

INTELLECTUAL PROPERTY AND THE COSTS OF COMMERCIAL EXCHANGE: A REVIEW ESSAY

*Robert P. Merges**

THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY. By *Peter A. Alces* and *Harold F. See*. Boston: Little, Brown & Co. 1994. Pp. xxxii, 736. \$145.

I. INTRODUCTION

Peter A. Alces¹ and Harold F. See² state in their highly useful book that

As the relative proportion of traditional goods involved in commercial transactions declines and the relative proportion of intellectual property in such transactions increases, the important question is whether Commercial Code principles designed with contemporary commercial practices in mind and promulgated essentially uniformly across the entire nation provide the better rules to foster economic and technological growth, or whether, on the other hand, the common law rules of contract forged in the early days of the industrial revolution, from which the commercial law sprang and diverged, provide the better guidance. [pp. 346-47]

Although they tip their hand a bit in framing the question — they clearly favor the extension of UCC rules and principles to cover “contemporary commercial practices” — Alces and See have no doubt hit on an important set of issues. They have identified a new ingredient increasingly spicing the meat-and-potatoes practice of the transaction-oriented business lawyer: intellectual property.

At the simplest level, their volume contains a compendium of, and commentary on, a wide range of commercial bargains in which intellectual property plays a role. By its own terms, their book is a straightforward effort to collect these cases from the corners of the commercial law reports and to impose some order on them. To do this, the authors make clear, they must describe and define some concepts that are familiar to intellectual property lawyers but not to commercial lawyers, and vice versa. Thus, for the practitioner, the book represents an effort to bridge the gap between two heretofore

* Professor of Law, University of California at Berkeley, School of Law (Boalt Hall). B.S. 1981, Carnegie-Mellon; J.D. 1985, Yale; LL.M. 1988, Columbia. — Ed.

1. Professor of Law, Marshall-Wythe School of Law, The College of William and Mary.

2. Herbert D. Warner Professor of Law, University of Alabama School of Law.

isolated fields. Although it is a smidgeon better at bringing commercial law to the intellectual property specialist than the other way around, overall it is a highly competent exemplar of the legal bridgebuilder's art.

Nevertheless, the bridge is an early model — a prototype, almost. Although there is a crying need for a book that brings out and ties together the multifaceted legal issues arising from intellectual property transactions, this book falls somewhat short of the deluxe, Golden-Gate-spanning variety the subject seems to call for. Nevertheless, it establishes some solid footings on which future scholars might build a more elaborate structure.

A. *The Plan of Attack*

In Part II, I try to explain why intellectual property is cropping up in more and more commercial transactions. I emphasize the role that intellectual property plays in some newly emerging organizational arrangements in economic production — in particular, the greater use of nonemployee consultants and contract-based “quasi firms” such as joint ventures. These increasingly common organizational forms, which appear regularly in the cases that Alces and See survey, have become more viable now that Congress and the courts have joined together to create stronger intellectual property rights.

After this account of the origins of the growing intellectual property component in commercial transactions, I turn in Part III to some details of those transactions, as analyzed by Alces and See. I first briefly describe the UCC-based approach the authors have taken to their subject matter, and I argue that the authors have included too many commercial transactions with only a nominal intellectual property component. I also describe the high points of the book and stop, now and again, to record a doctrinal quibble. The substantive conclusion of this Part is that the authors would have better served their intended audience by dissecting more thoroughly a smaller number of cases that expose basic incompatibilities between policies central to the UCC and accepted intellectual property doctrine.

In Part IV, I discuss why the book only partly bridges the existing gap in the intellectual property literature — why, as I like to put it, we need a *contract* law of intellectual property, and not just a commercial law. Here I argue for an integrated approach to the entire body of rules and doctrines that Congress and the courts have created to police intellectual property transactions. In the course of this discussion, I attempt to show why legislatures, courts, and scholars must consider the policing doctrines traditionally thought of as “internal” to the federal intellectual property regimes — especially the twin doctrines of copyright and patent “misuse,”

and such other issues as federal preemption of state law affecting intellectual property — together with U.C.C. issues if they are to construct a coherent body of transactional rules. I present a lengthy discussion of the “shrinkwrap” or “tear open” software license to illustrate the need for such an integrated treatment.

In Part V, I argue that the forces behind the growing commerce in intellectual property rights, which I review in Part II, will likely intensify, making it all the more necessary to complete what Alces and See have begun in this volume — the process of constructing a truly integrated contract law governing intellectual property-based transactions. I close by noting that books like this do more than describe this trend; they add to it by disseminating transactional “know-how” that enables lawyers and others to build more complex transactions on the foundation of intellectual property rights.

II. INTELLECTUAL PROPERTY RIGHTS AND THE ORGANIZATION OF PRODUCTION

Consider the quote from Alces and See in the introduction to this review. The authors observe that the relative importance of traditional goods involved in commercial transactions is declining while the relative proportion of intellectual property in such transactions is increasing. In this Part, I focus on what the authors see as the motivation for this development, and I discuss its implications and ramifications.

Let me state at the outset that, in the spirit of the authors’ undertaking, I will take as a given that they are correct in asserting a higher intellectual property content in the practice of commercial lawyers. Anecdotal evidence for this abounds; it is certainly also relevant that two experienced commercial lawyers have bothered to write a practitioner-oriented book on the subject. I will assume their market research was accurate. The interesting question is: What lies at the heart of this trend? Just why has intellectual property become the subject of an increasing volume of transactions?

There are essentially three interrelated reasons for the growth in intellectual property commercial transactions. First, there is more intellectual property to include in transactions than there used to be, and it is worth more because it is more readily enforced by the courts. Congress, and to a lesser extent the state legislatures, are creating more intellectual property each year; where the United States leads in this area, other countries tend to follow.³ Second,

3. Perhaps there is an interesting “race to the top,” or to the bottom, phenomenon going on here. On the leadership of the United States in intellectual property protection, see STEPHEN A. BENT ET AL., *INTELLECTUAL PROPERTY RIGHTS IN BIOTECHNOLOGY WORLDWIDE* (1987) (discussing U.S. leadership in biotechnology); Robert P. Merges, *A Comparative Look at Property Rights and the Software Industry*, in *THE INTERNATIONAL COMPUTER SOFTWARE INDUSTRY* (forthcoming 1995) (discussing U.S. leadership in software).

the growth in intellectual property has increased businesspeople's awareness of the intellectual property aspects of traditional transactions. Consequently, there is often now an intellectual property dimension to transactions that were conducted in the past without mention of these rights. Third, and most interesting to me, intellectual property rights make more feasible various organizational structures that firms and individuals are increasingly using to produce goods and services. Since these organizations are at least partially based on contracts, they provide a growing source of commercial transactions that necessarily include an intellectual property component.

Intellectual property rights appear to enhance and, in some cases, to enable these contract-based organizations — which run the gamut from consulting arrangements to “out-sourcing” agreements in which firms purchase components formerly manufactured by themselves. In general, intellectual property rights make such transactions less risky, and hence feasible in more instances, because they make it easier for the licensor — often the supplier of a productive input — to police the activities of the licensee. The strong policy favoring injunctions is one example of how licensors can use intellectual property rights to police licensee activities;⁴ another example is courts' strict adherence to the field-of-use limitations that many licensing agreements contain.⁵ In these and other ways, intellectual property rights give the input supplier greater control over the activities of the licensee, which makes the external production of inputs and the concomitant transfer by contract more feasible. To put it another way, intellectual property rights reduce

4. On the strong policy favoring injunctions, see Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); see also *Burberrys (Wholesale) Ltd. v. After Six Inc.*, 471 N.Y.S.2d 235 (Sup. Ct. 1984) (illustrating how a licensor can craft licensing agreements that provide for injunctions).

5. See, e.g., *General Talking Pictures Corp. v. Western Elec. Co.*, 305 U.S. 124 (1938). See generally Stephen J. Davidson, *Selected Legal and Practical Considerations Concerning 'Scope of Use' Provisions*, COMPUTER LAW., Oct. 1993, at 1. Davidson argues that

such restrictions [i.e., tight field-of-use limitations] (or the lack of express authorization for a particular use) may be used by the licensor in an effort to extract excessive license or renewal fees after the licensee has become reliant on the software in its business. Claims of default and termination based on such restrictions or lack of express authorization, or based on ambiguity over what uses are permitted, can threaten the licensee's very ability to continue in business. The courts are all over the place on these issues, and the opinions in those cases that have been decided in the past few years suggest that the decisions were based more on the courts' gut level sense of justice than any uniform rules of law.

....

The ability of software licensors to terminate or threaten termination of their licenses or support agreements based upon alleged default by unauthorized use is a very real threat to licensees who are reliant upon the software for continuation of their day-to-day business operations.

the licensee's opportunistic possibilities⁶ and thereby lower transaction costs.

While it is important not to overstate the significance of intellectual property rights in the emergence of these new organizational forms, it is also important to point out some likely causal links, all of which turn on the potential for tighter contractual control, at lower cost, that comes with property rights. The most obvious illustration of how property rights confer tight control is the example alluded to above, the availability of quick injunctions in the event of breach. Since injunctions are much more easily obtained in intellectual property infringement cases than in run-of-the-mill commercial contract disputes,⁷ the inclusion of intellectual property in a commercial arrangement gives the owner of that property right much more leverage with which to police licensee behavior. It follows that, at the margin at least, the availability of intellectual property will make a supplier more likely to rely on contract, as opposed to integration or some other transactional form. In this way property rights, including intellectual property rights, contribute to the growth of contract-based exchange.

Note in this connection that it is difficult to argue that contract terms can substitute fully for the enhanced control conferred by the strong injunction policy of intellectual property law. It is well established, for example, that courts do not necessarily enforce contractual provisions stipulating to specific performance or other injunctive remedies.⁸ In addition, even if an enforceable contractual provision to this effect were assumed, such a clause would be expensive to draft and negotiate,⁹ and someone would have to establish its enforceability. As I have argued elsewhere, these are precisely the sorts of costs that "off the rack" intellectual property rights serve to lower or eliminate.¹⁰

6. Of course, intellectual property rights also increase the bargaining leverage of the licensor, which is one reason the legal system must carefully consider the extension of these rights into new product markets. See Robert P. Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Improvement Inventions and Blocking Patents*, 62 TENN. L. REV. 75 (1994).

7. On injunctions in intellectual property cases, see Merges, *supra* note 4. On the availability of injunctions in commercial transaction cases, see Scott E. Masten, *A Legal Basis for the Firm*, in *THE NATURE OF THE FIRM* 195, 205 (Oliver E. Williamson & Sidney G. Winter eds., 1993) ("[S]pecific performance is infrequently applied in commercial settings . . .").

8. See Alan Schwartz, *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990).

9. See Masten, *supra* note 7, at 207 (pointing out the advantages of relying on standard common law principles in the area of employment law, as opposed to replicating them in services contracts, which "would . . . require reviewing and repeating the entire case law in each contract, obviously forfeiting a substantial economy").

10. See Merges, *supra* note 4, at 2664-73.

A. *Intellectual Property Rights and the "Propertization of Labor": The Parable of the Fish*

Portions of the Alces and See volume are consistent with the notion that stronger rights are linked to diverse organizational forms. For instance, some of the cases they discuss help illustrate how the growth of an intellectual property component in commercial transactions has enabled new organizational forms. For example, in *Real Estate Data, Inc. v. Sidwell Co.*,¹¹ an independent mapmaker contracted with a firm to produce maps. A copyright ownership dispute resulted from the relationship, but the relationship itself shows how intellectual property rights have become important in structuring this kind of consulting agreement. Because the consultant can control by contract the use and dissemination of her work product, she has an incentive to enter into a consulting agreement rather than an outright employment agreement.

A consultant generally can only sell a given unit of labor once, and she can sell it only to a single firm. Intellectual property, however, in effect "propertizes" her labor, making it possible to sell the same unit of output multiple times to multiple firms.¹² Of course, for this to work, the consultant must produce something that intellectual property law protects, and she must retain ownership of her work product, typically by contract. Assuming ownership of a protected work, however, intellectual property rights allow her to transform her efforts from a onetime service into a multiple-use commodity. This conversion of services into an asset that the producer can trade many times of course enhances the potential economic returns from such work.

The old parable of the fish captures how reusable techniques and information can pose a public goods problem and how intellectual property law solves that problem. In the parable, a fisherman is instructing a neophyte in the essence of his trade. "Catch fish for people," he says, "and you will make a fine living. But teach someone to fish, and you will starve." Intellectual property introduces a third possibility: teach multiple people to fish, but prohibit them from retransferring the fishing techniques, and even limit the uses of the techniques, via contract. Under this scenario, the fisherman

11. P. 373 (discussing *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366 (7th Cir. 1987)).

12. Commentators at least since Locke have asserted that everyone owns his or her labor; in Locke's case, this was an outgrowth of his starting point that everyone owns his or her own body. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 328-29 (Peter Laslett ed., 1960) (1690). But when these commentators refer to a property right in one's labor, they are talking about the right to bargain for a wage before engaging in work — in essence, the right not to be a slave. By contrast, I am referring to the conversion of labor into a tradeable asset or property right. "Assetization" might be a more appropriate term for what I have in mind; but since this sounds even worse than "propertization," I will stick with the latter. On a related phenomenon, see TAMAR FRANKEL, *SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSETS POOLS, AND ASSET-BACKED SECURITIES* (1991).

supplies a product, but that product is fishing techniques instead of fish. By limiting the licensees' ability to retransfer the techniques, the fisherman eliminates the downside of transferring techniques instead of goods. In addition, when a buyer is better positioned to invest in boats and fish processing equipment, the sale of techniques will increase efficiency all around. Instead of forcing the fishing expert to invest in these assets to ensure a return on his or her know-how, the expert can sever that know-how and sell it to those who already possess these assets.¹³ In a world in which fishing techniques are subject to a property right, firms that buy their own fishing fleets and hire fishing consultants may turn out to be more profitable than those that stick to the old production arrangement.¹⁴ In this respect, intellectual property rights can be seen as a mechanism for lowering the costs of a certain type of exchange and thereby facilitating a finer division of "intellectual labor."

One can view the property right in fishing techniques as a substitute for fishing services. The property right in the techniques allows the owner of the right to transfer the techniques themselves — as opposed to fish or fishing services. In some sense the essence of the transaction has not really changed: the fisherman is still selling an input into the firm's production process. But the property right in techniques, together with whatever business strategy the owner of the right employs to exploit it, enhances the profit potential of a business based on the licensing of techniques, which in turn makes it more likely that the relevant industry structure will include at least some firms that specialize in the sale of techniques. If so, the property right in fishing techniques and the firms that come to specialize in the sale of such techniques contribute to the enhanced production potential of the industry. This little story thus reveals that the property right — or rather, the transaction it enables — may actually create value in some cases.

13. When the law poorly specifies property rights, however, experts should invest in their own assets. See David J. Teece, *Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 RES. POLY. 285, 294 (1986) (observing that firms often invest in cospecific assets as a way of capturing returns from research and development expenses). One way of characterizing the point made in the text is to say that when the R&D performer is not in the best position to produce these cospecific assets, strengthening intellectual property rights can increase efficiency by making it possible to dis-aggregate production of R&D from production of these cospecific assets. See *infra* notes 14-16 and accompanying text.

14. The economist George Stigler is associated with the view that economic growth inevitably brings with it an increase in firm specialization, even with regards to research and development. This suggests the inevitability of specialized production of fishing techniques. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 197-205 (1975) (discussing Stigler's views on the organization of research activities, especially the tendency to specialize). Note that business historian Alfred Chandler has argued that firm specialization and economic growth are codetermined, and thus to some extent specialization causes growth. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 15-36 (1977).

In addition, once intellectual property rights are introduced into a transactional setting, they open up the possibility for another type of exchange altogether. In some cases, the property right is actually the motivating force behind the transaction. Just as the property right in fishing techniques creates a market for those techniques *qua* techniques, intellectual property rights create the possibility for certain transactions that would not otherwise be feasible. These transactions, in the aggregate, comprise new markets. In this sense, the introduction of intellectual property rights — in some cases at least — offers the potential to affect the organization of production in industries that commonly employ techniques, know-how, and the like. Ideally, these rights can even make existing commerce more efficient by increasing the viability of firms that specialize in the creation of techniques.

Of course, simply creating property rights does not guarantee such benign effects. If other factors — especially the transaction costs of integrating intangible inputs such as techniques into the production process¹⁵ — militate against the success of such specialized firms, property rights alone will not make them viable. Furthermore, if property rights create more transaction costs than they eliminate,¹⁶ they will soon become associated with extortion and rent-seeking, rather than with enhanced production possibilities. But property rights do make feasible some experiments in specialization, as well as other organizational innovations. As the cases in the Alces and See volume suggest, some of these experiments work. As long as this continues to happen, and as long as intellectual property rights are part of the experimental mix, firms will continue to generate new types of intellectual property-related transactions and the organizational forms that grow out of them.

15. See WILLIAMSON, *supra* note 14, at 176-207 (chapter entitled "Market Structure in Relation to Technical and Organizational Innovation"). Williamson argues:

At least occasionally, vertical integration backward into research is the most attractive way to overcome the dilemma posed when high-risk programs are to be performed: the sponsoring firm (agency) assumes the risk itself and assigns the task to an internal research group. It essentially writes a cost-plus contract for *internal* development. That this does not have the debilitating incentive consequences that often result when similar contracts are given to outside developers is attributable to differences in the incentive and compliance machinery: managers are employees, rather than "inside contractors" . . . and thus are unable to appropriate individual profit streams; also the internal compliance machinery to which the firm (agency) has access is vastly superior to and more delicately conceived than the policing machinery that prevails between organizations. Internal organization thus arises in part because of its superior properties in moral hazard respects.

Id. at 203-04.

16. On this, see Merges, *supra* note 4.

B. *Quasi-Integration, Dis-Integration, and Reintegration*

The fishing technique example also illustrates the possibility of other forms of economic production. One of these has come to be called "quasi-integration." This label signifies production that is midway between complete integration and total dis-integration. The classic case of complete integration is the manufacturer of automobiles that owns the supply of all of its inputs: everything from iron mines to rubber plantations to a work force entirely composed of full-time employees. The Ford Company of the Model T era comes to mind.¹⁷ The traditional rationale for this extensive integration is that managerial control over the entire production process is more efficient than the alternative of acquiring each input via a market transaction.

An example of complete dis-integration is harder to imagine, but consider the production of birthday cakes in a town in which there are only small specialty stores and there is no bakery. In such a town one who wishes to make a cake will have to get eggs and milk and butter from the dairy store, wheat and sugar from the grocer, candles from the hardware store, and perhaps other ingredients from other specialty stores. Then the baker of the cakes will sell them in a market transaction to those retail stores that wish to resell them. This is what is meant by dis-integrated production: each input into the final product, as well as the final product itself, must be purchased through an arm's-length market transaction.

Now consider an example of quasi-integration. Imagine a "firm" in the software industry that is composed strictly of independent consultants, none of whom are employees, working on leased computers and hired by clients on a contract basis, to produce specified types of computer programs for a specified fee. This firm assembles its components strictly by contract, on a limited-purpose, limited-time basis. In some sense, the firm is nothing but a collection of contracts organized around a specific task. Note that despite the contracted-in nature of the inputs, the ongoing nature of the task requires some management of the firm. This management is what differentiates this quasi-integration form from the case of dis-integration discussed earlier. In truly dis-integrated production, the transactions are discrete "spot market" contracts; in quasi-integrated production, the consultants assemble the inputs by contract, but they combine the inputs into an ongoing production process. The consultants perform the contracts over a period of time, rather than instantaneously in a spot-market transfer. In the lexicon of

17. See ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 208 (1990).

contracting, quasi-integration involves relational, rather than one-shot, or discrete, contracts.

With this as background, we return to the story of the fishing consultant. One can easily imagine a two-pronged agreement between the fishing consultant and the firm. The consultant agrees to: (i) teach members of the firm how to fish; and (ii) transfer her property right in fishing techniques to the firm. In exchange, imagine that the fishing consultant receives a portion of her compensation in the form of equity issued by the other party. This is an example of quasi-integration. It is certainly not an example of integration: the fishing consultant contracts with the firm rather than becoming an employee. It is not really an example of dis-integration, either, however; though the input supplied by the consultant is transferred via contract, the consultant helps implement the technique and disseminate it throughout the firm over time, and the equity compensation gives the consultant an ongoing interest in the activities of the firm.

We can see in examining these various contracts that intellectual property rights can enhance market transfers not only by propertizing labor, as described earlier, but also by facilitating quasi-integration. In the fishing example, this took the form of joining the property right with a service component. To the extent that the intellectual property right makes the transaction more feasible, it contributes to the desirability of the quasi-integrated organizational form. This is precisely the connection that I argue lies behind many of the transactions that Alces and See catalogue in their book.¹⁸

18. Among the organizational forms represented in the cases Alces and See discuss are: (1) outsourcing of manufacturing, e.g., pp. 377-79 (discussing Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91, 93 (3d Cir. 1991) (stating that plaintiff was a value-added retailer or VAR)); p. 438 (discussing Burkert v. Petrol Plus of Naugatuck, Inc., 579 A.2d 26, 29 (Conn. 1990) (providing an excellent illustration of outsourcing because the trademark owner in the case, General Motors, did not even know the formula for making its trademarked transmission fluid; the formula was a trade secret of one of the outside manufacturers)); pp. 487-90 (discussing Platt & Munk Co. v. Republic Graphics, 315 F.2d 847 (2d Cir. 1963)); pp. 559-60 (discussing Harper & Assocs. v. Printers, Inc., 730 P.2d 733 (Wash. Ct. App. 1986) (involving a printing contract for copyrighted poster)); p. 599 (discussing Log Plastics Prods., Inc. v. Robert Linkletter Assocs., No. 87-C3482, 1988 U.S. Dist. LEXIS 971 (S.D.N.Y. Jan. 29, 1988) (finding outsourcing manufacturing when a licensor licensed patent and proprietary know-how to a manufacturer)); pp. 605-06 (discussing Burberrys (Wholesale) Ltd. v. After Six Inc., 471 N.Y.S.2d 235 (Sup. Ct. 1984)); (2) franchising, e.g., p. 366 (discussing Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285 (9th Cir. 1987) (franchise termination)); pp. 534-35 (discussing Amoco Oil Co. v. D.Z. Enterprises, Inc., 607 F. Supp. 595 (E.D.N.Y. 1985) (involving cure of trademark infringement by a franchisee)); (3) consulting contracts, e.g., pp. 539-42 (discussing H.M. Stickle Co. v. Heublein, Inc., 716 F.2d 1550 (Fed. Cir. 1983) (involving an outsourcing manufacturer whose source hired design consultants)); (4) "image licensing," in other words, publicity and promotion, e.g., pp. 543-44 (discussing Moxie Indus., Inc. v. Hayden, 677 F. Supp. 187 (S.D.N.Y. 1988), *modified*, 1988 U.S. Dist. LEXIS 1174 (S.D.N.Y. Feb. 9, 1988)); (5) publishing and distribution arrangements, e.g., pp. 351-52 (discussing Platinum Record Co. v. Lucasfilm, Ltd., 566 F. Supp. 226 (D.N.J. 1983) (involving a music license for use in a movie)); pp. 546-47 (discussing Dodd, Mead & Co., Inc. v. Lilienthal, 514 F. Supp. 105 (S.D.N.Y. 1981) (involving a book-publishing con-

Quasi-integration takes advantage of the propretization of labor referred to earlier. For the sake of completeness, however, it seems appropriate to consider briefly how intellectual property rights can also facilitate complete dis-integration. Take as an example the organization of production in the music industry.¹⁹ A firm that sells musical recordings need not employ the musicians or the composer, and indeed the artist herself can arrange for the actual production of the music as she sees fit. Artists license their rights to the resulting musical compositions and recordings, and they usually transfer the license and the master tapes to the sales firm. Because a large record label will have entered into such transactions with hundreds of musicians, almost none of whom are employees, the production of music is what I would describe as dis-integrated production.

Indeed, the dis-integrated nature of music production requires the integration of a large number of musical properties in order to assemble a formidable music portfolio.²⁰ Although to some extent the same logic that leads firms in other industries to integrate vertically is present here, this approach rarely involves actually hiring creators as employees. There seems to be broad agreement that the nature of creative work is incompatible with employee status. What the firm integrates, then, is property rights, rather than the actual services of the creators. These transactions would be much more expensive without some way of easily dividing up the output stream of a creator into discrete assets — in other words, without formal intellectual property rights.

In an alternative organizational form, holders of intellectual property rights covering certain works license those rights to a central institution, which then typically issues blanket licenses.²¹ The

tract)); pp. 554-56 (discussing *Record Club of Am., Inc. v. United Artists Records, Inc.*, 643 F. Supp. 925 (S.D.N.Y. 1986) (involving record distribution)); pp. 603-05 (discussing *Freund v. Washington Square Press, Inc.*, 343 N.Y.S.2d 401 (App. Div. 1973), *modified*, 314 N.E.2d 419 (N.Y. 1974) (involving a book-publishing contract)); and (6) joint ventures, e.g., pp. 622-25 (discussing *Behr Venture Partners, Ltd. — 1983 v. Bedford Computer Corp.* (*In re Bedford Computer Corp.*), 62 B.R. 555 (Bankr. D.N.H. 1986) (involving a joint venture in the computer software industry)).

19. Alces and See cite several music industry cases in which the division of productive labor is an important factor. See, e.g., pp. 479-80 (discussing *Kamikaze Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 57 (S.D.N.Y. 1981) (involving a music publishing contract case)); pp. 554-56 (discussing *Record Club of Am., Inc. v. United Artists Records, Inc.*, 643 F. Supp. 925 (S.D.N.Y. 1986) (involving a record distribution agreement)). I spell out my views on the organization of production in the music industry and the role of intellectual property rights and collective rights organizations in more detail in Robert P. Merges, *Contracting into Liability Rules: Institutions Supporting Transactions in Intellectual Property Rights* (Oct.-Nov. 1994) (working paper, on file with author).

20. For example, Warner/Chappell, a large music publishing company, is said to hold over 700,000 copyrights to musical compositions. DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS: INTERNATIONAL PRACTICES, PROCEDURES, AND ORGANIZATIONS* 198 (1993).

21. Such central institutions are among a handful of distinctive organizations in the intellectual property-intensive industries. See Merges, *supra* note 19.

right holders remain independent, however. The best example of this phenomenon comes in the market for music performance rights, in which the American Society of Authors, Composers and Publishers and rival organizations play this integrating role. The key here is that these institutions serve to integrate a large pool of properties while allowing musicians to remain independent from the firms that package and disseminate music on a large scale.

