

JEAN BRAUCHER’S CONTRACTS WORLD VIEW

William C. Whitford*

The goal of this paper is to describe Jean Braucher’s (hereinafter Jean’s) views about contract law and the behavior to which it purports to apply, as revealed by her published writings. I strive for a painting, not a video—meaning that I want to provide a description of those views at the time of her premature death, rather than emphasizing how Jean’s views changed over time. My focus is on the big ideas that structured Jean’s thoughts, not on detailed proposals or points.

TABLE OF CONTENTS

I. THE LAW IN ACTION	14
II. CONTRACTS ARE RELATIONAL, AND DOCTRINAL LAW IS MARGINAL.....	16
III. THE SOCIAL SIGNIFICANCE OF CONTRACT DOCTRINE IS LARGELY SYMBOLIC	18
IV. THE MARKET IS NOT PERFECT; THERE IS ROOM FOR APPROPRIATE REGULATION	20
V. GOVERNMENT WORKS, BUT NOT ALWAYS.....	23
VI. WHAT KIND OF REGULATION?	25
VII. WHEN CASES DO GET TO APPELLATE COURTS, HOW SHOULD THE JUDGES BEHAVE?	28
VIII. A FEW ADDITIONAL OBSERVATIONS	29
CONCLUSION	31
APPENDIX.....	31

I state Jean’s contracts world view under seven headings, as detailed in the Table of Contents above. The list of Jean’s publications on which I primarily rely is produced in the Appendix.¹

* Emeritus Professor of Law, University of Wisconsin. I am grateful for helpful comments on an earlier draft from Professors Stewart Macaulay, Jonathan Lipson, and Angela Littwin.

There is one preliminary methodological issue. Jean and I were close friends and professional collaborators. In announcing her death on an email listserv of contracts professors, I said: “I sometimes felt that we shared a brain, since we so often viewed issues similarly . . .” My goal here is to describe Jean’s world view, not my own. There is an obvious risk that I will understand Jean’s work to state what I believe, when others would understand her work differently, or that I will interpret her published work in light of our many conversations, some of which I may not remember with complete accuracy. All I can do is try to be as objective as possible.

I. THE LAW IN ACTION

Jean was a zealot in promoting the study of the “law in action,” particularly with respect to the study of contracts.² It is hard to describe all that was part of Jean’s vision of the law in action—a concept without clear boundaries. The doctrines and precedents debated, discussed, and distinguished in published opinions, which are more or less codified in the Restatements of Contracts, are a part, but hardly the universe, of Jean’s law in action. Her law in action also included the behavior of parties as they formed and performed contracts, whether business-to-business (“B2B”) or business-to-consumer (“B2C”). This behavior is often found to be at variance with the behavior seemingly presumed by the common law of contracts. She wanted to know how, if at all, common law doctrines, statutes, and administrative regulations affected that behavior, as well as what other, nonlegal, factors influenced that behavior. She wanted to know how judicial decisions affected legislative and administrative decision-making, and vice versa. And she wanted to know about all the influences—legal and nonlegal—impacting decision-makers, whether judicial, legislative, or administrative.

Studying the law in action led Jean to formulate many ideas about how contracts law really works. Many of these ideas will be mentioned later in this paper. Two propositions about contract law in action stand out most strongly and will be mentioned here. First, Jean constantly emphasized that common law contractual remedies, as administered by courts, are far from adequate either to protect the expectation interests of a victim of breach or to deter breach.³ There are many reasons; especially important is the usual inability to recover litigation expenses in addition to damages.⁴ Second, the social norms and experiences of the

1. The Appendix also indicates the shortened title by which I will cite Jean’s articles in subsequent footnotes.

2. E.g., Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 75–86 (1995) [hereinafter Braucher, *Afterlife of Contract*]; Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 SUFFOLK U. L. REV. 667, 669–71, 688–92 (2012) [hereinafter Braucher, *Sacred and Profane*].

3. E.g., Braucher, *Sacred and Profane*, *supra* note 2, at 677 (“[T]he expectation interest is decidedly not protected by contract law or the shadow of contract law in any robust sort of way in most types of contracts, small or large.”).

4. *Id.* at 674 (“[C]ontract doctrines about remedies fail many times over to give parties the benefit of the bargain. Attorneys’ fees are not typically recoverable under the common-law American rule, absent contracting out of this background rule, so that . . . the

parties to contracts are that contracts are not (and should not be) performed in all situations, whether it be a B2B or B2C context. *Pacta sunt servanda*—agreements must be kept—may be a slogan used in opinions and some law review articles, but it is not an accurate statement of the values of parties to contracts. They anticipate that contractual commitments will be routinely modified or forgiven when difficulties arise, whether foreseeable or not.⁵

Two notable questions remain: Why was Jean so passionate about studying contracts law in action, and how did she study it? With respect to why, I believe the basic reason is that Jean was ultimately a very practical person who was committed to making the world a better place. She did not believe that the best way to have impact was to debate or change doctrine; certainly one needed to study more than doctrine to have any idea when a doctrinal change might make a difference. In order to formulate reform proposals that might actually make a difference, Jean needed much more information about how parties actually behaved and for what reasons—the law in action. Jean’s commitment to the law in action also flowed from her commitment to teaching, at which she was very good, winning many teaching awards. She wrote several times about her belief that one needed to teach about the law in action if one wanted to prepare students for what they would be doing when in practice.⁶ Students learn when starting practice that knowing doctrine as applied by courts is only a small bit of the knowledge needed to advise parties about contractual formation, what to do when performance difficulties occur, or even how to proceed in litigation if it comes to that. Jean had no patience for those who wanted to protect first-year students in the contracts course from the law in action because it was too difficult or too much to cover in a single course.

When studying the law in action, reviewing appellate opinions—even if abetted by statutes and regulations—is not enough. Learning about the law in action inevitably involves learning about the behaviors and values of contractual parties—meaning one must resort to the social sciences. Jean read extensively in social science literature relevant to the contracts law in action. Jean largely ignored the great methodological debate in the social sciences between quantitative and qualitative studies, instead gleaning relevant information from both types. She showed her knowledge of the methodological issues in each kind of study by conducting her own quantitative and qualitative studies, primarily in her other field of bankruptcy.⁷ Jean recognized the frequent criticism of qualitative studies—that

deduction of attorneys’ fees from an expectation award means the expectation is not in fact fully protected.”).

5. *Id.* at 679 (“[P]romissory morality as conventionally practiced involves . . . releas[ing] others because we know that we ourselves often disappoint and will need forgiveness.”).

