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TEACHING CONTRACT LAW THROUGH COMMON LAW ANALYSIS: THE UCI LAW EXPERIMENT

Gregory Scott Crespi*

ABSTRACT

The new law school at the University of California, Irvine, is attempting to implement an innovative vision of top-tier legal education that emphasizes skills-based and experiential training. As part of that effort, the school has restructured the traditional first-year law school curriculum so that several of these courses each focus on a particular analytical method—specifically, common law analysis, statutory analysis, procedural analysis, constitutional analysis, or international legal analysis—rather than on a particular doctrinal subject matter such as contract law or torts.

*There are no doubt some pedagogical advantages to taking such an analytical methods-oriented instructional approach. However, I have some concerns regarding the efficacy of its first-year course, *Common Law Analysis: Contracts*, which most directly addresses contract law. That course focuses in a Langdellian manner upon common law analysis and common-law-derived legal doctrines, to the virtual exclusion of statutory analysis. I question whether that course will be as effective in teaching students how to apply basic contract law principles in the modern “age of statutes” as is the more conventional approach that presents to students both the common law and statutory aspects of the subject in a more holistic and integrated fashion.*

INTRODUCTION

ERWIN Chemerinsky, the widely respected Dean of the new University of California, Irvine, School of Law (UCI Law), has recently discussed the founding of that law school and his vision for better incorporating skills training into top-tier legal education.¹ UCI

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1. Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1 (2011) [hereinafter “Chemerinsky”]. For more discussion of the UCI Law program, see generally Carrie Hempel & Carroll Seron, *An Innovative Approach to Legal Education: The Founding of the University of California, Irvine, School of Law*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 169 (Scott L. Cummings

Law is an ambitious project, and one certainly wishes Dean Chemerinsky and the other founding faculty committed to this new vision of legal education the best in their endeavors. There is, of course, a real question whether this effort at providing a truly distinctive style of top-tier legal education will survive the inevitable ebbing of the initial burst of enthusiasm. There are also questions whether the new program will be able to successfully overcome the financial constraints imposed by the increasingly stringent California school budgets.² These financial constraints will probably make it impossible for the school to continue to provide student scholarship assistance at anywhere near the incredibly generous levels awarded largely as a result of private donor efforts to the small, initial class of 2009–10 and entering classes of 2010–11 and 2011–12.³ Given the relatively high annual tuition and fees now charged by the school of over \$44,000/year for California residents and over \$54,000/year for out-of-state residents,⁴ the likely reduction in the availability of scholarship assistance in future years—as annual donations inevitably decline from their high initial amounts to a level more sustainable over the longer term—may prove to be a significant impediment to their ambitions.⁵

ed., 2011); Joseph F.C. DiMento, *UCI Law: The First Half Century*, 1 U.C. IRVINE L. REV. 25 (2011); Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach About the Legal Profession*, 1 U.C. IRVINE L. REV. 73 (2011); Christopher Tomlins, *What Would Langdell Have Thought? UC Irvine's New Law School and the Question of History*, 1 UCI LAW L. REV. 187 (2011).

2. Jennifer Medina, *California Cuts Threaten the Status of Universities*, N.Y. TIMES (June 1, 2012), www.nytimes.com/2012/06/02/us/california-cuts-threaten-the-status-of-universities.html.

3. The 60 members of the initial 2009–2010 entering class were each offered a full scholarship covering the entire three years of law school, Chemerinsky, *supra* note 1, at 11, which was made possible by a \$20 million gift from a local businessman and by other private donations. DiMento, *supra* note 1, at 32. The school accepted only about 4% of its 2,743 applicants for that class, and the class median LSAT score was 167 and the median undergraduate GPA was 3.61. Chemerinsky, *supra* note 1, at 11. The 83 members of the 2010–11 class were each offered at least 50% scholarships, *id.* at 12, and the members of the 2011–12 class were each offered 33% scholarships. Christopher Danzig, *UC Irvine Announces Better Clerkship Numbers Than Almost Everyone Else*, ABOVE THE LAW (Dec. 12, 2011, 4:28 PM), <http://www.abovethelaw.com/2011/12/uc-irvine-announces-better-clerkship-numbers-than-almost-everyone-else/>. The number of applications declined after the first year, and the acceptance rate for 2010–11 entrants increased to 18%, and again to 24% for the 2011–12 entering class, but there was no decline in class LSAT scores over that period. *Id.* The school's announced goal is to increase the class size by 20 students each year, up to a maximum size of 200 students, Chemerinsky, *supra* note 1, at 12, which would of course require large additional scholarship expenditures to maintain support at even the more modest 2011–12 levels.

