

5-2015

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Recommended Citation

Harry G. Prince, *Contract Law Present and Future: A Symposium to Honor Professor Charles L. Knapp on Fifty Years of Teaching Law*, 66 HASTINGS L.J. 871 (2015).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol66/iss4/1

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Contract Law Present and Future: A Symposium to Honor Professor Charles L. Knapp on Fifty Years of Teaching Law

Foreword

HARRY G. PRINCE*

INTRODUCTION

The American Association of Law Schools (“AALS”) Contracts Section listserv recently carried an online conversation that began with the question of whether anyone knew a case in which the court refused to enforce a contract because of its racial content.¹ A lively and informative discussion ensued. One of the responses cited a case in which the court held that the refusal to contract based on race was wrongful, but the author went on to suggest she believed she had seen a case in an older edition of the Knapp casebook that held that an offer could be restricted on the basis on race.² Shortly thereafter Professor Chuck Knapp confirmed that in the first edition of his casebook there had indeed been such a case, *Maughs v. Porter*,³ a 1931 Virginia Supreme Court decision.⁴ Professor Knapp went on to explain the holding in the case and its appearance, and subsequent disappearance, from the casebook. This

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1. The question was posed by Professor Nathan B. Oman under the subject line, “Racist Contracts.” Posting of Nathan B. Oman, nboman@wm.edu, to AALScontracts@lists.umn.edu (June 2, 2014) (on file with author). Professor Oman indicated that his question was prompted by a case, *Turman v. Boleman*, 510 S.E.2d 532 (Ga. 1998), involving the validity of a separation agreement that included a promise that the couple’s child would never have contact with “African-American males” during visitations; the provision was held unenforceable on public policy grounds.

2. Posting of Debora Threedy, Debora.threedy@law.utah.edu, to AALScontracts@lists.umn.edu (June 2, 2014) (on file with author). The case cited by Professor Threedy as involving refusal to contract on the basis of race was *Crawford v. Robert L. Kent, Inc.*, 167 N.E.2d 620 (Mass. 1960).

3. *Maughs v. Porter*, 161 S.E. 242 (Va. 1931).

4. Posting of Professor Charles L. Knapp, knappch@uchastings.edu, to AALScontracts@lists.umn.edu (June 2, 2014) (on file with author).

brief exchange offers a number of insights about Professor Knapp's stature and enduring contribution to the contract law academy.

Professor Charles Lincoln Knapp began teaching in the fall of 1964 at New York University School of Law, his alma mater. After utilizing a number of different casebooks over several years, he began assembling his own contract law teaching materials that eventually turned into his casebook, published by Little, Brown and Company in 1976 as a solo authored work.⁵ The *Maughs* case appeared early in the casebook in the section on consideration.⁶ As Professor Knapp explained in his posting to the contract teachers' listserv:

At issue was an advertised auction of lots at which a prize (a new Ford) would be awarded to one person who attended, the drawing to be open to "every white person over 16 years of age." Plaintiff (who was indeed "a white person over sixteen years of age") won the drawing, but didn't get the car, and sued for the car or its value. The court holds (correctly) that there was consideration for the defendant's promise of the car (which of course was the point of the case being in the casebook), but that the defendant's promotional scheme violated a public policy against "lotteries," and for that reason the plaintiff could not recover. The court never addressed the racial issue at all—it clearly was not regarded as controlling or even noteworthy in Virginia in 1931.⁷

Professor Knapp went on to say that he was "pleased and relieved" to find that he had included in that first edition of his casebook a substantial note after the opinion dealing with the racial discrimination issue. Indeed, that note made up the bulk of the commentary after the case and began by asking the reader to suppose that the plaintiff had not been white, but instead had been black or Asian. The note proceeds to touch upon constitutional and statutory law that prohibits racial discrimination in a variety of settings.⁸

The *Maughs* case and its note about race and contracting appeared only in the first edition of the casebook. Professor Knapp's best guess is that it was omitted as perhaps a "not-helpful distraction," though he also adds that the authors of the second edition (Knapp and Nathan Crystal) were "perhaps too timid" in deleting the case and note.⁹ The question facing the authors at the time would have been whether the doctrinal point made by the case was outweighed by the political import. The deletion of the case indicates that the authors decided that the case was not needed to further the discussion of consideration and that it would not be kept

5. CHARLES L. KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (1st ed. 1976).

6. *Id.* at 108–13.

