RENEGOTIATIONS AND SETTLEMENTS: DR. PANGLOSS'S NOTES ON THE MARGINS OF DAVID CAMPBELL'S PAPERS

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The British Empire brought to the colonies the benefits and burdens of, among other things, the English language, the King James Bible, Shakespeare, and the common law. In 1975, Richard Danzig offered the image of law students around the world studying *Hadley v. Baxendale*[1] as part of their inheritance from the colonial past.[2] Mastering this opinion is part of the initiation rite for new common lawyers. In 2004, there was a conference in Gloucester, the site of the Hadley flour mill, to celebrate the 150th anniversary of the decision. Those attending the conference discovered that the now legendary Hadley's flour mill had been converted into condominiums.

Professor David Campbell is one of the few scholars whose work I always read just because of my respect for the author. He ventured to Gloucester and presented a paper praising the consequences of *Hadley* and related rules.[3] This article developed ideas that he had sketched at a

[*] Malcolm Pitman Sharp Hilldale Professor of the University of Wisconsin-Madison and Theodore W. Brazeau Bascom Professor of Law. This article is a revision of a paper given at the University of Durham, UK, on May 17, 2006, while I held the Dickinson Dees Law Fellowship. I am grateful that the Department of Law and Grey College of the University, and Dickinson Dees LLP, made it possible for me to take up this Fellowship. I want to thank my colleagues Kathryn Hendley and Elizabeth Mertz and my daughter, corporate attorney Laura Macaulay, for comments on an earlier version of this article. Dean David Campbell also read the paper and asked a number of hard questions. All mistakes are mine because I did not take all the good advice offered.

[1] 9 Ex. 341, 156 Eng. Rep. 145 (1854). See U.C.C. § 2-715(2) (1995) for a modern statement of the rule.

[2] Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

[3] David Campbell, *The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455 (2005) [hereinafter Campbell, *Relational Constitution*]. Three rules operate together to minimize contract damage awards in all but a limited subset of cases. First, the aggrieved party must mitigate damages. Typically, she must buy a substitute and can recover only any increased cost of obtaining it. Second, if she cannot mitigate, she can seek consequential damages only if they pass the foreseeability tests of *Hadley v. Baxendale*. Finally, she must prove the existence of lost anticipated profits, and other consequential damages, with reasonable certainty.

2001 conference at Wisconsin.[4] He said provocatively: "Far from it being the function of the law of contract to (so far as possible) prevent breach, the function of that law is to make breach possible although on terms which the law regulates."[5] In all but the exceptional case, he notes, the aggrieved party will be limited to the difference between the contract price and the market price as contract damages. The limited remedies available provoke a sharing of losses in most cases. While Campbell says some very nice things about me in his article,[6] he argues that I fail to appreciate all of the virtues of this happy situation.[7]

I welcome the opportunity to look at the impact on long-term continuing relations of doctrines such as mitigation, *Hadley v. Baxendale*, and the rule requiring damages to be proved with reasonable certainty. It also gives me yet another chance to advocate the approach that we at Wisconsin call "new legal realism."[8] That is, parties to contracts renegotiate because of these rules but also because of the law in action. Let me make clear that I intend my paper to reflect our practice at the University of Wisconsin Law School, where faculty members read each other's work in a cooperative spirit. These are my notes on the margins of a friend's paper. I will feel free to offer suggestions about which I am not entirely sure.

To spoil any suspense, let me say that I like Campbell's articles very much because they open the door to considering contract-law-as-delivered. They look at the impact of remedies law on renegotiation of contracts and adjustment of disputes. These practices are important and too often overlooked.[9] Insofar as Professor Campbell and I differ, I

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[4] David Campbell, *Breach and Penalty at Contractual Norm and Contractual Anomie*, 2001 WIS. L. REV. 681 [hereinafter Campbell, *Breach and Penalty*].

[5] Campbell, *Relational Constitution*, *supra* note 3, at 456.

[6] *See id.* at 462 ("Macaulay, in the shining decency of his general attitude to the legitimate use of the law . . . .").

[7] *See id.* at 456 ("I do intend to argue that, in important ways, Macneil's own views (on breach) are open to radical criticism, as are those of the other principal contributor to the relational theory, Stewart Macaulay.").

[8] *See, e.g.*, Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335; Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365; Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433; Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455.

[9] Classic contracts scholarship asks only whether a renegotiation or adjustment lacked consideration. As far as I am concerned, this is one of the least interesting questions related to changing deals before they are fully performed. *See, e.g*, U.C.C. § 2-209(1) (1995) ("An agreement modifying a contract within this Article needs no consideration to be binding.") Official Comment 2 to that section tells us: "The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith." Grand words, but nothing is said about how, in all but the exceptional case, the victim of such an extortion can obtain any legal redress. Taking the approach of a new legal realism, I doubt that the Official Comment will serve to overturn many modifications.

think that I may like the present uncertain-law plus the chaotic law-in-action better than he does. I am tempted to take Dr. Pangloss's position: this is the best of all possible worlds.[10] In this paper, I will summarize Campbell's arguments, and then I will have a go at them.

Campbell criticizes a number of writers who see the law of contract remedies[11] as too nice to bad guys. Campbell points to one of my articles and says that I question "the normal principles of the quantification of damages, which in this context he [Macaulay] disparagingly calls 'the ideology' of the expectation interest."[12] Allan Farnsworth says that the law shows "a marked solicitude for men who do not keep their promises."[13] Other writers advocate that contract remedies should protect a "performance interest" and offer more incentives for people to honor their promises.[14] Still others advocate that the law grant specific performance relief in more situations.[15] Campbell argues that these views overlook that contract remedies reflect two valuable principles: first, the law tries to protect the claimant's expectation, but, second, it attempts to avoid economic waste by doing this as cheaply as possible. In some situations, the second principle will support breach of contract as a sensible adjustment to changed circumstances. Campbell notes that a party who breaches may not be a bad guy.

Campbell begins by looking at a typical business situation where a supplier[16] cannot deliver a generic good, and there is an available

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[10] In the face of earthquakes, wars, slavery, plague, syphilis and religious persecution, Dr. Pangloss teaches: "[I]n this best of all possible worlds . . . all is for the best." FRANCOIS MARIE AROUET DE VOLTAIRE, CANDIDE 16 (Donald Frame trans., 1961).

[11] Campbell focuses on legal remedies for breach of contract in his two papers, and I will limit myself in the same way. Clearly, many parties to contracts must take their disputes to various forms of alternative dispute resolution. We know relatively little about the impact of arbitration, mediation, and other forms of ADR on adjustments, renegotiations, and settlements of disputes. Nonetheless, ADR would seem to play a large role in provoking renegotiations and adjustments of disputes.

[12] Campbell, *Breach and Penalty*, *supra* note 4, at 689.

[13] E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1216 (1970).

[14] *See, e.g.*, Brian Coote, *Contract Damages, Ruxley, and the Performance Interest*, 56 CAMBRIDGE L.J. 537 (1997); Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L.Q. REV. 628 (1995); *see also*, Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000); Eric G. Andersen, A *New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073 (1988).

[15] *See, e.g.*, Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

[16] When a buyer is the one breaching the contract, the law of contract remedies takes an analogous approach. The seller is given incentives to resell the goods and collect as damages any difference between the contract price and a lower resale price. I will limit my discussion to the remedies of a buyer against a defaulting seller to simplify the discussion in the text. I think that whether buyer or seller is the aggrieved party makes little difference to the points that I am making.

market in such goods.[17] Here the law demands that the buyer mitigate any potential loss by covering his or her needs through a substitute contract with one of the seller's competitors.[18] If the available replacement goods cost more than the contract price, the original seller owes the buyer only this difference. In most instances, the effect of this rule is to give the aggrieved buyer an incentive to adjust the contract to reflect the changed circumstances that have made it difficult for the seller to keep its promise. The buyer could pay the increased cost of covering its needs on the market and consider suing its original supplier for this sum. However, for many reasons most buyers will have to take other paths. The buyer could agree to pay the original supplier something between the contract price and the market price as an adjustment if this will allow the seller to perform. The parties, alternatively, could work out a more complex settlement where the seller gets relief now but the buyer gets benefits in the future beyond the present contract.

There may be an implicit norm in at least some long-term continuing relationships calling for buyers to help sellers who run into trouble trying to perform. Campbell points out that errors in forecasting the future cannot be eliminated. Some contracts inevitably will impose on a party unanticipated costs that are beyond its ability to absorb. Buyers always take the risk of their supplier's going into bankruptcy or another kind of creditors' proceeding. They also take some small risk of their supplier being excused by the doctrines of mistake or frustration. The law of contract remedies limits damages for breach, and, as a result, it allows the threat of breach to induce adjustments. The law of remedies serves to keep contract as a useful institution, and not one that imposes such great risks so that only fools would make contracts.

However, not all commercial contracts involve generic goods that can be replaced by turning to the market.[19] Campbell recognizes that relational contracts are likely to involve idiosyncratic losses flowing from a buyer's reliance on its supplier's performance. There may be no

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[17] Campbell notes: "[F]or commercial parties, this normally is possible because capitalist economies are characterized by the ready availability of goods in competitive supply, including a margin of excess capacity which allows a buyer faced with breach to take cover." Campbell, *Breach and Penalty*, *supra* note 4, at 690-91.