C. *A Case Study in Quasi-Integration: Joint Ventures*

Joint ventures among two or more firms are increasingly popular.²² They appear to be at the heart of some of the cases that Alces and See discuss.²³ Joint ventures proliferate as firms recognize their advantages. Joint ventures (i) compensate for in-house weaknesses or technological gaps; (ii) fill out product lines and portfolios; (iii) position the firm to enter lucrative new markets; and, most important, (iv) reduce the costs, risks, and time required to develop new products and process technologies.²⁴ Indeed, David Teece has written that contractual governance structures such as joint ventures may come to displace the "managerial capitalism" of the large, integrated firm that Alfred Chandler argues lies at the heart of economic growth in the twentieth century. Teece says:

[Today's] challenges are somewhat different, and the organizational forms suited to each may vary to some degree, and may also differ from those that were effective in the [era studied by Chandler, i.e., the late nineteenth century to the mid-twentieth]. . . .

. . . .

. . . Perhaps it is because classical economies of scale and the unit price advantages can be accessed contractually in today's markets. Flexible specialization and contracting may today yield greater advantages than economies of scale and scope generated internally.²⁵

22. See KATHRYN RUDIE HARRIGAN, *MANAGING FOR JOINT VENTURE SUCCESS* (1986); Jeremy Main, *The Winning Organization*, *FORTUNE*, Sept. 26, 1988, at 50, 52 ("Kathryn Harrigan, a Columbia University business professor, says the number of such ventures [joint ventures, partnerships, or other agreements] began to pick up in the early Eighties, from a growth rate of some 6% a year to around 22%. She looks for much faster growth in the next few years."); JOHN P. KARALIS, *INTERNATIONAL JOINT VENTURES* § 1.1 (1992).

23. See, e.g., pp. 622-24 (discussing Behr Venture Partners, Ltd. — 1983 v. Bedford Computer Corp. (*In re Bedford Computer Corp.*), 62 B.R. 555 (Bankr. D.N.H. 1986)).

24. COMMITTEE ON JAPAN, NATIONAL RESEARCH COUNCIL, *U.S.-JAPAN STRATEGIC ALLIANCES IN THE SEMICONDUCTOR INDUSTRY: TECHNOLOGY TRANSFER, COMPETITION, AND PUBLIC POLICY* 17 (1992); see also Morton I. Kamien et al., *Research Joint Ventures and R&D Cartels*, 82 *AM. ECON. REV.* 1293 (1992) (describing a formal model of research joint ventures).

25. David J. Teece, *The Dynamics of Industrial Capitalism: Perspectives on Alfred Chandler's Scale and Scope*, 31 *J. ECON. LIT.* 199, 216-18 (1993) (citation omitted).

Whatever the motivations behind the growth in joint ventures, and despite their potential problems,²⁶ I am interested in the role of intellectual property rights in facilitating their formation. As explained earlier, I — along with Alces and See²⁷ — believe the same factors are at work in the growth of a wide range of increasingly common organizational forms,²⁸ and that many of the cases discussed in the Alces and See volume grow out of transactions connected to these organizations.

The literature directed at joint venture organizers features helpful pointers about the use of intellectual property. To begin with, it emphasizes the importance of contractual restrictions on the venture's use of technology licensed in from the partners. For example, one book aimed at managers states that

[Joint venturers] can use exclusive licensing provisions, right-of-first refusal provisions, noncompetition agreements, and other contractual provisions to protect knowledge from disseminating to unauthorized third parties. . . .

. . . [T]echnology licenses that are based on control of patents often provide that certain information cannot be passed on or used in another application (or for another purpose) without the owner's explicit permission.²⁹

I would argue that intellectual property rights are more than just another issue the joint venture agreement must deal with. Seen more broadly, these rights facilitate the very formation of the venture itself, because they codify discrete quanta of technology that the partners license into the venture, making it easier to keep track of which partner contributed the technology.

Likewise, intellectual property rights help the partners manage the output of the venture. First, these rights represent real assets

26. See, e.g., Jennifer F. Reinganum, *The Timing of Innovation: Research, Development, and Diffusion*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 849, 851 (Richard Schmalensee & Robert D. Willig eds., 1989) (summarizing models of research joint ventures, and concluding that a "robust" finding is that "firms who are not members of the research joint venture are left worse off as a result of innovation").

27. "Whatever the label, there is in its ascendancy a kind of property called 'intellectual property.' It lies at the heart of the 'computer revolution,' the 'franchising boom,' the 'communication explosion,' and virtually every other major advance in late twentieth-century America that is of economic significance." P. 6.

28. See *supra* sections II.A-B. For more on the growing diversity of organizational forms in U.S. industries, see Michael L. Gerlach & James R. Lincoln, *The Organization of Business Networks in the United States and Japan*, in NETWORKS AND ORGANIZATIONS 491, 495-96 (Nitin Nohria & Robert G. Eccles eds., 1992):

[N]etwork forms appear to be proliferating as corporate downsizing and streamlining, often in response to competitive challenges from Japan and Europe, have encouraged joint ventures, subcontracting, industry consortia such as Sematech, and other cooperative arrangements among firms. Finally, new manufacturing technologies and production systems have led to stronger bonds and closer working relationships between manufacturers and subcontractors.

Id.

29. HARRIGAN, *supra* note 22, at 148.

that the partners can allocate if they wind up the venture. This undoubtedly saves a good deal of time and energy because the parties need not, at the time of dissolution, specify in detail all the research results produced by the venture during its life. Second, these rights organize relations between the venture and its "parents" by providing a discrete asset that the venture can license or assign. Again, this saves the costs of specifying exactly what technology the venture has created and exactly what rights the venture will have. The venture's intellectual property rights cover the technology, and those rights define the limits of the venture's rights with respect to its technology. The venture would have to specify all of this at length by contract in the absence of these rights.

In light of this it is not surprising that the empirical data, though sketchy, suggest that intellectual property rights play a significant role in many joint ventures. I have been unable to locate rigorous empirical data on the prevalence of such rights in joint ventures.³⁰ Nonetheless, it is clear from the legal practitioner literature,³¹ the available quasi-armchair data,³² and reports of litigated cases,³³ that

30. I have, however, searched the NEXIS database for all periodical articles on joint ventures involving research and technology between 1977 and 1993. I found that 269 explicitly mentioned patents, and 1058 did not. Although it is by no means clear that the 1058 did not involve patents in some form or another, the large number of articles that specifically refer to patents is at least some indication that this form of intellectual property right plays a significant role in joint ventures.

31. See, e.g., KARALIS, *supra* note 22, § 2.25, at 64, 67-68:

If a joint venture engages primarily in research and development, its output will be primarily technology. This technology may include patentable inventions, copyrightable works or trade secrets. In addition to creating its own technology, the joint venture may improve upon technology transferred to it by one or more of its shareholders. It may also acquire, and improve upon, technology created by others.

Rights in this technology are acquired by license agreement. . . .

Id. (footnotes omitted); see also John P. Sinnott, *Selection Strategy for Foreign Patent Application Filing*, in GLOBAL INTELLECTUAL PROPERTY SERIES 1992: PRACTICAL STRATEGIES — PATENT (Practising Law Institute 1992). Sinnott adds some interesting points:

The character of the patent portfolio, moreover, should reflect the foreign business format that is likely to be chosen. Illustratively, the number and character of the patents in a license portfolio could be significantly different from the patents in a joint venture portfolio. A joint venture portfolio probably would be much more extensive and be weighted more toward process patent rights than the patents required for a less complicated product patent license program. Certainly, the United States concern that wants to enter, let us say, a joint venture in some country will be in a superior bargaining position if a large and relevant portfolio of patents can be presented to the prospective foreign business associate and to the host government's financial authorities who so frequently have the power to authorize royalty payments.

Id. at 29-30.

32. See *supra* note 31; see also MARK CASSON, *THE FIRM AND THE MARKET: STUDIES ON MULTINATIONAL ENTERPRISE AND THE SCOPE OF THE FIRM* 137-41 (1987) (describing the example of Pilkington's patented glass technology, which has been diffused internationally by means of joint ventures).

33. In a recent search I found more than ten cases involving joint ventures and intellectual property since 1980. See, e.g., *Hockerson-Halberstadt, Inc. v. Nike, Inc.*, 779 F. Supp. 49 (E.D. La. 1991) (refusing to dismiss suit, despite defendant's argument that plaintiff had not formed its joint venture when defendant's acts of infringement occurred, because the inven-

intellectual property is important in many joint ventures, especially those with a research and development component.

D. *Further Refinements: The "Pure" Market for Rights*

I will return briefly to the fishing example to illustrate an additional class of intellectual property transactions that Alces and See do not treat explicitly but that are nonetheless important both practically and theoretically. Imagine that the fishing techniques pioneered by the consultant in our story have long since passed into wide circulation. If the fisherman retains a property right in the techniques, others who wish to use them must still acquire the fisherman's permission. The difference between this and the transactions discussed earlier is that it is purely a transaction in legal rights.³⁴ As before, the fisherman is selling fishing techniques, not fish. Because the buyers know the techniques, however, they do not need the fisherman to teach them how to use those techniques. The real purpose of the transaction, then, is to remove the threat of a lawsuit. The fisherman, in other words, is waiving his right to sue for infringement of his property right — for a price, of course.

One reason to pay attention to the market for clearances and permissions is that this market is in some sense entirely a creature of legal rights. Unlike the fisherman's consulting agreement discussed earlier, the only thing that changes hands in the market for fishing technique permissions is a legal immunity from infringement litigation. Thus it is clear that when a licensee enters into such a transaction, she is in effect buying what might be termed "an invisible input" for her production process. The only effect of the license is to remove the risk of a lawsuit.³⁵

tors who assigned all their intellectual property to the joint venture specified that it was to have the right to sue for past infringements).

34. Although Alces and See do hint at the appropriateness of these transactions, they do not analyze them as a distinct class:

Answers to questions like "How do we hire a researcher to develop a product and keep for ourselves the patent on that product?" are of little help when the question is "How can we most fully exploit the concept of a children's cartoon character?" Both are fundamentally business questions. Both require legal answers. But the second question implicates commercial transactions in a way that the first does not.

P. 7.

35. Thus what I call the market for "pure" legal rights is distinct from the market for information that others have described. See, e.g., Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, L. & CONTEMP. PROBS., Summer 1992, at 103. Although Professor Nimmer, who has almost single-handedly pushed "intangible contracts" on to the U.C.C. policy agenda, appears at times to understand the difference between information contracts — those covering data, compilations, and the like — and "pure" intellectual property transactions, at other times he blurs the distinction:

Software and other intangibles contracts fit a standard of importance gauged by economic significance under any measure. The *information industry* accounts for over two percent of the gross national product of this country and affects a broad spectrum of commercial and individual interests. Ongoing developments in *information technology*

In theory, it makes no difference that the licensee was already familiar with the fisherman's technique. In many cases legal protection of the technique does not, after all, turn on whether someone learned of it directly from its creator. Instead, the inquiry centers around whether the technique used by the prospective licensee is in fact the same as, or legally similar to, that of the rightholder or licensor. As recent scholarship has made clear, the theory behind intellectual property rights demands compensation when the creator of a work bestows a substantial benefit on a subsequent user.³⁶ Determining the substantiality of the benefit is of course a major focus of intellectual property doctrine. The temporal limitations on copyrights and patents provide a way to cut off the compensation for beneficial effects bestowed on later users. The requirements of content similarity have the same effect — for example, “substantial similarity” in copyright law and the “doctrine of equivalents” in patent law — ensure that the benefit bestowed is not so attenuated, or so transformed in the user's context, that it is unfair to require compensation.

Two examples make this discussion more concrete. First, consider a copyrighted song that has passed into the general consciousness — for example, “Happy Birthday.” No one needs to deal with the composer of the song, or his estate or representatives, to learn

promise to continue the exponential growth of that field. *Technology (intangibles) contracts* underlie virtually all modern areas of commerce driving our present economy. Virtually every company uses one or more software products. *The copyright and related industries* are burgeoning and depend substantially on intangibles-based transactions.

Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1369 (1994) (emphasis added) (footnote omitted). Nimmer in this passage blurs the distinction between two types of nonphysical inputs I described — information, which makes a discernable physical difference in the product, and “invisible” inputs based on legal rights, which only make legal difference in the product. For example, a real estate agent who subscribes to a computerized listing service has entered into an information transaction; the additional exposure the real estate agent gains for her listed properties is a physical addition to the services she offers prospective buyers. Contrast this with a pure permission or clearance transaction, for instance, when an artist pays royalties to the Walt Disney Company for permission to include pictures of Disney characters in a children's book. Because the artist presumably knows the characters well, she does not need any guidance from Disney on how to draw them. The clearance transaction, then, only makes a legal difference to the buyer of the book.

Both nonphysical inputs add to the value of the final product, but they do so in different ways. In the case of information, collecting it and disseminating it in usable form is a valuable economic activity, which often makes the information the subject of a transaction. In the case of the pure legal right, the law creates the value of the asset, in the sense that without a legal rule no user would enter into a “pure” intellectual property license as I have defined it. In other words, gathering information creates value, and a transaction follows; “pure” intellectual property, by contrast, owes its value to the fact of legal enforceability, and transactions follow from this.

36. See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1038-39, 1043-44 (1990) (reviewing PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (1989)). I have explained the central problems that this analysis presents from a transactional perspective, with reference to the Coase theorem, in Merges, *supra* note 4, at 2656-64.

it. A transaction is only necessary to buy that invisible input — the copyright license — that authorizes one to use the song.

Next, consider a patent on a basic technology that is well known in the scientific and engineering community — for example, basic laser technology. Assume further that the patentee of this basic patent, as is common, filed a patent application amid a flurry of pioneering activity by several teams of researchers, and that the ensuing priority tangle took several decades to straighten out. By the time the patentee has won the various priority contests and received the basic patent, most researchers with any use for lasers know how they work and use them regularly. Of course, because of this, the technology has diffused widely among commercial applications as well, and anyone can find it in many products available on the market. Under such a scenario, when the patentee, having finally won the patent, opens licensing negotiations with all those who use lasers, the resulting transactions will fit my description of the purchase of invisible inputs. No buyers will need the patentee to instruct them on how to make or use lasers. The patentee simply will be collecting royalties for activities people have been carrying on for some time. Many of the activities will bear only slight resemblance to the pioneering efforts of the patentee, the technology having advanced significantly during the period when the patentee was involved in the priority contests.

The examples illustrate an endpoint on the spectrum of transactions based on intellectual property. This endpoint concerns what I term “pure” rights transactions — deals in which the only purpose is the exchange of legal rights. Because these transactions involve only legal permissions or clearances, and because such rights are of course not apparent on the face of the final product — for example, the song sung in a restaurant or an advanced laser incorporated into a consumer electronics product — I call them invisible inputs.

The characteristics of markets for “invisible inputs” put them outside the boundaries that Alces and See set for themselves in their book. Their book deals with transactions in goods that are covered by some form of intellectual property right. In these standard commercial transactions, intellectual property is linked with an underlying asset — for example, maps or raincoats.³⁷ Even in the earlier example of the fishing consultant, the property right in fishing techniques was transferred together with know-how or expertise in the consulting arrangement. What ties these examples together is the presence of an additional asset with which the intellectual property is bundled for transfer: standard goods, in the cases Alces and See discuss; and know-how or information, in the

37. The reference is to the *Real Estate Data* and *Burberrys* cases cited *supra* notes 4, 11, 18.

fishing example. These transactions are fundamentally different from the exchange of "pure" rights, as can be seen from the birthday song and laser examples.

Despite this fundamental difference, I believe a book like Alces and See's ought to consider the full realm of intellectual property transactions, including those involving "pure" rights, unbundled from any goods. Not only are the conceptual issues closely related,³⁸ but from a practitioner's standpoint, there may be occasions when one must choose among a variety of intellectual property-related transactions. For example, if a patent license is at issue, one may consider a naked license, or a license with know-how, or a license coupled with an outsourcing or subcontracting component. It would be useful in such circumstances to have a single volume on the shelf to give guidance for each alternative and, ideally, to help choose the appropriate one. I would lobby Alces and See to make the second edition of their book just such a volume.

E. *Policy Implications: Changing Property Rights to Affect Industry Structure*

I have argued so far that the transactions that Alces and See document reveal some interesting patterns in the use of intellectual property rights to structure commercial production. Before moving on to consider some of these transactions — and their doctrinal nuances — in more depth, I want to quickly touch on a policy matter implicated by these observations. If, as I have argued, intellec-

38. I have tried to show in this section, and earlier in this review, that intellectual property rights have unique attributes that can best be understood in a transactional setting. From a theoretical point of view, it is interesting that the traditional economic models assume that actors exchange intellectual property rights only in pure, in other words, unbundled, form. The paradox is that, because of the difficulty of tracing the source of an idea, valuing it, and determining a cutoff point beyond which an agreement will not require compensation for a benefit, the pure market is the most troublesome one. This may well explain why licensors so often join intellectual property rights to some tangible product, or at least to know-how or other transferrable assets of the licensor. These additional components may make it easier to value the package of benefits that the licensor is indeed bestowing. In some cases one might best describe this bundling as a kicker or sweetener — an additional, though minor, element of value in a multicomponent transaction. One corollary is that manufacturers sometimes consider licensors whose primary business is the issuance of pure or naked licenses as marginal contributors to the advancement of an industry, and sometimes even as mere extortionists. Cf. Edmund L. Andrews, *Inventor Wins Hot Wheels Case*, N.Y. TIMES, Nov. 11, 1989, at 35 (describing lawsuit by prolific inventor Jerome Lemelson, who is widely known for asserting broad but vague patents against entire industries). Economic theorists for the most part have yet to catch on to this. *But see* Teece, *supra* note 13. On "bundling," see Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 31, 41-43 (1969) (describing vertical integration and bundling of hard-to-police commodities with others that are not as "methods which will arise in the market and which will lower the required police cost"). On property rights theory in general, see YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (1989). The "conceptual relationship" depends on the idea that property rights can be enhanced by bundling them with other goods in a single transaction. This is the essence of the article written by Teece, *supra* note 13.

tual property rights are finding their way into more transactions, and if they are helping to further the spread of certain contract-based organizational forms for the ordering of production, the tantalizing possibility exists that policymakers might actually influence the profitability of these forms, and thereby indirectly influence industry structure in some cases.

Although this review is not the place for a full-blown exploration of these matters, a short discussion of a recent policy change in the Japanese intellectual property landscape may hint at some of the interesting issues. The Japanese software industry is an anomaly. In the United States especially, but also in Europe, the sale of prepackaged software — software available as a standardized, retail product, such as spreadsheets or word processing programs — far outstrips the sale of custom-programmed software.³⁹ The prepackaged segment of the world market has grown faster than custom programming services, and it is expected to continue to do so.⁴⁰ Consequently, Japanese officials have tried in recent years to stimulate the prepackaged segment, or at least to push the custom-programmed segment to evolve in this direction.⁴¹

Many Japanese software firms had their origins as divisions of large companies, and many others originated within the supportive but semiclosed environment of the *keiretsu* structure.⁴² In this environment, formal, statutory intellectual property rights are less important because most transactions are essentially contractual. Sellers of software rely on contractual safeguards — and to some extent, implicit understandings with fellow *keiretsu* members — rather than statutory protection. The lack of copyright protection both results from the prevalence of this structure and contributes to its maintenance.

If recent statements are any indication, Japanese policymakers may be attempting to change this structure. Their goal is to encourage the emergence of freestanding software firms, in part through strengthened intellectual property rights.⁴³ Japan adopted

39. See Merges, *supra* note 3, at 3-4.

40. *Id.* at 4.

41. *Id.* at 20.

42. For a description of Japanese *keiretsu*, see Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 *YALE L.J.* 871, 882-95 (1993).

43. See *Japanese Panel to Draft Guidelines for Software Protection*, 5 *J. PROPRIETARY RTS.* 44 (1993):

[A] subcommittee of the Industrial Structure Council, advisory panel to the Minister of International Trade and Industry, determined to draft guidelines to urge changes to the practices of software businesses in an effort to better protect software copyrights and to encourage new domestic software development. . . . Under prevailing Japanese practices, software is often treated as a service accompanying computer hardware and there is considerable concern that if software is continued to be treated lightly, the software industry will not become viable as an industry independent from the hardware industry.

copyright protection for software in 1985.⁴⁴ In addition, a government-industry committee run by the Ministry of International Trade and Industry (MITI) has recommended a series of changes in standard contracting practices between custom software firms and their clients, including explicit acknowledgment of the software firm's right to reuse the software code it writes as part of a project for a single client. These steps, designed to strengthen property rights over software, may be working; Japan has seen the founding of a significant number of independent software firms in the past ten years.⁴⁵

To the extent they associate freestanding software firms with smaller, more specialized organizations, Japanese policymakers seem to believe that the availability of enforceable intellectual property rights opens up a wider range of *choice* regarding the organizational form in which to house software production assets. Obviously, creating or strengthening such rights will not obviate all the advantages of internalized software production in all circumstances. Formal, statutory intellectual property rights do not always add enough of an appropriability premium, compared to the alternative appropriability mechanisms, to justify complete externalization of the software function in every case. Stronger property rights simply make it more feasible in the marginal case to establish a small, freestanding software firm.

This leads to a more general observation. As governments have strengthened intellectual property rights in recent years, a concomitant growth in organizational diversity has occurred. I suggest that this is not a coincidence. The availability of stronger protection bears significantly on the choice of organizational form. In line with Douglass North, however, I hasten to stress that stronger protection does not follow inevitably from prevailing economic conditions.⁴⁶ Specification of intellectual property rights is a matter of policy choice, not a spontaneously generated reaction to new market conditions. Although Harold Demsetz is undoubtedly correct that in the absence of economic conditions that make increased specification worthwhile no one would bother,⁴⁷ it does not necessarily follow that the *presence* of such conditions makes the new specification of rights automatic. In truth, we will seldom know

Id. at 44 (emphasis added).

44. See Yoshikazu Takaishi, *The Perspectives from Japan on Software Protection*, 1 SOFTWARE LAW JOURNAL 187, 188-207 (1986) (analyzing legal protection of computer software under pre- and post-1985 Japanese copyright law).

45. Merges, *supra* note 3, at 22.

46. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 121-22 (1990).

47. HAROLD DEMSETZ, *The Exchange and Enforcement of Property Rights, in OWNERSHIP, CONTROL AND THE FIRM* 31 (1988); see also BARZEL, *supra* note 38.

precisely when the conditions necessary to support a new configuration of rights have actually coalesced. But what we do know is that, once the legal and political spheres reconfigure the property rights regime, this will set in motion a series of second-order responses. Some, as North predicts and the Japanese software example tends to show, are exactly those changes that interest groups pushing for the new property rights regime had contemplated. The upshot is that tweaking the intellectual property rights regime in an industry encourages an industry structure with more organizational diversity, including more small, entrepreneurial software firms. One attribute of these small firms is that they engage in a greater number of arm's-length transactions, compared to vertically integrated software producing divisions of large companies. Consequently, we can say that stronger property rights lead indirectly to a higher volume of transactions involving those rights. As I have described it, a stronger intellectual property right lowers the costs of exchanging the asset covered by the right, making such exchanges more feasible and thus encouraging the emergence of firms that specialize in producing the asset.⁴⁸ Furthermore, what is true for the software industry ought also to be true for other industries. Thus the higher transactional volume we observe in a number of intellectual property-intensive industries — for example, biotechnology — may well follow from the strengthening of rights in those industries.

To return to the point of all this armchair theorizing, I would argue that the growing volume of cases at the confluence of intellectual property and commercial transactions stems at least in part from the trend in recent years toward stronger rights for intellectual creations. If this is so, it is a useful bit of information. It has the potential to do more than partially explain the origin of the cases Alces and See discuss, itself a worthwhile goal. The important effects of stronger intellectual property rights suggest that any discussion of the doctrine governing intellectual property transactions should be conducted with a view to this changing transactional setting. As but one example of why, note that the value of intellectual property in the hands of a firm that must exchange it via arm's-length transfer depends critically on contract law. To such a firm,

48. Of course, this holds true only if the gains from specialization are outweighed by the increased transaction costs of more arm's-length exchange. Note of course that transaction costs are present even in vertically integrated production; only if they are much higher, compared to the gains from specialization, will that specialization appear too costly. See HAROLD DEMSETZ, *The Theory of the Firm Revisited*, in OWNERSHIP, CONTROL AND THE FIRM, *supra* note 47, at 144 (discussing the presence of transaction costs inside firms). These are detailed empirical questions, to be answered in the context of each particular industry of interest. My main goal is to simply spell out a theoretical relationship between the structure of property rights and the volume of arm's-length contracting, again as a way of accounting for the increased volume of the intellectual-property-related transactions at the root of the cases in the Alces and See volume.

the law of contract supplements and cooperates with the law governing the property right. A rule restricting certain transfers, or prohibiting certain conditions or requirements in a contract, subtracts from the total value of the property right just as much as a limitation on the right itself.⁴⁹ In a word, in a more highly transaction-intensive environment, transactional rules take on central importance. With this in mind, we turn to a discussion of Alces and See's treatment of just these transactional rules.

III. COMMERCIAL CODE ISSUES FOR INTELLECTUAL PROPERTY TRANSACTIONS

Having now surveyed this background, the rest of this review essay proceeds to a consideration of Alces and See's main subject matter on its own terms. First, I analyze Alces and See's book in depth, describing and critiquing its approach. Then, I examine the intersection of commercial law and intellectual property from a more theoretical perspective.

A. The Commercial Law of Intellectual Property

Alces and See take a straightforward approach to the discussion of the bread-and-butter issues, those at the intersection of the UCC and intellectual property law. After some introductory chapters outlining the basics of the major intellectual property rights (chs. 2-7), the authors interweave chapters on basic UCC concepts (chs. 8, 10, 12, 14, 16, 18) with parallel chapters describing how courts have applied these concepts to cases involving intellectual property (chs. 9, 11, 13, 15, 17, 19). This structure has the obvious advantage of familiarity, at least to the commercial law portion of the audience; the Code itself provides the organization, and the authors array the cases accordingly.

Nevertheless, partly as a consequence of this approach, the authors' efforts to synthesize commercial and intellectual property law fall short in a number of respects. First, and least important, they oversimplify some intellectual property issues, mostly in an attempt to be brief. Second, they cover too many cases with only a nominal intellectual property component and fail to grapple with the interaction of intellectual property and commercial law at a sufficiently deep level where intellectual property law does in fact challenge

49. Louis Kaplow provided the first in-depth explanation of how permissible licensing practices *combined with* intellectual property rights (in his article, patents) define the total package of rewards available to creators. Although Kaplow was concerned primarily with which terms should be permitted in bilateral license agreements under the antitrust laws, his paper suggested that the overall economic impact of intellectual property rights can be understood only when they are seen in their transactional context. See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984).

fundamental UCC principles. Third, they simply neglect to cover some issues at the intersection of the two fields that are extremely important, especially to practitioners.

