ELEGANT MODELS, EMPIRICAL PICTURES, AND THE COMPLEXITIES OF CONTRACT

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Studies in nations with different social and economic systems indicate that the norms of contract law are seldom applied through the litigation process and that disputes are avoided or settled where there is a long-term relationship between the parties. Yet legal scholarship, as well as many proposals for reform, continue to be based on a picture of the contracts lawsuit, to a great extent. It is likely that this distortion is prompted by overgeneralization from a nonrepresentative sample of possible and actual disputes, and by the indirect influence of legal norms; it may also express the needs of legal scholars and reformers. It is questionable whether capitalist, socialist, or mixed economic systems would benefit if more disputes were resolved by the application of officially sanctioned contract norms.

When Maria Lós, the Polish sociologist of law, visited Madison several years ago, she told me of Kurczewski and Frieske's study of the practices of managers of Polish industrial enterprises which she thought resembled my description of the behavior of American business managers (Macaulay, 1963). I was eager to compare these findings, but I do not read Polish. Now, however, Kurczewski and Frieske have translated their work into English, and the editors of the *Law & Society Review* have asked me to edit the translation and comment on the article.

Kurczewski and Frieske's study of practices related to socialist contract in Poland is a fascinating addition to the growing literature on the role of contract in the United States (see, e.g., Macaulay, 1963; Mentschikoff, 1961; Moore, 1973; Whitford, 1968), Great Britain (Beale and Dugdale, 1975), Indonesia (Burns, 1974), Japan (Benjamin, 1975; Guittard, 1974; Kawashima, 1963; Sawada, 1968), Korea (Hahm, 1967; 1969) and Ethiopia (Ross and Berhe, 1974). (See also Honigmann and Honigmann, 1976.) In all of these societies—which differ so greatly in social structure, culture, and political and economic ideology—the picture looks much the same. Industrial managers and merchants seldom litigate to solve disputes about contracts, preferring to use other techniques of dispute avoidance and settlement. Perhaps the surprising thing is that anyone would expect the use of contract litigation to be other than rare and the influence of contract to be anything but indirect.

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Few, for example, would expect the process of divorce as it is expressed in statutes and cases to have much influence on ongoing marriage relationships. Some have advocated detailed marriage contracts with provision for arbitrators or mediators should the married couple encounter problems (see, e.g., *New York Times*, March 3, 1977:39), but my students, at least, tend to view the explicit specification of duties and the provision for third-party intervention to resolve problems as inconsistent with long-term commitment to a marriage relationship.[1] The managers of businesses who were questioned in all of these studies seemed to feel much the same way about the likely impact of too detailed planning or intervention by third parties on their long-term business relationships.

The group of studies about contract practices is interesting largely because many who write about contract law or who advocate social reforms using that body of law argue *as if* they were unaware of what these studies show.[2] The problem arises from confusing what we can call a classical model of a contract system with an empirical picture of the relationship between law and the contract process. A rough sketch of the classical model of the contract process in western capitalist societies would stress its formal and normative aspects. Formally, it assumes that the rules of contract law will be invoked by parties and applied by courts; normatively, it holds that they ought to be.

This classical model starts with the assumption that entrepreneurs need to plan and deal with risk. They do so by carefully drafting contracts, which they understand and agree to. In order to increase the chance that the contract will be performed and expectations honored, the legal system defines when a contract is made, stands ready to interpret the language used by the parties and to fill any gaps in that language by applying norms reflecting the customs of the commercial community and, importantly, offers remedies that either induce performance or compensate for non-

1. Of course, my students may be wrong, at least insofar as persons do not wish to play the traditional roles of husband and wife (see Weitzman, 1974; cf. Spencer and Zammit, 1976). Nonetheless, I think my students are correct that there are costs to using explicit contractual norms and involving third parties to handle disputes; undoubtedly, there are cases where those costs are outweighed by the benefits.
2. Blindness to an empirical view of contract is not a necessary hazard of the contracts teaching profession. Harold Havighurst's (1961) classic book shows what can be done in the lecture format. Malcolm Sharp's comment (1952) on Schultz's pioneering empirical study, "The Firm Offer Puzzle" (1952), reflects just what we should expect from a man who did so much to broaden the philosophic basis of classical contract law. The difficult part of empirical work is not methodology but asking the right questions and interpreting the answers one gets. Schultz's work standing alone was very valuable, but Sharp's response to it expands even further what Schultz can teach us.

performance. Disputes are avoided by asking a lawyer to predict what a court would do, or settled through adjudication. The more predictable the outcome of this process, the better contract law can facilitate the planning and settlement process that is essential to a market society. For example, Jensen and Meckling (1976: 15-16) tell us:

> Uncertainty in the structure of rights or in the "rules of the game" substantially changes both peoples' behavior and the use of resources. In particular, it significantly reduces private investment in the kind of long-term projects which have played such an important role in determining our standard of living. It is very difficult to observe these effects because they primarily involve actions not taken, that is projects not undertaken, buildings not built, etc., and are not the stuff of which newspaper headlines are made. . . . The low standard of living in South America . . . is due we believe in large part to the uncertainties in contract and property rights induced by the tremendous instabilities of the political system.

