What Did They Know and When Did They Know It? Pretesting as a Means Setting a Baseline for Assessing Learning Outcomes

Jeffrey L. Harrison

I. Introduction

Are legal rules intuitive or, at least, consistent with common sense? In this study, 260 law students at five law schools[1] who had not taken contract law[2] were presented with eight questions based on specific contracts cases or common contracts issues. They were asked what they felt was the fair or right answer to each question and to formulate the rule they would apply. The purposes of the study were to a) determine whether contract law is what the untrained person believes it is or should be, and b) experiment with a strategy of pretesting to determine what topics within any course deserve special attention during a semester. The eight-question form, including the instructions each student was given, is attached as Appendix 1.

This type of pretesting has important implications and is adaptable to any law school course in which legal issues can be presented in the form of relatively simple problems. For example, it may identify areas that are particularly difficult for students to grasp and others that seem self-evident to most if not all students. This may affect the amount of time devoted to each topic and even the approach.[3] Areas that seem to be easily grasped might be better-suited for a problem method of instruction, in which the students apply relatively easily understood doctrinal material to complex fact patterns.

Jeffrey L. Harrison is Huber Hurst Eminent Scholar Chair and Professor of Law, Levin College of Law, University of Florida.

1. The colleges are the University of Florida, Gonzaga, Florida State, Chicago-Kent and Mitchell-Hamline. Thanks to Professors Allen Blair, George Dawson, Mark Fenster, Jake Linford, Adrian Walters, and an anonymous reviewer of a prior draft.

2. The questionnaire was administered on the first day of class or was presented electronically, with the answers due on the first day of class.

3. This, of course, leads to the dilemma every teacher must face: how much time to devote to students based on individual needs. For example, do you spend entire class periods in the hope of improving the understanding of five out of 100 students?

Conversely, some more difficult material, or material that requires specialized knowledge, may be suitable for a lecture approach.

Diagnostic surveys of this type also complement the American Bar Association's requirement that schools study "learning outcomes."[4] One interpretation of these standards is that schools should assess the extent to which the education offered advances students' understanding and abilities—an assessment that is impossible without the baseline provided for by an initial diagnosis. It is hoped that this essay will open a discussion of whether it is appropriate to pretest students in many of their law school courses as a way of assessing how much time should be allocated to different units and the most beneficial approaches to instruction.

In the pages that follow, each question is presented[5] along with the material on which it was based and the responses of those tested. The results are mixed; what is revealed is that preconceptions about contract law are sometimes consistent with actual contract law and oftentimes inconsistent. More interesting is that the students revealed themselves to be highly formalistic in some instances while having a sense of fairness in others. For example, those untrained in contract law have a formalistic view when confronted with issues of formation but more substantive views when problems arise after the contract is formed. And in some instances they demonstrate a surprising (to this author) ignorance of basic principles. At times they reveal gaps in their understanding of commercial norms. The final section discusses specific ways in which the results might influence the teaching of contract law, demonstrates the limitations of this type of study, and offers suggestions for further research.

Before turning to the results of the experiment, an important disclaimer is in order. The questions asked may seem to endorse a certain approach to teaching contract law because many are based on well-known contract law "chestnuts." No endorsement is intended. To some these cases may not be as relevant as they once were. Nevertheless, the cases and the issues they present are included in many contract casebooks, and those books continue to be organized around the usual topics of "offer and acceptance," "consideration," and so on. Thus, the pretesting illustrated here applies to what might be viewed as a traditional course. Perhaps this test is not appropriate in the nontraditional context, but that is separate from the question of whether pretesting has any utility.

II. The Offer

A. The Question

Jeff wants to buy Jane's sports car. One night at a meeting of a car club of which they are both members, Jeff says to Jane, "What is the least you would

4. *See* Am. Bar Ass'n, Standards & Rules of Procedure for Approval of Law Schools 2017-2018, Standards 301, 203, 314, 315 (2017), https://www.americanbar.org/groups/legal_education/resources/standards.html.

5. The ordering is roughly how the issues would be addressed in a traditional contracts class.

take to sell your car?" Jane replied, "I could not sell it for less than $7000." Jeff says. "It's a deal." Is Jane obligated to sell the car to Jeff for $7000?