4. Katherine Mangan, *As They Ponder Reforms, Law Deans Find Schools 'Remarkably Resistant to Change'*, CHRON. HIGHER EDUC. (Feb. 27, 2011), <http://chronicle.com/article/As-They-Ponder-Reforms-Law/126536/>; see also BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 183 (2012).

5. Professor Brian Tamanaha, an influential critic of current legal education, believes that UCI Law, while initially justified by its proponents as a unique institution, gave up at the outset the opportunity to have a truly distinctive legal education program when the school spent its initial seed money to hire top scholars at competitive salaries and to recruit students with high LSAT scores, rather than to pursue the goal of providing an affordable legal education relative to the more limited opportunities facing law school graduates in recent years and for the foreseeable future. In his view, the school has unfortunately chosen to simply follow the standard template for other top-tier law schools, and will become—at

In this short article, I will not speculate further regarding the long-term prospects for this interesting experiment in legal education. Instead, I will offer some concerns I have regarding whether embracing such a skills-oriented instructional focus will actually result in better trained lawyers, given the inevitable trade-offs involved. Specifically, I call into question whether UCI Law's new first-year curricular approach will be as effective in teaching students how to apply basic contract law principles in the modern "age of statutes" as the more conventional approach—widely followed elsewhere in legal academia—that draws much more heavily upon statutory sources of law.⁶

The UCI Law first-year curriculum, as described by Dean Chemerinsky, is largely made up of courses that are each centered around one or another analytical method—common law analysis, statutory analysis, procedural analysis, constitutional analysis, or international legal analysis—rather than centered around specific doctrinal subject areas.⁷ In their first fall semester, for example, the students take a course titled "Common Law Analysis: Contracts," which as the name suggests is "primarily about the common law of contracts."⁸ They also take a course titled "Statutory

best—simply another prestigious and expensive research-oriented institution with a relatively heavy but not strikingly different clinical focus and will present its students with the same severe affordability problems now facing students attending other law schools. TAMANAHA, *supra* note 4, at 182–84.

In economic terms Irvine law school is nothing new. Avowedly progressive law professors with ample resources and a clean slate, setting out to build a school focused on public service, reproduced an institution that loads students with debt and channels them to the corporate law sector. This squandered opportunity demonstrates how difficult it is to break away from the distorted economic model that so dominates the thinking of legal academics. Where they went wrong was in setting out to create an *elite* law school. This goal condemned the project. Affordability and elite status are mutually exclusive under current circumstances. . . . Had their goal instead been to create an excellent law school that trains top-quality lawyers at an *affordable price*—which California lacks—a different design would have resulted.

Id. at 183 (emphasis in original). Dean Chemerinsky recently responded in some detail to Tamanaha's critique of the program, in particular expressing disagreement over the magnitude of the potential cost savings that could be achieved through reducing faculty salaries and increasing teaching loads, and with Tamanaha's claim that greater use could be made of adjuncts without compromising instructional quality. Erwin Chemerinsky, *You Get What You Pay For in Legal Education*, NAT'L LAW J., July 23, 2012.

6. Edward J. Imwinkelreid, *A More Modest Proposal Than a Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretive Intention*, 68 ALB. L. REV. 949, 949 (2005).

7. Chemerinsky, *supra* n.1, at 18.

We have redesigned the rest of the first-year curriculum to focus on methods of legal analysis. . . . In the first year, our students take a course in the fall called Common-Law Analysis: Private Ordering, and, in the spring, a course called Common-Law Analysis: Public Ordering. Although we use contracts and torts, the real goal is to teach the common-law method. We teach a course in the fall on statutory analysis, and though it focuses on criminal law, the real goal is to teach students how to deal with statutes.

Erwin Chemerinsky, *Reimagining Law Schools*, 96 IOWA L. REV. 1461, 1469–70 (2011); see also Hempel & Seron, *supra* note 1, at 185–87 (discussing the UCI Law first-year curriculum).

