ARTICLES

LEGAL AUTOPSIES: ASSESSING THE PERFORMANCE OF JUDGES AND LAWYERS THROUGH THE WINDOW OF LEADING CONTRACT CASES

*Gerald Caplan**

I. INTRODUCTION

The medical profession enjoys an evaluative practice for elevating physician performance. It is the autopsy. Literally translated, autopsy means to see for oneself. The pathologist observes the condition of the deceased and compares it with the diagnosis and treatment. The profession treats as a given that errors occur during the course of treatment, a judgment supported by autopsy studies of the last several decades that expose a consistent error rate hovering at forty percent.[1] The autopsy has practical value: it identifies mistakes, assesses performance, and provides a feedback loop for correction and remediation across a wide swath of treatment.[2] The

* Professor of Law, University of the Pacific, McGeorge School of Law. I am especially indebted to my research assistant Brett Bitzer for his thorough research and insightful analysis, and to my colleagues, Ruth Jones, Brian Landsberg, Michael Malloy, Ann Marie Marciarille, Paul Paton, John Sprankling, and Michael Vitiello, for their helpful critiques.

[1] Some diagnostic and treatment errors can only be understood in retrospect. *See generally* George D. Lundberg, *Low-Tech Autopsies in the Era of High-Tech Medicine: Continued Value for Quality Assurance and Patient Safety*, 280 JAMA 1273 (1998) (discussing the importance of autopsies for quality assurance in the medical field); Richard J. Zarbo et al., *The Autopsy as a Performance Measurement Tool—Diagnostic Discrepancies and Unresolved Clinical Questions*, 123 ARCHIVES PATHOLOGY & LABORATORY MED. 191, 197 (1999) (arguing that autopsy-derived knowledge can be used to improve patient care).

[2] Lundberg, *supra* note 1, at 1273. The University of Pittsburgh study reported a 44.9% discordance, of which "two thirds of the undiagnosed conditions were considered treatable." *Id.* at 1273–74. Studies show that a willingness to conduct autopsies is associated with better results. "[G]ood hospitals have a high autopsy rate; poor hospitals, a low rate. Raise the autopsy rate and the poor hospitals will automatically improve, for more frequent autopsies would stimulate more careful diagnosis . . . ." Lester S. King & Marjorie C. Meehan, *A History of the Autopsy,* 73 AM. J. PATHOLOGY 513, 537–38 (1973). The autopsy can be a dramatic event. One physician described the autopsy as "the moment of truth for all medical

legal profession has nothing like it.

Attorneys and judges perform at a low level of visibility. Assessment is possible but forbidding because studying the relevant documents—briefs, transcripts, and lower court records—is arduous and time-consuming. Data on the incidence of indisputable error, such as timely filing, proper choice of cause of action or remedy, citation of leading cases, and the like, is non-existent. Unlike the medical profession, competence is assumed and error deemed extraordinary.

Judge Richard Posner stands virtually alone in calling for evaluation of judicial performance. "In dealing with the work of judges," he observed in 1990,

> we inevitably take much on faith. Appellate decision making in the American legal system is characterized by a high degree of uncertainty. This makes it difficult to assess a judicial decision without access, which often is itself difficult and time-consuming to obtain, to briefs and lower-court records, and without careful study of the precedents and the other sources of law at the time . . . .[3]

Subsequently, Posner encouraged researchers to undertake studies of judicial decision making that would apply autopsy-like objective standards for evaluating performance.

> The most illuminating kind of critical study would compare the judge's opinion in some notable case with the opinion of the lower-court judge, the record of the case, and the lawyers' briefs and oral arguments, along with any internal court memoranda written by the judge, his colleagues, or his or their law clerks. The aim would be to determine the

---

care and the time of reckoning to improve the care of the patient." Alfred A. Angrist, *Plea for Realistic Support of the Autopsy in the Changing Medical Setting*, 47 BULL. N.Y. ACAD. MED. 758, 758 (1971); *see also* KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 117 (1994) (arguing that autopsies ensure quality control). In recent years, however, its deployment has decreased dramatically.

> Doctors are seeking so few autopsies that in recent years the *Journal of the American Medical Association* has twice felt the need to declare "war on the nonautopsy." According to the most recent statistics available, autopsies have been done in fewer than 10 percent of deaths; many hospitals do none. This is a dramatic turnabout.

ATUL GAWANDE, COMPLICATIONS 191 (2002). Dr. Gawande suggests that "what discourages autopsies is medicine's twenty-first-century, tall-in-the-saddle confidence." Medical professionals do not "see much likelihood that an error would be found." *Id.* at 193–94; *cf.* Denise Grady, *In Scans, Answers for Soldiers' Survivors and Aid for Comrades*, N.Y. TIMES, May 26, 2009, at A1 (describing the increasing use of computed tomography scans by the U.S. military).

[3] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 131–32 (1990) [hereinafter POSNER, CARDOZO].

> accuracy and completeness of the judge's opinion; whether it was scrupulous in its use of precedent; the value it added to the briefs . . . .
>
> A series of critical judicial studies would yield insights into the methods as well as the quality of the judge.[4]

Judge Posner's call for judicial studies can be extended to attorney performance. A similar set of evaluative studies could focus on client representation—the extent to which error characterizes certain aspects of law practice and is subject to remediation.

Such studies of judicial decision making and attorney practice open a door to a novel body of research, one that more accurately describes civil legal process and stimulates self-examination. A well-designed case study may produce representative findings that impact both practice and legal education, which tends to distance itself from law in action. Perhaps researchers cannot assess performance by legal professionals with the same certitude as pathologists performing an autopsy. Yet the analogy is apt. The legal profession has well-understood performance standards and specifications.

Evaluative studies of the order suggested by Judge Posner do not presently exist.[5] There are, however, pockets here and there in the literature that can be culled for data on attorney and judicial performance. One small but fertile database contains the studies of leading contract cases. Contract case studies are distinctive in that they are the only cluster of case studies, other than torts, that make use of the trial record;[6] and, as noted above, assessment is not possible without access to the record. As a data trove, these studies provide the largest window into how lawyers shape disputes and judges decide cases. In contrast to the factually compressed, written record, the case study is something of a tell-all. It more fully captures what happened and, importantly, positions the reader to make an independent judgment.[7] Although each case study is by

---

[4] RICHARD A. POSNER, HOW JUDGES THINK 218 (2008).

[5] For a sophisticated explication of methodological approaches to case studies, see ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005).

[6] Most of the case studies are recent stories and doctrinal analyses with little to no focus on legal process. *See, e.g.*, CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2004); IMMIGRATION STORIES (David A. Martin & Peter H. Schuck eds., 2005).

[7] The case studies are, however, imperfect vehicles. Their authors follow no protocol and do not seek to test or corroborate specific propositions or hypotheses. They may, in Professor Simpson's words, simply be trying to "make sense of the past." A. W. BRIAN SIMPSON,

definition unique, as a collective, they offer a glimpse of more general propositions that might be uncovered if autopsy-like studies were routinely undertaken.

The contract case studies that examine performance issues are remarkably revelatory. They evidence egregious attorney errors, judicial slanting and misstating of the record, misunderstanding of the dispute by counsel and judges, instances where one or both parties withheld relevant facts from the court, and cases decided on points not argued by the parties. Every study is suggestive of more general problems and most studies exhibit more than one performance deficiency; attorney error, for example, shows up in most studies.

Although the case study enjoys a respectable lineage in the social sciences, only in the last several decades has it captured the imagination of legal scholars. In origin, it was the domain of legal historians. Professor A. W. Brian Simpson compares his approach to that of an archeological dig in which the researcher seeks to "make sense [out] of the past."[8] The dig does not begin with a theoretical predicate. One digs and keeps digging for whatever may be relevant to understanding the dispute. Historical setting—context, place, and time—is central. This approach stands in sharp contrast to the social scientists whose studies start with a research design, are rooted and confined by a defined methodology, and are typically geared to testing hypotheses and developing a general theory.

Current interest by legal scholars is often traced to Richard Danzig. Danzig conceptualized the case study quite differently than the legal historians. He imagined it as a vehicle for understanding the capability of the legal system to achieve its goals. Beginning with his essay on *Hadley v. Baxendale*[9] in 1975 and followed a few

---

LEADING CASES IN THE COMMON LAW 12 (1995). Many researchers have so exhaustively examined the historical record in its socio-economic setting that their efforts have been analogized to an archeological dig.

> [A] reported case does in some ways resemble those traces of past human activity—crop marks, post holes, the footings of walls, pipe stems, pottery shards, kitchen middens . . . from which the archeologist attempts, by excavation . . . to reconstruct and make sense [out] of the past. Cases need to be treated as what they are, fragments of antiquity, and we need, like archeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and . . . in the evolution of the law.

Id.

[8] *Id.*

[9] (1854) 156 Eng. Rep. 145; Richard Danzig, Hadley v. Baxendale*: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). Some case studies antedate

years later by an engaging anthology of well-known contract case studies, Danzig focused on legal process, rather than doctrine.[10] His work was well received and spawned the publication of other case studies. The new-found academic respect for the case study was partially a reaction to the opaqueness of the factually compressed appellate opinion. Redaction, though necessary and useful in that it tempers judicial biases, idiosyncrasies, and prejudices by channeling analysis to the elements of the rule, can mislead. Redaction is not only a synonym for edited, it also has a secondary meaning, "to select or adapt (as by obscuring or removing sensitive information) for publication or release,"[11] and no doubt it is this meaning that some case study authors had in mind.[12] The appellate court opinion can blur, ignore, or dismiss relevant facts with little fear of detection.[13] Case studies provide a beam of light by illuminating what is lost through redaction. They afford a "better understanding of what 'really happened,' as well as uncertainties about what the facts 'really were' . . . by a fuller telling of the story based on an examination of the trial record, the briefs, external accounts of the event, and more."[14] On occasion, they suggest a different outcome than that of the court.

Danzig's anthology is organized around the concept of capability problems in legal process generally. He describes capability

---

Danzig. One of the best is WILLIAM K. MUIR, JR., PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967).

[10] RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (1978); *see also* RICHARD DANZIG & GEOFFREY R. WATSON, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (2d ed. 2004) (adding three new case analyses). In terms of deepening understanding of civil legal process, two volumes in the Foundation Press multi-volume, subject-by-subject, series of law "stories" standout: CONTRACTS STORIES (Douglas G. Baird ed., 2007) and TORTS STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003). Most of the essays in the twenty or so volumes published to date are largely doctrinal analyses and do not examine pleadings, trial transcripts, arguments, and the like. Another especially valuable collection of case studies, addressing the performance of lawyers and judges, is VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (2006).

[11] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1041 (11th ed. 2003).

[12] *See generally* Debora L. Threedy, *Unearthing Subversion with Legal Archeology*, 13 TEX. J. WOMEN & L. 133, 138–39 (2003) [hereinafter Threedy, *Unearthing Subversion*] (opining that appellate opinions often omit information about how the court reaches legal conclusions).

[13] "[T]he statement of facts in judicial opinions is extremely truncated and is usually presented as if the facts of the case are not problematical or in dispute." Debora L. Threedy, *A Fish Story:* Alaska Packers' Association v. Domenico, 2000 UTAH L. REV. 185, 185 (2000) (footnote omitted) [hereinafter Threedy, *A Fish Story*].

[14] TORTS STORIES, *supra* note 10, at 3. Richard Danzig makes a related point: "The appellate opinion gives no insight into what precedes litigation and what is not litigated; perforce it pays even less attention to what happens after litigation. Moreover, the appellate decision is predicated on 'found' or presumed facts . . . ." DANZIG & WATSON, *supra* note 10, at 3.

problems as systemic features, "the frictions, the ruts and the biases" that "impede and distort efforts to further preferred values through a legal system."[15] The values that Danzig seems to have had in mind relate to whether the legal process is performing according to prescribed rules and standards of the profession. These tend to be uncontroversial. Did, for example, the plaintiff's attorney sue the proper party, choose the right cause of action, and compute damages according to formula? Capability problems are not doctrinal. They are indifferent as to whether one rule is better than another in terms of fairness or efficiency or some other yardstick. The insight that Danzig brings to the fore "is the chaotic nature of the adversary process and the number of irrelevant factors that can limit attempts to advance the underlying goals (whatever they may be) of the legal system."[16]

This is a novel focus, one that has been justly called seminal. It has received much praise, but little emulation. Part of the difficulty in building upon Danzig's work stems from the breadth and lack of clarity as to what is a capability problem. The definition is both amorphous and unbounded, running the gamut of problems "arising before, during and after trial."[17] Presumably, capability problems include such different events as death of a witness, juror misconduct, excessive judicial workloads, and the host of maladjustments that scarce resources and underfunding inject. But, however defined, the concept is of limited value because it gives no guidance as the relative importance, frequency, amenability to correction, and the like of specific problems.[18]

Danzig, like the legal historians, starts not with a research design, but with a case, and searches somewhat non-specifically for the capability problems that might surface. No explicit working hypotheses focus the research effort. The studies follow no protocol, do not seek to test specific propositions or corroborate findings of another study; nor do they build on prior studies for findings or methodology. Each is limited to a place and time—to what

---

[15] DANZIG & WATSON, *supra* note 10, at 1.

[16] William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 983 (2001).

[17] DANZIG & WATSON, *supra* note 10, at 2.

[18] As individual efforts, the studies of course have value. For one thing, they offer an antidote to accolades celebrating the genius of the common law bestowed by Karl Llewellyn and other legal realists. Llewellyn, for example, saw the common law majestically, as a "functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 37 (1960) [hereinafter LLEWELLYN, DECIDING APPEALS].

happened in a unique context. The authors generally have no interest either in whether their findings are representative of some particular feature or characteristic of legal process or in abstracting more general propositions from their work. In short, they follow the historical, archeological dig model exemplified by the work of Professor Simpson.

In this essay, contract case studies are treated, not as a series of one-of-a-kind essays, but as a collective, a single entity, to be scrutinized for common features relating to a specific region of capability: attorney and judicial performance.[19] All the other "frictions, the ruts and the biases" that "impede and distort efforts to further preferred values through a legal system,"[20] are put aside. There is good reason to focus exclusively on performance of the legal professionals. Competence is central to the well-being of our legal system. Assessing performance of legal professionals can, like the medical autopsy, serve to confirm competency, identify error, and correct mistakes. Five observations regarding performance capability have been distilled from the contract case studies.[21] Two focus on the behavior of counsel. The first notes the frequency of error in client representation. The spotlight is on clear error, such as failure to file before the statute of limitations has run, rather than strategic error. The case studies suggest that attorney error, like incorrect physician diagnosis and treatment, is more routine than extraordinary. The second observation relates to deficiencies and gaps in the trial record which impair judicial capability to decide the case correctly. The record does not expose the actual transaction between the parties. If the full story were known, it would reveal a different dispute than the one decided by the court.

The remaining three observations implicate the judiciary more directly. The first is that appellate court judges, on occasion, slant the facts to justify the outcome. Fact selection can doctrinally

---

[19] Two of my observations are similar to those derived by Professors Rabin and Sugarman, the editors of TORT STORIES, *supra* note 10. One relates to judging.

> Judges writing appellate opinions purposely report only some of the 'facts' leaving others out. This not only can leave the reader with an incomplete picture of the story, but it can also situate the case doctrinally rather differently from where it might be seen to fit were more facts revealed.

