
Contract Drafting: A Socratic Manifesto

Preston M. Torbert

This manifesto is one practitioner’s reaction to the concerns raised by Harry Edwards about the gap between legal education and the legal profession¹ and to the 2007 Carnegie Report’s suggestion for integrating the doctrinal, practical, and ethical apprenticeships in legal education.² It is a call for a new perspective on “law” and a few small changes in “law”-school education. Because the Socratic method of instruction is characteristic of law-school education and because this manifesto consists of questions — that’s right: all questions — it seems appropriate to call it “Socratic.”

What Is the Importance of Contract Drafting?

1. Might contract drafting have an importance that would justify a greater emphasis in legal scholarship and teaching? Properly conceived, don’t contracts actually define humanity? Isn’t it true that in our solar system only one planet, the earth, has experienced the miracles of life and evolution, and that on it two dominant

¹ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993).

² William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 147 (Jossey-Bass 2007).

organisms surpass all others in complexity and biomass — ants and humans?³ And that the reason for the success of these two organisms is cooperation? And that the ants accomplish this by communicating through pheromones that function as commands, while humans achieve it through language and the voluntary arrangements called “contracts”? From this perspective, aren’t language and contracts the two greatest inventions of mankind, and don’t they deserve greater attention in studies of the human condition — especially in legal scholarship and teaching?

2. What is “law”? Isn’t contract drafting in fact “lawmaking,” and shouldn’t it be central to the law school’s mission in both research and teaching? Wasn’t David Cavers correct when he said that “a great deal of the law under which all of us live and work . . . is written, not by Congress and the state legislatures or by the courts and the administrative agencies, but by American lawyers . . .”⁴ Wasn’t Charles Curtis right when he wrote, “We forget, even the lawyers themselves forget, that it is the lawyers in their offices who make the bulk of our law”⁵ Don’t we need to broaden our concept of “lawmaking”? Aren’t there four types of lawmaking: legislative, administrative, judicial, and contractual? Not all types of lawmaking may be equally important, but hasn’t contractual lawmaking gotten short shrift in legal education compared with judicial lawmaking and legislative lawmaking?

³ Bert Hölldobler & Edward O. Wilson, *The Superorganism: The Beauty, Elegance, and Strangeness of Insect Societies* viii (W.W. Norton 2009); Bert Hölldobler & Edward O. Wilson, *Journey to the Ants: A Story of Scientific Exploration* 1 (Harv. U. Press 1998).

⁴ David F. Cavers, *Legal Education and Lawyer-Made Law*, 54 W. Va. L. Rev. 177, 178–79 (1952).

⁵ Charles P. Curtis, *It’s Your Law* 42 (Harv. U. Press 1954).

Why Has Contract Drafting Been Neglected?

1. Has contract drafting been neglected in both research and teaching because contractual lawmaking does not occupy a significant amount of time for most lawyers? Isn't the opposite really the case? Wasn't Reed Dickerson correct when he wrote in *The Fundamentals of Legal Drafting* that “[n]o legal discipline is more pervasive” than preparing definitive legal instruments?⁶ And doesn't his comment apply to all lawyers, to both “hemispheres” of the legal profession?⁷ Don't we need a time study of what lawyers actually do, the problems they encounter, and the ways in which they deal with them?⁸ But even without such a study, doesn't it seem clear that most lawyers do not spend their time reading appellate decisions, writing appellate briefs, arguing in court, working as judges, or pondering public-policy issues? What's the ratio of time spent by the average lawyer on litigation versus contracts?⁹ 1 to 10? 1 to 20? Wouldn't most lawyers agree that contracts is the discipline most central to law practice?

2. Is this neglect because the United States is a common-law jurisdiction in which court decisions play a major role in creating law? Or perhaps because Christopher Columbus Langdell's belief

⁶ Reed Dickerson, *The Fundamentals of Legal Drafting* 1 (2d ed., Little, Brown & Co. 1986).

⁷ John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* 7 (U. Chi. Press 2005).

⁸ See, e.g., *id.* at 43 (table 2.1); Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* 268–69 (tables 7 and 8) (U. Chi. Press 1988) (both using categories such as “corporate client sector” and “advocacy” or “advice,” but no category for “contracts” work).

⁹ See, e.g., Gerald F. Uelman, *Brief Encounters: The New Demands of Appellate Practice*, 14 Cal. Law. 57, 60 (1994) (estimating that a mere 200 California lawyers practice more than 50% of the time in appellate courts).

in a science of law derived from studying appellate decisions became the basis for much of legal education? Or maybe because we have succumbed to what Karl Llewellyn called the “threat of the available”¹⁰ — limiting our studies to the most easily accessible sources, such as published case reports, rather than privately held contracts? Is it perhaps because it’s difficult to find full-time law faculty with enough experience in contract drafting to teach it?

3. Is it that “[c]ontractual agreement so thoroughly pervades human social behavior, virtually like air we breathe, that it attracts no special notice — until it goes bad”?¹¹

What Are the Implications of This Neglect?

1. In general, hasn’t a combination of the factors just noted led to an inordinate emphasis on appellate decisions as “the law,” an emphasis that has distorted legal scholarship and teaching and failed to prepare students for law practice?