6. Braucher, *Afterlife of Contract*, *supra* note 2, at 81 (“Professors can unwittingly teach bad habits by ignoring business realities or by only referring to them occasionally.”).

7. My personal favorite study, a qualitative one, is reported in Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993). In this study, Jean looked at how consumer bankruptcy attorneys representing debtors behaved in two separate judicial districts and found distinct but widely varying

the observations recorded may be tilted by the biases of the observer. However, she believed that because so much of the information she deemed relevant was available only through qualitative studies, she would draw on them regularly. Jean was always careful to recognize that such findings were tentative and subject to verification. There is no better example of Jean's willingness to absorb and use the lessons learned from qualitative studies than her frequent citation to and reliance on the findings of Stewart Macaulay's famous interviews with a nonrandom survey of business executives and their lawyers.⁸

II. CONTRACTS ARE RELATIONAL, AND DOCTRINAL LAW IS MARGINAL

The framework for all of Jean's views about contracts law in action is provided by the relational perspective or theory of contract law and behavior. Jean was a student of the work of Stewart Macaulay, one of the key founders of the relational school.⁹ A core principle of the relational perspective is that what lawyers have traditionally called a *contract* is embedded¹⁰ in social relations. Often, the relationship between parties of a contract involves more activities than just the *contract*, and encompasses the customs of the society, profession, or trade group to which the two parties belong. For Jean and other strong adherents to the relational perspective, it is those relationships and societal customs that largely determine contractual behavior. Contract doctrine's influence is marginal at best.

For B2B contracts, the parties to most contracts have had previous dealings, and/or anticipate future dealings.¹¹ This means mutual trust probably exists and is desired in the future. Where trust exists, formation of contracts often does not occur, in the parties' minds, at a single moment, but gradually over time

patterns, even within the same bankruptcy district. *Id.* My favorite quantitative study is Jean Braucher, Dov Cohen & Robert M. Lawless, *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys*, 20 AM. BANKR. INST. L. REV. 611 (2012).

8. These findings were first reported in Macaulay's famous 1963 article, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

9. Ian Macneil, a contemporary of Macaulay's, is widely viewed among legal academics as the other key founder of the modern relational contracts theory/perspective. Jean's most important discussion of Macneil's work is in Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 709–11 (1990) [hereinafter Braucher, *Regulatory Role of Contract Law*].

10. Jean did not use the term *embedded*, nor does it come from either Macneil or Macaulay. The term comes from a leading sociologist theoretician writing about the same phenomena, and I find it useful. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985). For an argument that Macneil's concept of a "discrete" contract—essentially one that is not embedded in social relations—is almost nonexistent in reality, see Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

11. Jean did not write much about B2B contracts. Some of the statements made in this paragraph are drawn from my personal understanding of the basic tenets of the relational perspective. I am confident that Jean held these ideas, but I cannot cite each statement specifically to Jean's publications. For one passage where Jean did write about the relational perspective with respect to B2B contracts, expressing views consistent with those stated in this paragraph, see Braucher, *Sacred and Profane*, *supra* note 2, at 676–77.

as various parts of the business arrangement are bargained about at different times. Commonly, some performance begins before all terms are negotiated. The formation stage of contract is primarily a process of planning for performance, as opposed to negotiating the rules to govern unlikely contingencies. Parties rarely feel a need to agree to all possible terms, especially about contingencies, because new agreements can be reached as problems arise. And even when terms are agreed to, there is an implicit understanding that they are subject to renegotiation and modification at the request of either party, often responding to some changed or unforeseen circumstance. Litigation to resolve disputes happens, but only very rarely. Because litigation is rare, contractual terms about what rules should apply if litigation eventuates are rarely negotiated, though boilerplate terms about choice of law, venue, etc. are often included in the final written contract. To insist on negotiating terms not only expends resources (in negotiating) for something that will probably never be used—i.e., the agreed upon terms respecting litigation—but it risks communicating to the other party a distrust that problems cannot be worked out in the future. Communicating distrust can be costly. Few parties look to enter into contracts that are likely to lead to disagreement and litigation, so communicating distrust can kill an otherwise profitable deal.¹²

The reasons for the limited importance of formal doctrine for B2C contracts are a bit different. Of course many B2C contracts are part of a long-term relationship, with one or both parties having interests in repeat business. These contracts, where the parties are in direct contact, can operate similarly to the B2B contracts discussed above.¹³ To be sure, there is often a written standard form contract (“SFK”) that is signed at a moment which the parties may identify as the beginning of a legally binding contractual relationship. But the parties feel free to modify this contract as circumstances dictate, driven partly by their desire to maintain a long-term relationship that has been largely satisfactory to each.¹⁴ Many B2C contracts are what Jean called contracts with mass-market customers,¹⁵

12. In an email to me about an earlier draft of this paper, Jonathan Lipson makes the point that relational contracts occur in different social contexts, and in some contexts there is a pattern of greater negotiation about contingencies and litigation details at the time of formation. He suggests that financial transactions involving lending and security interests are one such circumstance, even if the parties have a long-standing relationship. His point is an excellent one, but it is not further explored in this paper because it is not a topic that Jean chose to write about. For the same reason, I do not discuss the “master agreements” that increasingly govern procurement contracts by manufacturers. See Lisa Bernstein, *Private Ordering, Social Capital, and Network Governance in Procurement Contracts: A Preliminary Exploration*, J. LEGAL ANALYSIS (forthcoming 2016), http://web.law.columbia.edu/sites/default/files/microsites/law-economics-studies/20150126_bernstein_private_ordering_social_capital_network_governance.pdf.

13. Think of a long-term car lease from a dealer with whom the consumer has previously done business.

14. Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1454 [hereinafter Braucher, *Informal Resolution*] (“Sellers are more willing to meet consumer demands . . . when their business depends on repeat trade.”); see also William C. Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006.

15. Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48

where the consumer has little direct contact with the business party, and there is little or no opportunity to negotiate with the business. Even in this commonplace situation, the business has an interest in its reputation for fair play, so reputational concerns clearly play a role in contractual behavior.¹⁶ But in many mass-market situations, repeat business from a particular consumer is a relatively marginal concern because the amounts involved are small. Thus, the incentives that encourage businesses not to drive a hard bargain, including bargains that violate the consumer's rights under existing law and even the terms of the SFK, are largely missing. Jean repeatedly emphasized that in this situation it is extremely difficult for the consumer to litigate to protect whatever rights he or she might have. Cost is the primary reason. Rarely are the remedies available to a single consumer sufficient to justify the attorney fees required to litigate effectively.¹⁷ The business party may initiate litigation, but the consumer rarely defends or even appears. It is basically a collection suit resulting in a default judgment. So once again, factors other than the terms of the written contract or contract doctrine largely influence what ultimately happens.