This question is based on *Owen v. Tunison,*[6] in which the owner of property stated to a potential buyer that "it would not be possible for me to sell it unless I was to receive $16,000 cash."[7] The would-be buyer attempted to portray this as an offer that he accepted. The court merely noted that there was no offer to sell.[8] Similarly in *Harvey v. Facey*,[9] the "buyer" asked "would you sell?" and what is the "lowest cash price?" Upon receiving a response of 900 pounds, the buyer claimed a contract had been formed. Again, the court noted the distinction between a *willingness* to sell and the related notion of what the price would be if one *were* willing to sell.

B. The Results

On this question the students were nearly unanimous in responding that there was no contract. In fact, of the eight questions asked, the results on this one were the most compelling in terms of demonstrating a base-level understanding of contract law. Some might reason that naming the lowest prices at which something *would* be sold is tantamount to saying that you would be *willing* to sell at that price. This theory is uniformly rejected by courts and, in the experiment, by the students. Although this one was easy for the students, it actually represented a trend throughout the study. On an intuitive level, students were unwilling to find a relationship had been formed unless the formal indicia of a relationship were present.[10] In a sense, they arrive at law school as contract formalists.

III. The Right to Revoke

A. The Question

Dick wanted to buy Dodd's farm. He asked Dodd about it on Monday, June 6, and Dodd said he was willing to sell. In fact, he wrote on a piece of paper: "I am hereby offering to sell my farm, known as the Rock Creek 20, for $20,000. This offer will remain open until Saturday, June 11, at 9 a.m." On Thursday, June 9, Dick heard that Dodd had sold the farm to someone else. Nevertheless, he came to Dodd's house at 8 a.m. on the 11th and announced he was there to buy the farm. Dodd said it was sold. Do you think Dodd should either transfer the farm to Dick, if possible, or pay damages because he did not hold the offer open?

This question is obviously based on the classic *Dickinson v. Dodds*.[11] The case stands for the idea that an offer not supported by consideration may be revoked

6. 158 A. 926 (Me. 1932).

7. *Id.* at 927.

8. *Id.*

9. [1893] PC 1 (Eng.).

10. This tendency is also found in questions 2 and 5.

11. [1876] 2 Ch. 463 (Eng.).

by the offeror even though there appears to be a promise that it will remain open under certain conditions.[12] An added issue found both in the original case and in the survey question was one of indirect revocation. In the actual case, whether Dickinson heard that Dodds had actually sold the property to someone else or was merely thinking about it is unclear.[13] The survey question attempts to maintain this ambiguity by noting that Dick merely "heard" that the farm was sold. In addition, it makes it clear that Dick does attempt to accept before being directly informed of the revocation.

The survey question deviated from *Dickinson v. Dodds* in one important way. In the actual case, the written offer specified that it was made to Dickinson. In the hypothetical, Dodd simply said he was "offering to sell," but there was no indication the offer was exclusively made to Dick. It was felt that the specific mention of Dickinson would almost certainly lead students to decide that the offer had to be held open for him. This is incorrect and would likely gloss over the principal issue of consideration.[14]

B. The Results

Sixty-five percent of the students replied that Dodds should not be liable for not conveying the farm to Dick. Although the students got to a result consistent with the outcome of the case, the answers suggest general ignorance of one area of contract law but an intuitive understanding of another. The case was decided on the basis of a lack of consideration to keep the offer open. The students did not mention this.[15] They did, however, note that the offer was not exclusive; Dick, therefore, should have known that it might be accepted by someone else. When Dick "heard" the property was sold, the offer was revoked.

In effect, the majority of students applied the notion of indirect revocation but did not note the complexity of the concept. The problem is that whether an indirect revocation occurs depends on the source of the news.[16] In no cases did the students question the validity of the indirect revocation, which would have been an important element of a fully informed response. Nevertheless, this is one instance in which the uninformed responses of the subjects seem to be in sync with contract law. It is noteworthy that, along with the offer

12. *See* U.C.C. § 2-205. But this is not the case.

13. The report of the case leaves it unclear as to whether Dickinson heard Dodds had sold the property or was offering to sell it. *See* E. Allan Farnsworth, et al., Contract: Cases and Materials 183 (8th ed. 2013).

