn shows could be analyzed using *Hadley*.

Nonetheless, after reviewing cases and writers on the issues raised by contract/tort overlap, the Colorado court held that

> consequential damages are recoverable in torts of economic interference, such as the wrongful attachment here. As in any other tort action, the appropriate measure of the damage a victim of an economic tort may recover is that amount which is the natural and probable result of the injury sustained by virtue of the tortious act. In order to be recoverable, such damages must be proximately caused by the tortious act and must be reasonably ascertainable.[26]

Thus, the court had "a choice between competing standards of foreseeability,"[27] and though it spoke of consequential damages, language of contract damages appropriate for a *Hadley* damage limitation analysis, the court chose a tort proximate cause approach.[28] Perhaps the answer to the approach put forth by Professor Tettenborn, is the comment of the Second Circuit in a federal securities fraud claim under SEC Rule 10b-5:

> In the end, whether loss causation has been demonstrated presents a public policy question, the resolution of which is predicated upon notions of equity because it establishes who, if anyone, along the causal chain should be liable for the plaintiffs' losses . . . . A finding of foreseeability must satisfy the judicial mind that such result conforms to "a rough sense of justice."[29]

Judge Andrews's "rough sense of justice" is appealing.[30] In a sense it leaves issues of damages to a jury's sense of fairness, a position espoused, at least in 1970, by that relentlessly middle-of-the-road

25. *See id.*

26. *Id.* at 875.

27. Melvin Aron Eisenberg, *The Principle of* Hadley v. Baxendale, 80 CAL. L. REV. 563, 567 (1992).

28. *Vanderbeek*, 50 P.3d at 875.

29. Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 96 (2d Cir. 2001) (quoting Palsgraf v. Long Island R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

30. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting). At least it is appealing to me. *See* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695.

scholar of contracts, Allan Farnsworth.[31] This, of course is the very approach that *Hadley* abandoned.

V. Mara Kent and Non-Economic Damages (a/k/a More Contorts)

Professor Mara Kent looks at non-economic damages, particularly emotional injuries, and concludes that an honest use of the *Hadley* foreseeability test would allow recovery in many of the cases, particularly when they involved insurance, personal, and family contracts.[32] But the general bar to mental anguish damages (as well as the bar on punitive damages) is not primarily based on their non-foreseeability.[33] They are based on the basic (though questionable) notion that breach of contract is not a tort. This, in turn, owes a great deal to Holmes in *The Path of the Law*,[34] particularly his famous aphorism:

> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing more. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[35]

It is because of this view of the difference between contract and tort that the Second Restatement allows punitive damages only if "the conduct constituting the breach is also a tort for which punitive damages are recoverable."[36] As far as emotional damages are concerned, the restatement is not quite as explicit: "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[37] But in its Comments it notes that the bodily injury situation may almost always be regarded as one in tort.[38] As to the second, it simply reiterates the importance

31. E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1199 (1970) (approving the apparent compromise award by the jury in Peevyhouse v. Garland Coal Co., 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963). I cannot tell if Professor Farnsworth adhered to this position. The last edition of his treatise refers to the compromise verdict, but makes no judgment about it. *See* E. Allan Farnsworth, Contracts § 12.13, at 791 n.16 (4th ed. 2004).

32. *See generally* Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions*, 11 Tex. Wesleyan L. Rev. 481 (2005).

33. On the interaction between consequential and non-economic damages, see *Bohac v. Dep't of Agric.*, 239 F.3d 1334 (Fed. Cir. 2001).

34. O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

35. *Id.* at 462.

36. Restatement (Second) of Contracts § 355 (1981).

37. *Id.* § 353.

38. *Id.* § 353 cmt. a.

of the "particularly likely result," suggesting that contracts of carriers and innkeepers, and contracts involving dead bodies or death messages (for which recovery of emotional damages are allowed) are different from other contracts, even though the breach of many other contracts might lead to bankruptcy or financial ruin, which in turn "may by chance cause even more severe emotional disturbance."[39] It seems clear enough that the relationships in these specialized contracts are also much closer to those raising tort duties. For centuries common carriers and innkeepers have had a status-based obligation to accept customers and to treat them well, and telegraph companies were early treated as a regulated industry. Thus, their duties to customers arguably are created less by contract than by the legal system itself, the essence of tort. Thus, the traditional categories allowing emotional injury damages or punitive damages do make sense in a world of a dichotomy between tort and breach of contract.