7. See Knapp, *supra* note 4.

8. See KNAPP, *supra* note 5, at 112–13 n.4 (raising issues of discrimination on the basis of race, age, and sex, and acknowledging both that such discrimination had existed over the years and that federal and state law may now prohibit such discrimination).

9. See Knapp, *supra* note 4.

for the purpose of provoking discussion about race and contract law. A bolder approach might have kept the case for that very reason.

The initial inclusion of the *Maughs* case and its note on race accurately reflect the Knapp casebook approach to contract law: recognizing the need to address fundamental and relatively neutral rules of contract law (that is, the need for consideration to make a promise enforceable as a general rule), but also refusing to ignore issues of race, gender, class, and other characteristics that often result in imbalances in bargaining power among contracting parties.¹⁰ Professor Knapp's message reflects that the challenge facing casebook editors is the search for the proper balance between offering a framework for the basic study of contract law while also providing workable opportunities for teachers to address broader social and policy issues that affect the application of the law, if the teacher chooses to do so.¹¹ The Knapp casebook has always sought to provide those options to faculty adopters.¹²

Professor Knapp's first edition casebook was recognized as innovative for a number of reasons, including its blending of the traditional cases with notes, questions, and problems.¹³ It is also remarkable that the casebook was among the very first to alternate use of male and female pronouns (that is, using "she" as well as "he") in the text and in referring to hypothetical parties.¹⁴ Further, the casebook received a critical boost when it was recognized by the late Professor Mary Joe Frug for some of its treatment of gender issues related to contract law.¹⁵ Moreover, there is a literary style to the casebook, a clever way of phrasing ideas and concepts that students

10. The first edition included a number of other cases that touched upon issues such as race, class, and gender. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (contesting validity of "add-on" security clause in contract made by person on government assistance on grounds of unconscionability); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971) (involving the hiring of women bartenders in violation of state statutory prohibitions); *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533 (Ct. App. 1966) (contesting validity of resignation by school teacher who had been arrested on criminal charges of homosexuality); *St. Landry Loan Co., Inc. v. Avie*, 147 So. 2d 725 (La. Ct. App. 1962) (involving the duty to read and a contract made in English by "an illiterate French-speaking Negro").

11. See Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 888 (1979) (reviewing KNAPP, *supra* note 5). Professor Klare noted that "Knapp's often poignant cases vividly reveal some of the ethical and social dilemmas courts confront in deciding whether to give legal effect to the apparent assent of the parties, or to upset the litigants' private arrangements." *Id.*

12. *Id.* at 896-97.

13. See Lawrence A. Cunningham, *Reflections on Contracts in the Real World: History, Currency, Context, and Other Values*, 88 WASH. L. REV. 1265, 1278 (2013) (noting the first edition's role in casebook evolution and that the "Knapp book remains . . . a complementary combination of cases, materials, and problems"); see also Klare, *supra* note 11, at 897 (noting the "skillfully drafted hypotheticals" that pose difficult counseling issues and often raise "questions of professional ethics").

14. Klare, *supra* note 11, at 896.

15. See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1117 n.179, 1119 n.182 (1985) (noting that the Knapp casebook had pointed out the feminist aspects of the notable case *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970)).

and teachers have found refreshing in the normally sterile world of law school reading.

