

LEGISLATION AND PEDAGOGY IN CONTRACTS 101

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Every teacher of contract law understands implicitly that no other first-year course is so worthy of devotion. The turgid practicalities of property law, the murky waters of tort, the empty abstractions of civil procedure, the unruly politics of crime and punishment, all of these things recede from view within this happy field. Confident students discover, in the law of contracts, a warm, sunlit upland, where lucid philosophy and sober common sense combine in equal measure to bring meaning and coherence to the world of ordinary affairs.

Nor is that all. Contract law is wonderfully well suited to the dominant mode of legal instruction, the case method. The rules of contract law, which are reasonably clear in themselves, are deliciously uncertain in their application to particular cases. Students must therefore study the cases to obtain a clear understanding of the matter at hand. The inventor of the case method, Christopher Columbus Langdell, the patron saint of American legal pedagogy, was himself a professor of contract law. No other calling would have fitted him so well. His *Selection of Cases on the Law of Contracts*¹ started the ball rolling 130 years ago, and it has been rolling and gathering momentum ever since.

Furthermore, the case method teaches our students an important lesson about the nature of contract law, or so we prefer to believe. Contract law, or much of it, originates in the judicial department. We are dealing here with a modern extension of an ancient common-law tradition, and we must therefore recognize the importance of the judicial process itself. Wise students of contract law will scrutinize the opinions of appellate judges and master, or attempt to master, the traditional techniques of legal argument and analysis. These are the things that have determined the content of contract law over the years. What better lesson could a budding lawyer learn?

Finally, contract law appeals to the political instincts of most legal academicians. Most of us approve of the modern liberal state, and we believe that the "institution of contract" plays an important role in its creation and preservation. Individual liberty, the freedom of association, the right to pursue

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1. CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

happiness (not to mention efficiency) within the economic realm, all of these things depend in one way or another upon an effective system of private ordering. Without such a system (without contract law!) things would fall apart. Professors of constitutional law are entitled to the respect that they so often receive, but professors of contract law know where the real constitutional battle is won or lost.

Thus, in this splendid little course, several large themes are presented. The idea that law is practical reason, the idea that law emerges from judicial action, the idea that private ordering is important to civil society, the idea that law should generally support private ordering, all of these propositions are embedded in the traditional fabric. I suspect that Christopher Columbus Langdell hammered away on each of these themes as he faced his students at Harvard long ago, and I suspect that most modern teachers of contract law take a similar approach. After perusing the many modern casebooks and hornbooks on the law of contracts, I conclude that the grand tradition is alive and well.

Yet the grand tradition is far from perfect, and as each year passes, I become increasingly convinced that a major revision is in order. One part of the problem is that the established forms do not deal adequately with legislation, the most important legal phenomenon of the modern era. Legislation so surrounds and pervades the law of contracts that the old themes are somewhat askew. One can think of contract law as the fruit of judicial action and the lawyer's art, but the practical politics of the legislative chamber account for so much of the modern law of contracts that the old faith is hard to hold. One can think of contract law as a system of private ordering, but the modern liberal state hedges private commitment with numerous public commands; and if our students leave our classrooms dreaming only of peppercorns, Benjamin Cardozo, and ships named the "Peerless," they will be poorly equipped to deal with the world as it is. To be sure, conscientious teachers of contract law can still extract Langdellian nuggets from the modern mix. (The grand tradition is alive and well, as I have said.) But the time has come for teachers and scholars alike to provide a better, clearer, more comprehensive and more rigorous account of the role of legislation in the law of contracts, and we must put this subject in the foreground of the first-year course. I will enlarge upon this idea in the paragraphs below, and I will make some modest proposals for reform.

I

SOME PEDAGOGICAL PROBLEMS

It is not easy to count the ways in which legislation influences the modern law of contracts. The effect is sometimes open and brutal, as in the case of the Uniform Commercial Code, a comprehensive legislative structure that restates

and modifies a vast body of contract law according to a carefully considered, expertly drafted plan. More often, the relevant legislation is limited in scope. Many statutes and administrative rules address narrow questions in the law of contracts, affirming or modifying single points of law, as in the case of the New York statute which declares that certain promises made in recognition of antecedent benefits are legally enforceable, despite the old common-law rule.² Occasionally legislation supplements the common law without attacking it directly, as in the case of the disclosure provisions of the Truth in Lending Act.³ Occasionally legislation produces effects that are difficult to assess, as in the case of the Employee Retirement Income Security Act,⁴ which flatly preempts state contract law insofar as it applies to certain “employee benefit plan[s],”⁵ only to replace it with a legislatively undefined body of “federal common law” that resembles nothing so much as the law of trusts.

