

TEACHING CONTRACTS FROM A SOCIOECONOMIC PERSPECTIVE

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This invitation to participate in a symposium issue devoted to teaching contracts law has forced me to consider more specifically than before how my interest in socioeconomics specifically influences my teaching. Having only seen one other contracts teacher at work, I am in no position to offer a comparison with other teachers. Nevertheless, it seems almost certain that teaching economics for eight years and developing a strong sense that conventional economics offers a limited perspective have had a measurable impact on my approach to contracts.¹

This essay begins with a brief discussion of what socioeconomics is.² In this section I also address whether one must be well versed in conventional economics in order to apply a socioeconomic perspective. I then discuss the basic themes that are present throughout my contracts class that stem from my interest in socioeconomics. Underlying these themes is the more fundamental goal of devising methodologies for assessing the *quality* of contracts. By quality, I mean something more and perhaps more subtle than whether the parties have conformed to all the formal requirements. Instead, I encourage students to examine whether all of the many factors leading to the formation of a contract are ones to be supported. Finally, I identify some specific materials that lend themselves to a socioeconomic perspective that are not always included in the casebook.³

Before beginning, one caveat is in order. Like most contracts teachers, I plow my way through most if not all of the contracts topics from offer and

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1. See, e.g., Jeffrey L. Harrison, *Law and Socioeconomics*, J. LEG. EDUC. 224 (1999); Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1 (1997); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 W. & MARY L. REV. 445 (1994) [hereinafter Harrison, *Class, Personality*].

2. Those wishing to follow-up may want to read Harrison, *Law and Socioeconomics*, *supra* note 1 and Robert Ashford, *Socioeconomics: What is its Place in Law Practice?*, 1997 WISC. L. REV. 611. See also the Law and Socioeconomics Section of the AALS sponsors meeting at the annual AALS conventions.

3. In my experience of switching contracts casebooks every three or four years, I have not found one that was superior to the rest in terms of permitting me to apply a socioeconomic perspective.

acceptance and remedies to consideration, promissory estoppel, and excuse. I also include fairly extensive coverage of Article 2 of the Uniform Commercial Code. I sincerely doubt that some unlucky visitor assigned to sit in on my class for a semester would note a huge difference between my course and that offered by another contracts teacher. The impact of a socioeconomic approach is manifested, I think, by differing degrees of emphases on different topics, the introduction of some unconventional topics and a running dialogue that involves both teaching contract law and maintaining a critical perspective. In terms of actual class time, my sense is that this perspective directly affects my class about 20% of the time.

A. *What is Socioeconomics?*

Robert Ashford, the leading and most energetic proponent of combining law and socioeconomics, offers this general description of socioeconomics: “[s]ocioeconomics begins with the assumption that an adequate understanding of economic behavior cannot be achieved by the assumptions of autonomy, rationality, and efficiency that stand at the epistemological foundations of neoclassical economics”⁴ In short, socioeconomics relies on any discipline—economics, sociology, psychology, biology—that may be useful in order to achieve a less sterile and fuller understanding of what motivates people when they transact. One way to grasp with more specificity the distinction between the socioeconomic approach and the economic approach is to examine three of the more important differences.

1. The Importance of Psychic Income

Psychic income is used by conventional economics to “explain” what might otherwise seem irrational. Thus, if a person does something that appears to be, for example, inconsistent with his or her self-interest, it is explained by psychic income. Thus, leaving a tip for a server in a restaurant to which one is almost sure never to return is explained by psychic income. Most gifts given without an expectation of a return gift would also have to be explained by psychic income. Amartya Sen puts it this way: “no matter whether you are a single-minded egoist or a raving altruist or a class conscious militant, you will appear to be maximizing your own utility in this enchanted world”⁵ To the socioeconomist, however, “psychic income” registers more as “I don’t know” than an explanation and identifies areas in which research is warranted.

4. Ashford, *supra* note 2, at 612.

5. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL & PUB. AFF. 317, 323 (1977).