[18] *See, e.g.*, U.C.C. §§ 2-711(1)(a), -712(1)-(2).

[19] Neither Professor Campbell nor I deal with contracts involving truly unique goods where specific performance is a real possibility. Sales of rare paintings and the like where the seller tries to back out do not represent a large share of commerce, and these deals are not the ones where we can expect that a buyer should share some of the seller's loss when she or he made a bad deal. *See, e.g.*, Estate of Nelson v. Rice, 12 P.3d 238 (Ariz. Ct. App 2000) (An executor sold paintings at a nominal price. The buyer purchased them because he liked their frames. Then the parties discovered that the paintings were extremely valuable. The court refused to give the estate relief).

substitutes available from other suppliers. Failure to deliver a machine or component parts may mean that the buyer will not be able to make its own product and sell it at a profit. Sometimes, whether there would have been profitable sales is uncertain; this is particularly true when there is no historical pattern of past sales. Sometimes the amount of that profit might be huge and beyond what the supplier had anticipated. Campbell sees such consequential damages as ordinarily outside of the zone of risk that a supplier assumes. If a buyer wants a seller to "insure" against the risk of such losses, Campbell argues that the buyer should negotiate explicitly for this. He says: "The solution to [these] problems . . . lie in the hands of the claimant prior to agreement, for he or she can require a clause giving the remedy he or she wants during negotiations."[20]

Campbell objects to the idea that we always must keep our promises even though they have become almost impossible to carry out. We all know the folk norm that imposes a moral obligation to perform a promise.[21] There are stories, for example, of people who were wiped out financially during the Great Depression of the 1930s, but who worked the rest of their lives trying to pay off their debts. The stories invite us to admire such people. Judge Richard Posner tells us that this also is the law:

> [A] fixed price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer.... If... the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk

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[20] Campbell, *Relational Constitution*, *supra* note 3, at 479. It may not be easy for a buyer to get a seller to agree to such liability. Moreover, the buyer's lawyer will have to navigate successfully the hazardous waters of the distinction between liquidated damages and a penalty as she drafts such a clause. In many, if not most, instances, it is hard to avoid creating a penalty. *See, e.g.*, Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985) (Judge Posner attacks refusing to enforce stipulated damages clauses as paternalistic, but, finding himself bound by Illinois law, he overturns what he finds to be a penalty with enthusiasm.).

[21] *See* Bernd Irlenbusch, *Relying on a Man's Word? An Experimental Study on Non-Binding Contracts*, 24 INT'L REV. L. & ECON. 299 (2004) ("Our experimental results . . . show that social norms cannot be ignored in the theoretical economic analysis of contract law. . . Our study clearly indicates that mutual transactions are in no way doomed to failure if parties cannot or do not want to refer to legal enforcement measures. The results provide unambiguous evidence that motivations such as trust in reciprocity and the will to keep a promise have a strong influence on the fulfillment on what is written in a contract."). Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1 (2005), notes that we can have person to person, person to organization, and organization to organization contracts. He discusses the difficulties of fashioning a theory of contract that adequately includes all three types. We can wonder whether the cultural norm about keeping promises applies equally to all types. Moreover, we also should suspect that at least some organization-to-organization contracts will reflect aspects of person-to-person deals. Representatives of seller and buyer may have long-term continuing face-to-face relationships.

back to the seller by invoking impossibility or related doctrines.[22]

Campbell objects to such statements in judicial opinions and writings about contracts. These statements, he says, may lead to extreme antagonism in commercial disputes because they influence the aggrieved party to see the matter as a moral issue.[23] Campbell argues that such positions found in the law may radiate an influence[24] on any attempted settlement and on any continuing relation. He concludes that it appears necessary to "design remedies that more facilitate and less hinder the making of the necessary . . . modifications of obligations in relational contracts."[25]

Campbell also looks at the claims of the new formalists.[26] They criticize realist qualitative approaches to resolving contracts problems. We have, for example, a number of American cases where courts applied the uncertain doctrines of mistake and impracticability to transactions affected by such shocks to the economy as OPEC and Vietnam and by the problems of nuclear power.[27] Professor Robert Scott, for example, argues that such judicial activity will tend to "crowd

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[22] N. Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 278 (7th Cir. 1986).

[23] *Cf.* Robert McGough, *Are Contracts Obsolete?*, FORBES, Apr. 29, 1985, at 101("Isn't anyone's word any good anymore? Since 1970 the number of private contract disputes brought annually to federal courts has tripled, to 35,400. The plain fact is that for a number of companies, doing business by traditional contracts doesn't work anymore. More disturbing, courts are pressuring companies to compromise on contract claims or else are rewriting the contracts themselves. . . . Are contracts a thing of the past?").

[24] Campbell, *Relational Constitution*, *supra* note 3, at 474 ("To the extent that they in this way encourage the vindication mentality, the formal remedies remain to pose a problem.").

[25] *Relational Constitution*, *supra* note 3, at 474.

[26] Richard A. Posner, in *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1592 (2005), asserts:

> The . . . formalist . . . approach . . . has been making a comeback in the academic literature. This may be due in part to the fact that fewer and fewer legal academics have significant experience in the 'real world' of contract drafting or business litigation. With academics as with judges, the less one knows about the real world setting of a contract, the less comfortable one is apt to be with an interpretive approach that emphasizes that setting; one will prefer to remain on the semantic surface.

In Richard A. Posner, *What Am I? A Potted Plant?*,NEW REPUBLIC, Sept. 28, 1987, at 23, he also said:

> There has never been a time when the courts of the United States, state or federal, behaved consistently in accordance with . . . [legal formalism]. Nor could they, for reasons rooted in the nature of law and legal institutions, in the limitations of human knowledge, and in the character of the political system.

I leave scholars who advocate formal contract approaches and know a good deal about business practices, such as Professor Lisa Bernstein, to debate Judge Posner's assertion about why they are drawn to formalism. *But see*, Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE UNIV. L. REV. 1, 58 (2004) ("But like the interstate highway system, the conservative vision of the common law is neither natural nor nonpolitical. Instead, it furthers the economic interests of big business and the political interests of conservative politicians, and it promotes an ideology in support of those interests.")

[27] *See, e.g.*, Fla. Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239 (4th Cir. 1987).

out" the parties' own incentives to seek satisfactory adjustments.[28] Campbell questions how much crowding out may take place.[29] Nonetheless, he advocates relatively clear rules of mitigation, foreseeability and proof with certainty to induce parties to make adjustments. Courts should not waste their time on major commercial actors who should deal with their problems themselves. There is no need for courts to care paternalistically for major corporations[30] that have armies of transaction planners. Campbell notes that reactions to

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[28] *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1645 (2003); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 382-85 (2004).

[29] Sergio G. Lazzarini, Gary J. Miller & Todd R. Zenger, in *Order with Some Law: Complementarity versus Substitution of Formal and Informal Agreements*, 20 J.L. ECON. & ORG. 261 (2004) (finding that contract does not necessarily crowd out reciprocal norms).. Their findings are not consistent with those studies that Professor Scott relies on, as Lazzarini, Miller and Zenger recognize. Context is important, and they suggest that more research is needed to clarify when legally enforceable contracts are seen as coercive and as statements of distrust. *See also* Rosalinde Klein Woolthuis, Bas Hillebrand & Bart Nooteboom, *Trust, Contract and Relationship Development*, 26 ORG. STUD. 813, 835 (2005) (arguing that trust and contract can be both complements and substitutes: "In a trusting atmosphere, negotiating the contract can be seen as a process of getting to know and understand each other. Here, trust can serve as a basis for contract. In an opportunistic atmosphere, instead, contract negotiations can resemble the battlefield . . ."); Das Narayandas & V. Kasturi Rangan, *Building and Sustaining Buyer-Seller Relationships in Mature Industrial Markets*, 68 J. MARKETING 63 (2004) (suggesting "weaker firms can structure and thrive in long-term relationships with powerful partners because initial asymmetries are subsequently redressed through the development of high levels of interpersonal trust across the dyad, which in turn leads to increased levels of interorganizational commitment."). Of course, new people in the powerful organization may take over administration of the contract, and they may abandon the informal understandings and reciprocal obligations and seek to "go by the book." See *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981), where the court defended the "real deal" from the paper deal and what it saw as the bad faith of new managers of Shell.

[30] *See* Aluminum Co. of America v. Essex Group, Inc., 499 F.Supp. 53 (W.D. Pa. 1980). In this case, the court rewrote an elaborate escalator clause that had, in the court's view, failed to carry out the actual deal of the parties. While the case was on appeal, the parties worked out an equally elaborate settlement. I discussed the case and the settlement in Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 71-73 (2003). I said there:

> For my purposes, the important thing to notice is that the judge's formula never went into effect. The parties settled after Essex appealed, and the appellate court had heard oral argument. As part of the settlement, the original contract remained in effect until December 31, 1981. It was extended for five years beyond the end of 1981. During the balance of time remaining from the date of the settlement to the new termination date, ALCOA would sell to Essex at a favorable price, but not one as favorable as Essex enjoyed through 1981. We can see the ultimate resolution of the dispute as very relational. The parties continued their relationship and provided for a transition bringing it to an end. Essex, to a large extent but not entirely, had to stay in its role under the original allocation of risks. It was buying aluminum in order to make aluminum wire products. It was not entitled to act as a middleman, capturing the gains from low cost sheets of aluminum which it could sell on the market. Essex had some duty to pay attention to ALCOA's interests. Rather than maximizing its own return, the implicit dimension of the relationship required Essex to cooperate to accommodate their mutual interests.