Sometimes legislation does not purport to affect contract law but is held to do so nonetheless, as in the case of the criminal statutes that implicitly limit the common-law doctrine of employment-at-will.⁶ Sometimes legislation does purport to affect contract law but is held to be ineffective in one respect or another, as in the case of the Statute of Frauds, which mysteriously recedes in the face of the doctrine of promissory estoppel, leaving the courts free to enforce oral agreements that induce reasonable and substantial reliance.⁷ Finally, there are many statutes and administrative rules that do not actually state, restate, revise, supplement, suspend, abrogate, or otherwise affect the substantive law of contracts, except to the extent that they regulate transactions that are contractual in nature, and thus they become, as a practical matter, so entwined with contract law that only a scholastic philosopher could sort the matter out. For example, the Occupational Safety and Health Act⁸ and the regulations promulgated thereunder⁹ do not deal directly with substantive contract law, yet they establish duties which employers and employees cannot alter by negotiation or consent, and thus, as a practical matter, they dramatically restrict the power of contract law in the context of the employment relationship. Law is a seamless web, as a famous man once said.

If a dedicated scholar were to make a list of all the statutes and rules that affect the law of contracts directly or indirectly, she would have plenty of work to do. I would not recommend the project. The list would be too long, and it

2. N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 1989).

3. 15 U.S.C. §§ 1601-67f (1994 & Supp. IV 1998).

4. 29 U.S.C. §§ 1001-461 (1994 & Supp. IV 1998).

5. 29 U.S.C. § 1144(a) (1994).

6. *See, e.g., Sides v. Duke Univ.*, 328 S.E.2d 818 (N.C. Ct. App. 1985) (at-will employee may not be discharged for refusal to violate perjury statute).

7. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

8. 29 U.S.C. §§ 651-78 (1994 & Supp. IV 1998).

9. Occupational Safety and Health Standards, 29 C.F.R. § 1910 (1999).

would grow with each new legislative session. It would literally never end. For present purposes I am content to rely upon the general proposition that there is plenty of legislation in existence that affects the law of contracts in one way or another.

If all of this legislation did not exist, or if it were less important in the grand scheme of things, our task as teachers of contract law would be much simpler than it is. We could then proceed as Langdell envisioned. We could treat the course as an investigation into the common law, and we could rely upon the case method to drive that point home. And if, on the other hand, we lived under a civil-law system, and if all the law of contracts were legislatively prescribed, our lives would be much simpler still. We could begin the course with the code itself, we could provide each student with a copy of the code, and we could ignore judicial opinions and the questions that arise at the intersection of legislation and common law (because there would be no common law and no authoritative judicial opinions to cite). But under the present American system we must deal with a rich mix of common law and legislation. Both of these bodies of law are important in themselves. Neither is merely incidental to the larger story. This situation is complex, and it creates various difficulties for students and teachers alike.

A. *The Common-law Bias*

A first-year course in contract law almost always begins with a discussion of some topic that is dominated by common-law principles. I begin my own course with a discussion of the process of contract formation. My students are perplexed by the concepts of “offer” and “acceptance,” and during the warm days of September they read judicial decisions that pour common-law content into these empty forms. Yet the situation would be much the same if I began the course at some other point. There are various avenues of approach. I could start with a discussion of consideration (a common-law concept), or I could take up the subject of damages and the various interests that the common law of contracts allegedly protects. Or I could begin with a potpourri of cases that afford a spacious overview of the entire course, and I could then return to the gritty details of contract formation, consideration, damages, or something else. But whatever approach I chose to take, my syllabus would almost certainly expose the students to a heavy dose of common law in the early going.

There are sound historical and pedagogical reasons for this. It makes sense to begin a first-year course with a discussion of fundamentals, and the fundamentals of contract law were laid down many years ago as common law. The legislation that affects the law of contracts is mostly a latter-day development, and it rests upon a common-law foundation. It rarely deals with fundamental questions; and even when it does, as in the case of the Uniform Commercial Code, it borrows shamelessly from the common law. It would be difficult to understand this great body of legislation without first understanding

the common law of contracts, and thus, we rightly expose our students to the common law before proceeding to a higher level.

