A Casebook for All Seasons?—Another Casebook Review

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We were glad to accept the editors' gracious invitation to respond to Professor Geoffrey R. Watson's review of our casebook.[1] Although tenure committees may denigrate the editing of casebooks as a lesser form of scholarship and the reviewing of such works as a minor variety of literary criticism, no less a person than Karl Llewellyn made an early mark with a casebook[2] and before that with reviews of the casebooks of others.[3] There is much to be said for casebook reviews. While many of the most widely reviewed books on law never see a second edition, it is a rare casebook that does not undergo successive revisions. And it would be a callous casebook editor who ignored a reviewer's thoughtful suggestions. Thus the reviewer of a casebook may hope to have an influence unlike that of most other reviewers, and the *Seattle University Law Review* may make a significant contribution to the improvement of casebooks and, indirectly, of American legal education.

The current edition of *Farnsworth & Young* is, as Professor Watson observed, the latest in a long succession of works produced by three authors in addition to ourselves: the late Edwin W. Patterson, George W. Goble, and Harry W. Jones.[4] It occurred to us to consider the change in *milieu* of our subject over our careers by making some comparisons between the current edition, published in 1995 (FY)[5] and the one published in 1957 by our three distinguished

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1. Geoffrey R. Watson, *A Casebook for All Seasons?*, 20 SEATTLE U. L. REV. 277 (1997).

2. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930).

3. The practice of reviewing casebooks by others before launching one's own is noted in E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1438-1439 (1987).

4. Watson, *supra* note 1, at 277-78.

5. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (5th ed. 1995).

predecessors (PGJ).[6] Could one, today, teach a serviceable course in contracts out of the materials of forty years ago? We hope it will not be thought that our object in answering this question is to show that we are wiser than our teachers; their work instructs us still.

FY is shorter than *PGJ* (fewer than 1,000 pages as compared to nearly 1,200 pages[7]) and *FY* makes do with fewer cases than those in *PGJ*. One explanation is that in many schools, including ours, the contracts course has been compressed in length—from a six-credit course to a five- or four-credit course. Another explanation is that fresh perspectives, including those offered by the Uniform Commercial Code and by economic analysis, make it possible to elicit more analysis and reflection, while using less space.

A comparison of the organization of the two volumes is more indicative of the authors' ambition than is a page count. For a first point, we note our belief that *FY* is a more highly *integrated* treatment of the subject than *PGJ*. By "integrated" we mean that it makes connections, more frequently, between an immediate topic or case and what goes fore and aft; the ideal is, of course, to teach the subject in one blinding flash. Failing in that, *FY* is at least outfitted with notes that a topic (*e.g.* mistake, restitution) recurs in a number of contexts.[8] In this—as in many other respects—*PGJ* was a model for us; but the device is used more sparingly there. The plainest evidence of this is the attention paid in *FY*, early and late, to matters of remedy. We urge Professor Watson to rethink his practice of moving the opening section on remedies to the main chapter on remedies.[9] In contrast to *FY*, *PGJ* paid no attention to the calculation of damages until page 191,[10] and it appears that the editors' notes make virtually no reference to specific performance until page 589.[11]

This integration has been powerfully promoted by the notice now commonly given to the microeconomic merits of legal rules. How near, it may be asked, were the authors of *PGJ* to anticipating that,

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6. The earlier book is PATTERSON ET AL., CASES AND MATERIALS (4th ed. 1957). (Owing to a fresh beginning in numbering, the current volume is called "Fifth Edition"; but four other editions have intervened.)

7. Exclusive of appendices and editorial apparatus.

8. *See, e.g.*, FARNSWORTH & YOUNG, *supra* note 5, at 795 (referring to various contexts in which mistake may occur (mutual, unilateral, etc.)).

9. Watson, *supra* note 1, at 278-79.

10. PATTERSON ET AL., *supra* note 6, at 191. The matter comes up next in connection with quasi contract. *See id.* at 208.