III. THE SOCIAL SIGNIFICANCE OF CONTRACT DOCTRINE IS LARGELY SYMBOLIC

If the law in action and relational contract perspectives teach that contract doctrine plays a marginal role at best in determining contractual behavior, what is the social significance of what we call contract doctrine, more-or-less codified in the Restatement of Contracts? Like most law professors, Jean could and did get involved in debating what these doctrines are or should be. And she was very good at it—distinguishing precedents and finding innovative interpretations of statutes with the best of us. As far as social significance, however, Jean constantly emphasized that court precedents have limited importance in the practical affairs of life. The debates about doctrine are primarily important as debates about what principles a society wishes to embrace symbolically. Symbolism can be important.

ARIZ. L. REV. 829 (2006) [hereinafter Braucher, *Deception and Economic Loss*]. The term “mass-market customers” is in the title of the article. Jean makes the point that mass-market customers can even be large businesses with respect to some products. *Id.* at 831 (“[M]ass-market customers buying for other [than consumer] uses are often subject to the same disadvantages when entering into transactions”); see also Jean Braucher, *New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ 177, 193–94 (Jane K. Winn ed., 2006) [hereinafter Braucher, *Fair Commerce in Software*].

16. Braucher, *Afterlife of Contract*, *supra* note 2, at 85–86 (“In business-consumer relations, too, use of legal rights is often bad business.”).

17. Jean wrote extensively about the difficulty a consumer faced in litigating against a deceitful seller in Braucher, *Deception and Economic Loss*, *supra* note 15, at 833:

[M]ost consumers who feel cheated lump it without even complaining to the seller, let alone going to a lawyer. . . . The hardy few customers willing and able to sue need encouragement if we are to deter, even weakly, lying and misleading If there is a problem with consumer protection law . . . it is that it is seldom enforced, with the poor bearing the brunt. . . . The result is . . . redistribution from the relatively worse off to the relatively better off.

If a court embraces a particular point of view, it could have an important impact on the politics of society—what happens in legislatures, and perhaps even in voting booths. When Jean wrote about the importance of doctrine for the law in action, she was usually concerned with this kind of effect.

Jean's recent contribution to a symposium on the contracts scholarship of Charles Fried contains a good statement of her view that the social significance of doctrinal debate, both in the courts and in law journals, is largely symbolic. Fried, essentially a libertarian, was concerned that contract doctrine be based on a moral theory that respected the autonomy of the individual. Drawing on Durkheim's ideas about the "sacred" and the "profane," Jean wrote:

Fried's focus on the world of appellate argument and appellate decisions has a sacred quality. . . . Fried's imagined moral order based on law on the books . . . serves a symbolic, totemic function It is a sacred vision of the rule of law enabling personal autonomy. Meanwhile, the contracts machine of actual business affairs hums or grinds in another realm, a profane one in the sense of mundane and often self-interested. Neither realm is necessarily good or evil, but they are separate, meeting only occasionally and not necessarily with much influence on each other.¹⁸

A good example of Jean's concern that doctrinal debate could influence political action, if not the activities of contractual parties, comes from an article she wrote in 1995 reflecting on Grant Gilmore's famous book, *The Death of Contract*.¹⁹ Writing in 1970, Gilmore argued that the neoclassical theory of contract, which had dominated thinking about contract doctrine for the previous century, seemed to have lost all legitimacy. Jean lamented the neoclassical revival clearly occurring in academia in 1995, and she associated that revival with the seeming popularity (at the time) of Newt Gingrich's political rhetoric about a "Contract With America" in the 1994 election campaign.²⁰ The Republicans had just won a substantial victory in the 1994 congressional elections, becoming the majority party in the House of Representatives, and Gingrich's rhetoric (he called it a program) was given some credit.²¹ Jean also claimed in the same article that neoclassical thought about appropriate contract doctrine contributed to the result in some constitutional cases, both those invalidating significant parts of the New Deal

18. Braucher, *Sacred and Profane*, *supra* note 2, at 670.

19. Braucher, *Afterlife of Contract*, *supra* note 2, at 53–58 ("Although the relationship between thinking about political economy and contract law is indirect, it is nonetheless significant."). Jean made the same point in 2008. Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 226 (2008) [hereinafter Braucher, *Cowboy Contracts*] ("Judicial decisions operate symbolically and contribute to the societal store of norms, influencing . . . people's attitudes about what is socially acceptable and changing their behavior independent of the sanctions that the law would impose if invoked.").

20. Braucher, *Afterlife of Contract*, *supra* note 2, at 52 ("[I]f we doubt the continuing power of contract rhetoric and its association with laissez-faire economics, we need look no further than 'The Contract With America,' as the Republican Party dubbed its 1994 congressional election platform.").

21. Newt Gingrich, *Beyond the 100 Days*, N.Y. TIMES, Feb. 22, 1995, at A15.

in the 1930s and some more recent ones, because it emphasized personal autonomy and freedom of contract.²²

IV. THE MARKET IS NOT PERFECT; THERE IS ROOM FOR APPROPRIATE REGULATION

Though symbolic, the content of contract doctrine was nonetheless important to Jean. She was also deeply concerned about the justness of contract law in action. Both concerns led Jean, like most contracts scholars, to address the adequacy of the market to provide the desired amount of justice. And Jean was quick to find that the market had many inadequacies.

In one article, Jean took on libertarian theorists²³ to suggest that, even assuming contract doctrine directly affected contractual behavior, it was impossible to devise rules based simply on the desire to protect personal autonomy and freedom of choice. Addressing the issue of how the law defines assent and agreement, Jean pointed out that the parties often do not share a subjective understanding of the meaning of an apparent agreement. Sometimes this is just a language problem. Words can mean different things to different people. Jean drew on the rules interpreting communications “objectively”—i.e., according to how the spoken or written words would be understood by a reasonable listener—to point out that in this situation a party can be held to a deal he or she did not subjectively intend to make.²⁴ Jean then pointed out that no civilized body of contract law ever enforced all deals. There were always some limitations based on coercion exercised to obtain an apparent consent or on abhorrence to the substantive terms

22. Braucher, *Afterlife of Contract*, *supra* note 2, at 61–75. In the same article Jean discusses two United States Supreme Court decisions involving contractual rights, though neither decision was technically based on contract law. In *Carnival Cruise Lines, Inc. v. Shute*, the Court applied admiralty law and enforced fine print in an SFK (a forum selection clause, almost surely not read or noticed by the consumer/buyer). 499 U.S. 585 (1991). In *American Airlines, Inc. v. Wolens*, the Court held states were preempted by a federal statute from applying state contract law in a suit brought to protect the rights of consumers who had acquired frequent flyer credits on American Airlines. 513 U.S. 219 (1995). Jean characterized both decisions as influenced by the free market orientation of the revived neoclassical contract law. Though the Supreme Court is not thought of as a political body, she argued that it is like one in these kinds of cases:

Precisely because [the Court] is not usually authoritative [on contract questions] . . . and thus does not have occasion to develop particular expertise, the Supreme Court works well as a barometer of generalists' contemporary legal consciousness concerning contracts. Alas, from these two examples one might guess that most of the justices had learned their contracts straight from Langdell As a result, a second branch of our national government is working along lines similar to the laissez-faire approach of the Contract with America.