Professor Knapp is also widely recognized for his other scholarship, including his groundbreaking 1969 article, *Enforcing the Contract to Bargain*,¹⁶ which has been widely hailed as an influential and innovative piece of contract law scholarship.¹⁷ Over the years he has also focused a substantial amount of attention on the role of reliance in contract law enforcement and, more recently, the use and abuse of mandatory arbitration clauses in perpetuating contract bargaining imbalances.¹⁸

What is it about Professor Knapp that has led him to this achievement of fifty years as a contract law teacher and scholar? To begin with, he started young. He has been blessed with good health, and he is very bright and motivated. To his colleagues, it is readily apparent that he remains invigorated by teaching and writing. He was born and raised in Zanesville, Ohio, the son of a lawyer and judge.¹⁹ Professor Knapp's older sister reports that he was always precocious, mastering the piano at an early age and skipping ahead a grade in elementary school. He attended Denison University for his undergraduate studies, where he graduated first in his class (and where he was a younger schoolmate of another notable contract law scholar, the late Professor Richard Speidel). Professor Knapp's record of academic achievement was also in evidence at NYU School of Law where, once again, he finished first in his class. He also made a very positive impression on the dean of the law school at the time, the late Russell Niles. It was Dean Niles who offered a young Chuck Knapp the opportunity to join the law faculty after four years as an associate attorney at a prominent New York City law firm. Professor

16. Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969).

17. See Amy J. Schmitz, *Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55 (2006) (article drawn from presentation on the panel "Revisiting a Classic: Charles Knapp's Enforcing the Contract to Bargain" at the American Association of Law Schools Contracts Conference "Exploring the Boundaries of Contract Law," which took place on June 17, 2005 in Montreal, Canada); G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 243 n.92 (1991); Harvey L. Temkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 161 n.166 (1986) (crediting Knapp with introducing the concept of the contract to bargain).

18. See, e.g., Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95 (2006); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191 (1998); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002).

19. Observations about Professor Knapp's background are drawn from his curriculum vitae, *Charles L. Knapp Curriculum Vitae*, UC HASTINGS, <http://www.uchastings.edu/academics/faculty/facultybios/knapp/docs/knappCV.pdf> (last visited May 10, 2015), and from comments made by his sister, Mrs. Betty Bawden, at a 75th birthday celebration held for Professor Knapp in San Francisco on October 23, 2010.

Knapp accepted that offer in 1964 and remained at NYU until 1998, with an occasional visit at other law schools along the way. In 1998, he was drawn to UC Hastings College of the Law and San Francisco.

Professor Knapp's move to San Francisco was clearly not an opportunity to "slow down." He has been very busy at UC Hastings as a writer and speaker in addition to being a fully engaged faculty member. As the anecdote about the *Maughs* online discussion illustrates, he has also been a very active mentor and resource for other scholars throughout the country.

The panel topics for the Symposium reflect areas of interest to Professor Knapp: the role of casebooks in the teaching and development of contract law, present day issues related to mutual assent and imbalance in bargaining power, and the roles of contract law and the courts in policing abuses in the bargaining process. He has devoted untold hours to the care and nurturing of his casebook, which began modestly as his personal project and is now generally recognized as a leading book in the area of contract law. All casebooks now face a somewhat uncertain future as the impact of technology and the ongoing evolution of law schools suggests that the traditional dependence on a hardcopy casebook may not continue. The question also arises as to what extent casebooks will shape future lawyers' and judges' approaches to the law. Two distinguished casebook authors formed the first panel of the Symposium, considering those topics and others. Professor Carol Chomsky of the University of Minnesota acknowledged that she learned a great deal about contract law by first teaching from the Knapp casebook before moving on to eventually write her own casebook with Professor Christina Kunz.²⁰ The role of casebooks in providing guidance to new teachers cannot be overstated. Professor Chomsky's article in this issue explores the goals of legal education and how course books need to adapt to use skills or experiential learning.²¹ Professor Chomsky also provides some insights into the aspects of course books that students find most helpful. Similarly, Professor Thomas Joo of the University of California at Davis offers keen observations about the evolution of casebooks, beginning with Langdell's original contracts casebook, and moving to the increasingly recognized need for such books to meet both theoretical and practical instruction, as well as address the traditional need for the development of critical thinking skills.²²

20. CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* (2d ed. 2013), 66.

21. See generally Carol L. Chomsky, *Casebooks and the Future of Contracts Pedagogy*, 66 HASTINGS L.J. 879 (2015).

22. See generally Thomas W. Joo, *Under the Sun: Casebooks and the Future of Contracts Teaching*, 66 HASTINGS L.J. 899 (2015). Professor Joo is also the editor of the casebook *CORPORATE GOVERNANCE: LAW, THEORY AND POLICY* (Thomas Joo ed., 2d ed. 2010).