2. Don’t these factors perhaps explain why the realists focused their attention on judicial lawmaking and why Karl Llewellyn studied the thrust and parry of the canons of statutory interpretation for judicial decision-making,¹² but never seems to have asked what were the implications of the canons for statutory and contract *drafting*? Don’t these factors also explain why Jerome Frank, in *Law*

¹⁰ As quoted in Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 75 (Princeton U. Press 1949).

¹¹ Edward O. Wilson, *Consilience: The Unity of Knowledge* 171 (Random House 1998).

¹² Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–35 (Little, Brown & Co. 1960).

and the Modern Mind, defined “law” as only “court law”?¹³ Isn’t this why the realists purportedly wanted to ask a judge, but not a lawyer, what he ate for breakfast?

3. Does the influence of these factors explain why there is so much written about law and the legal system that addresses only, or almost entirely, judicial or legislative lawmaking and not contractual lawmaking? Isn’t it still true, as David Cavers noted more than 50 years ago, that while many books and articles have been written on the judicial process, the legislative process, and the administrative process, “the lawyer’s vast output of law [through contract drafting] is largely escaping systematic study”?¹⁴ Why does Hart & Sacks’s *The Legal Process*,¹⁵ which surprisingly has an entire section on private ordering, still spend roughly ten times as many pages on judicial decisions and statutes as on contractual lawmaking?

4. Can these factors also explain why even free-market enthusiasts in academia and outside who extol the virtues of the market and private ordering have invested so much time and energy in analyzing the decisions of federal judges and generally ignored the process of private ordering that most lawyers engage in every day through contract drafting? Might scholarship and the profession have spent too much time and energy on the public sector and public policy while ignoring the normal lawyer’s primary role of serving the private sector — by providing legal services to individual clients? Couldn’t attention to contract drafting play an important role in restoring a better balance to scholarship and teaching, as well as continuing legal education? Couldn’t it give the practicing bar the benefit of academia’s creative insights?

¹³ Jerome Frank, *Law and the Modern Mind* 51 n. 4 (Doubleday 1963).

¹⁴ Cavers, *supra* n. 4, at 179.

¹⁵ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* (Found. Press 1994).

5. Can these factors also help to explain how the American lawyer's important role in government, described by de Tocqueville as incidental to the legal profession,¹⁶ became the focus of legal education? Aren't we still suffering from the distortion promoted by Harold Lasswell and Myres McDougal in their 1943 article *Legal Education and Public Policy*, in which they wrote that "[t]he proper function of our law schools is, in short, to contribute to the training of policy-makers . . ."?¹⁷ But haven't policy-makers, in either the executive or judicial branch, always been a minority of law graduates? How many lawyers have ever had a client that paid for advice on public policy? How many law firms (not economics departments) have ever asked a job applicant, "What do you know about law and economics?"

6. Might the mind-set formed by these factors also explain why, in the exhaustive list of fundamental lawyering skills in the MacCrate Report, contract drafting receives equal treatment with the drafting of wills, trust instruments, covenants, consent decrees, separation agreements, and corporate charters — and is buried in subparagraph (b)(iii)(A) of subsection 5.2 of section 5 on Communication?¹⁸

¹⁶ *The Tocqueville Reader: A Life in Letters and Politics* 55 (Olivier Zunz & Alan S. Kahan eds., Blackwell Publ'g 2002) ("The United States are ruled by lawyers. It is they who hold almost all the offices.").

¹⁷ Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale L.J.* 203, 206 (1943).

¹⁸ ABA Section of Legal Education & Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 175 (ABA 1992).

How Can We See Current Practices in Legal Education from the Perspective of Contract Drafting?

1. In legal education, hasn't "thinking like a lawyer" become "more a talismanic justification for what is going on than an articulated educational program"?¹⁹ Shouldn't "thinking like a lawyer" include "thinking like a lawyer drafting a contract" rather than merely "thinking like a judge interpreting a contract"? Does the fact that about 70% of law students will not become judges, but will be practicing lawyers, affect the answer to this question?²⁰ Why do we see two fine recent studies, one on how law professors think (*Thinking Like a Lawyer* by Frederick Schauer²¹) and another on how judges think (*How Judges Think* by Richard Posner²²), but apparently none about how practicing lawyers think?

2. If one of the lawyer's most valuable skills is the ability to "think like a lawyer who has a client" rather than like a judge or an arbiter of public policy, shouldn't law schools put more emphasis on training students to think of issues from the standpoint of a client's interests? Wouldn't contract drafting be a good way of teaching law students how to do this?

3. Isn't it true that drafting and interpretation are symbiotic and that a person can never fully understand one without understanding the other? If so, shouldn't there be more emphasis on contract (and statutory) drafting in law school, and wouldn't that improve

¹⁹ Herbert L. Packer & Thomas Ehrlich, *New Directions in Legal Education* 30 (McGraw-Hill 1972).

²⁰ Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers* 25 (Nat'l Ass'n for Law Placement Found. for Law Career Research & Educ. and Am. Bar Found. 2004).

²¹ Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harv. U. Press 2009).

²² Richard A. Posner, *How Judges Think* (Harv. U. Press 2008).

students' understanding of how to interpret contracts (and statutes)? If we argue that someone cannot draft a contract without understanding how a judge might interpret it, should we also recognize that someone cannot properly understand a judicial decision on a contract dispute without having drafted a contract? Couldn't improved scholarship lead to insights that would help judges in their interpretive role? Couldn't more emphasis on contract drafting improve the training of current and future judges?