Id. at 3–4. A second is closely related: "a better understanding of what 'really happened,' as well as uncertainties about what the facts 'really were,' may be gained by . . . examination of the trial record, the briefs, external accounts of the event, and more." *Id.* at 3.

[20] DANZIG & WATSON, *supra* note 10, at 1.

[21] Since few readers will be interested in the particulars of each case study, the text is limited to a few illustrations for each proposition, and supporting studies are relegated to the footnote. As a convention, the conclusions and analysis of the authors are taken as a given.

situate a case in a different posture and produce a different outcome. The second references courts that, acting sua sponte, decide a dispute on an issue not argued at trial or on appeal without notifying the parties or providing an opportunity to be heard. Third, the studies suggest that certain types of cases test the judiciary's capability to get the facts straight. Especially challenging are disputes within the family and perhaps promissory estoppel matters, where courts struggle to find the most plausible narrative. Here the e-case file (transcript, briefs, lower court opinions) comfortably lends itself to multiple stories, alternative narratives, which give rise to different issues, rules of laws, and, in some cases, outcomes.

II. JUDGES AT TIMES SLANT THE FACTS TO JUSTIFY THE OUTCOME. FACT SELECTION CAN DOCTRINALLY SITUATE A CASE IN A DIFFERENT PLACE.

Every case has a story. The judicial narrative provides the setting for the legal discussion that follows. Through fact selection the author can convince the reader that the court's legal analysis is sound and the outcome just. Here the judge is behaving no differently than anyone else called upon to justify a position. Fact selection plays a role similar to that of interpretation of precedent. Recall Karl Llewellyn's observation that "[t]here is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon."[22] Llewellyn did not mean this as a criticism, perhaps because expanding and contracting precedent is essential to the growth and development of the common law and, unlike slanting facts, can often be detected by the reader.

The best known critique of slanting in fact selection by an appellate court was written by Judge John Noonan.[23] Noonan took aim at *Helen Palsgraf v. Long Island Railroad*,[24] a 4–3 decision of the New York Court of Appeals, Judge Cardozo for the court, Judge Andrews in dissent. Noonan found both opinions bloodless, devoid of human features and circumstances.[25] The summaries of the facts were "wonderfully laconic."[26] For "impersonality," Noonan gave

[22] KARL N. LLEWELLYN, THE BRAMBLE BUSH 165 (Oxford Univ. Press, 11th prtg. 2008) (1930).

[23] JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (Univ. of Cal. Press 2002) (1976).

[24] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[25] NOONAN, JR., *supra* note 23, at 112–14.

[26] *Id.* at 112.

Andrews the edge; it was superior in that it "eliminate[ed] even the sex of 'plaintiff.'"[27] Andrews wrote:

> Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling, they injured the plaintiff, an intending passenger.[28]

Cardozo, "[c]ompelled by grammatical necessity to use a personal pronoun . . . did disclose that the plaintiff was female. Otherwise, neither judge said anything about her age, marital status, maternal responsibilities, employment, or income."[29] Nor was there mention of her injuries.

> [W]hether she had been almost decapitated or whether she had been mildly bruised, could not be learned from either opinion. What compensation she had sought or what compensation she had been awarded . . . was unmentioned.
>
> No greater information was given about the defendant . . . . Defendant was as impersonally designated as plaintiff. P and D or A and B could as well have been written for their names.[30]

What might one have learned from reading the record? A layperson's account might run like this: Helen Palsgraf, a poor, hard-working, middle-aged woman, the mother of three children, did janitorial work in the building where she lived to achieve a monthly rent reduction of ten dollars. She also did housework, earning about $8 a week. All alone, she nonetheless always found work and managed to pay the rent.[31] Through no fault of her own, she suffered a debilitating lifelong condition without compensation from the defendant railroad. The judgment in her favor, the

---

[27] *Id.* at 112–13.

[28] *Palsgraf*, 162 N.E. at 101–02 (Andrews, J., dissenting).

[29] NOONAN, JR., *supra* note 23, at 113.

[30] *Id.* at 113. Judge Richard Posner describes Cardozo's opinion as "strip[ping] away all extraneous details, except Mrs. Palsgraf's destination, *and perhaps some essential facts as well*." POSNER, CARDOZO, *supra* note 3, at 42 (emphasis added); *cf.* Gerald M. Caplan, *Miranda Revisited*, 93 YALE L.J. 1375 (1984) (book review) ("[The appellate court] views *Miranda v. Arizona* not as a crisis in the life of a disadvantaged, crime-prone young man or of the teenager he abducted and raped, nor even as a vignette about the personalit[y] and performance[] of the lawyers trying the case; rather it exists as a set of rules that grants one in custody certain heretofore unannounced rights." (citation omitted)).

[31] NOONAN, JR., *supra* note 23, at 126.

handsome sum of $6,000, was reversed on appeal, leaving her saddled with court costs roughly equivalent to her annual earnings, as well as legal fees and medical bills. Ms. Palsgraf suffered physical injury—she had been hit by the scales on the arm, hip, and thigh—but the chief perceptible effect of the accident was psychological: stammer and trembling. She began to tremble following the accident and her stuttering and stammering worsened during the litigation. Although her doctor thought she might well recover in about three years, her condition—"traumatic hysteria"—endured and she became mute for much of her life.[32]

One aware of these facts could be pardoned for feeling that justice was ill served. Cardozo ignored the suffering of the plaintiff and allowed a large corporate defendant to escape liability. But this cannot be Noonan's overarching point. Noonan understands that tort liability is not contingent on the relative economic status of the parties and that redistribution of income is not a goal of the law of torts.[33] What Noonan's exegesis reveals is that factual compression is a powerful discretionary tool that can be employed without detection to eliminate or obscure facts that might make the reader uncomfortable with the outcome. The "economical, indeed skeletal, presentation" of the facts by Cardozo, Judge Posner observes, "enables the reader to grasp the situation—or, rather, so much of the situation as Cardozo wants the reader to grasp—at a glance."[34] In fact, Cardozo does more than compress the facts—he alters them. In Posner's otherwise flattering evaluation of the *Palsgraf* opinion, he concludes that Cardozo "goes beyond omissions, even misleading ones, and makes up facts—to telling effect from a rhetorical standpoint."[35] Perhaps Cardozo would concede as much. "I often say," he wrote, "that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement."[36]

---

[32] Robert L. Rabin & Stephen D. Sugarman, *Introduction*, *in* TORTS STORIES, *supra* note 10, at 4–5.

[33] Noonan writes: "The central question for me is not implied criticism of the lawmakers and opinion writers. It is the place of rules in the legal system if the process takes persons into account." NOONAN, JR., *supra* note 23, at x.

[34] POSNER, CARDOZO, *supra* note 3, at 42. Posner does suggest another reason for factual compression. It makes it easier for a decision to function as precedent and it insulates an opinion from losing its status as precedent. Spare statements of facts make distinguishing the case more difficult. *Id.*

[35] *Id.* at 43. Elsewhere Posner comments that "[t]here is also a bad judicial rhetoric, which consists of such familiar but unedifying lawyers' tactics as distorting the facts, and it is a rhetoric to which Cardozo at times descended, most strikingly in the *Palsgraf* case . . . ." *Id.* at 137.

[36] Benjamin N. Cardozo, *Law and Literature*, 14 YALE REV. 699 (1925), *reprinted in* BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 7 (1931).

In sum, Noonan's well known account of the *Palsgraf* opinions reminds us of the handicap the reader of an appellate court opinion is under. With no pleadings, briefs, or oral argument transcripts at hand to provide background and setting, the judicial formulation of the facts and formulation of the issues embraces and confines the reader. The common observation that "if you really want to know what happened, you have to read the dissent," reflects general awareness that judges sometimes ignore or, in Cardozo's words, "misstate" inconvenient facts.[37] Judge Noonan, writing in the mid-1970's, before the publication stream of scholarly case studies, demonstrates how resorting to the record can rescue the reader from the grip of the appellate opinion and install a refined sense of justice of the possibilities for arguing and deciding a case.

Fact slanting does not seem to have caught the eye of court watchers, perhaps either because it is uncommon or because it is near impossible to detect without scrutinizing the record, or both. Appellate lawyers may smart when the tilting of the judicial narrative denies them a winning argument, but, being practical, they do not war against a practice that is not amenable to remediation. There is no alternative to trusting judges to do the right thing.[38]

Moreover, there is no database to reference for the frequency of the practice. Apart from Judge Posner's observations, there is little to no comment in the literature. Once again, we find Judge Posner, all alone, opening the door to discussion of a sensitive topic: "It is not the *invariable* practice of appellate judges to slant the facts in favor of the outcome," he wrote, "although goodness knows it is common."[39] One other source, the editors of TORTS STORIES,

---

[37] POSNER, CARDOZO, *supra* note 3, at 43.

[38] There are occasions where, as a result of historical developments or other external changes, facts take on new meaning. Here fact selection operates in the service of the common law tradition to fashion new rules. Edward Levi makes this point:

> [T]he judge . . . may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.

Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948) (citation omitted). There is no arguing with Dean Levi's point, but its application to the contract cases discussed in this essay is marginal.

[39] POSNER, CARDOZO, *supra* note 3, at 55. Judge Posner adds: "Invariable or not, it hardly seems praiseworthy." *Id.* Posner finds that Cardozo's opinion in *Palsgraf,* "goes beyond omissions, even misleading ones, and makes up facts—to telling effect from a rhetorical standpoint." *Id.* at 43. But he is not altogether critical. Cardozo's omission of the injury for which Helen Palsgraf was suing is acceptable as a matter of "artistry." "Mention that it was a stammer would have made the accident seem not only freakish but silly, a put-on, a fraud.

observed fact slanting in the ten case studies of landmark opinions:

> Judges writing appellate opinions purposively report only some of the "facts" leaving others out. This not only can leave the reader with an incomplete picture of the story, but it can also situate the case doctrinally rather differently from where it might be seen to fit were more facts revealed.[40]

And it makes judicial criticism more difficult.

A. Example of Hoffman v. Red Owl Stores, Inc.[41]

In *Hoffman v. Red Owl*, the Wisconsin Supreme Court elevated promissory estoppel from its historically modest role as a consideration substitute to that of an independent cause of action. The court opened a door long shut (that many thought should remain closed) to pre-contractual liability arising out of reliance on "promissory representations."[42] It granted recovery to a prospective franchisee, Joseph Hoffman, even though negotiations with representatives of Red Owl Stores broke off before agreement on critical terms was reached. The parties had not settled on the "size, cost, design, and layout of the store building and the terms of the lease with respect to rent, maintenance, renewal, and purchase options."[43] Under prevailing law, reliance on commitments made during negotiations was not actionable.[44] When discussions failed to ripen into a deal, each party ate its own costs.

Eager to improve his circumstances by becoming a Red Owl franchisee, Hoffman sought out the company's local representative, Edward Lukowitz. Hoffman made it clear that $18,000 was all he had to invest and Lukowitz assured him that this was sufficient.[45]

The scale fell on Mrs. Palsgraf and made her stammer. Tell us another. Great cases are not silly." *Id.* at 42; *cf.* RICHARD H. WEISBERG, WHEN LAWYERS WRITE 10–11 (1987).

[40] TORTS STORIES, *supra* note 10, at 3–4. Professor Threedy similarly observes that "'facts' unearthed through legal archeology sometimes bear little resemblance to the 'facts' as recited in the appellate opinion. Often, legal archeology reveals that the 'official' statement of the [case] is woefully incomplete." Debora L. Threedy, *Legal Archeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197, 1200–01 (2006) (citation omitted) [hereinafter Threedy, *Excavating Cases*]. Professor Victor Goldberg writes: "Too often I find the facts . . . incomplete . . . [or] irrelevant." GOLDBERG, *supra* note 10, at 1. From abroad, the English legal scholar William Twining likewise comments that "law reports often conceal as much as they reveal about the cases that they report." WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE 205 (1997).

[41] 133 N.W.2d 267 (Wis. 1965).

[42] *Id.* at 274.

[43] *Id.* Today, the final agreement would likely be Red Owl's form contract.

[44] *Id.* at 273.

[45] *Id.* at 269.

Over a three year period, Lukowitz coached, encouraged, and urged Hoffman to ready himself to run a supermarket. Following Lukowitz's counsel, Hoffman sold his bakery, purchased a grocery store to gain experience, then sold it, acquired an option on land for building a franchised outlet, and moved his residence nearby.[46] All to no avail; negotiations ultimately collapsed when Red Owl insisted that Hoffman, in order to get the store off on a sound basis, would need to provide considerably more than $18,000.[47]

This outcome has troubled readers because Red Owl had no ostensible motive for leading the Hoffmans down the garden path and then abandoning them. To get a handle on what happened, Professor Robert Scott turned to the record—the parties' briefs and the trial transcript—with startling results. Scott concluded that the Wisconsin Supreme Court was unfaithful to the record and had decided the case wrongly.[48]

At the outset, Scott discovered an unsettling fact: the Wisconsin Supreme Court decided the case without accessing the full trial record. It relied on an edited transcript to decide the case.[49] The full transcript, Scott found, "paints a very different picture" of the negotiations between Hoffman and Red Owl's representatives than the court's narrative;[50] and "[t]his is true even if one endeavors to interpret all [the] facts in the light most favorable to Hoffman, as the appellee [up]holding a jury verdict."[51] At a key meeting of the parties, Hoffman inquired of the Red Owl representatives, "[f]ellows, you know how much money I got—[approximately] $18,000. Will this put me in a bigger operation or won't it?"[52]

---

[46] *Id.* at 268–69.

[47] *Id.* at 271.

[48] Robert E. Scott, Hoffman v. Red Owl Stores *and the Myth of Contractual Reliance,* 68 OHIO ST. L.J. 71 (2007). Scott views *Hoffman* as an outlier and is troubled by the leading status treatment accorded the decision in the casebooks:

> The transcript of the trial reveals a story far different from the conventional understanding of the dispute between Joseph Hoffman and the representatives of Red Owl Stores. The truth suggests an important lesson for law teachers (and law students): It is dangerous to draw inferences about emerging doctrine from isolated cases, and it helps to read cases systematically if one wishes to recover the law in action. By setting the record straight on what really happened . . . and pointing where the legal rules governing preliminary agreements have evolved in the years since the case was decided, I hope to encourage a more systematic approach to the "discovery" of new legal doctrines.

Id. at 74 (citation omitted).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 75.

[52] *Id.* at 76 (quoting Transcript of Record at 86, Hoffman v. Red Owl Stores, Inc., No. 14954 (Wis. Cir. Ct., Outagamie County, Oct. 21, 1963)).

Lukowitz replied "no problem" or words to that effect.[53] Hoffman clearly assumed, the record reveals, that his contribution could be part equity, part borrowed cash.[54] On the other hand, Red Owl had reason to believe that Hoffman could and would supply at least $18,000 of his own cash in and would not borrow funds to make that contribution.[55] This misunderstanding of the composition of Hoffman's contribution persisted and infected negotiations throughout. "There was," Scott notes, "no discussion then (or at any time thereafter) as to the nature of the $18,000 investment. Was it to be all equity, or was it to be part equity and part borrowed cash?"[56]

Scott does not mean that such discussions never took place—there is no way of knowing this—but only that the record did not so indicate. Perhaps some mutual understandings came into being but never found their way into the trial testimony. One would think that after three years of negotiations the parties would have had a clear understanding of how much equity Hoffman had to contribute. Perhaps the attorneys for one or both parties, intentionally or through oversight, did not elicit testimony on this central point. Or perhaps both Hoffman and Red Owl found it prudent to keep the composition terms vague since progress was being made toward their mutual goal of placing Hoffman in a supermarket. Perhaps Red Owl knew of Hoffman's understanding but for strategic or other reasons did not dispute it, and, rather, kept negotiating. We are left to speculation on the deal breaking issue in this transaction.[57]

Finally, Scott questions the conclusion of the Wisconsin Supreme Court "that for the sum of $18,000 Red Owl would establish Hoffman in a store."[58] Scott states that

> This statement by the court is not supported by the record, even as it was edited for the appeal. Hoffman testified only that Lukowitz assured him that $18,000 was a sufficient

[53] *Id.* at 74–75.