Of course, all that is absolutely required to attain certainty is a *belief* that contracts are highly likely to be carried out, however this belief is brought about and however well founded it may be. Nonetheless, the classical model assumes that the rules of contract law and the process of contract litigation are central, significant, and necessary for economic transactions in a modern capitalist economy. In Max Weber's words, "economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion" (1954:29-30).

The studies as a whole show that the *empirical* picture of the contract process in capitalist societies differs sharply from the classical model. Planning for the risk of nonperformance often is none too careful, and disputes are seldom resolved by litigation or even by applying the norms of contract law outside of litigation. The classical model of the contract process may fit one-shot transactions, such as those sometimes found in financing and real estate, but the reality of modern business, particularly manufacturing, generally involves long-term continuing relationships (see Macneil, 1974; Goldberg, 1976). My colleague, David Trubek (1975), has argued that economic actors will employ the litigation process to settle disputes only to the extent that (1) the present value of continuing relationships is low, and (2) the anticipated return from the litigation process is relatively high. The classical model of the contract process thus operates only in a special and limited case where these conditions are met. Max Weber's theories about the role of contract law in the development of capitalism rest on a model of economic relations in which the typical dispute occurs between firms operating in what we would call a perfectly competitive market. In such conditions continuing relations have no economic value, and no actor has economic power over another.

Of course, this is only an ideal; in any real economic process there are at least some transaction costs in switching from, say, one supplier to another. Moreover Weber, and most writers following him, assume there are high net returns from formal remedy agents. They assume that modern legal systems are accessible and efficient, and that legal remedies deter the breaking of agreements and compensate those hurt by breaches of contract. These assumptions, of course, are very questionable.

Socialist contract, as indicated in my editorial note to Kurczewski and Frieske, is a technique for placing both control and responsibility in the hands of those who manage enterprises. It is a means of dealing with the inability of the central administration to plan all the details in a modern technological economy. The classical model of contract in a socialist society also assumes the existence of contract norms and sanctions to induce performance. Managers are expected to invoke this system not only to achieve the goals set for them under the plan but also so that planners will know of problems and trouble—litigation is public and will come to the attention of supervisors (see Loeber, 1964; Speer, 1971; compare Boim, 1974). The balance sheet of a firm that must pay a contract penalty is likely to reflect poorly on the firm's manager. Given the design of socialist central planning, we might assume that any grant of discretion to managers to make and perform contracts would be tightly controlled so that the national plan was carried out as fully as possible.

Kurczewski and Frieske show that a gap exists between the classical and empirical models of contract in socialist Poland, just as it does in other societies. Moreover, the explanations for the gap are similar in both capitalist and socialist systems. Most importantly, those who manage modern industries in any society are not rewarded for complying with the contract system pictured in law books but are judged by economic criteria. Any technique of dispute avoidance or settlement will only be invoked if it is advantageous after the potential benefits and costs are balanced. Litigation concerning anything—including, but not limited to, contracts—is generally expensive, seldom offers a worthwhile payoff, and tends to disrupt the continuing long-term relationships that are vital to the success of the managers. Other techniques of dispute avoidance and settlement are usually available which will produce acceptable results, allow relationships to continue, and cost much less than litigation. Interestingly, all of the studies, including that by Kurczewski and Frieske, indicate that these other techniques are similar despite great differences in social and economic organization or ideology. Moreover, Kurczewski and Frieske report

that under socialism, as under capitalism, those with economic power can use the courts to discipline those lacking power, and that rarely will the weaker be able to use litigation to offset economic imbalance.[3]

All of this raises an interesting question barely mentioned by any of the authors of this group of studies: what functions might a classical picture of the contract process serve if it is not an adequate description of what happens? If one shows that business people in all societies compromise differences rather than invoke contract norms to seek victories, rely on a network of contacts, and seek to avoid being dependent on other firms, one must still ex-

3. One valuable area for doctrinal research would be to look at the hurdles placed in the way of recovery and ask who, if anyone, might be able to jump them. In the United States, it is the economically less powerful who are likely to consider suing or likely actually to sue the powerful in situations involving more than simple debt collection. Yet our remedy system itself joins with other barriers to access to help repel such challenges. For example, there is a cluster of rules reflecting substantive policies inconsistent with full protection of the expectation interest: (a) Because the law seeks to avoid economic waste, the injured party must act quickly to minimize the loss, usually by seeking a substitute buyer or seller. Damages are only the difference, if any, between the performance originally promised and the substitute. (b) The law seeks to promote flexibility and the most efficient use of resources. The effect usually is to create a "right" to breach, punished only by very limited damages. Specific performance is seldom awarded, and standardized and limited measures of recovery often are used in a mechanical way so that the costs of breach are calculable in advance. (c) Large losses are rarely imposed on one who defaults even where the difference between contract price and substitute price is inadequate to protect the expectation interest. Although there are a few modern cases that can be cited to the contrary, *Hadley* v. *Baxendale* still demands that a defaulting party will only be charged with those losses that the party has clearly assumed in advance.

Added to these substantive policies is another cluster of rules reflecting the problems of operating a judicial system. An injured party must prove the loss with reasonable certainty, but it is often impossible to establish with any kind of certainty what would have happened had there been no breach. This is particularly the case in a long-term contract that is breached relatively early in its life. Procedural rules can be manipulated to delay decision and increase the costs of using the process. The courts in most states are crowded, adding further delay and cost and contributing to the mass processing of cases. Even if plaintiffs surmount all these barriers, they must enforce their judgments, which is often difficult. And of course, in the American system, the winning party usually must still pay legal fees, which are high.