But what about other, more commercial contracts where one party is in the power of the other, like the classic, though now overruled, *Seamen's Direct Buying Service, Inc. v. Standard Oil Co.*?[40] *Seamen's Direct* involved a man trying to develop a marina who was driven into insolvency by an oil company that "stonewalled" its contractual obligations though it knew he could not afford to challenge the breach and would be driven out of business. The California Supreme Court upheld the imposition of punitive damages for what was deemed a tort of bad faith breach. This tort came out of insurance cases, in which the relationship is at least a quasi-fiduciary one, and when the later Supreme Court overruled *Seamen's Direct* it indicated that it was not overruling precedents about bad faith in insurance contract cases.[41]

The overruling of *Seamen's Direct* has put California back with almost all states,[42] but, again, the reason is not foreseeability or, I think efficiency, but a public policy against extensive damages in business contracts, a policy that is often expressed, but not to my mind conclusively justified. It really turns on whether we want to dissuade contracting parties from deliberately breaching when they are in a dominant position and can ruin the opposite party.[43] Professor Kent expresses some doubt about allowing damages for willful breach because she fears it would interfere with "efficient breach of contract,"

39. *Id.*

40. 686 P.2d 1158 (Cal. 1984), *overruled by* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669 (Cal. 1995).

41. *See Freeman & Mills, Inc.*, 900 P.2d at 679–80.

42. FARNSWORTH, *supra* note 31, § 12.8, at 763.

43. Another way of accomplishing this is by the use of default rules, perhaps a presumption of bad faith when the dominant party breaches at great collateral cost to the other. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). Ayres and Gertner analyze *Hadley* as creating a "penalty default" that forces a party to disclose risks that might induce the other to demand a higher price as insurance against his extended liability if he defaults. *Id.* at 90–95.

conceding in a footnote that "not all scholars agree with the economists' theory of efficient breach."[44] Curiously, former California Chief Justice Rose Bird concurred specially in *Seamen's Direct*, because she, too, was concerned about interfering with efficient breach. She supported punitives in the situation of the egregious deliberate breach, but made clear that she would limit the intrusion on the privilege to breach to situations in which the breaching party could easily see that ruin would result.[45] Once again, though, we can see that the issue has to do with the nature of the particular contract or relationship, not the nature of contract generally.

VI. IRMA RUSSELL, THE ENVIRONMENTAL COMMONS AND THE TRAGEDY OF CONTRACT REMEDIES

The nature of the contract is emphasized by Irma Russell's discussion of the problem of enforcement of land developers' promises in connection with permits to use environmentally vulnerable public lands like lakes and wetlands.[46] The Army Corps of Engineers and other federal and state governmental agencies use contract as a way to permit some development with offsetting benefits to the environment paid for by the developer. The developer promises to do these positive goods as a tradeoff, but then reneges, relying on the fact that the government is too busy to enforce the contract, or has changed its mind about the environment, and that there is little incentive for an individual to shoulder the costs of enforcement for essentially no gain. Professor Russell flips Garrett Hardin's famous *The Tragedy of the Commons* to apply his reasoning not to the incentive to the individual to overuse the common land but to the disincentives to the ordinary citizen to enforce the promises made and broken by the users of the commons. This is perceptive, and it illustrates the essential role of remedies in the contract regime.

It is not the device of contract that is the problem in environmental and other social uses of contract; it is the niggardliness of remedies.[47]

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44. Kent, *supra* note 32, at 498, n.125. For criticisms of the efficient breach concept, see generally Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982). I am one of the critics. PETER LINZER, A CONTRACTS ANTHOLOGY 605–07 (2d ed. 1995); Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111, 114 (1981).

45. *Seamen's Direct Buying Serv., Inc.*, 686 P.2d at 1170–77 (Bird, C.J., concurring and dissenting).

46. Irma Russell, *A Common Tragedy: The Breach of Promises To Benefit the Public Commons and the Enforceability Problem*, 11 TEX. WESLEYAN L. REV. 557 (2005).

47. *See generally* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Linzer, *supra* note 44. Defenders of the status quo include Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982) and Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

The problem raised by Professor Russell was approached in another creative way by Anthony Jon Waters in his well-known article on third party beneficiary contracts, *The Property In the Promise.*[48] Waters showed that after the courts had made it difficult to establish a private right to enforce a federal statute, enterprising courts and lawyers used third party beneficiary theory to permit private enforcement. Thus, in *Zigas v. Superior Court*[49] a real estate developer had received a federal subsidy and in exchange had agreed to observe a schedule of maximum rents. He breached and the federal government failed to bring suit, but the tenants were allowed to sue as the intended beneficiaries of the contract between the United States and the developer.