Over the years, there has been notable movement in the world of contract law, from the more objective world of “formalism” to the more subjective approach of “legal realism” or “critical legal studies.”²³ But then again, some scholars have perceived a movement back toward formalism under a rubric known as the “new conceptualism” of contract law.²⁴ The panel on “the state of contract law” addressed the question where contract law now stands. In his article stemming from the panel, Professor William Woodward explores related issues of form contracts, hidden terms, and the duty to read as they play out in recurrent terms involving mandatory arbitration, choice of venue provisions, and prohibitions on class actions.²⁵ Professor Woodward also explores possible solutions to the lack of meaningful assent. In another article arising from the same panel, Professor Jay Feinman explores, more particularly, the ways in which the implied duty of good faith has been cabined by courts’ deference to express terms in the contract.²⁶ The final contributor on this panel, Professor Danielle Kie Hart, widened the lens in a couple of ways through her examination of cases from the federal and state courts in the Seventh and Ninth Circuits of the U.S. Courts of Appeal, examining the impact of a variety potential grounds for avoiding enforcement.²⁷

One need look not look very far to see the relevance of politics to the direction of contract law. Handy examples can be found in both California state contract law and the decisions of the U.S. Supreme Court regarding arbitration agreements. California Governor Jerry Brown, a Democrat, served initially in that office from 1975 to 1983.²⁸ He appointed a number of justices to the California Supreme Court who were viewed as “liberal” and likely to favor the “little person” in a contract dispute, as well as find grounds to overturn death penalty verdicts.²⁹ California gubernatorial politics took a very different turn, however, when Brown was followed by a number of Republican governors who succeeded in naming a majority of “conservatives” to the state supreme court.³⁰ Contract law decisions, like

23. See, e.g., Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983).

24. See, e.g., Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133–34 (1995).

25. See generally William J. Woodward Jr., “Contraps,” 66 HASTINGS L.J. 915 (2015).

26. See generally Jay M. Feinman, *The Duty of Good Faith: A Perspective on Contemporary Contract Law*, 66 HASTINGS L.J. 937 (2015).

27. See generally Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. (forthcoming Aug. 2015).

28. For a gallery of California governors, see *The Governor’s Gallery*, CAL. STATE LIBR., <http://governors.library.ca.gov> (last visited May 10, 2015). Jerry Brown was recently elected for a history-making fourth term in November 2014. See Chris Megerian, *Jerry Brown Plans Final Touches on Legacy As Governor*, L.A. TIMES (Nov. 5, 2014, 8:20 PM), <http://www.latimes.com/local/politics/la-me-pol-brown-legislature-20141106-story.html>.

29. See generally John H. Culver, *The Transformation of the California Supreme Court: 1977–1997*, 61 ALB. L. REV. 1461, 1486 (1998).

30. *Id.* at 1466–69.

death penalty cases, began to move in a different direction and one that was less favorable to employees, consumers, and others likely to be at a disadvantage in bargaining power. The clearest example is undoubtedly the reversal of the decision by the Brown-dominated court allowing recovery for the “bad faith denial of contract,” which opened the door to tort damages for breach of contract.³¹ The court, dominated by Republican appointees, found grounds to overrule the earlier court’s decision.³² As noted by Professor Knapp,³³ the Supreme Court has engaged in a steady movement toward enforcing arbitration agreements imposed by stronger parties on weaker adherents through standard form agreements, as in *AT&T Mobility LLC v. Concepcion*.³⁴ Generally, commentators anticipate the impact of judicial appointments on criminal law cases or hot-button social issues such as same-sex marriage or abortion. The panel on “the politics of contract law,” however, considered a variety of issues related to the judiciary, contract law, and politics.