Id. at 72.

such welfare for major corporations may undercut the judicial approach to situations where one or both parties cannot take care of themselves and real paternalism is needed.

What do I make of Campbell's arguments? As I said, I plan to follow the path of what many at Wisconsin have called "a new legal realism." Among other things, this new legal realism attempts to bring into play ideas about the law in action and the living law—an empirical picture of the legal system in operation and a view of the other social institutions that affect, substitute for or subvert the legal process. We should apply the findings of about forty years of law and society research in our legal scholarship. About twenty years ago, I tried to sum up what this body of research had discovered or made salient.[31] I offered seven points that law and society research had established. Three are important here: (1) law is not free; (2) law is delivered by actors with limited resources and interests of their own in settings where they have discretion; and (3) people, acting alone and in groups, cope with law and cannot be expected to comply passively. These ideas—perhaps in a more polished version[32]—must be part of any analysis of contract law that is concerned with the consequences of particular rules or of the entire system by which contract norms are carried out, have influence or are evaded or ignored. Or, put more colorfully, legal rules do not have little legs so that they can wiggle down off the page and enforce themselves.

As we consider Campbell's analysis, we must keep a revised and accurate chart of the law in action before us. Contracts scholars, such as the new formalists and their critics, frequently debate such things as

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[31] Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 182 (1984). Writing about fourteen years later, Professor Frank Munger discussed developments in law and society research after my survey of the field. While he found that my original list still stood up fairly well, he added four newer points of emphasis: (1) law is an element in the social construction of everyday life; (2) law is given content and meaning by actors with biography, in settings that have a history and thus a social organization of their own; (3) an issue of increasing importance in research is how the myth of neutral, autonomous law has been maintained; and (4) lawyers are producers of culture within the limits of their roles in political and economic institutions. *See* Frank Munger, *Mapping Law and Society*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH 21, 42-55 (Austin Sarat et al. eds., 1998).

[32] Munger concluded:

> I would argue that the findings of "new" critical empiricism and our vision of the contemporary law and society field are remarkably consistent with the earlier empirical results summarized by Macaulay, but we no longer understand the earlier results in terms of the "gap" between liberal legal aspirations and achievement. . . .
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> New perspectives render Macaulay's list of contingencies much less surprising. Research today is less a critique of official forms of legal authority than an exploration of all forms of power and their interaction in social life, ranging from formal discursive authority to embedded practical knowledge.

Munger, *supra* note 31, at 55.

Max Weber's ideas about formal and substantive rationality.[33] Should we have rules or standards?[34] Should contract law be formal and predictable or seek justice and pay the costs of uncertainty? However, a new legal realist would ask: how much impact will the form of the rules have on the dealings and disputes of businesses and consumers? Wolf Heydebrand says that this debate must consider the nature of functioning legal systems. Today, he says, we have what he calls "negotiated process rationality."[35] This is a mode of governance based on the "logic of informal, negotiated processes within social and sociolegal networks."[36] These networks are not accountable to elected or appointed officials.[37] Negotiated process rationality tolerates diversity and indeterminacy,[38] and it does not yield transparent, highly

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[33] *See* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, *in* MAX WEBER'S ECONOMY AND SOCIETY: A CRITICAL COMPANION 322 (Charles Camic et al. eds., 2005). David Trubek, in *Reconstructing Max Weber's Sociology of Law*, 37 STAN. L. REV. 919 (1985), tells us that Weber thought only a formal system of law can be predictable. Law seeking substantive ends leads to particularistic decisions. Such decisions make it impossible for business people to know in advance the right answers to legal questions. Formal justice, Weber argues, enhances individual opportunities, promotes self-determination and helps assure individual freedom. Trubek notes that Weber also argues, perhaps paradoxically, that formal thought in law may actually defeat the intent of transacting parties, and benefit those with power and wealth. In fact, Weber suggested that completely formal thought may be impossible. My colleague Elizabeth Mertz argues that such formalism is linguistically impossible. *See* Elizabeth Mertz, *An Afterward: Tapping the Promise of Relational Contract Theory—"Real" Legal Language and a New Legal Realism*, 94 Nw. U. L. REV. 909, 919-930 (2000). Ronen Shamir says that we have a history of formal rationality leading to internal contradictions. This provokes reform by substantive rationality, but this leads to routinization and demands for more predictable law. A new formalism then arises. In time, it too will bend to the irrationality of its rationality, and we get a demand for a substantive qualitative approach. *See* Ronen Shamir, *Formal and Substantive Rationality in American Law: A Weberian Perspective*, 2 SOCIAL & LEGAL STUDIES 45 (1993). *See also* David Campbell, *Truth Claims and Value-Freedom in the Treatment of Legitimacy. The Case of Weber*, 13 J.L. SOC'Y 207 (1986).

[34] *Compare* Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 *with* William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631, and David Campbell, *The Incompleteness of Our Understanding of the Law and Economics of Relational Contract*, 2004 WIS. L. REV. 645.

[35] Wolf Heydebrand, *Process Rationality as Legal Governance*, 18 INT'L SOC. 325 (2003). Heydebrand's picture is very much the same as is drawn in Chapter 2 of LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 19-168 (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds.,1995).

[36] Heydebrand, *supra* note 35, at 326.

[37] *See id.*

[38] Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006). Grundfest and Huang argue that uncertainty is an essential characteristic of litigation, and "uncertainty alone can be sufficient to throw a monkey wrench into the proposition that private litigation can systematically be relied upon to achieve optimal social objectives . . . ." *Id.* at 1320. They continue: "[I]n order to generate socially optimal rules, it appears necessary to consider the procedural environment in which substantive rules are litigated, the ambiguities inherent in the rules' articulation, and the unavoidable uncertainties of the litigation process." *Id.* at 1321.

predictable law.[39] To the degree that it affects the outcome of disputes, we lose both substantive and procedural rights.[40] Moreover, some individuals and interests will be able to play the game of informal, negotiated processes better than others.[41] Rather than imposing some restraint on power, this form of governance often amplifies the benefits of holding power. It is highly attractive to the interests of corporate and transnational governance. My colleague Jane Larson warns us: "Viewed from the perspectives of legality and equality, the subject of informality is a minefield. Even so, lawyers and legal scholars must take the lead in formulating policy responses to informality."[42] Obviously, we cannot meet Larson's challenge unless we recognize that negotiated process rationality is there; it must get on the scholar's map of the legal world. As we will see, Campbell's analysis takes us into the land of negotiated process rationality.

Campbell and I agree much more than we differ. He applies relational contract theory, and I am a longtime partisan of this way of seeing the world.[43] Campbell also focuses on the behavior of parties outside of the courtroom, and he argues that legal rules may affect how parties meet problems and resolve disputes. He also tells us that, in all but a limited subset of cases, a seller who names a fixed price for a performance is only taking a zone of risk and not committing his or her firm to foolish, if heroic, measures to carry out the deal precisely as

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39 *See* Heydebrand, *supra* note 35, at 327–28.

40 *See* Heydebrand, *supra* note 35, at 335–36.

41 *See* Heydebrand, *supra* note 35, at 334, 336.

42 Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 181 (2002).

43 In a well-known passage, Gordon tells us that in relational contracts:

> [P]arties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the others insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.

Robert Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569. Patrick J. Kaufmann & Louis W. Stern, in *Relational Exchange Norms, Perceptions of Unfairness, and Retained Hostility in Commercial Litigation*, 32 J. CONFLICT RES. 534 (1988), finds empirical support for Macneil's norms of solidary and role integrity in long-term relationships. *See, e.g.*, IAN R. MACNEIL & DAVID CAMPBELL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (2001). I reviewed relational contract theory and devoted particular emphasis to Ian Macneil's work, in Stewart Macaulay, *Long-Term Continuing Relations. The American Experience Regulating Dealerships and Franchises*, *in* FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 179 (Christian Joerges ed., 1991). For the best short review of Macneil's work, see William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545.

written.[44]

My own empirical research supports Campbell's picture of commercial norms.[45] For example, a general counsel of a maker of heating and air conditioning products said:

> When we are purchasing, we often help a supplier in difficulty. We will not penalize him in monetary terms. We think a strike or fire is a justifiable impossibility excuse whether or not the courts would think so. Our suppliers work with us when we need to delay deliveries or cancel, and we work with them. You don't worry about legal niceties.[46]

A purchasing agent of a major producer of agricultural machinery similarly noted:

> We have gone to great lengths to help our suppliers when they face situations beyond their control. A number of years ago there was a flood in the Connecticut Valley that put many electrical manufacturers out of business. . . . Our Boston works sent in people and equipment to help them clean up the mess so our suppliers could get back in operation. . . . You don't kick a man when he is down. Someday you may need help yourself.[47]

Of course, we might expect a different approach in insurance contracts that specify particular risks, transactions on commodities futures exchanges, debts owed to a loan shark or wagers at gambling casinos. These contracts are examples of the world of *pacta sunt servanda* where a deal is a deal. Moreover, there may be difficult borderline situations where the actual risk assumption is very unclear.