14. This was based on thirty years of teaching the case and finding that students were generally upset by the outcome. The idea that someone could make an offer to a specific person and promise it would be open for a certain period of time and then revoke it seemed to be viewed with substantial negativity.

15. If they had, it would have suggested some formal exposure to contracts, since the need for consideration is one of the mysteries of the common law of contracts.

16. Restatement (Second) of Contracts § 43 (Am. Law Inst. 1969).

hypothetical (above) and the sale of the diamond hypothetical[17] (below), the intuitive responses seem to lean toward formality and an "arm's-length" view of relationships at the formation stage.[18]

IV. Consideration and Family Contracts

A. The Question

When Sam graduated from high school, his older brother, Ben, said to him, "If you do not smoke cigarettes, drink alcohol, or take drugs while in college, I will give you $5000 when you graduate." Sam did avoid these activities while in college and asked Ben for the $5000. Ben refused to pay, saying that Sam was better off because he did not smoke, drink, or take drugs. Should Sam be able to recover the $5000 from Ben?

This question is based on *Hamer v. Sidway,*[19] which presents the issue of what counts as consideration. In that case, of course, the parties were a nephew and an uncle. The principal question is whether consideration flowing from one party to another (in the case, from the nephew to the uncle and, in the survey question, from the younger brother to the older brother) must be something (to put it simply) that harms or makes the performing party worse off or benefits the promising party. The answer of the court was that it was not necessary that a party be made worse off as long as he or she gave up a right. Nor was it necessary that the promising party enjoy any obvious gain. The case and the survey question also raise the issue of whether there should be judicial intervention in the case of relatively informal contracts between family members.[20]

B. The Results

The dual nature of the issue in the question may explain decidedly mixed answers from the students. Fifty-four percent of those surveyed concluded that the older brother should pay even though there was no writing and the agreement was between siblings. The sharp division among the students warranted a closer look at their reasoning. For example, those believing there was an obligation to pay may have applied an intuitive notion of consideration or, more likely, simply have felt one should keep his or her word. Conversely, those indicating there was no obligation to pay may have thought the contract was too informal to result in an obligation or that promising to do what was beneficial to oneself should not be consideration.

As it turns out, nearly all those who believed there was an obligation to pay felt that there was a contract or, in their terms, "a promise is a promise."

17. *See* text at *infra* notes 29-32.

18. No mention was made of the possibility, as has been argued, that consideration to keep the offer open was embedded in the price. *See* Friedrich Kessler, Grant Gilmore & Anthony T. Kronman, Contracts: Cases and Materials 319 (3d ed. 1986) (quoting P. Winfield, Pollock's Principles of Contracts 21 (13th ed. 1950)).

19. 124 N.Y. 538 (N.Y. 1891).

20. Farnsworth, et al., *supra* note 13, at 34-35.

Again, consideration appears to be a concept beyond their comprehension. A small handful (three) hinted at promissory estoppel by indicating the older brother should pay because the younger brother "relied." Those who saw no obligation fell into three predictable categories: Some reasoned the promise by the older brother was merely a "gift"; others felt the contract needed to be in writing; and still others believed the promise should not have been taken seriously. It appears likely that all these misgivings could have been overcome if the parties had observed the formality of a writing. In any case, there was no indication that an intuitive notion of consideration played a role. Students did indicate some discomfort with involving the courts in a family dispute.

V. Privity of Contract and Delegation

A. The Question

For several years the Smiths had their yard care provided by a company called Landscapes, Inc. Several months ago, they became dissatisfied with Landscapes, Inc., and told them that they were no longer willing to employ the company for yard care. They switched to Sam's Yard Care. Two months ago Landscapes bought out Sam's and began working on the yards of all of Sam's customers, including the Smiths. The Smiths eventually learned about this and refused to pay for the last two months of lawn care, saying they did not want lawn care from Landscapes. Do they have to pay for the two months of care?

The problem has more than one layer. For example, can a party be obligated to pay for the services rendered by someone he or she has previously rejected as a contracting partner or in a case in which privity is lacking? This layer of the question is based on *Boston Ice Co. v. Potter,*[21] in which Potter first dealt with Boston Ice but found its service unsatisfactory and switched to Citizens Ice. Boston Ice later acquired Citizens and delivered for a year with Potter's knowledge. When billed, Potter's refusal to pay was upheld by the court because of a lack of privity.[22]

Boston Ice was an 1877 case, and the law of assignment and delegation has evolved since then.[23] This gives rise to a second layer. As contracts teachers know, assignment refers to granting to a third party the benefits a contracting party would have received. Delegation, a touchier matter, means having a third party perform whatever performance was due from the contracting party. Today, as a general matter, we say that duties can be delegated as long as

21. 123 Mass 28 (1877).