Finally, our system allows considerable freedom of contract, and the economically powerful often use it to structure relationships that avoid any remaining risk of liability. Warranties are almost always disclaimed; more importantly, the remedies for default are limited to replacement or repair. The failure of a seller to perform is often excused by wars, strikes, or an endless list of similar events, and sellers often insist on escalator clauses so that they take little risk of increasing costs in inflationary times. Powerful buyers, on the other hand, insist on clauses guaranteeing a right to cancel for convenience, at little or no cost. Moreover, many of these clauses often are buried in the fine print of a lengthy form contract, and thus are inconsistent with the actual expectations of the weaker party.

Even if lawyers were free and litigation had no impact on continuing business relationships, contract doctrine and common contract clauses, coupled with the costs of delay, would serve to minimize the utility of litigation, either to deter or to compensate for breach. This is not to say that a contract action never pays. But it will make economic sense only in a narrow class of cases. It might be useful for many purposes to try to define more precisely the boundaries of that class.

plain the existence of a widely held, if often implicit, picture of the contract process that varies so markedly from reality. A major conclusion to be drawn from these studies is that we should give further thought to the functions of the classical model. All that can be done here is to offer a very sketchy explanation.

The most obvious explanation for the persistence of the classical model would be that scholars and reformers are unaware that the contract process described in the law books seldom affects behavior very directly. Yet, for many, it is an unwillingness to listen rather than unfamiliarity. Some actively resist considering the implications of empirical findings, dismissing them grandly as mere counting. Ignorance can be but a partial explanation.

Another explanation for the persistence of the classical model of the contract process may be that it is partially accurate. The classical picture may be just an overgeneralization from a biased sample. There *are* appellate opinions—the basic data about law for most legal scholars in the United States—that concern contracts. People will litigate and bring appeals when the potential benefits are thought to outweigh the costs. Occasionally, it is necessary to vindicate rights even at the cost of a valuable long-term relationship. For example, Laura Nader (1975:159), describing a study by Sylvia Forman of an Ecuadorian village where compromise and the preservation of relationships are vital, reports:

> She [Forman] separates into categories cases involving people who have multiplex, ongoing relationships and who are disputing specific kinds of issues. She argues that different issues generate the strategies employed by the disputants regardless of type of relationship, and that the apparently desired outcomes were also different. The non-compromise set of cases involved land and other important property, and prestige and access to power and influence within the community. All were cases dealing with scarce resources. Forman points out that there is no reason to believe that people involved in these zero-sum strategies fail to recognize the potential, or actual, damage of their strategies to their relationships with their adversaries. . . . In situations in which the object of the dispute is most highly valued, the social relationship will be sacrificed.

Similarly, in western societies, it is sometimes critically important to vindicate a right. For example, large corporations do sue each other about patent licenses, and they will sometimes litigate the question of which organization is to be saddled with a multimillion dollar loss. However, they are not likely to litigate and pursue appeals merely for the principle of the matter or for entertainment. In Aubert's terms (1963), they are quick to transform a conflict of value into a conflict of interest if that will look better on the profit and loss statement. When they look to contract norms, it is often to help ward off large potential losses for which they could be held liable if they had not placed them elsewhere by

contract.[4] Large corporations often dump these losses on organizations lacking the economic power to refuse to accept the risk. Some contemporary cases appear to stem from situations where one party, who has made a bad deal, is scrambling for a loophole, a tactic that is likely to be extremely damaging to a long-term relationship because it violates expectations that the other party views as justified. As a result, a large organization that plans on continuing in business is hesitant to assert technical defenses unless absolutely necessary, and is likely to do so only when its economic power so outweighs that of its adversary that it can ignore the reaction of the latter.

Other cases before the courts involve relationships already shattered, where contract is used for scavenger purposes to salvage something from the wreckage. For example, large organizations can be involved in bankruptcy proceedings or the cancellations of franchises. However, franchise cases often involve a weaker party suing a stronger corporation, and the weaker is likely to discover that freedom of contract is freedom for large organizations to avoid any contractual duties. Large organizations seldom need legal rights against weaker parties because they get what they want by command; the documents they draft assure that they are not significantly hampered by contractual duties owed to the weaker parties. Courts generally have refused to intervene on the side of the weaker party,[5] and modern franchise protection statutes have been only partially successful in altering this balance of power.[6]

However, the bulk of modern contract litigation usually involves something far less exalted than multimillion dollar deals that have soured. Edmundo Fuenzalida, in his study of the activity of the courts in Chile (1973, 1974), found that as the nation became more urban and industrialized, and as the population grew, commercial litigation in the ordinary civil courts did not rise at the same rate. After an initial increase roughly paralleling demographic and economic change, the demands on the courts reached a plateau and then began to decline. Moreover, the composition of these demands changed from cases involving the adjudication of