4. Why is it that scholars and teachers have spent so much time studying judges' decision-making, but have very rarely suggested how lawyers might influence judges' decision-making in advance by drafting documents in a way that avoids judicial intervention in the first place? Isn't it true that judges cannot interpret what drafters have not included in their contracts? Haven't contract-drafting lawyers been passive, submissively awaiting judges' decisions on the documents they draft, rather than undertaking a systematic initiative to draft in a way that would avoid litigation? Hasn't legal education focused perhaps too much on the pathology of law (judicial resolution of disputes) and not on prevention by better drafting? Couldn't we profitably shift some attention from pathology to prevention?

5. Could we discover the main causes of contract disputes? Is it true that ambiguity is the greatest cause of contract disputes? Or is it changes in circumstances that lead the parties to seek out ambiguities that can be exploited to their advantage? If it's changes in circumstances, then isn't it true that, *ceteris paribus*, the longer the term of a contract, the greater the risk of a dispute over ambiguity? What are the implications for contract drafting? To what extent are contract disputes the inevitable result of the nature of language, and to what extent are they the result of less-than-optimal drafting?

6. Shouldn't we appreciate that we do not, like the ants, live in a chemosensory commune and that the law's commands are not expressed by pheromones, but through language? Can we grasp the true significance of Peter Tiersma's statement — "Our law is a law of words"?²³ Isn't it true that the words of a contract (or a statute) do not describe the law, they *are* the law? Don't lawyers believe that in many respects process is substance,²⁴ and if so, can't they recognize that language is process? Isn't the medium the message? Could we paraphrase Holmes and say that "the life of the law is language, not logic *or* experience"?²⁵ Can we take language and the use of language in drafting contracts more seriously?

7. In our contract drafting, could we think about language — and especially ambiguity — more seriously and draft more thoughtfully and more professionally? Isn't ambiguity, as Reed Dickerson said, "the most serious disease of language"?²⁶ In thinking about ambiguity, can't we get beyond the amusing confusion over the two ships named *Peerless* in *Raffles v. Wichelhaus*?²⁷ Can we recognize that ambiguity can determine issues of life and death (the hanging of Roger Casement²⁸), of war and peace (the interpretation of the

²³ Peter M. Tiersma, *Legal Language* 1 (U. Chi. Press 1999).

²⁴ Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 55–56 (U. N.C. Press 1983) (noting that Langdell's case method was originally merely a means of teaching law as a series of rules, but this process of teaching the skill of thinking like a lawyer soon became the substance).

²⁵ Oliver Wendell Holmes, Jr., *The Common Law* 1 (Dover 1991).

²⁶ Reed Dickerson, *The Interpretation and Application of Statutes* 43 (Little, Brown & Co. 1975).

²⁷ *Raffles v. Wichelhaus*, [1864] 159 Eng. Rep. 375 (Ct. of Exchq.).

²⁸ Discussed in David Mellinkoff, *The Language of the Law* 167–70 (Little, Brown & Co. 1963).

Neutrality Statute of 1917²⁹), and multibillion-dollar verdicts (*Pennzoil Co. v. Texaco, Inc.*³⁰)? Wasn't Justice Johnson correct in his dissent in *U.S. v. Palmer* when he said, "And singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less" ³¹ Shouldn't we focus a lot more attention on learning how to avoid ambiguity when we draft?

8. If ambiguity is a significant factor in contract disputes, wouldn't it be useful to study exactly what types of ambiguity occur and then devise strategies for allocating resources to avoid the most harmful kinds? Can we learn which forms of ambiguity are most harmful? Is semantic or syntactic ambiguity the greater risk? Were Lord Thring, a leading nineteenth-century English drafter, and Reed Dickerson, the preeminent American drafter of the twentieth century, correct when they said that syntactic ambiguity was a much greater problem than semantic ambiguity?³² Is postmodification ambiguity — a modifier following a series — the biggest problem of syntactic ambiguity? Is hyponymic ambiguity — uncertainty about whether a subclass or a larger class is intended — the biggest problem of semantic ambiguity? How do semantic and syntactic ambiguity interact, for example, in enumerations, and what are the implications for contract drafting?

²⁹ Discussed in Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 Am J. Int'l L. 569, 575–79 (1940).

³⁰ 481 U.S. 1 (1987).

³¹ 16 U.S. 610, 636 (1818).

³² Sir Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* 90 (Little, Brown & Co. 1902); Dickerson, *supra* n. 6, at 101.

What Are the Implications of Contract Drafting for Law Schools?

1. In a sense, wasn't Langdell's reform of legal education already becoming outdated at its inception? Didn't the success of his reform in the late nineteenth century rely on the legal profession's shift from trial advocacy to counseling on complex commercial transactions, but didn't his reform itself, by using judicial opinions, still emphasize litigation?³³

2. Because the law is a profession of words, wouldn't it make sense for communication, including contract drafting, to take a central role in legal education? Isn't it true that law students realize this? Haven't American Bar Foundation studies of young lawyers found that (1) the skills considered most important by young lawyers were communication skills — written and oral; (2) those skills are not adequately learned in law school; and (3) the largest gap between what the young lawyers thought could be effectively taught in law school and whether enough attention was given to that subject concerned drafting legal documents (80% to 24%)?³⁴ Are law schools adjusting to these realities?