22. *See* Peter Linzer, *The Decline of Assent: At-will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 Ga. L. Rev. 323, 379 (1986); Arthur L. Corbin, Corbin on Contracts 807-08 (1952).

23. *Cf.* Boulton v. Jones (1857) 157 Eng. Rep. 232 (The defendant had not expressed a desire not to deal with the plaintiff).

they are not personal services.[24] In simple terms, one could can delegate the obligation to deliver a new refrigerator but not to paint a portrait.

Another layer of the question raises the issue of restitution. Even if the lawn care were regarded as a personal service and payment was unenforceable as a matter of contract principles, could Landscapes recover based on the benefits conferred? Thus, the problem raised a combination of issues ranging from privity to restitution.

B. The Results

Eighty-two percent of the students reported that Smith should pay for the lawn service. The reasoning of the other eighteen percent was predictable. From their points of view, the Smiths should not have to pay for lawn service from a company they had not selected. The reasoning of the eighty-two percent is more intriguing. Either they felt at some intuitive level that lawn care was essentially fungible, and thus similar to the refrigerator noted above, or they felt it was simply unfair to receive two months of lawn care free. A closer look at this second group revealed three lines of reasoning. Some students wrote no more than that the services were rendered and should be paid for.[25] Others took another step and said it was the duty of the Smiths to know who was performing the lawn care. Still others qualified their answers by saying that payment was due as long as the Smiths were aware of the change in companies. This group is probably fairly viewed as being more consistent with those who felt the Smiths should not have to pay at all since the implication is that one need not pay for services rendered by an objectionable third party. Although this offsets the strength of the eighty-two percent vote, the general sense of the students seems to be that one must pay for benefits received.

VI. Contract Modification/Duress

A. The Question

Tom owns a construction company and makes a contract to build a house for Richard for $200,000. It is understood that Richard will move in on July 31. Richard makes arrangements to move on that date, including paying in advance for moving services. He also cancels the lease on the apartment he and his family have been living in. On July 25, Tom tells Richard that the house will not be ready on time unless Richard agrees to pay an extra $10,000. Richard agrees and the house is ready on July 31. When Tom asks for the $10,000, Richard refuses to pay. Should he have to pay?

This question was not based on a specific contracts case but was designed to raise the issues of modification without consideration and duress. As far as the students knew, Tom was offering to do no more than he originally contracted to do. In addition, the question was slanted to make it appear that Richard was in a difficult position. The date of Tom's threat—just six days before the move-in date—was supposed to increase the pressure on Richard to agree to

24. Restatement (Second) of Contracts §318 (Am. Law Inst. 1969).

25. To paraphrase a common response, "they already received the service".

what is a fairly substantial price increase at the eleventh hour. The problem is that Richard, rather than show any signs of resistance, agreed to pay the extra.

Duress is defined as an improper threat that leaves the other party no reasonable alternative.[26] It is not clear that, in reality, the problem would be treated by a court as duress, since Richard could have simply refused and claimed a breach of contract if Tom carried through on his threat. When it comes to modification, the standard rule is that a modification without consideration is not enforceable unless made in light of an unforeseen event.[27] The problem was purposefully drafted to avoid creating the impression that Tom had run into some type of problem.[28]

B. The Results

Sixty percent of those responding felt that Richard was obligated to pay the addition $10,000. The reasoning of this group was fairly consistent—Richard must pay because he *promised,* or, as one student put it, "He has to pay it; that's the way it goes." The forty percent who indicated payment was not necessary took formalism one step further. Several students in this category reasoned that the agreement to pay the extra $10,000 was not in writing and thus was not enforceable. (The question did not specify either way.) Those who felt payment was not necessary but did not rely on a lack of writing usually said the parties already had made a bargain and that Tom could not change it.