4. See, e.g., *Air Products and Chemicals, Inc.* v. *Fairbanks Morse, Inc.* (58 Wis.2d 193, 206 N.W.2d 414, 1973), where two large corporations fought to establish whether a disclaimer of liability for negligence or warranty printed on the back of a form used in the transaction became part of the contract.
5. See, e.g., *Mobil Oil Corp.* v. *Rubenfeld* (CCH Trade Reg. Rep. ¶ 60,389, N.Y. App. Div., 1975), overturning a lower court decision based on a novel theory that favored a lessee of a gasoline service station.
6. See, e.g., the accounts of the Mobil Oil Corporation's successful battle against a Connecticut statute that would have benefited those who leased stations from Mobil (*New York Times*, March 19, 1974:47; March 20, 1974: 53).

rights to those involving only the enforcement of obligations that were fairly clear. In short, there was a shift from adjudication to a bureaucratic role for the courts as part of a debt collection process—they rubber-stamped claims and made them legal. And there is evidence that this shift in functions is not peculiarly Chilean (see Toharia, 1971; Friedman and Percival, 1976). Marc Galanter reviewed data about who uses courts in the United States and for what purposes, and found much the same pattern. Organizations seldom sue other organizations about anything. Galanter tells us: "We cannot escape the conclusion that in gross the courts in the United States are forums which are used by organizations to extract from and discipline individuals" (1975:360). Beale and Dugdale, examining British practices, note that "if a serious bad debt problem did arise it was quite likely that a solution would be sought through legal procedures. . . . It is probably also relevant that the debt action, being for a liquidated (preascertained sum), is relatively simple and cheap. Resort to the courts seemed far rarer in cases where there was any difficult question of fact, such as a performance dispute" (1975:51).

Kurczewski and Frieske do not tell us when, if ever, Polish managers use their formal contract system following the patterns traced in their statutes, although they indicate that it is the economically powerful who are likely to demand contract penalties. Most of their discussion centers on performance disputes which are rarely "litigated"; in their economic system there may be no problem of bad debts in transactions between organizations. On the other hand, Dietrich Loeber (1964:133) states that in the Soviet Union "it is likely that State and Departmental Arbitrazh together decide about one million cases yearly." This huge caseload may indicate that a process takes place in the Soviet Union very different from that which Kurczewski and Frieske found in Poland. We can only speculate about why this might be so, but it is possible that Soviet managers might want to shift responsibility for settlement decisions to the *arbitrazh* so that they will not be criticized for making payments from the funds of their enterprise. Soviet managers may be more tightly controlled than Polish managers. This explanation is similar to that offered by Ross for the failure of insurance companies to settle large claims for injuries in automobile accidents. In such cases, the amount involved is so substantial that no official in the company wants to assume responsibility for writing the check; it seems safer to do this under the compulsion of a court order (1970:220-24).

In summary, loopholes, salvage operations, the bureaucratic process of debt collection, and evasions of responsibility seem to

account for a large proportion of contract activity found in the real world of the courts. Yet these are not the topics likely to excite most contract scholars. Large important business organizations seldom are involved in these cases. Perhaps that is why they are not well represented in the model of the contract process held and disseminated by prominent legal scholars from all parts of the world. Perhaps it is necessary to ignore the fact that these kinds of cases predominate in order to give sufficient attention to the interesting situations that are the bulwarks of the remarkable intellectual creation that is contract law. Arguably, empirical research that challenges this elegant creation is mere counting, and scholars and intellectuals do not find the mundane task of describing the real world as delightful as polishing and fine-tuning the formal model. Frequency, of course, is not the only test of importance. But economically important contract cases that adjudicate rights are too rare to serve as a solid foundation for the classical model.

Of course, contract norms and the possibility of contract litigation can play important roles that are not clearly reflected in court records and appellate opinions. One such role is that of weaponry in the process of dispute settlement. The threat of litigation can be invoked without carrying the case to a conclusion in the courts. Contract here forms the foundation for strategic maneuvers in the game of negotiated settlement. Courts may be involved only marginally: filing a complaint, or even merely writing a letter on an attorney's letterhead, may be enough to provoke serious negotiation. In other situations, settlement comes only after a trial, one or more appeals, and perhaps an order for further trials.

Two recent cases in the United States between major corporations illustrate this indirect function of contract norms and the possibility of using a procedure that will, to some degree, implement those norms. In the first case, Westinghouse Electric Corporation sold nuclear reactors to twenty-seven power companies (see, e.g., *Wall Street Journal*, September 15, 1975:4, 8). In order to close the deals, Westinghouse agreed to supply uranium oxide—the needed fuel—at prices averaging about $9.50 per pound. Westinghouse had purchased only 15 million pounds, but it had agreed to supply about 80 million pounds under these contracts. The price of uranium oxide rose from about $6 a pound in 1972, to about $40 a pound in 1976. Westinghouse announced that it was terminating these contracts claiming, in the language of Section 2-615(a) of the Uniform Commercial Code, that the drastic market shift was "the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . ." The

power companies have brought a number of suits asserting that Westinghouse simply gambled and lost, so that Section 2-615(a) is inapplicable.[7] Several American law professors have earned handsome consulting fees for their opinions about aspects of this case; this appears to be the kind of problem with which they feel at home. But it is possible that we will never know whether Section 2-615(a) offers Westinghouse an excuse since it is likely that the matter will be settled before the litigation is concluded. These events undoubtedly have damaged relations between Westinghouse and some of its customers.[8] However, performance of all of the contracts could cause a loss of about $2 billion, and perhaps bankrupt Westinghouse. One financial analyst thinks that "they'll settle for somewhere between $500 million and $750 million . . ." but that even "a $1 billion settlement would not be a crippling thing" for Westinghouse (*Forbes*, January 1, 1977:126). All of the aggrieved customers have an interest in the survival of Westinghouse; someone will have to provide engineering, parts, and service for the reactors; and all of the electric utilities have some interest in preserving Westinghouse as a competitor among the sources of power generating equipment (see *Wall Street Journal*, September 15, 1975:8).