Professor Russell mentions this approach, and it is one way to get around the standing issues raised by cases like *Lujan v. Defenders of Wildlife*[50] in which the Supreme Court not only took a narrow view of what satisfied standing requirements, but suggested that the justiciability requirements of Article III of the United States Constitution limited Congress's power to confer standing on private citizens. Congress could, in its licenses and contracts for wetland development and other environmental and social concerns, expressly state that the contract was for the benefit of users of wetlands or even for the benefit of all Americans. This might or might not work[51]—the majority on the contemporary Supreme Court has shown hostility to private enforcement of social legislation. But it would be a start.

Professor Russell's article implicates broader questions, particularly involving *Hadley*. She shows the impact of remedial procedures on the effectiveness of contract as a social device. It is not just the small possibility of gain that dissuades individuals from enforcing public contracts. Many would act altruistically, but enforcement is hampered by the American Rule, requiring them to pay their attorneys' fees even if successful; limits on class actions; and the risks of sanctions when they try to extend the law or get around a hostile precedent. On top of this is the common law's limitation of damages and its reluctance to grant specific performance. Some of these can be dealt with directly: Congress can provide for attorney's fees to successful plaintiffs or even give them a bounty for protecting the public fisc; Congress and the courts can be more willing to grant and find standing,

48. Anthony John Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

49. 174 Cal. Rptr. 806 (1981).

50. 504 U.S. 555 (1992).

51. Whether this would clear the procedural hurdles raised by the Supreme Court is questionable. The majority opinion in *Lujan* says that there are constitutional limits to Congress's ability to create standing, and Justices Kennedy and Souter, in their concurrence in *Lujan*, say that the requirement of a concrete injury "is not just an empty formality." 504 U.S. at 581 (Kennedy, J., joined by Souter, J., concurring in part concurring in the judgment). Yet, by expressing Congress's intention to benefit citizens, Congress would have shown that the failure to perform did create a concrete injury in members of the general public.

and the courts can and should be wary about using sanctions against those putting forth new or unpopular theories of law.

But note how the traditional limits of contract remedies cut against enforcement. Despite liberalization, specific performance is still disfavored in contract,[52] and if specific performance is not granted, the damage rules will not make the plaintiff whole.[53] For instance, we have come to appreciate the importance to all of us of wetlands, but if damages were sought for breach of a wetlands development contract, a claim for the consequential damages caused by the failure to carry out a promise about alternative wetlands would run directly into *Hadley*'s foreseeability rules. Thus, here as in other situations, *Hadley* illustrates the interaction of contract, the common law, a changing domestic society and a changing world economy and ecology.

VII. CONCLUSION

Today, as Professor Perillo points out, we are in the middle of an era of globalization like that of the enlightenment that spawned Pothier and led to the Industrial Revolution.[54] Even more we are in the middle of a cyber/information revolution accelerating change in this multinational and transnational economy. Just as the *Hadley* lawyers and judges looked to a French writer and to Article 1150 of the French Civil Code,[55] today, we might look to such transnational authorities as the United Nations Convention on the International Sale of Goods (the CISG)[56], the UNIDROIT Principles of International Commercial Contracts, various civil codes, and increasingly the case law of other countries. But up to now, Americans especially have been reluctant to do so. This has begun to change, slowly, led, by

52. FARNSWORTH, *supra* note 31, §§12.4–.7.

53. The obvious example is *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), in which, admittedly, specific performance was not sought. On this problem, see Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1372–73 (1995); Linzer, *supra* note 44, at 118–20 .

54. Perillo, *supra* note 11, at 290.

55. Then and now, Article 1150 reads "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée." ("The debtor is held liable only for damages and interests that were foreseen or that one could have foreseen at the time of contracting, when it is not by his bad faith that the obligation was not carried out.") This is my translation, but I borrow Professor Perillo's translation of "dol" as bad faith. "Wrongful act" might be another translation. *See* Perillo, supra note 11, at 276.