As an intellectual property scholar, I found a number of issues to quibble with in the introductory chapters. For example, the authors try to summarize a complex area, the "first to invent" rule in patent law, by stating that "the invention generally will go to the first to conceive it" (p. 21). This is so oversimplified as to be quite misleading because they assume: (i) that the inventive activity occurred in the United States;⁵⁰ (ii) that the first conceiver also reduces to practice first, or at least is diligent in reducing to practice under the conditions that the patent code spells out;⁵¹ and (iii) that the first conceiver can meet the relevant evidentiary burden.⁵² If these criticisms sound picky, that is the point; generalizing in this area is so difficult as to be almost fruitless, and the best summary one can attempt is "this is complicated; see the cases."

Another example of an oversimplification is the authors' handling of the thorny issue of "combination patents" — patents claiming inventions comprised of new combinations of preexisting elements (pp. 46-48). After concluding that Supreme Court precedent has created a higher standard of patentability in these cases, the authors appropriately turn to the post-1982 Federal Circuit case law. They note that the Federal Circuit has in effect ignored the earlier Supreme Court opinions and now treats combination patents in the same way as other patents. My complaint is not that the authors have given the Federal Circuit coequal status on this issue, though I do believe that is a simmering issue that only the Supreme Court can bring to a boil. I simply would have liked to see a more frank statement that the older Supreme Court cases, whatever they say, are no longer the operative law in this area. The authors leave the mistaken impression that patent practitioners live in the shadow of doubt regarding the standard for combination patents; the truth is that the bar considers this a dead issue.

Despite minor quibbles such as these, however, I found that Alces and See's presentation was concise and clear. Especially once the authors turn to the heart of their project, commercial law cases with an intellectual property twist, their treatment of detailed UCC issues is surefooted and comprehensible. Commercial lawyers will certainly have no trouble following the authors through the Code cases.

50. See 35 U.S.C. § 104 (Supp. V 1993) (stating that inventors may introduce only U.S. inventive activity to prove conception and reduction to practice dates; inventors with foreign inventive activity must rely on their filing date).

51. See 35 U.S.C. § 102(g) (1988).

52. See generally ROBERT PATRICK MERGES, PATENT LAW AND POLICY 161-377 (1992).

Readers may wonder at times, however, where the “intellectual property” in the book’s title actually appears in the text. Many of the cases in the specific intellectual property chapters have a minimal — in some cases, almost nominal — intellectual property component.⁵³ More to the point, I often found that this component did not seem to affect the reasoning of the cases. In many of the cases said to illustrate application of a basic Code concept to the intellectual property context, I found the Code concept clearly enough but no evidence that the presence of the intellectual property issue changed anything about the case. Many of the cases are simply plain vanilla Code cases that only tangentially involve an intellectual property right.⁵⁴ This is not what one thinks of when the Preface to the book claims that the book will “effect a rapprochement of commercial law and intellectual property principles” (p. xxix).

Often the cases I am describing here involve franchise disputes, and obviously a trademark license is often an important component of a franchise agreement. The common trademark identifies the licensee-franchisee as a representative of the franchisor-licensor; in some sense, the institution of the franchise is impossible without the intellectual property right known as trademark.⁵⁵ Nonetheless — despite what the authors sometimes seem to think — simply because a trademark is present in the contractual relationship does not mean that every franchise dispute centers on an intellectual property issue.⁵⁶ There are a host of cases involving a myriad of

53. See, e.g., pp. 559-60 (discussing *Harper & Assocs. v. Printers, Inc.*, 730 P.2d 733 (Wash. Ct. App. 1986) (involving an impracticability defense in a contract for printing services; the “copyrighted” nature of artwork to be reproduced does not figure in case)); p. 602 (discussing *Maykuth v. Adolph Coors Co.*, 690 F.2d 689 (9th Cir. 1982) (holding that resale of beer without wrongful rejection raises a § 2-706 issue; the trademarked status of the beer was irrelevant to the determination of the case)); p. 358 (discussing *Thermal Sys., Inc. v. Sigafoose*, 533 So. 2d 567 (Ala. 1988) (involving a distributor dispute over a patented thermal heat exchanger, with the patent seemingly irrelevant)); pp. 362, 364 (discussing *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146 (5th Cir. 1979) (involving the sale of a patented corrosion resistance product for repackaging and resale by a buyer and licensee; a seemingly straightforward unconscionability case in which patented nature of product does not figure)).

54. See, e.g., p. 364 (discussing *Franz*, 594 F.2d at 149).

55. It also is one component in the relationship that adds to the mutual opportunism inherent in the relationship, as the law and economics literature has made clear. See James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 J. FIN. ECON. 401, 403-07 (1987); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990).

56. See, e.g., p. 362 (discussing *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370 (Mass. 1980) (involving primarily the unconscionability of a franchise termination; the trademark license is tangential at best)); p. 366 (discussing *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987) (involving unconscionability in franchise termination setting; the trademark license is not relevant)); pp. 433-34 (discussing *Ponderosa Sys., Inc. v. Brandt*, 767 F.2d 668 (10th Cir. 1985) (involving an implied warranty of merchantability in a franchise case; no discernible intellectual property issue exists)); pp. 535-37 (discussing *Lippo v. Mobil Oil Corp.*, 776 F.2d 706 (7th Cir. 1985)) (involving cure in a franchise termination case; no intellectual property issues involved); pp. 538-39 (discussing *Helindall Distribs., Inc. v. S.B.*

UCC issues in which franchise contracts are the source of the problem; yet rarely in these cases does the presence of a trademark license make much of a difference at all.

The cases the authors include in the book frequently undercut the implicit notion that there is anything distinctive in the UCC cases with an intellectual property component. This is a shame for two reasons. First, there are some cases in which intellectual property is directly involved and calls for some very subtle and nuanced analysis in the context of a UCC discussion. Because they cover so many cases, the authors give these cases short shrift. These diamonds, however, are worthy of a better setting. They demonstrate what the authors are after — the distinctive twist introduced into UCC doctrine by the presence of intellectual property issues.⁵⁷ Second, partly because many of the intellectual property issues are so tangential, the author's incorporation of them into Code exegesis suggests a seamless integration that closer analysis belies. Thus, the bridge they build between the two disciplines ends up having the quality of an optical illusion; it makes both sides appear closer than they are. In reality, as the discussion below illustrates, the authors have identified a legal interface that is fraught with some very difficult questions. It will not do, either as a service for practitioners or as a pioneering book in a new cross-disciplinary area, to suppress the difficult tensions this interface creates.

This is not to say that the authors only consider cases in which intellectual property issues are tangential. They do indeed grapple with some cases that involve deep tensions. A good example is *Burberrys (Wholesale) Ltd. v. After Six Inc.*,⁵⁸ which held that the Code's resale provisions were not available to an aggrieved seller after the buyer cancelled a trademark license. In *Burberrys* the seller, After Six, had agreed to manufacture thirty thousand raincoats for sale to Burberrys. After Six styled the raincoats to the buyer's proprietary specifications, and the raincoats included the buyer's famous trademark. As the court states,

Thomas, Inc., 559 F. Supp. 573 (E.D. Penn. 1983) (involving an acceptance issue under a franchise contract; intellectual property does not figure in decisions), *affd.*, 755 F.2d 920 (3d Cir. 1985)). To the same effect are numerous cases on distributorship agreements. *See, e.g.*, pp. 380-81 (discussing Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131 (3d Cir. 1991) (involving a distributorship agreement under which the seller allowed the distributor to display seller's logo; the trademark in the logo was not relevant to the course-of-performance issue)). These may be interesting cases, and they certainly show how intellectual property may enter into the structuring of a business relationship. I am simply pointing out that one cannot describe the issues in these cases as emerging out of the UCC-intellectual property interface. By all appearances they involve straight UCC issues.

57. I discuss some of the cases below. *See infra* notes 58-69 and accompanying text.

58. Pp. 605-06 (discussing *Burberrys (Wholesale) Ltd. v. After Six Inc.*, 471 N.Y.S.2d 235 (Sup. Ct. 1984)).

A dispute arose between the parties and no further cutting orders were given. . . . [P]laintiffs allege that [After Six] has manufactured or intends to manufacture the remaining Burberry raincoats and sell them to retailers. It alleged that [seller] has already attempted to sell the coats in question or threatens to do so. Defendant [seller] does not deny this. Plaintiffs have advised defendant . . . that it is not to manufacture or sell the remaining raincoats and has cancelled any license to do so, if one exists.⁵⁹

In a rather cursory opinion, the court held as follows:

UCC 2-703 provides that "where the buyer wrongfully rejects or revokes acceptance of goods . . . the aggrieved seller may (d) resell and recover damage as hereafter provided (§ 2-706)." UCC 2-706 states "where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price" While the Court has found no case directly in point, under the circumstances in this case, a sale by the defendant could not be considered to be made in good faith and to be commercially reasonable. § 2-706 does not purport to grant a trademark license and a sale under the sanction of that section would be doing exactly that. This is particularly true where the defendant shows no prejudice. The plaintiff is solvent and can respond in money damages to any claim made by defendant in a future litigation. Moreover, as the claim is a trademark infringement the defendant cannot be penalized for failure to mitigate its claim. It may resort to its other remedies under the Uniform Commercial Code if it is so advised.⁶⁰

Alces and See present this case as a simple one, in which UCC remedies must give way to intellectual property law:

The court noted that continued use of a trademark after expiration of the license constitutes infringement, and that this was true regardless of the quality of the products offered by the former licensee. . . .

The court wisely recognized the distinction elsewhere emphasized by the authors of this work . . . between tangible goods on the one hand and intellectual property on the other. . . .

. . . The Uniform Commercial Code authorizes resale, but it does not, absent a clear implication in the agreement to the contrary, transfer or otherwise license any intellectual property rights. This non-grant of intellectual property rights excuses conduct that would otherwise be required in mitigation.⁶¹

I believe that cases like *Burberrys* represent the *raison d'être* of a volume such as Alces and See's. Although the authors do a good job of describing and summarizing the case and putting it into its UCC perspective, there are other relevant cases that Alces and See

59. *Burberrys*, 471 N.Y.S.2d at 236.

60. *Burberrys*, 471 N.Y.S.2d at 237.

61. Pp. 605-06. The authors do go on to state in a footnote that "[t]he proper treatment of goods and intellectual property interests would benefit from clarification in the statute." P. 606 n.36.

might have discussed, cases that find it a much closer question whether the unauthorized sale of previously authorized merchandise in the midst of a dispute implicates the core trademark policy of avoiding consumer confusion.⁶² In some of these, courts diverge from the *Burberrys* approach and deny the injunction.⁶³

More to the point, the case illustrates the real tensions that sometimes arise between the Code and intellectual property law. It pits the general rule in intellectual property law — that any sale of items covered by the licensed right becomes an infringement once the license is terminated — against the strong Code policy favoring flexible, electable remedies on the part of an aggrieved party. It would seem to invite a host of questions, including: Can a license agreement provide for termination in the event of a dispute, even when this would frustrate the Code's remedial objectives? Can a party to a license agreement terminate in anticipation of a dispute, thus cutting off various aspects of UCC analysis?

Once a trademark license is terminated under the *Burberrys* approach, the seller is in much the same position as many sellers in the pre-Code era; her only remedy is to prove that there was a breach and collect damages.⁶⁴ The intellectual property component of the transaction thus sweeps away the innovative remedies that the Code has made commonplace — such as the aggrieved seller's right to make a reasonable resale.⁶⁵ Is it a good idea for intellectual property to have this effect on the Code? Has it been thought through? How can one contract around this result? The authors leave us in the dark on these and related questions — exactly the

62. See, e.g., *Bill Blass, Ltd. v. SAZ Corp.*, 751 F.2d 152 (3d Cir. 1984) (upholding the trial court's grant of injunction against sales after the license had expired, in light of an explicit contractual provision that limited the rights of the seller to liquidate inventory after expiration of the licensing agreement).

63. Curiously, the authors do discuss such a case later in the book (pp. 492-94), *Monte Carlo Shirt, Inc. v. Daewoo Intl. (Am.) Corp.*, 707 F.2d 1054 (9th Cir. 1983), which holds that there is no trademark infringement when a seller of rejected goods resells them without authorization of the trademark owner — a holding the authors criticize at length. While I agree with the authors that this holding perhaps goes too far in implying a trademark license, it is curious that they do not discuss *Monte Carlo Shirt* in more detail in the context of *Burberrys*.

64. Thus such situations might well thwart the author's belief in the efficacy of the UCC as applied to intellectual property, with a licensor seizing on the intellectual property component of the transaction to negate Code-based rights and remedies. Alces and See state:

This book argues for the direct application of U.C.C. provisions to intellectual property issues. . . . The exposition and argument here maintains that many (and perhaps the overwhelming majority) of Uniform Commercial Code rules would not only function well in the intellectual property contexts but would accommodate and actually facilitate the improvement of both the commercial and intellectual property law.

P. 264.

65. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 7-6, at 302 (3d ed. 1988) ("2-706 is an important Code innovation."); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 *STAN. L. REV.* 1107, 1142-43 (1984) (discussing the rationale for §§ 2-706 and 2-708).

kinds of questions one would want answered in a deep analysis of the UCC-intellectual property interface.

My own understanding of the *Burberrys* case is that it calls for a subtle adjustment of intellectual property doctrine. To forestall the strategic use of the intellectual property component of the transaction, a court should look hard for a way to interpret the license to allow the aggrieved seller to resell the goods. In the alternative, courts should consider the UCC's remedial provisions when deciding whether to grant injunctions in these cases.⁶⁶ When an aggrieved seller has invested significant sums in contract-specific assets, and when the option of immediate liquidation is superior to waiting and proving damages at trial, courts should deny injunctions — and create, in effect, a limited, implied trademark license. Either way, the goal is to allow the seller the benefit of the UCC's flexible menu of remedial options. Because immediate resale is an important remedy — essentially the only remedy that gives the aggrieved seller instant, liquidated recovery for at least part of the harm that a buyer's breach causes — courts must strive to preserve the remedy even when an intellectual property right is involved. This approach entails a sensitive consideration of both contract and intellectual property issues, far beyond the cursory treatment of these issues by the court in *Burberrys*.⁶⁷

The standard rule in intellectual property cases that *any* sale outside the protective umbrella of a license is an infringement must give way in this context to a recognition that the aggrieved reseller here is situated differently from the run-of-the-mill infringer. The aggrieved reseller's actions are rooted in a prior contractual relationship. The licensor had authorized her to perform acts that would otherwise amount to infringement and she relied on that authorization in completing the licensing contract. Thus, while the aggrieved reseller is no longer a presently authorized licensee, the

66. Federal courts in some instances have looked to the substance of the contract claims in determining whether they have jurisdiction under the Copyright Act, 28 U.S.C. § 1338(a) (1988), to grant an injunction to protect an intellectual property right. See, e.g., *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926 (2d Cir. 1992); *Berger v. Simon & Schuster*, 631 F. Supp. 915 (S.D.N.Y. 1986). See generally James M. McCarthy, Comment, *Federal Subject Matter Jurisdiction: When Does a Case Involving the Breach of a Copyright Licensing Contract "Arise Under" the Copyright Act?*, 19 U. DAYTON L. REV. 165, 190-94 (1993) (proposing a three-part test to determine whether a claim arises under the Copyright Act). I propose extending this approach to take into account the remedial policies of the UCC in determining the details of the injunction, such as when it will take effect.

67. For example, recall from the earlier quoted passage, *supra* notes 59-60 and accompanying text, that the court in the *Burberrys* case did not even decide whether the licensee had breached the agreement. It simply issued an injunction in the case, effectively waiting for trial to determine whether there was a material breach. The problem with this approach, as many of the jurisdictional cases make clear, is that without breach the license remains in force, and therefore no injunction should issue.

prior authorization and her reliance suggest that a court might find her constructively authorized.

In essence I am arguing that courts should not blithely interpret intellectual property rules so as to undermine important innovations of the UCC. One of the most important of these innovations was the clarification and expansion of what might be called a zone of cooperative damage control. The Code formalized what preexisting rules, such as the rule requiring mitigation, already required: that parties have an obligation to help a broken deal wind down in an orderly and efficient manner. In this spirit, the Code provides an obligation on the part of an aggrieved, remote buyer to resell rejected goods at the direction of the seller.⁶⁸ Likewise, the Code allows a seller to resell goods and apply the proceeds to her claims against the breaching buyer.⁶⁹ Courts should not allow the presence of an intellectual property component in a transaction to undercut these policies, at least not without giving the matter some thought.

In terms of the book at hand, this is precisely the type of case from which the authors could have made a real contribution. There are important and difficult issues here, but Alces and See sweep them away in a quick aside. If the interface between these branches of law is worthy of study — and I think it is — it deserves a more in-depth treatment.

As a further example of the book's shortcomings, consider some of the other practical issues that cases such as *Burberrys* raise. This is a state case, essentially involving a breach-of-contract claim. Yet, as mentioned earlier, it is also a trademark infringement case — a matter of federal law. It is therefore an example of a very common situation: a breach of a license agreement involving federal intellectual property rights. As legal claims go, this is an interesting two-headed beast: a state law contract, based on the exchange of federally granted intellectual property rights. It is perhaps not surprising that courts have had trouble coming to grips with such an animal. What is surprising, especially in a book aimed at commercial lawyers, is that the authors fail to mention the difficult jurisdictional issues — and concomitant litigation strategies — implicit in a case of this nature.

Courts essentially have to decide whether such a case is primarily a contract case, with an intellectual property right as its incidental subject matter; or primarily an intellectual property case, which just happened to arise in the context of a licensing agreement.⁷⁰

68. U.C.C. § 2-603 (1993).

69. U.C.C. § 2-706(1) (1993).

70. Actions brought in copyright, patent, and trademark are brought under the express grant of jurisdiction to federal courts found in 28 U.S.C. § 1338(a), which states that “[t]he

This can be a tricky distinction indeed, as a variety of cases and commentary in the area attest. For example, in the leading case on copyright jurisdiction, *T.B. Harms Co. v. Eliscu*,⁷¹ Judge Friendly of the Second Circuit stated:

[A]n action "arises under" the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act . . . or asserts a claim requiring construction of the Act . . . or, at the very least . . . presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.⁷²

This test has an analogue in the patent field,⁷³ in which similar jurisdictional principles — and squabbles — prevail.⁷⁴ A number of subsequent cases and commentators have tried to refine this and similar tests over the years.⁷⁵ The point here is not that one or an-

district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a) (1988).

71. 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

72. 339 F.2d at 828 (citations omitted).

73. See *Luckett v. Delpark, Inc.*, 270 U.S. 496 (1926). In *Luckett*, the Court held that an action against a patent licensee who asked for royalties owed, an accounting, a declaration that the patent had reverted to the plaintiff, and an injunction against future alleged infringements did not arise under the patent laws, and, therefore, no federal subject matter jurisdiction existed. In the course of the opinion, the Court stated that when a complainant "makes his suit one for recovery of royalties under a contract of license or assignment, or for damages for a breach of its covenants . . . he does not give the federal district court jurisdiction." *Luckett*, 270 U.S. at 510. Courts have interpreted *Luckett* variably, some finding that it limits the bases of state court jurisdiction in patent-licensing cases, *see, e.g.*, *Eli Lilly & Co. v. Genentech, Inc.*, 17 U.S.P.Q.2d (BNA) 1531, 1534-35 (S.D. Ind. 1990) (holding that no state law cause of action exists for an alleged violation of a licensing agreement that involved exceeding the scope of the licensed use), and others distinguishing it in holding that a breach of contract action will lie, *see, e.g.*, *Shaw v. E.I. DuPont De Nemours & Co.*, 226 A.2d 903, 905 (Vt. 1966) (holding that the licensee had breached an implied covenant not to exceed the bounds of the license restriction, thus the licensor "could elect to waive the patent infringement and rely on the defendant's contractual undertaking in the license"). *See generally* Ted D. Lee & Ann Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 ST. MARY'S L.J. 703, 738-745 (1988) (providing an extensive list of Texas state court cases involving intellectual property issues).

74. Federal courts have original jurisdiction in matters involving "patents, plant variety protection, copyrights, and trade-marks." 28 U.S.C. § 1338(a) (1988). Therefore, claims for copyright infringement are analogous to those for trademark infringement. *See* *Bear Creek Prods., Inc. v. Saleh*, 643 F. Supp. 489, 491 (S.D.N.Y. 1986) ("Analogous principles govern the exercise of federal jurisdiction in all three types of action."). *See generally* *Foxrun Workshop, Ltd. v. Klone Mfg., Inc.*, 686 F. Supp. 86 (S.D.N.Y. 1988); *Mary P. Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812 (1986).

75. For examples of cases applying, extending, and commenting on *Harms*, see *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926 (2d Cir. 1992); *Arthur Young & Co. v. City of Richmond*, 895 F.2d 967 (4th Cir. 1990) (rejecting the "essence" test of *Harms* and holding that federal subject-matter jurisdiction exists when the complaint asks for a remedy that is provided in the Copyright Act); *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380 (9th Cir. 1988) (holding that the court had federal subject matter jurisdiction because the complaint sought a remedy expressly granted by federal copyright law); *Daniel Wilson Prods., Inc. v. Time-Life Films, Inc.*, 736 F. Supp. 40 (S.D.N.Y. 1990) (rejecting the "essence" test and holding that the court had subject matter jurisdiction because the complaint alleged

other of these proposals is definitive; it is simply to point out that Alces and See omit this entire set of important, practical considerations from their book. It will not suffice to argue, as one might, that such a discussion is out of place in a book primarily aimed at the drafting stage of commercial agreements, because a number of the relevant cases turn on the presence, absence, or content of various provisions within the agreement itself.⁷⁶

Another example of the practical importance of issues at the interface between intellectual property and contract terms is the case of *ARP Films, Inc. v. Marvel Entertainment Group, Inc.*⁷⁷ In the agreement that led to the dispute in this case, Marvel licensed copyrights and trademarks in certain characters, such as Spiderman, to the plaintiff for inclusion in cartoon films. The parties fought over whether the field of use in the license agreement included videocassettes or simply televised cartoons. Defendant Marvel terminated the agreement under a provision in the licensing agreement permitting termination for material breach.⁷⁸ A jury found that the license did indeed cover the use of the characters in videocassettes, and hence that Marvel had improperly terminated.⁷⁹

copyright infringement and requested remedies provided by the Copyright Act); *Foxrun Workshop, Ltd. v. Klone Mfg., Inc.*, 686 F. Supp. 86 (S.D.N.Y. 1988) (rejecting the "essence" test in determining whether the court had subject matter jurisdiction to hear a suit brought under the Lanham Act for trademark infringement); see also Jay S. Fleischman, Comment, *Swimming the Murky Waters: The Second Circuit and Subject-Matter Jurisdiction in Copyright Infringement Cases*, 42 BUFF. L. REV. 119, 143 (1994) ("If the action involves two parties bargaining to exchange something then it is a contract claim; if, however, it is for one party to recover something which has been stolen, then it is for copyright infringement."). In *Foxrun Workshop*, Judge Leval stated in dicta that the "essence" test was against public policy. 686 F. Supp. at 90. Judge Leval further stated that the "essence" test left jurisdiction open to question as the parties conducted discovery and refined the issues in a case. "Indeed this approach admits a possibility of dismissal at the time of, or even after trial, upon the court's conclusion that the action primarily sought enforcement of contract rights rather than statutory remedies." *Foxrun Workshop*, 686 F. Supp. at 90. The "pleadings" test, therefore, was superior because it allowed jurisdiction to be determined as a preliminary matter, creating a degree of predictability and uniformity. *Foxrun Workshop*, 686 F. Supp. at 90.

76. For example, some of the cases on jurisdiction take into account whether the alleged breach violates a condition or merely a covenant of the license agreement; only if a condition is breached, resulting in rescission, do the licensee's postbreach activities constitute infringement of the licensed intellectual property right.

77. 952 F.2d 643 (2d Cir. 1991).

78. The licensing agreement read:

Marvel shall have the right to terminate the license as provided by this agreement in the event of . . . ARP's . . . not substantially abiding by the terms and conditions of this agreement or failing to substantially abide by the terms and conditions of the license for distribution of the [films] and rights related thereto, which terms and conditions include prompt accounting for such distribution, but except for such termination of license, this agreement shall continue in full force and effect.

Marvel Entertainment, 952 F.2d at 646-47 (emphasis omitted).

79. *Marvel Entertainment*, 952 F.2d at 648. On appeal, the Second Circuit held that, "On the heels of Marvel's repudiation . . . ARP had two options: (1) it could have stopped performance and sued for total breach; or (2) it could have affirmed the contract by continuing to perform while suing in partial breach." *Marvel Entertainment*, 952 F.2d at 649. The holding is complicated by the fact that ARP later withheld royalties due under the terminated

Although Marvel never sought a preliminary injunction, the case is typical of licensing disputes in which intellectual property rights can play a major role. The lapse of time between the beginning of the dispute and the final resolution of the case — roughly ten years⁸⁰ — gives an indication of the strategic value of a preliminary injunction to the property right holder. The introduction of this issue into the normal dynamic of contract performance disputes creates the need for a nuanced handling of the UCC issues that arise. If commercial law doctrine is insensitive to the special problems that a transaction that involves intellectual property creates, that doctrine will increasingly come to unbalance the carefully structured relationship between contracting parties that the UCC strives so hard to maintain. Alces and See had a marvelous opportunity, which they unfortunately missed, to address these concerns.

B. *When Property Rules and Contract Doctrine Meet*

Cases such as *Burberrys* and *Marvel Entertainment* demonstrate that the strong property rule that accompanies intellectual property rights can sometimes cause problems in the context of normal contract remedies. In particular, the presence of an intellectual property right can give the rightholder-licensor a significant strategic advantage in a dispute between licensor and licensee. This advantage comes in the form of the strong presumption in favor of injunctions — in particular preliminary injunctions — which gives the licensor a serious trump card over the licensee.⁸¹

The threat of an injunction can effectively hold the licensee hostage; licensors clearly can use it to manipulate the licensee to win a contract modification or other concession because there may be a hearing on the preliminary injunction long before a court has reviewed the basis for the termination.⁸² Once the licensor removes

agreement while continuing to earn revenues from the films. This led to an additional holding that ARP had affirmed the original agreement after Marvel terminated and thus that ARP had breached the now-affirmed agreement by withholding royalties. *Marvel Entertainment*, 952 F.2d at 649. The jury awarded ARP \$1,220,000 “for Marvel’s breach of contract by licensing others to distribute Marvel films on videocassette.” *Marvel Entertainment*, 952 F.2d at 648. It also awarded Marvel \$137,000 “for various contractual breaches by plaintiffs.” *Marvel Entertainment*, 952 F.2d at 648.

80. *Marvel Entertainment*, 952 F.2d at 647.