Significantly, after a trial that took more than three months, the judge sitting in the first of the several suits against Westinghouse sought to avoid making a decision based on contract norms. He pressed the parties to settle, and held negotiating sessions in his chambers with the chairman of Westinghouse and the presidents of the three utilities that had brought the case. The judge explained:

> The fiscal well-being, possibly the survival, of one of the world's corporate giants is in jeopardy. Likewise, the future of thousands of jobs.
>
> Any decision I hand down will hurt somebody and because of that potential damage, I want to make it clear that it will happen only because certain captains of industry could not together work out their problems so that the hurt might have been held to a minimum. [*New York Times*, February 11, 1977: D-1, D-10]
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> Solomon-like as I want to be, I can't cut this baby in half. [*New York Times*, February 17, 1977:57]

The judge's efforts were successful. Westinghouse agreed to give the utilities cash, services, and equipment over a number of years, which it estimated would cost about a third of what the utilities had claimed. The settlement also guaranteed the three utilities "parity" with the "most favorable of any settlements"

7. For a discussion of the legal issues, see Hurst (1976).
8. See *Forbes* (December 15, 1975: 10); but see *Wall Street Journal* (November 8, 1976:4), indicating that Westinghouse is trying to repair the damage in the settlement process.

Westinghouse might reach with other utilities suing it for breach of the uranium oxide contracts. Both sides praised the judge, who was running for reelection in Pittsburgh, the home of Westinghouse (see *Wall Street Journal*, March 31, 1977:6; *New York Times*, March 31, 1977:51).

In the second case, McDonnell Douglas Corporation was late in delivering ninety DC-8-60 and DC-9 passenger jet planes to Eastern Airlines in 1966-68. The delays were caused by the Vietnam war and poor management at the then Douglas Aircraft Corporation, and were an important factor in Eastern's decision to buy Lockheed L-1011 wide-body jets rather than the McDonnell Douglas DC-10. This was a serious loss to McDonnell Douglas (see Eddy *et al.*, 1976:70-72). Eastern then sued for breach of contract and won a $31.8 million judgment. However, this was reversed on appeal because of problems in proving the amount of damage suffered, among other things (*Eastern Airlines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 5th Cir., 1976). The suit was filed in 1970, and the Fifth Circuit's opinion reversing the district court judgment was handed down almost six years later. Rather than retry the case, McDonnell Douglas and Eastern reached a complicated settlement. Eastern returned nine older model DC-9 jets and leased nine newer model DC-9s at a price lower than usual (Gregory, 1976; "Eastern Airlines," 43 (183 §10) *Standard and Poor's New York Stock Exchange Reports* 792, September 21, 1976).

Partial but incomplete use of the contract litigation process, as in the cases just described, may serve a number of functions. Within each corporation, litigation means that, in large measure, problems are turned over to the lawyers, relieving management of immediate responsibility. And lawyers can communicate to opposing counsel through the rituals of formal process in ways that may assist settlement. Moreover, litigation may legitimate concessions in the eyes of outsiders who audit decisions. For example, the customers of Westinghouse are utilities whose rates are regulated. Without some strong justification, they could not negotiate a settlement with Westinghouse and then ask for approval of a rate increase to cover the balance of the loss. The chance that Westinghouse might win may serve to rationalize settlement, and the act of bringing suit might show the regulators that the utilities are not just giving money away. Consumer and antinuclear power organizations filed petitions in eleven states asking state utility regulators to scrutinize any out-of-court settlements that utilities may reach with Westinghouse. These groups assert that if utilities do not hold Westinghouse to its contracts, consumers will have to

pay the extra fuel costs (*Wall Street Journal*, April 8, 1977:6). Similarly, Eastern must win approval of its creditors when sums as large as $31 million are involved. Litigation also may affect the willingness of each side to make concessions. It serves as a declaration that matters are serious and not subject to the usual processes. It provides time limits in some cases and the opportunity for delay in others—both of which can affect the process of negotiation. Litigation, too, is a process that provides ever increasing information about the nature of the risk of an adverse judgment as each side sees what facts can be proved and which normative positions are developed.

