Response: The Values of Legal Archaeology

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Judith L. Maute**

Justice, justice, shall you seek1

I. INTRODUCTION: HISTORICAL RECONSTRUCTION AS AN ARCHAEOLOGICAL DIG

At its best, the study and practice of law is a passionate and untiring pursuit of justice. In the hustle of daily demands for our time and attention, we often lose sight of that goal, and lawyers' essential role in achieving just results. By pausing long enough to reflect on one case—intricately weaving together the facts, law, and historical context—one's passion and commitment to the ends of justice can be revitalized. To the extent that law is taught and received as a set of abstract legal rules, one can safely remain at a distance from the significance of a legal ruling to the parties, the greater community, and the legal system as a whole.

Professor Debora Threedy has suggested that historical reconstruction of noteworthy cases be viewed using the metaphor of an archeological dig.

"[A] reported case does in some ways resemble those traces of past human activity . . . . Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law."2

This metaphor captures what is involved in doing historical reconstruction, the value to those who get their hands dirty laboring in the field, and the resulting contributions to a deeper understanding of the law.

Historical reconstruction is invaluable to understanding legal processes: how cases are presented, take shape through the adversary process, and are finally decided by a court of last resort. The term "legal archaeology" is both

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1Bible, 1994 New Oxford Annotated; see also Michael D. Goldhaber, Case Reveals the Meaning of Life Nat'l L. J., at A20 (Sept. 6, 1999).
elegant and accurate. The process it describes is labor-intensive and thus can only be done by those who are willing to get their hands dirty, who are passionately motivated by a detective-like curiosity to understand, and who are willing to sift patiently through piles of sand until they find a coherent story take shape by piecing together broken shards.

Another possible metaphor is that of pathology done in the coroner’s office. I suspect that everyone recalls a sense of outrage in response to studying a case at some time during their law school experience. The facts seemed compelling, providing a strong moral and legal basis for the claim. According to the law student’s sense of justice, the case was wrongly decided.

During the process of legal education, many students and lawyers learn to shrug off outrage, and transfer their attention to a higher level of abstraction. They focus upon identifying the legal principle articulated by the court, and how that principle fit within the legal framework of this substantive area of law. As is so often true, if one does not accurately understand what transpired factually, a correct resolution to the problem is practically quite difficult. Law students and practicing lawyers must be vigilant toward the facts as stated, and constantly ask whether the court’s decision was based upon assumptions about the facts which could not withstand careful scrutiny.

II. VALUES OF DOING LEGAL ARCHAEOLOGY

A. Passion for Justice and the Skills to Help it Happen\(^3\)

Zeal on a client’s behalf is not necessarily translated into competent representation within legal bounds. At its best, legal education equips students with the technical skills needed for competence, a firm grounding in lawyers’ ethical obligations, and a passion to have their professional lives make a positive difference in the legal system.

A primary value of legal archaeology is to harness an individual’s passion for justice—to develop the legal skills to understand a case in its industrial, economic, and theoretical context. This process enables a rich comprehension about law, and how cases are decided in an adversary system. Besides making possible a deeper understanding of precedent and its possible flaws, this process also helps develop lawyering skills that are necessary to represent clients competently, with an adequate inquiry into facts, and

\(^3\)See Micah 6:8 (New Oxford Annotated Bible, 1994) (“[W]hat does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God.”).
provide effective presentation of the case starting with the initial interview, the pleadings, discovery, and on through final decision.\(^4\)

Competence "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."\(^5\) A student of the law can better appreciate what this rule means by examining the details of a case, what evidence might have been available, the evidence's impact on possible theory and policy issues, and the strategic choices made by the lawyers and their clients. Whether in law school, or in practice, we can all benefit from occasional pause for in-depth reflection on legal archaeology (or pathology); such reflections help put our professional lives in perspective, in terms of what we do, how we do it and why we do it. I find tremendous practical value from studying a case in depth. Such study may trigger creative ideas for factual inquiry and theoretical possibilities. As one participant in this symposium so eloquently put it: trying a case is like navigating a river; one must be able to read the river at this point in time, in light of what has gone before and possibilities for change. Understanding context enables the lawyer to position a case to flow in the deepest path of the law, avoiding obstacles that impede the flow.\(^6\)

B. Benefits to Researcher and Students

I find it difficult to make clean distinctions between benefits flowing to the legal historian and those flowing to students of the law. The intrinsic benefits of doing the work have external impact upon its consumers, whether they are students of the researcher or more distant readers of the final product.