3. Have we finally put aside the mistaken beliefs that legal writing is a frill in a law-school education, that it is mere "wordsmithing," and that attention to language issues is "just semantics" or "just words" or even "just grammar"? Do we view legal writing as having the same importance as other courses in the law-school curriculum and not as low-status, low-paid, high-burnout drudge

³³ Bruce A. Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826–1906*, at 266 (U. N.C. Press 2009).

³⁴ Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 *J. Legal Educ.* 469, 473, 478–79, 488 (1993).

work? More specifically, shouldn't we recognize that drafting is not a routine, nuts-and-bolts task and that, if it were, it would long ago have been outsourced to India? On the contrary, isn't contract drafting really problem-solving par excellence?

4. Hasn't the importance of legal drafting been recognized in some law schools even though no other skill vital to all lawyers is so much ignored in legal education? Hasn't Jamison Wilcox, a teacher of contract drafting, recalled repeated student questions asking, "Why isn't this a *required* course?"³⁵ But by and large, don't the following statements by Reed Dickerson and Edward Levi still ring true: "In the United States there is little training in draftsmanship and of that little is being provided by the law schools," and "law schools have been grossly deficient with respect to training in . . . draftsmanship"?³⁶ Or can we take heart from the Association of American Law Schools' recent (2011) provisional approval of the new Section on Transactional Law and Skills?

5. Isn't there a practical division of labor between the law schools and the firms in training for legal drafting? Wasn't Edward Levi right when he wrote that "the job of legal education is to turn out law students who will continue to learn"³⁷ and that law schools "do not train lawyers; rather they train students who, after they have engaged in practice, will become lawyers"?³⁸ Can't we take advantage of this division of labor to teach contract drafting effectively, with the law schools teaching the separate skills required and the law firms combining these skills in putting the contract together

³⁵ Jamison Wilcox, *Teaching Legal Drafting Effectively and Efficiently — By Dispensing with the Myths*, 57 J. Legal Educ. 448, 466 (2007).

³⁶ Dickerson, *supra* n. 6, at 1; Edward H. Levi, *4 Talks on Legal Education* 4 (U. Chi. Law Sch. 1952).

³⁷ Levi, *supra* n. 36, at 29.

³⁸ *Id.* at 6.

and negotiating it in a keystone performance?³⁹ Can't we allow the law schools and the law firms to do best what they do best? Wouldn't such a division of labor help promote the continuity of the transition from law school to practice? Can't we avoid having new associates "freeze like deer in [the] headlights" when asked by a partner to draft a contract?⁴⁰

6. What contract-drafting skills should the law schools teach? Wouldn't it be helpful to first recognize that "contract drafting" is a bit of a misnomer? Doesn't the term "drafting" bring to mind the image of a scrivener seated with quill in hand ready to darken a blank page with a flow of black ink? But doesn't contract drafting start not with a blank page, but with an existing precedent that needs to be revised? In contract drafting, isn't "plagiarism" a virtue?⁴¹ Shouldn't the drafter's first task be to review an existing contract rather than create a new one from scratch? And won't a drafter often incorporate provisions from a second or third contract to form a new contract rather than creatively thinking up the words of most provisions in the new contract? If these points are true, then wouldn't it be more appropriate to talk of "assembling" or "constructing" a contract rather than "drafting" one? Might not Charles Fox's general term "working with contracts"⁴² be an even more accurate expression? How about "contracting"? Wouldn't a more accurate term help to direct our attention away from the "creative writing" frame of mind toward the legal issues that a drafter faces in putting together a contract?

³⁹ Gregory S. Munro, *Outcomes Assessment for Law Schools* 54 (Inst. for Law Sch. Teaching 2000).

⁴⁰ Charles C. Lewis, *Turning the Firm into a School*, 15 *Bus. L. Today* 25, 25 (Jan.–Feb. 2006).

⁴¹ Charles M. Fox, *Working with Contracts: What Law School Doesn't Teach You* 42 (2d ed., P.L.I. 2008).

⁴² *Id.*

7. Wouldn't answering and elaborating these questions and others, such as those posed below, lead to developing a new doctrine — that of contract drafting — that could be taught in larger sections using clickers and other technology, as in other law-school courses?⁴³ Couldn't the basic skills of contract drafting be taught not by having each student draft a specific contract provision, but by having students review alternative provisions addressing a common problem and then discuss them in class? For practice in drafting, wouldn't it be more practical and more aligned with actual experience to have law students take examples of existing contract provisions and revise them and then discuss them in class?⁴⁴ Couldn't a contract-drafting course involve the students directly by asking them to provide sanitized copies of contracts they've signed, such as leases or credit-card agreements, for review and analysis in class as examples of good or bad drafting?

8. Couldn't a law school arrange a "Contracts Program" that has two basic courses, one on the language of contracts, teaching how to recognize and eliminate ambiguity, and a second on the elements and structure of contracts, examining the basic legal issues common to all contracts and reviewing alternative solutions? Couldn't the program also include courses on negotiation, as well as substantive fields like sales, labor, real estate, and M&A, that make some use of contracts as course material? Couldn't a transactional course that involves translating business deals into contracts also be part of such a program? If such a program teaching a new doctrine could raise the professional level of contract drafting, couldn't

⁴³ David I. C. Thomson, *Law School 2.0: Legal Education for a Digital Age* 93–120 (LexisNexis 2009).