2. What is “Better Off?”

The notion of being “better off” seeps into law and economics when one begins to analyze what it means for an outcome to be efficient. For example, a change in the allocation of a resource is said to be *Pareto Superior* if at least one person is better off and no one is made worse off. As a normative matter, how could anyone oppose on moral grounds a change that seems to increase the welfare of some while not decreasing the welfare of any others? This obviously fits nicely with contract formation because one could argue that, on its face, every voluntarily formed contract is a movement to a *Pareto Superior*, and therefore morally superior, position.⁶ The problem for the socioeconomist is just how much one should infer from outward signals that one is better off. For example, if a person buys a pack of cigarettes, are they “better off” in any meaningful sense? Moreover, suppose the cigarette purchase is the result of a nicotine addiction and that the buyer only tried smoking in the first place because hundreds of commercials for cigarettes suggested that smoking makes one look “cooler” or more likely to have a good time. There are a variety of ways in which the concept of “better off” can be unraveled, but in all these instances the socioeconomist is willing to look at the underlying bases for preference formation and question whether all these bases should be afforded the same level of respect by the law.

3. The Influence of Law

The third fundamental difference between conventional law and economics and law and socioeconomics is the view taken of law itself. Under the conventional view, “tastes and preferences” are a given. That means they are assumed to be constant and not altered by the law. This is not to say that law does not affect the way in which these preferences are manifested. This is an important distinction. Suppose someone experiences a certain level of utility from hot fudge sundaes. As the price goes up, he or she will buy fewer but the generalized preference for hot fudge sundaes will not change. Similarly, if a law is passed imposing a \$1.00 fine for each hot fudge sundae consumed, people will buy fewer, but again the basic desire for sundaes will be the same. On the other hand, suppose law has the capacity to actually change preferences. For example, if there is a law “against” something, the baseline desire for that item may change. Hot fudge sundaes could suddenly taste worse to the moralist because it is “against the law” to eat them. Or, they

6. An allocation is *Pareto Optimal* when there are no reallocations that would not leave at least one person worse off.

could seem to taste better because they are “forbidden.” In either instance, law can change tastes and preferences.⁷

Does this description of socioeconomics as a counterpoint or reaction to conventional economics mean that one can only “come” to teaching from a socioeconomic perspective by being well-versed in conventional economics and its limitations? This is a hard question for a person whose background entails a relatively sophisticated intuitive skepticism about conventional economics, but my inclination is to say no. My sense is that the three basic distinctions discussed here all play off of or arise from assumptions the conventional analysis asks one to make in the first place. As a matter of common sense, most teachers are not likely to get into matters of psychic income, the contingent nature of being better off, or whether law affects tastes and preferences. In other words, one can teach from a socioeconomic perspective without addressing what seems to be an artificial starting point. On the other hand, if one wants to introduce law and economics by, for example, assigning opinions by Judge Posner, then understanding conventional economics in order to point out its weaknesses seems required. Of course the introduction of economic analysis is not always voluntary. Oft times a student who has had law and economics before coming to law school will raise the matter directly or indirectly by answers to hypotheticals that introduce—in the context of policy discussions—matters of efficiency.⁸ In these instances, it probably makes for a fuller discussion if the teacher has more than just an intuitive skepticism.

B. Basic Themes

There are a number of ideas or themes that appear when I teach Contracts that reflect a socioeconomic orientation.⁹ First is the distinction between the subjective and the objective or what I refer to as the “everyone is average” assumption. The second theme relates to one’s sense of justice and sense of entitlement and how they are developed. In this context, there is a fair amount

7. The more technical description of this is that conventional economics assumes that tastes and preferences are exogenously determined. They are determined by factors that are outside the analysis. If law has an impact on tastes and preferences, it is an endogenous variable.

8. Some semesters I make a point not to mention law and economics at all to my first-year students but by the end of the course it has been discussed. Typically what happens is that a student either reads something I have written or has discovered that I have a Ph.D. in economics and the student decides that economics-based answers are what I am really after. Other times, they have heard of the Coase Theorem from their property or torts teachers and attempt to apply it in my class. Finally, there are instances in which they more or less think their way into an analysis that involves an economic logic and I facilitate the discussion by introducing them to the vocabulary.

9. I do not want to suggest that these themes were well thought out in advance. As I noted at the outset of this essay, I am more in the mode of reflecting on what I have done that stems from a socioeconomic slant on things.

of discussion of the allocative verses the distributive goals of contract law. The third theme involves the process of examining opinions as pieces of advocacy. This involves looking closely at the wording of opinions, but it also requires the students to become conscious of their own information filtering processes.