8. Chemerinsky, *supra* note 1, at 19. Dean Chemerinsky refers to this course in his article as "Common Law Analysis: Private Ordering," *id.*, but according to the law school's

Analysis,” which focuses on criminal law, and a course called “Procedural Analysis,” which focuses on civil procedure.⁹ In the following spring semester they take “Common Law Analysis: Torts,” which as the name suggests focuses upon the common law of torts,¹⁰ “Constitutional Analysis,” and “International Legal Analysis.”¹¹ The subsequent upper-level curriculum is largely elective, except for a writing requirement and a required clinical experience.¹² This clinical requirement is perhaps UCI Law’s most important skills-oriented innovation.¹³

My major concern with this approach is that while UCI Law’s first-year students will receive intensive instruction in both common law analysis and statutory analysis, each obviously an essential lawyering skill, this methods-oriented approach may not provide students with an integrated and holistic approach to any single doctrinal subject that would simultaneously expose them to both its common law and statutory aspects, emphasize the connections and relationships between the case law and the statutes, and arguably better prepare them for the many modern legal problems that require them to know both the relevant statutes and the case law and be able to effectively blend both forms of legal analysis.

I. THE UC-IRVINE APPROACH TO TEACHING CONTRACT LAW CONTRASTED WITH A MORE CONVENTIONAL APPROACH

My particular field of expertise is contract law, so let me use that area of law as a background to articulate my concerns. I have taught a two-semester, five-credit introductory contract law sequence to first-year law students at Southern Methodist University’s Dedman School of Law for over twenty years. I offer what might be regarded as a relatively conventional doctrinal course that attempts to blend together both common law and statutory principles. Let me discuss what I fear might be lost by the UCI Law approach of teaching contract law in a one-semester course focusing primarily upon general principles of common law analysis and common-law-derived legal doctrines, while simultaneously introducing students to statutory analysis through a different course focusing exclusively upon criminal law statutes, and not upon contract-related statutes such as the provisions of the Uniform Commercial Code.

I structure my courses around four major areas of contract law—(1) contract formation, (2) contract enforceability defenses, (3) contract in-

website it has since been renamed “Common Law Analysis: Contracts.” See *Fall 2012 Course Catalog*, UC IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/CourseCatalog> (last visited Feb. 7, 2013).

9. Chemerinsky, *supra* note 1, at 19.

10. *Id.* at 19. Dean Chemerinsky refers to this course in his article as “Common Law Analysis: Public Ordering,” *id.*, but according to the law school’s website it has since been renamed “Common Law Analysis: Torts.” See *Course Catalog*, UC IRVINE SCHOOL OF LAW, <http://apps.law.uci.edu/CourseCatalog/Detail.aspx?id=412> (last visited Sep. 1, 2013).

11. Chemerinsky, *supra* note 1, at 19.

12. *Id.*

13. See Hempel & Seron, *supra* note 1 (discussing the UCI Law clinical program).

terpretation, performance and breach, and, finally, (4) remedies—which I present in that order over the course of the year.¹⁴ In my treatment of contract formation law, I start by developing—in a common law fashion—the classical contract formation elements of offer, acceptance, mutual assent, and consideration; I then present the more expansive modern contract formation doctrines of promissory estoppel and moral obligation, also primarily in a common law fashion. In presenting this contract formation material, I do, however, make use of two important statutes contained in Article 2 of the Uniform Commercial Code. First, I have the students study U.C.C. section 2-205, which abridges the common law freedom of offerors who qualify as “merchants” to revoke at will with regard to certain written offers.¹⁵ This statute provides students with a first exposure to the pervasive modern statutory abridgement of longstanding common law doctrines, as well as providing a vehicle for introducing students to the idea of a civil code and to the comparative law insight that many other countries have not embraced the classical Anglo-American freedom of offerors to freely revoke their offers.¹⁶ Second, I have the students study the well-known U.C.C. section 2-207 “battle of the forms” provision in some detail.¹⁷ I explain the genesis of that complicated statute and the difficulty common law courts had in coming up with a practical resolution to the “battle of the forms” problem that meshes with the core “mirror image rule” classical acceptance principle.¹⁸ I also explain how section 2-207, despite its well-known shortcomings,¹⁹ has since its adoption been accorded substantial persuasive authority by case law outside of the sale of goods context.²⁰ By being exposed to section 2-207 in their introductory contract law course, which apparently does not take place at UCI Law,²¹ students are not only better equipped to deal with these commonly recurring kinds of sale of goods disputes in practice,

14. I also provide a two-to-three week general introduction to contract law and legal analysis as well as comments on how to be a good law student at the start of the fall semester. In addition, I provide a one-week introduction to quasi-contract principles later during the fall semester, and a brief introduction to the international law governing the sale of goods at the end of the two-semester course.