81. See Merges, *supra* note 4, at 2667-73.

82. See *C.R. Bard, Inc. v. Cordis Corp.*, 12 U.S.P.Q.2d (BNA) 1229 (D. Mass. 1989) (involving a plaintiff who sought a declaratory judgment that certain of its products did not infringe the defendant’s patent that the plaintiff had licensed earlier, and an injunction to prevent the defendant from terminating the license during the patent trial; in denying the motion to grant the injunction, the court in effect refused to consider the details of the termination issue); cf. Neil M. Goodman, Note, *Patent Licensee Standing and the Declaratory Judgment Act*, 83 COLUM. L. REV. 186, 187 (1983) (“This Note will argue that courts should generally require a patent licensee to terminate his license agreement as a prerequisite to bringing a declaratory action against a patentee.”).

the protective umbrella of the licensing agreement, the licensee is a naked infringer.⁸³ Unless a licensee convinces the court to consider the sometimes complicated facts behind a dispute leading to termination, there is a real threat that the court will fall back on the strong presumption in favor of preliminarily enjoining an infringer. The threat of total suspension of business that comes with a preliminary injunction may well pose a risk of significant losses for the licensee. In the many cases in which the licensee is a manufacturer, as in the *Burberrys* scenario, an immediate injunction will prevent the manufacturer from selling off its existing inventory. In the language of transaction cost economics, the manufacturing licensee in such a case will have made significant asset-specific investments, which the licensor can then use as leverage to extract concessions.⁸⁴

The law must respond to the inefficiencies that this dynamic can create. One response, suggested earlier, is to adjust the seller's remedies in cases in which the licensor breaches, wrongfully terminates, or perhaps even terminates for a minor breach.⁸⁵ Under these circumstances the manufacturing licensee should have a reasonable opportunity to liquidate any inventory on hand. If the licensor objects, for example on the grounds that the licensee is manufacturing products that fall below the licensor's quality standards, an alternative remedy would be to give the licensor a right of first refusal on any resale offer the licensee is able to generate.⁸⁶

83. Cf. *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926 (2d Cir. 1992).

84. This dynamic runs under the suggestive rubric of a "holdup problem" in the law and economics literature. See *Merges*, *supra* note 6; see also *Davidson*, *supra* note 5, at 1.

85. Also, courts could apply the UCC's requirement of good faith and fair dealing to preclude opportunistic terminations, as some seem to have already. See, e.g., *Baker v. Ratzlaff*, 564 P.2d 153 (Kan. Ct. App. 1977) (finding bad faith termination under "payment on delivery" clause because seller did not insist on payments at time of delivery). Although some commentators state that licensees would never agree to give licensors the right to terminate at will, others believe that some agreements contain such provisions. See *Davidson*, *supra* note 5, at 2 (noting that licensing agreements can provide that termination can be triggered by any breach "or even at will"). On "bad faith termination" in cases with an intellectual property component, see *First Nationwide Bank v. Florida Software Servs., Inc.*, 770 F. Supp. 1537 (M.D. Fla. 1991) (holding that a licensor's refusal to consent to an assignment, under a contract provision that the licensor must not unreasonably withhold approval of assignments, is a breach of the implied covenant of good faith and fair dealing); *Mr. Transmission v. Yount*, App. No. 88-43-II, 1988 WL 53339 (Tenn. Ct. App. May 27, 1988) (holding wrongful the termination of a franchise agreement, including a trademark license, for failure to pay royalties on credit sales when made, rather than when the credit entity was actually paid); cf. *Cordis Corp. v. Medtronic, Inc.*, 835 F.2d 859 (Fed. Cir. 1987) (granting an injunction to prevent the termination of a license agreement during the patent trial when the defendant-licensor threatened to terminate, allegedly because the plaintiff-licensee had developed an arguably noninfringing variant on a licensed product).

86. Several caveats are in order here. First, the manufacturing licensee's sales of the inventory should be subject to an obligation to pay royalties at the contractual rate, either directly to the licensee or into escrow. This will prevent licensors from strategically using the court-imposed quasi-license. Second, notice that the proposed remedy merely preserves the normal UCC remedies situation — it prevents the terminating licensor from using the intellectual property component of the transaction to do an "end run" around the UCC's detailed

Thus, the licensor could exercise control over output while giving the licensee a chance to recoup some of its investment.

One might well ask why contracting parties do not generally contractually specify such a remedy.⁸⁷ In the past, one reason may have been that the threat of an injunction was not as strong. Recently, there has been an apparent tightening of the standards for issuing preliminary injunctions in intellectual property cases, especially those involving patents.⁸⁸ A second reason might be that many termination provisions appear relatively innocuous. Some give the licensor the right to terminate at will, but most state that the licensor can terminate only when the licensee breaches or in several other well-specified circumstances, such as a failure to manufacture or sell a minimum quantity of output. Problems arise, however, when licensors decide to take advantage of these provisions. Only then do many licensees realize the opportunities for licensors to “play games” with these provisions. The cases are rife with reports of termination on the basis of allegedly faulty accounting for royalties, disputes over the scope of the license, and many other issues. Some of these disputes present exceedingly fine legal questions;⁸⁹ the termination right effectively gives the licensor’s interpretation of these legal points powerful strategic backing. Obviously, licensors do not concoct all of these disputes; by the nature of the relationship, however, licensing agreements provide many chances for the licensor to behave opportunistically. When they do,

menu of remedial choices. In addition, of course, the problem that necessitates this novel remedial solution — excessive licensor control — might well dissipate over time, as licensees become more sophisticated about the availability of intellectual property-related injunctions in connection with termination clauses. Licensees might well begin to insist on *contractual* versions of the remedy described here, or on other devices to offset the advantage to licensors that follows the strong injunction policy of intellectual property law.

The Article Two Revisions Committee has proposed to eliminate the requirement in § 2-706 that an aggrieved seller notify the breaching buyer prior to exercise of the resale remedy. Especially if the revised § 2-706 adopts this approach, my suggested licensee’s remedy would require a special provision. This provision would retain the old notice requirement and would add an explicit right of first refusal.

87. They apparently do sometimes. See HAROLD EINHORN, PATENT LICENSING TRANSACTIONS § 4.02[1], at 4-9 (1994) (“As a control over commercial sales, the licensor may reserve the right to purchase completed devices, either on hand or in progress, following termination.”).

88. See MERGES, *supra* note 52, at 750-59; Merges, *supra* note 6, at 84-89.

89. For example, in *Computer Associates Intl., Inc. v. State Street Bank & Trust Co.*, 789 F. Supp. 470 (D. Mass. 1992), the parties disputed whether the use of licensed software to State Street was covered by the scope-of-use provision in the licensing agreement. The court, ruling on a request by the plaintiff for a preliminary injunction, stated that a reasonable factfinder could find in any of three ways on the question whether the disputed use was permitted by the license agreement in issue — the way the plaintiff asserted, the way the defendant asserted, or by determining that the parties had totally failed to contemplate these circumstances and thus left a gap in their contract. *Computer Assocs.*, 789 F. Supp. at 475-76. The court concluded that in such an “omitted case,” a court is charged with filling the gap by “work[ing] out an answer that is consistent with all that the parties did agree to in arriving at a contract.” *Computer Assocs.*, 789 F. Supp. at 476.

licensees may find that the termination provisions that seemed reasonable at the contract formation stage take on an ominous aura at the enforcement stage.

To their credit, Alces and See do mention wrongful termination cases in their discussion of unconscionability (pp. 359-75). Following the conventional approach, they discuss both procedural and substantive unconscionability. Under the former heading they review a number of cases in which courts rejected claims of procedural unconscionability in the face of evidence that the aggrieved parties were experienced businesspeople (pp. 361-63). Under the latter heading, they review an interesting franchise termination case that brings out some of the termination-related possibilities discussed above (pp. 363-65). This case, *Zapatha v. Dairy Mart, Inc.*,⁹⁰ involved termination by a franchisor under an at-will termination clause. The court determined that the termination provision was not unconscionable, in part because the contract required the franchisor, upon termination without cause, to repurchase the franchisee's existing inventory.⁹¹ Consequently, the court concluded, "[t]here was no potential for forfeiture or loss of investment."⁹² This conclusion, which mirrors the analysis earlier in this section, is compelling enough that courts ought to embed it in doctrine. At a minimum, it ought to be the default rule, changeable by the parties by express contractual agreement. In such cases, the law will put the licensee on notice regarding the seriousness of the termination right, and perhaps the licensee will have an opportunity to extract a compensating concession somewhere else in the agreement.

Cases such as *Burberrys* and *Marvel Entertainment* suggest the need for a more detailed consideration of contracts bargained for in the shadow of a strong property rule.⁹³ Courts must not allow a licensor who has bargained into a private liability rule to reimpose unilaterally the strong property rule by dint of an all-encompassing termination right. Put another way, courts must be wary, in the context of licensing disputes, of blithely lumping an allegedly terminated licensee in with the class of all naked infringers.⁹⁴ Courts should not permit licensors to withdraw unilaterally the protective

90. 408 N.E.2d 1370 (Mass. 1980).

91. *Zapatha*, 408 N.E.2d at 1377.

92. *Zapatha*, 408 N.E.2d at 1377.

93. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (proposing a framework to integrate analysis of legal relationships traditionally analyzed in separate subject areas, such as property and torts).

94. Some courts have done just that when considering jurisdiction. See, e.g., *Marshall v. New Kids on the Block Partnership*, 780 F. Supp. 1005, 1008 (S.D.N.Y. 1991) (stating that parties make themselves "strangers" — and hence raise an everyday infringement scenario, justifying federal jurisdiction — when the licensee exceeds scope of license).

umbrella of the private liability rule, or permit them to threaten to do so with impunity. In the spirit of UCC provisions on modification, cure, and remedies, courts should seek to encourage parties to operate within the framework of the contract or, failing that, to salvage as much value as they can from the failed relationship. In the extreme case, such as *Burberrys*, courts should be willing to imply a temporary extension of the underlying license agreement, thereby recognizing that the UCC's remedial impetus requires them to treat a terminated licensee differently from a naked infringer. I am arguing, in other words, for the notion of a remedial implied license.⁹⁵ Courts must yoke these remedial considerations to the doctrine governing the grant of preliminary injunctions in intellectual property cases.

IV. INTEGRATING DOCTRINES TO POLICE INTELLECTUAL PROPERTY CONTRACTS

In Part III I tried to show that some of the cases that Alces and See consider that intertwine intellectual property and commercial code issues, produce some knotty puzzles that call for deft modification of conventional doctrine. In this Part, I extend the point. Here I am concerned with integrating the commercial code doctrines that Alces and See outline with the contract policing doctrines that have grown up within the confines of intellectual property law itself, primarily copyright and patent "misuse." Although Alces and See argue the distinctiveness of commercial code issues, I argue that only when courts and practitioners consider these "internal" policing doctrines coextensively with commercial code-based contracting rules can they confidently view the entire transactional landscape and coherently resolve transactional disputes. In section IV.A, I make these arguments in a general fashion; then, in section IV.B, I consider them in the context of the contemporary debate about the enforceability of so-called shrink-wrap software license agreements. Shrinkwrap licenses are a perfect illustration of the need to keep "internal" intellectual property

95. Another context in which this would prove a useful concept is the "electronic repossession" case. In these cases software vendors have used hidden "erase" commands embedded in licensed software to expunge licensed software from computers owned and operated by a licensee. This is a highly effective "self-help" remedy, but it is capable of such extreme opportunistic leverage that if courts permit it, they must police it very carefully. See *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1496-97 (D. Minn. 1991) (holding that erasure was permissible, without referring to Article 2 or to general practice among licensing parties), *affd. sub nom. American Computer Trust Leasing v. Boerboom Intl., Inc.*, 967 F.2d 1208 (8th Cir.), *cert. denied*, 113 S. Ct. 414 (1992); cf. Raymond T. Nimmer, *Uniform Codification of Commercial Contract Law*, 18 RUTGERS COMPUTER & TECH. L.J. 465, 470 (1992) (discussing how computers and computer software fit into the commercial law).

policies in mind in applying commercial code concepts to transactions with a substantial intellectual property component.

A. Integrating "Commercial" and "Internal" Policing Rules

A number of doctrines affecting the content of intellectual property contracts have grown out of intellectual property cases over the years. These doctrines are what I term "internal" policing doctrines; they owe their origins — usually as defenses pled by accused infringers — to courts deciding intellectual property disputes. They are internal in the sense that they are contractual restrictions that have grown out of the body of law that defines, interprets, and enforces intellectual property rights. The implicit contrast is with the "external" limits that emerge directly from the law governing transactions.

Under a variety of doctrines, courts have crafted limits on the terms that an intellectual property holder may include in a licensing agreement. Always, the rationale has remained the same: to prevent rightholders from leveraging or extending their rights via contract. These rules primarily run under the banner of "misuse." As applied to both copyright and patent, courts have invoked this catch-all doctrine to nullify intellectual property licenses that contain terms that effectively extend intellectual property rights by contract.⁹⁶ For example, a significant body of case law prohibits

96. The issues that misuse cases raise are not unique to intellectual property. Real property law, too, long ago prohibited certain restraints on alienation. Robert Ellickson has explained that such restraints may have beneficial effects, however, as responses to bilateral contracts that impose negative externalities on a community of property holders: "Although alienability generally enhances efficiency of land use, group-imposed restraints on alienation are defensible when they bar a transfer that would harm others more than it benefits the parties to the transaction." Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376 (1993). Ellickson gives the following example in the context of his general discussion of norms and rules governing real property in close-knit communities:

For example, a preliterate group with abundant land might understandably restrict transfer of village land. Because of internal kinship ties, most of a village's current residents would have in effect offered up their relatives as "hostages," a fact that would help ensure that the residents would cooperate, say, in defending the village against enemies. An outsider who acquired land in a village, by contrast, would be less likely to have kin there and therefore would not be as reliably loyal. By prohibiting or regulating land sales to strangers, a village can help ensure its future close-knittedness.

Id. (footnote omitted). Thus, courts should respect the restraint on alienation and refuse to enforce the bilateral sales contract.

I would argue that the same essential logic drives the law of patent and copyright misuse. Under these doctrines, courts refuse to enforce voluntary, bilateral contracts that presumably benefit both parties. The rationale is that these contracts undercut the policies at the heart of the federal intellectual property regimes that were the source of the contracted-for rights. The only workable rationale for such a prohibition must be that the contracts, though mutually beneficial to the transacting parties, harm third parties.

For example, some have explained the law of patent misuse as applied to tie-ins as an attempt to prevent a patentee from leveraging her monopoly into other markets. See, e.g., WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW (1973). For copyright misuse, see *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). See generally Thomas M. Susman, *Tying, Refusals to License, and Copyright Misuse: The Patent Misuse Model*, 36 J.

licensing agreements that condition access to a patented technology on purchase of a nonpatented component.⁹⁷ A similar doctrine exists for copyright licenses.⁹⁸ Although some academic commentators have argued that the reasoning of these cases is wrong,⁹⁹ or that these cases should be subsumed under general antitrust principles,¹⁰⁰ such cases remain a durable staple of the intellectual property landscape.¹⁰¹

COPYRIGHT OFF. SOCY. U.S. 300 (1989). The "anti-leverage" theories of commentators such as Bowman fail to recognize that these doctrines are concerned not only with the short-term competitive impact of tie-ins, but with the long-term, *dynamic* effects as well. To be specific, a tie-in that allows a patentee easy entry into, and — admittedly temporary — supracompetitive profits in a market related to the market for the patented good might drive other firms from the market for the tied good or deter other market entrants. Especially when licensees face high switching costs in moving from the tying-tied-product pair to the next best alternative, patentees might achieve just enough market power at just the right moment in the development of the ancillary market (that is, the market for the tied product) to gain a significant competitive advantage. A number of technologies appear to have had such critical moments at times in their histories, as theorists of "path dependent" industry development have shown. See, e.g., CHANDLER, *supra* note 14, at 197-203. When these conditions hold, permitting tie-ins might well harm third parties — in the form of producers and purchasers of the tied good who would have offered the tied good in competition with the patentee, but who do not, because the tie-in excluded them at a critical moment in the development of the market. Thus under the rationale identified by Ellickson, misuse doctrines, properly applied, make sense. They effectively prevent the parties to the license from imposing negative externalities on nonparties, namely consumers and competitors.

97. See, e.g., *Brulotte v. Thys Co.*, 379 U.S. 29 (1964); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942). A relatively recent article by one of the coauthors of the book under review criticizes *Brulotte*. See Harold See & Frank M. Caprio, *The Trouble with Brulotte: The Patent Royalty Term and Patent Monopoly Extension*, 1990 UTAH L. REV. 813.

98. See, e.g., *Lasercomb*, 911 F.2d at 970 (finding copyright misuse); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949) (finding that the practice of requiring blanket licenses of movie theater owners for the use of musical composition copyrights constituted copyright misuse); see also *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (holding that the block-booking of movies for television performance, in other words, licensing only a large collection rather than individual films, violated the antitrust laws); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (holding that the block-booking of movies for theater performance is an antitrust violation because "the result is to add to the monopoly of the copyright [on each movie] in violation of the principle of the patent cases involving tying clauses").

99. These authors argue that misuse tie-in cases mistakenly assume that a patentee can increase profits by means of a tie-in. See, e.g., BOWMAN, *supra* note 96; Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957). But see Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 541 n.108 (1985) (critiquing Bowman's view).

100. See, e.g., Byron A. Bilicki, Note, *Standard Antitrust Analysis and the Doctrine of Patent Misuse: A Unification Under the Rule of Reason*, 46 U. PITT. L. REV. 209 (1984); Mark A. Lemley, Comment, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599 (1990). But see Kenneth J. Burchfiel, *Patent Misuse and Antitrust Reform: "Blessed Be the Tie?"* 4 HARV. J.L. & TECH. 1 (1991) (defending patent misuse on the basis that the antitrust standard is difficult and expensive); Robert P. Merges, *Reflections on Current Legislation Affecting Patent Misuse*, 70 J. PAT. & TRADEMARK OFF. SOCY. 793 (1988) (defending a separate doctrine of patent misuse). See generally Kaplow, *supra* note 49.

101. See, e.g., *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 665 & n.5 (Fed. Cir. 1986) (finding patent misuse in a tie-in situation); cf. *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505,

There are other contract-policing doctrines that have emerged from intellectual property cases over the years. For instance, the "first-sale" doctrine in copyright law prohibits the seller of a copy of a copyrighted work from controlling the buyer's use or resale of the copy. Although the rule has been subject to amendment¹⁰² and subtle interpretation¹⁰³ in recent years, courts continue to apply it in a number of circumstances.¹⁰⁴ Patent law has traditionally espoused a corresponding doctrine. One recent case, however, if followed, could significantly reduce the scope of the doctrine's operation; this case held that postsale restrictions on use were enforceable so long as the seller clearly gave notice of the restrictions at the time of sale.¹⁰⁵

Perhaps because they developed internally, alongside of doctrines concerning validity and infringement, many implicitly consider these and other contract policing doctrines part of the state's endowment when it grants an intellectual property right. Thus courts — again implicitly — deal with them separately from other rules bearing on intellectual property contracts, such as the UCC rules that are the subject of Alces and See's volume. Although this makes sense historically given that different groups of practitioners have traditionally dealt with intellectual property and commercial transactions, there is no denying that both sets of rules — the internal policing rules such as misuse and those contract rules bearing particularly on commercial transactions involving intellectual property — are of great importance to practitioners whose job it is to draw up intellectual property transactions. If a practitioner wants to know what contract terms this branch of law will tolerate, she is as interested in knowing that she cannot tie the sale of a patented product to an unpatented one as she is in knowing that under the UCC cases in this area, she must carefully structure termination provisions.¹⁰⁶ It would be convenient if practitioners could find an integrated treatment of both sets of rules. But they will have to

511 (7th Cir. 1982) (Posner, J.) (concluding that there is an increasing convergence of patent-misuse analysis with standard antitrust analysis), *cert. denied*, 462 U.S. 1107 (1983).

102. Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (prohibiting buyers of record albums from "renting" them); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5134 (1990). Congress designed these laws to shut down the market for rental shops catering to home tapers.

103. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) (holding that the right to control creation of derivative works "trumped" first-sale doctrine in case involving repackaging of purchased copyrighted works and resale in different form).

104. See *Intel Corp. v. ULSI Sys. Technology, Inc.*, 995 F.2d 1566, 1570 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 923 (1994); *Lisle Corp. v. Edwards*, 777 F.2d 693, 695 (Fed. Cir. 1985); *Cyrix Corp. v. Intel Corp.*, 879 F. Supp. 666, 671 (E.D. Tex. 1995).

105. *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992).

106. See the cases discussed *supra* section III.B.

wait for the second edition of Alces and See's book, or perhaps for another book altogether.

B. *More on the Need for Integrated Treatment: Of "Shrinkwrap" Software Licenses and Intellectual Property Policy*

One crucial area that calls for integrated treatment is the law of prepackaged software licenses. These ubiquitous agreements impose a series of restraints on "licensees" — who look, act, and feel like buyers — that push the limits of intellectual property policy and sometimes, as I argue below, exceed them. Especially now, when the Article 2 Revisions Committee is in the midst of a major restatement of the law in this area, it is essential to consider how current practices, as well as the proposed new rules, square with the central policies of intellectual property law, especially copyright. Although Alces and See come closer here to the model of deep integration I have discussed above, their discussion still falls a bit short. But before critiquing their discussion of these cases and related matters, it is important to describe how software licensing developed, what activities these contracts typically try to control, and how all this relates to intellectual property policy.

In the beginning, an authoritative recent article tells us, uncertainty surrounded software licensing.¹⁰⁷ Software was new; lawyers did not know exactly which legal categories would cover it. So they fell back on a basic, foundational principle that they hoped would provide a safe haven: freedom of contract. To judge from the development of the industry since then, this old chestnut has not disappointed. Despite a few minor setbacks, the practice of explicitly licensing software, *against the backdrop of strong statutory protection*, has served the industry well. It allows sellers of software to market their products with some degree of comfort, despite the changing landscape of copyright law. At the very least, it is apparent that software licensing has not mortally harmed the industry; its growth rate and current absolute size attest to that.¹⁰⁸

In the custom programming segment of the market, in which negotiated agreements are the norm, protecting rights by contract makes sense. The custom nature of the good, together with the relatively high price tag on the transaction, dictate custom-tailored contracts. But the prepackaged software industry is different. The adoption of the licensing model here, born of historical necessity, has always seemed anomalous. After all, people usually purchase books and videotapes outright, rather than subject to a license. If not for the fact that buyers have always obtained software by a li-

107. Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 577-79 (1994).

108. See Merges, *supra* note 3, at 2-3.

cense, they would probably resist the imposition of a contract regime by a single firm, say, or by the entire industry after long acquiescence in the practice of outright purchase.

Innumerable commentators have catalogued the many conceptual and doctrinal problems that shrinkwrap licenses present for traditional contract law.¹⁰⁹ In the context of this review, however, I will limit my observations to the area of contract enforceability. As mentioned in section IV.A, the law of intellectual property has always contained a distinctive set of policing mechanisms to deny the enforceability of contract terms that in some way undermined precious intellectual property policies. The UCC drafting committees and the courts must bring such issues as misuse and statutory preemption front and center in the current debate about the enforceability of shrinkwrap license agreements. They must consider these internal policing doctrines in parallel with questions of contract formation, unconscionability, and the like.

One internal policing mechanism that has only recently surfaced in software protection discussions is preemption of state law. This statutory principle,¹¹⁰ which has been applied almost exclusively to overturn state legislation, has in theory been available as a limit on the terms that parties can include in a private contract;¹¹¹ but no court — so far as I can determine — actually has ever used this principle to render unenforceable a particular licensing agreement. In an excellent law review article,¹¹² Professor David Rice has argued strenuously for its application in the context of a particular shrinkwrap license term — prohibitions on “reverse engineering” — but so far no reported cases have adopted this approach.

Professor Rice asserts that federal courts should refuse to enforce contracts containing restrictions on reverse engineering, to the extent those restrictions conflict with the reverse engineering privilege found to exist under the fair use provision of the federal copyright statute. Courts ought to treat the right to fair use in this context, in other words, as an immutable statutory endowment, rather than as a default rule that the parties can change by mutual agreement.¹¹³ It is clear from this formulation of the issue that preemption would serve the role traditionally reserved for doctrines

109. See, e.g., David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543 (1992).

110. 17 U.S.C. § 301 (1988 & Supp. V 1993).

111. See, e.g., *Fantastic Fakes, Inc. v. Pickwick Intl., Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (“It is possible to hypothesize situations where application of particular state rules of construction would so alter rights granted by the copyright statutes as to invade the scope of copyright law or violate its policies.”).

112. Rice, *supra* note 109.

113. *Id.* at 605-16.

such as patent misuse: the policing of voluntary, bilateral contracts. As I have stressed elsewhere in this review, I believe that these doctrines are crucial not only from the perspective of intellectual property policy but also from the point of view of a practitioner asked to draft an agreement dealing with intellectual property. The implicit critique of Alces and See's book, of course, is once again that they omit these matters from their otherwise careful treatment of shrink-wrap licenses.

In general there is much merit at the heart of Professor Rice's proposal. There is something wrong with the wholesale undermining of a statutory right. I disagree, however, with the implicit premise that the right to reverse engineer is an immutable right, one that a prospective licensee cannot surrender in a transaction. Instead, I believe that preemption should occur only when the practice of contracting away a statutory right has become pervasive and perpetual in a particular industry setting. Once one accepts this gloss on Rice's proposal, however, it turns out to produce the same policy recommendation — the preemption of no-reverse-engineering clauses — that Rice himself advocates.

1. *Contracts as "Private Legislation"*

In Friedrich Kessler's classic 1943 article on contracts of adhesion,¹¹⁴ he argued that when an entire industry put forth nearly identical contract terms under which consumers could purchase its products, the industry was in effect exercising a form of "private legislation." In his words,

Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.¹¹⁵

Kessler saw standard form contracts as evidence of a regression to the days when status predominated over contract.¹¹⁶ Kessler believed that courts had not yet caught on to this and thus were adding to the problem. In his view, contract case law continued to perpetuate the rhetoric of freedom of contract under the mistaken

114. Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (defining notion of "private legislation" in context of adhesion contracts).

115. *Id.* at 640. Interestingly, an experienced copyright practitioner has argued recently in print the similarity between software licensing and feudal landholding arrangements. Hemnes, *supra* note 107, at 585 ("The system of software distribution under license is analogous to the feudal system of land tenure.")

116. Kessler, *supra* note 114, at 641.

impression that contract law was all about decentralizing the “law-making process.”¹¹⁷ The cases assumed the classic nineteenth-century conception of contract as a quintessentially *bilateral* relationship. This assumption blinded them to what Kessler saw in the changing economic landscape, in which large firms were gaining more and more power — power that they employed to force uniform contracting terms and practices on consumers. Rather than having the courts slavishly repeat outmoded doctrine, Kessler argued that courts should be willing to revise cherished principles of contract formation and interpretation in recognition of the very different ramifications that the freedom-of-contract principle has in markets in which sellers possess concentrated power.¹¹⁸

In the next section, I argue that Kessler’s conception of the unique status of uniform, standardized contracts holds the key to the resolution of the shrinkwrap licensing debate.