1. The Objective and Subjective

The difference between what may generally be regarded as observed or objective reality and actual reality comes up in contracts at a number of places. Primarily, I emphasize the distinction when discussing remedies and assent. In the area of remedies, the importance of this is obvious. In the typical contracts case, damages in the amount of the market value of expectancy are awarded. In effect, the rights one has under a contract are protected by what Calabresi and Melamed label a liability rule.¹⁰

The usual hypothetical is one in which a buyer has agreed to pay \$150, let's say, for an item that he or she values at considerably more and which has a market value of \$200 or less. The seller then breaches and sells the item to a third party for \$300. The damages are \$50—the buyer's objective expectancy. Under the notion of the "efficient breach," no one is worse off, the seller and the new buyer are better off and it appears that the law has worked to an outcome that is fair to all parties.¹¹ Obviously, this is not so fair to the original buyer who is worse off. The problem is that objective values are not the same as subjective ones, and the law, rather than wading into the difficulties of responding to individuals, treats all people as "averages."

The averaging perspective also finds its way into virtually every nook and cranny of contract law. "Offer and acceptance" is centered around what appears to be happening and not what happened. If people seem to have agreed, then they have. Concepts of duress and undue influence appear to soften the averaging affect. Thus, a person who appears to consent but is under duress has not consented. But even these off-setting doctrines are centered around what the "average" person would find coercive.

The purpose of alerting the students to the averaging perspective of contract law is three fold. First, it illustrates the narrow behavioral assumptions of contract law. The foremost of these, as I discuss below,¹² is that people are basically self-interested in the narrowest sense of the term. Second, it leads to the issue of what institutions and behaviors are implicitly legitimized by law when it adopts the "averaging" perspective. For example,

10. See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

11. This leaves aside the possibility that there is an independent value associated with requiring people to keep their promises.

12. See *infra* text and accompanying notes 32-33.

suppose we call duress an influence that prevents a party from acting in a manner that is consistent with his or her true preferences. Let's further assume that there are groups or classes of people that are especially susceptible to being "pulled off" of their true preferences. Under the "averaging" view, these people may not be afforded the benefit of the usual contract policing mechanisms. In these instances, the "averaging" approach has the effect of supporting the continued possible exploitation of identifiable segments of society.¹³

This is not to say there are not exceptions to "averaging." Thus, the third reason I like to get the averaging issue before the students is to permit them to consider the explanation for patterns of exceptions to the "averaging" rule. In remedies, the use of specific performance can overcome the "averaging" problem. In the area of contract formation, the treatment of minors is the principle example. There are, however, other possibilities. For example, it is possible that informal exceptions are made for elderly women. To some extent these exceptions are a function of stereotypes that the complaining party may decide to use to his or her advantage but whose successful use may perpetuate less beneficial outcomes. On the other hand, the law seems to have few exceptions for those who, because of class differences or a history of discrimination or other cultural factors, tend to behave in different from "average" ways when negotiating. In short, by noting the difference between actual reality and objective "reality" for the purposes of the law, one can begin to probe when and why law allows for social and behavioral differences.

2. Fairness and a Sense of Entitlement

Closely related to "averaging" is the issue of whether contract law can and should respond to differences with respect to one's sense of fairness. Here I typically tell two true stories. Both involve actual events at my law school. The first deals with two entry-level professors who were hired several years ago. Neither had the foresight to negotiate a moving expense allowance and, thus, after their appointment, asked the dean what the law school would pay in the way of assistance. Both were told a fixed amount which I have now forgotten, but let's say \$3,000. One of the new appointees simply said "thanks." The other became quite exorcised, arguing that the amount was too low and that it was "unacceptable." The dean relented and increased the allowance.

When I was told the story, I began to wonder about the different reactions. The satisfied faculty member had attended a mid-level state law school, had practiced law for a mid-sized firm and came from a lower middle class family in which the father was largely absent. The unhappy faculty member attended high-ranking schools, served in a federal clerkship, and came from a family in

13. See Harrison, *Class, Personality*, *supra* note 1.

which both parents were professionals. As one might expect, they were quite different personality-wise. The first new professor was obviously happy to have the job and immediately set about to participate in the full range of law school activities. The second seemed to always find something wrong with the classrooms, the salary, the curriculum, etc. But mainly he was absent from anything that was institutionally oriented, preferring to devote his efforts to projects that would lead to advancement in the profession.