As a general matter, the students demonstrated little understanding of the situations in which a modification is enforceable. This may relate to general ignorance about the doctrine of consideration. Similarly, the portions of the question that were supposed to lead them to conclude that Tom had Richard at a disadvantage and used his leverage made little impression. Obviously the students here did not feel that Richard was "forced" into anything. Almost certainly if the $10,000 promise had been made at gunpoint or in the context or a physical threat to a loved one, the students would have found it unenforceable. Just how far from these extreme examples a threat would have to be is not clear, but then it is not clear in contract law generally.

VII. Mutual Mistake: A Rock or a Diamond?

A. The Question

Smith found a rock while hiking in the mountains. That afternoon she went to a jewelry store to buy a hat pin. While there she asked the jeweler, Jack, if he knew what the rock was. Jack had never seen an uncut diamond and told Smith he did not know what it was but it could be a topaz. He offered to buy it for $50. Smith accepted the offer. A few days later, Smith realized the stone was an uncut diamond worth $5000. She returned to the jewelry store and

26. Restatement (Second) of Contracts §175 (Am. Law Inst. 1969).

27. *Id.* §318.

28. Although perhaps the point is overly subtle, Richard is told the house "will not be ready," not that it "cannot be ready".

offered to refund the $50 to get the diamond back. The store refused to sell it back for $50. Should the store be required to return the stone for $50?

Contracts professors will recognize this question as based on *Wood v. Boynton*.[29] The prices and values have been changed and the facts objectified in the sense that Smith is not described, as she was in the original case, as needing money "pretty badly."[30] The answer in the case was that no refund was due. This is likely consistent with the current *Restatement of Contracts*[31] under the theory that Smith assumed the risk of the mistake by virtue of her conscious ignorance. This assumes, however, that Jack did not provide Smith with misleading information.

B. The Results

Under this variation of the facts, eighty-seven percent of the students said the diamond should remain with Jack. The reasoning was fairly clearly along the lines of "a deal is a deal," or that Smith was at fault (assumed the risk) by selling the stone. The nature of the reasoning suggested a highly formalistic, seller/buyer-beware view of contract law when issues arise at the formation stage.[32] It is not clear whether the result would change, or if it did by how much, if the facts were given, as they are in the case, with Smith portrayed as someone needing the money "very badly." Nevertheless, the notion of assuming the risk or, in more informal terms, buyer or seller beware seems to be a compelling influence on those without formal contract training.

VIII. Trade Usage

Zeke starts a lawn-care business for the first time. He is able to sign up ten new customers. Each week he mows their yards. Things go smoothly until the grass in some of their yards turns brown. It is determined that the yards need to be fertilized and Zeke has not done it. The homeowners tell Zeke correctly that all the other lawn-care services in town that charge the same price as Zeke include fertilizing the yard in their price for "lawn care." Zeke did not know this. The customers say he should have known it before saying his business is "lawn care." Should Zeke be required to fertilize the yards of his customers?

This question can be viewed as having two layers. First, a student employing an intuitive notion of the "four corners" approach to contract interpretation may have wondered why it was even relevant that other companies included fertilizing as part of their service. In effect, as a technical matter, the fact that there may be a relevant trade usage would be unimportant unless there was an ambiguity.

Additionally, a student could recognize the possibility of an ambiguity and still not be sure of the relevance of trade usage in light of a newcomer to an

29. 25 N.W. 42 (1885).

30. *Id.* at 43.

31. Restatement (Second) of Contracts §154(b) (Am. Law Inst. 1981).

32. See also question 3 discussed above.

industry. Holding even newcomers to the usage can lower transaction costs in that customers and suppliers can make certain assumptions about the meaning of terms. This, however, shifts the burden to the newcomer and, arguably, raises the costs of entry into the field and inhibits competition. Some courts, as illustrated in the *Frigaliment Importing Co. v. B.N.S. International Sales Corp*.,[33] adopt a middle ground and apply trade usage only when it is well-established and "notorious."

B. The Results

Students by a wide majority (seventy-six percent) rejected the notion that Zeke should be responsible for fertilizing the yards of his customers, even though the question attempts to lead them to the understanding that the customers could reasonably believe fertilizing was included under the term "lawn care." Here again student comments reveal a formalistic view of contract. Many announced the rule that Zeke was not responsible for fertilizing the yards because it was not found expressly in their contracts. For these students, evidently nothing was ambiguous about the term "lawn care," and this could be determined in light of their personal understanding.[34] Some hinted at a sense of ambiguity by applying risk-allocation/buyer-beware reasoning and stating that it was up to the buyers to know what they were getting.