2. *Shrinkwrap Licensing as Private Legislation: Preemption of Rules Made Immutable by Standard Form Contracts*

As David Rice recognizes, the received law of federal preemption in the intellectual property area does not fit comfortably into the role of a contract policing-mechanism.¹¹⁹ Courts have almost uniformly applied preemption doctrine to strike down state legislation,¹²⁰ not bilateral contracts.¹²¹ Yet, anyone observing the erosion

117. *Id.*

118. As examples of difficulties courts have had with standardized contracts, Kessler cites cases on insurance contracts dealing with warranties and offer and acceptance. *Id.* at 633-34. Today, we might use a new vocabulary to describe this phenomenon. Under the rubric of “default rule” analysis, scholars interested in contract have sharpened our understanding of the source of contract terms. On default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989). Unlike Kessler, who asserts repeatedly that the parties to a contract make their own law, contributors to the default rule literature conceptualize contract law as emanating from two sources: (i) the parties, in the case of negotiated terms; and (ii) the state, in the case of non-negotiated background terms, or default rules. This understanding of contract law thus brings state lawmaking back in to the transaction. Yet it shares with Kessler the notion that the parties are the dominant and, in most cases the ultimate, source of the legal rules that govern their interaction. Default rule analysis divides state-supplied contract terms into two classes. True default rules are rules that apply unless parties contract out of them. Immutable rules, conversely, apply notwithstanding the parties’ attempts to contract around them.

From the analytical perspective of the default rule literature, the shrinkwrap licensing controversy turns on the enforceability of contract rules made effectively immutable by standard industry licensing practices. Likewise, the issue of federal preemption of individual contract terms, discussed earlier, turns on which statutory rights are default rules and which are immutable. I have argued this in my patent law casebook. See *MERGES supra* note 52, at 898-900.

119. Rice, *supra* note 109, at 604 (“Courts . . . tend to treat state contract law as not generally preempted under Section 301(a).”).

120. *Id.* at 577-88.

121. *Cf. Fantastic Fakes, Inc. v. Pickwick Intl., Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (holding that federal copyright law did not preempt the application of a state law rule of contract construction, which stated that an undertaking by a licensee to place a licensor’s

of finely tuned federal intellectual property policy through the mechanism of contract should be attracted to Professor Rice's proposal.

I propose to unite Rice's impulse to preempt with Kessler's insight that uniform standardized contracts are a form of private legislation. Standard form software licensing contracts, by virtue of their very uniformity and the immutability — in other words, non-negotiability — of their provisions, have the same generality of scope as the state legislation that is often the target of federal preemption. Furthermore, these contracts have the same effect as offending state legislation: wholesale subversion of an important federal policy. Under this analysis, I essentially second Professor Rice's proposal with one caveat. Only when a licensing provision in contravention of the federal statute has become totally pervasive will the statute preempt it.

This doctrine of contract preemption is in addition, of course, to patent and copyright misuse law that has traditionally prohibited certain licensing provisions, such as private patent or copyright term extensions and tie-in agreements.¹²² In effect, the proposed contract preemption notion I am advancing would create a third tier of intellectual property policing doctrines. In addition to the general rule that intellectual property is generally freely alienable and the traditional misuse exception that prohibits certain provisions in all bilateral licensing agreements, I am proposing a new policing concept: a prohibition against blanket imposition of a contract term on essentially the entire licensee population.¹²³ Unlike the traditional misuse exception, which applies regardless of the pervasiveness of the offending contract term, the new doctrine of contract preemption would apply only when the contract term rises to the level of private legislation.

name and a copyright notice on the products manufactured was a covenant and not a condition of the contract; the court recognized, however, that "[i]t is possible to hypothesize situations where application of particular state rules of [contract] construction would so alter rights granted by the copyright statutes as to invade the scope of copyright law or violate its policies."); *Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986) (holding that federal law preempted contract claims in a complaint to the extent that they simply restated a copyright infringement cause of action, but that the law would not preempt the addition of an agreement to pay royalties in exchange for the right to use copyrighted software).

122. See discussion *supra* section IV.A. On patent misuse, see *MERGES*, *supra* note 52, at 750-59. On copyright misuse, see *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

123. Obviously, the policing mechanism must take effect somewhere short of absolute unanimity; otherwise, a software copyright holder will simply license his best friend or his mother without the restriction and avoid the effect of the rule. Perhaps we can dub this the "Mrs. Gates"-keeper provision? Okay, perhaps not.

V. CONCLUSION: THE DISSEMINATION OF TRANSACTIONAL KNOW-HOW

In this review, I have tried to move beyond the detailed commercial law issues central to the volume by Alces and See to consider the reasons for, and implications of, the growth of commercial transactions having an intellectual property component. Two simultaneous developments seem to be at work: the rapid emergence of a robust market for intellectual property rights themselves, and the insertion of an intellectual property component into traditional commercial transactions. Inspired by the cases that Alces and See discuss, I find that intellectual property rights are often layered on top of transactions involving other assets, and sometimes they are the primary subject matter of a wholly distinct class of transactions. What emerges from this analysis is a sense of how policymakers can use intellectual property rights to change the dynamics of buyer-seller interactions that the UCC traditionally structures. I conclude that in light of the changes in commerce ushered in by increasing reliance on intellectual property, the law must become more sensitive to the quiet insertion of an intellectual property element into traditional commercial exchanges. For example, I argued that courts must adjust intellectual property and UCC damages remedies to insure that contracting parties in the midst of contract repudiation disputes cannot undercut the structure of rights accorded by the UCC, at least not without gaining explicit contractual approval.

The forces behind the growing commerce in intellectual property rights will likely intensify in the coming years. If they do, it will be all the more necessary to complete what Alces and See have begun in this volume: the process of constructing a truly integrated *contract* law governing intellectual property-based transactions. Their contribution, though only one step along the way, is thus important.

To some extent, this book, and others like it, will go some way toward fulfilling its own prophecy. Just as in newly emerging scientific¹²⁴ and engineering¹²⁵ disciplines, the dissemination of know-how in a new legal field is a crucial step in advancing promising techniques and establishing the field's legitimacy. We know now that lawyers — *especially* commercial lawyers — truly are “transac-

124. See, e.g., JOHN W. SERVOS, *PHYSICAL CHEMISTRY FROM OSTWALD TO PAULING: THE MAKING OF A SCIENCE IN AMERICA* 46-50 (1990) (describing the diffusion of the new field of physical chemistry through publication of journals and textbooks).

125. See, e.g., Ralph Landau & Nathan Rosenberg, *Innovation in the Chemical Processing Industries*, in NATHAN ROSENBERG, *EXPLORING THE BLACK BOX: TECHNOLOGY, ECONOMICS, AND HISTORY* 190, 202 (1994) (discussing the diffusion of knowledge in the chemical-processing industry).

tion cost engineers,"¹²⁶ as Professor Ronald Gilson has described so well. From this point of view, a book such as Alces and See's helps to disseminate the transactional know-how associated with the new form of transaction. This will not only help identify and legitimize a new subcommunity of practicing commercial lawyers; it will also drive down the costs of transactions, which should make them even more common in the future.

126. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 243 (1984).

REARRANGING DECK CHAIRS ON THE TITANIC: THE INADEQUACY OF MODEST PROPOSALS TO REFORM LABOR LAW

*Charles B. Craver**

AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW. By *William B. Gould IV*. Cambridge: The MIT Press. 1993. Pp. x, 313. \$37.50.

It is impossible for any neutral observer to be sanguine regarding the current state of the American labor movement.¹ The union density rate — the percentage of nonagricultural labor force participants in labor organizations — has declined from a high of 35% in 1954² to 15.5% today.³ When the increase in public sector unionization over the past several decades is discounted, the dire state of private sector unions becomes even more apparent. The private sector density rate is currently an anemic 10.9%⁴ — the lowest figure since 1936. If the rate of membership decline over the past twelve years continues, the private sector union density rate may fall to five percent by the end of this decade.⁵ Labor organizations would only be relevant — and, in light of international competition, would diminish in significance — in such heavy industries as automotive, electronics, and steel.

The decline of labor organizations might be palatable if counterbalanced by increased respect for and protection of individual employee rights. This has not, however, been the case. Even though Congress has enacted more expansive statutes protecting employees against certain forms of invidious discrimination, and even though employees enjoy minimal wage, health and safety, and ben-

* Leroy S. Merrifield Research Professor of Law, George Washington University. B.S. 1967, M. Indus. & Lab. Rel. 1968, Cornell; J.D. 1971, University of Michigan. — Ed.

1. See generally CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT (1993); MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

2. See GOLDFIELD, *supra* note 1, at 10, tbl. 1.

3. See Data for 1994 Shows Membership Held Steady at 16.7 Million, Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995).

4. *Id.*

5. See Union Coverage of U.S. Private Workforce Predicted to Fall Below 5 Percent by 2000, Daily Lab. Rep. (BNA) No. 241, at A-1 (Dec. 18, 1989).

efit protection, most American workers are less confident of their future employment security today than they have been since the Great Depression. Under the traditional employment-at-will doctrine that still is accepted in forty-nine states, workers may be terminated at any time for good cause, bad cause, or no cause. Technological advancements may supplant them, or they may lose their positions to workers in emerging nations who earn one-tenth the wages of U.S. personnel. Their employers are under no legal obligation to discuss these possible developments with the directly interested employees before implementing final management decisions and laying off the adversely affected individuals. Nor are firms required to consult their workers regarding other operational modifications that may profoundly alter employee job functions or future employment security. Rank-and-file personnel are given no more respect than the machines they operate.

In his thoughtful book *Agenda for Reform*, Professor William Gould⁶ describes both the demise of the American labor movement and the continuing erosion of worker dignity and job security. He explores the absence of wrongful termination protection for most U.S. employees and the lack of meaningful worker participation programs. He then evaluates the need for National Labor Relations Act amendments that would streamline the certification process and expand the scope of collective bargaining. He also proposes measures that would increase the economic weapons available to representative labor organizations. Gould concludes by comparing the American and Canadian experiences over the past several decades in an effort to understand the unique nature of the American decline in union density.

In *Agenda for Reform*, Gould recommends many legal changes that would enhance individual employment rights, encourage the growth of unions, and contribute to the efficacy of the collective bargaining process. Even though a number of management representatives consider many of Gould's proposals radical, his suggested modifications are truly modest and, in fact, wholly inadequate to alleviate the crises facing both individual workers and labor organizations. They are more reflective of the current conservative political climate than of the true needs of American workers.

It is time to acknowledge that U.S. workers have minimal employment dignity and almost no job security. Instead of being considered an integral part of the production or service process, they are treated like fungible machines. They are ignored by most management officials when critical operational decisions are formu-

6. Charles A. Beardley Professor of Law, Stanford University. Professor Gould is currently on leave from Stanford University and is Chair of the National Labor Relations Board.

lated, and they enjoy meager statutory protections. The circumstances affecting labor organizations are even worse. Unions have found it extremely difficult to organize new bargaining units, due to the overt hostility of most business firms. The relatively few labor organizations that currently represent employees are fearful of management-encouraged decertification efforts, find it increasingly arduous to negotiate effectively over the most significant issues affecting bargaining unit members, and have few economic weapons they can use to support their bargaining demands. In the coming years, the United States must decide whether it will view free trade unions as an important part of a democratic society or, instead, provide corporate leaders with unrestrained authority over lower-level personnel.

I. FACTORS CONTRIBUTING TO THE RISE AND DECLINE OF UNIONS

In his first substantive chapter, Chapter Two, Gould briefly describes the expansive growth of unions from 1935 until 1955, a growth fueled by the ability of newly created industrial unions to organize the automobile, electronics, rubber, steel, textiles, and transportation industries. Curiously absent from this part of the book is any significant acknowledgement of the momentous impact of the enactment of the National Labor Relations Act (NLRA)⁷ in 1935 and its explicit congressional policy "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association [and] self-organization"⁸

Gould next describes the three major developments that have contributed to the substantial decline of labor organizations over the past several decades. The first factor cited is the development of a global economic system that has forced domestic firms to compete with business enterprises in lower-wage countries (pp. 12-13). The rise of multinational corporations has undermined labor solidarity and forced high-wage American employees to compete against personnel in countries such as Mexico, where wage rates are approximately one-tenth of those in the United States (pp. 12-13). Moreover, the creation of the North American Free Trade Zone will encourage the migration of traditional unionized manufacturing jobs from the United States to Northern Mexico. American production workers whose jobs are not transferred will need to moderate their wage and benefit expectations if they are to avoid ultimate displacement by foreign laborers (p. 13).

7. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)).

8. 29 U.S.C. § 151 (1988).

Between 1969 and 1985, 3,500,000 production jobs were transferred from the United States to other countries.⁹ Over the next decade, employers will relocate several million additional production jobs to Mexican facilities to take advantage of the lower labor costs, minimal health and environmental law enforcement, and hostile union climate in that country. Millions of other production jobs have been supplanted by technologically advanced machines, as the United States has changed from a production economy to a post-industrial society composed primarily of white-collar and service personnel.¹⁰ These phenomena will threaten the continued viability of major industrial unions like the United Automobile Workers, the United Steelworkers, the United Mine Workers, and the International Union of Electrical Workers. Although the global economy and deindustrialization have also affected nations such as Canada, Germany, Sweden, Denmark, and the United Kingdom, their labor organizations have not suffered the significant membership losses sustained by U.S. unions (pp. 14-15, tbl. 2.1). This observation would suggest that factors unique to the United States are primarily responsible for the decline of American labor organizations.

Even within the United States, the increase in international competition does not explain the lack of union organizing success in the expanding service sector among employees whose jobs cannot be easily exported to foreign nations. Although employees performing routinized jobs for bureaucratic institutions in the banking, computer, health care, and insurance industries should be ripe for collectivization, union success in these service areas has been minimal. Gould attributes this situation to his second determinative factor — the antilabor environment generated during the Reagan administration (pp. 13-14). The Reagan Labor Board enlarged management prerogatives by refusing to require collective bargaining with respect to corporate decisions that Board members thought management officials should unilaterally decide (pp. 21-25). Support for Gould's view regarding the negative impact of the anti-union Reagan presidency may be found in the data indicating that during the 1980s the absolute number of union members declined for the first time since the enactment of the NLRA.¹¹

Gould fails to ask whether the election of President Reagan actually generated the anti-union climate of the 1980s or merely served as a reflection of an antilabor environment created by private business firms in the mid to late 1970s that culminated in the election of President Reagan in 1980. American business leaders

9. See CRAVER, *supra* note 1, at 45.

10. See *id.* at 40-42.

11. See *id.* at 35.

have historically opposed worker organizing.¹² During the late 1800s and early 1900s, for example, they used antitrust and criminal conspiracy doctrines to prevent unionization.¹³ They required employees to sign "yellow-dog" contracts that precluded union membership and hired private detective agencies to report on the concerted activities of their workers. Employers summarily terminated union sympathizers and blacklisted them, preventing subsequent employment with other area firms.

Business leaders vigorously opposed enactment of the NLRA, and they lobbied diligently for the adoption of the 1947 Labor Management Relations Act¹⁴ and the 1959 Labor Management Reporting and Disclosure Act¹⁵ amendments to the NLRA that were designed to dilute the rights previously extended to employees and labor organizations. In some instances, moreover, legislative modifications were not even necessary because conservative Labor Board and court decisions had already narrowed worker rights. For example, even though the original NLRA explicitly guaranteed employees the right to withhold their labor during bargaining disputes,¹⁶ a probusiness-oriented Supreme Court quickly weakened this fundamental right by holding that employers could hire permanent replacements for striking workers.¹⁷

Unionized firms appeared to tolerate their representative labor organizations during the 1960s and early 1970s, but the hyperinflation of the mid-1970s reminded these employers of the high costs of unionization. Cost-of-living adjustment provisions in bargaining agreements caused the union wage premium — the difference between the wages paid to organized workers and their nonunion counterparts — to increase in many industries to at least fifteen-to-twenty percent. Unionized businesses thus found it more difficult to compete with unorganized companies, so they began to look for ways to undermine the labor movement. In 1977, when union officials sought modest changes in the NLRA through the proposed Labor Law Reform Act, business organizations lobbied diligently

12. See generally *id.* at 47-51.

13. See, e.g., *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (holding union strike activity to be violation of antitrust laws); *Loewe v. Lawler*, 208 U.S. 274 (1908) (same); *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900) (holding union strike activity unlawful as criminal conspiracy); *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896) (same).

14. Pub. L. No. 80-101, 61 Stat. 136 (1947).

15. Pub. L. No. 86-257, 73 Stat. 519 (1959).

16. See Pub. L. No. 74-198, § 13, 49 Stat. 449, 457 (1935) (codified as amended at 29 U.S.C. § 163 (1988)).

17. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); see also *Trans World Airlines, Inc. v. Independent Fedn. of Flight Attendants*, 489 U.S. 426, 432-43 (1989) (holding that less senior "cross-over" employees refusing to honor initial strike call or deciding to return to work during the stoppage could, after labor dispute had been resolved, retain higher positions obtained while more senior colleagues were on strike).

to prevent these legislative changes. Union leaders felt betrayed by this behavior, which served as a reminder of the increasingly adversarial labor-management environment they faced.

By the late 1970s, the business community realized that control of the White House could prevent the enactment of prolabor legislation and allow it to seize control of the Labor Board and the federal judiciary. Business organizations thus expended millions of dollars in an effort to place Ronald Reagan in the White House. Having accomplished this goal, they then lobbied effectively for appropriate presidential vetoes and for the appointment of judges who believed that unionization generated a cartel-based wage premium that undermined free market efficiency. These judges thought that collective bargaining by representative unions should not be permitted to interfere with the exercise of managerial discretion. The Supreme Court thus ruled that "in view of an employer's need for unencumbered decisionmaking," the duty to bargain over corporate decisions having a substantial impact on the continued employment of bargaining unit personnel "should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."¹⁸ If one acknowledges that a fundamental purpose of unionization is to allow employees to "interfere with" managerial freedom, it becomes obvious that the *First National Maintenance* decision quoted above reads more like a legislative committee report than a judicial decision. The Court's assault on the organizational rights of workers continued in another case that held that university professors are "managerial" personnel who are not subject to NLRA coverage.¹⁹ These holdings encouraged the conservative Reagan Labor Board to erode other doctrines protecting employee rights.²⁰

18. *First Nat. Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

19. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); see also *NLRB v. Health Care & Retirement Corp. of America*, 114 S. Ct. 1778, 1782-83 (1994) (holding that professional people who minimally direct the work of nonprofessionals constitute excluded "supervisors"). See generally David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 *YALE L.J.* 689 (1990) (arguing that traditional collective bargaining subjects are incompatible with professionalism and that modifications to collective bargaining are needed to make the labor system more conducive to professional values); David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 *COLUM. L. REV.* 1775 (1989) (arguing that the exclusion of professional employees as managers is contrary to the NLRA's legislative history).

20. See, e.g., *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986) (holding that nonunion employees who individually complain about unsafe conditions are not engaged in a protected concerted activity), *affid. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (holding that nonunion workers do not have right to have fellow employees accompany them to management investigatory interviews that they think will result in disciplinary action).

The third critical factor that Gould cites to explain both the decline of unions and the erosion of individual employment rights is the recent expansion of more tenuous employment relationships (pp. 25-26). According to Jonathan Hiatt and Lynn Rhinehart, "The past decade has seen tremendous growth in the contingent work force. Together, temporary, contract, and part-time workers make up 25 percent to 30 percent of the work force as a whole."²¹ These attenuated employment relationships have become especially popular in retail and service establishments, making it more difficult for unions to organize these businesses.

To explain the degree of anti-union sentiment exhibited by most American firms as opposed to their European counterparts, Gould emphasizes a crucial difference between collective bargaining in many Western European countries and collective bargaining in the United States. Collective negotiations in nations like Germany and Sweden are conducted on a centralized basis at the regional or national level, with government fiat extending the negotiated wages and benefits to firms throughout the industry involved (p. 35). In the United States, in contrast, bargaining takes place in a highly decentralized manner, with negotiated wages and benefits affecting only the workers in the pertinent bargaining units. This American practice greatly increases the cost of unionization to organized companies by permitting unorganized firms to gain a competitive advantage through the adoption of lower wages and less generous fringe benefits. This factor explains why organized employers have worked diligently over the past fifteen years to decertify, or at least to weaken, incumbent bargaining representatives.

Although Gould notes in a subsequent chapter the use of unlawful tactics by many American employers to discourage worker organizing, he discounts the overall impact of this phenomenon (pp. 151-52). Evaluations of Labor Board data by Professor Paul Weiler²² and by Professors Robert LaLonde and Bernard Meltzer²³ have documented an alarming increase in employer unfair labor practices during organizing campaigns over the past fifteen years. Employers routinely threaten plant closures or production transfers and frequently terminate key union supporters in violation of Section 8(a)(3).²⁴ These tactics make it difficult for unions to organize

21. Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 LAB. LAW. 143, 144 (1994).

22. See WEILER, *supra* note 1, at 238-39.

23. See Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 961-69 (1991); see also Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991).

24. 29 U.S.C. § 158(a)(3) (1988). This provision makes it an unfair labor practice for employers to discriminate against employees to encourage or discourage membership in labor organizations. Regarding the pervasive use of questionable anti-union tactics by employ-

new units. Workers who fear employer retaliation are hesitant to demonstrate their union support openly, and many individuals are afraid to sign union authorization cards or to vote for union representation. Anemic Labor Board remedies have done little to discourage these unlawful anti-union tactics. Corporations realize that it is often less costly to defend and even remedy pervasive unfair labor practices than to be saddled with collective bargaining obligations that will place them at a distinct disadvantage vis-à-vis their unorganized competitors. It is this illegal behavior by a number of American firms that distinguishes the rapidly deteriorating union situation in the United States from the more stable union environments in Canada and most Western European countries.

In addition to citing illegal employer practices, Gould notes the relatively unique business union movement in the United States, drawing a comparison to the social and political labor organizations indigenous to Western European nations (pp. 45-47). Foreign labor movements have historically united workers by both socioeconomic class and political affiliation. This factor has enhanced union solidarity during periods of economic crisis and political hostility. In the United States, in contrast, employees tend to view labor organizations solely in terms of the economic benefits they may obtain through the bargaining process. When workers conclude that bargaining representatives are unlikely to advance their economic interests substantially, they opt for nonrepresentation. It would thus be beneficial for American labor leaders to become more politically visible. They must also convince rank-and-file personnel that they need a collective voice to counterbalance the economic power of their corporate employers. The fact that executive compensation has increased much faster than rank-and-file worker pay over the past fifteen years (p. 61) should suggest that employees lack the power to advance their own interests on an individualized basis.

Gould briefly mentions the fact that American labor officials have not provided exemplary leadership (p. 31). He notes that undemocratic and corrupt leaders have contributed to the negative public perception of unions. He also could have cited the fact that union officers no longer reflect the heterogeneous composition of the present labor market. Most national union officers continue to be older, white males who evince the craft or industrial union philosophies of the 1950s or 1960s. They find it difficult to relate to the women and minorities who have been entering the labor force in record numbers. Many union officers also fail to comprehend the need for both novel organizing techniques that will appeal to white-

ers during organizing campaigns, see generally MARTIN JAY LEVITT & TERRY CONROW, *CONFESSIONS OF A UNION BUSTER* (1993).

collar workers and new organizations that might reflect the aspirations of those employees.

In recent years, while many business firms have retained sophisticated behaviorists to convince white-collar workers that it would be demeaning and unprofessional to collectivize, most labor organizers have continued to use blue-collar appeals that repulse most educated employees. The American labor movement must create new organizations that will do for white-collar industries, such as banking, insurance, computers, and health care, what the old industrial unions did for mass production industries during the 1930s and 1940s. Labor organizations will only survive in the coming decades if they can organize physicians, nurses, lawyers, computer specialists, insurance agents, financial institution personnel, and similar workers. As white-collar jobs become increasingly routinized, this task should become easier. Nonetheless, if labor leaders do not develop the necessary institutions now, unions may never be able to regain their previous vitality.

II. JOB SECURITY AND WRONGFUL TERMINATION PROTECTION

In Chapter Three, Gould discusses one of the most significant differences between organized and unorganized workers — the availability of protection against unjust dismissal. He emphasizes the fact that individuals covered by collective bargaining agreements receive protection against unjust discipline through “just cause” provisions and the availability of grievance arbitration procedures to review adverse employer decisions (pp. 63-64). Gould then reviews the traditional employment-at-will doctrine that allows employers to terminate most employment relationships at any time for any reason (pp. 66-67). He examines the three exceptions to that doctrine that many state courts have created to deal with perceived inequities. Most states have adopted a public policy exception that precludes discharges that contravene important public policies (pp. 67-69). A number of jurisdictions have also adopted an express or implied contract theory that enables wrongfully terminated workers to sue to enforce oral management representations or written personnel policy statements indicating that employees will only be discharged for valid reasons (pp. 69-74). A few state courts have provided employees with additional protection against unfair dismissals through their application of implied covenants of good faith and fair dealing in individual employment contracts (p. 72).

Gould notes that the United States is the only major industrial nation that does not provide private sector workers with statutory protection against unjust dismissals (p. 77). Even though he believes that employees receive the most effective job security

through bargaining-agreement just cause and grievance-arbitration provisions, Gould recognizes that the vast majority of American workers who are unorganized enjoy no such protection (p. 77). The author thus proposes the enactment of federal legislation that would prohibit wrongful terminations (pp. 80-87). He discounts labor fears that the enactment of such statutory protection would diminish worker receptivity to unionization because he thinks that unions would still provide the most expansive employment security through just cause provisions (pp. 90-91). Under contractual just cause provisions, labor arbitrators have traditionally required employers to demonstrate the presence of just cause for termination.²⁵ Under a statutorily created wrongful termination law, however, discharged workers would presumably be obliged to establish that they were impermissibly dismissed. This important proof distinction would thus provide unionized personnel with greater protection than would be available to their unorganized cohorts.

After a brief probationary period of up to one year, the statute would cover all nonexecutive personnel employed by firms with at least fifty workers.²⁶ Courts could then use the traditional just cause standards developed by labor arbitrators to determine which terminations are inappropriate. Although unionized grievants could have their cases resolved through grievance-arbitration procedures, unorganized complainants would have their cases resolved by unemployment compensation administrative law judges who regularly determine similar issues under misconduct disqualification provisions (pp. 98-99). Wrongfully terminated individuals would be presumptively entitled to monetary relief, but Gould would be reluctant to create a presumption in favor of reinstatement in the absence of union representatives who could monitor reinstatement directives (p. 101).

Gould's recommendations are similar to those made by Professor Clyde Summers almost twenty years ago.²⁷ They are as valid today as they were then. Despite Montana's enactment of a wrongful termination law²⁸ and the adoption of a Model Employment Termination Act by the Uniform Commissioners on State Laws,²⁹ little progress has been made in this critical area. If courts continue to expand judicial exceptions in egregious discharge cases, employ-

25. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 661-63 (4th ed. 1985).