Braucher, *Afterlife of Contract*, *supra* note 2, at 61.

23. Jean cited Robert Nozick and Randy Barnett as exemplary of libertarian theorists of contract law. Braucher, *Regulatory Role of Contract Law*, *supra* note 9, at 702 n.16.

24. *Id.* at 703–06 (“What Barnett fails to recognize is that legal interpretation inevitably involves social control of contract parties.”).

of the agreement. She used an agreement to contract oneself into slavery as an example.²⁵

Jean often wrote about the inability of consumers to consent in any knowing way to all the terms in an SFK in the mass-marketing context. Everybody acknowledges that the terms to these contracts are not normally read, and that it would be very costly for consumers to do so. It is certainly a stretch to justify enforcing these contracts using autonomy theory. With respect to theories grounded in welfare economics or efficiency theory, Jean took seriously the argument that there is a “market for terms” in an SFK.²⁶ The argument is that a few consumers will become aware of undesirable terms in a proposed SFK and shop for an alternative where the terms of the SFK are less unfavorable. The resulting competition among sellers for these terms shoppers could benefit all consumers if sellers could not differentiate the terms in their SFK depending on whether the prospective customer was a term shopper. Jean acknowledged that such terms shopping could have some policing effect on the content of SFK,²⁷ but she concluded that this effect would not be sufficient to adequately address all the problems with abusive terms.²⁸

A good deal of Jean’s scholarship dealt with fraud or misrepresentation—a policing doctrine applicable to all contracts, including B2B contracts. Remedies for fraud are commonly supported because agreements entered on false informational assumptions that the other party created neither respect personal autonomy nor are necessarily in the wealth-maximizing interests of both parties. Jean argued that the common law remedies for fraud or misrepresentation are inadequate to deter much fraudulent behavior, and she strongly defended making tort remedies, including punitive damages, available to the victims of misrepresentations. She also argued for relaxing some of the historic preconditions for liability of fraud, such as the misrepresenter’s requisite knowledge of the falsity, or that the victim show that the false information was material to his or her decision to conclude the contract.²⁹

25. *Id.* at 716–22. Jean also addressed the libertarian perspective in an earlier article, where she argued that the decision to provide remedies for breach of contract is a delegation to the contractual parties of the state’s monopoly on the exercise of power. Because the parties have differing bargaining endowments (i.e., resources, information), this decision is hardly neutral nor easily justified on personal autonomy grounds. Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 369–71 (1988) [hereinafter Braucher, *Defining Unfairness*].

26. The works which Jean is critiquing include: Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679; and Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1450 (1983).

27. For one such discussion, see Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 764–65 [hereinafter Braucher, *Trust the Courts*] (“A minority of reading customers can introduce some market policing [of terms] . . .”).

28. See *infra* notes 50–52 and accompanying text.

29. Braucher, *Deception and Economic Loss*, *supra* note 15, at 849–51.

Throughout her career Jean argued that the market was an inadequate regulator of contractual behavior for reasons other than conventional analysis premised on welfare economics or efficiency theory. Jean did not want to trust that parties, especially consumer parties, always make judgments in their enlightened self-interest, even absent coercion or misrepresentation. Like everybody else who has struggled to identify when the law of contract should be based on paternalistic concerns,³⁰ Jean struggled to define in which conditions the law should go beyond correcting conventional market failures. Jean was a voracious consumer of the social science studies based in psychology that purport to show people have cognitive biases that cause them to make decisions not in their self-interest.³¹ She applauded as many commentators, whose work had historically been grounded in the law and economics perspective, began to use these concepts in their analyses about when regulation was appropriate.³²

Jean wanted to go beyond what is now sometimes called behavioral economics, however, and find principles rooted in morality for regulating contracts. In her terms, “transactional fairness is largely coextensive with the idea of efficient allocation, although adding a moral spin.”³³ For example, she suggested regulating consumer credit contracts to prevent creditors from including terms that allow them to exert undue pressure on a debtor upon alleged default. Jean believed that creditors should not be permitted to repossess household goods having sentimental value to the debtor, even if the creditor held a valid security interest and the ability to threaten repossession might be wealth maximizing (and hence under some definitions efficient) by increasing debt repayment, ultimately making credit cheaper to consumers in general.³⁴ She thought businesses should be regulated to prevent them from knowingly taking advantage of a consumer’s idiosyncratic emotional weaknesses.³⁵ Perhaps most interestingly, Jean toyed with the idea that law should be more liberal in letting people out of deals that they had

30. Jean extensively discusses the struggles of Anthony Kronman and Duncan Kennedy in Braucher, *Defining Unfairness*, *supra* note 25, at 384–94. *See, e.g.*, Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

31. JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) is often cited as one of the early works in this tradition.

32. Jean Braucher, *Scamming Considered as One of the Exact Sciences: 19th Century American Literature Foreshadows Insights of Behavioral Economics*, at 14 (Univ. of Ariz. James E. Rogers Coll. of Law, Ariz. Legal Studies, Discussion Paper No. 13-37, 2014), <http://getoutofdebt.org/wp-content/uploads/2013/09/SSRN-id2314071.pdf> [hereinafter Braucher, *Scamming*] (“Behavioral economics is now an important part of law and economics, and its incorporation of psychology opens up significant common ground with literature.”).