⁴⁴ Wilcox, *supra* n. 35, at 459–61.

it change the status quo in which “students who take practical courses . . . have no advantage in getting hired”?⁴⁵ Wouldn’t many law firms want to ask whether job applicants have participated in such a program? Might this create a virtuous feedback loop between the job market and a law school adopting such a program?

9. Who would teach these courses? Couldn’t it initially be a cooperative team effort by full-time and adjunct faculty, such as a contracts teacher, a legal-writing teacher, and a part-time or retired practitioner? Couldn’t each provide a perspective that the others lack? Wouldn’t a new doctrine of contract drafting be a discipline both familiar and unfamiliar to the practitioner and the professor, but in different respects for each? Wouldn’t that mean that they would have to rely on each other, increasing the cross-fertilization between them? Wouldn’t that required cooperation be the greatest potential strength of the effort? Given that the doctrine of contract drafting would, to a significant degree, involve the application of traditional contract theory to a specific document, shouldn’t a law-school professor be able to master the doctrine without undue effort? Given that the doctrine would also relate to contract practice, shouldn’t the practitioner also be able to master the doctrine without undue effort?

10. How would professors, who generally have little experience in dealing with actual contracts, become familiar with them and be able to use them as teaching tools with more confidence? Wouldn’t it be useful for a law library to contain a large searchable database of contract precedents, organized by type, that could be used for study and reference in contract-drafting courses? Doesn’t it seem that the current holdings of law-school libraries are unbalanced in their ratio of appellate decisions to actual contract precedents? Couldn’t a law-school library, or a group of libraries,

⁴⁵ Garth & Martin, *supra* n. 34, at 501.

systematically collect these materials using the SEC's LIVEDGAR database and other resources? Couldn't practicing lawyers collect sanitized contract precedents and provide them to libraries? Aren't there historical sources, such as archival materials, where we could also find negative examples of contract drafting? Wouldn't a library with these resources conform in spirit, if not in deed, with Langdell's vision that all the materials of the science of law be contained in the library, the center of legal education and a "proper workshop of professors and students alike"?⁴⁶

11. Couldn't exploring questions about the interaction of contractual and judicial lawmaking, and the relationship between contractual lawmaking and private ordering (as well as the other questions posed above and below), lead to a new doctrine of contract drafting and stimulate academic research worthy of consideration by law-school tenure committees? Couldn't interdisciplinary studies enrich the theory and the practice of contract drafting by involving linguistics, psychology, neuroscience, and other fields? Wouldn't those studies attract interest among law professors?

12. Couldn't this new doctrine be the basis for courses in contract drafting that would be scholarly, practical, and interesting? Haven't law students expressed a desire for more practical courses?⁴⁷ Doesn't it seem likely that the matter of language in contract drafting would excite their interest when they learn how an easily avoidable case of ambiguity led to the largest civil-damages award in American history;⁴⁸ how a case of postmodification ambiguity

⁴⁶ Stevens, *supra* n. 24, at 53.

⁴⁷ Dinovitzer et al., *supra* n. 20, at 79.

⁴⁸ *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

caused a million-dollar ambiguity in a contract;⁴⁹ and how Roger Casement was “hanged by the comma” in the English Treason Act of 1351?⁵⁰ Isn’t it humbling that a case of postmodification ambiguity in the Neutrality Act of 1917 altered the course of World War II by allowing Dean Acheson and a few friends, in August 1940, to conjure a strained interpretation of the Act — an interpretation that Attorney General Robert Jackson adopted in a legal opinion authorizing President Roosevelt to deliver 50 reconditioned destroyers to Great Britain during the Battle of Britain and on the eve of Hitler’s threatened invasion?⁵¹ Wouldn’t students be interested to learn that Robert Jackson’s legal opinion on this trifling ambiguity posed what is perhaps the lawyer’s ultimate ethical challenge: is it justifiable to violate the rule of law in order to save it? Wouldn’t that make for a great class discussion?

13. Wouldn’t examples like these not only pique the curiosity of students, but teach them a valuable lesson in how practice trumps theory? How policy-making and theory without practice are ultimately vapid and trite? How grand ideas and abstract notions — the rule of law, for instance — can be implemented only through concrete manifestations, such as contracts and legislation, and how these concrete manifestations often do not, or cannot, reflect the perfection of the ideas they represent? That they may have catastrophic consequences resulting from a mere trifle of language? That

⁴⁹ Canadian Radio–Television and Telecommunications Commission, Telecom Decision CRTC 2006-45, Ottawa, 28 July 2006 (Reference 8690-R28-200512534) & Telecom Decision CRTC 2007-75, Ottawa, 20 Aug. 2007 (Reference 8662-R28-200612326); Ian Austen, *The Comma That Costs 1 Million Dollars (Canadian)*, N.Y. Times, <http://www.nytimes.com/2006/10/25/business/worldbusiness/25comma.html?scp=1&sq=co> (Oct. 25, 2006).

⁵⁰ Mellinkoff, *supra* n. 28, at 167–70.

