Finding a Happy Medium: Teaching Contract Creation in the First Year

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Educational experiences oriented toward preparation for practice can provide students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work. In addition, . . . practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life — a motivation that is rarely accorded status or emphasis in the present curriculum.¹

Introduction
Notwithstanding casebooks and television depictions of lawyers, most lawyers do not operate in a win-or-lose, all-or-nothing, black-or-white world. Rather, most operate in a world of compromises, middle grounds, shades of gray. Thus, new lawyers need to know how to come to and express compromise. Teaching contract creation — a set of skills culminating in contract drafting — in the first year of law school can serve this purpose very well and promote students’ development into well-rounded lawyers.

Making the case for teaching contract creation in the first year of law school, this essay addresses the following questions: (1) How are contracts, as a genre of legal writing, somewhat similar to yet also significantly different from expository writing, such as office memos and appellate briefs? (2) What are the distinctive elements of learning, and hence teaching, contract creation? (3) What might a contract-creation unit in a legal writing or other first-year course look like? (4) What are the developmental benefits for students of a contract-creation unit early in law school?

1. Contracts as a Genre of Legal Writing
At first glance, a contract does not look much like a piece of expository legal

¹ William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 88 (Jossey-Bass 2007) [hereinafter Carnegie Report] because the study was undertaken by The Carnegie Found. for the Advancement of Teaching.
writing, such as an office memo or appellate brief. The typical contract reads more like a set of directions or spare descriptions of a series of events than an expository paper. A contract has no citations, includes numbers — such as quantities, prices, and dates — and graphic elements not used in analytical writing, and features two signatures rather than one. It is meant to be consulted, not read from beginning to end. It pertains to the future, rather than the past. The contracting parties, not lawyers, comprise its primary audience.

First glances can be deceiving; contracts, at least fairly substantial contracts, are in some ways similar to memos and briefs. First, many contracts have standard components, as do some types of expository writing. Second, good drafting resembles good writing. A contract’s prose should be clear, simple, precise, consistent, and concise. Many contracts should be written in plain English. As with terms of art in expository writing, some contract concepts, such as representations, covenants, conditions, and discretionary authority, are critical and thus phrased in a very specific manner. Third, contracts are imbued with legal meaning, even if citations and legal rules do not appear, because contract provisions, in combination with applicable legal rules, have legal significance as the contracting parties perform under the contract and in the event disputes arise. Fourth, as in expository writing, a contract embodies a narrative, a story of what is to happen pursuant to the contract.

This text-to-text comparison of contracts and analytical writing derives from the contrast in how analytical writing and contracts are created. According to George Kuney:

In the litigation model, one extracts rules of law from cases or statutes, examines a given set of facts, spots the issues, applies the law to the facts, and reaches a conclusion. . . . At every step of the way, one is dealing with “givens”: facts that have already happened, laws that have already been made by legislators and courts . . . .

Transactional lawyering is different. It involves understanding the parties’ deal and then translating the business terms into a transactional structure that uses contract, commercial, and other business law principles to govern the parties’ relationship. . . . [N]othing, or at least very little, is “given.” . . . [T]he attorney is creating the structure and provisions along the way in a manner that creates the most benefit for the client by


\[4\] See Burnham, supra n. 2, at 271-96.

harnessing applicable law and allocating risk and reward.\textsuperscript{6}

Often, at least in complex transactions, lawyers are involved in structuring the deal\textsuperscript{7} and, most important for purposes of this essay, negotiating the terms of the deal.\textsuperscript{8}

2. The Elements of Contract Creation

What should — and can — students learn about contract creation in the first year of law school\textsuperscript{9} One approach\textsuperscript{10} is to emphasize one key concept — the notion of contingency — and work through the process of creating a contract, in four more or less distinct stages.

Contingency, the Key Concept: A contract is about a series of contingencies: will the parties enter into a contract at all, which depends on their ability to come to a mutually satisfying agreement; what may or may not happen during the contract transaction; and what occurs when a particular event does occur, which largely depends on what the contract specifies about that contingency. Some events are desired: payment for services rendered or goods produced and delivered. Others are problematic, such as delay, supply difficulties, and adverse economic or political events.