11. There is a casual reference in stating a case, and many an earlier case features the remedy. *Id.* at 556. The reference at p. 589 relates to third party beneficiary contracts. *Id.* at 589. There is no entry in the index for specific performance.

forty years ago? At the outset of its chapter on damages we find a series of excerpts dating from as early as 1873 and as late as 1931.[12] "I have no right," Austin wrote in 1873, "independently of the injunction [or other sanction]."[13] And Llewellyn wrote in 1931 of the "work of the law machine at the margin . . . probably the most vital single aspect of contract law."[14] But there is no mention of Adam Smith, not to mention transaction or opportunity costs as such. On the other hand, a note makes reference to Patterson's insight about small-job/large-job pricing;[15] another refers to his interpretation of *Hadley v. Baxendale*[16] as a factor in 19th-century productivity.[17] But it is an astonishing fact that this chapter (Chapter 6) makes no reference to Fuller & Perdue, who had published their "reliance" study thirty years earlier.[18]

In 1957 the editors were faced with something of the same problem that faced us in preparing *FY*. They had in hand a revised text of the Uniform Commercial Code, not yet enacted anywhere, on which Patterson's critique of the 1954 draft had a powerful influence. They paid little attention to the text. We were faced with a much-revised new text of Article 2. We supposed it to be in imminent danger of acceptance. They guessed wrong;[19] and so did we. Very likely there is a moral to be drawn from these misfortunes. We are not sure what it is, however, unless it is the admonition of our late colleague Walter Gellhorn, to keep in mind that many of our students will be practicing law forty years after completing our tutelage, when the complexion of the law will have changed in many ways.

Turning to the selection of cases, the discard rate is high: only one in eight cases has been carried over, through five successive editions. That count suggests either that we found late-vintage opinions to represent the law better than older ones (as in the case of UCC problems) or that the law has a look very different from its

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12. JOHN AUSTIN, JURISPRUDENCE (4th ed.), *reprinted in* PATTERSON ET AL., *supra* note 6, at 752; Karl Llewellyn, *What Price Contract - An Essay in Perspective*, 40 YALE L. J. 704, 725 n.47 (1931), *reprinted in* PATTERSON ET AL., *supra* note 6, at 753-54.

13. AUSTIN, *supra* note 12.

14. Llewellyn, *supra* note 12.

15. *See* PATTERSON ET AL., *supra* note 6, at 775, Note 2, citing Edwin W. Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 COLUM. L. REV. 1286 (1931).

16. 9 Ex. 341 (Ex. 1854) *reprinted in* PATTERSON ET AL., *supra* note 6, at 790.

17. *See id.* at 792, Note 1, referring to Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924).

18. L.L. Fuller & William R. Perdue, Jr., 46 YALE L.J. 52 (1937). This is cited, however, in connection with Restatement § 45. PATTERSON ET AL., *supra* note 6, at 191.

19. PATTERSON ET AL., *supra* note 6. References to the text in *PGJ*, though sparse, appear at pages 93, 119, 756, 761. *Id.*

appearance to the authors of *PGJ* (as in the case of precontractual liability).[20]

Professor Watson's reactions to the choice of cases[21] reminds us of our difficulties, repeated with each edition, in deciding what to add and what to sacrifice in order to stay under 1,000 pages.[22] As for losses, we too miss *East Providence Credit Union v. Geremia*[23] and regret the pruning of *Mills v. Wyman*.[24] We believe that, in the area of promissory estoppel for example, the addition of *P & G Stout v. Bacardi Imports*[25] and *Cohen v. Cowles*[26] has more than made up for the loss. We rather hope that if these new cases should be sacrificed in a future edition, colleagues will suffer pangs similar to that experienced by Professor Watson at the loss of *Geremia*. As for retentions, we made inquiries about the case of the single mother, *Fiege v. Boehm*,[27] and concluded that at least our own "nervous first-year students" were inured to such matters.

A pastoral America emerges from the cases collected for *PGJ*. One reads about the stabling of a horse, the manufacture of buggy whips, and sales of peas, beans, and hops. The automobile age seems hardly to have arrived. Jet travel, telexes, software, and the nuclear age are not represented until 1995. Although there is a built-in lag in the law's response to new technology, elements of antiquarianism and nostalgia also figure in casebook construction. Buggy whips, horse trading, and hay harvesting are on the agenda still.