1. Fun and Travel in the Name of Research

Let's be upfront about it. Law professors have great jobs. Academic freedom allows us significant latitude in determining our scholarly pursuits. If we are blessed with the curiosity about what really happened in a case and can identify possible sources of information, we can justify (at least to ourselves) the worthiness of exploration. When I first began to inquire about the *Peevyhouse* case, I was a newcomer to the state of Oklahoma. Feeling much the stranger in a strange land, my curiosity about the case provided a good conversation topic as I began to meet people in the diverse Oklahoma legal community. Lawyers love to tell stories, and the contemporary history of the Oklahoma Supreme Court bribe scandal was a rich topic for interesting tales. Over time, the stories fit together. Operating on Woodward and Bernstein's principle of investigative reporting, I would not publish any alleged "fact" of scandalous history unless I could find documentary support, or two sources who were willing to be cited as a reference for that point. In the process of fact-gathering, I made many new friends and acquaintances, developed a rich understanding of my adoptive state's history, and established a foundation for appreciating its local legal culture. Interviews with lawyers or other persons typically required that I leave the hallowed halls of the academy, and venture out to other towns, cities, and the outlying countryside. My travels exposed me to parts of the state I would not otherwise have visited, and helped me to appreciate the aesthetic beauty of a geography which was foreign to me.

As I reflected upon Professor Threedy's symposium piece, I was thrilled with the potential her project holds for exploration in San Francisco and the Inside Passage of Alaska. Both are awesome in their beauty, and steeped in exciting history around the turn of the century. Spring break, summer travels... need I say more?

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8 See ROBERT HEINLEIN, STRANGER IN A STRANGE LAND (1961).
9 At the time I began this project, Woodward and Bernstein were still honored for the work they had done in uncovering the Watergate Scandal. See CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENTS MEN passim (1974). Times have changed, and their "waggish" take on Washington affairs is less revered. See, e.g., Jamie Malanowski, *A New Nixon Who's Warm and Fatherly*, N.Y. TIMES, Aug. 15, 1999, at § 2, 9 (reviewing hilarious movie, DICK (Columbia Pictures 1999), which portrays Woodward as "shrill and stuffy," and Bernstein as "vain and nebbishy").
10 I dare not give tax advice, for that specialty field is not my own. If, however, the "primary purpose" of travel is business, the potential tax deductions may be attractive as self-justification for spending extended time in a desired location with rich historical resources. See I.R.C. § 162 (1999).
Particularly for professors in state or regional law schools, there is much to be said for getting a lay of the land. Students do not enter law school with their minds tabula rasa. How they read cases and their subjective and moral reactions to legal and intellectual issues are deeply influenced by their backgrounds. By developing some familiarity with the sociological, economic, and political backgrounds from which many of my students have come, I have become better equipped to hear and respond to the concerns that they express in class.

The pedagogical benefit of contextualizing is not confined to cases from one’s “home state” or geological region. Before they become physically exhausted or cynical about the law, most students yearn for justice in individual cases. Intuitively, they sense that facts are important to outcome. Some would say that a subtext to legal education—particularly first year—is to wipe out fuzzy thinking guided by sentimental notions of right and wrong. As the work load increases and the fog begins to roll in, anxiety impulses often move students to grasp desperately for abstract legal principles that they can memorize and dutifully regurgitate on an exam. They do not yet grasp the critical connection between facts and law. By taking the time in class to examine the factual details in or around some cases, a professor helps the sun begin to burn through the clouds.

As a personal reminder to make explicit this realist perspective, for years I kept a taped note on the cover page of my contracts casebook: “If you don’t get it factually, you can’t get it right legally.” The evolutionary nature of legal doctrine is better grasped when students are trained to read carefully for subtle factual variations, and to think about the date of decision as a cue to consider the decision against the backdrop of its economic, industrial and political context.