Having raised these cheers for Campbell's approach, there are a few notes that I would make on the margins of his articles. First, he says that he is writing about "efficient breach," but he uses the term in his own way.[48] I will look at the usual meaning of the term, and then I will trace Campbell's spin on the phrase. I confess that I am never

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[44] *See* Campbell, *Relational Constitution*, *supra* note 3, at 472-73, 479-80; Campbell, *Breach and Penalty*, *supra* note 4, at 690.

[45] The quotations come from my research interview notes, and they are reproduced in 2 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 594 (2d ed. 2003). *See also* Susan Carey, Kathryn Kranhold & Melanie Trottman, *GE's Bailouts of Troubled Carriers Divide Airline Industry*, WALL ST. J., Mar. 31, 2005, at B1 ("GE has become a vital prop for the airline industry in recent years by rescuing some of the most-troubled carriers with loans and other financing. Through its fast-growing airline-leasing unit, the largest in the industry, GE owns more than 1,300 airplanes, the world's largest commercial fleet, and has new aircraft on order with a list price of $10.2 billion. . . . GE also is among the world's largest makers of aircraft engines and providers of engine-maintenance services."); Scott McCartney, *The Middle Seat: One Reason Airlines Keep Flying Despite Huge Losses: GE*, WALL ST. J., Dec. 14, 2004, at D8 ("For GE, the world's largest aircraft-leasing firm, pumping money into airlines is in part a way to avoid potentially huge losses from an airline collapse. GE, which has 1,239 airplanes and $29 billion of airplane loans and leases, has an interest in keeping its leased planes in circulation.")

[46] 2 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION, *supra* note 45 at 594.

[47] *Id*

[48] *See*, Campbell, *Relational Constitution*, *supra* note 3, at 477-80.

entirely sure what the word "efficient" means, other than the person using it likes what she or he labels as that. In my more cynical moods, I say that efficient means that it is not good but it is cheap,[49] but I am sure that this is unfair except when the idea is viewed from a seat in steerage class on one of today's airlines.[50] "Efficient breach" is a phrase that approaches "a most ingenious paradox."[51] If one is morally obligated to perform all promises, how can a breach be good and beneficial?

The classic paradoxical parable goes something like this: Seller is a rational actor. He has a contract to supply goods or services to Buyer #1. Buyer #2 offers Seller enough more for these goods or services so that Seller can pay Buyer #1's contract damages and still make a profit by diverting performance to Buyer #2. If Seller does this, everyone will live happily ever after. Seller will make more money; Buyer #2 will gain a performance that she values even at the premium price; and Buyer #1 will be where he would have been had the contract been performed. It reminds me of a nice children's book, suitable for bedtime reading.

However, the law in action and the living law complicate matters and ruin the pretty story. Why would Seller, as a rational actor, pay Buyer #1 his contract damages? If Seller were willing to breach and divert the goods or services, he must have decided that he is not troubled by relational norms and sanctions. Moreover, if Buyer #1 were to sue, she would have to invest in all of the costs of litigation plus face its delays. Also, Buyer #1 would face the risk that a court might come to the wrong result. Seller's lawyer probably could fabricate some kind of defense,[52] and there is always a chance that it might work. Should we not expect Seller to offer, if anything, no more than a token settlement that reflected the law in action? As a result, Buyer #1 is not

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[49] *See* Joe Nocera, *Good Luck With That Broken iPod*, N.Y. TIMES, Feb. 4, 2006, at C1. ("[C]ustomer support is expensive for gadget makers. 'A phone call costs a company 75 cents a minute,' said the writer and technology investor Andrew Kessler. 'An hour call is $45.' As prices have dropped sharply for computers and other digital devices, keeping those phone calls to a minimum has become supremely important to consumer electronics companies that want to maintain their margins and profitability. That's why all the big tech companies try to force customers to use their Web sites to figure out problems themselves.'").

[50] The problem comes when we try to apply any definition of efficiency to real world situations. Often it is not clear what counts as a cost and what counts as a benefit. Often it is unclear whether we should look at the short or the long run.

[51] *See* WILLIAM S. GILBERT AND ARTHUR S. SULLIVAN, THE PIRATES OF PENZANCE, OR THE SLAVE OF DUTY (1880). You may recall that Gilbert and Sullivan's paradox is that a boy has been apprenticed by mistake to a pirate until his "21st birthday." However, he was born on February 29th in a leap year. Thus, he is not free of his apprenticeship because his 21st birthday won't come until long after he is 21 years old. This is the most ingenious paradox.

[52] *See* Bill's Coal Co. v. Bd. of Pub. Util. of Springfield, Mo., 682 F.2d 883 (10th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (The lawyer for a party wishing to breach may fabricate a reading of the contract contrary to the intentions of the parties without violating the duty of good faith.).

likely to be put where she would have been had the contract been performed. The story is not as happy told this way. A new legal realism spoils the tale. If this view of efficient breach is a children's book, it resembles *Where the Wild Things Are*,[53] without its happy ending.

Campbell stresses that he is not talking about this situation. He wants to limit his discussion of efficient breach to good faith refusals to perform. He wants to focus on a party who breaches to contain a loss rather than those who breach to capture a gain. Campbell comes close to arguing that refusing to perform to avoid a loss outside of the real zone of risk assumed is not a breach at all but a way of carrying out the real, if not the paper, deal. However, even if there is a failure to perform, any breach may or may not be efficient if we practice a new legal realism. The breach may prompt a settlement, but not all settlements are the same.

Campbell begins with a supplier who has promised to supply generic goods for a fixed price.[54] In a capitalist system, supplies of goods in excess of demand are often available. The supplier faces a situation where delivering the goods at the contract price will cause a substantial loss because the supplier's own costs have risen. If supplier breaches, the buyer might not deal with the supplier in the future, and other potential customers might learn what happened. Up to some point, such relational norms and sanctions will push the supplier to supply the goods, collect only the contract price and absorb the loss. Nonetheless, there is a point where the supplier cannot continue supplying goods for, say, $10 a unit that cost it $15 a unit to obtain and deliver. As a result, it breaches the contract. The law of contract remedies, with a few exceptions, limits the aggrieved buyer to the increased amount over the contract price that it must spend to cover its needs on the market. Instead of litigating, the buyer may agree to pay some, if not all, of the seller's increased costs; the buyer may agree to call off the contract and look to another supplier for the needed goods; or the buyer may agree to more complex adjustments where the seller

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[53] MAURICE SENDAK, WHERE THE WILD THINGS ARE (1963). This book won the Caldecott Award as the best picture book of 1963. Some parents question the book, fearing that it would frighten children. Our four seem to have survived it, but I always was sure to emphasize the happy ending:

> When Max, a boy dressed in a white wolf suit is sent to bed without supper, his room becomes a forest, an ocean swells outside his window, and a boat takes him to a land where the Wild Things are—lumpish creatures who roll their eyes and gnash their teeth, and were based on Sendak's own relatives in Brooklyn. Max stares the Wild Things down; they anoint him king; and he reigns until, lonely and a little hungry, he sails home to find his supper waiting for him.

Cynthia Zarin, *Not Nice: Maurice Sendak and the Perils of Childhood*, NEW YORKER, Apr. 17, 2006, at 38, 38-39.

[54] Campbell, *Relational Constitution*, *supra* note 3, at 469.

gets a higher price now but promises to supply something of value in the future in another deal.

Campbell sees this outcome as something to be encouraged. Perhaps we should encourage it, but we should not forget that we are making the parties share a loss. The loss does not just vanish into thin air. As we relieve the burden on the seller, we are imposing some or all of it on the buyer. Perhaps it is the least bad solution, an idea which at least connotes something different from the "best" or a "good" result.

Many buyers of generic goods, for example, may have to renegotiate with their supplier, but they may be themselves bound to fixed price contracts with others. Suppose the buyer plans to take the supplier's generic goods and use them as a component in the product that the buyer sells to its customers. Sometimes, our buyer can increase its price (or cut its costs) so that the renegotiated price with the supplier will not produce too much pain. At least in some cases, however, our buyer may not be able to pass on any or all of the increased cost of this needed component to its customers.

Such a buyer's lawyer might consider litigation and seek the lost anticipated profit that the buyer would have made had it received the component, fabricated its own product with it, and sold it to its customers. However, the lawyer would not take this step lightly. Gross and Syverud say that the function of trials in the American legal system is not dispute resolution.[55] Rather, the real function is to deter other trials, and this function is carried out very successfully. Trials are costly and risky and often they do not pay because the risk is not worth the reward.

As we have said, our aggrieved buyer's lawyer would know that she or he would have to satisfy the foreseeability requirements of *Hadley v. Baxendale*, as well as prove the lost anticipated profits with reasonable certainty.[56] Sometimes this would not be a great problem; often it would be very questionable whether the aggrieved buyer could jump these hurdles.[57] Campbell praises this doctrinal result because it

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[55] Samuel G. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 63 (1996).

[56] In his paper at the Gloucester conference, my colleague John Kidwell pointed out that proof of lost profits with reasonable certainty would have been a major problem in *Hadley v. Baxendale* itself. *See* John Kidwell, *Extending the Lessons of* Hadley v. Baxendale, 11 Tex. Wesleyan L. Rev. 421 (2005).