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20. The "different look" hypothesis is somewhat discredited, however, by the fact that more than 55 other cases in *PGJ* are represented in *FY*—"represented" in the sense that they are described in a way admitting of class discussion.

21. Watson, *supra* note 1, at 278-88.

22. These difficulties can be appreciated by observing the increase in size of many casebooks in this and other fields.

23. Watson, *supra* note 1, at 282 (discussing the omission of *East Providence Credit Union v. Geremia*, 239 A.2d 725 (R.I. 1968), in this edition of *FY*).

24. *See* Watson, *supra* note 1, at 280 n.13 (discussing the shortening of *Mills v. Wyman*, 3 Pick. 207 (Mass. 1825), in this edition of *FY*). We do not, however, regret the pruning of *Dickinson v. Dodds*, 2 ch. Div. 463 (1876)—which took a good deal of space to make a relatively unimportant point on indirect revocation and made the important point of firm offers only in passing.

Those who share Professor Watson's regret at the "unfortunate redaction" of the *Mills v. Wyman*, should see his recent article. *See* Geoffrey R. Watson, *In the Tribunal Conscience*, 71 TUL. L. REV. 1749 (1997).

25. 923 F.2d 566 (2d Cir. 1991), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 110.

26. 479 N.W.2d 387 (Minn. 1992) (en banc), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 107.

27. 123 A.2d 316 (Md. 1956), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 55 (inclusion was questioned by Watson, *supra* note 1, at 281).

We have not calculated the average age of the opinions presented in the two editions.[28] But we do see that, in PGJ, considerably more than a quarter of the cases were reported within the decade before 1957,[29] whereas in *FY*, only a fifth were reported in the decade before 1997. It is a fair conclusion that neither we nor our predecessors were preoccupied with the past.[30]

In the Preface to the edition preceding *PGJ*, the authors agonized over the conflicting temptations of classicism and novelty, thus:

> [A] considerable number of judicial decisions has been added . . . in an effort to make the book faithfully represent current developments and problems . . . . Yet the temptation to give undue emphasis to the decisions arising out of the peculiar conditions of World War II has been resisted, in the belief that many of these decisions will prove to have been ephemeral in their significance. The older landmarks of the law of contracts have been retained, both because of their traditional authority and because, in many instances, they give the best judicial statements of the reasons for legal rules and principles.[31]

Much later, the oil shocks of the '70s presented casebook editors with something of the same quandary that World War II presented to our predecessors. It would be gratifying to believe that, in preparing *FY*, we have been equally stout in resisting decisions "ephemeral in their significance."

Advancing technology has affected casebook production in many ways. New facilities for moving and correlating texts have probably enhanced "integration" in the way we present materials. Technology has also encouraged prolixity in opinions, so that some judges tend to recapitulate "the best judicial statements of the reasons for legal rules and principles"—sometimes only to cavil at them—as found in long-moldering cases. Who can resist teaching from a crisp, contemporary formulation of the rule against penal damages, accompanied by a denunciation of it?

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28. An adjustment would be in order for the addition of forty years to the lifespans of *Kingston v. Preston*, 99 Eng. Rep. 437 (K.B. 1773), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 700, *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. Div. 1854), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 534, and similar staples.

29. More precisely, 98 out of 344, or nearly 28.5%. We did not count the two opinions in *Liebman v. Rosenthal*, 57 N.Y.S.2d 875 (N.Y. Sup. Ct. 1945) and 59 N.Y.S.2d 148 (N.Y. App. Div. 1945), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 477, as two cases.

30. *FY* is equipped with more text that traces histories of doctrines, it seems.

31. Edwin W. Patterson & George W. Goble, *Preface to* PATTERSON & GOBLE, CASES AND MATERIALS ON CONTRACTS vii (3d ed. 1949).