33. Braucher, *Cowboy Contracts*, *supra* note 19, at 197.

34. Braucher, *Defining Unfairness*, *supra* note 25, at 364–65, 388.

35. Braucher, *Scamming*, *supra* note 32, at 33 (“Whether in the screening of customers for their vulnerability or the design of products to get customers to pay more than they expect, financial services businesses can and do employ both data and experimentation to get to optimal . . . profitability. . . . [A]bsent effective regulation, businesses [will] act . . . deliberately to achieve those gains.”).

come to regret, a social norm that she described as consistent with the law in action.³⁶

Jean expressed different views at different times of the extent to which contract law should attempt to redistribute wealth or power. She was certainly aware that contract law has almost no ability to implement substantial wealth redistribution; she believed that it was better to leave this goal, which she certainly endorsed, to tax law and government transfer payments.³⁷ But, at times, she also suggested that it was permissible for contract law to consider the wealth disparities of the parties in formulating rules or rendering particular decisions.³⁸

V. GOVERNMENT WORKS, BUT NOT ALWAYS

Having concluded that the market was not a fully adequate regulator of contractual behavior, Jean needed to address what fixes might be available. I have already indicated that she believed court decisions had little impact beyond adjudicating the interests of the parties to the lawsuit. Instead, Jean looked to legislation and administrative rules as a source of contractual behavior regulation that could serve her goals. Jean believed that government could get it right. In her most recent writings, she keenly followed developments at the Consumer Financial Protection Bureau; she was clearly hopeful that good things would come from this new agency.³⁹ In an early writing, she wrote approvingly of the Federal Trade Commission's efforts to adopt rules under its mandate to regulate consumer transactions for "unfairness."⁴⁰

Jean was also aware of the problem of regulatory capture. There were certainly situations where Jean believed that leaving regulation to the market was preferable—and the lesser of two evils when compared to proposed legislation. The circumstances where Jean most clearly espoused that position concerned proposed legislation promulgated and endorsed by the National Commissioners on Uniform State Laws ("NCCUSL").⁴¹ In an article comparing federal legislation

36. See *supra* note 5 and accompanying text.

37. See, e.g., Braucher, *Afterlife of Contract*, *supra* note 2, at 57–58 ("Contract law is *not* an effective device for redistribution. The wealth effects of changes in contract law are small and generally temporary, lasting only until powerful parties disfavored by legal rules figure out how to plan around them or pass on their costs."); Braucher, *Defining Unfairness*, *supra* note 25, at 381–84.

38. E.g., Braucher, *Regulatory Role of Contract Law*, *supra* note 9, at 714 ("It is hard to tolerate . . . extreme contractual advantage-taking by those rich in entitlements in their dealings with the relatively poor, so long as we fail to redistribute sufficiently through taxes and transfer payments. This is a reason for contract law to take wealth disparities into account.").

39. See, e.g., Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807 (2015) [hereinafter Braucher & Littwin, *Examination*]; Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK J. CORP. FIN. & COM. L. 107 (2012) [hereinafter Braucher, *Form and Substance*]; Braucher, *Scamming*, *supra* note 32.

40. See Braucher, *Defining Unfairness*, *supra* note 25.

41. The Commission is now known as the Uniform Law Commission ("ULC"), but it is the same organization. The Commission's website is

concerning the validity of electronic signatures (commonly called “E-Sign”)⁴² with the Uniform Electronic Transactions Act (“UETA”) (proposed state legislation drafted by NCCUSL),⁴³ Jean commented on the “greater hostility to consumer protection provided by the NCCUSL uniform laws drafting process.”⁴⁴ She expressed similar dismay about the Uniform Computer Information Transfer Act (“UCITA”),⁴⁵ which was also proposed for state adoption by NCCUSL.⁴⁶ She worked with others to oppose adoption of this legislation in state legislatures.⁴⁷ Finally, in an article about the revisions to Article 9 of the UCC, she discussed how the sponsoring bodies—both NCCUSL and the American Law Institute (“ALI”)—decided not to propose anything substantive regarding certain consumer rights largely because the sponsoring bodies would not propose legislation opposed by leading commercial interests who they feared had the power to block enactment at the state level.⁴⁸

Interestingly, despite her considerable reservations about the limited ability of courts to impact the law in action and her belief that the market did not provide sufficient protection for consumers, Jean preferred to rely on the courts to determine the guiding legal rules in all of these situations. This was even true with respect to electronic signatures, where her preference was to let the courts make the adjustments to contract doctrine needed to adapt to changing technology.⁴⁹ To Jean, as to most of us, sometimes the remedy of legislation (or administrative rule) is worse than the disease—a reliance on market limitations and the impotence of courts.

<http://www.uniformlawcommission.com>, which provides some information about the background and structure of the Commission.

42. 15 U.S.C. § 7001 (2012).

43. UNIF. ELEC. TRANSACTIONS ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1999), http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf.

44. Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 529 [hereinafter Braucher, *Rent-Seeking*]. Jean’s view about bias in the uniform law making process is consistent with the views of others, who Jean cited with approval. E.g., Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

45. UNIF. COMPUT. INFO. TRANSACTIONS ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2002), http://www.uniformlaws.org/shared/docs/computer_information_transactions/ucita_final_02.pdf.

46. Braucher, *Trust the Courts*, *supra* note 27, at 767.

47. Braucher, *Fair Commerce in Software*, *supra* note 15, at 181–82. This work has been very successful. Only two states have enacted this statute, Virginia and Maryland. See *Legislative Fact Sheet – Computer Information Transaction Act*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/LegislativeFactSheet.aspx?title=Computer%20Information%20Transactions%20Act> (last visited on Jan. 12, 2016).

48. Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83 (1999) [hereinafter Braucher, *Deadlock*].

49. Braucher, *Rent-Seeking*, *supra* note 44, at 532–34.

VI. WHAT KIND OF REGULATION?

In writing about what kinds of legislative and administrative regulation she preferred, Jean focused almost exclusively on B2C contracts involving mass-market customers. SFKs exist within most B2C contracts and Jean gave the challenges they present considerable attention. Like so many others, Jean favored disclosure regulation, requiring the SFK drafter (usually the seller) to prominently disclose key terms that Jean and others wanted consumers to notice. Jean emphasized that this disclosure should occur before the consumer makes a purchase decision; Jean roundly condemned so-called delayed disclosure. A primary goal of disclosure for Jean was to encourage consumers to shop for favorable SFK terms in circumstances where there is competition for the consumers' business. Delayed disclosure cannot affect shopping behavior, only advance disclosure can have that effect.⁵⁰ Jean also believed that prominent disclosure of clear and unambiguous terms could encourage consumers who later become dissatisfied with the seller's performance to effectively voice their complaints.⁵¹ Though disclosure regulation could make some difference, Jean repeatedly made clear that such regulation could not offer consumers sufficient protection.⁵² She also wanted substantive regulation of terms, by which she meant a requirement either that certain terms be prohibited and/or that other terms be mandated in consumer contracts.