[54] *Id.* at 77.

[55] *Id.*

[56] *Id.* at 76.

[57] Scott tracks how the parties' misunderstanding as to the composition of Hoffman's contribution played out. For example, when Red Owl learned that Hoffman had something less than $13,000 in unencumbered equity, Red Owl sought an increased contribution of $6,000 to bring the equity component amount closer to the $18,000 figure initially put forward by Hoffman as his investment capital. *Id.* at 81–82. From Hoffman's perspective, however, Red Owl had broken faith by upping the ante to $24,000, after having agreed that $18,000 was sufficient. But Red Owl saw the $6,000 as simply bringing Hoffman's investment into conformity with the original agreement of $18,000 in equity. *Id.*

[58] Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965).

> amount to secure a franchise. There was no testimony that Lukowitz ever said that in return for an $18,000 contribution "he would establish Hoffman in a store."[59]

Scott's essay, beyond displaying how the record can be ignored or distorted by an appellate court, also illustrates two other characteristics of legal process discussed in this essay: deficiency in lawyering and deciding a case on a point not argued by the parties.[60] "The record of the case," Scott finds, "reveals much to criticize about the way Red Owl's attorneys defended their clients. In particular, they failed to raise three issues, either at trial or on appeal, that seem quite cogent given the trial testimony."[61] These relate to the apparent authority of Lukowitz, the reasonableness of Hoffman's reliance, and the misunderstanding of the parties—oversights that exceed what one might consider the irreducible amount of error that inheres in extended litigation. Beyond this, they failed from the outset to present evidence that would show their client was behaving reasonably and decently in its dealings with Hoffman. "They could and should have elicited testimony about how hard everyone worked to make the negotiations succeed, and how it came to naught . . . ."[62]

---

[59] Scott, *supra* note 48, at 89 n.83.

[60] *See infra* Part IV for the discussion of deficiencies in client representation. The Wisconsin Supreme Court decided the case on an issue not raised below without giving the parties notice or offering them an opportunity to be heard. This practice is not atypical. *See infra* Part VI for an extended discussion on the impropriety of deciding cases on points not argued by the parties.

[61] Scott, *supra* note 48, at 95–96.

[62] *Id.* at 97. Although it is a convention of this essay to treat the author's conclusions as a given, a short critique may nonetheless be helpful. Accepting Scott's assertion that the parties held different meanings as to the composition of Hoffman's contribution (equity only or equity plus borrowed funds), Red Owl did in fact increase Hoffman's burden by insisting on added capital to fund operations well beyond the $18,000 Hoffman stated at the outset was his maximum. *Id.* at 80–81. By increasing the price, it knew that Hoffman would have to borrow funds. Even, however, if there were a mutual misunderstanding, Red Owl is not free of fault. Prospective franchisees are more like consumers than corporations and need some looking after. It would not have been too much for Red Owl to clarify early on that the Hoffman's contribution could not include borrowed funds. Yet Red Owl either avoided or neglected doing so, or intentionally muddied the waters to make it easier to dump Hoffman should it find it prudent to do so. Professor Scott emphasizes that "Hoffman testified only that Lukowitz assured him that $18,000 was a sufficient amount to secure a franchise." *Id.* at 89 n.83. To Scott, "to secure a franchise" is very different than to "establish Hoffman in a store." *Id.* But in context, this seems like hairsplitting, and the context was that Lukowitz was positive and encouraging throughout. He wanted to make a sale and both he and Hoffman likely understood his assurance to mean "establish Hoffman in a store." *Id.* Scott bypasses clear assurances that were made by other Red Owl officials, one that "the deal would go through," the other that sale of the Hoffman's bakery building "was the last step." *Id.* at 95. Whether one calls these communications from Red Owl assurances or promises or representations, Red Owl sought and induced Hoffman's reliance. The reader may be

Nonetheless, as Scott observes, Red Owl's attorneys had every reason to believe that they would prevail because the representations relied upon by Hoffman were "too indefinite to [constitute] a promissory commitment" and no other theory could be mustered under Wisconsin law.[63] Promissory estoppel was not argued by the attorneys for Hoffman, and Red Owl's attorneys cannot be faulted for failing to anticipate that the Wisconsin Supreme Court would depart from well understood definitions of promise and promissory estoppel and from precedent.[64]

B. Example of Parker v. Twentieth Century-Fox Film Corp.[65]

Shirley MacLaine's suit against Twentieth Century-Fox ("Fox") is a leading case on the rule of avoidable damages. The rule limits the breaching party's liability to damages that the plaintiff could not have avoided by reasonable efforts to find a comparable substitute performance.[66] Fox informed Parker (MacLaine's actual name) that it had "determined not to proceed with the production" of *Bloomer Girl*, a musical that would have showcased MacLaine's dancing skills.[67] "[W]e cannot and will not utilize your services as contemplated by the Agreement nor otherwise comply with our obligations to you under that Agreement."[68] Fox then offered MacLaine an alternative "[i]n order to avoid any damage to [her]."[69]

---

forgiven for sympathizing with Hoffman when he wrote Lukowitz, "[a]fter doing my utmost to put this together for 2½ years, it seems to me Red Owls' [sic] demands have gotten beyond my power to fulfill." *Id.* at 85 (quoting Exhibit 39, Hoffman v. Red Owl Stores, Inc., No. 14954 (Wis. Cir. Ct., Outagamie County, Oct. 21, 1963)). Finally, Scott is particularly disturbed that the court's deployment of promissory estoppel broke with precedent. He notes the elements of other theories—good faith, negligent misrepresentation, quasi-contract, and fundamental fairness—and finds them, like promissory estoppel, inapplicable. *Id.* at 91–94. But this being so, the door is open for the court to carve out a remedy. This is what common law courts do. Here the court selected promissory estoppel as the doctrine to be stretched to reach a desired result.

[63] Scott, *supra* note 48, at 97.

[64] "It is fundamental to contract law that mere participation in negotiations and discussions does not create binding obligation, even if agreement is reached on all disputed terms. More is needed than agreement on each detail, which is overall agreement (or offer and acceptance) to enter into the binding contract." Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (citation omitted).

[65] Parker v. Twentieth Century-Fox Film Corp. (*Parker II*), 474 P.2d. 689 (Cal. 1970).

[66] *Id.* at 692.

[67] Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 WIS. L. REV. 1051, 1055 n.13 (1998) (quoting Respondent's Brief in the Court of Appeal at 7, Parker v. Twentieth Century-Fox Film Corp. (*Parker I*), 81 Cal. Rptr. 221 (Ct. App. 1969) (Civ. No. 33270)).

[68] *Id.*

[69] *Id.*

It was the feminine lead in *Big Country, Big Man*, a western to be filmed in Australia for which MacLaine would receive the same amount as in *Bloomer Girl*, $750,000.[70] MacLaine turned this offer down, rejected a settlement offer of $400,000 as well, sued for $750,000 and ultimately prevailed.[71] The California Supreme Court found *Big Country, Big Man* a poor substitute.[72] It was "different and inferior" to *Bloomer Girl*, not only in content and setting, but also in reduced rights.[73] Under the original *Bloomer Girl* contract, MacLaine enjoyed the right to approve the screenplay and the director.[74]

The foregoing is the story presented in the casebooks to teach mitigation principles. But it is not the full story, nor even the primary one, as Professor Victor Goldberg artfully demonstrates in his case study.[75] The MacLaine/Fox contract contained a pay-or-play provision, common in the industry, under which the studio promises to pay the artist to be ready to make a particular film, but does not promise either to use her services or to make the film.[76] In effect, the studio is purchasing an option on her time. Under this interpretation, the obligation to mitigate does not arise. When Fox canceled *Bloomer Girl*, it did not breach; it merely chose not to exercise its option. No breach, no obligation to mitigate. Fox in its letter to MacLaine, however, presented itself as having breached by stating that it would not perform its "obligations" to her.[77]

MacLaine's lawyers seem to have accepted this position or at least not rejected it, which they should have done. The complaint filed on her behalf to recover the $750,000 guarantee stated two causes of action, money due under the contract and damages for breach of contract.[78] MacLaine's lawyers virtually ignored the pay-or-play precedents in their favor. In the "lengthy briefs" they filed, they "mentioned only one [case] and did not bother to note that the case involved a pay-or-play clause."[79]

---

[70] *Parker II*, 474 P.2d at 690–91.

[71] Goldberg, *supra* note 67, at 1057.

[72] *Parker II*, 474 P.2d at 693–94.

[73] *Id.*

[74] *Id.* at 691 n.2.

[75] Goldberg, *supra* note 67.

[76] *Id.* at 1052; *see also id.* at 1065–83 (discussing several cases involving pay-or-play provisions) (citations omitted).

[77] *Id.* at 1056 n.13 (quoting Respondent's Brief in the Court of Appeal at 7, Parker v. Twentieth Century-Fox Film Corp. (*Parker I*), 81 Cal. Rptr. 221 (Ct. App. 1969) (Civ. No. 33270)).

[78] *Id.* at 1057.

[79] *Id.* at 1065.

Fox's attorneys understandably fastened onto the breach claim and argued as its only defense that MacLaine's failure to accept the offered role in *Big Country, Big Man* discharged its obligation.[80] This defense was soundly and justly rejected by the trial court, which granted summary judgment for the plaintiff. Although Fox insisted that it had breached the contract, the trial court pointed out that Fox never promised to make the film or provide work for MacLaine.[81] Fox's "only enforceable promise . . . [was] to pay the guaranteed compensation."[82] This interpretation comports with Professor Goldberg's analysis.

The appellate court, however, took a detour, misreading and misstating the record. It accurately restated plaintiff's claim: "Plaintiff's cause of action . . . is not actually for . . . breach of . . . contract [for] . . . unlawful discharge; rather it is for a recovery under the contract according to its terms."[83] This is correct; a pay-or-play contract is an option contract and Fox was obligated to pay if it did not "play" MacLaine. But the appellate court inexplicably continues: "The parties also are in agreement that defendant's alternative obligation to pay plaintiff $750,000 if it did not utilize her services in 'Bloomer Girl' was subject to an implied condition that she mitigate defendant's obligation by accepting other suitable employment."[84] This assertion is erroneous; the briefs of both parties are crystal clear that MacLaine did not take this position.[85] Her counsel argued in its brief that "[h]er sole present right of action . . . is to have the guaranteed compensation."[86] Nonetheless, the appellate court proceeded as if the issue were mitigation. It found the substitute offer "different and inferior" to that of the original offer.[87] *Bloomer Girl* was a musical, providing opportunities for MacLaine to display her talents as a singer and dancer, which a western would not offer. It would be filmed in Los Angeles, not a foreign country. Moreover, MacLaine would be unable to exercise the rights she enjoyed in *Bloomer Girl* to approve

[80] *Id.* at 1057.

[81] *Id.* at 1059.

[82] *Id.* at 1058 (quoting Appendix to Respondent's Brief in the Court of Appeal, Parker v. Twentieth Century-Fox Film Corp. (*Parker I),* 81 Cal. Rptr. 221 (Ct. App. 1969) (Civ. No. 33270)).

[83] *Id.* at 1060 (quoting *Parker I*, 81 Cal. Rptr. at 222).

[84] *Id.*

[85] *Id.* at 1061–62 (citations omitted).

[86] *Id.* at 1062 (quoting Respondent's Brief in the Court of Appeal at 37–38, *Parker I*, 81 Cal. Rptr. 221 (Civ. No. 33270)).

[87] Goldberg, *supra* note 67, at 1062.

the script and director as the studio had already settled these matters in *Big Country, Big Man*.[88] The California Supreme Court, accepting the lower court's approach, found it unnecessary to "consider plaintiff's further contention that . . . plaintiff was excused from attempting to mitigate damages."[89]

This case not only evidences judicial misstatement of the record and muddled pleading and argument by MacLaine's lawyers, but features attorney error by counsel for Fox. The error here is monumental. Fox unwittingly argued MacLaine's position by citing a case on all fours with it.[90] Petitioning for a hearing in the California Supreme Court, it insisted that

> not only did plaintiff never agree that [the] defendant's obligation to pay $750,000 was subject to an implied condition that she mitigate damages, plaintiff vigorously contended quite the opposite." Thus, when the court of appeal declared "(1) this was not a case involving an unlawful discharge and (2) plaintiff had agreed that her right to receive $750,000 was subject to an implied condition to mitigate damages, it was inaccurate in the extreme."[91]

In short, counsel insisted that MacLaine's action was not for breach of contract of employment, but an action on the contract itself for agreed compensation. This was, Goldberg wryly notes, "a pretty powerful argument, but *for the plaintiff*."[92]

The court's failure to recognize the nature of a pay-or-play clause can be attributed in part to plaintiff's presentation. "While [plaintiff] did argue that the clause did not require her to mitigate, she did not even attempt to relate the case to the few other reported cases involving such a clause."[93]

III. COURTS HAVE PARTICULAR DIFFICULTY IN IDENTIFYING THE MOST PLAUSIBLE STORY IN DISPUTES WITHIN THE FAMILY (AND PERHAPS IN PROMISSORY ESTOPPEL CASES AS WELL).

In intrafamilial disputes in particular, the case file—transcripts, briefs, lower court opinions—comfortably lends itself to multiple stories. These alternative narratives may give rise to different

---

[88] *Id.* at 1062–63 (quoting *Parker I*, 81 Cal. Rptr. at 224–25).

[89] Parker v. Twentieth Century-Fox Film Corp. (*Parker II*), 474 P.2d 689, 694 (Cal. 1970).

[90] Goldberg, *supra* note 67, at 1064–65.

[91] *Id.* (quoting Appellant's Petition for Hearing in Supreme Court at 25, 26, *Parker II*, 474 P.2d 689 (Cal. 1970) (L.A. No. 29705)).

[92] *Id.* at 1065.

[93] *Id.*

issues, rules of law, and outcomes. The three cases discussed below illustrate the difficult capability problems courts face in deciding disputes within the family. Professor Douglas Baird, in his study of *Hamer v. Sidway*,[94] a landmark consideration case, postulates that "[t]he further the promise from the marketplace, the more likely it has conditions implicit and explicit" and that a trial will result in error.[95] Reducing a family history to a snapshot in time eliminates relevant explanatory events, and can lead a court astray. The second illustration, *Ortelere v. Teachers' Retirement Board*,[96] presents the familiar scenario of a trial court massaging the facts to bring about a preferred result. The plaintiff, Francis Ortelere, sought to invalidate the election of his wife, Grace, to take the maximum retirement benefit for herself, thereby leaving nothing for him.[97] The intermediate appellate court, ignoring evidence considered by the trial court that Grace acted deliberately, thoughtfully, and perhaps prudently as well, found that she lacked capacity to contract.[98] The Court of Appeals could not swallow this distorted reading of the record and instead told a different story, rooted in a suspect finding that the Orteleres were happily married.[99]

Mills v. Wyman,[100] the third illustration, takes us back to the first quarter of the 19th century. It tells a story about a caring father, his ailing adult son, and a generous innkeeper. The Massachusetts Supreme Court reluctantly held that a father's promise to compensate an innkeeper who cared for his son during his illness was unenforceable for want of consideration.[101] At the time the father promised to reimburse the innkeeper for the expenses he incurred, the innkeeper had fully performed. The court's holding comports with consideration doctrine then and now. The father was morally, but not legally, bound to keep his word.[102] But, as Professor Watson's research reveals, the court would not have had to settle for castigating the father for his "disgraceful" behavior.[103]

---

[94] 27 N.E. 256 (N.Y. 1891).