The problem with this sensible sequence is that it subjects our students to an experience from which they never fully recover. Luxuriating in the common law and its methods, they become convinced that there is only a loose connection between law and particular forms of words, that rational argument is the key to the legal enterprise, that judicial decisions are central to the development of law, and that one may praise or criticize judicial decisions according to the wisdom or folly of the policies they reflect. In other words, our students quickly embrace the grand tradition, and having once embraced it, they never let it go. Accordingly, when legislative decisions begin to crop up in the cases they are reading, they are poorly equipped to handle the freight. They resist the suggestion that there is a fundamental difference between a statutory formula and a common-law rule. They usually neglect to read the relevant statutes even when they are requested to do so. They tend to argue about statutory questions as if the legislature itself did not exist. They assume that in statutory cases, as in any case, the legally important thing is the wisdom or folly of the policy or policies in question. They accept in principle the idea that legislative action can somehow limit argument about what the law is, but they are reluctant to apply this principle to their own deliberations. I cannot blame them. We teach them to think as they do.

My point is simple enough. In the early stages of the traditional course in contract law we teach our students how to think about the common law of contracts—a valuable lesson, to be sure. Yet there is little in the common-law-way-of-thinking that prepares them to think critically and sensibly about legislation, and they must master legislation if they are to master contract law. In other words, using Langdellian methods, spinning our dialogues and critiquing our cases, we succeed wonderfully in introducing our students to one part of the law of contracts (the common-law part), but we do a poor job of introducing them to the other. Indeed, we encourage them to develop a common-law bias that actually interferes with the education they must ultimately receive.

B. Explaining Legal Events at the Intersection of Legislation and Common Law

Even if we were to succeed completely in teaching our students about the legislative and common-law components of the law of contracts, we would still have one more job to do. We would have to teach them about the hybrid legal events that occur at the intersection of legislation and common law—events that somehow reflect both phenomena at once. The subject is perplexing. The courts have never dealt with it adequately, and the traditional casebooks and hornbooks do not take up the slack. Set forth below are seven not-so-easy pieces, taken straight from the first-year course, which illustrate the

complexities that arise in the law of contracts from the interaction between legislation and common law. More illustrations can be supplied on request. The challenge is to find a way to discuss these phenomena intelligibly.

1. Statutes and Covenants-not-to-Compete

In the midst of a traditional discussion of the employer-employee relationship, or in the midst of a more general discussion of the so-called "public-policy" defense, the first-year student may well encounter a case or two involving covenants-not-to-compete. The subject is important in itself, and it appeals to anyone who is interested in the interaction between legislation and common law. The student will gather from the assigned materials that covenants-not-to-compete are sometimes enforceable and sometimes not. They are enforceable if they are reasonable with respect to the temporal and territorial restrictions they impose, if they protect some legitimate interest belonging to the employer, and if they are not deemed to be injurious to the public. They are unenforceable if they do not pass these tests.¹⁰ If the student is very good, she will perceive that the limitations on the enforceability of covenants-not-to-compete reflect conflicting public policies: on the one hand, a policy that favors free competition, and, on the other hand, a policy that protects the employer's interest in conducting business without fear of interference from disloyal employees (a policy that probably dates back to the days of indentured servitude and body arrest). And if the student is very, very good, she will note that the first policy is embedded in legislation, e.g., the Sherman Act,¹¹ whereas the second policy, in most jurisdictions, is a creature of the common law and the judicial inventiveness that gives rise to common law.

Thus, the question of the enforceability of covenants-not-to-compete is complex. It is not simply a common-law question, and it is not simply a legislative question. The student begins with the proposition that promises supported by consideration are generally enforceable. She then observes that the legislature has power to trump the common law. She recognizes that the legislature has acted in this instance, boldly declaring that contracts "in restraint of trade" are "illegal."¹² Finally, she observes that despite the legislature's action, covenants-not-to-compete are deemed to be enforceable if they pass certain judicially identified tests. How does one explain this result? Is it simply a question of statutory interpretation? If it is, why do the courts interpret these statutes as condemning some covenants-not-to-compete but not others? What theory or theories support such an interpretation? Is it possible to quarry from the language of these statutes, or from the demonstrable

10. *See, e.g.*, *Karlin v. Weinberg*, 390 A.2d 1161 (N.J. 1978).