The second story involves a faculty member who each year, like everyone else, received a letter indicating what his salary would be for next year, including whatever raise the dean had granted. For several years, he knew only his own raise, and he typically acknowledged getting the letter by writing a note to the dean thanking him for the recognition. One year, through a fluke, he discovered that his raise was below that of many of his colleagues. This concerned him enough that he asked the dean why his raise was lower. The response from the dean was that his was lower because "you have always been happy with your raises."

In both cases, a personal sense of what is fair comes into play. In the first instance, it was affected by a life-long process of socialization. In the second, a simple lack of information affected the faculty member's sense of fairness. This sense of fairness leads to different distributive outcomes. In both examples, the person with the relatively less developed sense of entitlement received a smaller portion of the gain from making the contract than others did. And, by virtue of that, all other things remaining equal, the material outcomes are different. Mainly, I want the students to examine the quality of contracts that have different distributive outcomes. In particular, I want them to understand that contract law and how it is applied has an impact on the material well-being of people and that it may perpetuate the superior well-being of those who simply feel they deserve more even though the sense of desert may be based on something that is irrelevant to any morally based notion of desert.

3. Law as advocacy

The third theme I include throughout the course is the recognition of judges as people—typically establishment types—who write opinions that are subtly and notso subtly designed to convince the reader that the outcome is fair or reasonable, if not preordained. I am speaking not so much about the reasoning of the judge, but about the descriptive language. To put it in terms we are all familiar with, judges write opinions that attempt to push our sympathetic buttons. The way this emphasis manifests itself in class is that about every other day I ask, "At what point in the opinion did you first sense the outcome was going for the plaintiff (or defendant)?"

This or something like it is a much used device among law professors and the answers are predictable after one teaches the course for a few years. The

examples are fairly well-known. In *Wood v. Lucy, Lady Duff-Gordon*,¹⁴ when Judge Cardozo, in his first paragraph, refers to the defendant as someone who “styles herself a ‘creator of fashion’”¹⁵ and then describes her effort as one designed “to turn this vogue into money,” it is hard to imagine that she will prevail in the action. The key is that the language suggests she is not necessarily someone who *is* a “creator of fashion.” No, instead that is only what she claims to be. Similarly, any effort to turn a vogue into money does not sound serious; it seems like an effort to make money on the vanity of others. Judge Cardozo pushes the buttons of that era by emphasizing the greed and frivolity of Duff-Gordon.

On the opposite end of the spectrum is Emma Fienberg, the well-known (to virtually every law student) loyal employee of the S. Pfeiffer Manufacturing Co.¹⁶ Here, after a paragraph describing the procedural history of the case, Commissioner Doerner lets the reader know that the plaintiff has worked for over forty years for the defendant and was “but 17 years of age” when she started.¹⁷ It would be enough for the reader to know that Fienberg had worked for the defendant for a number of years or even that she has worked for forty years. The age when she started seems irrelevant to the legal analysis and the “but” is clearly uncalled for except as a device to raise in us a sense of injustice as far as her treatment by the defendant.

One of the more interesting instances of button-pushing occurs in *Vokes v. Arthur Murry Inc.*,¹⁸ one of the “dance lesson” cases. Vokes essentially buys far more dance lessons than she can possibly use from some smooth operators who assured her in a variety of ways that she could become a great dancer. Vokes, as the court points out in the first sentence after describing the procedural niceties, is “a widow of 51 and without family.”¹⁹ In addition, we find out that upon visiting Davenport’s School of Dance she “whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique”²⁰ *Vokes* is fascinating on two levels. First, and relating to the ideas of averaging and a sense of justice, the court clearly regards Vokes’ “reality” as one that the courts should not legitimize. Second, the case illustrates how the view of law with respect to “protected” groups can change. The “helpless widow” image button the court pushes in the case is scoffed at by many of today’s students. In class, I try to get them to think about the change and what now might be viewed as appealing to our collective sense of fairness.

14. 118 N.E. 214 (N.Y. 1917).

15. *Id.* at 214.