[95] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 180.

[96] (*Ortelere II*) 250 N.E.2d 460 (N.Y. 1969).

[97] *Id.* at 462.

[98] *Id.* (quoting Ortelere v. Teachers' Ret. Bd. (*Ortelere I*), 295 N.Y.S.2d 506, 509 (App. Div. 1968)).

[99] *Id.* at 462.

[100] 20 Mass. (3 Pick.) 207 (1825).

[101] *Id.* at 210.

[102] *Id.*

[103] DANZIG & WATSON, *supra* note 10, at 131–32.

A more reasonable interpretation of the father's promise to the innkeeper who cared for his son was that it extended to future services.[104]

A. Example of Hamer v. Sidway[105]

Professor Baird provides a telling illustration of how a case record can fairly and comfortably be read not only to challenge the official judicial narrative, but also to reach an outcome more faithful to the record.[106] In so doing, Baird cautions that the superior narrative may also be flawed. The evidence presented by the parties may be so partial or incomplete that the court lacks sufficient information to make the right call (a point discussed below in some detail), and this is especially true when the dispute involves family members—here, a nephew suing his uncle's estate to enforce a promise made by his uncle.[107] Understanding this case, Baird observes,

> requires locating the uncle and his nephew in a large family group portrait. In addition to his nephew, the uncle cared also about his nieces and making sure . . . they were taken care of. He also had to sort out his relationship with his elder brother, someone who was financially dependent on him for much of his adult life. . . . Outside of the commercial mainstream, social relationships are inevitably intricate and laden with ambiguity. The law can play only a limited role in such an environment.[108]

The plaintiff, Willie Story ("Willie"), claimed that during a family celebration when he was fifteen, his uncle promised him $5,000, provided that he give up smoking, gambling, and drinking until he reached the age of twenty-one. The trial court found that Willie had fully performed by desisting from the behaviors specified by his uncle.[109] The record was clear enough on this point. Willie, on his twenty-first birthday, wrote his uncle: "I believe, according to

---

[104] *Id.*

[105] 27 N.E. 256 (N.Y. 1891).

[106] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 170–71.

[107] *Id.* at 160. This observation is evidenced by several cases discussed *infr*a Part IV.

[108] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 161. Professor Baird extends this critique of judicial capability to promissory estoppel cases outside the marketplace. These are "often cases where something has happened offstage that the judge cannot see. The facts are likely to be hard to penetrate, and the way the judge constructs the story is especially likely to be wrong." *Id.* at 171. The discussion of *Kirksey v. Kirksey*, *infra* Part IV.A, nicely illustrates this point.

[109] *Hamer*, 27 N.E. at 256.

agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word." Uncle agreed: "I have no doubt but you have, for which you shall have $5,000, as I promised you."[110]

Nonetheless, the intermediate appellate court reversed the trial court's decision for Willie. Willie's promise to refrain from smoking, drinking, and gambling, it held, did not qualify as consideration.[111] The promise had no pecuniary value. Willie suffered no detriment; quite the opposite, he was better off for having abstained. The *Harvard Law Review* rightly criticized the intermediate court, stating that the court's conclusion that "no legal right is parted with [by Willie], would probably surprise a [great] many persons . . . ."[112] Fortunately for Willie, among those surprised were the judges of the New York Court of Appeals. Forsaking what one has a legal right to do, the court held, does constitute a detriment to Willie. It is enough that Willie "restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement . . . ."[113] This finding is clearly correct. But it is only dispositive if the court ignores critical evidence in the record.

The record identifies two competing accounts that the courts ignored. The first is that no contract was formed between Willie and his uncle.[114] When the uncle made his promise at the family banquet, he was doing no more than adding a condition to a gift promise that he had made years earlier to Willie's parents when Willie was a small boy. Years later at the family banquet when Willie was sixteen, the uncle attached strings to his earlier gift promise to satisfy his continuing concern that Willie would stray into bad habits.[115] He wanted Willie to make something of himself. He did not seek a return promise from him, nor did he consider himself legally bound any more than a parent does who offers his child an incentive for getting good grades or performing household chores. Testimony at the trial indicates that,

> [i]n the uncle's view, when Willie came of age, if everything was favorable, he would start him in business and help him . . . to do right, and if he was steady and industrious this

[110] *Id.* at 258.

[111] *Id.*

[112] Note, *Contract: Abstaining from Tobacco or Liquor as Consideration*, 4 HARV. L. REV. 237, 237 (1891).

[113] *Hamer*, 27 N.E. at 257.

[114] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 166.

[115] *Id.*

> would be a good start; and, if he was not, this would be enough for him to squander.[116]

Under this view of the facts, even though Willie fully performed, the uncle's promise remained unenforceable for want of consideration.

Baird also offers a second, stronger, independent ground for finding the uncle's promise unenforceable: the uncle had fully performed. The uncle seems to have satisfied whatever obligations he owed Willie by setting him up in business, not once, but twice.

> Shortly after turning twenty-one, Willie and his father borrowed $5,000 from the uncle as part of their efforts to run a dry goods business. This loan was never repaid. When [the uncle] set up his brother and his son in business a second time, he insisted that they both sign "a good strong release."[117]

This comprehensive release discharged the uncle from all obligations and causes of action that might be brought by Willie.[118]

There is yet a third basis for finding that Willie had no claim on his uncle's estate. When Willie's first business failed, Willie filed for bankruptcy. Consequently, any legal right he had against his uncle was "necessarily turned over to his creditors. And, of course, the largest of these creditors was his uncle."[119]

In sum, *Hamer* is a case where the record can comfortably be interpreted to tell three highly plausible stories, none of which were considered by the court, all of which would deny recovery to Willie. Baird remarkably does not find this unusual. "In fashioning and explicating doctrine, we need to recognize that behind *Hamer v. Sidway* and the other great cases in the canon are many possible narratives, and judges are limited in their ability to discover them and distinguish one from another."[120] There may be more than a touch of hyperbole in Baird's insistence that cases ordinarily lend themselves "many possible narratives," but Baird's observation is nonetheless profound and unsettling. It meshes with the tenor of many contract case studies. These studies do not reflect the buoyancy of the legal realists of the last century who, like Roscoe Pound, proclaimed that:

---

[116] *Id.* (quoting Record in the Court of Appeal at 58–59, *Hamer*, 27 N.E. 256).

[117] *Id.* at 176.

[118] *Id.*

[119] *Id.*

[120] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 170–71.

> It is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons.[121]

As the case studies evidence, we are more skeptical today, more realistic than the realists of the last century, as to the limitations of the legal process to perform according to prescription, more aware of the "capability problem."

B. Example of Ortelere v. Teachers' Retirement Board[122]

Ortelere is another case where the record lends itself to multiple stories each of which plausibly suggests a different outcome than that reached by the appellate court, and each of which, given the gaps in the record, fail to capture the circumstances that motivated Grace Ortelere's election of retirement benefits. Recall Professor Baird's observation that judicial capability in sorting out the facts is severely tested when dealing with family matters.[123]

Grace Ortelere was a 60-year-old New York City schoolteacher who had been placed on leave following a nervous breakdown.[124] Her psychiatrist had diagnosed—more likely misdiagnosed—her as suffering from "involutional psychosis, melancholia type," which he treated with twelve shock treatments until belatedly recognizing that her condition may have been caused by cerebral arteriosclerosis.[125] Grace had participated in the public school

---

[121] Roscoe Pound, *The Theory of Judicial Decision: III. A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 951 (1923).

[122] Ortelere v. Teachers' Ret. Bd. (*Ortelere II*), 250 N.E.2d 460 (N.Y. 1969). See DANZIG & WATSON, s*upra* note 10, at 242, for an extended treatment of the case.

[123] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 161.

[124] *Ortelere II*, 250 N.E.2d at 461.

[125] *Id.* at 462. At trial, the psychiatrist testified Grace Ortelere suffered from:

> a nervous breakdown. Her particular type was the involutional psychosis, melancholia type. . . . [T]hat is the diagnosis we give that particular type, after the change of life. Before the change of life we call that a manic depressive psychosis . . . .
>
> . . . [T]here was a question in my mind that she probably had some hardening of the arteries of the brain, cerebral arteriosclerosis . . . . I didn't make that diagnosis at the time because of the confusion she was experiencing, and the difficulty in concentration; so I said it was a possible CAS. That is cerebroarteriosclerosis [sic]. I prescribed shock therapy with tranquilizers and I gave her a series of twelve . . . . I was thinking of giving her some more shock therapy, but . . . I didn't because naturally with a definite organic factor we don't usually give shock therapy . . . .

DANZIG & WATSON, s*upra* note 10, at 277.

retirement system for over forty years.[126] In 1965, she made an irrevocable election to take the maximum retirement benefits of $450 a month during her lifetime.[127] This decision caused "the entire reserve to fall in," with no provision for her husband Francis.[128] When Grace died a few months later, her husband Francis brought suit to void her election and reinstate her prior choice providing survivor's benefits for him.[129] The trial court held for Francis, finding Grace Ortelere "seriously sick emotionally and mentally" and "incapable of understanding and of acting with discretion."[130]

Had the Retirement Board walked away from the adverse decision of the trial court, it could have done so without concern that the judge's short, conclusory opinion would have spawned litigation by plaintiffs seeking to void irrevocable elections. But the Retirement Board, perhaps finding the evidence of rationality too powerful to be ignored by an appellate court, appealed. The Board did not dispute that Grace Ortelere suffered from mental illness.[131] Rather, it argued that in this instance it did not impair her thought processes; she knew what she was doing.[132] Grace's letter to the Board, which the trial court ignored, powerfully evidenced Grace's ability to express herself clearly and thoughtfully. It posed eight specific questions regarding her retirement options.[133] One of Grace's questions indicated that she was considering making her daughter her heir. "I am 60 years old. If I select option four-a with a beneficiary (female) 27 years younger, what is my allowance?"[134] So sophisticated were the questions posed by Grace that the Appellate Division, in reversing the trial court, praised her erudition: "In the esoteric area of retirement options, this detailed, explicit and extremely pertinent list of questions reveals a mind totally capable of making a choice suited to meet the needs of the

[126] *Ortelere II*, 250 N.E.2d at 461.

[127] *Id.* at 461–62.

[128] *Id.*

[129] *Id.* at 462.

[130] DANZIG & WATSON, s*upra* note 10, at 301–02. One of the special treats of reading this case study is that it includes extended excerpts from the trial transcript. One gets the feel of the hurried, brusque proceedings of large city courts where judges are charged with moving the calendar as well as deciding the case.

[131] Grace's condition would likely have been diagnosed differently today. *See, e.g.*, Myrna M. Weissman, *The Myth of Involutional Melancholia*, 242 JAMA 742, 742–44 (1979).

[132] Ortelere v. Teachers' Ret. Bd. (*Ortelere II*), 250 N.E.2d 460, 463 (N.Y. 1970).

[133] *Id.*

[134] *Id.* at 467 (Jasen, J., dissenting).

retiree and her family."[135] Grace's letter revealed "a mind fully in command of the salient features of the Teachers' Retirement System."[136]

Francis Ortelere nonetheless sought reinstatement of the trial court opinion, appealing to the New York Court of Appeals. There he found a sympathetic ear with Judge Breitel. That Grace understood her options was indisputable and Breitel, rejecting the psychiatric testimony, did not dispute it. "While the psychiatrist used terms referring to 'rationality,'" Breitel wrote, "it is quite evident that Mrs. Ortelere's psychopathology did not lend itself to a classification under the legal test of irrationality."[137] But this was not the end of the matter. Rather to Breitel and his colleagues on the Advisory Committee drafting the Restatement of Contracts section on incompetency to contract, existing rules were deficient; cognitive capacity should not be the only test for competency.[138] The drafters, following changes in the criminal law of insanity (subsequently rejected by most federal and state courts), sought to "modernize" the existing cognition test by adding a volitional component.[139] The proposed Second Restatement of Contracts test that Breitel embraced in his opinion allowed assent to be voided when a party is "unable to act in a *reasonable* manner in relation to the transaction."[140]

Could Francis prevail under this enlarged, supplementary test? Could he prove that Grace's election was an uncontrolled and unreasonable reaction to her mental illness? Breitel suggested he could. Applying Section 15, Breitel characterized Grace Ortelere's decision to take the maximum payment "evidently unwise and foolhardy."[141] Here Breitel went astray. The Restatement test does not void foolhardy or unwise decisions, nor does it hold that mentally ill persons cannot contract. The test is event specific; it pertains to the ability to act reasonably in a particular transaction. What then was unreasonable (or, in the court's terminology, "unwise and foolhardy") about Grace Ortelere's decision to take the maximum during her lifetime?

---

[135] Ortelere v. Teachers' Ret. Bd. (*Ortelere I*), 295 N.Y.S.2d 506, 508 (App. Div. 1968).

[136] *Ortelere II*, 250 N.E.2d at 467 (Jasen, J., dissenting).

[137] *Id.* at 464.

[138] *Id.* at 465; RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

[139] *Ortelere II*, 250 N.E.2d at 464; RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. b (1981).

[140] *Ortelere II*, 250 N.E.2d at 465 (emphasis added); RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

[141] *Ortelere II*, 250 N.E.2d at 461.

The record suggests several narratives, each of which would result in a judgment adverse to Francis Ortelere. Perhaps Grace selfishly chose to take full advantage of her annuity at the expense of her husband. A selfish decision by itself would not evidence inability to act reasonably. Indeed, under New York law a presumption arose that an incompetent would have chosen the option yielding the largest return in her lifetime.[142] Judge Breitel's narrative, however, does not admit of this interpretation. Grace had no motive to exclude her husband; they "had been happily married for 38 years."[143] How does Breitel know this? The record contains only one sentence directly on point. When counsel for Francis asked, "And what was the relationship between you and your wife?" Francis replied, "I had 40 years the most happiest life a man could have."[144] If the linchpin for Breitel's decision is finding a happy marriage, apart from her husband's statement, there is little else in the record to support that conclusion. The record, however, is replete with hints of a troubled relationship. The Board of Education physician who interviewed Grace shortly before her death (and recommended that she be allowed to return to full-time teaching) testified that Grace Ortelere told him that her nervousness and depression resulted in part from her husband's "large losses in the stock market" and his heart attack.[145] Elsewhere, Francis testified that his wife never let him get near the checkbook. She insisted on handling all their finances.[146] We also know that Grace considered bequeathing her assets to her daughter. As mentioned above, she asked the Board what her allowance would be if she selected "a beneficiary (female) 27 years younger."[147] This is enough to give one pause. By ignoring this testimony, both the majority and the dissent chose to treat the Orteleres somewhat stereotypically as a happy immigrant family undone by Grace's sudden illness and death.