For us, what might be called the "flavor" of an opinion counts in making choices, either for or against its use. Laying aside all else, we think it important that students of the 21st century be allowed to read a report so magisterial as this: "His Lordship then proceeded to say, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties . . . ."[32]

This is not to say, of course, that students profit more from that than from a neat observation like this:

> The formula—full contract price minus the amount already invoiced . . .—is invariant to the gravity of the breach.[33]

—which might have come from Learned Hand, but which came, in fact, from Judge Posner.

As we have observed already, *FY* presents far fewer cases: not half so many. Allowing for that fact, we have made counts of cases within the several "fields" of contracting, with a view to knowing what has been sloughed off. (For various reasons our counts are rough ones;[34] and we have counted only cases decided in this century.) In both books, by far the best represented of our categories are—in the following order—

i) sales of goods,
ii) construction & improvement contracts, and
iii) sales of real property.

The largest shift within these categories has been away from land-sale cases.[35]

Other categories in which we find a considerable number of cases include leasing contracts, employment contracts, and financing contracts. Proportionally, these categories have more than held their own. Lease cases have, indeed, held their own in absolute numbers. To count the numbers of "entertainment" cases and of intellectual-property cases was of special interest to us. There has been a

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32. Kingston v. Preston, 99 Eng. Rep. 437 (K.B. 1773), *reprinted in* FARNSWORTH & YOUNG, *supra* note 5, at 700, 701.

33. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1290 (7th Cir. 1985). The opinion in this case appeared in the next most recent volume in the series of casebooks under consideration here—FARNSWORTH & YOUNG, CASES AND MATERIALS ON CONTRACTS (4th ed. 1988). It was displaced by newer materials in *FY*. The loss is of course regrettable.

34. On occasion we counted a case twice—once as a sale-of-goods case, for example, and again as a franchise case. And it is a puzzle how to count a case about whether a timber sale is a sale of goods.

35. From this one might infer that the advent of the UCC has made less difference than one might suppose.

quantitative change in the latter—a growth possibly reflecting a sector change in the country's economy—and a qualitative change (Shirley MacLaine vice Walter Huston), but little quantitative change in the former.

Many of the notions featured in *FY* (in addition to economic analysis) were only gleams in the eye of *PGJ*. Although vagueness in the conception of "relational contracts" makes the count exceptionally imprecise,[36] the growth in the representation of such contracts has been exponential. Other examples are the battle of the forms, specialized "merchant" and "consumer" rules, unconscionability in contracting, good faith in performance, and statutory remedies, all of which can be ascribed largely to the advent of the UCC. Searching for provisions of the "proposed" Code that were chosen for mention in *PGJ*, we found references to damages calculations (§§ 2-708 and 2-713) and to waiver-of-defense clauses (§ 9-206), and quotations from §§ 2-206 ("Offer and Acceptance . . .") and 2-207 ("Additional Terms . . .").

It remains a fair question whether or not, if students were provided with large swatches of the Code, *PGJ* could be made a serviceable tool for a contracts course today. The chapter on remedies would have to be reworked and the one on assignment and delegation would have to be reworked—or omitted.[37] But the chapters on third party beneficiaries[38] and on illegal bargains (as far as it goes),[39] seem fairly acceptable today. As to the rest,[40] owing to social and regulatory moves over the forty-year interim, connected with what may loosely be called inequality of bargaining power, an instructor using only *PGJ* (and a UCC "supplement") would be excommunicated today.[41]

But the reader should not conclude that a 1957 casebook is wholly outmoded, for our judgment is more temperate. We believe

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36. Definitions differ. *See* Mark P. Gergen, *The Use of Open Terms in Contracts*, 92 COLUM. L. REV. 997, 999 (1992) ("The term . . . describes the web of legal and non-legal forces (mostly the latter) that induce parties to work together in mutually advantageous relationships"—but citing to other conceptions).

37. Apparently Professor Patterson, who was primarily responsible for that chapter, and who was surely the editor most familiar with the Code, had only a nodding acquaintance with Article 9. He referred to bonds, stocks, and savings bank books as "essentially 'chattel' paper." PATTERSON ET AL., *supra* note 6, at 669.

38. PATTERSON ET AL., *supra* note 6, at 572.

39. *Id.* at 1136.