Kurczewski and Frieske tell us that Polish managers who have economic power often demand contract penalties and then, if they have no further trouble with the promisor, remit the penalty at the end of the year. Here contract law creates rights that can be given up in exchange for cooperation (cf. Moore, 1973:728). Yet not all of the normative claims that must be accommodated are created, or even recognized, by contract law. For example, Eastern had established that delays by McDonnell Douglas had caused Eastern serious financial loss although it could not prove the amount with reasonable certainty. The reversal of the trial court's judgment shows how very difficult it is to win large sums of money under the damages rules in American contract law where the fact of loss is clear, but not the amount. And McDonnell Douglas could not really contest the fact of loss since it sells airplanes by representing that airlines flying them will make a great deal of money. On the other hand, McDonnell Douglas was able to argue that its duties as an important military supplier during the undeclared Vietnam war significantly contributed to the delays; indeed, had the Vietnam conflict been fought under a Congressional declaration of war, McDonnell Douglas probably would have been excused from obligations to perform contracts with civilian customers. The settlement reached gave Eastern much needed newer planes that were larger, quieter, and burned less fuel; importantly, it did not require Eastern to try to borrow money in order to do this. McDonnell Douglas apparently sought the resumption of close business relations after the earlier divorce.

The *Wall Street Journal* (September 15, 1975:8) points to a similar assertion of norms that are not coterminous with the law of contract, in the Westinghouse cases:

> [T]he electric utilities have canceled and stretched out contracts for atomic power plants, putting a financial squeeze on such companies as Westinghouse.
>
> "You and I know that in the real world of business there's going to be some horse-trading," an industry person says. "You can bet

> that Westinghouse is reminding companies like Con Edison that it has gone along with them in stretching contracts."

Conduct in prior transactions generally is legally irrelevant in contract law, which focuses on the particular contract under litigation. However, the claim of prior accommodation to the needs of the utilities was highly relevant if any settlement was to be reached.

Although it would be hard to prove, the contract litigation process may also exert an indirect influence on the behavior of the managers of industrial enterprises even where they devote little thought to it. Those making bargains may tacitly rely on the law to fill gaps and provide sanctions, in order to avoid the costs of negotiating about unlikely contingencies or of constructing elaborate systems of security to insure performance. Contract law may crystallize business customs and provide a normative vocabulary, affecting expectations about what is fair. Westinghouse, for example, did not repudiate its uranium oxide contracts in the name of pure self-interest but sought to cloak its actions in the language of the Uniform Commercial Code. Its position, in that guise, may have been more palatable to some of its customers. It may be easier to negotiate with someone asserting a plausible claim of right than with an outlaw openly scorning those who had relied on its promise. (Perhaps the UCC served as a means of self-justification so that executives at Westinghouse felt better about not honoring the commitment their firm had made.) We can only speculate about the situation had the drafters of the Uniform Commercial Code adopted a more rigorous standard that rarely excused nonperformance based on the occurrence of an unforeseen contingency.[9] Suppose the rule had been that one who makes a promise must perform come hell or high water. Would Westinghouse have marched to bankruptcy trying to perform or would it have begged for mercy? Would the impact have been only on the amount of any settlement, since the likelihood of victory by Westinghouse would have been insignificant and thus worth little?

The contract litigation process may also maintain a vague sense of threat that keeps everyone reasonably reliable (see Llewellyn, 1931:725 n.47). For this process to operate, it is not necessary that business managers understand contract norms and the realities of the litigation process. Perhaps all that is needed is a sense that breach may entail disagreeable legal problems. The Polish managers described by Kurczewski and Frieske reflect this when they tell us that "one needs to threaten [to use contract

9. For a discussion of a much more rigorous "impossibility" standard, see Macaulay (1961:833-38).

penalties] intelligently." The authors go on to remark, somewhat paradoxically, that the "system works well so long as the penalties [for breach of contract] are not actually applied. They work well as a threat, but their application will injure the relationship with the cooperating enterprise so that in the future it will seek contacts with other directors who have a more conciliatory approach" (1977:497). At least among many business people in the United States, an intelligent threat to sue for breach of contract by one who wants to maintain a relationship will be made only tacitly or very indirectly. Even a letter from a lawyer may be deemed a declaration of war, and so business people may do all the negotiating although they may speak from scripts written by lawyers. Yet the very vocabulary used by these nonlawyers may signal that matters have moved a step further toward litigation, and thus constitute an intelligent threat.

Finally, the classical model of contract may serve as one of many ways to legitimate the accepted ideology of a society and that ideology, in turn, may serve to legitimate contract norms and their application through the litigation process. Though sociological theory suggests that law and the legal system serve a legitimating function, it is difficult to identify all the links in the chain of events by which a statute or a decision might affect the attitudes of people who are not legal professionals. No sociological theorist has devoted much attention to the symbolic role of contract doctrine. However, one could argue that in most societies people, as a result of their socialization and experiences, will have some opinion about the obligation to perform promises. The legal system, as but one of many influences in this socialization, declares that contracts generally ought to be performed. It also offers remedies that purport to compensate those injured by nonperformance, thereby emphasizing the importance of compliance with the norm of performance. Lawmakers claim to speak in the name of the society as a whole, and to do so on the basis of principles such as election by a majority of the voters, selection by the revolution, the revelation of God's will, or the like. As a result, citizens may tend to identify what is legal with what is good and right (see Berkowitz and Walker, 1967; Hogan and Mills, 1976; Tapp and Kohlberg, 1971). Insofar as they know or think they know something about the nature of contract law, this knowledge may affect their beliefs. And their attitudes may affect their behavior (but see Liska, 1974).