11. 15 U.S.C. §§ 1-7 (1994).

12. *Id.* § 1.

legislative intentions, anything that resembles the judicially identified tests? Are conscientious judges supposed to treat legislation this way? Conscientious contracts teachers could spend a week or two on questions such as these, but of course I never do.

2. Statutory Duties and the Pre-existing Duty Rule

The “pre-existing duty rule” is a glittering jewel in the common law of contracts. If Smith makes a promise to Jones, and if Jones makes a promise to Smith in return, the courts will hold that Smith’s promise does not provide a legally sufficient consideration for Jones’ promise if Smith already has a legal obligation to do what he is promising to do. This rule may have originated in cases involving contract modification. If Smith and Jones already have a contract between them, and if Jones makes a new promise to Smith based only on Smith’s old commitment, there is probably no good reason to enforce Jones’ new promise, because he is getting nothing new from Smith in return for it. Essentially, he is promising to make a gift. And even if Smith gratefully reconfirms his old commitment to Jones in exchange for Jones’ new promise, the legal situation remains the same. A promise to perform a pre-existing contractual obligation does not provide a legally sufficient consideration for a new promise by the old obligee.¹³

The interesting thing is that the courts sometimes invoke this rule in cases involving pre-existing statutory duties. If Smith has a statutory duty to do one thing or another, if Smith makes a promise to Jones to perform that duty, and if Jones makes a promise in return, many courts will hold that Smith’s promise does not provide a legally sufficient consideration for Jones’ promise, because Smith is undertaking to do nothing more than what he is already bound to do.¹⁴ Jones is not getting anything new from Smith, or so the argument goes.

But this argument makes little sense. Obviously, Jones is getting something new from Smith in this case. (He is getting a promise from Smith, and Smith has made no promise to him before. That is why this case is different from the contract-modification case.) Why, then, do the courts hold that Smith’s promise does not provide sufficient consideration for Jones’ promise? Perhaps the courts are assuming that the statute itself would make Smith liable to Jones if Smith fails to perform his statutory duty. Indeed, if that is the case, Smith’s promise is truly superfluous because it adds nothing to the liability that the statute itself creates. But many, probably most, public statutes create duties without creating contract-like liabilities in favor of persons such as Jones, and thus the no-consideration argument begs a crucial statutory question: what kind of liability does the statute in question impose?

13. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

14. *Id.*

If it does not impose a contract-like liability in favor of Jones, Smith's promise to Jones is far from superfluous, and the no-consideration argument falls flat.

And there may be other statutory concerns as well. If Smith happens to be a public official, and if Jones is promising to pay Smith to perform his official duties, the statutory prohibition against extortion or bribery would condemn the deal in all likelihood. Jones' promise would then be unenforceable, not because it is flatly unsupported by consideration, but because it is illegal. The Restatement (Second) of Contracts recognizes this point.¹⁵

On the other hand, if we can put the statutory concerns to rest, why should the contract between Smith and Jones not be enforced? Assume that Jones is a rich old geezer and that Smith is his bright-eyed, college-bound nephew. Assume further that Smith has a statutory duty to refrain from drinking alcohol until he reaches age twenty-one. If Smith promises Jones that he will perform this statutory duty faithfully, and if Jones promises to pay him \$5,000 if he succeeds, why should the courts let Jones welsh on the deal? Nothing in the relevant legislation makes Smith liable to Jones for breach of this statutory duty. Nothing in the law of bribery or extortion would bar this laudable and altogether beneficial arrangement. If Smith promises his uncle that he will abstain, and if he succeeds in keeping his promise, why should the doctrine of consideration let his uncle off the hook?¹⁶ (A teacher of contract law could spend a good deal of time attempting to answer questions such as this, but, of course, I rarely do.)

3. Legislation and Third-Party Enforcement of Government Contracts

The question of the implicit effect of public legislation on private contract rights, which is squarely presented in cases involving statutory duties and the pre-existing duty rule, arises in many other contexts as well. I am indebted to Professors Charles Knapp, Nathan Crystal and Harry Prince for bringing my attention to an interesting line of cases, noted in the fourth edition of their excellent casebook,¹⁷ which discuss the implicit effect of public legislation on the rights of third-party beneficiaries of government contracts. Under the common law a person who is not a party to a contract has a right to sue for its enforcement if she is an "intended beneficiary" of the contract.¹⁸ But what makes her an "intended beneficiary"? In cases involving governmental contracts, various courts have suggested that the answer may turn on the interpretation of the legislation that creates the contracting authority. If the legislation itself contains evidence of a legislative intention to benefit a certain

15. *Id.* at cmt. b.

