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Poke Your Nose into Your Clients' Businesses (If You Want to Understand their Contracts)

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**POKE YOUR NOSE INTO YOUR CLIENTS'
BUSINESSES (IF YOU WANT TO UNDERSTAND
THEIR CONTRACTS)**

**EDWARD S. GODFREY
SCHOLAR-IN-RESIDENCE LECTURE**

James W. Bowers

ABSTRACT

Thirty years ago Grant Gilmore argued that "Contract" was dead. This lecture, delivered as 2004 Godfrey Scholar-in-Residence at the University of Maine School of Law, considers the cause of death. Since the expired doctrines arose in a common law process, the lecture argues their demise resulted from the failings of lawyers, especially lawyers' commitment to wooden, formalist legal methods. I explore some of the reasons why lawyers became committed to these methods, and argue that even were nineteenth-century formalistic practices resurrected, modern lawyers must still be prepared to understand the potential effects business contexts might have in contract disputes and negotiations. To prepare themselves, lawyers must give up legalistic, formal method and become willing to learn something about their clients' businesses. The lecture concludes by suggesting that sensitivity to social context is a likely requirement of effective lawyering, not merely when dealing with contracts, but in practice involving construction of legal texts generally.

POKE YOUR NOSE INTO YOUR CLIENTS' BUSINESSES (IF YOU WANT TO UNDERSTAND THEIR CONTRACTS)

*James W. Bowers**

Thirty years ago Grant Gilmore wrote a book, "The Death of Contract."¹ Its title overstated his case. He did not establish that Contract had croaked. He did show, however, that the good-old nineteenth-century bargain theory of consideration was in its death throes, if it had not already expired. Although Gilmore accurately concluded that the consideration doctrine was biting the dust, he did not explain the cause of death.² I offer here my diagnosis of what went wrong with contract law because I fear that, unaddressed, it could keep on going wrong.

My hypothesis is that the good-old contract doctrine perished because it failed to meet the needs, wants, and aspirations of the people who had to live with it, namely, people doing business. Failure of doctrine created in a common law process means it was lawyers and judges who failed. Better lawyers, back then, would have sensitized the courts to the needs of contracting parties and thus helped create contract doctrine better suited for their business clients. Those lawyers would have first been required, however, to become sensitized to the needs of their *own* clients. To do that, they would have had to have poked their noses into their clients' businesses.

Lawyers will resist this prescription. Many lawyers, and most law students, hope that law practice is essentially only about reading and writing. This hope is particularly appealing for commercial lawyers. The reading and writing of contracts is their essential professional activity. The common law of contract we inherited from the nineteenth century came to us embodying an exaggerated belief in the power of words. That belief, now labeled "neoformalism," is arguably experiencing a resurgence in American commercial law. Among the doctrines that exhibited that belief were the so-called "four corners," and "plain meaning" doctrines of contract interpretation, and the strong version of the parol evidence rule. Even Dr. Seuss suggests that words have that much power. Recall Horton the Elephant's most famous quote—

I meant what I said,
and, I said what I meant.
(An Elephant's faithful,
One Hundred Per Cent!).³

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1. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

2. See *id.* at 55-85. Gilmore argues that the consideration doctrine was, in fact, an invention of Langdell, elaborated upon by Holmes, and finally systematized by Williston, but which never accurately captured the holdings of the actual cases they cited. *Id.* at 12-34. Thus, in a way he argues as strongly for the point that Contract had not legitimately arisen as he does for the point that it had fallen. *Id.*

3. DR. SUESS, *HORTON HATCHES THE EGG*, 16 (2d ed. 1968).

That suggests it is child's play for you to express what you mean,⁴ and for me to accurately understand it.

Neoformalists claim words have "plain meanings." Contractual security and predictability are thus enhanced if courts construing contracts restrict themselves to ruling based strictly on the dictionary's definition of the contract's words. This is the carryover of the "we-are-a-government-of-laws, not-of-men" idea into the realm of contract law. The central activity of commercial law practice can, if this claim is true, be accomplished sitting in your law office, if it requires only an ability to read and use the dictionary. Law students, too, find this image of commercial practice attractive. It promises them that all they need to know in order to be effective lawyers is what they can find in the law books. Having to know something about business, or about social life as well, might be asking them for things they doubt they can deliver. Indeed, I carried away from my own law school training that there was a world of business about which I, as a prospective lawyer, would have no concern, and then there was a separate legal universe whose boundaries were the limits of my professional obligations.