Actually, there is little empirical evidence to support theories of symbolic legitimation through law. Indeed, a number of studies indicate that most people know very little about the content of

most legal norms (see Friedman and Macaulay, 1977: 607-8). As a result, the symbolic impact of law, if it has any, usually must be achieved by indirect and subtle means. This is not to say that theories about symbolic legitimation are wrong; only that they must be far more specific about the circumstances under which laws as symbols influence attitudes.

Whatever its functions for the larger society, the classical model of contract may serve the needs of law professors with a professional interest in contract and those appellate judges who are interested in doctrinal development. If one wants to build a rational, intellectually satisfying system in any branch of law, one must simplify reality in order to produce the necessary generalizations. In Unger's words (1976:11-12) "the more [we make our premises faithful to the social reality we want to apprehend], the higher the risk that our conjectures will degenerate into a series of propositions so qualified and complicated that we are just as well off with our commonsense impressions." The conclusions of classical contract theory, like those of any system of thought, are descriptively true only to the extent that its premises hold. Yet this theory seldom makes clear its hypothetical nature. If writing about contract were to reflect the empirical operation of the contract system, we might lose the elegance and neatness that once gave us confidence that our doctrine supports and reflects our economic ideals. Instead of a neat system, we would risk being left with an unsatisfying collection of ideas where everything "depends."

The classical model of contract also probably appeals to many legal professionals because it seems to offer those without political or economic power the possibility of overturning the structures of the powerful in the society (cf. Lazarus, 1974; Scheingold, 1974). Judges are supposed to respond to reasoned argument, and if their decisions importantly affect behavior, then a single skilled advocate or author of a law review article, armed only with reason, could right wrongs by persuading judges. Not only would the powerless win, but the legal professional who championed their cause would need to do only honorable and enjoyable things in order to help them. The champion works through appeals to reason and intelligence, and talks of economic and social norms, the "findings of science," efficiency, or some other highly valued body of thought. Problems of politics, interest, power, and dominance need not be faced because they do not appear to be relevant in the world of doctrine, where it is assumed that right ideas will be crystallized into rules that are self-enforcing. For example, when Warren and Brandeis wrote a law review article (1890) which was

instrumental in persuading the courts to create a right of privacy, no one felt the need to ask whether that right would have any impact on whether people actually obtained greater privacy in the society (see Kalven, 1966), or whether privacy might serve to undercut the enforcement of laws dealing with personal behavior (see Kelvin, 1973). Of course, a law review writer's influence on a decision or a statute may affect the lives of at least a few people. And it may be better to attempt to right wrongs by this indirect and problematic route than to conduct empirical studies that are less likely to do anything to make the world a better place for even a few individuals. Nonetheless, it seems likely that "generals do better when they know the enemy and terrain on which they are to fight" (Friedman and Macaulay, 1977:*vii*).

Legal professionals, particularly professors, often see their calling as a search for the means to achieve justice or some version of the good society. In the early part of the century, the substantive norms of the common law of contract must have seemed to embody simple common sense to most of those who held professorial rank. Then, after the First World War, many of the legal realists had faith that if appellate judges were freed from legalism, they would be able to balance interests and shape rules in a way that would improve society. At the very least, they could reach sensible results in the cases before them. These assumptions, of course, underlie much of Article 2 of the Uniform Commercial Code and the writings of Karl Llewellyn (e.g., 1960). Other scholars, particularly during the New Deal, professed a faith in regulation and administrative expertise as a means of offsetting the excesses of a regime of pure, unfettered, contract. Still later, a new generation of law professors tended to see pluralism or meticulous attention to proper procedures as the key to the proper role of legal institutions. And some sought a value-neutral means of decision-making in one version of economic theory (see, e.g., Posner, 1972). But many of those who examine the legal process in operation today find it difficult to retain their faith that the key to the good society resides in appellate judges, administrative agencies exercising discretion, pluralism, the morality of adjudication, or economic theory. Instead of justice, the empiricists decribe a system of bargaining (see Friedman and Macaulay, 1977:31-191) where "the haves come out ahead" (Galanter, 1974). One response to this gloomy and ugly picture has been to turn back to the materials legal scholars have been trained to deal with, to seek satisfaction in the normative structure, or to look for remedies to social problems in the interaction between appellate decision-making and scholarly reflection.

Other factors may also contribute to the persistence of the classical model of contract. Lawyers probably have some interest in mystification as a means of status-preservation. They may believe that the illusion of certainty and predictability facilitates business planning and ensures the performance of obligations, and they may be correct to some degree. But it is clear that legal scholars risk serious error if they refuse to recognize that we have found, in a variety of societies, that the application of contract norms through litigation, or even through buying legal advice, is extremely costly and seldom pays. Scholars must also deal with the fact that few nonlawyers know much about the content of the formal norms or the realities of litigation. Any serious and satisfactory view of contract must acknowledge that much, if not most, significant economic behavior takes place almost untouched by contract norms or litigation. Indeed, Lawrence Friedman reminds us that in the mid-1950s,

> the law of contract remained alive, not, however, as the organic law of the state's economic system—a kind of constitution for business transactions—but as one among many. It was the system of rules applicable to marginal, novel, as yet unregulated, residual, and peripheral business and quasi-business transactions, transactions which might, in exceptional cases, call for problem-solving and dispute-settling. "Contract" stepped in where no other body of law and no agency of law other than the court was appropriate or available. [1965:193; cf. Milhollin, 1974]