[57] Compare the traditional approach in *Evergreen Amusement Corp. v. Milstead*, 112 A.2d 901, 904 (Md. Ct. App. 1956) (finding that the profits for the first year of operation of a drive-in theater were not sufficiently reasonably certain despite a clear track record for the second year of operation because it takes time to establish a new business), with a more recent relaxation of the requirement in *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1365 (7th Cir. 1996) (holding that in a breach of contract involving the manufacture of china with holiday patterns, the specialty stores statements that in their opinion such china would have sold was sufficient to satisfy the reasonable certainty rule and get to the jury, even though the buyer had never previously marketed such a product to those stores). *See* L. Katie Mason, Mid-America

will push parties to renegotiate their deal.

When we look at the law in action, we see that these damages rules, moreover, are reinforced by other possible difficulties our aggrieved buyer might well face. The law in action also will exert pressure for settlement. Let me review many of these difficulties: if the parties did business on forms supplied by the seller, there likely would be a *force majeure* clause that might offer the seller an excuse. Some of these are written, as one lawyer put it to me, so that they give an excuse if there is a cloud in the blue sky.[58] Even if the language of any such clause were open to some question, the buyer's lawyer would have to appraise the odds that the supplier might prevail. Moreover, the supplier might have other defenses too. Again, if the supplier drafted a form contract that was used in the deal, in the United States at least, the form almost certainly would provide that the supplier would not be liable for consequential damages. It might even limit the buyer's remedy for a breach by the seller to a refund of any money that the buyer had paid.[59] The aggrieved buyer, in some cases, also will face the

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Tablewares, Inc. v. Mogi Trading Co.: *The Seventh Circuit's Tasty Recipe for New Business Recovery of Future Lost Profits Under Wisconsin Law, or a Suspicious Side Dish Wisconsin Won't Try?*, 2005 WIS. L. REV. 1385.

[58] One well-known multinational corporation provides in its sales contracts:

> Seller will not be liable for any delay or failure in performance of this order or in the delivery or shipment of products hereunder, or for any damages suffered by Buyer by reason of such delay or failure, when such delay or failure is, directly or indirectly, caused by or in any manner arises from acts of God, or of public enemies, fires, floods, explosions, accidents, epidemics, quarantine restrictions, riots, mobilizations, war, rebellion, revolutions, blockades, hostilities, governmental regulations, requirements, restrictions, interference or embargoes, strikes, lockouts, differences with workmen, inadequate transportation facilities, delays or interruptions in transportation, shortages of labor, fuel, raw materials, supplies or power, accidents to, breakdowns to or mechanical failure of plant machinery or equipment arising from any cause whatsoever or any other cause or causes (whether or not similar in nature to any of those hereinbefore specified) beyond Seller's control. In no event will Seller be liable for any consequential damages for delay in or failure of performance, whether or not excused by the foregoing.

2 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION, *supra* note 45 at 607-08.

[59] An experienced corporate lawyer wrote to me recently:

> [Y]ou are right that the big boys can push their weight around. And depending on how desperate/unsophisticated the other party is, they may just get what they want, even if it screws the little guy (everything from venue, governing law, liquidated damages, bad (meaning useless) indemnification provisions, etc.). Big fish like Google and Microsoft insist on their contracts, which at best include numerous inapplicable provisions and at worst contain unfavorable provisions. And more specifically, I was recently on the phone with a dummy from. [a well-known large corporation]. who argued that their boilerplate NDA [nondisclosure agreement], which included a liquidated damages provision for breaches of the NDA to the tune of $1M, was appropriate. She argued that her litigation department has analyzed this issue and that this number was carefully crafted and adequately reflect the damages [the large corporation] would incur should we breach the NDA. I told her that . . . there was absolutely no evidence to support her argument and that she was pushing a 'penalty' which, as she should know, is not the goal of a liquidated damages provision. I argued

risk that litigation would force the supplier into bankruptcy or some other kind of creditors' proceeding.[60]

The seller, moreover, may be able to afford more experienced and more talented lawyers than the buyer.[61] One party may be able to invest more in pretrial maneuvering that runs up the costs of the other. Generally, with the exception of a few areas, American plaintiffs and defendants pay their own lawyers' fees whether they win or lose. Thus, even if the law of contract damages yields just the sum that we think a plaintiff should get, plaintiffs do not see that amount. They have to deduct what usually are large lawyers' fees to find out what they net from winning a contracts case.

Furthermore, one party may need money fairly quickly, and, whatever the situation elsewhere, the American legal system moves with only glacial speed. One or both parties may not like the public nature of the proceedings. Executives may not like having their conduct reported in the pages of the *Financial Times*, *The Wall Street Journal*, or a trade paper or newsletter. One or both parties may worry about the effect of particular litigation on its relationship with the other and on its reputation in the relevant business world. Timing of litigation may be critical. If a public company faces litigation just before it is time to report its earnings, it may not want to air its dirty linen in the press because this might affect the market price of its stock. A corporation may face similar concerns if it is seeking to acquire another firm or another firm is seeking to acquire it. Courts seldom will issue protective orders to hide the facts surrounding litigation.

At the very least, business executives involved in complex litigation are not at their desks making money for the corporation; they are being deposed or spending time producing documents for discovery, answering questions or the like. Moreover, many executives hesitate to hand over control of transactions involving significant sums of money to lawyers, because they fear that lawyers will ruin relationships and win the battle while losing the war. Of course, many executives dislike being challenged by the other side on deposition or in cross examination.[62] A person accustomed to running a major business may

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> further that if there was a breach of the NDA, we'd be happy to pay the appropriate amount of damages, but [the large corporation] would have to prove their damages to a judge. I won the point, but after months of back and forth. Stupid! Other folks might not have the luxury, time, and money that in-house lawyers do to do the same.

Personal letter to author (Mar. 13, 2006) (on file with author).

[60] *See* Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99 (1990).

[61] The defaulting seller also may be a repeat player that faces this type of litigation frequently while the buyer may be a "one-shotter" that must cope with it for the first time. *See* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (analyzing the advantages repeat players in the litigation game have.).

[62] George Anders, *In the Lead*, WALL ST. J., July 26, 2005, at A17("If they [strong willed

not come across to a jury or a judge as someone who is nice or deserves sympathy.[63]

What are the consequences of the law in action? Those business people who understand contract litigation may reach a settlement that will result in loss sharing. Of course, for this to happen all that is necessary is for business people to think that contract litigation is something unpleasant and best avoided; they do not have to understand the details. Campbell sees this outcome as something to be encouraged—this is the point of his two papers. However, it is uncertain whether either or both of the parties, or an objective observer, would say that any settlement reached in this setting was fair, good or the best that could be achieved, given the options open. As Galanter and Cahill note:

> Settlement is not intrinsically good or bad, anymore than adjudication is good or bad. Settlements do not share any generic traits that commend us to avoid them *per se* or to promote them. This does not mean that some settlements are not preferable to some adjudications—and to other settlements. . . . [T]here is, we would suppose, great variation in the quality of settlements from one disputing arena to another and within such arenas.[64]

I like a rough analogy with triage rather than the happy-face story of efficiency. Suppose there is a military field hospital near where a battle is being fought. Sometimes more wounded soldiers will be brought to the hospital than the medical personnel can treat in time to save them all. Someone practices triage. He or she sorts through all of the victims and decides in which cases the surgeons and other doctors are likely to have the most success. The doctors will devote the medical resources of the field hospital to these patients first and get to the others only later if at all. Almost inevitably, some will die awaiting treatment. And some of these patients might have lived had they been treated

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managers] try to argue, joke or bluster their way out of an awkward spot [in a deposition], every word of their answers will be picked apart for inconsistencies or signs of arrogance that might hurt their company's ability to defend itself.").

[63] *See* Alexei Barrionuevo, *Hostility May Cost Ken Lay*, N.Y. TIMES, May 3, 2006, at C1 ("[C]hief executives often make difficult witnesses for lawyers defending them. The same qualities of toughness, charisma and confidence that propelled them to the top translate poorly in the courtroom. . . . 'Companies that are led well are not led well by people who in public express self-doubt. But juries like that. They want to see that doubt, that humility.'") (quoting Jamie Wareham, the global chairman of litigation for Paul, Hastings, Janofsky & Walker LLP); Stephanie Kirchgaessner, *Defense Lawyers Indicate Black Will Not Take Stand*, FIN. TIMES, June 1, 2007, at 4 ("Orin Snyder, a former prosecutor and attorney at Gibson Dunn [says] 'Defendants like Conrad Black [the former CEO of a major corporation who was charged with being involved in a scheme to defraud it] are accustomed to being in charge and being able to persuade people by force of intellect and power of their position. In the courtroom, the rules are fundamentally different than in the boardroom.'").

[64] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1388 (1994).

sooner. However, had the medical staff taken the patients on a first-come, first-served basis, more patients might have died. The staff would have wasted time on hopeless cases, and this wasted time could mean that people who could have been saved would die because of the delay in treating them. We can call triage efficient, but no one pretends that it is a happy situation. It is only the best of a set of bad choices.