⁵¹ Briggs, *supra* n. 29; for a description of the background, see Ian Kershaw, *Fateful Choices: Ten Decisions That Changed the World 1940–1941*, at 208–20 (Penguin 2007).

it's precisely *because* we have the rule of law — the rule of language and not man — that trifles can have catastrophic consequences? Can't the realization that trifles are important help initiate students into the wisdom of practice that all lawyers must go through? Wouldn't studying the legal-drafting trifles that led to war and peace, life and death, and a multibillion-dollar verdict help law students understand the meticulous attention to detail demanded of lawyers and the corresponding responsibility that falls on the drafter's shoulders? Isn't this realization, and the maturity it demonstrates, something that theory and policy-making cannot provide, but that law firms are searching for, however imperfectly, in their hiring interviews?

14. Isn't there another aspect to the personal responsibility that characterizes contractual lawmaking? Compared to a legislative, judicial, or administrative lawmaker, doesn't a contract drafter bear a heavier burden? Aren't the drafters of legislation, judicial opinions, and administrative regulations government employees who enjoy permanent or semipermanent employment that limits the personal responsibility they bear for their lawmaking? But nowadays, how many lawyers have permanent or semipermanent clients?⁵² Doesn't this mean that, besides malpractice liability, contract drafters are responsible in a much more direct and personal way for the consequences of their drafting — and any mistakes? Wouldn't reviewing and discussing the examples noted above be one way to bring home this truth to law students?

15. In developing and teaching a new doctrine of contract drafting, couldn't we build on the work of the commentators on

⁵² Heinz et al., *supra* n. 7, at 295–99.

statutory drafting,⁵³ as well as the work of commentators on legal writing generally, such as Bryan Garner,⁵⁴ Joseph Kimble,⁵⁵ Terri LeClercq,⁵⁶ David Mellinkoff,⁵⁷ and Richard Wydick?⁵⁸ Couldn't we also use as a basis, but go beyond, the substantial work already done on contract drafting by Reed Dickerson, and the more recent practical "how-to" books by Kenneth Adams,⁵⁹ Scott Burnham,⁶⁰ Charles Fox,⁶¹ Marvin Garfinkel,⁶² Thomas Haggard and George Kuney,⁶³ George Kuney,⁶⁴ Sue Payne,⁶⁵ Tina Stark,⁶⁶ and David Zarfes and Michael Bloom?⁶⁷ Couldn't we also benefit from the

⁵³ Lawrence E. Filson, *The Legislative Drafter's Desk Reference* (Cong. Q. 1992); Donald Hirsch, *Drafting Federal Law* (2d ed., Off. of Legis. Counsel, U.S. House of Representatives 1989); Robert Martineau, *Drafting Legislation and Rules in Plain English* (2d ed., West Publ'g 1991); M.E. Mullins, *A Handbook for Legislative Drafters* (Ark. Legis. Dig. 1986); Jack Stark, *The Art of the Statute* (Fred B. Rothman 1996).

⁵⁴ *Legal Writing in Plain English* (U. Chi. Press 2001).

⁵⁵ *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press 2006).

⁵⁶ *Expert Legal Writing* (U. of Tex. Press 1995).

⁵⁷ Mellinkoff, *supra* n. 28.

⁵⁸ *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005).

⁵⁹ *A Manual of Style for Contract Drafting* (2d ed., ABA 2008).

⁶⁰ *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (3d ed., LexisNexis 2003).

⁶¹ Fox, *supra* n. 41.

⁶² *Real World Document Drafting: A Dispute-Avoidance Approach* (ALI-ABA 2008).

⁶³ *Legal Drafting* (Thomson West 2007).

⁶⁴ *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2d ed., Thomson West 2006).

⁶⁵ *Basic Contract Drafting Assignments: A Narrative Approach* (Aspen 2010).

⁶⁶ *Drafting Contracts: How and Why Lawyers Do What They Do* (Aspen 2007).

⁶⁷ *Contracts and Commercial Transactions* (Aspen 2011).

linguistics perspective on legal language provided by Lawrence Solan⁶⁸ and Peter Tiersma?⁶⁹ And what about the resources from other common-law countries, such as works on statutory drafting⁷⁰ and those on drafting generally by J. K. Aitken and Peter Butt,⁷¹ Peter Butt and Richard Castle,⁷² and Robert Dick?⁷³

16. Couldn't contract drafting foster even in a first-year law-school course the integration of the doctrinal apprenticeship and practical apprenticeship proposed in the Carnegie Report?⁷⁴ Wouldn't it be useful if the first-year contracts professor, after discussing some cases, posed the following questions: "Could this contract dispute have been avoided by drafting the contract differently? How?"

17. Isn't it true that "[t]he primary reason why all law schools in the United States exist is to prepare students for entry into the legal profession"⁷⁵ and that law schools need to maintain accreditation by the ABA's Section of Legal Education and Admissions to the Bar? Isn't that Section currently proposing to apply "outcome assessments" in law-school accreditation to ensure that law students

⁶⁸ *The Language of Judges* (U. Chi. Press 1993).

⁶⁹ Tiersma, *supra* n 23.

⁷⁰ Frederick Bowers, *Linguistic Aspects of Legislative Expression* (U. Brit. Colum. Press 1989); Elmer A. Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (2d ed., Dep't of Just. 1976); Sir Courtenay Ilbert, *The Mechanics of Law Making* (3d ed., Colum. U. Press 1914); Sir Alison Russell, *Legislative Drafting and Forms* (4th ed., Butterworths 1938); G.C. Thornton, *Legislative Drafting* (4th ed., Butterworths 1996); Thring, *supra* n. 32.