So far we have speculated about why those who study contract so often write as if they held what we have called a classical model—where one-shot transactions are performed largely because of the threat of the sanctions that follow a breach—in the face of an empirical picture that differs so sharply. Kurczewski and Frieske offer another answer. The classical model, they assume, is a picture of how people ought to behave; the empirical is but an aberration that should be corrected. They tell a story of avoiding disputes if possible and, if not, of settling them by techniques outside of, and even opposed to, the official model of central planning and socialist contract; but they decry the costs of these techniques, both to the Polish economy and to its social system. Managers seek to avoid disputes by remaining independent of other industries. They build unauthorized inventories of potentially scarce raw materials, and they seek self-sufficiency through vertical integration. This wastes resources that could be devoted to productive use if the planners knew of them, and some of the advantages of the division of labor are lost. Illegal practices such as bribes and fictional jobs for the employees of suppliers, may prompt more illegality elsewhere, for if people get away with these minor crimes the perceived risk of punishment for other violations may be reduced. Furthermore, these illegal adjustments may be

interpreted as evidence that socialist economic planning cannot work within its own rules, thus casting doubt on the legitimacy of the entire regime. Avoiding disputes or settling them through informal contacts among managers, also has costs, even though such behavior is perfectly legal. In socialist systems, as I have said, disputes are supposed to serve as feedback to supervisors and planners, signaling the existence of problems and allowing them to evaluate the skill of managers. When things are smoothed out between members of the "club," problems are covered up and useful information is withheld from those who do the planning. One wonders, in any case, how such adjustments can be entirely legal. The manager who fails to seek contract penalties is likely not to meet the planned quota for the factory unless there is slack in the system that ought not to be there in a planned economy.

In contrast to this critical view, most of the studies of business transactions elsewhere tend to applaud what they find, downgrading the classical model of the process. We must ask whether the dispute avoidance and settlement techniques in western countries have costs similar to those stressed by Kurczewski and Frieske. Obviously, capitalist societies do not need to defend the integrity of central state planning, and formal legal rules do not demand litigation to vindicate breaches of contract since such breaches are regarded as a matter of private rather than public concern. On the contrary, one can find statements applauding private settlement of disputes. Yet insofar as the law of contract is thought to advance social norms other than the peaceful resolution of disputes, a system of negotiation will defeat those values (cf. Lubman, 1967). Abram Chayes (1959) has suggested that important regulation takes place when the legal system offers desired facilities—the right to incorporate, a legally valid marriage, or the transfer of legal title—to individuals and groups if they comply with certain conditions. He uses the law of contracts as an example, but we should expect people to be willing to satisfy such conditions only when the facility offered by the law is viewed as sufficiently valuable to be worth the cost. There was a time when courts in the United States refused to enforce a contract in which the seller agreed to supply all of the buyer's requirements of particular goods. Insofar as these decisions had any policy basis, they appear to express the belief that sellers ought not assume a commitment, which might bankrupt them, to supply almost limitless quantities at a fixed price while receiving so little in return. Curtis Reitz (1976) notes that one legal scholar said that such a rule had wreaked havoc within the commercial community. But it did no such thing: the commercial community continued to make "re-

quirements" contracts, apparently unconcerned whether or not they would be legally enforceable. This business relationship was too useful to sacrifice by invoking the formal rules of contract law.

Perhaps there are other costs that we pay as the price of a less aggressive system in which some sins are forgiven, costs such as lowered efficiency. On the other hand, the degree of cooperation found in business in the United States may outweigh any loss in efficiency. It is worth considering what, if anything, might change if contract litigation became cheaper and offered a better chance of obtaining large recoveries. Kurczewski and Frieske want to see practices in Poland brought closer to the model of socialist contract found in their statutes. Apparently, they would substitute contract penalties for contacts and bribes. Suppose the state in either a socialist or capitalist society moved to deter breaches of contract by inducing those who manage large organizations to insist upon the application of contract norms through litigation. Would anyone want contractual parties pushed to perform the letter of their agreements in every case? Clearly performance would be an inefficient use of resources in some cases—it would be hard to advocate forcing an automobile manufacturer to buy thousands of parts for a car model that did not sell; it seems better to allow the manufacturer to stop the supplier from producing any more parts and work out a settlement. And how was the settlement in the *Eastern Airlines* v. *McDonnell Douglas* litigation inferior to an award of only those damages that Eastern could prove had flowed from late delivery of the airplanes? If the present system were curbed might not Poland find itself with higher compliance with its statutory model of contract at the cost of less efficient or declining production? Is it not possible that some slack, sloppiness, and irrationality are unavoidable by-products of the essential flexibility and potential for growth and change in modern industrial systems? The existence of a practice does not prove its inevitability, but we would be unwise to dismiss the possibility.

Kurczewski and Frieske's study is a step toward the most fruitful kind of work in comparative law. It should be matched with studies at the level of practice rather than doctrine. This is not to argue that doctrine and ideology make no difference. The picture Kurczewski and Frieske paint of Poland is similar to, but not identical with, that of the United States, or Great Britain. There are differences, and they, too, deserve our attention. Nonetheless, despite doctrinal and ideological differences, common problems often lead to common solutions.

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