Context and Comparison: To succeed in creating a contract, a lawyer\textsuperscript{11} must first know both the factual and legal context of the deal. Acquiring this information entails interviewing the client, learning about the industry, and engaging in legal research. The more specific to the type of contract at hand the legal research is, the more effective it is. In coming to understand the context of the deal, the lawyer should discover one or more possible approaches to a

\textsuperscript{6} George W. Kuney, The Elements of Contract Drafting with Questions and Clauses for Consideration 24 (2d ed., Thomson West 2006).

\textsuperscript{7} As needed, the lawyer may identify legal issues, prepare an opinion letter, or conduct due diligence investigations. See Fox, supra n. 3, at 33-63.

\textsuperscript{8} Id. at 4. Contract negotiation is a much-studied process. For a recent example and extensive bibliography, see Gregory A. Garrett, Contract Negotiations: Skills, Tools, and Best Practices (CCH Inc. 2005).


\textsuperscript{11} The allocation of responsibility between lawyer and client varies widely. This discussion assumes that the lawyer is involved early in the deal.
particular topic, one of which may well be to state nothing about the topic. Each possibility should then be compared to the others to develop a set of best to worst options, based on legal and non-legal factors. This analysis may be captured in a piece of expository writing, such as an office memo or advice letter.

Compromise: A contract involves the agreement, in some form, of the contracting parties. When the disparity in bargaining power between the parties is great, the weaker party may in essence acquiesce to the terms presented by the stronger party. In many situations, the agreement reflects compromise: a middle ground between the two parties’ positions on a topic, a mix of pro-buyer and pro-seller terms. Coming to that compromise involves negotiation: the reciprocal sharing of information, expression of both parties’ goals and interests, discussion of legal and business rationales for one approach or the other, then ultimately coming to agreement on a package of terms.

Crafting the Contract: Writing the contract begins during the compromise process. The parties may present language for consideration on some topics and agree on specific language. For other topics, they may agree on concepts but not specific language. Some topics may not be discussed at all because the parties expect the contract to contain more or less standard language. Expressing all of these terms in writing is what most call contract “drafting”; a better term, reflecting the difficulty of the task and the attention to detail it requires, is contract “crafting.” Often, one lawyer will craft a proposed contract for review by the other party, and the lawyers may engage in several rounds of edits until the language is fully formed.

Checking the Contract: A contract must be carefully checked before it is considered complete. One list of criteria includes lawfulness, accuracy, balance, comprehensiveness, foresight, practicality, precision, comprehensibility, aptness of style and tone, and aesthetics.12

3. Teaching Contract Creation in the First Year

A contract-creation unit can be designed various ways and housed in various first-year courses.13 This part describes two units I have taught: a negotiated-contract unit in a first-year skills course and an adhesion-contract unit in a contracts course. Both simulate legal practice, but take different approaches: the deal-negotiation unit is a four-week exercise with several performances; the adhesion-contract unit is a semester-long exercise with fewer performances.14

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13 Contract creation could be taught in a torts or property course, focusing on a tort or property subject involving contracts, e.g., an exculpatory clause or a lease. However, the focus likely would be on the legal rules, more than the contract-creation process.
Deal-Negotiation Unit: Negotiated contracts are taught in the second semester of William Mitchell’s first-year skills course, Writing & Representation: Advice & Persuasion (WRAP). WRAP encompasses the standard elements of a legal research and writing course and also includes interpersonal skills, which we call “representation.” WRAP is an adjunct-based course, with homerooms of twelve or fewer students, taught by a writing professor and a representation professor. Full-time faculty coordinators also teach large-section classes.