From when I was a law student myself, taking business law classes, I recall hypos in which my professors would dismiss a student's argument, asserting that the issue it raised involved the making of a "*business* decision," and not a *legal* decision. I took these admonitions to mean that my job only involved knowing the law. Knowing business was somebody else's responsibility. Once I was in practice myself, I came to realize that law practices are businesses themselves, more profitable if conducted in a businesslike manner. Many lawyers are very good at making the business decisions required by their own firms. The old classroom distinction could not mean that lawyers should not be expected to have good business instincts and skills.

Probably the professors' point was a different one, something as simple as: Some decisions are your job to make, and some decisions are not. This, of course, was an obviously sensible observation (as are all observations made by law professors). Adam Smith advised us, over two hundred years ago, that the "division of labor" was the best way to organize things.⁵ Allocate task "A" to persons especially skilled in doing "A" (or who happen to like doing "A" a lot more than the rest of us), task "B" to folks who are best at "B" (or like it better), and so forth; that way, a society produces more goods and services, and makes them better while suffering less unpleasantness than one in which the "B" skilled guy does the "A" work, and vice versa. Assigning Colleen Khoury to a law school deanship and Lawrence Taylor to a linebacker position leads to both better law schools and better football teams than doing it the other way around.⁶ In any case, in a well-

4. Of course, no one would have guessed from his expression of total fidelity that he would have undergone the efforts actually required in the conditions that Horton faced. The efforts Horton makes in "Horton Hatches a Who," in incubating the abandoned egg of the shiftless Mazie bird, would be categorized in modern sport speak as giving two hundred percent.

5. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 7-15 (1776).

6. Indeed, to this very day, I am advising my students (and my own children) that the recipe for a happy life involves finding out something that you both really like to do and are really good at. Then find the career which involves doing those things.

functioning lawyer/client relationship, you should be making the decisions you are best at, and your clients should be making the decisions they make best. Maybe this was all my professors meant to suggest and, if so, they were obviously right, even if, since Adam Smith had said as much as twenty decades earlier, their observation was not exactly novel.

It turns out there is a lot of doctrine that addresses what questions clients should answer for themselves and which ones the lawyer is authorized to answer. The basic principle, carried forward in this doctrine, is that the client is the principal, and the lawyer is just his or her agent. Efficient principals might authorize their agents to make the decisions which, as between them, the agent is better suited to make. Indeed, because principals want efficient relationships because they work better, many will actually provide for such an allocation of decision-making responsibilities as between themselves and their agents.

Under the law of agency (and professional ethics), however, there is a potential conflict with the adage that the division of labor is wise. The principal gets to make *all* the decisions he or she wants to make, and the agent gets to make only those which the principal authorizes. This is true whether or not the agent is likely to be the better decision-maker. Lawyers who are confident that accepting an obviously favorable settlement offer (or rejecting an obviously ridiculous one) is in the client's best interest can, and regularly do, resist this rule of agency and professional responsibility. Even though the lawyer is obviously likely to be better informed about whether or not the offers are favorable or unfavorable, the client is the one who gets to make that decision.⁷ The ethical rule may not be the efficient one, but therein lies the problem. The lawyer who does the right thing economically, exceeds his ethical authority. Whether or not to accept or reject an offer to settle is a business decision, not a legal decision. If this is what my professors had in mind, their sense of the rules of professional responsibility was as sound as their sense of the principle of the division of labor.

I would, at one time, have preferred to end my remarks at this point by concluding that law professors are likely always to be correct, no matter how you looked at what they are saying. It would not follow, though, that the law student always understands correctly. At the time, I took great comfort from the understanding that to practice law, all I had to know could be found in the law library. Whether it grew from the wisdom of children's literature or the advice of law professors, I hoped that business considerations were for the client, and all I had to know were the words expressing the law.

I obviously was not alone in my law school wishes. Lawyers and clients continue to harbor the formalist hope that words are so powerful that they can be used to control the future. That hope is the foundation of the nineteenth-century contract interpretation doctrines and formalist legal method. Indeed, controlling the future with their words is what lawyers and clients aspire to when they write

7. Rule 1.2 of the American Bar Association's Model Rules of Professional Conduct, regarding the scope of representation and allocation of authority between client and lawyer, provides in part:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.

MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

contracts.⁸ Words, sentences, and paragraphs are the commercial lawyer's stock in trade. Lately, however, there has been a rising controversy among scholars in the profession about whether commercial law is giving naked words their just due, or giving them too much credit. In academic commercial law, at least, there is a significant movement advocating a return to eighteenth and nineteenth-century faith in the power of language. Contracts, some are saying, should be enforced by strictly attending only to their words.⁹ All that should count is the *form*, and matters of the *substance* of the transaction should not even be looked into. Some even think that contract law is moving in the direction of becoming rigidly formal,¹⁰ although other observers are not so sure.¹¹ Sadly, for my student hopes, there is a lot more to practicing commercial law, and understanding contracts, than simply reading and writing. If that were not true, we are all vastly overqualified. At least since the writings of Oliver Wendell Holmes in the nineteenth century,¹² we have been on notice that it might be the future that controls the words, not the other way around.

The reason is that the meaning of a word is *not* just a function of the word itself. The meanings of words change as you use them in different contexts. The simple noun "fly" means something drastically different when describing what you saw in a ballpark from what you saw near the garbage dump. "Give me a cheeseburger and fries," spoken to your mom in her kitchen, is a request for a gratuitous meal. When she serves them, title passes. Those identical words—"Give me a cheeseburger and fries"—spoken at the "Burger Boy" counter, are actually an offer to buy them and pay the posted price. Title, were it still a useful personal-property concept, would not pass until you paid. Similarly, the words in contracts may come to mean different things should the future in which they are consulted differ from the future context the contract drafter meant them to govern. The words used in contracts nearly always assume that they will be resorted to in a business context. In order to read contracts, then, you have to know something about the business context the words were chosen to rule. To know about that context, commercial lawyers are obliged to poke their noses into their clients' businesses.

Why was Gilmore able to show that the classic contract consideration doctrine is dying? I think the lawyers who used it, and the courts who applied it, failed to get beyond the neoformalist stance of thinking they could merely read the words

8. Compare William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971 (2001) with John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002).

9. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Woodward, *supra* note 8, at 971; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000).

10. See, e.g., Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995); Michael P. Van Alstine, *Of Textualism, Party Autonomy and Good Faith*, 40 WM. & MARY L. REV. 1223 (1999).

11. See, e.g., Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879 (1999).

12. See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

in the case holding or the Restatement section and find, by reading alone, how the law solved the problem. They might have inquired into the business reasons, which could have explained the conduct they were assessing and showed that it was praiseworthy or legitimate. They might have asked what justified the doctrine whose words they were examining and argued the doctrine should not be applied when doing so does not advance that justifying rationale. Had they done so, the damaging doctrines probably never would have been created, or had they been formulated, would not have been applied in such damaging ways. In a nutshell, formalism created and then killed contract.

Contract law enforces many serious promises people make. At one time, a promise made in writing and sealed with a ring in sealing wax would have been automatically enforceable.¹³ The consideration doctrine arose, however, to regulate the enforcement of promises that were less formal. The doctrine enforced only a promise made in exchange for something of value from the promisee, either a return promise or a bargained-for act.¹⁴ Other legal systems enforce nonreciprocal promises to make gifts,¹⁵ so it was hardly inevitable that the common law would refuse to. However, there probably was a good reason. The Anglo-American legal system was the only one that relied on juries in civil cases. In a preliterate culture, anybody might appear before a jury and claim that someone else had promised her something. Who knows whether a jury would have believed that claim? The consideration doctrine, on the other hand, restricts juries to deciding only claims based on promises which are highly likely to have been made. If the lender who wants the jury to enforce your promise to pay him \$1,000 must first prove that he lent you that much, his claim that you made such a promise is highly reliable. The point is that a doctrine which enforces contracts needs rules which help it to restrict enforcement to actual promises. The early consideration doctrine had such a purpose and effect.

Lawyers sensitive to the reasons why the original consideration requirement had merit might have phrased the rule somewhat differently than the form that came to be accepted. The holdings in the initial cases which invented the doctrine might have been characterized as developing a rule that the law will only enforce contracts in cases where it can be reliably established that promises were really made. Promises to buy provoke promises to sell. Promises to repay naturally follow agreements to loan. Promises to pay wages induce promises to work. Showing that the promise you base your claim on occurred in such a reciprocal environment gives assurances that the promise likely was actually made.¹⁶ The courts

13. E. ALLEN FARNSWORTH, *CONTRACTS* § 2.16 (1982).

14. *RESTATEMENT (SECOND) CONTRACTS* § 71 (1981). Conditional gift promises raised the issue whether compliance with the condition was adequate consideration. *See, e.g., Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891). Eventually, when compliance with the condition could be foreseen as sufficiently detrimental, the promise relied upon could be enforced even without consideration, under the doctrine of promissory estoppel. *RESTATEMENT (SECOND) CONTRACTS* § 90 (1981).