Campbell recognizes that relational contracts often involve goods that are not generic and are not readily available on a market.[65] A buyer in such a contract cannot cover its needs from another supplier or it cannot do this in time to avoid a loss. Again, the reality of the law in action pushes for an adjustment of the deal or a settlement of litigation if a complaint has been filed. Campbell defends this result. He argues that rational pricing requires the parties to include the cost of potential liability for breach, and the claimant gets a lower price because mitigation decreases the cost of liability. He says: "I would hazard the hypothesis that it is competition over this aspect of contracting that made contracts which minimize liability the norm and this is reflected in the expectation principle being the default rule of remedies."[66]

Perhaps, at least in some situations, the seller's lower price has paid the buyer for taking the risk of having to adjust the price of the deal when things go wrong. However, I question whether most business people think this way when they are making contracts. If there is a real risk that the supplier will not perform, buyers look for someone more reliable. Moreover, even if, to some unknown extent, buyers do consider the price as being given both for the goods as well as a risk of default, it would seem very difficult to do much more than make an intuitive guess as to the right price for taking the real risk involved. What do most buyers know about the risks faced by their supplier? Large corporations, however, frequently deal with the risk of delays or defaults by their suppliers by pursuing a strategy of multiple sources of supply. At least in the past, firms would buy raw materials and component parts from at least two suppliers to minimize the impact of strikes, fires, floods, and the like. Modern just-in-time supply strategies may seek to cut costs by giving larger orders to fewer suppliers.[67] It is in these situations that Campbell's taking-the-risk-of-default argument has the most purchase.

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65 Campbell, *Relational Constitution*, *supra* note 3, at 472.

66 *Relational Constitution*, *supra* note 3, at 465.

67 *See, e.g.*, Norihiko Shirouzu, *Ford and GM Put the Squeeze on Parts Suppliers for Price Cuts*, WALL ST. J., Nov. 18, 2003, at A3; Jeremy Grant, *Tensions Drive Apart Detroit and Suppliers: Chrysler's Decision to Collaborate in One Assembly Plant Could Improve Relations at a Time of Intense Competition*, FIN. TIMES, Aug. 10, 2004, at 29; Bernard Simon, *Chrysler Takes Lead in Healing Supplier Rifts*, FIN. TIMES ASIA, Aug. 5, 2005, at 18; Bernard Simon, *Delphi Accuses GM Over Price Cuts*, FIN. TIMES, Apr. 3, 2006, at 21; Bernard Simon, *GM Supplier Dispute Raises Tensions*, FIN. TIMES, Apr. 26, 2006, at 28.

Campbell talks of a good faith efficient breach, and suggests that the law of remedies offers an incentive for such an allocation of losses.[68] By using the term "efficient," he seems to endorse this outcome. He may mean no more than that while any one aggrieved buyer may be hurt badly, most such buyers will be better off accepting a settlement rather than turning to the courts. On balance, settlements may be better than litigation for all concerned, although a breach in a particular case may greatly burden that aggrieved party. The law in action means that those suffering large losses can vindicate their rights only in a limited subset of cases.

Campbell also worries that much in the law and legal writing may reinforce the norm of carrying out promises without exception. He argues that this may undercut a desirable willingness to adjust deals and settle disputes.[69] However, I think that there are two inconsistent folk norms found in business. On one hand, people should perform their promises and not make excuses. "A deal is a deal." "You gave your word." On the other hand, as I said earlier, those who would benefit from a promise that is extremely burdensome often recognize that they should help such promisors when they are not at fault and are seeking only to avoid a serious loss. As is true of most customary norms, they are uncertain at the margins, and the facts of each case are all important. Contract law reflects both of these inconsistent ideas. Typically, both the law of contract remedies and the law in action push for some loss sharing. However, it is always possible that the plaintiff might recover a large amount as consequential damages. This chance may keep defendants trying to perform at least a little harder than if they were totally free of this risk.

Willard Hurst, the great legal historian, noted:

> To encourage entrepreneurs by reducing risks, the English court in 1845 laid down what became the accepted rule, that damages for breach of contract should be limited to "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." . . . Of course, it was also true that the functioning of a market-oriented, division-of-labor society rested on the maintenance of an assured framework of justifiable expectations as to other people's behavior. At some point, this emphasis was inconsistent with relieving entrepreneurs from damages liability. However, the extent of the inconsistency did not become clear until the enormous expansion of the use of machinery in the last quarter of the [nineteenth] century.[70]

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[68] *See* Campbell, *Relational Constitution*, *supra* note 3 at 477-80.

[69] Campbell, *Relational Constitution*, *supra* note 3, at 474.

[70] J. Willard Hurst, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 20 (1956).

Does the law over-emphasize the obligation to perform even burdensome promises and undercut a willingness to make adjustments? This is a hard-to-answer empirical question. We would have to study a sample of disputes where there were and were not renegotiations and settlements and attempt to determine what provoked the outcome. Such a sample would be very difficult, if not impossible, to fashion. How would we discover those contract disputes that did not provoke litigation? Some might be easy to uncover; many, if not most, would not. We also should ask how far the idea that promise keeping is a moral obligation rests on the law of contract remedies and how far it rests on norms existing outside the law?[71] Do these legal rules significantly influence the moral norm held by business people? One step in answering these questions would be to find out how many business people even know anything about the law of remedies. Sometimes legal norms can reinforce norms that come from other sources. Untangling the source of a party's strongly held belief that "a deal is a deal" might be very difficult.

By far the best analysis of renegotiating existing agreements is that of Professor Jeswald Salacuse.[72] In large measure, Salacuse and Campbell agree. Drawing on his experience in international transactions, Salacuse points out that a demand to renegotiate can create bad feeling and mistrust. The one who wants to rework the deal is going back on his or her word, and the other party may feel a moral right to the benefit of the contract. The one asked to renegotiate may feel the need to show that he or she is not weak and can stand up for his or her rights. Such a person may worry about a ripple effect: if he or she lets one contract partner out of a bad deal, will he or she have to let others out as well? Salacuse, however, says that those experienced in international business negotiations assume that almost all long-term contracts are but obsolescing bargains. Usually, the day will come well before the end of the contract when the rights and duties will have to be reworked if the relationship is to continue. Salacuse argues that even if a party feels forced into an extra-deal renegotiation, it should approach the process as an opportunity to create value, to make the pie bigger.[73] Often, however, this is easier said than done.

Part of the problem is that a buyer who is faced with a request for renegotiation or a settlement of a dispute often will find appraising the

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[71] We can ask what we teach our children about the obligation to perform promises. One of my favorite books when our children were young was Maurice Sendak, *Kenny's Window* (1956). Kenny must find the answer to seven questions. One of them is "Can you fix a broken promise?" Sendak's answer: "Yes, . . . if it only looks broken, but really isn't."

[72] *See* Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319 (2001); *see also*, Jeswald W. Salacuse, *Renegotiating Existing Agreements: How to Deal with "Life Struggling Against Form,"* 17 NEGOTIATION J. 311 (2001).

[73] Salacuse, *Renegotiating International Project Agreements*, *supra* note 70, at 1366-67.

seller's claim difficult. As Scott and Stephan put it:

> Selecting an appropriate response to . . . an instance of shirking behavior becomes more complicated when the other party's behavior cannot be understood readily. Parties rarely shirk by directly announcing their unwillingness to perform as promised. They typically affirm solidarity, protest helplessness in the face of intractable problems, or act in subtle ways that are difficult to evaluate. In other words, nonperformance is a *noisy* signal and systematic misperception of the other's actions may cause inappropriate responses.[74]

Does the present legal situation work to minimize walking away for self interest but to deter buyers from taking advantage of a seller's hardship? Campbell thinks, "[t]o improve the contribution of the law to business, it would appear necessary, from the point of view of the substantive law, to in the future design remedies that more facilitate and less hinder the making of the necessary (and therefore legitimate) modifications of obligations in relational contracts."[75]

I am not sure about the impact of the present law on renegotiation. However, I think that we need some incentive placed on the promisor to try to perform and to ask for relief only in extraordinary cases. There is such an incentive in our present situation. As I have said, a party to a contract cannot be sure that her default will not provoke a large award of damages or a costly court battle where even the party who wins will incur high costs. At the same time, I agree with Campbell that there should be some incentive placed on the other party to make accommodations and share some of the loss in those extraordinary cases. Whatever the situation elsewhere, American contract law in action reflects these inconsistent goals.[76] We can only seek some balance between the two ideas, and it is hard to know whether we have offered appropriate incentives to parties trying to deal with changed circumstances that have disrupted their plans.

Nonetheless, I must concede that Campbell may be right. If we looked carefully at something approaching a sample of all attempts to renegotiate, we might find that we need to reform the law. He thinks that the "vindication mentality casts its pall over post-breach negotiations . . . The only general present corrective to this seems to be the advice one imagines is given very commonly indeed, that the law in practice falls short of the law in books (in which the client would get his

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[74] Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 568.

[75] Campbell, *Relational Constitution*, *supra* note 3, at 474.