The deal-negotiation unit in WRAP takes four weeks. To provide non-legal context, students receive several documents, such as notes of a conversation or a letter describing the potential deal and some background information on the industry, taken from a reputable Internet source. The documents indicate what the legal issue is. A homeroom of a dozen students is divided in two, with half of the students representing the seller of goods or services, the other half representing the buyer. The documents indicate what the legal issue is.

Over several weeks, to acquire the legal context of the deal, students research the legal issue in cases; statutes; familiar types of commentary, such as treatises and periodicals; and formbooks. They then prepare advice letters setting out the legal rules, the options the client should consider, and the student’s evaluation of the options. The writing professor evaluates and scores the advice letters.

Shortly after turning in their advice letters, students engage in simulated negotiations of the contract on which they have been working. A week before the advice letters are due, students receive the buyer's or seller’s confidential handout, which includes further directions and confidential information. These handouts inform the students of the topics they will negotiate: the legal issue and several mostly numerical topics, such as price, quantity, and duration of the contract. The confidential information covers additional facts about the client’s situation as well as the client’s degree of interest in concluding the deal. For each side, there are two versions of confidential information: in one, the client is very motivated to come to a deal; in the other, the client is much less motivated because it has other good options.

In preparation for the negotiation, and shortly after they turn in their advice letters, students write negotiation plans, which cover (1) the theory of the negotiation; (2) the client’s goals, the other party’s probable goals, and the parties’ mutual interests; (3) information to obtain, reveal, or not reveal; (4) pertinent

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15 WRAP covers research in commentary, cases, statutes, and rules of procedure. The major writing projects are office memos, advice and demand letters, and motion practice memoranda. WRAP is followed by Writing & Representation: Advocacy, taken in the second or third year of law school; Advocacy covers trial and appellate litigation.

16 This unit is described in Deborah A. Schmedemann & Ken Kirwin, Transactional Skills Workshop in Teaching the Law School Curriculum 270-71 (Steven Friedland & Gerald F. Hess eds., Carolina Academic Press 2004). My colleague, Ken Kirwin, and I spoke about this unit at the 2005 Association of Legal Writing Directors Conference.
legal rules and the client’s legal positions; (5) the lawyer’s negotiating authority; (6) the client’s best alternative to a negotiated agreement; and (7) the opening proposal. In addition to negotiating, students watch other students negotiate. The representation professor orally critiques each negotiation and provides written comments and a score shortly thereafter.

After the negotiation, students craft several contract clauses. Most of the clauses derive from the negotiation; thus students craft a clause on their legal topic and several clauses on the non-legal topics. If two students do not agree on one or more topics during their negotiation, the representation professor provides terms to write. In addition, students craft a clause they did not negotiate—providing for mediation in the event of disputes under the contract.17

In the final stage of the unit, students submit their clauses for marking and scoring by the representation professor. Equally valuable is the reaction of the classmate who represented the other party to the contract. Thus, students exchange their clauses and discuss the following questions: (1) Is the content what you expected, based on your negotiation (or your representation professor’s directions)? (2) How does this draft protect the interests of the drafter’s client? (3) How does it create potential problems for the drafter’s client? (4) What two specific improvements might be made in the draft clauses?

This unit involves many skills: research; legal and factual analysis; expository writing; negotiation, including structured preparation; crafting contract language; and critiquing contract language. Some of the skills are taught in other units, of course; several are unique to this unit. The transactional setting of this unit sets it apart from the dominant litigation setting of the first-year curriculum.

Adhesion-Contract Unit: I have also taught contract creation in my contracts course. Having taught both doctrinal and skills courses for over twenty-five years, I find the line between the two rather hazy, which is a good thing. As students learn doctrinal law in skills courses from the problems they are assigned to work on, doctrinal courses are places for teaching skills related to the course’s subject matter.

The adhesion-contract unit occurs in the second semester. By then, students have studied contract formation and grounds for avoidance of contracts; the spring semester focuses on contract interpretation, breach, and remedies.