Another very different narrative is also suggested by the trial testimony. It assumes that their marriage was, as Breitel found, a happy one and that Grace, far from acting selfishly, was thinking of

---

[142] Schwartzberg v. Teachers' Ret. Bd., 76 N.Y.S.2d 488, 491 (App. Div. 1948), *aff'd*, 83 N.E.2d 146 (N.Y. 1948). Today, a surviving spouse in the position of Francis might be entitled as a matter of law to some portion of his or her spouse's retirement savings. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1055 (2006).

[143] *Ortelere II*, 250 N.E.2d at 462.

[144] DANZIG & WATSON, s*upra* note 10, at 273.

[145] *Id.* at 298.

[146] *Id.* at 272.

[147] *Ortelere II*, 250 N.E.2d at 467 (Jasen, J., dissenting).

her husband's welfare when she took the maximum election. Believing that her husband had suffered a heart attack, she assumed that she would outlive him. If so, then electing the maximum election would allow them both to be better off during their time together and for her to be better situated as a survivor.[148]

Finally, there is some evidence in the record that Grace Ortelere had recovered from her nervous breakdown. Grace Ortelere sought to return to teaching. Grace was examined by a Board of Education physician who found that she had fully recovered and was able to resume her duties. This physician testified that Grace reported that her "depression and nervousness followed a heart attack had by her husband and his large losses in the stock market" and that "she had shaken off her worries concerning the stocks" and "felt that she could return to [teaching] without any trouble."[149] Grace also reported that "she had had her house redecorated, that she shopped, that she had been seeing friends and playing cards, that she went and visited her daughter and her grandchildren, and that she had done some painting of pictures."[150] Grace was "quite alert, by which I would mean that she answered my questions . . . without any hesitation, and that she did not contradict herself. She didn't appear at all depressed. Neither did she appear euphoric—with her head in the clouds. She didn't claim that everything was perfect."[151] Both the trial court and the Court of Appeals ignored this testimony.

In sum, *Ortelere* is a case where very different narratives hover over Grace's election to take maximum benefits and it may well be that the court did not select the most plausible one.

C. Example of Mills v. Wyman[152]

Mills v. Wyman is a nineteenth century foundational opinion for understanding consideration doctrine. Levi Wyman, having fallen ill "[o]n his return from a foreign country," was "give[n] . . . shelter and comfort" by a stranger, the plaintiff Daniel Mills.[153] When Mills informed Levi's father of his son's circumstances, the father,

[148] *Id.*

[149] DANZIG & WATSON, s*upra* note 10, at 298.

[150] *Id.*

[151] *Id.*

[152] 20 Mass. (3 Pick.) 207 (1825); *see* Geoffrey R. Watson, *In the Tribunal of Conscience:* Mills v. Wyman *Reconsidered*, 71 TUL. L. REV. 1749 (1997). For a shorter article discussing the case, see DANZIG & WATSON, *supra* note 10, at 126.

[153] *Mills*, 20 Mass. (3 Pick.) at 209.

"influenced by a transient feeling of gratitude," promised to reimburse Mills for the expenses he had incurred.[154] He failed to do so and Mills sued, unsuccessfully, for breach of contract. The Massachusetts Supreme Court treated the father's promise as a gift promise, unsupported by consideration. It was made after Mills had fully performed. Mills would have to settle for being a Good Samaritan for whom virtue was his only reward. In language echoed by hundreds of opinions, the court stated that "[i]t is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity."[155] The defendant did have a moral obligation to keep his promise, but as a matter of law, such obligations are left to the promisor's internal "tribunal of conscience."[156]

The case is of interest because, like *Hamer v. Sidway* and *Ortelere v. Teachers' Retirement Board*, the record lends itself comfortably to narratives other than and inconsistent with that expounded by the court. It is puzzling why the court treated Seth Wyman's commitment as a promise to pay for services rendered when it would be no stretch to interpret the precise language of the promise as seeking an exchange. Seth Wyman, after noting in his response to Mills that he could not come to visit his son, wrote: "I wish you to take all possible care of him and if you cannot have him at your house I wish you to remove him to some convenient place and if he cannot satisfy you for it I will."[157] The Court treated this as a promise to pay for services rendered—"past consideration," an oxymoron—but, as Professor Geoffrey Watson argues, the letter can more plausibly be read as "procuring *future* services from Daniel Mills—i.e., that he either 'have him at your house' or 'remove him to some convenient place.'"[158] Professor Watson concludes that Seth Wyman "can be more fairly said to have been bargaining for future conduct and for real consideration than to have been making a

[154] *Id.*

[155] *Id.* at 210.

[156] *Id.* The supreme court notes at several points that Levi Wyman died while in Mills' care, a fact which perhaps suggests why Levi Wyman's father did not keep his promise. Perhaps Seth Wyman faulted the treatment his son received. But, as it turns out, Levi Wyman did not perish. Professor Watson discovered that Levi Wyman recovered, left Hartford in good health, and returned to Springfield where he married and lived on for many a year, rather unproductively it appears, as a "spendthrift and drunkard." Watson, *supra* note 153, at 1757. Why the supreme judicial court went astray in stating that Levi had died while in Mills' care remains a mystery even to such a dedicated investigator as Professor Watson.

[157] Watson, *supra* note 152, at 1760 & n.72.

[158] *Id.* at 1761.

sterile promise to pay for past services."[159] This interpretation is supported by the concluding line of Seth's letter: "I want that you should write me again immediately how he does . . . ."[160] Here Seth sounds like a concerned father, willing to do what is needed to care for his son.[161]

Still another way of reading the record is proposed by Professor Douglas Baird, who finds the court's statement of facts "exceedingly odd."[162] Baird notes that we know only that Mills is a stranger who has no obligation to the ailing Levi Wyman but who nonetheless assumes responsibility as a Good Samaritan at substantial expense to himself.[163] About the father, we know only that he lives away from Hartford and that, although not obligated to care for his adult son, he nonetheless promises to reimburse Mills. Given these facts, one would expect the parties to perform. But they do not. The grateful parent reneges; the Good Samaritan acts as if he were in it for the money. Baird, puzzled by this turn of events, spotlights a "crucial" fact unstated in the court's opinion.[164] The plaintiff was an innkeeper who earned his living from his lodgers. He likely expected Levi Wyman would pay for his lodging. Instead, Mills gets stuck with a lodger who needs continuing care. Mills then turns to the father for intervention. The father, not recognizing Mills as an innkeeper who expects payment, enlists his further aid, one

---

[159] *Id.*

[160] *Id.* at 1761 & n.72.

[161] *See id.* In many casebooks, the *Mills* decision is followed by *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935), which creates an exception to the consideration rule promulgated in *Mills*. McGowin's promise to Webb, like the promise made by the defendant Seth Wyman to Mills, was made after Webb performed and therefore does not qualify as consideration. The exception that the court created applies when the plaintiff's performance confers a material benefit on the defendant and the defendant subsequently promises to compensate the plaintiff for the benefit. *Id.* at 198. The case study of *Webb v. McGowin* in DANZIG & WATSON, drawing on the record, suggests that McGowin's executor would likely have prevailed but for two strategic decisions made by his attorney. DANZIG & WATSON, *supra* note 10, at 170–72. If counsel had let the case go to trial, rather than simply demurring on grounds of lack of consideration, Webb would likely have been unable to prove that his split second decision to risk his life to save that of his employer was made with compensation for his services in mind. Second, the estate could likely have set up the Workman's Compensation Act at trial as a defense. Under the law, this was the plaintiff's exclusive remedy. *Id.* at 171. Most likely, the lawyers felt that the consideration argument was strong enough to sustain the demurrer and they wished to avoid a trial because it would have delayed closing the estate. *See generally* Clay B. Tousey, III, *Exceptional Circumstances: The Material Benefit Rule in Practice and Theory*, 28 CAMPBELL L. REV. 153, 160–64 (2006) (exploring various theories for the material benefit rule, including moral obligation).

[162] Douglas G. Baird, *Reconstructing Contracts:* Hamer v. Sidway, *in* CONTRACTS STORIES, *supra* note 10, at 171.

[163] *Id.*

[164] *Id.* at 172.

gentleman to another, to "take all possible care" of Levi "and if you cannot have him at your house I wish you to remove him to some convenient place and if he cannot satisfy you for [the expenses] I will."[165] Mills, the innkeeper, believes he has been promised reimbursement for all his expenses. Baird acknowledges that "[t]his account of *Mills v. Wyman* may be no more accurate than the conventional one"[166] It does not change the outcome; Innkeeper Mills still loses, as Seth Wyman's promise is not supported by consideration.[167] But the cloud placed on Seth Wyman's reputation by the strong criticism in Judge Parker's opinion recedes.[168]

IV. ERROR IS A CHARACTERISTIC OF LEGAL PRACTICE.

Typically, the judicial opinion does not address the performance of the attorneys. Deficiencies ordinarily become apparent only through examination of the record. By deficiency, I do not mean errors that would support a finding of malpractice, nor do I have in mind questionable strategic decisions. The measure is closer to indisputable error, as evidenced by the cases discussed below, when counsel conflated tort and contract damages, filed suit after the statute of limitations had run, sued the wrong defendant, or chose the wrong cause of action.

Scholarly research notes error in the context of specific cases but does not attempt to chart it in the aggregate. Thus the legal process map has a huge gap. As a matter of speculation, it is probably accurate to state that error is a characteristic of legal practice, as it is of medical practice, and should be treated as commonplace rather than extraordinary.

A. Example of Sullivan v. O'Connor[169]

Sullivan v. O'Connor provides an erudite introduction to contract remedies in what appears to be a garden-variety medical malpractice case. The plaintiff, Alice Sullivan, a middle-aged,

---

[165] *Id.* at 172–73.

[166] *Id.* at 174.

[167] *Id.* at 171.

[168] Another decision that may lend itself to multiple narratives is *Alaska Packers' Ass'n v. Domenico,* 117 F. 99 (9th Cir. 1902). The fact pattern is generally understood as a classic example of duress. *Id.* at 100–01. Professor Threedy's research, however, suggests several alternative interpretations that render the seamen's refusal to continue working unless their wages were doubled defensible. Threedy, *A Fish Story*, *supra* note 13, at 205–20.

[169] 296 N.E.2d 183 (Mass. 1973).

sometime entertainer, sought to improve her appearance.[170] She found her nose unattractive and wanted it shortened. Dr. O'Connor, a plastic surgeon, undertook to achieve the desired result in two operations, but the results were disappointing. A third operation was needed to undo the effects of the first two, but it too worsened her condition. Alice Sullivan's nose, the Massachusetts Supreme Judicial Court reported, "now had a concave line to about the midpoint, at which it became bulbous[,] . . . flattened and broadened . . . ."[171] "Like she had been hit by a shovel," according to one juror. [172]

Although Sullivan's suit against O'Connor was a picture-perfect malpractice case, her counsel, out of habit more than reflection, included a breach of contract claim as well.[173] "A lot of lawyers," he explained, "thought you could only get damages for the amount of the fee. I know [opposing counsel] thought so. But I always assumed you . . . get all the damages flowing from the breach."[174] Counsel for Dr. O'Connor was surprised to see the contract count included, and asserted that he devoted eighty-eight pretrial hours of "'substantial research' to the contracts damage issue."[175] This research convinced him that a favorable verdict for Alice Sullivan on the contracts claim would be limited to her medical expenses. Recovery would embrace more than the fee, since Sullivan paid hospital costs, but it would exclude compensation for pain and suffering and it would deny her the typical contract remedy of the benefit of her bargain (the difference in value between her condition as promised and her condition following the surgery).[176] Reassured by his extended, erroneous research, defendant's counsel advised his client not to make a settlement offer. Subsequently, he was surprised by the trial court's refusal to limit the jury to medical expenses on the contract count and shocked by the opinion of the Massachusetts Supreme Court that posited a far more expansive theory of recovery based on either the expectation or reliance interest of the plaintiff.[177]

---

[170] *Id.* at 184.

[171] *Id.* at 185. Interviews with the attorneys for both parties revealed basic misunderstanding of the law, perhaps enough to bring a suit for malpractice against their contract and tort professors.

[172] DANZIG & WATSON, *supra* note 10, at 26.

[173] *Id.* at 18.

[174] *Id.*

[175] *Id.* at 19.

[176] Sullivan v. O'Connor, 296 N.E.2d 183, 189–90 (Mass. 1973).

[177] DANZIG & WATSON, *supra* note 10, at 20.

The trial judge, a graduate of Yale College and Harvard Law School, "report[ed] that he became concerned about the contract claim during the first day of the proceeding[]."[178] He had no informed sense of how to charge the jury as to the measure of damages and called upon the attorneys for the parties to assist him. They agreed to research the question, but their efforts were modest and of no value. But for the judge's research, the leading case *Hawkins v. McGee*,[179] would not have been found. There the plaintiff Hawkins agreed to undergo surgery to remove scar tissue based on Dr. McGee's guarantee that the result would be "a hundred per cent perfect hand."[180] The surgery was unsuccessful and the court awarded Hawkins his lost expectancy, the difference in value between the hand as promised and its value in a worsened condition, far more than either attorney contemplated.

The jury found for O'Connor on the malpractice count,[181] presumably on the ground that there was no negligence in his performance. It returned a verdict for Alice Sullivan on the contract count, however, awarding her damages of $13,500, which combined elements of the reliance and expectation interests.[182] The judge and the lawyers can be forgiven for being unfamiliar with the "reliance interest" highlighted in Justice Kaplan's opinion for the Massachusetts Supreme Judicial Court. It was an uncommon measure of recovery that may not have been emphasized in law school. But the lawyers surely should have known the difference between tort and contract damages.

B. Example of Harrington v. Taylor[183]

Harrington v. Taylor is not a leading case, but on its facts it is nearly identical to a leading case, *Webb v. McGowin*,[184] which introduces students to an exception to the consideration requirement. This exception, often referred to as promissory restitution or the material benefit rule, is a minority rule. It allows a plaintiff to recover damages in situations where the plaintiff's performance was not the subject of an exchange, provided that the defendant received a substantial benefit not intended as a gift and

[178] *Id.*
[179] 146 A. 641 (N.H. 1929).
[180] *Id.* at 643.
[181] DANZIG & WATSON, *supra* note 10, at 21.
[182] *Id.* at 40.
[183] (*Harrington I*) 36 S.E.2d 227 (N.C. 1945).
[184] 168 So. 196 (Ala. Ct. App. 1935).

subsequently promised to compensate the plaintiff for the benefit.[185] *Harrington* follows the traditional rule, denying recovery because the plaintiff's performance was rendered prior to and not in exchange for the defendant's promise to compensate the plaintiff.