[76] *See* Stewart Macaulay, *Klein and the Contradictions of Corporations Law*, 2 BERKELEY BUS. L. J. 119, 121-25 (2005); Stewart Macaulay, *Private Legislation and the Duty to Read—Business by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1056-69 (1966).

supposed full deserts), a very unsatisfactory position indeed."[77] Here I noted on the margin of Campbell's paper: "Why unsatisfactory? Can we practice social engineering and do better? I wonder." A new legal realism, resting on empirical evidence might help show us what is involved. It certainly would help to have information of higher quality than anecdotes and atrocity stories. Nonetheless, I am still uncertain how we could fashion rules that both pushed for as much performance as is possible and, at the same time, pushed for accommodations and adjustments. Could we do anything more than invoke the Spike Lee principle of jurisprudence and tell the courts to "Do The Right Thing?" Perhaps the law could impose a duty to renegotiate as part of the duty of performing in good faith.[78] I am uncertain how this would work in litigation, and I am even more uncertain about its impact on long-term continuing relations in practice.

Professor Campbell also looks at the positions staked out by the new formalists. They advocate clear and certain rules of contract law rather than judicial attempts to reach substantive justice. Professor Robert Scott, for example, argues that relational norms and sanctions govern ongoing transactions. However, he asserts that when parties get to the endgame and seek a divorce, they will be better off with formalism than with the highly qualitative approach taken by the American Uniform Commercial Code.[79] Scott worries that the possibility of judicial winner-take-all opportunities will "crowd out" cooperation by the parties, and he cites psychological studies to support

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[77] Campbell, *Relational Constitution*, *supra* note 3, at 471.

[78] The court refused to impose such a duty in *Mo. Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1980). *See* Richard E. Speidel, *The New Spirit of Contract*, 2 J. L. & COM. 193 (1982); Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981). Professor Speidel advocates a limited duty to renegotiate and offers tests of when one must accept an accommodation.

[79] David Campbell, in *The Incompleteness of Our Understanding of the Law and Economics of Relational Contract*, 2004 WIS. L. REV. 645, 651 n. 23, recognizes the value of Professor Scott's position but says: "I am of the opinion that Professor John Kidwell made the fundamental point almost twenty years ago at a previous Wisconsin Law School contracts symposium." He cites John Kidwell, *A Caveat*, 1985 WIS. L. REV. 615. Kidwell argued that contract law has two functions. It must process the dispute before the court and reach a result, but it also must communicate information to others interested in what the law would do with similar problems. Such communication requires a degree of formal abstraction from all of the details of each particular case. As I read Kidwell, however, he is reasonably content with modern contract law with its many qualitative provisions. He would not go as far as Professor Scott in abandoning the entire approach of Article 2 of the Uniform Commercial Code. As I see it, the question is whether we need a "transparent" contract law so that lawyers will be more certain as to what would happen if a case were litigated or whether it is enough so that they can make reasonable, but less than certain, predictions about such matters. Moreover, we must remember that even if the rules are fairly certain in statement, they may become less precise as we try to apply them to the facts of a case. Furthermore, facts must be established by evidence, and this always creates a large degree of uncertainty about the outcome.

this position.[80] Campbell is skeptical. I share his uncertainty about such a process. My research shows that many business people renegotiate contracts and adjust disputes with only a glance, if that, at contract law. Yet some demands for renegotiation and adjustment do get sent to lawyers, and at least some lawyers would rather fight than negotiate.[81] We have little idea what is typical and what is but an atypical atrocity story. Moreover, we can wonder why Scott's formal legal approaches would not also crowd out cooperation in those instances when there was a chance of gaining a winner-take-all judgment under the approach that he advocates. Of course, under his approach, there would be fewer chances to go to court when a bargain turned sour.

Campbell says that, rather than crowding out, he is more worried that qualitative approaches that seek substantive justice burden the courts.[82] He and his coauthors in a leading treatise on remedies,[83] for example, criticize the United Kingdom's Frustrated Contracts Act[84] and *B. P. Exploration Ltd. v. Hunt*.[85] That statute says that where there has been a down payment and the contract is frustrated, a court "may, if it considers it just to do so having regard to all the circumstances of the case,"[86] apportion the losses. In the *Hunt* opinion, the judge said, "[o]nly by reason of the good sense and restraint shown by counsel on both sides, and the efficiency of their instructing solicitors, was it possible for a so substantial piece of litigation to be kept under control and for the hearing to take no longer than 57 days."[87] I certainly see Campbell's point. When we add what both parties paid lawyers and others to the cost of occupying the court for that amount time, the case seems more like burning money ceremonially than dispute resolution. However, the *Hunt* case probably was atypical. It seems that cost barriers to litigation, for a change, did not matter. I would guess that much of the explanation for the scope of that case was the wealth and the personality of the claimant, Texas oil man, Nelson Bunker Hunt.

Moreover, American courts have found ways to defend themselves

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[80] Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1645 (2003).

[81] Cameron Stracher, *Cut My Salary, Please!*, WALL ST. J., Apr. 1, 2006, at A7, says:

> Higher salaries have forced firms to look for new ways to increase revenues. One obvious solution is to throw more lawyers on a case, and to be more aggressive about litigating and challenging small matters that might otherwise go uncontested. . . . [F]irms are lawyering matters to death, and killing their associates in the process.

[82] Campbell, *Relational Constitution*, *supra* note 3, at 476.

[83] *See* Donald Harris, David Campbell & Roger Halson, *Remedies in Contract and Tort* 253-54 (2002).

[84] Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40.

[85] [1979] 1 W.L.R. 783, *aff'd*, [1982] 1 All E.R. 925.

[86] §§1(3)(a) & (b).

[87] [1979] 1 W.L.R. 783, 788-89.

against much burdensome litigation.[88] More and more, judges decide matters on summary judgment, and scholars are now writing about "the vanishing trial."[89] American judges have served as coercive mediators rather than as referees of parties' attempts to vindicate rights.[90] These judges twist arms and push settlement. Campbell says that he is "concerned about the costs and consequences of committing the valuable and scarce public resource of court time to the assistance of competent commercial parties. . . ."[91]

At least in some big cases, however, competent commercial parties may need the contract litigation process as a bargaining arena.[92] Filing a law suit and beginning the litigation process usually moves the problem from engineers, purchasing agents and sales people to another level in a corporation. Now top officials and lawyers are involved. At this level, people can make decisions that will involve large sums of money, and they will consider the costs of litigation as they decide how to proceed. Moreover, at this level, the matter may be less of a question of ego and responsibility for making what has turned out to be a bad bargain. Those now involved usually did not negotiate or attempt to perform the contract. Preparing for litigation also may clarify facts and the nature of a firm's legal position. Finally, the risk of having to go through a costly and unpleasant trial can motivate people to renegotiate and settle.

Further, some cases involve, in Aubert's terms,[93] conflicts of value where compromise is impossible because one cannot sell out his or her principles. Unconditional surrender or a third party decision based on

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[88] William L. Reynolds & William M. Richman, in *Studying the Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996), consider unpublished opinions by federal courts of appeal. They do save time. However, "'[i]t is sort of a formula for irresponsibility,' said Richard A. Posner, the chief judge of the United States Court of Appeals for the Seventh Circuit in Chicago. 'Most judges, myself included, are not nearly as careful in dealing with unpublished opinions.'" William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, §1, at 1. *See* Professor Linzer's discussion of *Shore v. Motorola*, in Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 764-772. *Shore v. Motorola*, an unpublished opinion probably written by Judge Posner, was for me an unhappy example.

[89] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); *see also* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

[90] *See* Marc Galanter, *Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1 (1985).

[91] Campbell, *Relational Constitution*, *supra* note 3, at 476.

[92] Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFFALO L. REV. 1369 (2006), points out that litigation in the United States increasingly involves artificial persons, such as corporations, rather than natural persons. Moreover, artificial persons enjoy many advantages and do better than natural persons.

[93] Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RES. 26 (1963).

the law applied to the facts may be the only solutions possible. Of course, conflicts of value can be transformed into conflicts of interest which can be compromised. Sometimes, all of the frustrations and delays of the law in action will push people to reassess the situation. They may come to see what seemed a matter of principle as less vital and something to deal with so they can move on.[94] They may not be happy, but they may come to see settlement as the best of the bad alternatives available.

Professor Campbell also says that the relational approach taken in his paper may serve to interest those involved in law and economics. He thinks that law and economic scholars see relational contract theory as paternalistic.[95] Moreover, it does not allow for markets and competition, as his approach does. I have always been troubled by the idea that relational contract ideas are paternalistic or communitarian.[96] If contract law seeks to protect reasonable expectations and encourage reliance in order to promote planning and risk taking, then how is it paternalistic when it says that law should consider the actual expectations and reliance involved in a relational transaction?[97] Short term advantage may be economically irrational in the long-term.

Becoming a good customer or a regular supplier has its own long-term benefits. My late father-in-law, John Ramsey, was the chief executive officer of S.C. Johnson & Son, Inc. (Johnson's Wax), from the mid-1930s through the Second World War. He told me that in the middle of the Great Depression, there were three firms that produced the containers used to package Johnson's floor waxes and household cleaners. (These were "tin cans" made out of steel; this was before the days of plastic bottles.) It tried to help all three firms survive the depression. Johnson intentionally placed its orders with the firm that needed them the most at the time. It did not bargain with the three firms

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[94] See Howard S. Erlanger, Elizabeth Chambliss & Marygold S. Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585 (1987), where their interviews with parties and lawyers to divorce actions suggest that the delays and costs of the formal legal process serve to induce parties to settle.

[95] Campbell, *Relational Constitution*, *supra* note 3, at 476.