An adhesion contract is a “standard form contract prepared by one party, to be signed by the party in a weaker position, . . . who adheres to the contract with little choice about the terms.”18 The drafter typically is the seller of consumer goods or services; the consumer must accept the seller’s contract to

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17 This clause reflects Minnesota’s strong preference for alternative dispute resolution. See Minn. Stat. §§ 572.31-.40 (2006) (providing for civil mediation); Minn. R. Prac. Dist. Cts. 114 (providing for use of some form of alternative dispute resolution in nearly all civil cases).

obtain the goods or services. Thus the contract-creation process appears to be very different than the negotiation setting, in which two parties interact to come to a compromise. In an adhesion contract, compromise is present at only a minimal level; the drafter must envision the reactions of consumers to various terms and present a contract that is acceptable enough to its consumers for them to enter into the deal. In some situations, consumer legislation sets the outer limits of a permissible contract.

Our study of adhesion contracts began with distribution of a seemingly simple contract pertaining to an unremarkable consumer transaction — boarding a pet. The contract was an actual contract developed by a trade association and used by the kennel where I board my dog. The students’ role was to act as the lawyer retained by the trade association to answer members’ questions about specific situations covered by the contract. Throughout the semester, students explored various parts of the contract in response to scenarios I provided, none of them farfetched. For example, a pregnant dog delivered her puppies while at the kennel; a dog was injured on the grounds of the kennel before he had been checked in. The contract clearly and appropriately governed some scenarios, but problems arose as to other scenarios. In the latter situations, students tried to write clearer or more appropriate provisions. Through this process, the one-sidedness of some provisions became apparent, and students considered more balanced provisions. This project lasted throughout the semester, from conditions and promises to breach to excuse for non-performance to remedies.

With this background, students completed a take-home exam, which involved another adhesion contract — rental of a beach cottage for a summer vacation. Again students were presented with an actual contract, which consisted of three documents: the main contract, notices required by law, and cottage rules. Again, an unremarkable scenario was presented. When students applied the contract to the scenario, most realized that the contract provisions were too rigid and unfavorable to the renters, who were valued repeat customers. The troublesome provisions were framed as compelled by law, so I provided the state statute, which in fact permitted but did not require the troublesome provisions. In the final step, students revised the troublesome provisions and explained their revisions.

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19 Id.

20 A seller in a position of significant power over its prospective consumers may write very one-sided terms, sometimes unconscionably so; such a contract may be voidable by the consumer. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).


22 For a dose of realism, I showed students a picture of my dog LeRoy (but decided not to have him come to class).
4. Developmental Benefits of a Contract-Creation Unit in the First Year

Teaching a contract-creation unit in the first year is not yet standard but appears to be increasing in popularity. Its value can be understood through consideration of what we want our students to become and who they are in their first year of law school.

Future Lawyers: Contract creation is a fundamental lawyering skill, “bread-and-butter work” for many lawyers. The influential MacCrate Report, written in 1992 by a blue-ribbon panel of lawyers and professors, lists negotiation, including negotiation in the transactional context, as one of ten fundamental lawyering skill sets; constituent skills are preparing for and conducting a negotiation as well as counseling the client and implementing the client’s decision. The MacCrate Report also lists communication, including contract drafting, as a fundamental lawyering skill. Fifteen years later, in April 2007, the ABA Council of the Section on Legal Education and Admission to the Bar convened a “national legal education conclave.” There was consensus that law schools now provide more

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24 See e.g. Association of Legal Writing Directors–Legal Writing Institute, 2007 Survey Results, Questions 20, 33, 35, http://www.alwd.org/surveys/survey_results/2007_Survey_Results.pdf (last accessed June 6, 2008). The 2007 survey found that sixty programs require “drafting documents,” a number that has risen steadily over the past few years. It is not clear whether the documents are pleadings or contracts. Id. at Question 20. Over 160 schools require an upper-level writing course, and many of those courses focus on drafting. Id. at Questions 33, 35. According to the 2007 survey, “There was an increase in the number of advanced elective writing courses offered in 2007, most notably in drafting courses, with 129 programs offering courses in general drafting (compared to 115 in 2006), 130 in litigation drafting (compared to 111 in 2006), 67 in legislation drafting (compared to 63 in 2006), and 137 in transactional drafting (compared to 120 in 2006).” Id. at iii. See also ABA Sec. Leg. Educ. & Admis. to the B., Sourcebook on Legal Writing Programs 33-35,178-83 (Eric B. Easton gen. ed., 2d ed. 2006) [hereinafter Sourcebook] (discussing negotiation in a first-year course and drafting in upper-level courses).