⁷¹ *The Elements of Drafting* (10th ed., Law Book Co. 2004).

⁷² *Modern Legal Drafting: A Guide to Using Clearer Language* (2d ed., Cambridge U. Press 2006).

⁷³ *Legal Drafting in Plain Language* (3d ed., Carswell Legal Publ'ns 1995).

⁷⁴ Sullivan et al., *supra* n. 2, at 194.

⁷⁵ Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* 60 (Clinical Legal Educ. Ass'n 2007).

learn the skills employers want?⁷⁶ Wouldn't contract drafting be a good example of such a skill? Could successful efforts to teach contract drafting perhaps serve as a game changer that could even help lead to an uptick in a law school's *US News & World Report* ranking?

What Are Examples of the Language Questions That a New Doctrine of Contract Drafting Might Answer?

1. What might the language aspects of a new doctrine of contract drafting look like? If language is the means for contractual lawmaking, wouldn't it help contract drafters to better understand the subtleties of English syntax, vocabulary, and existing usage and how they affect ambiguity, particularly in statutory and contract drafting? Wouldn't answers to the questions like those below assist in developing the doctrine?

2. Much more has been written about statutory drafting than contract drafting, so what can the former teach us about the latter? What have the principal drafters of legislation in Congress and in the state legislatures written about legislative drafting? What about the Commonwealth Association of Legislative Counsel?⁷⁷ What are the different audiences for statutes and contracts, and how do they affect the influence of statutory drafting on contract drafting? On the other hand, what can contract drafting teach us about statutory drafting? (The traditional assumption has been that statutory drafting is primary and contract drafting secondary, so this question has never been asked, but shouldn't it be?)

⁷⁶ ABA Section of Legal Education and Admissions to the Bar, Report of the Outcome Measures Committee (July 27, 2008) (available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>).

⁷⁷ <http://www.opc.gov.au/calc/index.htm>.

3. Do the canons of statutory interpretation apply to contracts? From a legal perspective, what are the canons of statutory interpretation? Law? Interpretive aids for judges? What are the lessons, if any, of the canons of statutory interpretation for *drafting*, not just for interpretation?

4. Is it true that the canons of statutory interpretation arose through an effort by judges to limit legislative changes to the common law? Was the judiciary attempting to limit change by interpreting statutes narrowly? If so, is it appropriate that the canons are applied to contracts, as opposed to legislation? Do they express universal principles of language interpretation or only the concrete tactics of a particular political struggle?

5. Should contract drafters or litigators welcome or promote the creation of new canons of interpretation — or variations on an old one, such as *eiusdem generis*? (Example: “dogs, cats, and other pets,” in which *pets* might be limited to four-legged mammals.) What about atypical *eiusdem generis*?⁷⁸ (Example: “pets, such as dogs and cats.”) Does the canon still apply?⁷⁹ What about the presumption of so-called reverse *eiusdem generis* that was created by judges within the last 20 years?⁷⁹ (Example: “bass, trout, or any other freshwater fish,” in which the bass and trout are presumed to be freshwater, not saltwater, fish.) Does it make any difference whether *any* or *all* precedes the last item?

6. What are the implications of the doctrine of *contra proferentem* (“against the party putting forward”) for contract drafting? Does it apply to an individual contract provision drafted by one party in a contract prepared by the other party? To a provi-

⁷⁸ See, e.g., *U.S. v. Apodaca*, 843 F.2d 421, 426 (10th Cir. 1988); *U.S. v. Delgado*, 4 F.3d 780, 786 (9th Cir. 1993); *Dong v. Smithsonian Inst’n*, 125 F.3d 877, 879–80 (D.C. Cir. 1997).

⁷⁹ See Gregory R. Englert, *The Other Side of Eiusdem Generis*, 11 *Scribes J. Legal Writing* 51 (2007) (citing cases that do apply it).

sion that is subject to negotiation? If not, how much negotiation is required to prevent the application? What are the implications of the parol-evidence rule and the burden of proof for asserting *contra proferentem*?

7. When considering ambiguity, shouldn't we recognize the significance of drafting our contracts in the English language? What peculiarities of English grammar or vocabulary cause what types of ambiguity in English? What is the significance that in English the indefinite article, as opposed to the definite article, does not possess a plural form? Doesn't this mean that in the plural the word *such* is ambiguous between the senses of "that type of ____" and "those ____"? Are there similar instances in English?

8. Which choice is best for the contract drafter in creating a class that grants rights or imposes obligations — an exhaustive enumeration (*law, act, statute, ordinance, bylaw, regulation, rule, order, or directive*), an enumeration with just three items (*law, regulation, or rule*), a single superordinate term (*the law*), or a phrasal superordinate (*any requirement having legally binding force*)? What are the pros and cons of these different methods?

9. What are the implications of lexicography and of dictionaries for contract drafting? For example, if judges want to apply the "ordinary" meaning of a word, how do they find that in a dictionary? *Webster's Third New International Dictionary* (1961) and the *Oxford English Dictionary* (2d ed. 1989) list the senses under each entry by order of historical appearance, but *The Random House Dictionary of the English Language* (2d ed. 1987) generally lists the "most frequently encountered" sense first — so is the most frequently encountered sense the "ordinary" meaning? And if it is, or if it's closer to the ordinary meaning than the other senses, should judges refer to the *Random House Dictionary* rather than others that list meanings in historical order?