[96] Campbell does not see relational ideas as paternalistic nor communitarian. *See* David Campbell, *The Limits of Concept Formation in Legal Science*, 9 SOC. & LEGAL STUD. 439, 445 (2000).

[97] One could argue that rational actors would plan all contracts in detail and reduce them to a writing that accurately recorded their deal. They also would revise their writing continually to reflect changes in the rights and duties of the parties. A party who relied on oral statements or tacit assumptions, given these assumptions, would be behaving unreasonably. Courts that protected such unreasonable reliance would be behaving paternalistically. A contracts scholar certainly is free to take such a normative position. It would have the virtue of making more work for lawyers, but I doubt that many business people would applaud this result. Most of us enter many long-term relationships such as marriage and our jobs without having all the details spelled out in advance, and we make accommodations as the world changes. Business people in complex long-term transactions do this too.

in an attempt to gain the lowest possible prices for containers. Ramsey explained Johnson's allocation system as what was required morally in such a situation. He also pointed out its long-term efficiency. All three firms survived the economic crisis of the mid-1930s, at least in some part because of Johnson's strategy. Just a few years later, during the Second World War, using steel for packaging consumer products had a very low priority in the regulated economy of the time. Nonetheless, Johnson's Wax never had a problem in obtaining the containers it needed. The suppliers "owed us one," Ramsey explained. This part of Johnson's relationship with its suppliers was not written down and filed away. Yet it was real. It seems to me that this is a nice expression of relational contract. Indeed, the story was one of the things that started my career as an empirical scholar. However, it also seems to me to be an expression of long-term efficiency. Even had the war not occurred, Johnson's Wax had an interest in the continued existence of several suppliers to provide some measure of competition.

Those in such relationships are less likely to devote great resources to planning for performance and planning to solve disputes in a formal document.[98] They are unlikely to bother calling in lawyers to redraft

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[98] *See* Thomas Palay, *A Contract Does Not a Contract Make*, 1985 WIS. L. REV. 561, 562 ("Parties who have, or anticipate, strong relational ties with their contracting opposites are not particularly worried about initial terms of agreement."). *Cf.* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006)("In deciding whether to express their obligations in precise or vague terms, contracting parties implicitly allocate costs between the front and back end."); Royce de R. Barondes, *The Business Lawyer as Terrorist Transaction Cost Engineer*, 69 FORDHAM L. REV. 31 (2000) (Lawyers take hostages by drafting provisions that provide latent unreasonable contractual rights exercisable in remote contingencies, which facilitate cooperative contract performance); Stefan Wuyts & Inge Geyskens, *The Formation of Buyer-Supplier Relationships: Detailed Contract Drafting and Close Partner Selections*, 69 J. MARKETING 103, 113 (2005) (In a study of small to medium sized buyers from two related industries in the Netherlands, the authors "find that detailed contract drafting and close partner selection act at cross-purposes, and their combination increases opportunism. Contracts set parameters on what the partner can legitimately do. As such, detailed contracts may signal distrust, which conflicts with the trust conventions that typify close relationships between a firm and its partner, thus encouraging rather than discouraging opportunistic behavior. Similarly, the direct social control function of relational closeness stands in the way of firms strictly enforcing the terms of the contract."). *See also*, Jerry Adler, HIGH RISE: HOW 1,000 MEN AND WOMEN WORKED AROUND THE CLOCK FOR FIVE YEARS AND LOST $200 MILLION BUILDING A SKYSCRAPER 206 (1993). Adler illuminated the tension between business and law in an anecdote:

> Bruce considered Ross a tremendously smart man, which was a mixed blessing in a lawyer; the smarter lawyers are, the more sides to a question they see, and the more complicated they want to make everything. Bruce drew a distinction between his world of "business points" and Ross's realm of "legal points." The former had to do with money in the here and now: who spent what, who got how much. The latter had to do largely with the what-ifs, the potential for things to go wrong and the remedies and sanctions that could be applied. It wasn't that Bruce didn't believe that things could go wrong. On the contrary, he knew that thousands of things would go wrong, most of them totally unpredictable, unforeseen and beyond the scope of even the most comprehensive legal draftsmanship. And in that case the solution would be found in

documents as a long-term relationship is modified by practices over time. Is a relational approach paternal or does it merely support the trust needed to make a modern market system work? Too often those who advocate a formal approach would treat documents as complete and accurate statements of the entire bargain. Not always, but often, this is to engage in a comforting fantasy.

My own explanation of the reaction of many law and economics writers to relational ideas is different. I think that they are seeking certain and unambiguous solutions—real answers to the question of what should be done by courts and legislatures.[99] If one reads Ian Macneil's work on relational contract, for example, one finds a list of factors to consider in making a judgment rather than neat answers.[100] This leaves us uncertain about the right judgment in a particular case. Uncertainty has costs, but so do certain and precise rules that defeat actual expectations and reasonable reliance.

Let me sum up: Campbell's essays push us to look at the impact of contract remedies on the renegotiation and settlement processes. We need to focus on this issue much more. My own notes on the margins of his articles reflect the ideas of a new legal realism. That is, I want to look at the law in action and the living law. I want to consider the impact of what Heydebrand calls "negotiated process rationality." Of course, much of the incentive to settle comes indirectly from perceptions of business people and their lawyers about the need to avoid litigation in all but exceptional cases. Campbell advocates legal reform so that people will be induced to settle rather than going to courts. However, I see the law trying to balance two inconsistent ideas. We should both keep people trying to perform as long as this makes sense, and, in addition, we should induce those receiving the performance to be open to renegotiation and settlement. I think that the present uncertain situation probably is the best that we can do toward carrying

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> the real world and not in the carefully crafted and scrupulously numbered paragraphs of the agreements. Ultimately he would be thrown back on his own resources, to rant and deal as best he could. To spend $200 an hour pretending otherwise struck him as an expensive form of voodoo.

Id.

[99] *Cf.* Robert M. Solow, *How Did Economics Get That Way & What Way Did it Get?*, 134 DAEDALUS 87, 90, 92 (2005):

> "Today, if you ask a mainstream economist a question about almost any aspect of economic life, the response will be: suppose we model that situation and see what happens. . . . A model is a deliberately simplified representation of a much more complicated situation. . . . The idea is to focus on one or two causal or conditioning factors, exclude everything else, and hope to understand how just these aspects of reality work and interact. . . . [A] really good model is one that generates a lot of understanding from focusing on a very small number of causal arrows."

[100] *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 783 (2000).

out a balance of these not wholly consistent goals.[101] But maybe it is not. Before we can be more certain of our judgments, we have to think much more about renegotiation and settlement. We have to worry about what is a good or at least acceptable settlement. I repeat: the loss will not just go away. If the seller cannot perform and the legal remedy is uncertain, the buyer can adjust the deal. But we must recognize that many buyers are going to be much worse off than they expected to be when they made their contracts.

New legal realism always demands more empirical evidence about the likely impact of legal rules and the law in action on behavior. Moreover, a new legal realism always complicates matters and gets in the way of simple, clear conclusions. However, if our approach is truly realistic, this is a virtue and not a vice.

Finally, what about Campbell's objection to my charge that Fuller and Perdue's expectation interest is but ideology?[102] If we bow to the authority of the *Oxford English Dictionary*, we learn that an ideology is "[a] systematic scheme of ideas . . . esp. one that is held implicitly or adopted as a whole and maintained regardless of the course of events."[103] The OED then offers an example from Scott's 1827 work on Napoleon. Ideology was a term which "the French ruler . . . used to distinguish every species of theory, which . . . could . . . prevail with none save hot-brained boys and crazed enthusiasts."[104] If we talk of contract remedies as serving to put the aggrieved party in the position she would have been in had the contract been performed, it still strikes me that this is a scheme "maintained regardless of the course of events." A new legal realist approach suggests how seldom contract remedies will serve this purpose, particularly in light of the cost barriers to litigation. I probably should not label those who write about the expectation interest as "hot-brained boys and crazed enthusiasts"—but I confess that sometimes I am tempted.

The great philosopher and comedian Lily Tomlin visited Madison a few years ago. She asked: "What is reality?" One of her characters responded: "It's the leading cause of stress for those who have a grasp of it." Campbell says that I fail to distinguish "breaches that involved compensation and breaches that do not."[105] This is true, but the limited

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[101] *Cf* Victor Goldberg, *Impossibility and Related Excuses*, 144 J. INSTITUTIONAL & THEORETICAL ECON. 100, n. 3 (1988) ("This is not to say that parties would never adjust the contract price. Price concessions in the face of changed market conditions are commonplace. But the grantor of the concession often expects a quid pro quo, either express (e.g., an increase in the term of the contract) or implied (e.g., enhanced good will). The grantor, that is, maintains the right to make (or not make) price concessions.")

[102] *See* Stewart Macaulay, *The Reliance Interest and the World Outside the Law Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 249-57.

[103] 7 THE OXFORD ENGLISH DICTIONARY 622 (2d ed. 1989).

[104] *Id.*

[105] Campbell, *Breach and Penalty*, *supra* note 4, at 689.

compensation available often will be far from the equivalent of performance. He, instead, offers what I see as a grand compromise between performance and sharing losses. This is not an ideology, but, as I have said, it is the least bad solution or maybe the best of all possible worlds. Perhaps it is a reality that will cause some to experience stress.