15. Compare U.C.C. § 2-205 (2011), with RESTATEMENT (SECOND) OF CONTRACTS § 42 (1982).

16. MICHAEL H. WHINCUP, *CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS* 55–58 (4th ed. 2001).

17. U.C.C. § 2-207.

18. See John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 *BUS. LAW* 1029, 1035–51 (1994).

19. See Daniel T. Ostas & Frank P. Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, 73 *DENV. U. L. REV.* 403, 406–07 (1996).

20. See, e.g., *Magliozzi v. P & T Container Serv. Co.*, 614 N.E.2d 690, 690–93 (Miss. App. Ct. 1993) (applying section 2-207 by analogy in a products liability and negligence action).

21. My conjecture here is supported by the fact that one of the UCI Law professors that taught the initial Common Law Analysis: Contracts course described his course, as compared to a more conventional contract law course, as “eliminating study of the Uniform Commercial Code and creating a stronger focus on the way law is made through judicial opinions.” Hempel & Seron, *supra* note 1, at 186 & n.73 (paraphrasing a December 2009 interview with Christopher Leslie, the UCI Law professor who taught this course).

but they are also introduced more generally to an instance of the complicated interplay between common law rulings and statutes in contract law.

Moving on to enforceability defenses, the limitations inherent in a common-law-focused instructional approach are even more severe than they are for teaching contract formation law. I am frankly at a loss to understand how this important area of contract law could be adequately taught without repeated reference to statutes, since many of the more important enforceability defenses are primarily—or even entirely—statutory in nature. For example, both what are often referred to as the “common law” statutes of frauds and the U.C.C. statute of frauds are obviously statutes, not common law principles.²² The Statute of Limitations defense, which can involve important issues about whether to characterize particular claims as contractual or in tort,²³ and (for U.C.C. section 2-725) how best to characterize breach-of-warranty claims, is entirely grounded in state or federal statutes.²⁴ The modern unconscionability defense, while it has some early common law grounding, is largely the outgrowth of courts applying and extending U.C.C. section 2-302.²⁵ The common-law-based fraud and misrepresentation defenses are now very often asserted under the more permissive statutory and regulatory provisions of the federal securities laws and SEC rule 10b-5.²⁶ There have also been significant federal and state statutory limitations imposed on the common law sovereign immunity defense.²⁷ Furthermore, the bankruptcy defense, which is very important in practice and will often bar otherwise valid contractual claims, is wholly statutory.²⁸ One simply must address certain statutes in some detail to give students an adequate understanding of the range and contours of the many contract enforceability defenses that are potentially available to litigants.

The portion of the contracts course relating to contract interpretation, performance, and breach is perhaps more amenable to a common-law-focused teaching approach than the previously discussed areas of contract law. However, U.C.C. Article 2, in sections 2-601 and 2-508, substitutes a “perfect tender rule/seller cure rights” framework for the common law materiality-of-breach analysis.²⁹ Students who may later be involved in sale of goods litigation obviously need to have some familiarity with these statutory provisions, which differ significantly from the common law doctrines of implied conditions and material breach. In addition, the com-

22. See TEX. BUS. & COM. CODE ANN. § 29.01 (West 2011); U.C.C. § 2-201.

23. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (West 2011) (setting two-year time period to bring tort claim), with CIV. PRAC. & REM. § 16.051 (setting four-year limitation for other claims).

24. See 15 U.S.C. § 2304(a) (2006); TEX. BUS. & COM. CODE ANN. § 2.714; U.C.C. § 2-725.

25. See U.C.C. § 2-302.

26. See 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (2013).

27. See 28 U.S.C. § 2674 (2006); TEX. LOC. GOV'T CODE ANN. § 271.152 (West 2011).

28. See 11 U.S.C. § 524 (2006).

29. Compare U.C.C. § 2-601, and U.C.C. § 2-508, with *Sonken-Galamba Corp. v. Al-pirn*, 292 N.W. 46, 48 (Neb. 1940).

mon law authority regarding the important impracticability excuse defense has been displaced for sale of goods contracts by U.C.C. section 2-615,³⁰ which has also been accorded significant persuasive authority outside of the U.C.C.

Finally, as to remedies, a student's understanding of remedial law is incomplete without at least some exposure to the various state and federal statutes that displace to a greater or lesser extent the common law "American" rule that parties to contract litigation are responsible for their own attorney's fees.³¹ For example, the large majority of the graduates of the Dedman School of Law here at Southern Methodist University go on to engage in private practice in Texas.³² Texas has a broad statute in force that awards attorney's fees to any person who prevails on a contract claim against an "individual or corporation."³³ A student who graduated from law school unaware of that statute, or who had heard of it in passing reference but was completely unfamiliar with the complicated and conflicting case law interpreting the scope of that statute, including the difficult question as to which parties qualify under the statute as an "individual or corporation,"³⁴ would not really be ready to practice law in Texas.