10. How should we deal with the concept of proportionality in contract drafting? What is the effect of the amount at risk or the likelihood of an event's causing damages? If a properly drafted contract is good enough for a \$10,000 transaction, is it also good enough for a \$10,000,000 transaction? If not, why? And how should the contract be changed?

11. In contract drafting, how do we balance the probability of an undesirable event and the severity of its consequences? Does our perception of a risk of an undesirable event and remedial measures for mitigating or eliminating it change if the probability is high but the severity would not be great? What if the probability is low but the severity would be great?

12. When is it proper to establish a general rule of language use in contract drafting that will avoid problems in isolated cases but seem superfluous in most cases? How seriously should we take the Golden Rule of drafting that demands consistent use of words? For example, does this demand restrict the use of the word *term* in a contract to only one of its three common senses: a synonym for *word*, the effective period of a contract, or a provision of a contract? Doesn't (or shouldn't) the Golden Rule have a "rule of reason" as its corollary?

13. What are the general implications of the plain-English movement for contract drafting, especially for semantic ambiguity? What are its implications for contracts not involving consumers? What could we learn about terminology in contract drafting from the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods?

14. What is the rationale for punctuation? How did it develop historically, and does it still serve its original purposes? How can answers to these questions aid contract drafters? Could we do a

study on the comma as discussed in court decisions and derive some widely accepted principles that would be useful for drafters? Was Roger Casement's counsel correct when he said that "in dealing with a penal statute . . . crimes should not depend on the significance of breaks or of commas"?⁸⁰

15. How do courts deal with a scrivener's error, and what can drafters learn from this in order to eliminate mistakes or lessen their negative effects? What about *United States v. Locke*⁸¹ — a case in which the use of "prior to December 31" instead of "prior to January 1" in the Federal Land Policy and Management Act of 1976 led to the loss of the Locke family's mining rights, worth millions of dollars? Is that a good example? What is the implication of the concept of *casus omissus* ("an omitted case") for contract drafting?

What Other Resources Are There for Developing a Doctrine of Contract Drafting?

1. Wouldn't it be useful if practical lessons for contract drafting could be distilled from the rich theoretical and policy analysis on contract law in law-review articles by Marc Galanter,⁸² Mitu Gulati,⁸³

⁸⁰ *The Trial of Roger Casement* 241 (G.H. Knott ed., William Hodge & Co. 1917).

⁸¹ 471 U.S. 84 (1985).

⁸² See, e.g., *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577.

⁸³ See, e.g., *Origin Myths, Contract, and the Hunt for Pari Passu* (UNC Legal Research Paper No. 1633439, 2011) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633439).

Ian Macneil,⁸⁴ Eric A. Posner,⁸⁵ Robert E. Scott,⁸⁶ and others and from the study of language in law school by Elizabeth Mertz?⁸⁷

2. Given the importance of language to contract lawmaking, isn't it time, as suggested earlier, for more interdisciplinary cooperation between law scholars and linguistics professors? Isn't this thought behind Richard A. Posner's comment on Lawrence M. Solan's book *The Language of Judges* that "there is a significant domain of application of linguistic theory to law,"⁸⁸ and Richard Wydick's comment on Peter Tiersma's book *Legal Language* that law and linguistics are "a combination that could become tomorrow's hot field"?⁸⁹ How can a drafter use the insights of linguistics, especially pragmatics, to improve contract drafting? Can the theory of speech acts and the cooperative principle teach us something about contract drafting?

3. What can anthropology, the law-and-society movement, and economics, especially behavioral economics, teach us about contract drafting? Can psychology and neuroscience also provide insights for contract drafting?

4. For the third-year law student, doesn't the lawyer's mantra that "nothing happens until you have a client" become "nothing happens until you have a job"? Doesn't the current (and future) job market suggest the value of courses, such as those in contract

⁸⁴ *The Relational Theory of Contract: Selected Works of Ian Macneil* (David Campbell ed., Sweet & Maxwell 2001).

⁸⁵ See, e.g., *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533 (1998).

⁸⁶ See, e.g., *A Theory of Self-Enforcing Indefinite Agreements*, 103 Colum. L. Rev. 1641 (2003).

⁸⁷ *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford U. Press 2007).

⁸⁸ *The Language of Judges*, *supra* n. 68, dust-jacket blurb.

⁸⁹ *Legal Language*, *supra* n. 23, dust-jacket blurb.

drafting, that could help students in very concrete ways to prepare for law practice, to generate distinguishing credentials that would help in a job search, and to provide work samples and fascinating case stories that could be provided, as appropriate, in job interviews? Wouldn't a course in contract drafting be a win for school and student alike?

What Is the Final Question?

Is there still a question whether a minor course correction in law-school education is overdue? Whether we should reorient our concept of “law” and “law” school? If law professors, practitioners, and judges (with assistance from law students and law librarians) could contribute to answering and elaborating these many questions, wouldn't we be able to develop a new doctrine of contract drafting that would benefit all of us — by helping scholars to push the frontiers of our understanding of language, lawmaking, and private ordering; by enabling teachers to help students learn the practical wisdom of contractual lawmaking; and by helping judges and practicing lawyers, who are making law day by day, contract by contract, enhance their professionalism and do justice to the rule of law? Isn't this the direction in which the academy, bench, and bar should all go — *together*?