56. The CISG is binding on sales of goods involving parties whose places of business are in different States (*i.e.*, nations), both of which are Contracting Parties to the Convention. CISG Art. 1. *See, e.g.*, MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1389 (11th Cir. 1998) (holding that the parol evidence rule was inapplicable to a dispute governed by the CISG because of its Article 8(3)). On this case, see FARNSWORTH, *supra* note 31, § 7.3, at 423–24 n.36.

justices of the United States Supreme Court,[57] over, it should be noted, vociferous objections by their colleagues.[58]

Even more striking, however, is the impact of Anglo-American law on third world countries. As Perillo points out, English is now the *lingua franca* of the world, and in many former British colonies the multiplicity of native languages causes English to be the primary language of the law.[59] Many third world nations have enacted civil codes rather than try to use our idiosyncratic common law, most notably China, which used the German code as its model. But Chinese lawyers increasingly study in the United States; thus, becoming familiar with the common law approach. Anglophone, Africa has imposed a common law court system on traditional and religious law, and India and Pakistan, with populations totaling over a billion, have common law systems with their best lawyers typically studying in England.

An illustration of the overlay of the common law on the developing world was the notorious case of a Nigerian woman who gave birth two years after being divorced against her will and was convicted of adultery and sentenced to death by stoning.[60] The case got worldwide attention and was a great embarrassment to the Nigerian federal government, but ran into the government's decision to decentralize authority. The woman lived in the Muslim north and had been tried under the Islamic *sha'ria.* The Nigerian President was appalled, but could not interfere without undermining the decentralization program. The case, however, went up on appeal, and the appellate court, with judges in wigs and gowns, solemnly found a commentary on the Koran that suggested that pregnancy might last up to five years. Based on this "finding," the court solemnly and with a straight face found that the woman might have been pregnant by her husband at the time of her divorce, and thus could not be convicted of adultery.

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57. In the landmark *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy, Justice Anthony Kennedy, speaking for the Court, cited *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), in which the European Court of Human Rights struck down a British anti-sodomy statute under the European Convention on Human Rights. *See id.* at 575. In an address to the American Law Institute, Justice Sandra Day O'Connor spoke of the importance of international law as part of American law. *See* Justice Sandra Day O'Connor, Address at the American Law Institute Annual Meeting (May 15, 2002), *in* 2002 A.L.I. PROC. 245–51.

58. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The Court's discussion . . . is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."

Lawrence, 539 U.S. at 599 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) (emphasis in original) (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

59. For instance, in Pakistan, only English is allowed in the nation's courts.

60. *See* Somini Sengupta, *Facing Death for Adultery, Nigerian Woman Is Acquitted*, N.Y. TIMES, Sept. 26, 2003, at A3.

This legal fiction, in the great tradition of the common law, achieved justice without upsetting the devolution of power to the states and constituent ethnic groups. It shows the vitality of the common law. Civilians might have accomplished the same thing through a creative reading of a code provision; I do not know.

I *do* know that this is what common law judges have been doing for centuries, nearly a millennium. And it is clear that sometimes judges can do the job on a piecemeal basis better than statutes, not all the time, but sometimes. An illustration is the so-far unsuccessful attempts to create a statute dealing with the licensing of computer software. Initially, the co-sponsors of the Uniform Commercial Code (UCC), the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) considered revising Article 2 with a "hub" that would cover commercial contracts generally and "spokes," one of which would have included the licensing of intellectual property. The hub and spoke approach was quickly abandoned and the licensing spoke cast off to become tentative Article 2B, which originally was to include all forms of licensing, including motion picture rentals. This proved to cumbersome, so Article 2B was limited to software. But the drafts submitted were violently attacked as too pro-manufacturer,[61] especially because of concerns over assent in computerized contracts of adhesion, and the ALI withdrew, forcing the provision out of the UCC and leading NCCUSL to offer it as a free-standing uniform act called the Uniform Computer Information Transactions Act (UCITA).[62] As of today, only Maryland and Virginia have enacted UCITA and NCCUSL is reported to have abandoned it. Similarly, attempts were made to make clear that Article 2 of the UCC did not cover software, but the ALI opposed this, preferring to leave the decision up to the courts. In a compromise with NCCUSL, ALI agreed to a provision stating that "goods" did not include "information," but leaving that term undefined.[63] So far, no states have adopted the amendments to Article 2, and this particular one is most likely to be controversial.

In a world of computers, the Internet, economic power dispersing to Europe, South America, Asia, and we can hope, Africa, the common law can play a creative role in the evolution of law in the third millennium. *Hadley* shows us one example of how it dealt with earlier turmoil; its spirit will deal well with the future.

61. *See* STEVEN J. BURTON & MELVIN A. EISENBERG, CONTRACT LAW: SELECTED SOURCE MATERIALS 338 (2004) ("some called it the Microsoft Act").

62. *Id.*

63. *See* U.C.C 2-103(k) (Proposed Amendment 2003).