26. Pp. 87-88, 95-97. I would encourage Congress to extend wrongful discharge protection to firms with twenty-five or more employees, and possibly even to companies with fifteen or more employees that are now covered by typical federal civil rights statutes.

27. See Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

28. See MONT. CODE ANN. § 39-2-901 to -915 (1993).

29. 9A Lab. Rel. Rep. (BNA) Individual Employment Rts. Manual 540:21 (Dec. 1991).

ers will recognize that the cost of defending these claims and of satisfying increasingly generous plaintiff verdicts is becoming extremely burdensome. They may thus realize that legislated protection with prescribed monetary remedies would be preferable to the continued risk of excessive compensatory and punitive damage awards in tort actions.

Employers should also acknowledge other benefits resulting from wrongful termination protection.³⁰ Managers frequently decry the lack of firm loyalty exhibited by contemporary employees. But it is difficult to expect significant loyalty from newly hired individuals who are expressly informed that their new relationships may be terminated at any time for any reason. If workers experienced greater corporate loyalty in the form of meaningful employment security, they would have a greater commitment to their employers. Worker turnover would be reduced, and employee morale and productivity would probably increase. Companies would also be more willing to assume the costs of employee training if they thought that the trainees would be more likely to remain in their employ in future years.

Proponents of wrongful termination statutes have often been as reluctant as Gould to provide for the reinstatement of improperly fired individuals who wish to return to their former employment environments, but this reluctance is unfounded. When labor arbitrators conclude that unionized employees have been discharged in contravention of contractual just cause provisions, they regularly order reinstatement. Federal and state courts also use the reinstatement remedy to rectify discriminatory discharges based on race, religion, gender, national origin, age, disability, or other impermissible factors. In my experience as a labor arbitrator, I have directed the reinstatement of a number of grievants who had been unjustly dismissed. I am not aware of a single case in which employers were unable to return the grievants to their former positions.³¹ If expedited adjudication procedures could be provided through either contractual grievance-arbitration mechanisms or administrative law judge hearings, reinstatement difficulties should be rare. On the other hand, if wrongfully terminated employees are not returned to their former employment environments, they may suffer both emotional and monetary losses that cannot be alleviated satisfactorily through front pay or severance pay awards. Their future employ-

30. For cogent arguments in favor of wrongful termination legislation, see WEILER, *supra* note 1, at 48-104. For an economic argument supporting unrestrained freedom of contract, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

31. Federal and state courts rarely encounter difficulties with respect to individuals they reinstate to nonunion settings. If persons reinstated to nonunion environments under wrongful termination laws faced retaliation, they could always file additional wrongful termination claims.

ment security would also be diminished through the loss of their previously accumulated seniority rights. I would thus urge adoption of statutory provisions that would provide for the reinstatement of unjustly discharged individuals.

III. THE NEED TO CREATE WORKER PARTICIPATION PROGRAMS

A. *Gould's Analysis*

Gould next turns, in Chapter Four, to worker participation programs in both the United States and other countries. He initially notes that union leaders have not generally been receptive to such programs because of the frequent use of shop committees and company unions during the 1930s and 1940s to prevent the selection of independent bargaining representatives (p. 110). A number of business firms have recently decided to create various quality of work life (QWL) programs that involve shop-level committees consisting of employees and often managerial personnel. These committees are designed to enhance worker-management communication and to improve productivity and quality (p. 111).

Gould carefully examines the German co-determination model (pp. 115-17). The German Works Council Act requires firms to create works councils at the shop level to enable employees to participate in decisions that affect their employment conditions and job security. Corporate leaders must inform works councils about contemplated decisions that would affect employees and must supply committee members with the information they need to evaluate the possible effects of those decisions. Management officials must then consult with works council members in an effort to achieve mutual accommodations. If no agreements can be reached, arbitral or labor court proceedings resolve the issues (p. 116).

The works councils, which operate at the shop level, do not interfere with the functions of representative labor organizations that negotiate agreements at the regional or national level (p. 116). The Co-determination Act of 1976 provides employees with additional input at the corporate level. Large firms are required to have corporate boards that are composed of one-third or one-half employee-elected representatives (p. 117). Although procedural rules permit shareholder and management representatives to make final decisions regarding deadlocked issues, board members usually endeavor to achieve mutually acceptable results.

Gould also evaluates innovative examples of labor-management cooperation within the United States. He describes the collectively bargained programs involving the United Automobile Workers (UAW) and New United Motors Manufacturing, Inc. (NUMMI), and the UAW and Saturn, a General Motors subsidiary (pp. 123-

31). Employees participate in production planning and learn different jobs that they perform on a rotating basis. General categories replace narrowly defined job classifications, thus providing the companies with managerial flexibility. NUMMI and Saturn executives recognized that cooperative programs designed to increase worker productivity and product quality could succeed only if the company promised employees reasonable job security and a share of the resulting profits (pp. 126-27). Gould emphasizes that these efforts involve "perpetual bargaining" over numerous issues of joint interest that arise regularly in the shop (pp. 130-31).

Worker participation programs function most effectively, according to Gould, when compensation is related to skill levels and to individual or group performance or both (p. 132). The author indicates that employees know when they are being fleeced and says that only meaningful worker participation plans can succeed in the long run (p. 135). If corporate managers are the primary beneficiaries of enhanced firm revenues, lower-level workers will quickly revert to pre-worker participation practices.

Older court and recent Labor Board decisions have made it difficult for firms to establish even bona fide worker participation programs without risking unfair labor practice liability under Section 8(a)(2) of the NLRA,³² which makes it unlawful for employers to dominate or provide financial support to labor organizations. Because the NLRA expansively defines the term *labor organization* to include any "employee representation committee or plan . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work,"³³ court and Labor Board determinations have found certain worker participation committees to constitute employer-dominated labor organizations.³⁴

Gould suggests that Section 8(a)(2) has outlived its usefulness and should simply be repealed (pp. 140-41). Although the abrogation of Section 8(a)(2) might appear to give disingenuous employers the opportunity to create sham worker-management committees as an anti-union device, this fear is unfounded. Any firm that engaged in such insincere behavior would clearly be guilty of restraining or coercing its employees with respect to the exercise

32. 29 U.S.C. § 158(a)(2) (1988).

33. 29 U.S.C. § 152(5) (1988).

34. See, e.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (1994).

Some court decisions have been more flexible regarding the legality of bona fide worker participation plans. See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

of their protected NLRA rights in violation of Section 8(a)(1).³⁵ Although subtle uses of employee-employer committees to discourage collectivization might be difficult to prove, this is the type of conduct the Labor Board has historically regulated with minimal difficulty.

Despite his support for voluntary worker participation programs, Gould does not propose legislation mandating greater employee involvement in corporate management. Even though I believe that many employees in white-collar and service occupations will eventually decide that collectivization may enhance their employment interests, the union density rate in the private sector will not likely ever exceed twenty to twenty-five percent in the United States. American workers are so individualistic and afraid of being considered part of the working class and employer opposition is so substantial that union membership figures could not conceivably approach those in many Western European countries. Thus, seventy-five to eighty percent of private sector personnel will continue to lack the ability to influence their employment destinies through the traditional bargaining process. Gould deals with this reality by suggesting that unions representing twenty or thirty percent of employees in a particular unit be given the legal right to speak for those individuals (p. 141). Without more formal participation rights, however, it is doubtful that nonmajority representatives would possess the economic leverage they would need to protect the persons they represent.

It is time for Congress to recognize two critical realities. First, the NLRA has truly become an irrelevant statute for the vast majority of private sector employees. If unorganized workers are to have the capacity to affect their employment conditions, the legislature must provide them with new statutory rights guaranteeing that privilege. Second, corporate success is dependent upon three symbiotic groups: (i) the investors who provide the necessary capital, (ii) the managers who provide the requisite leadership, and (iii) the employees who carry out the regular job functions.

Corporate laws carefully protect the rights of business investors. Prospective shareholders receive extensive firm information before they decide to purchase shares, and they participate in the election of corporate directors. Firm managers owe shareholders a fiduciary duty and are liable to stockholders who are injured by breaches of this duty. Because capital is a highly mobile commodity, shareholders can protect their interests through diversification and through transfer of their financial support from poorly performing businesses to other investments.

35. 29 U.S.C. § 158(a)(1) (1988).

Corporate managers also possess the capacity to protect themselves against adverse corporate decisions. They usually exercise meaningful discretion with respect to decisions affecting their own futures. Corporate managers can often avoid employment-at-will insecurity through individual employment contracts that guarantee their continued employment for specified time periods. They may be able to obtain generous severance packages in case they lose their positions through corporate reorganizations or buy-outs. Moreover, they directly benefit from business success through bonus payments and stock options that are unavailable to most subordinate personnel. Finally, corporate managers even have access to confidential business information that would let them know when they should begin to contemplate alternative employment.

Rank-and-file employees are treated the same as the equipment they use or operate. Even though they commit their working lives to the success of their respective employers, their employment can normally be terminated at any time for any reason. They are not privy to confidential firm information, and they are not consulted about contemplated business decisions that may affect their employment destinies. Although workers may resort to the "exit voice" and seek other jobs when they are dissatisfied with firm developments, most lack the unique skills to enjoy significant mobility. Furthermore, their pension rights and length of service frequently induce them to remain with their current employers during periods of declining firm performance.

B. *Legislative Approach*

The time has come to provide rank-and-file personnel with fundamental employment dignity. Congress should enact an employer-employee relations statute similar to the German Works Constitution Act of 1972.³⁶ The statute would require every employer with at least fifteen or twenty-five employees to create a specified minimum number of works councils. One works council would be required for each separate facility with no more than a certain number of employees — for example, two hundred and fifty employees. For large facilities, the law would require separate works councils for each distinct department and for each group of interrelated departments containing employees who share a com-

36. Betriebsverfassungsgesetz [Works Constitution Act], BGB1.I 13 (1972) (amended 1985) (F.R.G.) (discussed on p. 117). Professor Paul Weiler previously proposed the creation of similar employee participation committees for American workers. See WEILER, *supra* note 1, at 283-306; see also Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993). For an explication of the German model, see Rudolf Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993).

munity of employment interest.³⁷ Every two years, employees would nominate and elect the members of their respective works councils. To ensure a meaningful dialogue between employees and management and to provide some employment protections for managerial personnel whose employment interests are more aligned with their subordinates than their superiors, lower and middle managers would be allowed to elect one-fifth or one-quarter of the council members.

Business firms would need to provide works council members with information regarding basic operations and contemplated changes that would meaningfully affect working conditions or employee job security.³⁸ Proposed corporate changes concerning basic operations, new technology, health and safety concerns, significant job transfers to other facilities, group layoffs, and individual terminations would have to be presented to the appropriate works council for consideration.³⁹ In most cases, works council members and firm managers would likely agree upon the proper course to be taken. Rank-and-file employees understand the need for firm efficiency and increased productivity to remain competitive in a global economy, and they recognize that superfluous or incompetent personnel cannot be retained indefinitely without threatening the employment security of all workers.⁴⁰ Managers would obtain a better understanding of worker concerns and would be forced to recognize the need to formulate corporate decisions that would maximize worker morale and loyalty. Congress should provide that when a majority — or perhaps a weighted majority⁴¹ — of works council members reject proposed managerial action, a mediator with business expertise who was previously selected by managers and works council members would endeavor to achieve a conciliated agreement. In those infrequent instances in which no mutual accord could be reached, arbitrators selected by management and council members would ultimately resolve the issue. Expedited procedures

37. Criteria similar to those presently used to define appropriate bargaining units under the NLRA could be used to determine appropriate works council groupings under my proposal.

38. Without the elimination of the information imbalance that currently exists between managers and lower-level personnel, employees would be unable to influence the corporate decisionmaking process significantly. See Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 *CHI-KENT L. REV.* 59, 76-78 (1993).

39. When fundamental issues would affect personnel covered by several works councils, management would be required to consult with the relevant councils jointly in an effort to achieve a mutually acceptable accommodation of the competing interests.

40. See JAMES C. FURLONG, *LABOR IN THE BOARDROOM* 45, 131 (1977).

41. To minimize works council-manager confrontations and the difficulties those controversies could generate, weighted majorities of 60% or two-thirds might be required to reject managerial decisions. Congress might alternatively allow councils bare majority rejections for less significant issues and require weighted-majority rejections for fundamental policy determinations.

could be used to generate final decisions within several days with respect to matters that must be resolved quickly.

Congress should also mandate the election of one-quarter or one-third of corporate board members by nonexecutive personnel. Both rank-and-file employees and lower-level managers should be given the opportunity to vote. This would guarantee board consideration of worker interests when important firm policies are debated. All corporate board members should be both obliged to consider worker interests when making business decisions and subject to liability to rank-and-file employees when they violate this fiduciary obligation.⁴² Statutory provisions should recognize their dual loyalties to shareholders and to workers by granting the board members sufficient discretion to make good faith managerial decisions when stockholder and employee interests conflict without the fear of liability. On the other hand, when board members fail to consider worker interests adequately, they should be subject to the same legal accountability that would result if they failed to respect the interests of shareholders.

The adoption of mandated worker participation programs would not render labor organizations obsolete. They could continue to provide employees with the expertise and assistance they would need when dealing with corporate boards or works councils.⁴³ Unions should have the right to nominate employee slates for works council positions and should serve as a deterrent preventing employer agents from coercing or restraining employees with respect to the nomination and election of council or corporate board members. Such activities would significantly diminish firm conduct designed to undermine free worker elections.

If a majority of employee-elected council members were affiliated with a particular labor organization, that entity would be granted exclusive bargaining rights similar to those currently enjoyed by majority bargaining agents under the NLRA. If no labor organization enjoyed majority support, each union with twenty or twenty-five percent employee-elected council member support would be entitled to formal consultation rights.⁴⁴ Firm managers would be required to consult with representatives from each organization with the requisite support before they made final decisions concerning matters affecting employee interests. Even though for-

42. See Gottesman, *supra* note 38, at 93-95; see also Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty To Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

43. See generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

44. In chapter 5, Professor Gould supports the concept of minority union representation rights similar to those proposed here; see also Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993).

mal bargaining would not be necessary, these minority entities could provide managers with critical input, such as proposing alternatives that would be less injurious to employee interests.

Business leaders would undoubtedly denounce legislative proposals calling for the establishment of works councils and worker-elected board members as unworkable and inefficient. What they would most resent would be the need to share their corporate power with rank-and-file personnel. Employees are not ignorant people. They usually understand basic operations, sometimes even more thoroughly than upper managers. Workers are in an advantageous position to enhance productivity and firm quality, but they are presently hesitant to do so because such improvements might undermine their job security. If employers treated them as corporate partners in a cooperative venture and employees realized that new developments would not unduly affect their employment rights, the employees would be more inclined to propose and support operational changes.

IV. PROPOSED REFORM OF THE NLRA

In Chapter Five, Gould suggests that after sixty years, it is time to reassess the efficacy of the NLRA. He notes the call of some unionists for repeal of this legislation based on its unfair constraints on the exercise of collective power through secondary activity (pp. 153-54). The author rejects this position, believing that a modified NLRA can continue to protect employee rights. Although my proposed statutory changes mandating the creation of works councils and the election of employee representatives to corporate boards would render NLRA amendments superfluous, I realize that a probusiness Congress would be unlikely to contemplate seriously such radical changes in American employment law. People who think that President Clinton might consider my proposals should remember that his major legislative accomplishments at the time of this review have been the Senate approval of the Republican-negotiated and business-community-supported North American Free Trade Agreement with Mexico and the enactment of a relatively conservative crime bill. The election of Republican majorities in the House and Senate further diminishes the likelihood of proworker legislative reform.

A. *Representation Election and Certification Reform*

Gould maintains that the Labor Board excessively regulates the representation election process, especially with respect to campaign propaganda (p. 152). The empirical study of representation elections conducted by Professors Getman, Goldberg, and Herman dur-

ing the early 1970s provides support for this notion.⁴⁵ Although subsequent evaluations of the same database have suggested that these experts may have underestimated the impact of coercive employer statements on employee voting,⁴⁶ Gould believes that employees are capable of recognizing electioneering for what it is. Because I agree with the Supreme Court's admonition that "any balancing of [employer and employee] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear,"⁴⁷ I have argued in favor of *greater* Labor Board regulation of this area.⁴⁸ If truly free elections are to occur, neither party should be permitted to mislead intentionally or to threaten implicitly prospective voters in a manner that would be likely to affect their vote.

Gould notes that nonemployee union organizer access to employer premises is severely limited (pp. 157-58). Such organizers are not permitted to distribute union literature even on retail store parking lots that are open to prospective customers.⁴⁹ Employees may proselytize in favor of collectivization only during nonworktime, even though employer agents may disseminate their anti-union message during worktime.⁵⁰ Employers can inundate workers with anti-union propaganda through captive audience speeches, supervisory discussions, bulletin board notices, and personal memoranda or letters. Business firms thus enjoy an enormous advantage during organizing campaigns. Gould would alleviate this substantial imbalance through rules providing union organizers with access to company property open to the public and access to other appropriate areas after representation petitions have been filed (p. 158). This change in existing NLRA law would greatly enhance the opportunity of union organizers to communicate with targeted employees.

Gould acknowledges that extended representation proceedings tend to provide employers with the extra time they need to defeat union organizing drives. He notes that some Canadian provinces

45. See JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976).

46. See, e.g., William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 567-75 (1983).

47. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

48. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 411, 419 (1992).

49. See *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992); see also *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (banning union organizers from distributing literature on company-owned parking lots).

50. See *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

conduct elections within five days after union petitions have been filed, and he proposes similarly expedited procedures for NLRA elections (p. 158). The author also documents the two- or three-year delay between the unlawful termination of union supporters and their judicially enforced reinstatement orders (pp. 158-59). He suggests that the Labor Board make greater use of Section 10(j)⁵¹ temporary restraining orders that would allow the immediate reinstatement of union sympathizers illegally discharged during organizing campaigns (pp. 160-61). This procedure would greatly diminish the chilling effect of discriminatory terminations during union organizing drives.

Gould indicates that prolonged delays could be avoided if Congress amended the NLRA to authorize Labor Board certifications based upon authorization card demonstrations of adequate support (pp. 162-63). Several Canadian provinces allow card-based certification when unions establish fifty-five or sixty percent support, and this approach would greatly enhance union organizing. Gould appropriately recognizes that peer pressure may induce some workers to sign authorization cards they might not have otherwise signed, and therefore he proposes that card-based certification require a supermajority of fifty-five or sixty percent (p. 163). Such a requirement would not affect most labor organizations, because few petition for Labor Board elections until they have obtained cards signed by sixty or seventy percent of the employees in proposed units.

B. Obligation To Bargain and Scope of Bargaining Reforms

Even when unions obtain Labor Board certification, their struggle for representation rights is not over. Employers frequently decline to recognize newly certified organizations, forcing them to prosecute refusal-to-bargain charges. It may take a year or more for the Labor Board to issue remedial bargaining orders in these cases, and losing employers can avoid bargaining for an additional year while the Labor Board petitions for court of appeals enforcement orders. To curtail these delays, Gould proposes that Labor Board certifications include bargaining directives that may be directly appealed to courts of appeal without the need for unfair labor practice proceedings before administrative law judges (p. 164). This practice would greatly diminish the delay between certifications and court-enforced bargaining orders. In cases in which employer objections to union certification are clearly without merit, the Labor Board should be required to seek temporary bargaining orders under Section 10(j) to allow prevailing unions to demand

51. 29 U.S.C. § 160(j) (1988) authorizes district courts to grant temporary injunctive relief while unfair labor practice cases are being litigated.

bargaining while certification cases are being appealed to appellate courts.

In almost forty percent of cases in which unions obtain certification, they are unable to negotiate initial bargaining agreements.⁵² Many of these negotiation failures are due to employer recalcitrance, as employers are disappointed with their election loss and hope to defeat the prevailing unions at the bargaining table through disingenuous bargaining. Gould supports the laws of certain Canadian provinces⁵³ that require parties that are unable to achieve first contracts to resolve their disputes through binding interest arbitration (pp. 168-70). Because I believe that the Labor Board should be given the authority to provide make-whole relief to workers victimized by manifestly unjustified employer refusals-to-bargain through compensation awards approximating what the employees would presumably have obtained had the firms negotiated in good faith,⁵⁴ I would have no difficulty accepting the concept of first contract interest arbitration.

The negotiating parties would initially attempt to achieve a voluntary resolution of their competing differences. If that objective could not be attained because of uncompromising employer behavior, arbitral determination would resolve the conflict. Arbitrators should be required to follow legislatively prescribed standards, and they must decide which party made the more reasonable final offer on an issue-by-issue or total-package basis. These constraints would prevent unprincipled arbitral awards. The availability of final-offer arbitration would also encourage parties to resolve their initial differences through the bargaining process, in recognition of the fact that negotiation impasses would no longer lead to the premature emasculation of newly certified labor organizations.

Finally, Gould decries the limited scope of bargaining currently available to representative labor organizations (pp. 170-73). In *First National Maintenance Corp. v. NLRB*,⁵⁵ the Supreme Court completely ignored the proper function of unions as it severely restricted the scope of bargaining required over management decisions affecting employee job security:

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling

52. See SUBCOMM. ON LABOR-MANAGEMENT RELATIONS, HOUSE COMM. ON EDUC. & LABOR, 98TH CONG., 2D SESS., *THE FAILURE OF LABOR LAW — A BETRAYAL OF AMERICAN WORKERS*, 10 (Comm. Print 1984), excerpted in LEROY S. MERRIFIELD ET AL., *LABOR RELATIONS LAW* 59, 62 (9th ed. 1994).

53. See WEILER, *supra* note 1, at 249-51.

54. See Craver, *supra* note 48, at 433-34.

55. 452 U.S. 666 (1981).

its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.⁵⁶

The *First National Maintenance* majority was unduly concerned about labor interference with managerial freedom. It failed to acknowledge that when Congress enacted the NLRA, it made the legislative determination that worker "interference" with managerial discretion was an appropriate consequence of an industrial relations system that provides employees with meaningful input regarding their basic employment conditions. Despite the curtailment of managerial freedom involved, I agree with Gould's proposal to expand the scope of bargaining to include most issues of real concern to employees (pp. 170-73). I also concur in his proposal to require business firms to provide representative unions with greater corporate information to enable them to perform their representational function more effectively (p. 175).

Although I support the NLRA proposals that Gould makes and believe that they would be of limited benefit to organizing unions and represented employees, I also think that these modifications would be analogous to the rearranging of deck chairs on the Titanic. The American labor movement is in dire trouble, and minor NLRA changes will not make a significant difference. If the vast majority of U.S. workers who are unlikely to select union representation is to receive meaningful employment rights, legislatures must enact laws similar to those proposed earlier with respect to the creation of works councils and the election of employee representatives on corporate boards.⁵⁷ Only these legislative programs could provide workers with the scope of industrial democracy that one should expect in a truly free society.

V. THE ENHANCEMENT OF WORKER ECONOMIC POWER

Gould acknowledges that industrial and economic developments have significantly diminished the efficacy of the traditional strike weapon (pp. 181-83). Increasingly diverse and technologically advanced business enterprises are finding it easier to withstand the impact of work stoppages. Managerial personnel can often maintain production by keeping automated equipment func-

56. 452 U.S. at 678-79.

57. Regarding the need for more expansive and more innovative labor law reform, see Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 *CHL-KENT L. REV.* 3, 20-46 (1993).

tioning. Lost production may be transferred to facilities in other states or other countries.

Another important factor contributing to the decline of the work stoppage concerns the lack of legal protection given to striking personnel. As early as 1938, the Supreme Court held that employers could hire permanent replacements for striking employees, despite the negative impact of the replacement option on the exercise of the statutorily protected right to strike.⁵⁸ The Court apparently believed employers' need to continue operations during a strike outweighed employees' right to engage in work stoppages. Nonetheless, for over four decades, few American firms exercised their "right" to hire permanent replacements during work stoppages. Employers have used the *Mackay Radio* doctrine more frequently in recent years, however, following President Reagan's 1981 decision to terminate 11,000 unlawfully striking air traffic controllers. A recent AFL-CIO study found that employers permanently replaced eleven percent of the 243,300 individuals who participated in major work stoppages during 1990.⁵⁹ It is doubtful that the thousands of displaced strikers received solace from the fact they had been "permanently replaced" due to employer desires to continue operations rather than "discharged" because of anti-strike motivations. Most were forced to seek other gainful employment, and their representative labor organizations probably ceased to function as viable bargaining agents for the new workers.

The year before *Mackay Radio*, when the Supreme Court sustained the constitutionality of the NLRA, it eloquently acknowledged that individuals lacked the capacity to counterbalance the economic power possessed by their corporate employers:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.⁶⁰

If meaningful collective bargaining is to exist without the need for excessive government intervention, the strike weapon must be preserved and even strengthened.

Gould recommends a statutory modification of the *Mackay Radio* rule that would prohibit the hiring of permanent replacements

58. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-47 (1938).

59. *AFL-CIO Study Indicates Increase in Permanent Replacement of Strikers*, Daily Lab. Rep. (BNA) No. 114, at A-3 (June 13, 1991).

60. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

until a work stoppage has continued for at least six months (pp. 201-02). I previously suggested a balancing approach that would allow struck employers to continue operations initially through the retention of *temporary* replacements.⁶¹ They could only hire *permanent* replacements if they could demonstrate — after a one-, two-, or three-month period — that local labor market conditions precluded the employment of qualified *temporary* personnel.

Congress enacted the original NLRA to provide individual workers with collective empowerment. Pursuant to that statute, employees involved in a labor dispute could exert direct pressure against the target firm, and they could enlist the support of secondary parties. By inducing the employees of secondary companies to cease handling products going to or coming from the struck business, the primary workers were able to increase their bargaining leverage. In 1947, business leaders induced Congress to proscribe many forms of secondary behavior, and in 1959, the legislature prohibited most of the remaining forms of secondary action.

If Congress wants to maintain a *laissez faire* posture, it should amend the NLRA to permit some forms of secondary activity.⁶² When a work stoppage is effective, it shuts down the operations of the target firm. As a result, that firm suspends its purchases of raw materials and reduces its shipment of finished goods. When striking employees are unable to generate a complete cessation of primary firm operations, they could be allowed to expand their concerted appeal to employees of those secondary businesses that deal directly with the struck employer as suppliers or customers. They could induce the workers of those secondary firms to refuse to handle the raw materials destined for the struck plant or the finished goods coming from that establishment during the primary work stoppage.