The per curiam opinion of the North Carolina Supreme Court's rivals *Palsgraf*[186] in compactness and impersonality of the statement of facts. No mention is made of the race or social class of the parties or their ongoing relationships; in fact, all were impoverished African-Americans, friends and neighbors, living in the small town of Hamlet, North Carolina. The opinion reads:

> The defendant . . . assaulted his wife, who took refuge in plaintiff's house. The next day the defendant gained access to the house and began another assault upon his wife. The defendant's wife knocked him down with an axe, and was on the point of cutting his head open or decapitating him while he was laying on the floor, [when] the plaintiff intervened, [she] caught the axe as it was descending, and the blow intended for [the] defendant fell upon her hand, mutilating it badly, but saving defendant's life.
>
> Subsequently, defendant orally promised to pay the plaintiff her damages; but, after paying a small sum, failed to pay anything more.[187]

The legal analysis, equally terse, found the defendant's promise unenforceable as it was made after plaintiff had fully performed. The defendant, the court said, should "be impelled by common gratitude" to reward the plaintiff as promised, but "a humanitarian act of this kind, voluntarily performed," does not constitute consideration.[188]

Since the parties were both of little means, one would likely assume that the plaintiff's lawyer would make little of the matter. But in fact he labored hard and long on her behalf. His shortcoming was legal acumen. Counsel marshaled arguments on three independent theories of recovery: contract, restitution, and tort.[189] Counsel can perhaps be excused for not citing the leading case,

---

[185] RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

[186] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[187] *Harrington I*, 36 S.E.2d at 227.

[188] *Id.*

[189] Harrington v. Taylor (*Harrington II*), 40 S.E.2d 367 (N.C. 1946). When the North Carolina Supreme Court ignored his tort argument in its opinion, counsel returned to the trial court to press again an action in tort and was again nonsuited. *See* DANZIG & WATSON, *supra* note 10, at 195, 204. Once more, he appealed to the North Carolina Supreme Court, which again found for the defendant. *Id.* at 204, 211.

Webb v. McGowin, which was on all fours as much as a precedent can be and which would have resulted in a decision for the plaintiff.[190] *Webb* is not mentioned in the twelfth volume of *American Jurisprudence, Contracts*, counsel's principal research source, but the material benefit rule is referenced and counsel did note its applicability.[191] The sole case counsel cited as precedent, however, an 1878 decision of the North Carolina Supreme Court, was easily distinguishable and the court did not bother to reference it in its conclusory opinion.[192] The counsel's argument, the bulk of which was based on *quasi contract* and tort, was put forth vigorously, but was also overstated, oversimplified, and just plain wrong. In the tort action, counsel sued the wrong party. Counsel argued that "it is well recognized that if a person assaults one person and in so doing strikes a third person, he is liable to the third person"[193] True enough, but the rule does not apply to a situation where the defendant is the victim and not the perpetrator. As the North Carolina Supreme Court noted in the first line of its *per curiam* opinion: "The action is against the defendant [who was struck by the axe] and not his wife who inflicted the injury [on the plaintiff]."[194]

---

[190] In both cases, the plaintiff bravely intervened to save the defendant from an injury likely to have resulted in death. And in both cases the plaintiff suffered serious injury and the rescued party gratefully promised to compensate his benefactor and partially performed. The difference is in the result: Webb prevailed; Harrington did not. *Webb* is introduced into the contracts curriculum as an exception to the bargained-for-exchange requirement of consideration. Consideration is absent in both *Webb* and *Harrington*, as the plaintiff's rescuing performance preceded the defendant's promise and was not induced by it. Such a promise is said to create a moral obligation only. The *Webb* court, drawing on the restitution cases, broke with precedent and granted relief to the promisee on the ground that the promisee conferred a material benefit, not intended as a gift. Webb v. McGowin, 168 So. 196, 199–200 (Ala. Ct. App. 1935). The receipt of the benefit coupled with the defendant's subsequent promise to pay, was held sufficient for recovery. *Id.* Section 86 of the Restatement (Second) of Contracts adopts this rule, aptly designating it "promissory restitution." RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

[191] DANZIG & WATSON, *supra* note 10, at 191–95.

[192] *Id.* In *Jacob Kull & Sons v. W.D. Farmer*, 78 N.C. 339, 340 (1878), the North Carolina Supreme Court enforced a gratuitous promise to pay a prior legal obligation that would have been or was discharged in bankruptcy. The existence of a prior legal obligation has been long treated as a basis for enforcement because consideration once existed and was voluntarily reinstated by the defendant's promise. *See generally* JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, § 5.5, at 235 (5th ed. 2003) ("[A] promise to pay a debt discharged in bankruptcy . . . is enforceable without consideration" because traditionally, "an antecedent debt is sufficient consideration for a subsequent promise to pay.").

[193] DANZIG & WATSON, *supra* note 10, at 207.

[194] *Harrington II*, 40 S.E.2d at 367.

C. Example of Peevyhouse v. Garland Coal and Mining Co.[195]

Peevyhouse presents the rather dry issue of how to compute damages when a contractor's performance is deficient or incomplete. The general rule in the abstract is easy enough to master. The plaintiff's recovery is to be measured by the cost of remediation or completion, except when this amount is excessive in relation to the diminution of the market value of the property caused by the breach.[196] Dry as the damage issue may appear, *Peevyhouse* has become one of a handful of contracts cases that ignites readers' sense of injustice. Garland Coal Company ("Garland") unapologetically left the Peevyhouses' land in shambles, unusable for pasture or farming, when it concluded strip-mining. "It's just not right," Willie Peevyhouse said, "to do something with land that makes it useless for the future."[197] Here, it appears, that large, heartless corporate executives took advantage of the little guy and the Oklahoma Supreme Court let them get away with it.[198]

This stereotype, however, is not an exact fit. The Peevyhouses were not country bumpkins and Garland was not a giant company, nor all that villainous. The story line is the quality of representation by counsel for the plaintiffs.[199] The Peevyhouses

---

[195] (*Peevyhouse I*) 382 P.2d 109 (Okla. 1962); *see* Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille,* 89 NW. U. L. REV. 1341 (1995) [hereinafter Maute, Peevyhouse *Revisited*]; *see also* Judith L. Maute, *The Unearthed Facts of* Peevyhouse v. Garland Coal & Mining Co., *in* CONTRACTS STORIES, *supra* note 10, at 265 (shortened revision).

[196] RESTATEMENT (SECOND) OF CONTRACTS, § 348(2)(b) (1981) would allow recovery of "the reasonable cost of completing performance"—here, restoring the land to its prior condition—"if that cost is not clearly disproportionate to the probable loss in value to [the owner]." The casebook editors typically juxtapose *Peevyhouse I* with *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939), which adopts a different test, and which, like *Peevyhouse I*, seems wrongly decided on its facts. In *Groves*, the court awarded the cost of remediation for a commercial property even though the amount greatly exceeded the loss in market value of the property. *Id.* at 236–38. In *Peevyhouse I*, the plaintiff who lived on land that had been left ravaged by strip mining in breach of contract, was treated like a corporation and limited to the diminished value of the land, a pittance of $300. 382 P.2d at 114.

[197] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1406.

[198] Longstanding rumors among the profession and in the media that several judges on the Oklahoma Supreme Court had been taking bribes came to fruition with the indictment of three members of the court, two of whom voted with the *Peevyhouse I* majority in favor of Garland. *Id.* at 1457–58.

[199] Several case studies note the imbalance in skills between the attorneys for the parties. Professor Threedy concludes that a "common capability problem unearthed during legal archeology is that of 'unequal' adversaries. Indeed, this problem occurs with distressing regularity." Threedy, *Excavating Cases*, *supra* note 40, at 1210 (citation omitted). Professor Victor Goldberg finds that untoward results occur even when the playing field is level in the sense that both parties enjoy adequate resources. GOLDBERG, *supra* note 10, at 328. Studying this later group of cases may illuminate more deeply embedded "capability"

lived in Stigler, a small town in southeastern Oklahoma, where they owned 120 acres on which they "lived, farmed, and grazed cattle. In 1954 they leased sixty acres to Garland . . . for stripmining . . . ."[200] They refused the standard payment of $3,000 that Garland offered as compensation for damage to the land based on the current market price of fifty dollars an acre and insisted instead that Garland promise to restore the land.[201] Cost of remediation being far in excess of the diminished value of the land, Garland had an incentive to breach, which it did. The Peevyhouses then brought suit for $25,000.[202]

At trial, Garland offered no excuse, acknowledging that it had breached. The sole issue for the jury was the measure of damages. The Peevyhouses sought reclamation damages; Garland argued that recovery should be limited to the diminished value of the land resulting from the breach.[203] The trial court allowed the jury to consider both tests and entered judgment on its $5,000 verdict.[204] Both sides appealed. The Oklahoma Supreme Court affirmed judgment for the Peevyhouses, but insisted on diminished market value of the acreage, not the cost of remediation, as the measure of recovery, and the court reduced damages to $300.[205]

The Oklahoma Supreme Court's decision was not as unjust as it may appear. Indeed, it was "arguably defensible," Professor Maute concludes, given the deficiencies in the record.[206] Maute found the trial record meager, confusing, inaccurate, and incomplete. These deficiencies were not for want of vigor. Counsel tenaciously pursued relief for the Peevyhouses over a six-year period. But his path was strewn with failure. Counsel failed to introduce evidence critical to proving that remediation was an essential part of the bargain, not merely an incidental obligation of the defendant.[207] Then, instead of accepting a respectable trial court judgment in favor of the Peevyhouses of $5,000, counsel appealed to the Oklahoma Supreme Court, which, as indicated, reduced the award to $300.[208] Next, he

problems.

[200] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1345.

[201] *Id.* at 1347.

[202] *Id.* at 1345.

[203] Peevyhouse v. Garland Coal & Mining Co. (*Peevyhouse I*), 382 P.2d 109, 111 (Okla. 1962).

[204] *Id.*

[205] *Id.* at 114.

[206] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1347.

[207] *Id.* at 1414–15.

[208] *Peevyhouse I*, 382 P.2d at 111, 114.

filed a petition for rehearing in the high court that won him another oral argument, but not a victory.[209] He then filed a petition for a writ of certiorari in the United States Supreme Court that was promptly denied.[210] Next, he brought suit in the federal district court, this time seeking specific performance and in the alternative money damages.[211] This suit was dismissed. And, finally, he appealed to the Tenth Circuit which affirmed the dismissal.[212]

Along the way, he made a number of errors—in Professor Maute's words, "fact-gathering, legal knowledge, and advocacy skill[]"—which just about covers the waterfront.[213] The following are some examples: (1) counsel filed a tort claim after the statute of limitations had run on the erroneous assumption that the statute of limitations was five years when in fact it was two years; (2) he grossly exaggerated the cost to complete the remedial work and then insisted on taking an appeal after the jury had awarded the Peevyhouses an appropriate amount to remediate of $5,000; and (3) he lacked familiarity with the parol evidence rule.[214] Evidence critical to the plaintiff's case was excluded under the parol evidence rule because counsel did not raise well-recognized exceptions permitting admission of evidence. Most critical, Professor Maute states, was his failure to introduce evidence showing that "[t]he Peevyhouses . . . gave up a $3,000 . . . payment for surface damages [expressly in exchange] for Garland's [promise of] remedial work."[215]

In retrospect, perhaps counsel's major error occurred at his initial meeting with the Peevyhouses at his law office. The Peevyhouses were then considering a settlement offer that Willie Peevyhouse had managed to wrest from Garland for $3,000, a sum at the time likely sufficient for Willie to contract out the work and achieve full remediation of the land.[216] The offer was conditioned on the Peevyhouses executing a full release and indemnification. Counsel, however, advised against signing this release because it might expose the Peevyhouses to suit by their neighbors for damage done to their land arising from Garland's diversion of a creek on the

[209] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1402.

[210] Peevyhouse v. Garland Coal & Mining Co. (*Peevyhouse II*), 375 U.S. 906 (1963).

[211] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1404–05.

[212] Peevyhouse v. Garland Coal & Mining Co. (*Peevyhouse III*), 356 F.2d 979, 980 (10th Cir. 1966) (citation omitted).

[213] Maute, Peevyhouse *Revisited*, *supra* note 195, at 1451.

[214] *Id.* at 1375 n.133, 1397–98, 1415–16.

[215] *Id.* at 1390. Counsel for Garland was not free from error. In his appeal brief, he "mislabeled a valuation figure, which . . . misled and confused the court." *Id.*

[216] *Id.* at 1370.

Peevyhouse land.[217] Whether this advice was prudent cannot at this late date be determined. But as the Peevyhouses were not in fact sued by their neighbors, if they had ignored counsel's advice and signed the waiver, they would have recovered $2,700 more than the court awarded, been spared years of heart-rending litigation, attorney fees, and, perhaps most important, had full enjoyment of their land.[218]

V. THE RECORD DOES NOT REVEAL THE ACTUAL NATURE OF THE TRANSACTION, THEREBY IMPAIRING JUDICIAL CAPABILITY TO DECIDE THE CASE CORRECTLY.

The common thread for the cases discussed below is that the court is in the dark as to the actual transaction. Reasons for this vary. Sometimes one or both parties withhold critical facts. Sometimes judicial incapacitation flows from failure of counsel to adequately

---

[217] *Id.*

[218] Three other cases warrant brief mention. Professor Robert Hillman offers an example of apparently deficient lawyering in *Forman v. Benson*, 446 N.E.2d 535 (Ill. App. Ct. 1983), a sale of land case in which the buyer Forman sought specific performance of a contract to convey specific land. Benson's obligation to perform was conditioned on his approving the buyer's credit report. *Id.* at 537. Benson withheld his approval because the credit report revealed that Forman had liabilities well in excess of liquid assets. *Id.* at 538. He did not, however, call the deal off but instead sought a higher price. The appellate court treated Benson's attempt to renegotiate a higher price for the sale of land as bad faith because his disapproval was based on reasons other than Forman's poor credit rating. *Id.* at 540. Hillman notes, however, that the court ignored an important point in the seller's brief: "Benson was fully justified in seeking a higher price in light of [his] greater-than-anticipated credit risk." Robert A. Hillman, *Approaches to Teaching Contracts: Enriching Case Reports*, 44 ST. LOUIS. U. L.J. 1197, 1199 (2000). This important point, his students note, was made weakly in the brief, suggesting poor advocacy. Hillman agrees, stating that "it is difficult to imagine a more ambivalent presentation of the point that Benson was fully justified in rejecting the credit report" *Id.* But, Hillman adds, the facts suggest more than the obvious conclusion that poor advocacy can affect the result. Benson's lawyer may have been tentative in his brief because Benson in fact did act in bad faith. *Id.*

Another well-known case where attorney error may have influenced the outcome is *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996). Here, both the buyer and the seller assumed that the retailer, by putting software for sale on the shelf in his store, was making an offer to its customers. *Id.* at 1450. This is contrary to the general rule that advertisements and the display of goods are invitations for offers. *See* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000). The parties, by treating the retailer as the offeror, facilitated Judge Easterbrook's conclusion that the purchaser was bound by the seller's terms specifying mode of acceptance. *ProCD*, 86 F.3d at 1452–53. In *Klocek*, a dispute factually similar to *ProCD*, the court critically observed that "the Seventh Circuit provided no explanation for its conclusion that 'the vendor is the master of the offer,'" and noted that "as [a] general rule orders are considered offers to purchase." 104 F. Supp. 2d at 1340 (citation omitted). The record in *ProCD*, however, indicates that it was the parties, not the trial court or the Seventh Circuit, who so decided. 86 F.3d at 1452; *see* Richard A. Epstein, ProCD v. Zeidenberg*: Do Doctrine and Function Mix?*, *in* CONTRACT STORIES, *supra* note 10, at 94.

present the case. Sometimes extensive knowledge of context and setting may be required and the need to turn to external sources may not be apparent. Whatever the cause, this phenomenon is difficult to detect even with full access to the record. Professor Marvin Chirelstein suggests, as has been observed in this essay, that many of the stories told in the cases, "perhaps most, are either partly false or (more often) true as far as they go but not the whole story by any means."[219] "[S]kepticism," he adds, though "rather a sour habit of mind to go about the world with . . . is a necessary component of the professional outlook."[220]

The terse decision in the well-known case of *Kirksey v. Kirksey*[221] has led generations of readers to speculate, erroneously it now appears, on the nature of the agreement between Isaac Kirksey and his recently widowed sister-in-law Angelico. But for the perseverance of Professors William Casto and Val Ricks, we would still be speculating on why the defendant unceremoniously ousted his sister-in-law from the house and land he had so generously made available to her and her nine children.[222] *Wood v. Lucy, Lady-Duff Gordon*[223] represents a similar kind of incapability, one where the judges could not gather from the record the true nature of the agreement. Lucy, a well-known and successful designer of women's apparel gave an "exclusive right" to Wood to market her fashions. The agreement, though containing a number of terms relating to Wood's obligations once he had marketed Lucy's products, omitted any commitment by Wood to bring them to market. When Lucy seized on this omission to cut a more favorable deal with Sears, taking advantage of the omnipresence of the Sears' catalog in homes across the county, Justice Cardozo refused to release her. He found the contract "instinct with an obligation" by Wood and implied a promise by Wood to use best efforts to license the use of the defendant's name in connection with the manufacturing of women's garments, fabrics and the like.[224] What Cardozo didn't know, and what generations of contracts professors did not know before Professor Victor Goldberg published his research, is that Wood knew well how to draft a best efforts clause, having done so in other

[219] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 229 (5th ed. 2006).