No students expressly applied a two-step analysis of a) determining there was an ambiguity, and b) deciding whether Zeke should be held to trade usage. Nevertheless, a quarter of the students did say Zeke should provide fertilizing, and uniformly they indicated it was because it was his responsibility to know what his customers were likely to expect. It is possible that before making that step they first concluded the term "lawn service" could be reasonably viewed as including fertilization but, if so, this was not evident in their responses.

IX. Expectancy as a Remedy

A. The question:

Thomas decided he wanted to buy Tim's 1999 Honda. He offered to pay $2000, and Tim agreed to sell it for that price. Under the terms of their agreement, they were to meet one week later. At that time, Thomas would present the $2000 and Tim would give him the car, including its title and keys. One week later they did meet but Tim informed Thomas that the car had already been sold to Janice. There is no question that this was a breach of their agreement. That afternoon Thomas searched the Internet and found that the price on a similar car was $2100. How much should Thomas recover from Tim, if anything?

33. 190 F.Supp. 116 (S.D.N.Y., 1960).

34. Arguably this is precisely the type of bias Judge Traynor warned against in Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (1968).

It was expected that remedies could be a difficult subject for the students. For that reason, the simplest possible remedies problem was devised. It purposely did not involve issues of mitigation[35] or consequential damages.

B. The Results

In the experiment, the answer of $100 was treated as consistent with existing contract law.[36] Of the students surveyed, thirty-five percent answered $100. Those who did not answer $100 typically answered either zero or $2000. Those answering zero explained their answers by saying Thomas had not been harmed.[37] One supposes this is because Thomas had not yet paid. Those answering $2000 (seventeen percent) "reasoned" that $2000 was due since it was the price of the car. One explanation for this outcome is that the students simply did not read the question carefully and assumed Thomas had paid and was due a refund. Whatever the explanation, it is clear that the notion of expectancy is not an obvious one, at least not when posed in the form of a hypothetical. It seems likely, though, that if confronted with a real-life situation, the nonbreaching party would think in terms of the position he or she would have been in had there been performance.

X. The Takeaway

The results of this modest experiment can be viewed from two perspectives. First, what are the layperson's impressions of some basic contract law doctrines? Second, could a study like this be employed to inform the teaching of contract law? By extension, could similar studies in torts, property, or any course in which critical issues can be presented as relatively simply problems help determine time allocations and teaching methods?

A. What Do They Know About Contracts?

As for what those without formal training in contract law believe, the results are perhaps not surprising. The subjects revealed a very formalistic, arm's-length view of contracts. Many responses depended of whether there was a "writing" involved.[38] The notion that one was stuck with a deal once it was in writing seemed to pervade the results. The diamond, once mistakenly sold, was gone; the agreement to pay $10,000 for nothing in the context of the unfinished house was to be paid; fertilizing that yard, even though arguably required by trade usage, was unnecessary unless the contract requires it. On a more general level, and not surprisingly, the notion of consideration is foreign. It could have figured into problems involving the offer from Dick to Dodds,

35. It is only a hunch, but it seems likely that mitigation, at least is some instances, would be regarded as a necessity to the relatively untrained.

36. A few students seem to use $100 as a base and note that there could be other expenses associated with the breach along the lines of what are called incidental or consequential damages. These students were included among those viewed as giving the right answer.

37. Arguably, these students were applying a reliance measure of damages, but the explanations did not reveal even a rudimentary understanding of reliance.

38. This formalistic view also seemed to rule out relational contract theory.

the promise from the older to the younger brother, and the $10,000 promise from the homeowner to the builder, but there did not appear to be even a shadow of an intuitive awareness of consideration.

There is also the puzzle of contract remedies. In the simplest possible problem included here, more than half those responding gave a wrong answer. What makes this puzzling is that they do, in fact, in real life have a sense of being entitled to expectancy. If a layperson agrees to buy a new car from one dealer for $10,000 and this is followed by a breach and a purchase of the same model from another dealer for $11,000, it seems almost certain that the buyer would look to the initial seller to make up the difference.