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

17. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (4th ed. 1999).

18. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

class of people, then such people may be the “intended beneficiaries” of contracts made pursuant to that legislation, and they may therefore be able to sue to enforce them.¹⁹

What is interesting here is the interaction between the relevant legislation and the common law. On the one hand, the legislation in these cases does not expressly create a private right of enforcement. It has that effect because of the operation of a common-law principle that attributes legal significance to the legislature’s mere intention to benefit third parties. On the other hand, the common law alone would not confer third-party standing in these cases. The evidence of legislative support is crucial. So what is going on here? These cases appear to recognize a kind of synergy between legislation and common law which creates contract rights that neither the legislation itself nor the common law itself would recognize alone. From what jurisprudential source does this synergy spring? Would it be wiser in these cases for the courts to ask whether judicial recognition of third-party standing would be appropriate to effectuate the legislature’s policy (a legislatively oriented question)? Or would it be wiser for them to focus, as the common law once did, on the status of the third party and the inherent justice of his claim?

4. Statutory Liens and the Rights of Subcontractors

If legislation can implicitly create contract rights that would not otherwise exist, it can also implicitly deny contract rights or quasi-contractual rights. Consider, for example, the plight of the conscientious subcontractor who performs faithfully and improves the owner’s property, only to discover that the prime contractor is broke and incapable of paying the bill. Does the subcontractor have any claim against the ungrateful owner? Some courts say yes.²⁰ If the owner has not yet paid the prime contractor for the improvements the subcontractor has made, the subcontractor may have a claim against the owner for the value of the improvements. The theory is unjust enrichment. The owner should have to pay for the benefit that the subcontractor conferred upon him. Assume, however, that the legislature has considered the plight of such subcontractors and has enacted a statute that allows them to file mechanics liens against the property they have improved. Assume further that the subcontractor neglects to file such a lien. Does his failure to comply with the statute adversely affect his quasi-contract claim at common law? Some courts say yes.²¹ Although the statute may not expressly declare that the

19. *See, e.g.*, *Zigas v. Superior Court*, 174 Cal. Rptr. 806 (Cal. Ct. App. 1981), *cert. denied*, 455 U.S. 943 (1982).

20. *See, e.g.*, *Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co.*, 695 So. 2d 383, 387 (Fla. Dist. Ct. App. 1997), *citing Maloney v. Therm Alum Indus. Corp.*, 636 So. 2d 767 (Fla. Dist. Ct. App. 1994).

21. *See, e.g.*, *Season Comfort Corp. v. Ben A. Borenstein Co.*, 655 N.E.2d 1065 (Ill. Ct. App. 1995).

mechanic's lien is the subcontractor's "exclusive remedy," some courts hold that it is; therefore, if the subcontractor does not comply with the statutory procedure, he will be out of luck.

Here the intersection of statutory law and common law produces unexpected results. Why would a lien statute, which is presumably intended to benefit subcontractors in cases such as these, operate to defeat a claim that the common law would otherwise uphold? Should we think of this as a question of statutory interpretation, or should we think of it as a matter that implicates judge-made policy—a policy that punishes otherwise worthy citizens who fail to follow the legislatively prescribed paths?

5. Statutes of Limitation and the Revival of Old Debts

The traditional teaching materials sometimes acknowledge hybrid issues such as the ones I am discussing here, but often they do not. I would highlight such issues at every reasonable opportunity, and I am therefore especially pained by the failure of the traditional materials to recognize the hybrid nature of one of the oldest chestnuts in the law of contracts.

The problem is usually presented in the following way. Smith makes a contract with Jones. Smith performs the contract in full, but Jones does not. Time passes. The statute of limitations runs. A remorseful Jones acknowledges his old contractual obligation and promises to perform it. A grateful Smith accepts. The question is whether Jones' new promise is legally enforceable. Traditionally, this is almost always presented as a question of "consideration." There seems to be no "consideration" in the usual sense for Jones' new promise, and thus, to the uninitiated eye, the promise would appear to be unenforceable. But the common-law courts, in defiance of every reasonable expectation, held that the antecedent legal obligation did provide consideration for the new promise, even though the old obligation lay in the past and was now time-barred. In other words, the courts made an end run around the doctrine of consideration and allowed the new promise to revive the old debt. That, at any rate, is the traditional account.