[220] *Id.*

[221] 8 Ala. 131 (1845).

[222] William R. Casto & Val D. Ricks, *"Dear Sister Antillico . . .": The Story of* Kirksey v. Kirksey, 94 GEO. L.J. 321 (2006).

[223] 118 N.E. 214 (N.Y. 1917).

[224] *Id.* at 214 (quoting Moran v. Standard Oil Co., 105 N.E. 217, 221 (N.Y. 1914)).

contracts.[225] His omission of a best efforts clause in the contract that he drafted was likely deliberate and not the innocent oversight that Cardozo attributed to him.

A. Example of Kirksey v. Kirksey

One would not think that a nine line, single paragraph opinion by a mid-nineteenth century Alabama judge who disagreed with the majority would become a famous contracts case, or that its fame would derive not from any doctrinal postulates, but rather from the factual obscurity of what transpired between the Kirksey in-laws. The case turns on an interpretation of Isaac Kirksey's letter to his sister-in-law Antillico Kirksey ("an aberrant spelling of *Angelico*").[226] Isaac, having learned of his brother's death, wrote his bereaved sister-in-law, inviting her to give up her current residence and come with her children to live in a more comfortable house that he would provide. Isaac's motivation in extending this invitation was clouded in ambiguity. "I feel like I want you and the children to do well"[227] sounds benevolent and familial. "I have more open land than I can tend"[228] carries a hint of self-interest; perhaps Isaac wanted Angelico and her brood to work the land in exchange for comfortable housing. Angelico did move her family and set up house, but, within two years, Isaac changed his mind and forced her to pack up and move to a house "not comfortable, in the woods, which he afterwards required her to leave."[229] The house lacked outhouses and was distant from the land she had been farming.[230] Following this unceremonious eviction, Angelico sued Isaac for breach of contract.

Judge Ormand's opinion for the court is something of an oddity; he begins by noting his disagreement with it. Ormand would have found for Angelico.

> The inclination of my mind, is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is . . . sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she

[225] GOLDBERG, *supra* note 10, at 53.
[226] Casto & Ricks, *supra* note 222, at 324.
[227] 8 Ala. at 132.
[228] *Id.*
[229] *Id.*
[230] Casto & Ricks, *supra* note 222, at 340 (citation omitted).

could raise her family.[231]

But the majority disagreed, perceiving only generosity in Isaac's proposal. His promise was "a mere gratuity."[232]

Because the court's opinion offered no explanation for Isaac's apparently mean-spirited change of heart, it has provoked much speculation as to what may have occurred. Professor Chirelstein, for example, surmised that "the two former in-laws at some point formed a 'relationship', that the relationship later broke down, and that the defendant . . . took steps to eliminate all ties."[233] A reasonable enough assumption, but Isaac had just remarried shortly before learning of his brother's death. Others treated the transaction as a bargained-for exchange in which Isaac provided a house in exchange for Angelico's promise to work his land. Also reasonable, but Isaac was a large slaveholder who had no need of additional farm labor.[234] In actual fact, as Professors Casto and Ricks discovered, Isaac was proposing a deal, not making a gift promise, and what he desired had nothing to do with love or labor.[235] It all had to do with land preferences.

Isaac wanted Angelico to help him acquire title to federal land. The reference in his letter to Angelico to "open land" was to "land open to the public for settlement" under the federal preference acts.[236] The preference laws enacted by Congress throughout the first half of the nineteenth century granted individuals illegally squatting on federal land a preemption right in preference to all others; this permitted them to acquire the land at highly favorable prices.[237] Isaac wanted the land in question for himself, but he could only lay claim by squatting and this he did not want to do. His letter then was an offer for his sister-in-law to squat on open land and gain a preference that she would then transfer to Isaac. In exchange, Isaac would "let [her] have a place to raise [her]

[231] *Kirksey,* 8 Ala. at 133 (Ormond, J., dissenting). As we have seen in other cases discussed herein, counsel and judges alike miss citing a case that is on point. *Brown v. Adams*, 1 Stew. 51 (Ala. 1827), is a decision that supports Judge Ormand's position, but was overlooked by counsel. Today, a court would likely find for Angelico based on promissory estoppel.

[232] *Kirksey*, 8 Ala. at 131.

[233] CHIRELSTEIN, *supra* note 219, at 17 n.2.

[234] Casto & Ricks, *supra* note 222, at 332 ("In 1830, [Isaac] owned thirteen slaves.").

[235] *Id.* at 346.

[236] *Id.* at 344.

[237] *See, e.g.*, Preemption Act of 1841, ch. 16, § 9, 5 Stat. 455 (repealed 1891); Casto & Ricks, *supra* note 222, at 346–47 (considering *Kirksey* in light of the various preference laws in effect in the 1830s and 1840s).

family,"[238] most likely as long as she wished. This was the offer that Angelico accepted. Under federal law, this practice was permissible and commonplace.

What then made the deal go sour? A change in the law limited preemption to individuals who owned less than 320 acres and Isaac was a large landowner.[239] But this same enactment law gave Angelico a right to the land on which Isaac placed her at the same attractive, discount price. Had Isaac not evicted her, she could have secured the preference in her own name and Isaac would have lost the benefit of their bargain. Consequently, he moved quickly to evict her and install his twenty-one year old son on the land in the hopes his son could secure a preference and keep the land in the family.[240]

Had Angelico alleged the actual agreement made, that she came as a placeholder, she could have argued that she suffered a detriment induced by Isaac's promise. Why did counsel not argue this point? Professors Casto and Ricks think that counsel desisted because what Angelico wanted was the land itself and acknowledging that she had come as a placeholder for Isaac would have excluded her.[241] The same newly enacted law that excluded Isaac because his land holdings exceeded 320 acres also excluded Angelico: "any person claiming the benefit of this act . . . shall make oath before the . . . register of the land district . . . that . . . she settled upon and improved said land . . . in good faith to appropriate it to . . . her own exclusive use or benefit."[242] The wording of Angelico's complaint supports their interpretation:

> Rather than allege as a consideration that Isaac wanted Angelico to preserve a possible preemption right in the land he allowed her to possess—a consideration a judge might . . . find [to be] meretricious, given the settler's oath—Angelico's lawyer alleged only the consideration of her inconvenience in moving her family.[243]

And whether that was "sufficient consideration"[244] became the issue of the case. Today, counsel might have argued that Isaac was excused from performance on grounds either of frustration or

---

[238] Kirksey v. Kirksey, 8 Ala. 131, 132 (1845).
[239] Preemption Act of 1841, ch. 16, § 10, 5 Stat. 453, 456 (repealed 1981).
[240] Casto & Ricks, *supra* note 222, at 349.
[241] *Id.* at 352.
[242] Preemption Act of 1841, ch. 16, § 13, 5 Stat. 453, 456 (repealed 1891).
[243] Casto & Ricks, *supra* note 222, at 353.
[244] Kirksey v. Kirksey, 8 Ala. 131, 133 (1845) (Ormand, J., dissenting).

impossibility by supervening illegality.

Members of the jury may have been familiar enough with perfecting preferences to understand what the parties intended in their agreement, as they awarded Angelico the exact amount she would need to purchase the property or make a substitute land purchase.[245] But if so, they, like the court, had no help from the parties.

B. Example of Wood v. Lucy, Lady Duff-Gordon[246]

In this famous case, the defendant Lucy, Lady Duff-Gordon ("Lucy") granted Wood an exclusive license to use and market her name on her designs in exchange for half of all profits and revenue.[247] Nonetheless, while Wood was out seeking and securing commercial endorsements, Lucy began placing endorsements independently, in effect going into the licensing business on her own.[248] Wood sued for breach of contract and Lucy defended, arguing that the contract lacked mutuality. Wood never promised to take advantage of the exclusive rights.[249] Since Wood could, she argued, do nothing at all without breaching the agreement, their agreement was unenforceable for want of consideration.[250] Nonetheless, as is well known, Cardozo found consideration for her promise. Even though Wood made no express promises, Cardozo explained in frequently quoted language: "[a] promise may be lacking, and yet the whole writing may be 'instinct with . . . an obligation,' imperfectly expressed."[251] "We are not to suppose," Cardozo added, "that one party [Lucy] was to be placed at the mercy of the other [Wood]."[252]

This supposition, however, was one the intermediate court made rather easily. It found the case a simple one.

> It is quite apparent that . . . the defendant gives everything

---

[245] *Id.* at 132; Casto & Ricks, *supra* note 222, at 325.

[246] Wood v. Lucy, Lady Duff-Gordon (*Wood II*), 118 N.E. 214 (N.Y. 1917).

[247] *Id.* at 214.

[248] *Id.*

[249] *Id.*

[250] *Id.* The record in this well-known Cardozo opinion is sparse because the lower courts granted the defendant's motion to dismiss the complaint for failure to state a cause of action. Thus, the New York Court of Appeals had before it only Wood's allegations in the complaint and an attachment of a copy of the contract in issue.

[251] *Wood II*, 118 N.E. at 214 (citations omitted).

[252] *Id.* As Professor Goldberg observes, "[t]his argument [can] be turned on its head. Cardozo could have reasoned that since we are not to suppose that she would put herself at Wood's mercy, she did not in fact do so." GOLDBERG, *supra* note 10, at 61.

> and the plaintiff nothing, and there is a lack of mutuality in the contract.
>
> And the same may be said of plaintiff's agreement to take out patents and protect them by legal proceedings. The performance of this promise cannot be enforced, for the reason that the promise relates to indorsements which he is under no obligation to place, and the performance of it is left entirely to his own judgment.[253]

Cardozo, however, insisted that the omission of an express promise by Wood was something of an oversight. The parties intended to bind each other but ineptly drafted their agreement.[254]

Cardozo may have been wrong. The contract was drafted by Wood, and we learn from Professor Goldberg's sleuthing that Wood knew how to draft a best efforts clause. Wood had done so before. Indeed, he was currently being sued for not exercising meeting the best efforts provision in a contract giving him the exclusive right to market Kewpie dolls.[255] In this context, then, "[t]he most plausible story" is that Wood deliberately omitted promissory language and "was trying to avoid making an enforceable commitment."[256]

But this is not the only plausible story. Lucy may have thought it in her interests to fashion an arrangement that she could walk away from if Wood was performing below her expectations. She likely was optimistic that Wood would successfully promote her products, but remained wary of putting all her eggs in one basket. If Wood did not live up to her expectations, the lack of promissory commitment binding him would free her up to look for a better deal, which she eventually found with Sears.[257]

Still another plausible interpretation is that Lucy was free to place her endorsements as she wished, as long as she shared the profits. This interpretation is supported by the relief Wood was

---

[253] Wood v. Lucy, Lady Duff-Gordon (*Wood I*), 164 N.Y.S. 576, 577 (App. Div.), *rev'd*, 118 N.E. 214 (N.Y. 1917).

[254] *Wood II*, 118 N.E. at 214–15.

[255] Wood received an exclusive right to market the Kewpie doll for Rose O'Neill in exchange for his promise to use reasonable or best efforts. *Id.* at 53. O'Neill claimed that Wood had breached by not using best efforts. *Id.* at 55.

[256] *Id.* at 73.

[257] What made the deal attractive for Lucy (ex ante) was not the promise of any particular level of effort. The value came from the incentive structure. True, Wood could have chosen to do nothing. But if Wood did nothing, he would get nothing. His compensation was contingent upon his effort. The sharing arrangement encouraged both parties to contribute their efforts, he to promote her name and she to produce marketable designs.

Id. at 64–65.

seeking. Wood sued for $50,000, apparently on the theory of disgorgement of the benefit Lucy received from her deals with Sears and others. This seems wrong on principle. Disgorgement, as every first year contracts student is taught, is not a contract remedy. But disgorgement makes sense if we define an exclusive agreement differently than Cardozo did. Cardozo interpreted the term as a complete transfer of Lucy's rights to market her designs and place endorsements.[258] Goldberg observes that this may not have been the case. Exclusives are often nuanced. In the Kewpie contract, which Wood negotiated with Rose O'Neill, O'Neill was free to pursue business on her own provided that she would remit a contractually set fee of twenty percent to Wood.[259] This may well have been the case with Wood's contract with Lucy. Lucy was free to make whatever sales she wished, provided that she compensated Wood. The revenue she produced would be treated the same as if Wood generated it. Lucy would not be in breach and Wood's theory of recovery would be disgorgement.[260]

---

[258] *Id.* at 61.

[259] This interpretation of "exclusive" is not unique to the Kewpie contract. In *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 100 N.Y.S. 960, 961–62 (App. Div. 1906), the exclusive that the plaintiff had did not preclude sales by the defendant as long as the defendant remitted the plaintiff's commission for all cement that the defendant manufactured and sold.

[260] A particularly striking example of where a party withheld facts from the court is *Odorizzi v. Bloomfield School District*, 54 Cal. Rptr. 533 (Dist. Ct. App. 1966). Although the case is well known for its clear explication of the elements of undue influence as a defense to enforcement of a contract, it began as a criminal prosecution. Don Odorizzi was arrested in his home for homosexual conduct (more precisely oral copulation). *Id.* at 537; RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 1003 (3d ed. 2003). At the criminal trial, the arresting officer, Ronald Arrington, testified that Odorizzi told him that he had dialed a random phone number and invited the man who answered to have sex with him. Barnett, *supra*, at 1003. As luck would be, the party at the other end was vice officer Ronald Arrington. They met at a parking lot and then proceeded to Odorizzi's apartment. Odorizzi made a sexual gesture, whereupon Arrington identified himself and placed Odorizzi under arrest. *Id.* Arrington then informed the school authorities of the foregoing, thereby triggering their high pressure tactics to secure Odorizzi's resignation. *Id.* at 1003–04. Odorizzi's version of his meeting with Arrington as related to Dean Kellye Testy's is entirely different and exculpatory. Dean Kellye Testy's unpublished essay on Don Odorizzi's ordeal is excerpted in BARNETT, *supra*, at 1003–04. Odorizzi, feeling alone and depressed because his live-in boyfriend, Bud, had left him over two weeks ago, "went out, met someone he liked," and brought him back to his apartment where they had sex. *Id.* at 1004. Unfortunately, at that very moment Bud returned, saw Don with another man and, enraged, called the police to report "homosexual activity." *Id.* Ronald Arrington was the responding officer. Bud let him in to arrest Don. Don states that he never engaged in random dialing. *Id.* Most likely, it was Arrington, who manufactured the random dialing tale with perhaps some help from Bud. Nonetheless, Odorizzi endorsed it. It is hard to understand Odorizzi's complicity, but Testy seems to credit it.