25 Kaplow & Shavell, supra n. 9, at 1.


27 MacCrate Report, supra n. 26, at 175.
and better skills training than in 1992 — and yet need to improve in the area of transactional practice.28 The mere presence of a contract-creation unit can provide “much needed transactional counterpoint to the strongly litigative viewpoint” of the first year.29

It is, of course, not enough to teach students how to create contracts; our goal should be to develop lawyers who are insightful, skilled, and ethical. The recent report on legal education by the Carnegie Foundation for the Advancement of Teaching identifies three facets of an excellent education, or in the report’s term, “apprenticeships” for the profession of law: first, the teaching of doctrine and analysis, which provides the basis for professional growth;

second, introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and

third, exploration and assumption of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.30

These apprenticeships parallel educational theorists’ categorization of educational outcomes: knowledge, skills, and values.31 A well-designed contract-creation unit can advance all three objectives.

First, students learn important lessons about contracts and the law of contracts. Furthermore, well-designed contract-creation units can make important points. For example, in one of the negotiated contracts (storing dinosaur bones), a statute sets a minimum duty yet permits capping recovery in the event of negligence; students learn about the interaction of statutory and contract language and various ways to reach the same end. Another negotiated contract matter (installing a sculpture) involves controlling the risk of delay through time-of-the-essence and per-diem-liquidated-damages clauses; students learn about contracts as ways to manage risk. Through the adhesion-contract unit, students learn about the interplay of contract interpretation approaches, such as the plain language rule and construction against the drafter.32

Second, students also begin to develop skills involved in contract creation. They learn levels of organization; wording of definitions; problems posed by the passive voice; proper use of “may,” “will,” and “shall”; and different ways to phrase lists. In the deal-negotiation unit, they learn about positional and interest-

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28 E-mail from Craig Smith, Assoc. Prof. & Dir. Legal Writing, Vanderbilt U. L. Sch., to members of Assn. of Leg. Writing Directors (Apr. 30, 2007) (copy on file with author).
29 Kunz, supra n. 24, at 707.
30 Carnegie Report, supra n. 1, at 27-29. The report uses various labels for the three apprenticeships: legal analysis, practical skill, professional identity, id. at 13-14; cognitive, practical, and ethical-social, id. at 194-97.
31 Stuckey, supra n. 23, at 43.
32 See Fajans, Falk & Shapo, supra n. 9, at 497-500.
based bargaining, linking topics, identifying the client’s best alternative to a negotiated agreement, supporting proposals and justifying concessions, and so on.

Less obvious but no less important, students learn about working within and with the client’s context.33 They learn about the central importance of the client’s situation, now and in the hoped-for future, and bargaining in the shadow of the law34 in which non-legal factors intermingle with legal factors as the parties come to agreement. This lesson is built into the deal-negotiation problems; the two versions of the parties’ confidential material are devised so that one contract should benefit the buyer, the other the seller. In the adhesion-contract unit, students see why the party that drafted the contract may not exercise its full contractual rights when doing so would harm relationships with customers.