16. *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959).

17. *Id.* at 164.

18. 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

19. *Id.* at 907.

20. *Id.*

One more case that illustrates the use of language, changing norms, and social values is *Monge v. Beebe Rubber Co.*²¹ This 1974 case is an important one in tracing the erosion of the terminable-at-will rule as it applies to employment contracts.²² Monge, an employee of Beebe Rubber, was terminated after she refused the social advances of a supervisor. The court ruled that a “bad faith” termination could give rise to damages.²³ Looking at the case now, those facts would seem to be sufficiently compelling. In 1974, however, the judge evidently felt the outcome required additional facts to make it more acceptable. Thus, we find that the plaintiff had been “a school teacher in Costa Rica,” was attending college at night, paid for college with the money she earned from the defendant and was married with three children.²⁴

Monge contains enough fodder for discussion to fill a week. Today it is easy to say that it is bad faith, at least, to fire someone who refuses a supervisor’s sexual advances. On the other hand, suppose in 1974 Monge had not been a former schoolteacher, was single, a college dropout and had served time for a felony. It is not unreasonable to believe the case would have gone against her. In a sense, Monge, as she actually was in 1974, was the sort of person the court decided to protect. Put differently, what happened to her was unfair; she deserved better than she got from the contract. The “other” Monge might not have been viewed as deserving of better. If this different treatment is true, it could simply be that the real Monge was more credible than the ex-con Monge. On the other hand, it may mean that “no” from a former school teacher and mother meant “no” in 1974 and “no” from a high school drop out meant “maybe” and the court would have been willing to entertain that the firing was the result of a misunderstanding but not bad faith. The point is that the case tells us what information the court felt it needed to include in order to create an appearance of fairness. And, if the factual details would not be necessary today, it tells us about how the view of how people deserve to be treated, in contracts and in life, have changed.

C. *Materials That I Use That May Differ from the Norm*

I am sure that every contracts teacher has materials that he or she exposes the students to that are not necessarily in the casebook. These materials reveal, far more than casebook selection, the teacher’s approach to the course. The following examples reflect my socioeconomic approach.

21. 316 A.2d 549 (N.H. 1974).

22. See generally Jeffrey L. Harrison, *The “New” Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984).

23. *Monge*, 316 A.2d at 549.

24. *Id.* at 550.

1. Results of Experiments Dealing with Fairness and Entitlement

Over the years I have introduced the students to a number of experiments that focus on fairness in exchanges.²⁵ Two that I am particularly fond of right now are found in the work of Richard Thaler. The first one involves the following question:

You are lying on a beach on a hot day For the last hour you have been thinking about how much you would like a cold bottle of your favorite brand of beer. A companion . . . offers to bring back a beer from the only nearby place where beer is sold (a fancy resort hotel) (a small run-down grocery store). He says that the beer might be expensive and so asks how much you are willing to pay for the beer. He says that he will buy the beer if it costs as much or less than the price you state. But if it costs more than the price you state he will not buy it What price do you tell him?²⁶

The question is asked in its “fancy resort” form to some subjects and the “run-down grocery store” form to others. What Thaler discovered is that willingness to pay varied not with the beer itself and its thirst quenching capacity but with the type of vendor. People were willing to pay more for the resort beer than for the run-down grocery store beer.²⁷ Put differently, a price that was deemed as “unfair” at the run-down grocery store was not seen as “unfair” when charged by the resort. The sense of unfairness was so strong that the subjects were willing to forego the beer rather than pay a price that was too high for that particular vendor.²⁸

The second experiment involves two “players” who are presented with an opportunity to keep a certain sum of money. One player is the allocator. In a one-try situation, he or she can offer a certain portion of the sum to the other player. If that player accepts, he gets the sum offered and the allocator keeps what is left. If the other party declines, neither party keeps any portion of the initial sum put into play. In these experiments, even a one-penny offer by the allocator would leave both parties better off. In the actual trials, the allocators rarely offered very low amounts and, when they did, they were typically

25. Examples other than the ones discussed here can be found in Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 U.C.L.A. L. REV. 1309 (1986). A good survey is Donald L. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

26. RICHARD THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 31 (1992).

27. *Id.* at 32.