Although the issue was touched on only briefly, the students did seem to express an underlying sense of fairness when it came to unjust enrichment. In the question concerning the landscaping by an unwanted firm, students consistently felt the services rendered must be paid for. This may be seen to be offset by their response to the problem involving the rock that turned out to be a diamond. There is a difference, though. In the diamond case either the jeweler or the seller would enjoy a windfall. In the lawn-care case, allowing the homeowner not to pay would have resulted in a windfall, but only at the lawn-care service's expense. Thus, students were particularly sensitive to unjust enrichment when the result was unjust impoverishment of another.

B. Teaching Implications

This modest effort to develop a diagnostic tool for contracts can be improved on. Nevertheless, suppose this sample of 260 students comprised a single contracts class; what might a contracts teacher take away from the exercise? It will probably come as no surprise to any contracts professor that contract remedies are difficult. Based on this study, one might devote additional time to remedies and, especially, adopt a problems method to the teaching of remedies. Along with remedies, consideration is an area in which students arrive in class as blank slates. It can arise in the context of offer and acceptance, formation generally, and modification. Perhaps there cannot be too much emphasis on the doctrine.

In this hypothetical class, the greatest challenge would be to demystify contract law. Oddly, this is done by emphasizing the complexity of contract law. This group of students came with the impression that if it is written or someone "agrees," that is the end of the story. They seem to envision a contract as a magical piece of paper with the heading "CONTRACT" that solves most if not all problems. Indeed, this may simply reflect cultural norms more generally than about the substance of contract law. What is missing is an understanding of how that document or, more likely, a far less formal version of the contract came to exist and the implications of variations in that process. For example, to this group of students you owe an extra $10,000 to have a house built simply because you said you would pay. Or you are not obligated to fertilize yards even though everyone else in the trade does so simply because you did not say you would or it is not "in writing."

The pretest results for this class impart four very practical lessons. First, the importance of a writing or the lack of a writing needs to be emphasized. Some documents need to be in writing but many do not. And even when a writing is necessary, the analysis can be complex. "It is in writing" is rarely the answer. Second, this particular group of 260 seemed to lack the type of life experience that would alert them to the malleability of contract law and to commercial reality. Doctrines like trade usage, course of performance, and course of dealing are all likely to come as surprises to this group of students. Third, if I were teaching this group, I would also devote problem-solving time to remedies. Finally, a few days on assignment and delegation would be useful.

C. Some Limitations and Further Research

This effort is intended to be no more than an illustration of pretesting. As noted at the outset, it reflects what might be called a traditional approach to contract law. Precisely how contract law should be taught is a different question. In this respect, any effort to pretest should be preceded by a process of defining goals for a class. Those goals could differ from the ones implicit in this example. In addition, the possibility of pretesting does not solve the dilemma faced by every teacher about how much time to spend on each topic when the test shows that a minority of students do not grasp a topic. For example, is it good teaching to spend an hour or so on a topic that seems to be well-understood by all but ten of 100 students?

Another factor to keep in mind is that testing is always limited. For example, in this case, we know that some portion of the students reacted to the survey questions in a matter that was *consistent* with contract doctrine. That is not a substitute for knowing the policy behind the doctrine or how it would apply in a context in which policies compete. That type of information might be obtained from a more comprehensive form of pretesting. On the other hand, a simple test like the one employed here can provide important baseline information.

Finally, in this exercise, the students from each school had very similar results. That does not mean all students within each class were similar. Some of us teach classes made up of predominantly twenty-four-year-olds who have had little or no exposure to contract-type issues and who have little professional experience. Other teachers may teach in part-time programs or night programs in which students are older and sometimes convinced, rightly or wrongly, that they know contract law. Because of the potential socioeconomic and demographic differences from law school to law school and class to class, the next iteration of a study like this should involve collecting important information about other variables—age, parents' education, undergraduate major, work experience, LSAT score—that may well be valuable in making course-design and time-allocation decisions.

Appendix

INSTRUCTIONS

Below are eight fact patterns dealing with very common problems in the area of contract law. Please read each one and then write what you think should happen and what general rule should be applied. There are no "right" or "wrong" answers. Please just write what you think is the fair outcome. Do not put your name on your answer sheet. The purpose of the experiment will be explained as soon as you are finished. Thank you.