Third, students experience ethical challenges and begin to develop their ability to grapple with ethical quandaries. For example, one of the negotiated contract matters involves a post-employment covenant not to compete in a contract between a television station and a broadcast personality; an ethical quandary arises if the employer includes an overly broad restriction that would deter the employee from leaving, even though the court likely would reduce the scope of or refuse to enforce the clause. This general quandary arises in many adhesion-contract situations. Furthermore, in negotiating a contract, a lawyer may be tempted to misrepresent facts known only to one’s client, the client’s alternatives and bottom line, the lawyer’s authority, and the client’s likely response to various proposals.35

Simulation is a good choice of teaching strategy for these lessons. Simulation, a form of context-based instruction, promotes all three types of knowledge described by Aristotle: theoria, or theory; poiesis, or productive action; and praxis, or practice; taken together, these constitute practical judgment.36 In particular, simulated contract-creation units that involve problem solving, role playing, and candid discussion are well suited for instruction in professional responsibility and moral education in a broader sense.37

33 The client’s context is vital to the work of lawyers in various settings. See Recalling Atticus Finch: Conversations with Practicing Lawyers, 18 Wm. Mitchell Mag. 28 (Spring 2001).


35 For a thoughtful discussion of the various possibilities, see Christina L. Kunz, The Ethics of Invalid and “Iffy” Contract Clauses, 40 Loy. L.A. L. Rev. 487 (2006) (discussing Model Rules of Professional Conduct 1.2 prohibiting a client to engage in fraud, 8.4 prohibiting conduct involving fraud, 2.1 requiring candid advice, and 4.1 prohibiting false statements of material fact).

36 Stuckey, supra n. 23, at 146-49 (quoting and citing Judith Wegner, Theory, Practice, and the Course of Study — The Problem of the Elephant (Draft 2003) (unpublished manuscript on file with Roy Stuckey)).

First-Year Law Students: If students should learn contract creation in preparation for practice, the question still arises: why teach contract creation in the first year of law school?

First-year students are ready to study contract creation. When students enter law school, they know a lot about contracts from their own experience in an economy that is based on contracts and a culture that values contracts. One fall, I asked my Contracts students to identify the most important contracts in their lives; common answers were contracts for cell phone service, credit cards, car loans, apartment leases and mortgages, employment, and student loans. Furthermore, to the extent contract law tracks common understanding of what makes for a legally binding agreement, students also grasp the main principles of contract law. Students’ experience and background understanding of contracts provide not only sufficient grounding but also motivation for the study of contract creation. As students learn, the skills involved in contract creation are not simple and thus merit repeated instruction; starting in the first year permits the groundwork to be laid for work later in law school.

Furthermore, the first year of law school is a formative time; hence the need to provide a balanced education. As detailed below, studying contract creation benefits students by engaging them in a different way than the traditional first-year curriculum does, possibly counteracting some of the psychological detriments of the first year of law school, and presenting a wide-angle view of practicing law to guide them through the rest of law school and into practice.

(1) Adult education: Studying contract creation engages students in a different way than traditional teaching methods of the first year. The contract-creation units build on three key principles of adult education.

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38 Litigators need to understand contract creation to handle contractual disputes. Kaplow & Shavell, supra n. 9, at 1.

39 See Carnegie Report, supra n. 1, at 104-11 (discussing legal writing as a setting for connecting the three apprenticeships). Id. at 191-97 (discussing an integrative model with immediate implications for the first-year experience).

40 One student identified the contract between the Minnesota Twins baseball team and star player Torii Hunter.

41 This appears to be so, at least as to employment contracts. See Deborah A. Schmedemann & Judi McLean Parks, Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses, 29 Wake Forest L. Rev. 647 (linguistic factors such as verb strength and signature); Deborah A. Schmedemann, Beyond Words: An Empirical Study of Context in Contract Creation, 55 S.C. L. Rev. 145 (2003).

42 See Stuckey, supra n. 23, at 142.

43 Carnegie Report, supra n. 1, at 91.

First, studying contract creation entails active learning: “Learning is not a spectator sport. . . . [Students] must talk about what they are learning, write about it, relate it to past experience, apply it to their daily lives. They must make what they learn part of themselves.”

Second, studying contract creation entails cooperation among students:

Learning is enhanced when it is more like a team effort than a solo race. Good learning, like good work, is collaborative and social, not competitive and isolated. Working with others often increases involvement in learning. Sharing one’s own ideas and responding to others’ reactions improves thinking and deepens understanding.