Business leaders would undoubtedly resist any efforts to reverse *Mackay Radio* or to expand the secondary appeals for support that could be made by striking employees. They realize that they are in a superior economic position, and they do not wish to let legislative modifications redress the substantial power imbalance that currently exists. Nonetheless, if Congress believes that viable labor organizations are indispensable attributes of industrial democracy, it must increase the economic leverage available to those entities. If members of Congress are concerned about the production losses that expanded work stoppages would generate, they could consider alternatives that would not cause operational disruptions. They could require resort to tripartite interest arbitration to resolve bargaining disputes, with the arbitration panel selecting the more rea-

61. See Craver, *supra* note 48, at 422-23.

62. See *id.* at 424-25.

sonable final offer made by the employer or the representative union — on an issue-by-issue or total-package approach.

Alternatively, Congress could amend the NLRA to authorize only "statutory strikes" that would not entail actual work disruptions.⁶³ Once a bargaining impasse was reached, the employer or the union could declare a "strike." Production and services would continue as usual, but employee compensation would be reduced by a specified amount — for example, ten or fifteen percent — and firm revenues would be reduced by a similar percentage. If the parties resolved their dispute expeditiously, the withheld compensation and revenues could be returned to the workers and the company. If the controversy was not settled quickly, however, the withheld funds could be permanently transferred to the public treasury. Although statutory strikes would not involve work disruptions, the statutorily prescribed financial incentives would encourage labor and management negotiators to resolve their controversies in an expeditious manner.

As Gould recognizes, meaningful collective bargaining is impossible if one party to the interaction lacks real leverage. Over the past several decades, the bargaining power of labor has waned while that of employers has increased. Many unions are so weak that they are effectively reduced to collective begging. They are forced to take whatever the employers are willing to give them. Congress must decide whether the United States should become the only country in the advanced world to have no viable labor movement. If it does not move quickly, the issue will unfortunately become entirely academic.

VI. CONTRASTING THE AMERICAN AND CANADIAN EXPERIENCES

When observers attempt to understand the reasons for the substantial decline of U.S. labor organizations over the past several decades, they frequently make comparisons to the Canadian union experience. That nation's provincial labor relations statutes are similar to the NLRA, and many of their industries and trade unions have close ties to U.S. entities. In Chapter Seven, Gould explores the Canadian situation and attempts to explain why Canadian trade unions have not experienced the same membership losses as their U.S. counterparts. He notes that Canadians tend to be less individualistic than U.S. residents and that Canadians exhibit greater social and class cohesiveness.⁶⁴

63. See generally George W. Goble, *The Non-Stoppage Strike*, 2 LAB. L.J. 105 (1951); David B. McCalmont, *The Semi-Strike*, 15 INDUS. & LAB. REL. REV. 191 (1962).

64. P. 208; see Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 B.Y.U. L. REV. 727.

In addition, most Canadian employers respect the right of their employees to organize and do not resort to the overtly coercive tactics used by many U.S. firms to defeat organizing campaigns. Several of the Canadian labor statutes facilitate union organizing by permitting authorization-card based certification when unions obtain fifty-five or sixty percent support (p. 215). Even when elections are required, they are conducted in an expedited manner — often within five days after representation petitions are filed (pp. 215-16). These two practices preclude unnecessary delays and limit the opportunity for resort to the anti-union conduct so prevalent during drawn-out organizing campaigns in the United States.

U.S. employers frequently characterize proposals to allow card-based certification under the NLRA as “radical.” They overlook the fact that the original Wagner Act authorized card-based certification as it provided that the Labor Board “may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.”⁶⁵ In a perfect world, I would prefer secret ballot elections to card checks because of the possibility that employees may have signed authorization cards due to social pressure, misunderstanding, or outright coercion. Congress must acknowledge, however, that neutral elections do not usually occur. Employers frequently imply that pro-union votes will result in lost employment, and a number of firms graphically demonstrate this possibility through the unlawful termination of key union supporters during the organizing campaigns.

If we could guarantee elections within five or ten days after the filing of representation petitions — and if coercive campaign techniques could be effectively proscribed — resort to secret ballot elections would be the preferable option. If the Labor Board could not conduct elections on an expedited basis, then I would favor card-based certification in limited circumstances. I would prefer to have Congress amend the NLRA to mandate elections within five or ten days after petitions are filed, except when extraordinary circumstances would preclude an expedited election.

Gould recognizes that only about two-thirds of the unions that receive Labor Board certification ever obtain first contracts (p. 222). This figure is substantially below the eighty-four percent success rate experienced by certified labor organizations in Ontario (p. 223, tbl. 7-3). Two factors account for this difference: (i) U.S. employers know that if they can avoid the execution of bargaining agreements during the certification year, they can often defeat the newly certified unions;⁶⁶ and (ii) the Ontario labor relations statute

65. Wagner Act, ch. 372, sec. 9(c), 49 Stat. 449, 453 (1935), *set forth in* N.L.R.B., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3274 (1959).

66. *See* LEVITT & CONROW, *supra* note 24, at 201-25.

mandates first-contract interest arbitration when the negotiating parties are unable to achieve their own agreements due to employer recalcitrance (pp. 222-27).

VII. OVERALL ASSESSMENT

William Gould has written a thoughtful and provocative book that is especially timely due to the election of President Clinton, the creation of the Dunlop Commission to study the need for labor law reform, and the appointment of Gould himself as Chair of the NLRB. Americans must decide whether we believe that independent labor organizations are an important aspect of a democratic society. If we do not act quickly to reverse the long-standing union decline, labor entities may become irrelevant by the end of this decade. The NLRA changes that Gould proposes would certainly help. Election campaigns would become less coercive, and the certification process would be greatly expedited. Employee free choice would be more effectively protected, and unions would probably obtain more certifications than they do under existing NLRA doctrines.

Gould implicitly acknowledges, however, that a labor movement revival would not likely extend collective protection to a majority of U.S. employees. Many would be hesitant to organize for fear of being considered unprofessional or even lower class. Nevertheless, innovative new entities may be created that would be more analogous to the American Bar Association or the American Medical Association than to present AFL-CIO affiliates, and such organizations would have a greater appeal to white-collar and professional personnel. It is important to remember that the American Nurses Association, the National Education Association, the American Association of University Professors, and similar entities were, not so long ago, wholly professional groups with no labor agendas. The British Medical Association, by contrast, has been a registered trade union for several decades.

Despite the image of U.S. residents as rugged individualists, most Americans are group-oriented when they endeavor to advance their economic interests. Business firms are associated with various groups, such as the Chamber of Commerce, the National Association of Manufacturers, and specific industry organizations. Attorneys have the American Bar Association, physicians the American Medical Association, older people the American Association of Retired Persons, women the National Organization for Women, and African-Americans the National Association for the Advancement of Colored People. Each distinct profession has at least one professional group to advance member interests. It is indeed ironic that although collective power is appropriate for profes-

sionals and independent entrepreneurs, it is considered inappropriate and unprofessional for rank-and-file workers. Those persons who most lack individual bargaining power and who most need a collective voice to advance their interests are expected and even encouraged to eschew organizational strength. Employers go to great lengths to prevent their employees from enjoying the same group benefits they derive from their own professional associations. Congress should finally ensure that workers have the unfettered right to organize that the Wagner Act originally granted to employees. The adoption of Gould's proposed NLRA amendments would constitute a significant improvement over the status quo.

Labor law experts must now admit that the NLRA has become an antiquated and relatively meaningless statute. It no longer protects worker organizational rights, nor does it provide unionized employees with expansive bargaining opportunities or meaningful economic leverage. If the vast majority of private sector personnel are to enjoy employment rights beyond the minimal terms unilaterally offered by their employers, those privileges will have to be provided through federal legislation.

The most effective way to grant employees meaningful influence over their terms of employment would be to mandate the creation of shop-level works councils and the election of employee representatives to corporate boards. These worker participation programs would give individual employees the right to be consulted regarding contemplated firm policies that would affect their employment interests. Local works councils could also explore ways in which to increase productivity and product or service quality in a manner that would simultaneously advance the interests of both workers and employers. I am disappointed that Gould does not support legislatively-mandated worker participation programs.

I agree with Gould that specific statutory provisions should prohibit unjust dismissals and provide administrative or arbitral procedures to review challenged terminations. I also think that Congress should acknowledge the unconscionably low wages and minimal fringe benefits enjoyed by millions of American workers. Elected representatives can no longer assume that these issues are resolved through private collective bargaining, because so few individuals have their employment terms determined through the collective process. The minimum wage should be increased to an appropriate level, with variable scales adopted to take into account the capacity of different industries to afford specified labor costs.

Anyone concerned with the rights of American workers should read *Agenda for Reform*. It contains many proposals that would enhance the employment interests of most persons. Nonetheless, readers should recognize that Gould's suggestions provide only a

modest beginning. If U.S. personnel are to enjoy the fundamental rights already available to workers in most other advanced nations, far more legislative protections are necessary. These changes may initially seem radical, but they would merely prepare the United States for the twenty-first century. The other industrial nations have already demonstrated that firms can maintain humane employment conditions and still be competitive in a global economy. It is time for the United States to exhibit a similar commitment to its most precious resource — its human capital.⁶⁷

⁶⁷. See generally Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law To Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

PRAGMATISM, FEMINISM, AND THE PROBLEM OF BAD COHERENCE

Catharine Pierce Wells*

REINTERPRETING PROPERTY. By Margaret Jane Radin. Chicago: University of Chicago Press. 1993. Pp. xi, 265. \$29.95.

I. INTRODUCTION

Professor Radin¹ bases *Reinterpreting Property* on her well-known and justly admired articles on property law and theory. It is a rich repository of original insight, lucid analysis, and sharp debate. None of the essays that it includes is entirely new.² What is new is a long and substantive introduction that analyzes her ten-year project on property law in terms of the insights and methodological commitments of philosophical pragmatism (pp. 1-34). This manner of developing a theory — beginning with substantive positions and only later articulating the method that spawns them — is a very pragmatic and remarkably useful way to proceed. Radin begins with the struggle to say something useful about standard issues in property law. As she pursues this project, she begins to reflect on the nature of the method and techniques she is using. These reflections are themselves very interesting and provocative — both as they shed light on the nature of Radin's own contributions to property law and as an independent contribution to the more philosophical literature on legal method.

* Professor of Law, University of Southern California. B.A. 1968, Wellesley College; M.A. 1973, Ph.D. 1981, University of California, Berkeley; J.D. 1976, Harvard. — Ed. I am grateful to the following people for their comments: Richard Craswell, Richard Ford, Trina Grillo, JoAnne Manfred, Ruth Anna Putnam, Richard Warner, and Stephanie Wildman. Special thanks to Megan Cosby and Mark Watkin for their research assistance and to Katie Waitman for her secretarial help.

1. Professor of Law, Stanford University.

2. Included in the book are versions of papers previously published as Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Margaret Jane Radin, *Residential Rent Control*, 25 PHIL. & PUB. AFF. 350 (1986). "Problems for the Theory of Absolute Property Rights" (chapter 3) is adapted from Margaret Jane Radin, *Diagnosing the Takings Problem*, in NOMOS XXXIII: COMPENSATORY JUSTICE 248 (John W. Chapman ed., 1991); Margaret Jane Radin, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, in PUBLIC VALUES IN CONSTITUTIONAL LAW (Stephen E. Gottlieb ed., 1993); Margaret Jane Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1986); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739 (1986). "The Rhetoric of Alienation" (chapter 7) was written in 1986 for a colloquium on property and rhetoric.

I have tried in this review to avoid restatements and analysis of Radin's substantive positions in property theory. These have already been the subject of much spirited debate in the literature.³ Instead, I have focused on the question of method and the specific contribution that Radin's pragmatism makes to ongoing questions about the role of law in achieving social transformation. To do this, I have organized my comments around three main topics: first, the nature of Radin's pragmatism; second, its connection to her feminism; and third, what she calls the problem of bad coherence.

II. PRAGMATISM

A. *Anticonceptualism*

One of the chief tenets of pragmatism is its rejection of conceptualism. Pragmatism originated in Peirce's formulation of the pragmatic maxim: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."⁴ This maxim commits pragmatism to a form of reductionism — the meaning of abstract concepts is limited to the sum total of the empirical expectations they generate. It follows that one cannot increase the amount of our knowledge by logically dissecting the concepts we use. Conceptual methods⁵ do not work because, according to the pragmatic maxim, a concept is not the kind of thing from which we can deduce a priori knowledge. To the contrary, the suggestion that an abstract concept entails certain empirical consequences is itself an empirical hypothesis that we must test through observation. Similarly, a pragmatic theory of law will not attempt formalistic deductions of legal rules from legal concepts.⁶ It will instead treat legal concepts as potential explanations

3. See, e.g., Scott Altman, (*Com*)*modifying Experience*, 65 S. CAL. L. REV. 293, 315-16, 340 nn.91-93 (1991); Timothy J. Brennan, *Rights, Market Failure, and Rent Control: A Comment on Radin*, 17 PHIL. & PUB. AFF. 66 (1988); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1400 nn.309 & 322 (1993); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 770-74 (1988).

4. 5 CHARLES SANDERS PEIRCE, *THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* ¶ 5.402 (Charles Hartshorne & Paul Weiss eds., 1963).

5. By "conceptual methods," I mean methods of reasoning that are entirely conceptual and contain no element of experiential confirmation. Obviously, conceptual methods can help us to become clearer about our semantic commitments. They can also be useful in the formation of scientific hypotheses. What the pragmatist denies, however, is that one can enrich our store of knowledge solely by abstract reasoning.

6. See, e.g., OLIVER WENDELL HOLMES, *Possession*, in *THE COMMON LAW* 163-94 (1963) (rejecting abstract theories of possession in favor of explanations that derive from the practicalities of property relations).

for particular doctrinal results and test them against the actual patterns of legal decisionmaking.⁷

A good illustration of this difference in legal method is provided by the contrast between Radin's work in property theory and that of Richard Epstein, whose work Radin criticizes (pp. 98-119). The difficulty with Epstein's method, she argues, is that it is too conceptual:

Epstein is a conceptualist because he thinks there is a concept of property that, in fact, is the right one or the only one. He thinks, that is, that there is *a* conception of property that is *the* concept of property. He is also a formalist . . . because he thinks the concept of property can be applied . . . logically . . . to yield results that should be obvious to readers and legal decision-makers.⁸

She disputes the idea that property has "an essential, prepolitical" meaning that is "sufficiently precise and detailed to determine legal rules and outcomes in practice" (p. 99).

By contrast, Radin bases her own work upon a recognition that American property law derives from a number of distinct, intellectual traditions.⁹ When Radin analyzes a concept of property, she takes it as she finds it — not as an idealized concept that is unitary and unequivocal but as a concept that is replete with contradictions, inconsistencies, and real world imperfections. Thus, for Radin, theorizing about property is not simply a matter of deriving substantive rules from a single intellectual conception. Instead, property law must reconcile the conflicts generated by the diverse strands of property theory.

For example, in an essay entitled "The Rhetoric of Alienation" (pp. 191-202), Radin describes the "double meaning" ascribed to the word "property." Property, she says, is both an object owned and an attribute possessed (pp. 191-92). "Object-property" is based on the concept of ownership and is identified with the material object that is owned. "Attribute-property," conversely, is based on the idea that certain characteristics constitute identity. An entitlement to live in the White House, for example, might be considered an attribute-property of the presidency. Thus, for Radin, property theory must begin with the recognition that there are two — or

7. For a fuller description of this process, see Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 335-42 (1994).

8. P. 100. Radin concludes this observation by saying, "Epstein's tacit acceptance of conceptualism and formalism goes a long way toward explaining why he seems so blithely to believe that results many readers find breathtakingly wrong are just obvious to rational people." P. 100.

9. Among these are the labor-desert theory of Locke (p. 45), the expectation theories of Bentham (p. 43), and the personality theories of Kant and Hegel (p. 47).

more¹⁰ — distinct conceptions of property. Property can be understood, on the one hand, as fungible items in trade or commerce and, on the other hand, as something that constitutes the personhood of the owner. Both of these conceptions have influenced the common law of property and, indeed, the competing effects of these two concepts may well account for some of the conflicts in that tradition. Thus, Epstein's attempt to derive the substance of property law from a single concept of property is doomed to failure. Such attempts inevitably overlook the tensions that underlie existing law and impoverish our understanding of a legal tradition whose genius lies precisely in its ongoing efforts to reconcile competing conceptions.

B. *Pragmatic Method*

It is sometimes easier to describe what pragmatism rejects than to identify its affirmative claims. This is especially true when it comes to pragmatic method. Nevertheless, the introduction to Radin's book is suggestive. For Radin, pragmatism seems to entail two central methodological commitments. First, a theory should be useful for some particular purpose. Thus, writers must establish a dialectical relationship between theory and practice; it is not enough to formulate theory for an ideal world.¹¹ Second, every theory must be held tentatively and must be subject to ongoing revision in light of further experience.¹² I will begin by showing how Radin's work exhibits these commitments. I will then go on to consider more generally the pragmatic aspects of Radin's work.

It is commonplace for pragmatists to insist upon a close connection between theory and practice.¹³ This seems sensible. A theory that has no intersection with practical things has little to offer us. Furthermore, speculative theorizing is often unreliable. Theories that are too abstract encounter the risk of collapsing into a muddle of imprecise concepts, unmarked and unsupported assumptions, and mistaken reasoning. By contrast, a theorist who routinely compares abstract conceptions with practical experience can avoid these problems because this process entails continuous attention to the requirements of rigor and precision.

Radin's commitment to the usefulness of theory is well illustrated by her attempt to relate her theoretical claims to the ongoing

10. In this chapter (*The Rhetoric of Alienation*, pp. 91-202), Radin emphasizes two distinct conceptions of property. In other contexts, her views are more complex. See *infra* text accompanying note 21.

11. Pp. 1-2; see also p. 40.

12. See, e.g., p. 4 (describing the evolution of Radin's theories).

13. See, e.g., p. 29 ("Rather, for the pragmatist, theory is immanent and evolving; its development goes hand in hand with practice.").

development of property doctrine. In law, the connection between theory and practice can be very difficult to maintain. The law is a seamless web with many layers and types of theory and many odd doctrinal problems. A good legal theorist is therefore required not only to scale an entire mountain range of abstractions but also to catalogue carefully the trees and boulders she encounters on the way. This is slow and patient work that requires a rare combination of lofty spirit and a passion for particularity. Indeed, Radin's work exhibits both these qualities. She is able to ascend the peaks of high theory with great skill and dexterity and, at the same time, to illuminate the rich terrain of common law decisionmaking.

Another illustration of Radin's commitment to the usefulness of theory is her bifurcation of normative analysis into two questions: (1) What should happen in an *ideal* world?; and (2) What should happen in this *less than ideal* world? For example, Radin uses this distinction in her analysis of the takings problem:

By ideal issues I mean issues about how we should decide the takings problem in a frictionless world of perfect good faith and perfect knowledge, including knowledge of justified theories of property and politics. In the ideal world of theory, those charged with carrying out law unfailingly do it correctly. By nonideal issues I mean issues concerning how we should decide the takings problem in our world of ignorance, including theoretical disagreement and uncertainty, mistakes, and bad faith. The problem of transition concerns how much deviance from our ideals we should mandate in practice in our present nonideal world to make the best progress toward our ideal world of theory. [p. 162]

The distinction between ideal and nonideal theories is important to Radin because thinking about the ideal world enables her to develop a coherent set of values whereas thinking about the nonideal actual world prevents her from slipping into the problems of utopianism. But she does not overlook the fact that this approach is fraught with difficulties:

It cannot be denied that this kind of strategic choice, like all of our political choices, involves a potential double bind. Attempting to transcend the deeply entrenched meaning of property might result in no progress, or in only illusory progress. . . . But provisionally accepting the entrenched meaning might further reinforce and entrench that meaning in our culture, and make future evolution even more difficult.¹⁴

14. P. 27. Radin explains the intractability of the takings issue as in part arising from our inability to specify in any general way when we should be governed by the ideal and when we should pay attention instead primarily to the nonideal. Always in the midst of the transition, we are always unsure when we should lean toward theory and our hopes for progress and when toward practical politics and our realistic appraisal of the world as it is.

Nevertheless, her way of handling these questions is typically contextual and pragmatic: "I believe these double binds are a defining mark of political life, and I believe that they have no a priori theoretical solution. In practice, we must judge which alternative is better on the whole, and we must keep reconsidering as circumstances change" (p. 27).

The second of Radin's methodological commitments — the recognition that all beliefs must be held tentatively — is a central feature of her work, although she acknowledges that she has not always been clear on this point. Thus, she describes her earliest essay — "Property and Personhood" (pp. 35-71) — as follows:

In my essay, I said that even if someone is bound up with a "thing," we nevertheless should not treat that "thing" as personal "when there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution. (p. 4)

She then criticizes her own use of terms such as "objective," "consensus," and "healthy." She used these terms, she says, because she had not, at the beginning, fully understood her own pragmatic method. With a clearer understanding of her pragmatism, she would now want to phrase her pragmatism differently — "objective" understandings are those "shared understandings that are, for now, too entrenched to be revisable by individuals" (p. 5). Her basic point is this: we begin with certain understandings about property that are too fundamental to be seriously questioned. These understandings are not "objective" in the sense that they describe timeless truths. Nor does their special status rely upon the notion of consensus.¹⁵ Instead, such understandings are an appropriate starting point solely because they are, in fact, the only place we can begin with true sincerity. Moreover, if someone questions such a starting point, we can merely restate the premise and say, with Wittgenstein: "[We] have reached bedrock, and [our] spade is turned."¹⁶

Although I have shown how Radin's work conforms to her understanding of the commitments of pragmatic method, the discussion thus far has failed to capture the fullness of Radin's method. Pragmatic method requires a certain complexity of analysis. The

15. The phrase "for now, too entrenched to be revisable by individuals" may suggest to some that Radin bases her theory on certain fundamentally shared *values*. I think this is a misreading. The fact that values are embedded in our language does not make them objects of universal assent because at the moment they are articulated many might wish to express their dissent. The values are entrenched not because they command universal assent but because they are so essential to an understanding of current practices that they cannot easily be foresworn until there is a full-bodied alternative.

16. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 217 (G.E.M. Anscombe trans., 1953).

following quotation from Peirce perhaps best conveys that complexity:

Philosophy ought to imitate the successful sciences in its methods, so far as to proceed only from tangible premisses which can be subjected to careful scrutiny, and to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.¹⁷

The above description might well evoke Radin's critique of Epstein described earlier.¹⁸ Epstein was wrong, she argued, in trying to deduce the normative outlines of property law from an intellectual conception of property. Instead, property law must be understood in a number of different contexts. On the one hand, property law is the embodiment of many different political and legal traditions. On the other hand, it is also profoundly shaped by culture, by custom, and by the ever shifting realities of daily life. This fact requires Radin to analyze property law in relation to the diverse aspects of human experience, and the complexity of this task, in turn, requires her to reject the traditional "chains" of conceptual theory in favor of a "cable" of "slender" but "numerous" fibers.

The cable that Radin is constructing is the general concept of property as personhood (pp. 35-71). Her development of this theme proceeds in pragmatic fashion. She begins with an intuitive understanding of the way in which we invest our personhood in particular items of property. She then develops this intuition by tracing its roots in the personality theory of property.¹⁹ In discussing this theory, she is neither proponent nor radical critic. She is not proposing to solve the dilemmas of modern property law by adopting the values of Hegel and Kant — whatever endorsement she gives these values is ambivalent at best. Rather, her technique is to appropriate the German tradition for her own purposes or, in her more modest characterization, to "build upon some of Hegel's insights" (p. 47). At the same time, she is careful to separate the German concept of personhood from the intuitive personhood conception she is proposing. We should distinguish the German conception, she argues, from the intuitive conception because the German view "assumes away" many of the attributes of per-

17. 5 PEIRCE, *supra* note 4, ¶ 5.265.

18. See *supra* section II.A.

19. See generally G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. KNOX trans., Oxford University Press 1942) (1821); IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF ETHICS* (Thomas Abbott trans., 10th ed. 1946).

sonhood that are a vital part of the intuitive conception.²⁰ Nevertheless, the German concept has continued vitality in its resonance with the intuitive understanding of property as personhood. It is this resonance that reinforces Radin's claim that property must be understood in the context of its emotional connection to human experience and, in turn, supports her conclusion that property must sometimes be protected because of this emotional connection (pp. 70-71). Thus, Radin uses the German concept — imperfect though it may be — to illuminate contemporary property practices and to argue for their reform.

It should be obvious from the above that we should not look at Radin's work as the embodiment of a single analytical structure — she is not simply applying German property theory to modern problems in property law. Instead she is, in Peirce's terms, weaving a "cable" of property theory from many different "fibers" — from intuition, ordinary experience, tradition, and doctrine, as well as from abstract philosophical thought. But, with all these "fibers," we should not lose track of the general purposes that govern her work. Her examination of contemporary property law is not simply descriptive. The point of looking at the law's relationship to so many different things — to the various intellectual theories of property, to our evolving cultural commitments with respect to property, to our ongoing practices with respect to property relations, and to the activities of courts in ruling on property claims — is to criticize current practices and to propose reforms. Where then, we might well ask, does Radin obtain the values that underlie her criticism and her claims for reform? As a pragmatist, Radin surely rejects the idea that value comes from abstract intellectual conceptions: all theories — even theories of value — must come from real world practices. Thus, it is necessary for Radin to identify the ideals and aspirations that underlie our current practices while at the same time using these ideals to formulate a critique of these same practices. In the next section, I will consider the bootstrapping difficulties that this entails.

C. *Facts and Values and the Problems of Relativism*

In her Introduction, Radin places considerable emphasis on her belief that there is no "sharp distinction" between fact and value (p. 3). She writes:

Both descriptive and evaluative understandings are constructed from the totality of the circumstances in which we find ourselves. Our circumstances include, blurred together, both the problems we need

20. P. 44. Further, she argues, we must sever the German concept from its undesirable connection to the idea that respect for property and possession is simply a matter of respecting an individual human will. Pp. 45-47.

tools to solve and our visions and desires for a better future. Observations about the world we face "out there" help to construct our values, and our values help to construct our observations about the world. [p. 4]

The committed pragmatist will find this a nice statement of one of the central features of a pragmatic philosophy.²¹ For the uncommitted, however, such statements are the source of much frustration. For such a person, the denial of a distinction between fact and value may seem like a descent into avoidable confusion. Alternatively, it simply may seem mistaken. To be sure, facts and values are different. Indeed, using the phrase "denying the distinction" in this context is in some respects an overstatement.

What is really happening when pragmatists "deny the distinction" is that they are rejecting the claims of a particular kind of empiricist theory.²² These theories describe the distinction in terms that are loaded with epistemological significance. Thus, for example, these theories characterize factual judgments as empirical, descriptive, and objective. Value claims, conversely, are nonempirical, normative, and subjective. Furthermore, the contrast between these two terms goes beyond such characterizations. Factual judgments, properly phrased and tested, are said to command high degrees of consensus. Normative judgments, by contrast, are considered to be highly controversial. Factual judgments, these theories continue, are unable by themselves to motivate or justify human action in the absence of a commitment to certain values. Values are an essential touchstone for judging the desirability or correctness of any course of action. These distinctions might be summarized in two columns:

<i>FACT</i>	<i>VALUE</i>
science	ethics
descriptive	normative
objective	subjective
consensus	controversial
not motivational	motivational

21. Radin follows this statement with a quotation: "This insistence on the total entanglement of the particular with the universal, the so-called factual with the so-called normative, is at the heart of pragmatism." P. 4 (quoting Hilary Putnam, in *Afterword: Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1915 (1990)).