> Once Don realized that Arrington's version of the circumstances of his arrest did not match his own, Don kept quiet about the fabricated story thinking he was somehow

VI. THE COURT DECIDED THE CASE ON AN ISSUE NOT ARGUED BY THE PARTIES WITHOUT GIVING THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD.

Appellate courts perform a kind of autopsy when they determine that a party misstated or overlooked a rule, a controlling case, or a statute.[261] This is superior to a medical post-mortem examination in that correction can occur before the litigation terminates; the party who should prevail will prevail. Judicial response may also be triggered by a party who invites the court to modify an existing rule. Here, attorneys are performing their historic role in the development of the common law. In some instances, it is the court itself that initiates a review of existing law. But here a difficulty may arise. The difficulty is not that the court voices a concern sua sponte, but that it decides sua sponte to enlarge, diminish, or reject a controlling legal rule—not challenged by the parties—without giving them an opportunity to be heard. This undermines the adversary system by depriving the court of whatever assistance counsel could have offered and depriving counsel of the opportunity to advance the position of the client.[262] "[It seems] unfair," as Llewellyn observed, "[to put] a decision on a ground which losing counsel has had no opportunity to meet."[263] Beyond this consideration, it may give the appearance of bias: "[A] judge who generates arguments that the lawyers did not raise will appear to assist one side or the other. Lawyers and parties who face a judge acting as a roving commissioner will view the judge as yet another adversary in the courtroom, and as biased or even co-opted . . . ."[264]

The United States Supreme Court has disapproved the practice

> protecting Bud . . . . Thinking he would lend credence to the fabricated story to which he was still committed, Don said that this was not the first time that he had called random numbers seeking sex with men.

Id. The stories told by Odorizzi and Arrington leave questions unanswered and likely deserve low marks on the credibility scale.

[261] Adam A. Milani & Michael R. Smith, *Playing God*: *A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 249–50 (2002) (providing that there is general agreement that courts may act sua sponte when the issue relates to jurisdiction, mootness, standing, and appealability).

[262] For an example, see the discussion of *Poyner v. Loftus*, 694 A.2d. 69 (D.C. 1997), in Milani & Smith, *supra* note 261, at 259–61.

[263] LLEWELLYN, DECIDING APPEALS, *supra* note 18, at 29 (citation omitted); *cf.* George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1329 (1969) ("[T]he primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated." (citation omitted)).

[264] David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1804 (2009) (book review).

without outlawing it. "We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home."[265] Justice Scalia regards "[t]he rule that points not argued will not be considered [as precedent as] more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[266] And Justice Souter has suggested that a decision based on points not argued is entitled to less deference.[267]

How often do such decisions occur? Little statistical data are available. This is not surprising in that courts ordinarily do not indicate when they decide a case on a point not argued. Absent reading the briefs, it is near impossible to determine whether a court raised and decided an issue sua sponte, though occasionally the dissent may air the matter. On this point there is one study where the researcher read the briefs and interviewed the judges.[268] It found that "[t]he practice is especially hidden on courts where it is such a common practice that it is not a grounds for dissent."[269] The researchers reviewed one-hundred twelve Supreme Court decisions during a one-year period and identified sixteen cases—involving nineteen issues—decided on issues not raised by the parties.[270]

The judges that act sua sponte run the reputational spectrum. They include jurists who are highly regarded, even revered, and who are applauded, not reproached, for taking the initiative to reform the law. Justices Traynor and Cardozo (whose treatment of *Palsgraf* was discussed above), come immediately to mind. In *Escola v. Coca Cola Bottling Co.*,[271] Traynor, in a concurring opinion, adopted a position that had not been argued by any of the parties, that "a manufacturer incurs . . . absolute liability when an article that he has placed on the market, knowing that it is to be

---

[265] Trest v. Cain, 522 U.S. 87, 92 (1997).

[266] United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (citing United States v. Pryce, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, J., dissenting in part)), *superseded by statute*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1838.

[267] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring in part and concurring in the judgment) (citations omitted).

[268] THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 121–25 (1978).

[269] *Id.* at 122.

[270] *Id.* at 122–23.

[271] 150 P.2d 436 (Cal. 1944).

used without inspection, proves to have a defect that causes injury to human beings."[272] Subsequently, Traynor persuaded the entire court to impose strict liability on the manufacturer of a defective power tool in the landmark case of *Greenman v. Yuba Power Products, Inc.*[273] As in *Escola*, none of the parties had made an argument concerning strict liability. Nonetheless, Traynor concluded that "[w]e need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated . . . ."[274] For authority, Traynor cited his *Escola* concurrence, an influential law review article, a treatise, and some decisions from other jurisdictions.[275]

If Traynor were on the court today, he would find it more difficult to take a shortcut around the attorneys. California has a remarkable law, likely unique, which requires a court to notify the parties whenever it intends to decide a case on a point not argued.[276] If the court fails to give notice, the parties (the losing party typically) can petition the court to afford it an opportunity to be heard.[277] The California statute owes its existence to the persistence of then Attorney General John Van de Kamp who was troubled by certain criminal law decisions of the California Supreme Court that were decided without input from counsel.[278] Unable to persuade the judges to ban this practice, Van de Kamp sought a legislative remedy.

The California Judicial Council and the California Judges' Association condemned the Van de Kamp proposal as unconstitutional. It violated separation of powers; the legislature was not empowered to tell the judiciary how it should discharge its constitutional duties.[279] The Judicial Council also suggested, no

---

[272] *Id.* at 440 (Traynor, J., concurring).

[273] 377 P.2d 897 (Cal. 1963).

[274] *Id.* at 901.

[275] *Id.*

[276] CAL. GOV'T CODE § 68081 (West 2009). The statute provides that, where an appellate court

> renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party [of] the proceeding, [1] the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing[;] [2] [i]f the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

[277] *Id.*

[278] In *People v. Castro*, 696 P.2d 111 (Cal. 1985), the California Supreme Court interpreted a provision stating that the prosecution may introduce "without limitation" evidence of "any" prior felony conviction in subsequent criminal proceedings for impeachment or sentencing to mean only felonies involving moral turpitude. *Id.* at 115; *see* CAL. CONST. art. I, § 28 (f)(4).

[279] Third Assembly Reading, S. 2321, 1985–86 Sess. (Cal. 1986) (on file with author).

doubt to some courthouse chuckling, that the "bill might more appropriately impose a duty on attorneys to identify all the issues in a case and brief them thoroughly."[280] For its part, the California Judges' Association found the Attorney General's proposal unnecessary, because courts were already giving the parties notice, and, contradictorily, too expensive to implement. The bill would introduce "a new and costly level of hearings into the appellate process" and "a new body of case law on procedural obscurities."[281]

The bill is now law;[282] it has evoked no further controversy and none of the dire predictions of the judicial interest groups have occurred. Unfortunately, there is no record of how frequently the statute comes into play. Outside of California, the practice of not affording counsel an opportunity to be heard seems unabated.

The following case shows the difficulties experienced by a client who, having relied on long standing precedent regarding the enforceability of restrictive covenants to open a new business, found himself subjected to a rule change by the Wisconsin Supreme Court that could have put him out of work. Albert Torborg's story is an interesting one, with an unexpected turn or two.

A. Example of Fullerton Lumber Co. v. Torborg[283]

Albert Torborg was the manager of the Clintonville outlet of the Fullerton Lumber Company ("Fullerton"). His employment contract contained a covenant not to compete for ten years following his departure from the company for any reason.[284] Seven years later, he resigned, advising Fullerton that he intended to open his own lumber yard in Clintonville. Fullerton moved to enjoin Torborg from competing and Torborg defended on the ground that the ten year restriction on competition was overly broad, which it surely was.[285] Either Fullerton's lawyers took an unwarranted risk in setting a ten year term in the restriction or they were simply

[280] Letter from John W. Davies, Assistant Dir., Judicial Council of Cal., Admin. Office of the Courts, to Bill Lockyer, Chairman, Cal. Senate Judiciary Comm. (Apr. 14, 1986) (on file with author).

[281] Letter from Constance E. Dove, Executive Dir., Cal. Judges Ass'n, to Assemblyperson (Aug. 26, 1986) (on file with author).

[282] CAL. GOV'T CODE § 68081 (West 2009).

[283] 70 N.W.2d 585 (Wis. 1955) *superseded by statute*, WIS. STAT. § 103.465 (2002), *as recognized in* Heyde Cos. v. Dove Healthcare, LLC, 654 N.W.2d 830, 833 (Wis. 2002). For Professor Stewart Macaulay's engaging account of the case, see DANZIG & WATSON, *supra* note 10, at 226.

[284] *Fullerton Lumber Co.*, 70 N.W.2d at 586.

[285] *Id.*

negligent in not researching the cases. Under longstanding case law, courts were required to strike down in their entirety overly broad covenants.[286] Courts could not reduce a restriction to a reasonable time. The rationale for this all-or-nothing rule is that it discourages overreaching by employers who would impose unreasonable restrictions on unwary or reticent employees to deter them from leaving and to stifle competition.

The trial court predictably found for Torborg. Ten years was far longer than needed for the protection of Fullerton's interests. Fullerton did not argue, as one might have anticipated, that the all-or-nothing rule should be modified to permit a court to reduce an overly broad restriction to one that would have been reasonable had the parties chosen it when they contracted.[287] Nonetheless, the Wisconsin Supreme Court took this course on its own. It reversed the trial court, overruling prior decisions that applied the all-or-nothing rule, and installed in its place a rule permitting a court to carve down an excessively broad limitation on competition.[288] If Fullerton was pleasantly surprised by this unexpected turn, Torborg must have been crushed, having relied on counsel to quit his job and invest his savings in a business that depended on his participation to succeed.

The court justified its decision in part by observing that "[t]he evidence of irreparable damage" to Fullerton "is so strong," that "a thorough reconsideration of the rule that has obtained in Wisconsin—that a covenant imposing an unreasonable restraint is unenforceable in its entirety" was required.[289] "[N]o case in this court," it stated, "presented such a clear need for the kind of protection plaintiff thought it was bargaining for when this contract was made."[290] Applying its new rule, the court set the life of the covenant at three years, effective at the date of judgment.[291]

What induced the Wisconsin Supreme Court to change the rule? And why did it feel that three years was the right length for the restriction? The answers to these questions are lodged, not as one would expect in the briefs of the plaintiff, Fullerton, but those of

---

[286] Wisconsin law admitted an exception to the total invalidity rule called the "blue pencil" rule, which is not relevant here. "Under the rule, [a court] would, if grammatically feasible, sever some words of the [restriction]," leaving intact the remainder. *See* PERILLO, *supra* note 192, § 16.21, at 661 (2003).

[287] *See* DANZIG & WATSON, *supra* note 10, at 230.

[288] *See id.*

[289] *Fullerton Lumber Co.*, 70 N.W.2d at 589.

[290] *Id.*

[291] *Id.* at 592.

Torborg. Counsel for Torborg agreed with Fullerton that Torborg "has been able to establish a business [in] Clintonville which has substantially cut into the business of [Fullerton]."[292] Counsel also agreed that "[Fullerton] does have a legitimate interest in its business and good will which it is entitled to preserve by exacting a reasonable restrictive covenant from its manager."[293] And, finally, counsel capped off these concessions by volunteering that "a three year period would be long enough" and that "[c]ertainly five years would have been ample."[294] By making these concessions, by placing all Torborg's chips on existing law, counsel may have unwittingly lured the court into reconsidering the all-or-nothing rule.[295]

Although Torborg may not have studied the brief submitted on his behalf, he likely felt that he had been misled by his attorney. But for assurances from counsel, he would not have quit his job and invested his savings in a startup firm. Now, counsel had to explain and defend the advice he had given Torborg. In his petition for a rehearing, counsel stated that he had advised his client that the covenant was void because the time limit was too long and "it must be admitted that Mr. Torborg received sound advice."[296] Counsel had relied on "decisions . . . which stood for over twenty years."[297] The end result, however, was that Torborg now was prohibited for three years from working directly or indirectly for a competitor of Fullerton Lumber within a fifteen-mile radius of Clintonville. He was also ordered, as a consequence of a subsequent action brought by Fullerton Lumber, to pay damages of $9,500.[298]

But there is more to the story. The Wisconsin Supreme Court decision was overturned by the legislature shortly after it was promulgated.[299] The assemblyman, representing the district in which Clintonville was located and practicing law there, introduced legislation reinstating prior law. The Wisconsin rule today is that a covenant "imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance

---

[292] DANZIG & WATSON, *supra* note 10, at 228.

[293] *Id.*

[294] *Id.* at 229.

[295] *Id.* at 230.

[296] *Id.*

[297] *Id.*

[298] *Id.* at 233.

[299] Fullerton Lumber Co. v. Torborg, 70 N.W.2d 585 (Wis. 1955), *superseded by statute*, WIS. STAT. § 103.465 (2002), *as recognized in* Heyde Cos. v. Dove Healthcare, LLC, 654 N.W.2d 830, 833 (Wis. 2002).

that would be a reasonable restraint."[300]

If the court did not have the last word on the rule of law, did it at least determine the fate of the parties? What happened to Al Torborg and Fullerton Lumber? Recall that the injunction ran only to Torborg personally. Professor Macaulay tells us the rest of the story. Fullerton's presence gradually faded away while Clintonville Lumber and Supply prospered. Al Torborg, the records show, honored the injunction, but it appears that Betty Torborg and a senior employee were able to run the business successfully for three years.[301] Not only did Clintonville Lumber (later Torborg Lumber) prosper, but Fullerton Lumber never received the damages awarded by the court. Al Torborg, having invested everything he had in the lumber company, successfully sought the protection of the bankruptcy court which discharged the civil judgment against him of $9,500.[302] At story's end, it was Torborg's enterprise, Clintonville Lumber and Supply, not Fullerton, which remained standing.[303]

VII. AS TO THE FUTURE

This essay opens the door to a novel field of research: the assessment of performance by lawyers and judges. Lacking a relevant database to turn to for this information, the study drew by default upon the universe of case studies of leading contract cases, because, unlike most other case studies, these made use of the record. Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like. The contract case studies examined were replete with performance issues. Each offered something of interest. Most implicated more than one of the five propositions discussed above.

If future research is to prove of value, it needs to draw upon the rich body of social science research methodology. It should begin not with a single case or even a set of cases, but rather specific propositions to be tested through examination of a representative sample of cases with similar characteristics. The most important of the five observations relates to attorney competence because it is the most consequential and the most subject to remediation. A larger universe of case studies will likely provide a more accurate map of professional performance, one that does not assume

---

[300] WIS. STAT. § 103.465 (2002).
[301] *See* DANZIG & WATSON, *supra* note 10, at 236.
[302] *Id.*
[303] *Id.* at 235.

competence as the norm. Although no claim can be made that the five observations discussed herein would survive if more performance data was available, one can surmise that future research may well offer both corroboration and refinement.