28. I have asked others what they think the result of this experiment means. Most agree that the “rational” thing is to offer one price for the beer where ever it is to be purchased. The deviation for this strategy, they say, is probably just explained by efforts by the subjects to estimate what a beer is likely to cost and not by a sense of fairness.

rejected even though the rejection meant that neither party benefited in a traditional sense.²⁹

Both of these experiments test the conventional ideas of self-interest and rationality. If the beer is the same, why is it not worth the same? Why would a person turn down a “gift” with the result being that he or she is worse off in a material sense than he or she would otherwise have been? In both instances, there seems to be an interpersonal sense of justice that comes into play. This possibility helps explain why liability rules may not address all the losses associated with a breach.³⁰ In addition, the example leads one to discuss problems associated with the settlement of contract claims as well as a number of other issues.

2. Moral Development

Nearly every semester I introduce my class to Lawrence Kohlberg’s stages of moral development.³¹ As most readers know, Kohlberg suggests that people go through stages of moral development ranging from what we regard as narrowly self-interested or selfish to taking into consideration the welfare of others to acting on the basis of principles about right and wrong.

In conjunction with this, I usually ask them to read a rather ordinary case, *Allied Van Lines, Inc. v. Bratton*.³² Bratton, a woman, contracted to have her possessions moved by Allied Van Lines. When the moving truck was packed at the end of the day, she was asked to sign a bill of lading limiting the liability of Allied to \$1.25 per pound. Her possessions were lost and she sought to recover on the bases of “mistake” and “lack of assent.” She lost the case. The appellate opinion contains a short but interesting excerpt of trial testimony:

Q: Did anyone prevent you or stop you from reading the bill of lading?

A: No.

Q: Did anyone say anything to you that you took to be an inducement not to read it?

A: No. Like I said before, the house was really cold, and the men were tired. They were in a hurry to get out.³³

It seems clear that Bratton’s assent was not motivated by selfishness in the narrow sense. From her comment, she felt either direct pressure not to tie the tired men up any longer or a subtle indirect pressure from having a viewpoint that required her to consider what others wanted. One possibility, in Kohlbergian terms, is that she is an ordinary person with some sense of

29. THALER, *supra* note 26, at 32.

30. Liability rules allow the breaching party to pay the non-breaching party its costs and to keep all the gains associated with the breach.

31. Lawrence Kohlberg, *Moral Stages and Moralization*, in *MORAL DEVELOPMENT AND BEHAVIOR* 31 (Thomas Lickona ed., 1976).

32. 351 So. 2d 344 (Fla. 1977).

33. *Id.* at 346 n.2.

responsibility to others who was caught dealing with a corporation's form that is drafted to reflect the firm's narrow self-interest. Another is that there is a gender difference that accounts for a need to find an agreeable way to end her interaction with the tired men.

I pose the question to the class of whether the outcome of the case is the right one given that the parties seem to be working from very different places in terms of what is acceptable in the treatment of others. There is, obviously, no good answer for this, but the exercise typically results in a spirited discussion about the capacity of contract law to allow for differences between and among people. Sometimes the discussion goes into possible gender-based differences in negotiation strategies. I tend to remind the students that say it is impossible for contracts law to allow for these differences that cases—like *Monge* and *Vokes*—in fact may turn on certain personal characteristics. And, it is similarly easy to remind the students who want to construct a system of contract law that is responsive to too many differences that it may mean that each party would want the psychological profile of the party he or she is dealing with before entering into a bargain.

3. Ian Ayres' Car Buying Experiments

Most law teachers are familiar with the studies devised and conducted by Professor Ian Ayres in the early 1990s that deal with differential prices in the purchase of automobiles.³⁴ Using men and women as well as white and African-American shoppers and holding constant for as many factors as possible other than race and gender, he found a ranking in terms of the best price the four groups of shoppers were able to achieve through negotiation with car sellers. What Ayres discovered was that African-American shoppers were consistently made higher initial and final offers by the sales personnel. Interestingly, each group of buyers did not get their best offers from their race or gender counterparts. In other words, African-American men did not get their best offers from African-American men sellers and so on.