In thinking about what form substantive regulation should take, Jean often discussed the advantages and disadvantages of broad, legislatively established principles requiring judgment in their application—what are often called standards. She certainly saw advantages in standards as opposed to concrete rules, whose application in a given fact situation would be easily predictable. She was a big fan of Karl Llewellyn's reasonable expectations principle. Llewellyn posited that there were often differences in the "paper deal," represented by the SFK, and the "real deal," constituting the expectations of the consumer informed by what the parties discussed and what was customarily anticipated in the social situations in which the contract was formed.⁵³ When in conflict, Llewellyn believed that the "real deal" should be enforced.⁵⁴

50. See, e.g., Braucher, *Fair Commerce in Software*, *supra* note 15, at 193 ("Although advance disclosure of terms may have [only] weak effects in stimulating shopping it is . . . worth preserving as part of the set of tools to address unfairness . . ."); Braucher, *Trust the Courts*, *supra* note 27, at 764 ("[R]eading and shopping by some buyers introduces some competition in terms.").

51. Braucher, *Informal Resolution*, *supra* note 14, at 1458–64.

52. Braucher, *Form and Substance*, *supra* note 39, at 123–24 ("[R]egulation by disclosure often fails to work for an array of reasons.").

53. See Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003). The terms "real deal" and "paper deal" are Macaulay's, not Llewellyn's, but they track concepts used by Llewellyn.

54. Jean's most extensive discussion of the reasonable expectations principle (which is now restated in RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981)) is in Braucher, *Form and Substance*, *supra* note 39, at 113–15; see also Braucher, *Fair Commerce in Software*, *supra* note 15, at 191–92. Jean drew particularly on

What most attracted Jean to the reasonable expectations doctrine was its grounding in the law in action. One needs to look at how parties really behave when initiating contracts to ascertain reasonable expectations. Jean also believed it was necessary to have somewhat flexible standards “to address the creativity . . . [of SFK drafters] in coming up with new ways to trap hapless [consumers].”⁵⁵ She also, however, frequently made the point that standards alone are not likely to have a significant impact on the law in action. Merchants are unlikely to voluntarily change their behavior on the basis of a standard alone because its application to any fact situation is unclear, and consumers will rarely sue to enforce a standard. She made this point most often by discussing the limited impact of the unconscionability standard of the UCC, Article 2.⁵⁶ What could change practices on the ground, Jean believed, were rules (e.g., what terms to include or not to include in a SFK). The greatest advantage to specific rules is that they are partially self-enforcing because, if told specifically and unambiguously what to do, many merchants will obey even if there is little fear of sanction for disobedience—perhaps from a sense of law abidingness, perhaps from a fear of bad publicity, or for some other reason.⁵⁷ The specific rules Jean favored could,

Llewellyn’s discussion of reasonable expectations in KARL LLEWELLYN, *THE COMMON LAW TRADITION* 362–70 (1960). While Jean enthusiastically embraced Llewellyn’s reasonable expectations principle, she separated herself from his endorsement of “blanket assent”—the idea that the consumer should be considered to have given a blanket (as opposed to specific) assent to all terms in a standard form that do not conflict with the consumers actual reasonable expectations. Jean regarded such assent as fictional and worried about the fairness of hidden terms. She more strongly advocated for direct administrative regulation of these terms than did Llewellyn. Braucher, *Form and Substance*, *supra* note 39, at 114–16.

55. Braucher, *Form and Substance*, *supra* note 39, at 117.

56. *E.g.*, Braucher, *Defining Unfairness*, *supra* note 25, at 396 (“Court-administered policing for unconscionability . . . is an ineffective means of regulating consumer contracts. Judicial policing involves fact-intensive case-by-case development through litigation . . . Consumers rarely litigate . . . Even when a consumer prevails in litigation under a theory of unconscionability, . . . the precedent is qualified by the facts of the particular case and does not necessarily bar use of the contested term in subsequent transactions. On a different factual record, the term may be enforced. Even if the term proves unenforceable in subsequent litigation, the drafter can leave the term in the form contract for use against consumers who are unrepresented and uninformed about the term’s doubtful enforceability.”). In making this argument, Jean relied extensively on the work of Arthur Leff, especially *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970), an article that both Jean and I have cited repeatedly in our work.

57. Braucher, *Cowboy Contracts*, *supra* note 19, at 225–26 & n.250. Jean used Arizona’s statute regulating cross-collateral clauses in consumer credit contracts granting the creditor a security interest in personalty as an example of a specific prohibition. This type of clause was involved in the famous unconscionability case, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Jean’s point was that the Arizona statute would have a much greater impact on behavior than the Court’s determination that the cross-collateral clause in the *Williams* case was unconscionable.

and sometimes do, come from direct legislation, but Jean's preference was to implement a flexible statutory standard through administrative regulations.⁵⁸

Jean also wrote about what the goals of substantive regulation should be. With the acknowledgement of cognitive biases that can cause consumers to make marketplace choices that are not wealth maximizing, even rational choice theorists now endorse regulation beyond additional disclosure.⁵⁹ She emphasized, however, that behavioral economics “retains a normative commitment to market choice,” and “tends to recommend trying to fix even behaviorally failed markets with . . . disclosures [and] warnings.”⁶⁰ The goal of substantive regulation, from this perspective, would be to use disclosure to replicate consumer misunderstandings stemming from cognitive biases, so as to replicate the kind of contracts that would be reached in a “perfect world”—one where there are few transaction costs, lots of information, and no cognitive biases. Jean, on the other hand, wanted to go well beyond mandating new disclosures. She desired to prohibit particular practices when the risk of exploiting consumers was too great. As discussed previously, she embraced paternalism, or mortality, as a basis for regulation, though neither she nor other commentators embracing paternalism have arrived at a set of general principles offering guidance for when paternalist interference with marketplace choices are appropriate.⁶¹ Jean was encouraged that the statute establishing the Consumer Financial Protection Bureau (“CFPB”) authorized it to regulate not only deceptive and unfair practices, an authority long held by the FTC, but also “abusive” practices. She believed that this additional authority would allow the CFPB to base new rules on behavioral economics insights, and she was hopeful that it would encourage the CFPB to prohibit certain practices, not simply mandate disclosures, and perhaps to consider extending the traditional bases of marketplace regulation to include new paternalist principles.⁶²

Jean was concerned not just with the content of regulation, but also that regulations be enforced. Thoroughly a pragmatist, Jean wanted law to make a difference in the law in action world. Ideological consistency in law's substantive rules was desirable but of secondary importance. I have already mentioned one key to creating regulation that can make a difference—that there is a relatively specific rule.⁶³ Jean also wanted administrative enforcement of both these rules and more general standards. Consumers mostly cannot afford to enforce rules and standards against merchants who do not voluntarily comply, especially when the amount in controversy is modest. Jean was particularly enthusiastic about the CFPB's authority to examine large creditors to determine compliance with consumer protection regulations. It is the first time a federal administrative agency has had

58. Braucher, *Form and Substance*, *supra* note 39, at 117 (“This problem demands regulation that can nip in the bud innovations in exploitation. For this part of the task, administratively policed general standards are needed.”).