The contract-creation units described in this essay, especially the negotiated-contract unit, fit these two descriptions: students talk and write about the contract, they collaborate in the negotiation and drafting of the contract, and they exchange reactions to their drafts.

Third, closely related to principles of active learning and cooperation among students is teaching so as to reach students with diverse ways of learning:

There are many roads to learning. People bring different talents and styles of learning to [law school]. . . . Students rich in hands-on experience may not do well with theory. [Students who work well with theory must learn to work on concrete problems.] Students need the opportunity to show their talents and learn in ways that work for them. Then they can be pushed to learning in ways that do not come so easily.

Although one might suppose that law students would tend to learn similarly, this appears not to be so. The contract-creation units described in this essay involve styles of learning — concrete experience and active experimentation— that are quite different from the standard approach in law school classrooms.
These features of the contract-creation unit matter in part because the more effective teaching is, the more educational benefit the student receives. These features also matter because this teaching, done well, may counteract some of the detrimental effects of law school.

(2) Psychological well-being: Psychologists have long sought to identify the determinants of psychological well-being. Motivation plays a part, with intrinsic motivation enhancing well-being and extrinsic motivation producing frustration, irritation, or stress. Extrinsic goals, such as affluence, power, or image, decrease well-being; intrinsic goals, such as close relationships or social betterment, increase well-being. Furthermore, experiencing self-esteem, relatedness to others, autonomy, and competence leads to increased satisfaction and vitality, while a lack of these experiences leads to a loss of vitality and depressed mood.

Studies of law students’ and lawyers’ psychological well-being consistently reveal high levels of psychological problems such as anxiety, depression, hostility, and substance abuse. A study focusing on first-year students revealed marked decreases in well-being and satisfaction with life; increases in depression, negative affect, and physical symptoms; and shifts towards extrinsic motivations. These results “are fully consistent with the reports of distress, dissatisfaction, and loss of ethics and values among practicing lawyers.”

“Thinking like a lawyer” involves detachment, abstraction, and categorization within a system of available rules. A lawyer reduces the situation at hand to a few key facts, focuses on the competing arguments by the two irreconcilable sides, and then decides which one wins the zero-sum game or determines that there is no basis for choosing (with feelings about the right outcome outside the bounds of the analysis). According to one critic, “[t]hinking like a lawyer” is “fundamentally negative; it is critical, pessimistic and

for several questions, high ratings correlated with reflective observation; this suggests that standard law school classes work better for students with that learning style.


52 Id. at 260-61.

53 Id. at 261-63.


55 Krieger, supra n. 54, at 122-23.

56 Id. at 123.
In contract creation, while legal analysis matters, so does narrative thinking, which looks to the client’s context to provide meaning for the client’s situation. Contract creation is fundamentally positive, creative, optimistic, and deeply contextual. It involves interaction with other students as equals and coming to a creative solution from a range of options, such that both students share a sense of accomplishment — that is, an experience of self-esteem, relatedness to others, autonomy, and competence.

(3) Wide-angle view of practicing law: Finally, teaching contract creation presents a wide-angle view of practicing law that may inform the rest of the students’ legal education and indeed their practice of law. In addition to learning standard legal analysis, students may see law as a more comprehensive endeavor.

Susan Daicoff has identified nine emerging, alternative types of practicing law, which together constitute a “comprehensive law movement”: collaborative law, creative problem-solving, holistic justice, preventive law, problem-solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation. The two distinctive attributes of these practices are that first, each “recognizes and values the law’s potential as an agent of positive interpersonal and individual change . . . (such as healing, wholeness, harmony . . . ),” and second, each “integrates and values external concerns — factors beyond strict legal rights and duties— into law and legal practice.” Examples of the “external concerns” are goals, morals, values, interpersonal well-being, and community well-being. Comprehensive practices take a wider view of legal problems than standard legal analysis does. In addition to considering financial factors, “comprehensive law approaches also consider the psychological, social, emotional, and relational consequences of various legal courses of action.”