Typically, I lay out Ayres' numbers for my class and describe his methodology and ask, "What is going on here?" Without exception, a lively discussion follows as the students try to explain the outcome by reference to Ayres' methodology or by reference to sociological factors. Sometimes I draw their attention to the fact that it appears that both white and African-American sales people seem to be willing to forego profitable sales before lowering the price to African-American shoppers to the white level. "Why pass on any profitable sale?" I ask. Eventually, many of the students come to the conclusion that this makes no sense unless the sellers know that, as a general

34. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995).

rule, African-American shoppers will “settle” for a poorer deal than white shoppers.

This leads to a variety of related considerations. For example, if the sellers of cars in Ayres’ experiments do have a sense that African-Americans will pay more, what is this based on? And, if they are right, why are African-Americans willing to pay more? Finally, most classes include some students who have worked in a context in which “steering” customers occurs. I allow them to explain the practice of matching buyers up with particular types of sellers. One possibility is that the buyer will believe, incorrectly, that the seller is on his or her side and will not attempt to maximize the return from the exchange.

All of these issues are “on the table” for a discussion of whether contract law can or should react to price differences and steering. At a more philosophical level, some students say the issue is not whether African-Americans are “willing” to pay high prices. Instead, they argue that they are required to pay higher prices. This leads to a broad-based discussion of the meaning of fairness, good faith and assent and whether contract law should enforce bargains that seem to be based on social inequalities. As one would expect, the doctrines of duress and unconscionability are usually brought into the discussion and the students usually arrive at the conclusion that, while they are uncomfortable with much of the advantage taking that takes place when contracts are formed, they are not at all sure that standard contract law has the tools to address the problem.

4. Contract Practice and Policy

Perhaps as well-known as Ayres’ work on price discrimination is Russell Weintraub’s 1992 article in which he describes the results of a survey examining actual business practices as compared to the more formal rules of contract.³⁵ In his study, Weintraub queried general counsel of corporations about how specific contract issues are handled. The questions included ones about requests for contract modifications as well as more general ones about the importance of legal sanctions.³⁶ For example, Weintraub asked what the response would be to a request from a supplier or customer for an adjustment in price based on a change in market prices. Only 5% of the respondents reported that they would always insist on adherence to the contract price.³⁷ The relevant factors in a firm’s decision to grant relief included items like the reasonableness of the request, whether a reasonable profit can be made, and the length of time the firm had dealt with the requesting firm. The overall results

35. Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1 (1992).

36. Questions were also asked that posed hypotheticals based on actual cases.

37. Weintraub, *supra* note 35, at 18.

suggest that formal contract rules do not conform in important ways to the actual norms that have evolved in the commercial world.

The purpose of introducing the Weintraub materials is two-fold. First, as every contracts teacher knows, an effort to teach contracts by moving from case to case and U.C.C. section to U.C.C. section can leave the student with an understanding of contract law that does not reflect contract "law" as it exists in practice. Second, as Weintraub discusses, the deviation from formal contract standards can be explained by a number of factors including non-legal sanctions. Although Weintraub's entire article is useful, from the standpoint of socioeconomics, I stress the non-legal sanctions (some of which are also not financial) in order to attempt to achieve a broader perspective of what motivates those making and performing contracts.

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As noted at the outset, I cannot claim that a contracts course taught from a socioeconomic perspective varies much from one taught by anyone with some insight, even intuitive, into the difference between the view of human interaction taken in the context of economic theory and that which exists in reality. A socioeconomic approach is, to me at least, one that examines contract law through a lens of understanding that behaviors and deal making are affected by a host of complex factors. From that perspective, one can assess not simply the fact that a contract is made but the *quality* of that contract. Thus, one may conclude that a contract has been formed but also feel that it is of such poor quality that the law should do little to legitimize it. The agreement by *Bratton*, discussed above, might fit this category. Similarly, this may be the case when a person of one group, defined by class or race, pays substantially more for a good or service than others.

One objection to this approach is that by examining quality we are tempted then to do something about poor quality. In other words, an approach that pierces the contract, one could argue, only makes sense if we are prepared to respond in some way to "correct" matters. This is, I fully agree, a daunting and perhaps impossible task for contract law. On the other hand, it is equally clear that this is nothing more than what judges have been doing. There have always been exceptions to following the formalistic rules of contracts. In one sense, all I suggest in my course is that, to the extent this is done, it would make sense to broaden our understanding of the variables that come into play when "agreements" are made.