59. Braucher, *Scamming*, *supra* note 32, at 7–8.

60. *Id.*

61. *See supra* notes 30–38 and accompanying text.

62. Braucher, *Scamming*, *supra* note 32, at 8–9. The FTC and the CFPB do not have jurisdiction over the same transactions, but because both agencies regulate mass-market contracts, the regulatory problems faced should be similar.

63. *See supra* notes 52–54 and accompanying text.

this kind of authority, and Jean was studying and writing about how the agency would use its new power at the time of her death.⁶⁴ She was hopeful that examinations would prove effective in getting merchants to comply with consumer protection regulations without the need for formal administrative enforcement.

To the extent that it is necessary to rely on consumers to sue to protect their interests (because agencies did not exist or were not active enough), Jean favored incentives to sue, like the availability of punitive damages.⁶⁵ In her very first article as a professor, she also emphasized facilitating informal dispute resolution. Her point was that most consumers would never sue, whatever the remedy structure. Jean wanted to encourage consumers to complain directly to the merchant when they felt wronged, because complaining was usually the only practical means for obtaining redress. She proposed various measures to encourage consumers to complain, and to do so in a way that would be effective, in the context of consumer product warranties.⁶⁶

VII. WHEN CASES DO GET TO APPELLATE COURTS, HOW SHOULD THE JUDGES BEHAVE?

Few contracts cases get to the appellate courts. When they do, the appellate judges have the power to mold doctrine. Doctrine can be important symbolically, but Jean believed it has little effect on contracts law in action. Obviously appellate judges also settle the conflict between the litigating parties. In these circumstances, what did Jean say about how appellate judges should behave?

In a remarkable article about the contracts jurisprudence of the Arizona Supreme Court written in 2008, Jean made her answer to that question quite clear.⁶⁷ She was a strong advocate of Karl Llewellyn's "Grand Style" of judging.⁶⁸ In this tradition, with respect to contracts, judges can consider all, or most, of the information that a proponent of the relational perspective on contracting would want them to, which includes far more than just the language of the contract.⁶⁹ The effect of this approach is that, inevitably, judges exercise a good deal of discretion. Today, many academics writing about contracts cringe at such an approach, believing that judges who are not well versed in economic analysis and/or the business customs in the industry out of which the contract arose are likely to make mistaken assumptions about the parties' objectives and what they reasonably

64. Braucher & Littwin, *Examination*, *supra* note 39.

65. Braucher, *Deadlock*, *supra* note 48, at 103–05 (discussing the need for enhanced remedies for creditor violations of UCC Article 9); *see also* Braucher, *Deception and Economic Loss*, *supra* note 15, at 846 (“Contract remedies in theory award the benefit of the bargain, but this is rarely the reality. . . . Legal rights will then prove unusable as a practical matter, absent some stronger remedies than warranty law supplies.”).

66. Braucher, *Informal Resolution*, *supra* note 14, at 1462–64.

67. Braucher, *Cowboy Contracts*, *supra* note 19.

68. *Id.* *See* LLEWELLYN, *supra* note 54, at 36 (discussing the “Grand Style”).

69. Braucher, *Cowboy Contracts*, *supra* note 19, at 195–96 (“The consistent theme of the Arizona Supreme Court decisions [using the Grand Style] is that a contractual relationship as a whole creates reasonable expectations, with writing or records only part of the picture, not to be formalistically over-emphasized.”).

communicated to the other party.⁷⁰ These commentators want the judges to stick closely to the plain meaning of the text of the written contract. Jean, like Llewellyn before her, trusted that judges would often get it right. Because of that trust, Jean found much to like in standards as a statement of common law doctrine, rather than more determinate rules. Discretion allows the judges to reach a result in the particular case that was more just in Jean's view, provided of course that the judges broadly shared Jean's views.⁷¹ As discussed before, Jean believed that standards did not have much capacity to produce voluntary compliance where there was a power or informational imbalance between the contractual parties.⁷² But the common law has mostly symbolic impact, and perhaps standards serve symbolic objectives just fine.⁷³

VIII. A FEW ADDITIONAL OBSERVATIONS

This completes my description of the structure of Jean's thoughts about contract law, as revealed by the articles listed in the Appendix. But focusing on the structure of her thoughts leaves out a few other significant observations that can be gleaned from these articles. I will mention three: (1) she was a pragmatic activist; (2) a very well read scholar; and (3) a lover of literature.

I have already mentioned that Jean was a pragmatist. The phrase "whatever works" was fine with her. She was also an activist. If one looks at the topics that she chose to write about, it seems clear that she was drawn to issues that were being contested at the time and where she thought she might make a difference. The most obvious illustrations of this point are the articles she wrote on the uniform laws process, especially those with respect to electronic contracting, in

70. E.g., VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 379 (2006) ("The use of the implied duty of good faith, for example, should be tightly cabined. Doctrinal tricks, like the liberal invocation of custom and usage, should not be allowed to undo clear contractual language . . .").

71. See Braucher, *Cowboy Contracts*, *supra* note 19. Jean found that the Arizona Supreme Court, during the period about which she was writing, satisfied that condition.

72. See *supra* notes 55–58 and accompanying text.

73. In Jean's words:

Even though appellate judging has modest direct impact, . . . it is not completely without significance. Judicial decisions operate symbolically and contribute to the societal store of norms, influencing behavior that way. A cynical view is that ameliorative judicial decision-making in the name of fairness amounts to no more than cosmetics, a diversion from facing the harshness of an economic and social system that produces increasing disparities in wealth and opportunity. On the other hand, a focus on the expressive power of law suggests that indirect effects may be significant, influencing people's attitudes about what is socially acceptable and changing their behavior independent of the sanctions that the law would impose if invoked. . . . When . . . bad behavior not only happen[s], but [is] pronounced acceptable by justices in black robes, a downward spiral in social norms is likely. With its grand tradition of transactional fairness, the Arizona Supreme Court speaks up for doing right.

Braucher, *Cowboy Contracts*, *supra* note 19, at 226.