One way of comparing the standard emphasis of law school to an emphasis on comprehensive law practice is the difference between rights-oriented and care-oriented approaches to solving moral problems. Research in moral development has been dominated by two approaches. In Lawrence Kohlberg’s rights-oriented theory, as one matures, one advances from simple towards

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57 Id. at 117.
58 Carnegie Report, supra n. 1, at 107-08.
59 See id. at 128 (suggesting collaborative exercises as a way to promote relatedness as well as increase engagement); Iijima, supra n. 54, at 528-35 (focusing on interconnectedness).
61 Id. at 4.
62 Id.
63 Id. at 9.
sophisticated thinking about moral dilemmas; lawyers tend to cluster at stage 4, which emphasizes law and order.\textsuperscript{65} In Carol Gilligan’s ethic-of-care theory, context matters greatly, including relationships and feelings.\textsuperscript{66} Gilligan has differentiated the two orientations as follows:

From a justice perspective, the self as moral agent stands as the figure against a background of social relationships, judging the conflicting claims of self and other against a standard of equality or equal respect. . . . From a care perspective, the relationship becomes the figure, defining self and others. Within the context of relationship, the self as moral agent perceives and responds to the perception of need. The shift in moral perspective is manifest by a change in the moral question from “What is just?” to “How to respond?”\textsuperscript{67}

In general, in considering moral problems, lawyers rely more heavily than the general population on objectivity, rational analysis, and codified rights.\textsuperscript{68} In a major study of law students, researchers found that law school does not foster the “relational side of human nature,” “thinking like a lawyer” embodies the rights-oriented approach, and care-oriented students submerge that approach to better fit within the ethos of law school.\textsuperscript{69}

This orientation matters as students become practicing lawyers. The care-oriented approach to moral problems is better suited to comprehensive practice — yet as early as the first year of law school, students shift away from the care orientation and towards the rights orientation.\textsuperscript{70} A higher percentage of law students than new lawyers are care oriented.\textsuperscript{71} And care-oriented law students and new lawyers are more oriented towards pro bono than rights-oriented students and lawyers.\textsuperscript{72}

If one were to promote the care orientation for reasons such as these, one good strategy would be a contract-creation unit early in law school, while students are still open to influence. Teaching contract creation, as described here, involves consideration of a wide range of factors beyond legal rules and money.

\begin{itemize}
\item \bibitem{65} Id. at 1396-97.
\item \bibitem{66} Id. at 1399.
\item \bibitem{68} Daicoff, \textit{supra} n. 64, at 1397.
\item \bibitem{69} Id. at 1400-02.
\item \bibitem{70} Daicoff, \textit{supra} n. 60, at 6-8. In addition, students shift their focus from intrinsic values, such as community contribution, to extrinsic values, such as money and fame.
\item \bibitem{72} Id.
\end{itemize}
Students collaborate, rather than compete, with classmates. The product is a joint success, not a ranking of one client over the other. Because the contract will bind the clients together, students see that lawyers not only separate and substitute for opposing parties; they can also be involved in fostering good relationships.

Conclusion

This essay has sought first to delineate the chief characteristics of contracts as a genre of legal writing and the basics of the process of contract creation. It has then described two models of teaching contract creation in the first year and shown how the two units further the goals articulated in the landmark MacCrate Report of 1992 and the Carnegie Report of 2007. Finally it has argued that teaching contract creation in the first year will help students to develop into well-rounded lawyers by using a teaching method that will engage students, provide an antidote to the psychological stress of the first year, and foster a wide-angle view on moral problems and their roles as lawyers.

This essay began with a quote from the Carnegie Foundation report. It ends with a quote from a different expert — a student reflecting on a simple contract negotiation and drafting unit: “I think the exercise helped me to re-connect with the real reason I wanted to be an attorney, which is to help people to solve their problems with minimum anxiety.”

73 Chomsky & Landsman, supra n. 24, at 1560.