15. *See, e.g.,* LA. CIV. CODE ANN. art. 1536 (West 2004); S.Q. Ch. 64 § 1812 (2004) (Can.), available at <http://www.canlii.org/qc/laws/sta/ccq/20030901/part1.html> (last accessed Nov. 2, 1994). Frequently, however, certain formalities, which substitute for the reciprocity reliability test of the consideration doctrine, are required. *Crosby v. Stinson*, 766 So. 2d 615, 619 (La. Ct. App. 2000).

16. GILMORE, *supra* note 1, at 18 (attributing this view to Lord Mansfield in the mid-eighteenth century).

that invented consideration could plausibly be praised for appreciating the need of contracting parties for such a reliability screening test.

Unfortunately, however, the rule was paraphrased not as a reliability test but rather as a wooden requirement for bargained-for exchanges. Lawyers and courts treated the rule as one that could and should be mechanically and thoughtlessly applied; it was used in hundreds of cases to deny enforcement of valuable promises that had concededly been made and in which reliability, therefore, was not at issue. In many of these cases, it damaged the interests of contracting parties who may have had good reasons both for making or soliciting the promise, and for wanting the promise to be enforceable. We can never be sure it would have worked, but had the lawyers urging the enforceability of the promise gone on to explain that to the courts, the hardening of the doctrine that occurred in a formalist regime that led to the death of the doctrine might have been avoided.

Here are some of the things that were included in the doctrine, together with what I argue good lawyers should have been saying about them:

- (1) The so-called "pre-existing duty rule" branch of consideration doctrine required new consideration to support natural modifications to existing contracts. That rule rendered many efficient contract modifications unenforceable.¹⁷ Lawyers defending modified contracts should have argued that some modifications were willingly made by the parties for good business reasons. Modifications frequently become optimal for parties whose transaction encounters unexpected future conditions. There is no particularly good reason, then, why those modifications should not become enforceable, so long as we are reasonably assured the parties actually agreed to them. Indeed, the rule that modifications require new consideration has now been legislatively reversed in the Uniform Commercial Code (UCC).¹⁸
- (2) The "illusory promise" branch of the consideration doctrine made it difficult to confect enforceable contracts with efficient allocation of quantity uncertainties that inhere in requirements and output contracts.¹⁹ Lawyers might have pointed out that uncertainty about the amount of a product that could be produced or grown, or that might be demanded by the market, is a fact of business life. Parties have no good choice but to allocate those risks among themselves and requirements contracts or output contracts are both sensible ways to do so.²⁰ Nowadays, of course, such contracts are routinely enforced.²¹
- (3) The rule making firm offers revocable likewise got in the way of some legitimate business practices. Businesspeople have good reasons for wanting the power to make enforceable firm offers without the expense of negotiating option contracts.²² Mechanically applied, the consideration doctrine denied them that power. Fortunately, in the twentieth century, the persons damaged by these senseless rules were able to obtain their reversal.²³

17. FARNSWORTH, *supra* note 13, §§ 4.21-4.22, at 271-79.

18. U.C.C. § 2-209(1) (2003).

19. FARNSWORTH, *supra* note 13, § 2.15, at 79-82.

20. See James W. Bowers, *Incomplete Law*, 62 LA. L. REV. 1229, 1260-65 (2002), for an analysis of possible business motivations behind the use of requirements and output contracts.

21. U.C.C. § 2-306 (2003).

22. For some possible reasons, see Peter Klik, *Mass Media and Offers to the Public: An Economic Analysis of Dutch Civil Law and American Common Law*, 36 AM. J. COMP. L. 235 (1988).

23. See U.C.C. § 2-205 (2003).

(4) It used to be that in order for a contract to arise, businesspeople had to perform the offer and acceptance routine. Since they did not typically perform all of the steps the law of contract formation required, these old rules imposed needless expense on them. The requirement of this artificial ritual also often trapped them into unexpected legal results. Today, the rule is that a contract may be established in any manner sufficient to show agreement.²⁴ Behavior that comes naturally, then, now may be the basis for finding a contract.