Yet I would argue that something rather different was happening in these ancient cases. To be sure, the old courts were making an end run around the doctrine of consideration, but they were making this end run to strike a blow against the statute of limitations. They did not want the statute to bar collection of the old debt, and to prevent that from happening, they manipulated the common law to convert an otherwise unenforceable promise into a freshly minted contract—a contract against which the statute had not yet run. The real question presented by these cases is not whether they can be reconciled with the doctrine of consideration but whether they can be reconciled with the legislative policy that limits the time within which contract

actions must be brought. Was this manipulation of the common law consistent with the legislative command?²²

6. Statutes and the Enforcement of Contracts Affecting Marriage and the Family

Hybrid issues such as the issue of the revival of time-barred debts are relatively unimportant in themselves, but many hybrid issues are of paramount importance. I can think of no single set of issues in the first-year course that are more important than those that arise in cases involving marriage and the family, and many of these reflect an intriguing interplay between statutory policy and common law. Of course, the “palimony” cases come to mind,²³ as do the cases involving surrogate motherhood and the like.²⁴ Marital affairs, domestic partnerships, reproductive arrangements, custody arrangements, agreements involving human genetic material and human embryos, all of these transactions are at least potentially subject to private ordering through the common law, yet all of them are also subject in one way or another to public choices reflected in public legislation, and in recent years the courts have been presented with difficult cases that require them to reconcile the one body of law with the other. How is this to be done? Which order, public or private, will prevail?

Cases such as these present rich pedagogical opportunities. The risk is that the discussion will dissolve into an interesting but unfocused inquiry into the pro’s and con’s of the contract in question. (Is a “surrogate-motherhood” agreement a good thing or a bad thing?) It is necessary to focus, instead, on the actual legal materials involved in the case. These disputes usually involve statutes that are uncertain in their application to the facts presented. The transaction is novel in one way or another, and the statutes simply do not fit. The courts must therefore determine the relevance or the irrelevance of the public choices that the statutes represent. Are adoption statutes legally relevant to a dispute involving a custody agreement between a “surrogate mother” and her sperm-donor? (Some courts say yes.²⁵) Are equitable distribution statutes, which usually apply to married persons, relevant to a dispute between unmarried domestic partners who have lived together for many years and have now decided to split? (Some courts say no.²⁶) Such questions require our

22. In some modern American jurisdictions, the legislature has cured the jurisprudential problem by enacting legislation that affirms the old common-law rule, subject to the requirement that the subsequent promise must be in writing. See ERIC MILLS HOLMES, 3 CORBIN ON CONTRACTS § 9.14 (rev. ed. 1992); RICHARD A. LORD, 4 WILLISTON ON CONTRACTS § 824 (4th ed. 1992); N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1989).

23. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

24. See, e.g., *R.R. v. M.H.* 689 N.E.2d 790 (Mass. 1998).

25. See *id.*

26. See *Watts v. Watts*, 405 N.W.2d 303, 311 (Wis. 1997).

students to think about the principles that determine the legal effect of legislative decisions in doubtful cases, and the answers to such questions adjust the boundary line between public and private order. I wish that I could spend more time on the subject than I usually do.

7. Part Performance and the Statute of Frauds

Sometimes the courts extend legislation creatively to defeat private ordering, as in the “surrogate-motherhood” cases, but sometimes they protect private ordering by defying the legislature and creating law of their own. I have already alluded to the harsh treatment that the statute of limitations receives at the hands of the common-law courts. I will conclude this part of the discussion by mentioning the role that “equity” sometimes plays in the enforcement of statutory law. I have a familiar example in mind.