40. The chapter on "Discharge" appears to be a be a tying up of loose ends, and would not suit any contemporary instructor. PATTERSON ET AL., *supra* note 6, at 1111. It comprises only eight cases, four of which date from the 19th century or earlier. *Id.*

41. In *FY*, these moves are represented chiefly under the rubric "Policing the Bargain." FARNSWORTH & YOUNG, *supra* note 5, at 324-82.

that—aside from UCC materials—only moderate supplementation would equip the earlier book for use today. De Tocqueville believed that the men of Massachusetts could make any constitution work; and we imagine that a skillful teacher could make most any contracts casebook work. Aside from that, however, we find enduring enlightenment in most of the materials collected in *PGJ*. If our perception is right, it follows that continuity in the law of contracts is a more notable quality than a beginning teacher might suppose, on starting with *FY*. "[T]he casebook world has changed substantially since Corbin's day," Professor Watson observed.[42] Yes of course, we say; but also no.

Finally, we would like to respond briefly to Professor Watson's principal objection: that the book fails to direct students to wider perspectives on the law of contracts—other than an economic one. He mentioned, in particular, a feminist point of view, a religious one, and (more broadly) a jurisprudential one.[43] Without attempting to answer this objection in full, we say that although economic analysis can be fairly treated with *representative* text and excerpts, what might count as representing fairly those other perspectives is hard to say. We are risk-averse about that.

Neither we nor (we suspect) Professor Watson would have been content with the technique of *PGJ*, which attached an appendix called "The Ethical Basis of Contract,"[44] comprising brief excerpts from a number of jurisprudential works, ranging in age from Grotius to Weber, and in substance from John Austin to Morris Cohen.[45] The alternative is to weave, say, religious commentary into thoroughly secular materials. We did not make the effort and we are unrepentant about that. Not only would it be distracting, but it would fail to have cumulative effect.[46] In contrast, exercises in economic analysis, however modest, build on one another by developing at least some facility in recognizing the method of economists. Furthermore, we assume that one of the benefits of keeping the book under 1,000 pages

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42. Watson, *supra* note 1, at 293.

43. *Id.* at 291-92.

44. PATTERSON ET AL., *supra* note 6, at 1197.

45. *Id.* We recall teaching from that book—and taking no notice of the appendix.

46. What to do about quietist strains of religious thought—among the most attractive ones—would be a conundrum. In the forepart of the last century, we believe, the term "transcendental" was kidnapped from quietists by Americans who subscribed to rather muscular religious notions. A book about contract law would be wholly incongruous with a truly transcendental religious attitude.

is to make it practicable for teachers to use supplementary materials according to taste.

It is appropriate, in closing, to express our gratitude for being taken seriously, and for Professor Watson's generosity in indicating merits that he found in *FY* (including one or two that we had not noticed[47]). But at bottom, we may have an irreconcilable difference with him. We believe that the best way for beginning students to develop recognition of the "method" of jurisprudence—and of much else relating to contracts—is to examine the methods of the law. We remember Maitland's regret about the course of his studies: much better training for doing legal history, he thought, to begin with a study of the law, and thereafter to learn historiography.[48]

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47. One of us, picking up on a suggestion by Profession Watson, has tried inserting a bit of third-party-beneficiary material before the chapter on the Statute of Frauds—which opens with a (non)suretyship case. The effect was bracing.

Professor Watson may be interested to know that his reordering is a partial reversion to *PGJ*, which dealt with third party beneficiary contracts (and assignments) in the middle of the book.

48. *See* FREDERICK WILLIAM MAITLAND, *Why the History of English Law Was Not Written* (1888), HISTORIAN: SELECTED WRITINGS 132 (Robert L. Schuyler, ed., 1960).

> [A] thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history. . . .
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> I believe that any one who aspires to study legal history should begin by studying modern law. . . . I had not the advantage of studying law [rather than philosophy and political theory] at Cambridge, otherwise perhaps I should not have been a barrister of seven years' standing before I had any idea of the whereabouts of the first-hand evidence for the law of the middle ages.

Id. at 140-42.