1999, 2001, and 2004.⁷⁴ At the time, there was a concerted battle about adopting legal rules, particularly respecting the formation of contracts, that Jean regarded as unduly favorable to the software industry. Jean not only wrote about these issues, but she personally lobbied many state legislatures to reject the uniform statutes. The same pragmatic activism may account for her focus on the CFPB in her three most recent articles. Jean was not, to my knowledge, directly involved in the establishment of the CFPB, though she certainly had friends who were.⁷⁵ Jean was hopeful, however, that this agency would play a significant role in the law of consumer contracts, and so it became a focus of her attention.

Jean was also quite scholarly. Her footnotes are a treasure trove of citations and insights into the works of the giants in contract law. One might expect that this would be true of Llewellyn and Macaulay, because she drew heavily on their work in formulating her own contract world view, and one would certainly not be disappointed.⁷⁶ But I was surprised to find in both her text and footnotes erudite discussions of the early works of Samuel Williston,⁷⁷ Roscoe Pound,⁷⁸ and Oliver Wendell Holmes.⁷⁹ This woman knew her subject.

Jean was also a lover of literature and believed that contract scholars could learn something from literature. This is most obvious in her most recent piece,⁸⁰ where she looked at the work of three 19th century American novelists—Poe, Melville, and Twain—and argued that their insights into what later came to be called “confidence men” foreshadowed the current insights of behavioral economics.⁸¹ Jean sought to gain insights from these novels for the most troublesome intellectual problem she addressed in her writings—when should the law go beyond correcting the effects of deviations from an ideal market and make a paternalistic intervention in contract relationships? Jean also relied on American literature in other articles to support views that deviated from conventional contract theory. She relied on another 19th century American novelist, Harriet Beecher Stowe, to support the argument that morality sometimes required releasing a promisor from a promise he or she had come to regret⁸²—a

74. Braucher, *Deadlock*, *supra* note 48; Braucher, *Rent-Seeking*, *supra* note 44; Braucher, *Trust the Courts*, *supra* note 27.

75. Elizabeth Warren and Gail Hildebrand, both contributors to this issue of the Arizona Law Review, are two.

76. See, e.g., Braucher, *Afterlife of Contract*, *supra* note 2, at 78–86 (drawing extensively on the Macaulay’s work and cites him often in the footnotes); Braucher, *Cowboy Contracts*, *supra* note 19, at 226 n.251 (Llewellyn); Braucher, *Form and Substance*, *supra* note 39, at 116 n.46 (Llewellyn).

77. E.g., Braucher, *Afterlife of Contract*, *supra* note 2, at 58–61.

78. Braucher, *Sacred and Profane*, *supra* note 2, at 688–90.

79. *Id.* at 671–73.

80. See Braucher & Littwin, *Examination*, *supra* note 39.

81. Braucher, *Scamming*, *supra* note 32. In the same article Jean has a lengthy discussion of the changing views of Judge Richard Posner on the relevance of literature to the study of law.

82. Braucher, *Sacred and Profane*, *supra* note 2, at 680–83. The novel described by Jean in this article is *THE MINISTER’S WOOING*, by Harriet Beecher Stowe, a book that Jean “highly recommend[ed] to contracts scholars for insight and pleasure.” *Id.* at 680 n.70.

practice which Jean believed permeated business culture, as reflected in the law in action.

CONCLUSION

Any summary here of what I have written above would be a disservice to the fullness and complexity of Jean's thoughts about contract law. Instead I will quote from two of Jean's recent emails, one to my colleague, Stewart Macaulay, and the other to both of us. The emails capture much of what Jean was, in her own words.

The first, sent to Macaulay and reflecting on her career, is as follows:

I spread my attention over . . . contracts, bankruptcy, and consumer protection, and so I look for intersections of these things, where I might be able to add value . . . I believe in viewing contract law as the law that governs contracts, not just common law of contracts.

The second, sent to both Macaulay and me, offered reflections on a draft paper⁸³ we had written on the origins and philosophy of the contracts casebook for the third edition of which Jean joined us as a full co-editor:

[T]he reported, fully litigated case is a freak, often atypical of disputes in general . . . Why keep the appellate cases? If they are not representative, maybe they just mislead. I think there are answers. Students have to learn about common law holdings as law, and how those holdings affect later cases, but it is good for them to learn at the same time that the impact of holdings is usually not what lawyers and judges imagine in their arguments and reasoning. The law does not march forward so much as stumble on. If common law decisions matter much to powerful interests, statutes are likely to be employed, and even then, unintended consequences—or less charitably, tolerated injustices—are a common result. Law is about social struggle, and we never get neat, perfect conclusions.

APPENDIX

Listed below are Jean Braucher's articles on contract law on which I have based this summary of her views on this subject. The articles are listed in reverse chronological order.

Examination as a Method of Consumer Protection, 87 TEMP. L. REV. 807 (2015) (with Angela Littwin).

Scamming Considered as One of the Exact Sciences: 19th Century American Literature Foreshadows Insights of Behavioral Economics (Univ. of Ariz. James E. Rogers Coll. of Law, Ariz. Legal Studies, Discussion Paper No. 13-37,

83. A later draft of this paper was published as Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 TEMP. L. REV. 793 (2015).

2014), <http://getoutofdebt.org/wp-content/uploads/2013/09/SSRN-id2314071.pdf>.

⁸⁴

Form and Substance in Consumer Financial Protection, 7 BROOK. J. CORP. FIN. & COM. L. 107 (2012).

The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action, 45 SUFFOLK U. L. REV. 667 (2012).

Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness, 50 ARIZ. L. REV. 191 (2008).

Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud, 48 ARIZ. L. REV. 829 (2006).

New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' (Jane K. Winn ed., 2006).

Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software, 2004 WIS. L. REV. 753.

Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online, 2001 WIS. L. REV. 527.

Deadlock: Consumer Transactions under Revised Article 9, 73 AM. BANKR. L.J. 83 (1999).

The Afterlife of Contract, 90 NW. U. L. REV. 49 (1995).

Contracts versus Contractarianism: The Regulatory Role of Contract Law, 47 WASH. & LEE L. REV. 697 (1990).

Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission, 68 B.U. L. REV. 349 (1988).

An Informal Resolution Model of Consumer Product Warranty Law, 1985 WIS. L. REV. 1405.

84. A reworked version of this draft article, with many changes being made posthumously, was published as Jean Braucher & Barak Orbach, *Scamming: The Misunderstood Confidence Man*, 27 YALE J.L. & HUMAN. 249 (2015). I relied on the draft listed in the appendix in preparing this paper, since it is exclusively Jean's work and includes material that was omitted in the final published version of the article.