The old Statute of Frauds provides that contracts for the sale or transfer of an interest in land must be in writing. But human beings do not always comply with statutory standards, and they sometimes make contracts for the sale or transfer of interests in land without putting pen to paper. In some of these cases the parties may actually perform the contract in part before dissolving into disputation, and in such cases the party seeking to enforce the contract may seek the aid of the courts of equity. At an early date the courts of equity demonstrated their willingness to ignore the Statute of Frauds and to enforce partially performed oral contracts for the sale or transfer of interests in land, if the performance was substantial and compelling; and this traditional practice ripened into the part-performance rule that is recognized in most American jurisdictions today.²⁷

Now the question is this: why do modern judges think that they are free to ignore the Statute of Frauds in cases such as these? Here we are confronted with what can only be described as a judicially created exception to an otherwise unqualified statutory command. What role must judges play in the interpretation and enforcement of statutory law? The part-performance rule originated at a time when the concept of the separation of powers was far less important than it is today. Whatever role the Lord Chancellor may have played in British government in the eighteenth century, is it appropriate for American judges to play the same role as they interpret and enforce legislation in the twenty-first century? Furthermore, we are dealing here with a question of public order versus private order. The legislature has prescribed certain public standards to govern transactions involving interests in land, but here the parties have seen fit to make an agreement that ignores them. Which order should prevail? And how, in general, should the courts adjust the conflict between the one order and the other? (Of course, it is possible to discuss the

27. RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981).

old part-performance exception without getting into questions such as these, but why let the matter pass?)

II

SOME PEDAGOGICAL SUGGESTIONS

I have identified two problems—the problem of overcoming the common-law bias that is built into our traditional teaching methods and materials, and the problem of discussing intelligibly the mysterious legal events that occur at the intersection of legislation and common law. I must now propose some solutions. Here are a few ideas.

A. *Raising Legislative Consciousness*

It is possible to counteract the common-law bias simply by talking more openly and more emphatically about legislative issues as they come up in the normal course of pedagogical events. At the first sighting of a significant piece of legislation in the first-year course, the Langdellian ball should temporarily stop rolling, and the teacher should devote substantial class time to the following questions: (a) Where does legislation come from? (b) What forces, political and otherwise, bear upon the legislative process? (c) What are the legal differences, if any, between a statutory text and a common-law rule? (d) What is a legislative “code,” and how does one deal with such a “code”? (e) What are administrative “rules”? (f) What is the appropriate judicial role in the interpretation and enforcement of legislation? (g) What are the dominant modern theories of legislative interpretation? (h) What is the legal significance of the enacted legislative text? (i) What is the significance of the underlying legislative intention? (j) What factors, other than text or intention, should affect the interpretation of legislation? (k) How, in general, do legislation and the interpretation of legislation affect the law of contracts?

I recognize that our students will be exposed to some of these questions in some of their other first-year courses, and, in any event, I do not believe that we should convert the contracts course into a course on legislation. But surely we need to administer a mild corrective. For the sake of balance, and for the sake of fidelity to the real world, we should talk a little less about the well-beloved, lawyer-centered process of the common law and a little more about (i) the politician-centered legislative process and (ii) the baffling, poorly articulated process of judicial interpretation by which courts convert unmoving legislative texts, suppositions concerning legislative will, and other amorphous concerns into effective, legislatively-based law.

Furthermore, I would adjust our pedagogical methods at least occasionally. Every now and then I would begin a class discussion, not with a judicial decision or an abstract legal proposition, but with a specific statute or

administrative rule. I would ask, where did this piece of legislation come from? Who made it? Why did they make it? What is its legal meaning? How do we know its legal meaning? I would then turn, not to a judicial decision, but to a series of hypothetical problems involving contractual transactions, and I would ask, how does this legislation apply to these facts? Finally, after developing a sense of the legislation and its possible applications, I would consider the case law and the phenomenon of judicial interpretation. The following questions would be relevant to that undertaking. How do the courts deal with this legislation? What theories of interpretation do they adopt? Are their judgments good ones or bad ones, given the role that courts must play in the interpretation and enforcement of legislation? And, finally, does this piece of legislation, as interpreted, damage or improve the law?

B. Supplementing the Langdellian Themes

I have great affection for the old verities, and I would not abandon them. The law of contracts is indeed a system of practical reasoning (at least some of the time), it does indeed emerge from judicial action (at least some of the time), it does indeed support a system of private ordering (at least some of the time), and it does indeed contribute to the health of civil society (at least some of the time). But we need to supplement these grand themes with others that recognize the role of legislation in the law of contracts, and we need to pursue these other themes just as doggedly as we pursue the traditional ones. In other words, after taking the first step—after resolving to talk more openly and more frequently about legislative issues—we must attempt to bring order to the subject by showing how legislative issues link together and how they relate to the larger story.