I. Thomas decided he wanted to buy Tim's 1999 Honda. He offered to pay $2000, and Tim agreed to sell it for that price. Under the terms of their agreement, they were to meet one week later. At that time Thomas would present the $2000 and Tim would give him the car, including its title and keys. One week later they did meet, but Tim informed Thomas that the car had already been sold to Janice. There is no question that this was a breach of their agreement. That afternoon Thomas searched the Internet and found that the price on a similar car was $2100. How much should Thomas recover from Tim, if anything?

1. The amount _____
_____
_____

2. Your rule _____
_____
_____

II. Smith found a rock while hiking in the mountains. That afternoon she went to a jewelry store to buy a hat pin. While there she asked the jeweler, Jack, if he knew what the rock was. Jack had never seen an uncut diamond and told Smith he did not know what it was but it could be a topaz. He offered to buy it for $50. Smith accepted the offer. A few days later, Smith realized the stone was an uncut diamond worth $5000. She returned to the jewelry store and offered to refund the $50 to get the diamond back. The store refused to sell it back for $50. Should the store be required to return the stone for $50?

1. Your answer _____
2. Your rule _____
_____
_____

III. Dick wanted to buy Dodd's farm. He asked Dodd about it on Monday, June 6, and Dodd said he was willing to sell. In fact, he wrote on a piece of paper: "I am hereby offering to sell my farm, known as the Rock Creek 20,

for $20,000. This offer will remain open until Saturday, June 11, at 9 a.m." On Thursday, June 9, Dick heard that Dodd had sold the farm to someone else. Nevertheless, he came to Dodd's house at 8 a.m. on the 11th and announced he was there to buy the farm. Dodd said it was sold. Do you think Dodd should either transfer the farm to Dick, if possible, or pay damages because he did not hold the offer open?

1. Your answer _____
2. Your rule _____
_____
_____

IV. For several years the Smiths had their yard care provided by a company called Landscapes, Inc. Several months ago, they became dissatisfied with Landscapes, Inc., and told them that they were no longer willing to employ the company for yard care. They switched to Sam's Yard Care. Two months ago Landscapes bought out Sam's and began working on the yards of all of Sam's customers, including the Smiths. The Smiths eventually learned about this and refused to pay for the last two months of lawn care, saying they did not want lawn care from Landscapes. Do they have to pay for the two months of care?

1. Your answer _____
2. Your rule _____
_____
_____

V. Tom owns a construction company and makes a contract to build a house for Richard for $200,000. It is understood that Richard will move in on July 31. Richard makes arrangements to move on that date, including paying in advance for moving services. He also cancels the lease on the apartment he and his family have been living in. On July 25 Tom tells Richard that the house will not be ready on time unless Richard agrees to pay an extra $10,000. Richard agrees and the house is ready on July 31. When Tom asks for the $10,000 Richard refuses to pay. Should he have to pay?

1. Your answer _____
2. Your rule _____
_____
_____

VI. When Sam graduated from high school, his older brother, Ben, said to him, "If you do not smoke cigarettes, drink alcohol, or take drugs while in college, I will give you $5000 when you graduate." Sam did avoid these activities while in college and asked Ben for the $5000. Ben refused to pay, saying that Sam was better off because he did not smoke, drink, or take drugs. Should Sam be able to recover the $5000 from Ben?

1. Your answer _____

2. Your rule _____
_____
_____

VII. Jeff wants to buy Jane's sports car. One night at a meeting of a car club of which they are both members, Jeff says to Jane, "What is the least you would take to sell your car?" Jane replied, "I could not sell it for less than $7000." Jeff says. "It's a deal." Is Jane obligated to sell the car to Jeff for $7000?

1. Your answer _____
2. Your rule _____
_____
_____

VIII. Zeke starts a lawn-care business for the first time. He is able to sign up ten new customers. Each week he mows their yards. Things go smoothly until the grass in some of their yards turns brown. It is determined that the yards need to be fertilized and Zeke has not done it. The homeowners tell Zeke correctly that all the other lawn-care services in town that charge the same price as Zeke include fertilizing the yard in their price for "lawn care." Zeke did not know this. The customers say he should have known it before saying his business is "lawn care." Should Zeke be required to fertilize the yards of his customers?

1. Your answer _____
2. Your rule _____
_____
_____