22. The logical positivism of the mid-twentieth century typifies the kind of theory that pragmatists reject. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* (1952). While few people would describe themselves today as positivists, the movement survives in many common philosophical moves including the assertion of a particular kind of distinction between fact and value.

The pragmatic attack on the fact-value distinction is not so much an attack on the distinction itself as it is an attack on the bundling of this group of distinctions. Descriptive statements may differ from normative statements, but, according to the pragmatist, the difference is merely one of degree and is fundamentally misdescribed by the above bundle of characterizations.

There are many philosophers who would agree with the pragmatist's rejection of this bundle of contrasting characteristics. For example, there are some moral theorists who would disagree with the claim that value judgments are inevitably subjective. Kant, for example, asserts the possibility of objective moral judgments based on reason.²³ Similarly, many contemporary legal theorists argue for the objectivity of normative claims.²⁴ What is distinctive about the pragmatist position is that it does not rest upon a simple assertion of the objectivity of normative judgments. Rather, pragmatism questions the fundamental bifurcation between fact and value. First, it does this by recognizing that value judgments are an inherent part of empirical inquiry. Science is regulated by logic, by reason, and by the requirements of the scientific method. These requirements are normative in character, and yet there could be no scientific or empirical knowledge without them. Second, pragmatism denies the standard of objectivity that is purportedly set by empirical science. Science, in a pragmatic theory, is a tentative system of interdependent judgments that must always be revised to account for additional data. No individual judgment is beyond the scope of this revision except as we choose to make it so. Objectivity, on this account, is a conception that is not based on some God-like accuracy or upon the notion of unshakable foundations but rather upon the ideas of coherence and consensus. Human perspectives will always be partial — what makes some judgments better than others is not their objectivity but the fullness of the perspectives from which they are made.²⁵ Thus, under the pragmatic conception of truth, it makes sense to speak of truth as being relative to a perspective or to a preexisting set of theories.

This conception of truth raises three distinct problems. The first is the problem of starting points — how do we choose our background theories and perspectives? The second is the problem of relativism — how do we justify our conclusions when they are admittedly relative to a somewhat arbitrary starting point? The third problem is motivational — if truth and values are relative to who

23. KANT, *supra* note 19.

24. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

25. For a fuller discussion of this concept of objectivity, see THOMAS NAGEL, *Subjective and Objective*, in *MORTAL QUESTIONS* 196 (1979).

we are, what motivation could we ever have to transform ourselves or our political practices?

To address the first problem, Radin makes a typically pragmatic move. I noted earlier that Radin's starting point is the current set of beliefs and practices with respect to property law.²⁶ Thus, her analysis begins with what she takes to be our current understandings — those “that are, for now, too entrenched to be revisable by individuals” (p. 5) — and uses these as a kind of baseline for her inquiry. This is, no doubt, a sensible starting point, but it does not provide us with much help in resolving the second and third problems described above. Pragmatic theories are progressive and prophetic²⁷ and thus require an ability to assert the desirability of certain outcomes. It is fine to say that we should begin our analysis with current beliefs, but it is another thing to say that these beliefs provide an adequate basis for a critique of contemporary practices. After all, this forces us to choose between the imperfections of our current beliefs and those of our current practices. We may be more committed to our beliefs than to our practices, or vice versa, but this psychological fact falls short of providing a justification for permitting beliefs to dominate over practices. These problems are commonly thought to be the Achilles heel of pragmatism: if rational thought cannot provide a foundation for both empirical and normative claims then how can the law — or, for that matter, life itself — be anything other than a mindless repetition of current practices. In other words, a pragmatic method seems a salient way to analyze current practices but a less salient way to articulate reforms of these same practices.

How do we, as pragmatists, propel ourselves forward and improve our situation? How do we engage in progressive thought and activity? The pragmatic response to these questions is often vague and not very satisfactory. Commonly pragmatists say something like the following: as pragmatists we struggle with the inconsistencies between our convictions and our practices and, over time, become clearer and more coherent about the nature of reality and our part in it. But this is only a partial answer. In the final section, I will return to these questions and consider Radin's own particular response to these issues.

26. See *supra* section II.B.

27. One author uses the term “prophetic” to “harken back to the rich, though flawed, traditions of Judaism and Christianity that promote courageous resistance against, and relentless critiques of, injustice and social misery.” Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747, 1750 (1990).

III. FEMINISM

While Radin spends the Introduction trying to define her pragmatism, she says virtually nothing about the relationship between her work and feminism.²⁸ This omission is notable because Radin is a self-proclaimed feminist whose work is richly interlaced with feminist insight.²⁹ Indeed, feminist theorists widely recognize her as a colleague and an inspiration.³⁰ It is therefore not surprising that there is much in Radin's work on property that is both deeply feminist and closely related to concerns that are part of the traditional feminist agenda. Nevertheless, I should be clear that Radin's work is not "feminist theory" in any stereotypical way. Overly simplistic conceptions of feminist theory tend to restrict feminism to insights that are based upon women's unique experience. Alternatively, they imagine that feminist theory must focus on issues that are traditionally of greater concern to women than men — issues such as sexual harassment, domestic violence, job discrimination, or child care. In addition, there is frequently a simplistic notion that feminist theory paradoxically rejects theory — that it is "antitheoretical" in the sense that it attacks all forms of abstraction and theorizing.³¹

None of these stereotypes would be accurate descriptions of Radin's work. While she insists that theory have a close and dialectical relationship with experience,³² and while she certainly believes that all experience is gendered in the sense that it "belongs" to a person who is one gender or another, her theories of property do not claim to be specially privileged by her own female-type experience. Nor does Radin confine her insights to issues that are of special interest to women — her subjects are the standard problems of property law. Finally, one could never characterize Radin's work as antitheoretical. She generously strews her texts with references to the canon of western legal and political thought. Indeed her work on property is greatly enriched by her familiarity with such traditional "male" writers as Hegel, Kant, Locke, and Bentham.

28. Indeed the index does not even have entries for feminism or gender.

29. See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

30. See, e.g., Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1762 n.15 (1988); Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy*, 72 B.U. L. REV. 101, 119-20 n.74 (1992); Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 894-95 & nn.82-83, 943 (1994).

31. See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). Several astute criticisms of this feminist tendency can be found throughout *A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* (Louise M. Antony & Charlotte Witt eds., 1993); see also Martha Nussbaum, *Feminists and Philosophy*, N.Y. REV. BOOKS, Oct. 20, 1994, at 59.

32. See *infra* Part IV.

That Radin does not embrace an oversimplified version of feminist theory can hardly be considered a deficit. During the past ten years, the simplified forms of feminist theory have encountered a number of problems. Feminist theory has an important agenda. Beginning with Simone de Beauvoir,³³ modern feminists have pointed to the obvious — gender is such a pervasive feature of the human enterprise that whether one experiences the world as a woman or as a man makes a substantial difference in one's perceptions. Because modern empiricism holds that all science and theory rest upon experience, it follows that science and theory done exclusively by men will not include "women's experience" and, as a result, such theories will be only partial — they will adapt well to the needs of men but poorly to the needs of women. As a corrective, feminists have offered a thorough articulation of "women's experience" and a systematic attempt to revise contemporary wisdom in a way that will include women's wisdom and women's interests.

In the legal arena, there is much to be said for this agenda. When the criminal law considers rape exclusively from the viewpoint of the alleged perpetrator, it does an injustice to female victims.³⁴ In addition, when we classify job-related sexual harassment as "personal" conduct, we miss a very important aspect of sex discrimination.³⁵ Nevertheless, there are deep and substantial problems with this approach. Perhaps the most important for feminist theory is the problem of essentialism.³⁶ Theories that are based upon "women's experience" must face the difficulty that "women's experience" is not a unitary thing. There are many women, many different kinds of women's experience, and thus, some argue, many feminisms. When a feminist speaks in terms of a single, uniform "women's experience," the result may be to suppress further the experience of women who are different from her — often women who are silenced not only by their gender but also by their race, their class, their sexual orientation, or even by a simple lack of access to scholarly debate. For this reason, feminists who fail to deal concretely with the problem of essentialism may end up freeing their own voices at the expense of those women who are multiply oppressed by the wider society.³⁷

33. This is the general argument that de Beauvoir makes in *The Second Sex*. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Bantam Books 1961).

34. See SUSAN ESTRICH, *REAL RAPE* (1987).

35. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

36. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

37. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191, 204-14 (1989-90); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); see also SPELMAN, *supra* note 36, at 114-32.

The oversimplified model of feminist theory creates a second problem by its supposed rejection of abstract theorizing. By embracing the concrete, feminism insists that legal debate be based upon the lived realities of real people. Experience, feminism reminds us, should not be read through the filtering lens of male institutions and male intellectual constructs. One of the ways in which women have been silenced, however, is that few theorists have generalized and abstracted their³⁸ experience in such a way that it can be adequately addressed in mainstream debates about normative theory.

“Male experience” is frequently the focus of theoretical distinctions that operate in the legal arena. For example, under certain circumstances, the common law reduced the crime of murder to manslaughter if it happened in the course of a barroom fight or if it was provoked by marital infidelity.³⁹ Among provocations for violence, these situations were relatively common and the rules that governed the availability of these doctrines were technical and complex. For women, though, domestic abuse is a far more common provocation for murder. The tendency, however, is to treat all domestic abuse as one psychosocial syndrome. There are few distinctions made between types of abuse and little attempt made to consider the limits on the extent of excuse and justification that specific instances of abuse might offer. Thus, most of the jurisdictions that recognize a “battered woman defense” do so only in accordance with the standard requirements of self-defense and insanity doctrine.⁴⁰ This is not surprising — to the extent that “women’s experience” is undertheorized and underanalyzed, it is not fully comprehensible to those who settle legal controversies. For this reason it would make sense for feminism to move beyond the rejection of “male theories” and to move forward with a project of retheorizing “women’s experience.”⁴¹

In describing these two problems, I do not mean to suggest that feminism is a doomed enterprise. I only suggest that the easy an-

38. Note how the use of the phrase “their” experience assumes a certain kind of essentialism.

39. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* §§ 7.10(b)(2) & 7.10(b)(5) (2d ed. 1986).

40. See *State v. Kelley*, 478 A.2d 364 (N.J. 1984) (treating expert testimony as to battered woman syndrome as relevant to the issue of self defense); *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (rejecting claim of perfect self defense based on battered woman theory).

41. The reader will note that I continue to use the phrase “women’s experience” surrounded by scare quotes. The reason for this is to highlight the fact that, as the problem of retheorizing women’s experience becomes more pressing, the problem of essentialism becomes even more difficult. If feminism were simply a matter of articulating experience on a concrete level, there would be room for many different windows on women’s experience and consequently room for many feminisms. If generalization, abstraction, and the doing of theory are necessary parts of the plan, however, then the substance of these abstractions may well become contested ground among the many feminisms.

swers to the question — “What is feminist theory?” — are fraught with difficulty. Furthermore, these difficulties might prompt us to take a somewhat more pragmatic approach to defining the enterprise. Instead of trying to analyze Radin’s work in terms of the traditional understandings about feminist theory, it might be more useful to start with the idea that feminist theory is what feminists like Radin do. Understanding the strength of her work may well improve our understanding of the potential for feminist theory and, at the same time, suggest how feminists might begin to address the twin problems of essentialism and the undertheorization of “women’s experience.” In short, if we are currently unclear about what feminist theory is or about what it might aspire to, then perhaps we can make some pragmatic progress by determining what it is about Radin’s work that makes it successful as feminist theory.

Before examining Radin’s feminism, we must recognize that Radin’s property theories stand in a particular relation to traditional “male” theories. I noted earlier that she uses the work of Kant and Hegel to elucidate her own intuitive conception of property as personhood.⁴² By doing this, she provides a certain familiarity and resonance to her own intuitive conceptions. From a feminist perspective, however, there is a definite downside to this use of traditional theory. The references to Hegel and Kant seem to suggest that intuitions about property are largely gender-neutral. If they were not, Radin’s use of these writers in such a central expository role might be a threat to the integrity of her own “feminist” insight. Did it not worry her, a feminist might ask, that the intuitions born of her “women’s experience” might be hopelessly confounded by associating them with such abstract “male” theories of property?

Much of feminist theory has been concerned with insisting upon the uniqueness and incomparability of male and female experience and the theories these experiences generate.⁴³ But Radin’s more pragmatic brand of feminism seems to reject this move. For Radin, there is a realm of theoretical discourse that is accessible to both men and women and is, at the same time, an important tool for understanding the world around us. The possibility of such a realm follows from her particular combination of pragmatism and feminism. As a pragmatist, she recognizes that there is a dialectical relation between theoretical discourse and experience — that certain pervasive “male” theoretical terms play an important role in constructing “female” experience.⁴⁴ As a feminist, she recognizes that

42. See *supra* notes 19-20 and accompanying text.

43. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

44. For a pragmatist, all knowledge is held relative to a preexisting web of beliefs, attitudes, and theoretical constructs. Women, therefore, have no choice but to utilize familiar

differences in "male" and "female" experience may lead to different theoretical constructs. The combination of these beliefs entails a more realistic feminist epistemology: as feminists, we must begin with our actual experience — experience that is constructed both by our female situation and by the traditionally "male" theories that dominate our culture. For this reason, Radin is not concerned with leaving traditional theories behind in favor of a pure breed of feminist theory. Instead she attempts to appropriate traditional theories and to redirect them toward her own feminist project — the reconceptualization of property doctrine in ways that make its relationships to gender and power explicit.

Keeping in mind that Radin's feminism is pragmatic in the sense described above, I will turn now to a description of the feminist aspects of her work. I will examine, in particular, three characteristics of her work that seem to give it power and depth and that are, at the same time, obviously related to the feminist enterprise.

The first characteristic related to the feminist enterprise is the fact that her work is firmly rooted in a world of human experience and emotion. Radin does not purport to articulate "the view from nowhere."⁴⁵ Her voice is theoretical, to be sure, but it is neither detached nor rigidly conceptual. Her analysis is well focused on the dialectical relationship between law and human life. Radin's personhood theory is a good illustration of this. Her theory stems from the intuition that property interacts with people in many different ways. People may feel one way about widgets and gas caps but entirely differently about wedding rings, homes, and pictures of their children. Although it is true that some property is held instrumentally, it is also true that some is not. Some property interacts with its owner's self-perception in such a way that it carries a real investment of the owner's personhood. Radin argues that such property must be protected precisely for this reason (p. 71). The result is a theory that not only analyzes property as an intellectual concept but also examines its ongoing interaction with human experience. Thus, for Radin, the point of legal theory is to focus upon the complex dialectic between law and daily life and to define a normative world that is responsive to the emotional and practical realities that arise from this dialectic. Certainly, Radin's pursuit of such a world is one of the things that gives her work its feminist tone.

The second characteristic of Radin's work related to the feminist enterprise is that she keeps issues of gender and power in the forefront when she describes the relationships between property

concepts and categories as they experience the world from within this web and interpret their experience within its framework.

45. The phrase comes from a book of the same title: THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

and human experience. This does not mean that she focuses particularly on issues that have a gender bias. She is not, for example, particularly concerned with alimony or with the rules of dower and curtesy. In fact, her analysis seems to transcend gender. Property as personhood, for example, is a concept equally applicable to female *and* male experience.⁴⁶ Even so, there are feminist consequences of this kind of analysis. Once we view property as a part of the web of human experience and emotion, its relationships to gender become apparent. Indeed, Radin's articulation of the personhood aspects of property relations is a good example of this kind of feminist insight. Without the connection to personhood, the abstract concepts of property and ownership may seem to be gender-neutral — property is property whether it belongs to a man or a woman. Once we understand that people invest a part of themselves in certain property, however, we can see that relationships to property are inherently related to issues of gender and power. Thus, Radin helps us to understand that property has to do not just with wealth, but also with self-esteem and self-confidence, human happiness, and human flourishing. Property is one of the tools that facilitates life. It is one of the things we use to make our way in the world. Thus, in Radin's theory, a misallocation of property will not simply deprive a person of material objects; it will also affect fundamental issues of empowerment.

The third characteristic of Radin's work related to the feminist enterprise is that her writing is fundamentally strategic. Property law raises a wide range of issues and Radin's choice of issues is quite distinct — even conventional issues are framed in unconventional ways. Although it is no doubt true that these choices were largely instinctive, the book provides a fine opportunity for her to explore, *ex post facto*, why she made the choices she did. Not surprisingly, she concludes that her choices were largely practical — that she had instinctively directed her attention to those areas of the law in which it appeared to her that a better understanding would be “useful” (p. 3). This, of course, poses the pragmatic question: “Useful for what?” “What problem,” she asks, “is best solved by understanding the social world in this way?” (p. 3).

For Radin, such inquiries inevitably implicate the concept of human flourishing, and this concept, in turn, raises even more fundamental issues:

To what extent do “we” possess a persuasive conception of human flourishing? Or is the concept of human flourishing too deeply con-

46. For example, the connection between property and personhood is not gender-specific. If the example of wedding rings tends to suggest that women may have more personhood interest in property, one need only consider the relationship of many men to their cars, their stereos, or their tools.

tested to admit of one conception that is properly “ours”? In light of this conception (or, these conceptions), what property relations — if any — are appropriate? [p. 6]

These are strange questions for a feminist. Some feminist theories may seem to suggest that gender differences are a zero-sum game — what is one person’s empowerment is inevitably someone else’s subordination. Radin does not, however, embrace this view. She does not propose to overthrow the rule of law or to engage in radical reconstructions of legal doctrine. Rather her project is more reformist and pragmatic. She begins with law largely as it stands and proceeds to suggest ways in which it could be adapted to the needs of real people. Thus, despite the lack of radical critique,⁴⁷ Radin’s work has an indisputably radical purpose — to reconceptualize the abstractions that constitute property law in terms of their genuine connections to the lives of real people. Moreover, because it is frequently subordinated people who are most disempowered by the detached abstractions of traditional legal theory, this is a program with substantial political consequences.

To summarize, there are at least three areas in which Radin’s pragmatism coincides with her feminism. First, her theories are situated in the daily realities of human experience. Second, because her theories are so situated, they recognize the tangible reality of gender and power. Third, her writing is strategic — it is meant to be useful to an ongoing project of appropriating legal theory to the needs of real people. Yet, as Radin is a pragmatist, her feminism is distinctive in its recognition of the moral ambiguities of daily life and in its placement of these ambiguities at the very center of its analysis. Many feminist writers tend toward the utopian. There are some, for example, who are uncompromising in their rejection of prevailing culture. In addition, there are some who seem to glorify a pure and essential conception of “women’s experience.” Finally, there are some who debate gender issues in teleological terms: What is our ultimate goal? Are we fighting for special or equal treatment? Do we want a society that is androgynous or one that is dominated by female norms and ideals? As interesting as these questions are, they seldom lead to real advances in the material conditions that oppress women. These questions are too abstract and those who ask them are too little mindful of the realities that confront subordinated people. Radin, however, as a pragmatic feminist, treats feminism as one of a number of progressive forces

47. This is essentially the criticism Stephen J. Schnably offers in *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993). Radin’s reply can be found in Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409 (1993).

in a world that is complicated by double binds⁴⁸ and the inevitable political compromise of participation in the surrounding culture.

But, as I indicated earlier,⁴⁹ the pragmatic approach brings its own set of problems. Its very lack of utopianism seems to disable it from becoming a vehicle for substantial change. Radin is forthright in her description of the problem:

Some [critics on the left] consider pragmatism to be inherently conservative, primarily for two reasons. First, if there can be no transcendent transformative theory by which all progress is measured, then (it is argued) the pragmatist meliorist spirit results not in real progress but rather only in ineffectual tinkering. Second, if pragmatism measures the goodness of the law, or of proposals for change, or of theories of social justice, by "coherence" or "fit" with what we already accept, then the more firmly entrenched is the status quo the harder it will be to avoid blindly reaffirming it. [p. 29]

These observations lead her to confront what she calls the problem of bad coherence.

IV. THE PROBLEM OF BAD COHERENCE

Radin describes the problem of bad coherence in the following terms:

Some pragmatists endorse coherence theories of truth or goodness, in which any given proposition or value is judged by how well it hangs together with the whole system of propositions or values to which we are committed. If a pragmatist defines truth or goodness by means of coherence, then how can the pragmatist recognize a system that is coherent but *bad*, such as institutionally coherent and pervasive racism or sexism? [pp. 29-30]

As such, she diagnoses the problem as resulting from an incomplete pragmatism:

[P]ragmatists who rely on institutional coherence this way are incomplete pragmatists. They are throwing out the other half of the pragmatist spirit — the importance of our critical visions and imaginative recreations of our world. Inconsistent pragmatists are disabled from critique, but consistent pragmatists are not. [p. 30]

What this comes to is a little puzzling.⁵⁰ What does she mean by "critical visions and imaginative recreations"? Where in the pragmatist's universe do they come from? Without doubt, imagination

48. Radin believes that political double binds are a pervasive aspect of our political situation. On the one hand, attempting to transcend deeply entrenched meanings may create such a division between theory and practice that we are unable to make any real progress. On the other hand, a failure to challenge deeply entrenched meanings may reinforce ideology and make future progress that much more difficult. See *supra* note 14 and accompanying text.

49. See *supra* note 27 and accompanying text.

50. Nor are we helped by an earlier discussion of the problem: "A pragmatist does not suggest that all ideal theory is impossible or that we can somehow do without it altogether. Rather, for the pragmatist, theory is immanent and evolving; its development goes hand in hand with practice." P. 29. If theory is "immanent and evolving," how can it be at the same

is a good — perhaps even a pragmatic — thing. Under some circumstances, it may well help us to define the possibility of social change. It cannot, however, establish its desirability. Thus, Radin's response to the problem of bad coherence is not entirely satisfactory. Radin is correct in her charge that the problem of bad coherence is a problem of partial pragmatism. She errs, however, in thinking that imagination and critical vision supply the missing part. Either truth and virtue are solely matters of consensus and coherence, or they are not. If they are, then human beings will inevitably be stuck with many deeply entrenched but backward conceptions. If they are not, then there is indeed something besides imagination missing from Radin's account of the pragmatic conception of truth. In other words, pragmatists are stuck on the horns of a dilemma. If everything is "contingent" and "socially constructed," then all of our norms and ideals are nothing more than temporary resting places in an ongoing process of social negotiation — resting places that have more to do with the realities of privilege and power than with aspirations for truth and justice.

Among contemporary pragmatists, there is a dispute that sheds some light on this problem. On one side, there are pragmatists such as Richard Rorty who are uncompromising in their rejection of foundationalism. These pragmatists believe that what we call "truth" is nothing more than consensus and coherence.⁵¹ On the other side, there are pragmatists such as Hilary Putnam who, like Peirce and James, are committed to the use of a pragmatic method.⁵² This type of pragmatism insists upon more than consensus and coherence. Beliefs are only true if they are arrived at in accordance with a certain method — the method that forms the basis of scientific practice. This results in a more robust notion of truth, but, at the same time, it reopens the question of foundationalism — if there is a uniquely correct method of inquiry, does it not function as an unquestioned, and unquestionable, foundation for human knowledge? To put it somewhat differently, if we canonize the contemporary understanding of scientific methodology, then have we not made a substantial retreat from our pragmatism?

This dilemma and the dispute it prompts are central topics for pragmatic philosophers. Although it is obvious that Radin has not resolved these issues, there is much in her work that suggests possible resolutions. In particular, it is useful to think about her suggestion that the feminist practice of consciousness-raising is a model of "pragmatist . . . reconceptualization" (p. 30). Consciousness-raising

time "ideal theory"? Ideal or utopian theories differ from immanent theories precisely in the fact that their development does *not* go "hand in hand with practice."

51. *Afterword, supra* note 21, at 1917.

52. *Id.* at 1914.

is not high theory. Women do it by talking about their lives in the simplest possible terms. Their focus is on careful observation of their own experience. In telling their stories, they question normally unquestioned assumptions and reject interpretations that are formulated in ordinary, patriarchal discourse. Consciousness-raising can challenge false consciousness and bad coherence precisely because of its commitment to an extremely rigorous form of empiricism. In a similar fashion, the depth and relentlessness of pragmatism's own commitment to empiricism may provide a partial answer to the problem of bad coherence. If a belief coheres with our pre-existing beliefs and attitudes, we are inclined to call it true. But as pragmatists, we should not take this as the end of the story. We must understand the belief in terms of its empirical consequences, and, if it concerns a matter that is important to us, we must test it aggressively against the onslaught of future experience. Thus, pragmatism and feminism, properly understood, share a deep commitment to a rigorous form of empirical inquiry.

In short, one answer to the problem of bad coherence resides in the pragmatic maxim itself: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."⁵³ The maxim prescribes not so much a method as a form of disciplined thinking. Abstract conceptions must be rigorously compared to practical expectations. Expectations must be continuously compared to actual experience. Ideological tones must always be mistrusted. Thus, while bad coherence is inevitable, it will never be permanent so long as we continue to think in the manner that is prescribed by the maxim.

V. CONCLUSION

I have examined a number of problems that arise in the context of Radin's pragmatism. Each of these problems relates to the nature of ideals and their relationship to progressive social change. One problem is the problem of meaning: where do ideals come from? If meaning is always to be understood in terms of practical consequences, what are the practical consequences that attach to statements about ideals?⁵⁴ Another problem is the problem of relativism: what reason could there be for preferring our current ideals to our current practices? Yet another is the problem of motivation: if our visions of truth and justice are relative to our own individual history and perspective on the world, what motives could we —

53. PEIRCE, *supra* note 4, ¶ 5.402.

54. It is tempting to answer this question by saying that ideals are descriptions of individual dispositions towards certain kinds of behavior. If this is all that ideals are, however, they can explain human actions but not justify them.

either individually or as a society — ever have for genuine self-transformation? A final problem is the problem of bad coherence: what do we do about the fact that consensus and coherence are often the products of dominance and coercion rather than sustained rational inquiry?

None of these problems is unique to Radin; they are part and parcel of her commitment to pragmatism. Nevertheless they are serious problems. Indeed, the continuing usefulness of pragmatic analysis to matters of legal theory depends crucially upon on their resolution. But resolutions are hard to come by. Radin, in fact, does as well as any have done in addressing these issues — she has addressed them honestly and straightforwardly. But ultimately what she offers is not so much solutions as the hope of solutions to come — solutions that will come only if we are rigorous and relentless in our continuing commitment to a pragmatic method.