Here are two supplementary themes that I would attempt to develop in the first-year course. First, the law of contracts is a mixed system that regulates consensual transactions according to standards that are created both by private choices and by public choices. Second, the substantive law of contracts originates sometimes in the courts and sometimes in the legislative chamber, and it sometimes emerges from the confluence of legislation and judge-made law. I would work hardest on the last point. The hybrid legal events that occur at the intersection of legislation and common law are both intellectually challenging and practically important. I would not be able to tell my students much about them (because I do not know much about them), but I could highlight the main propositions. I would note that in the law of contracts, legislation can sometimes produce legal effects that the legislation itself does not describe. For example, legislation can implicitly invalidate agreements that might otherwise be valid and enforceable, as in the case of “surrogate-motherhood”²⁸ contracts or contracts founded on pre-existing statutory duties;

28. *See supra* text accompanying notes 24-25.

and legislation can sometimes implicitly undermine quasi-contractual rights, as in the case of neglectful subcontractors under the mechanics' lien statutes.²⁹ I would tell my students that, conversely, legislation can sometimes implicitly create or enhance contract rights, as in the case of third-party rights under certain government contracts.

And what is true of legislation is also roughly true of the common law. If legislation can trump the common law, common law can influence both the interpretation and the enforcement of legislation. Cases involving covenants-not-to-compete provide an especially good illustration of this point.³⁰ Cases involving the revival of time-barred debts³¹ and the "part-performance" exception to the Statute of Frauds³² provide both subtle and flagrant examples of the same thing.

These hybrid phenomena present a larger question that is probably unanswerable but nonetheless worth posing: what principles, if any, are at work within this field? The standard theories of statutory interpretation, intentionalism and textualism, provide inadequate answers in most instances. My own pet theory is that judges fall back on some very simple ideas when they are asked to integrate legislation with common law. They understand, on their better days, that (a) like cases should be treated alike, (b) the legal system should provide an adequate remedy for every legal wrong, and (c) substantial justice should generally triumph over form. Ideas such as these are not peculiar to the law of contracts, of course, but they influence the law of contracts profoundly; and they can be most influential, as one might expect, in the cases that fall between the cracks of settled law, including the cases that inhabit the space between common law and legislation. I would add this last idea to the list of grand themes to which our first-year students should be exposed.

C. *Considering a Modest Reorganization*

The traditional course in contract law is organized topically according to a standard analysis of the substantive law. The topics are much the same as those set forth in the Restatement (Second) of Contracts. They involve discrete substantive issues. I love this tradition as much as anyone. It makes almost perfect sense, and the authors of the leading casebooks do right to adhere to it closely. I would suggest, however, that methodological issues are sometimes important even in courses devoted to substantive law, and it is possible to organize useful discussions around them. With this idea in mind, I would make the following suggestion.

29. See *supra* text accompanying note 20.

30. See *supra* text accompanying notes 10-11.

31. See *supra* text accompanying note 22.

32. See *supra* text accompanying notes 27.

To deal adequately with the general question of the role of legislation in the law of contracts, it may be desirable or perhaps even necessary to devote one small segment of the course to that question alone. To be sure, legislative issues come up repeatedly during the traditional course, as the discussion proceeds normally from one substantive issue to another, and it is possible to discuss legislative issues effectively in that context. But I have found that the substantive agenda inevitably limits and skews the discussion, and thus I have concluded that at some point it may make sense to put the substantive agenda to one side. Collect some interesting cases involving legislative issues. (It does not really matter what they are.) Arrange the cases so that they illustrate the various ways in which legislation can affect, or fail to affect, the law of contracts. Block out two or three class hours somewhere around the middle of the course, and start a discussion.

Of course, there will be a natural reluctance to depart from the normal substantive sequence for the sake of what can only be described as a diversion into the mists of jurisprudence. Yet the traditionalists and the skeptics should remind themselves of the point I made in the beginning. The traditional course in contract law is already a course in jurisprudence, the jurisprudence of the common law. Our students already learn everything they need to know about common law methodology in the law of contracts. The case method itself guarantees this result. What they miss is a systematic exposure to legislative sources and methods, and a short segment devoted to that subject may well supply the deficiency.