The death or reversal of these old versions of the nineteenth-century consideration doctrine constitute what Gilmore styled the "Death of Contract." It is now well understood that these doctrines are better off dead because they stood in the way of legitimate and efficient business practices desired by people who regularly resort to contracts. Still, these doctrines persisted for the better part of a century before they were finally reversed or repealed. The bad news is that the common law process can make long-lasting and costly mistakes. The good news is that the democratic process provides an escape from those mistakes which the judicial process does not correct on its own. Better lawyering, conducted with an eye toward the business consequences of contract doctrine, results in fewer mistakes, and promises to correct them sooner. I think that if lawyers, at the time, had asked their clients to explain to the court why sensible businesspeople might desire to avoid the expenses these doctrines imposed and retain the powers they took away, the courts might never have developed the doctrines at all. At least the courts might have applied the doctrines in a manner less damaging to legitimate commercial goals.

Maybe, to use Gilmore's style, contract didn't die because contract lawyers tried to get by, resorting only to the contractual texts, without trying to understand their clients' businesses. Maybe it wasn't formalism that created and then killed contract. Maybe formalism wouldn't continue to develop damaging doctrines and the cure I propose isn't called for. Nevertheless, there are still good reasons why you should poke your nose into your clients' businesses.

The first reason is the operation of Murphy's Law. Current law on the question of interpreting contracts is in a state of uproar. The classic nineteenth-century parol evidence rule, still adhered to in some states, is that parol evidence is not admissible to alter the "plain meaning" of unambiguous, integrated, contractual text.²⁵ This rule (partially) delivers on the law student's hope. It promises that if you can read, and have a dictionary, you can practice commercial law without leaving your law office. That approach will not work, however, when the writing was so poorly crafted as to leave you in doubt about its meaning. Murphy's Law holds that this will often be the case. Thus you *will* have to poke your nose into your client's business—go out of the office, talk to witnesses, gather documents, inspect exhibits, and prepare to offer or meet parol evidence on the question of what the contract might mean. The kind of evidence you will need to obtain and offer at the trial will be facts which persuade the court that the contracting parties adopted a sensible plan with their contract, which, if enforced by the court, will enable your client to prevail. Parol evidence showing that the other side's interpretation would not make business sense will also be useful for your client's case.

24. See U.C.C. § 2-204(1) (2003).

25. *Hershon v. Gibraltar Bldg. & Loan Ass'n*, 864 F.2d 848, 851 (D.C. Cir. 1989); *Savik v. Entech, Inc.*, 923 P.2d 1091, 1094 (Mont. 1996).

The second reason is that current law itself admonishes you to poke your nose into your client's business. Even when the drafter of contractual language leaves you without any doubt about what the parties to the contract intended, you still may have to prepare to defend your understanding with evidence. The UCC itself, by incorporating trade practices and the parties' past behaviors as contract standards and terms (unless carefully negated), forces lawyers out of their offices and requires them to go beyond their dictionaries when they try to draft or understand their clients' contracts. The Code thus entertains the possibility that the words of the contract have meanings to the parties which might vary from those found in the dictionary. The word "dozen" might mean "twelve" in the dictionary. If you poked your nose into your client the baker's business, however, you might discover it means "thirteen" in the bakery. The modern rule on understanding contracts is that extrinsic evidence is always admissible to establish "the meaning of the writing, whether or not integrated," and without a prior showing of ambiguity.²⁶ This rule means you can never relax in your office, confident that you know, merely from reading its text, just what the contract provides. In between the Restatement Second's modern and classic parol evidence rule extremes are several other possible versions of the contractual evidence rules, most of which have been urged upon and adopted by various courts and commentators over time.²⁷ Under all of them, however, the possibility always exists that on occasion, the business context in which the contractual language is to apply will matter to its meaning.

Modern neoformalists thus decry the UCC. The Code counsels that the contract is not the words alone, but the parties' agreement, which is to be understood as taking for granted certain facts about the marketplace.²⁸ The Code presumes that the words the parties use in their commercial deals will be understood by such parties as meaning what they are understood to mean by persons in the trade, or that the meaning demonstrated by their repeated past practices is more convincing evidence of what they thought their obligations were than is some dictionary definition. The formalist faith in words is thus resisted in the commercial law itself. As long as the UCC is on the books, and directs us to understand business contracts in the way businesspeople understand them, however, we lose the comfort we used to have with the feeling that everything we will ever need to know can be found in the case reports or annotated statutes. In order to understand contracts in the ways that contract law directs us to, the lawyer is obliged to understand something about the business, as well as what is in the hornbooks and treatises.