I am an economist by training and am therefore well aware of the unavoidable trade-offs that are involved in any course of action. The major trade-off that is inherent in UCI Law's analytical methods-oriented first-year instructional approach is that while the traditional doctrinal subject-matter organization of law school curriculum does not feature and differentiate among the several different analytical methods one must master to practice effectively in any field of law as well as the UCI Law approach does, moving to their analytical methods orientation in first-year legal education to remedy this problem appears to me to be done at the significant cost of disrupting the holistic blending of common law and statutory themes that can be achieved in a well-taught doctrinal course. At least in the contract law area, this meshing of common law and statutory principles appears to me to be essential for effective student learning.

Dean Chemerinsky has, of course, in his writings emphasized what is distinct about UCI Law's skills-oriented approach to first-year legal instruction.³⁵ I am sure that whichever faculty will be teaching the new "Common Law Analysis: Contracts" classes during at least the next few years will be experienced contract law professors who have previously

30. See U.C.C. § 2-615.

31. Compare *Intercontinental Grp. P'ship v. KB Holme Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009), with 29 U.S.C. § 794a(b) (2006), and TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2011).

32. See *Employment Statistics*, SMU DEDMAN SCHOOL OF LAW, <http://www.law.smu.edu/career-services/employment-statistics.aspx> (last visited Feb. 18, 2013).

33. CIV. PRAC. & REM. § 38.001.

34. See Gregory Scott Crespi, *Who is Liable for Attorney's Fees Under Texas Civil Practice & Remedies Code Section 38.001 in Breach of Contract Litigation?*, 65 SMU L. REV. 71 (2012).

35. Chemerinsky, *supra* note 1, at 18-19.

taught more conventional courses in this area, and who are therefore well aware of the points that I am here making. They doubtless will attempt to incorporate statutory references and discussions into their classes where they believe it is necessary for educational purposes. But they will be severely limited in their ability to present and explain those statutes, and in their ability to have the students spend time working with the statutes, by the overarching and explicit common-law-analysis orientation of the class—particularly given the severe single-semester coverage constraint. Something will have to give, and it will likely be the time usually devoted to statutory analysis in a more conventional two-semester contracts course sequence, as well as the time often devoted to discussions of broader legal themes of general interest to contract law students.

II. CONCLUSION

UCI Law's analytical methods-oriented approach to first-year legal education may ultimately prove to be superior to the more traditional doctrinal subject-matter approach, especially when it is assessed in the context of the innovative second- and third-year education that the school will be attempting to provide. But as I have discussed, it appears to me that there will likely be something lost as well as something gained from pursuing that approach, at least with regard to first-year contract law instruction.

One perspective that could be taken on the common law-oriented contract law course that is being offered at UCI Law is to regard it as essentially a return to the original Langdellian focus of late-19th-century contract law instruction, emphasizing once again the close reading of appellate cases and the identification of the legal doctrines emerging from that case law. Such an instructional approach has its advantages, but in my view the rationale for returning to this 19th-century approach is badly undercut by the pervasive encroachment of statutes upon common law contract doctrines over the past century. I fear that UCI Law students who have not been exposed in their introductory contract law course to the more important Uniform Commercial Code provisions and other relevant and broadly applicable statutes may be at somewhat of a disadvantage in that regard when they later enter into their law-practice careers.³⁶

36. It would certainly be desirable to subject my conjecture here to some form of empirical testing once the first groups of UCI Law graduates enter into practice, but this would be extraordinarily difficult—if not impossible—to do. One would have to first define some meaningful and operationally feasible measure of "proficiency in contract law," a tall order indeed, and then attempt to compare by that criterion a sample of UCI Law graduates with a carefully selected sample of graduates of other law schools with comparable backgrounds and abilities over the same general time period, but who had a more traditional introductory contract law training, to determine if the different educational approaches had a statistically significant effect on contract law proficiency. Even if such a statistically significant difference were to be identified, it would likely prove to be impossible to determine whether it was attributable primarily to the different methods of contract law instruction, or instead was more a resultant of the overall law school differences. The general problem of conducting meaningful empirical educational assessment of the effec-

tiveness of various instructional techniques is indeed severe; merely to suggest such an effort in this context reveals its impracticality. My concerns regarding the trade-offs inherent in the UCI Law approach to teaching contract law will unfortunately probably have to remain a matter of unverified conjecture.

Casenotes