Professor Judith Maute uncovered the political aspects of the curious case of *Quake Construction, Inc. v. American Airlines, Inc.*,³⁵ a principal case in the Knapp, Crystal & Prince casebook involving a dispute about whether a contract was formed to perform construction work in a renovation of facilities at Chicago’s O’Hare Airport. Professor Maute’s study reveals the impact of race and politics in understanding the case, including the interesting interplay between legendary “Chicago style politics” and efforts to diversify the participation of contractors on major construction projects in the city.³⁶ Moreover, the case presents an interesting potential application of Professor Knapp’s theory of the contract to bargain in good faith. In a similar vein, in an article in this issue, Professor Emily Houh offers an analytical deconstruction of two early twentieth century cases in which black plaintiffs received favorable judgments, but perhaps from condescending courts, raising the question of at what price is justice received.³⁷ To complete the panel, Professor Peter Linzer mounts a rather frontal assault on contracts of adhesion and their ubiquitous place in supposedly reflecting mutual assent.³⁸

31. See Gregory Klass, *Contracting for Cooperation in Recovery*, 117 YALE L.J. 2, 38 (2007); Robert L. Rancourt, Jr., *Freeman & Mills, Inc. v. Belcher Oil Co.: Yes, The Seaman’s Tort Is Dead*, 27 PAC. L.J. 1405, 1421 (1996).

32. See Culver, *supra* note 29, at 1476–77.

33. See Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty First-Century-Survey*, in COMMERCIAL CONTRACT LAW: A TRANSATLANTIC PERSPECTIVE 309 (Larry A. DiMatteo et al. eds., 2013).

34. 131 S. Ct. 1740 (2011).

35. 565 N.E.2d 990 (Ill. 1990).

36. See generally Judith L. Maute, *Race Politics, O’Hare Airport Expansion and Promissory Estoppel: The More Things Change, The More They Stay the Same* (Oct. 19, 2014) (unpublished manuscript) (on file with Judith Maute).

37. See generally Emily M.S. Houh, *Sketches of a Redemptive Theory of Contract Law*, 66 HASTINGS L.J. 951 (2015).

38. See generally Peter Linzer, *Contract as Evil*, 66 HASTINGS L.J. 971 (2015).

The final panel on “the future of unconscionability” touched upon a specific topic on which Professor Knapp has more recently focused while also addressing broader questions about the courts’ ability to police bargains. Professor Hazel Beh reexamines the use of the unconscionability doctrine generally, noting limitations on its application and offering some rather specific recommendations about means for increasing its usefulness in policing “naughty behavior.”³⁹ Professor David Horton closed the panel by addressing a growing practice of commercial parties imposing “indescendability” restrictions on contract rights, prohibiting them from passing to family members or other survivors.⁴⁰ Such restrictions are particularly troublesome when presented in “browse wrap” agreements or imposed by virtue of terms allowing the drafter to unilaterally modify contract terms.

This Symposium is further enriched by a contribution from Professor Knapp himself by way of a reprinting of a book chapter, *Is There a “Duty to Read”?*⁴¹ This writing perfectly captures the essence of the symposium, in that it reflects concerns about the impact of society and modern day business practices on traditional contract law doctrine and investigates the potential for lawyers (and the schools that mold them) to play a further role in the evolution of law that impacts the lives of real people. It is appropriate to end with a question because there is much still left unanswered.

The completion of fifty years of teaching is a remarkable achievement in any event. It is even more so when the teacher has established a record of academic achievement throughout those fifty years. Such is the case with Professor Charles L. Knapp. More than simple longevity, it is his huge contributions to two different law schools, scores of colleagues and fellow teachers, and countless numbers of law students that make the occasion so grand. This Symposium is a mere token of the appreciation due to Professor Knapp for his past, present, and future advancement of the scholarly enterprise.

39. See generally Hazel Glenn Beh, *Curing the Infirmitities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2015).

40. See generally David Horton, *Contractual Indescendibility*, 66 HASTINGS L.J. 1047 (2015).

41. Charles L. Knapp, *Is There a “Duty to Read”?*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 315 (Jean Braucher et al. eds., 2013), reprinted in 66 HASTINGS L.J. 1083 (2015).