As a final reason, I hypothesize, it is probably true that this way of thinking actually predated the UCC and would even continue long after the UCC were repealed, should the formalists ever succeed in making that happen. The contracts themselves that your clients will make under either regime will require you to understand the business contexts they address. When, for example, a contractor agrees to build in a "good and workmanlike manner,"²⁹ the question might always

26. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (1981) (emphasis added).

27. Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 *FORDHAM L. REV.* 799 (2002) (reviewing the entire range of contractual evidence rules).

28. See, e.g., U.C.C. §§ 2-202(a), 1-205(4), 2-208(2), 2-208(3) (2000).

29. See, e.g., THE AMER. INST. OF ARCHITECTS, AIA DOC. A201: GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (1970). For discussion of this standard and its common use in construction contracts, see 1 *SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: THE MAJOR AIA DOCUMENTS*, 12.06 (4th ed. 1999).

arise “how good is that?” What other people in the market are getting from their contractors when their contracts call for this level of performance seems to be what others should reasonably expect when they contract for the “good and workmanlike” standard. Sometimes it is so difficult to articulate a quality standard that words fail to give us predictability and precision. Thus, the best contract law can do is refer us to a sample we can see, smell, or taste. Formalists rarely take account of this particular weakness of words, even though businesspeople understand that clauses like these refer to particular market standards. What I am suggesting here is simply one more reason why commercial law cannot be practiced with only resort to the dictionary in your law office. The contracts themselves will frequently direct the lawyer out into the marketplace before he or she will be able to understand just what it was that the contract words actually required.

I am persuaded that my point is more general than the one I urge here. All law is a creature of social life. In consequence, to work with legal texts, you must also know something about that social life. There was a time, not so long ago, when law was regarded simply as words. Even at the most famous of law schools, the underlying pedagogic strategy was that lawyers could be trained simply by obliging students to study legal texts.³⁰ Nevertheless, as a result of the influence of the American Legal Realism movement, initiated by Holmes, by the last half of the twentieth century (in the words of Richard Posner):

[L]aw was . . . recognized to be a deliberate instrument of social control, so that one had to know something about society to be able to understand law, criticize it, and improve it. The “something,” however, was what any intelligent person with a good general education and some common sense knew; or could pick up from the legal texts themselves (viewed as windows on social custom); or, failing these sources of insight, would acquire naturally in a few years of practicing law: a set of basic ethical and political values, some knowledge of institutions, some acquaintance with the workings of the economy.³¹

Some 40 years prior to Posner’s formulation, a pair of professors, Myres McDougal and Harold Lasswell, wrote a famous law review article³² that was probably a legal forerunner to the cultural literacy movement recently popularized by E.D. Hirsch and his collaborators.³³ In their article, Lasswell and McDougal argued that law schools should train their students not only about legal doctrine, but also about social facts and statistical trends of the sort that might affect legal policy.³⁴ Implicit in their argument was the claim that effective lawyering requires lawyers to be up-to-speed on the facts of social life. The effort to keep awake while reading *The Statistical Abstract of the United States* would be so substantial that, as a student, I cringed at the thought. Learning the doctrine was hard enough without piling the prospect of learning social statistics on top of it.

We live in a regime dedicated to the proposition that “ignorance of the law is no defense.” In order to believe that law is morally coherent, we thus have to

30. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762-63 (1987).

31. *Id.*

32. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

33. E.D. HIRSCH, JR. ET AL., *THE DICTIONARY OF CULTURAL LITERACY* (1988).

34. Lasswell & McDougal, *supra* note 32, at 206-07.

believe that its texts actually carry out a scheme in which sensible behaviors are approved of, and only obviously antisocial, ridiculous behaviors are penalized. The something extra, beyond the legal texts, which Posner maintains is necessary, is simply enough familiarity with the facts of social life to be able to understand the substance of what the society would deem is common sense. If the citizenry can be expected to behave in accordance with that common sense, judges can probably be trusted to conform the doctrines they develop in the same way. I want my students to understand why and how the doctrines in the books conform to common sense. I urge them always to argue not only that "the text of the law requires this," but also to explain that it makes good sense for the law to require it. How can lawyers even know that the consequence of any particular interpretation of legal text would be sensible for businesses? They will have to ask their clients to explain what makes business sense and why. That is what it means to poke your nose into your client's business. Doctrines created by the common law process which do not attend to this feature of social life are doomed to create nonsensical outcomes just as did the old elements of contractual consideration. When they do appear, these doctrines, like the bargain theory of consideration, deserve to die. When they do, we should hire the brass band, and celebrate with a second-line New Orleans jazz funeral.