Contextualizing helps the justice-hungry student who is outraged with an “unjust result” to grasp the fact that the law is not static, that it has potential for change, and that the quality of lawyering may have a significant impact on the outcome of litigation. Students who are trained to think about the relationship between fact-gathering, theory development, and practical lawyering skills are empowered, so that their skill, knowledge and dedication

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11Excuse the puns. Having lived so intensively with the aesthetic and geological aspects of stripmining and land reclamation, double entendres pertaining to land have become second nature.
13See William L. Prosser, Lighthouse No Good, 1 J. LEGAL EDUC. 257, 262 (1948).
to a client's cause can make a meaningful difference in the quality of justice. If this point is made early on, and throughout their legal education, students may emerge better equipped to represent clients.\footnote{See generally, MacCrate Report, supra note 4, at 38–46 (discussing importance of factual investigation for sound legal reasoning).}

Contextualizing also helps students see the big picture. Pressures to cover and adequately survey an area of law necessarily dictate treatment of many issues in snippets; following the excerpt of a principal case, the typical casebook treats multiple related issues in small, cryptic paragraphs. With practice, the seasoned learner can conceptually place these issues according to their relative importance. In the last twenty years, legal education has become more attentive to teaching pedagogy, and has drawn upon research showing that individuals have different optimal learning styles. By varying one's approach to presenting materials, the teacher better satisfies students' diverse learning needs, while also expanding their capacity to master material presented in different formats. Many students are what I would call "whole to part" learners; until they can see the big picture, they cannot understand the discrete parts. I find well spent the initial time investment in developing an overview of a course. Detailed case reconstructions are superb teaching materials for this purpose. Civil procedure teachers have long used Marc Franklin's \textit{Biography of a Case},\footnote{Marc Franklin, \textit{Biography of a Legal Dispute}, 46 \textit{Syracuse L. Rev.} 1243, 1251 (1996).} and Gerald Stern's \textit{The Buffalo Creek Disaster}.

Indeed, one reason I embarked on the \textit{Peevyhouse} project was to create such materials for first year contracts students. To see in the rich detail of one case, the development of a contract, from negotiation through formation, performance, breach, excuse, and remedies, the beginning student is introduced to the doctrinal universe covering in the course. Professor Threedy's work on \textit{Alaska Packers}\footnote{Domenico v. Alaska Packers' Ass'n, 112 F. 554 (N.D. Cal. 1901).} could serve the same purpose. Background on the salmon fishing industry at the turn of the century, introduction to the dominant views on industrial development, labor, and laissez-faire economics provide a rich backdrop for the doctrinal issues of consideration, pre-existing duty rule, modification, and duress.

While I understand the time pressures imposed by curricular revisions to the first year courses, I would suggest that students' overall comprehension could be helped significantly by the occasional study of reconstructed cases. There are many possibilities. Students could be assigned to read a

\footnote{GERALD M. STERN, \textit{THE BUFFALO CREEK DISASTER} (1976). Another fine example of legal archaeology, although the message may be too depressing for incoming first year law students, is \textit{JONATHAN HARR, A CIVIL ACTION} (1995), or the movie counterpart by the same name, \textit{A CIVIL ACTION} (Touchstone Pictures 1998).}
completed work (like my own) before their first class as an overview for the course, and then occasionally revisit the material while studying specific doctrines. Or, the material could be used for writing assignments and practical skills development. The professor could assign the reading out of class and perhaps have law firm teams concentrate on different lawyering skills components.

A couple years after completing the *Peevyhouse* project, I was asked to discuss what influence legal archaeology had on my teaching for a faculty workshop on teaching pedagogy. I found myself dreaming (literally) about my years of classroom teaching, and the underlying philosophy that continues to shape my classroom behavior. The assignment took on a metaphysical tone, akin to the existential query: "What is the meaning of life?" I summarize my conclusions below:

1. View any legal doctrine as the product of context, theory, policy, procedure, and the adversary system.
2. Aid students who need to see the big picture before studying minutiae.
3. "If you don't get the facts right, you can't get the law right."
4. Explicit development of higher levels of learning, starting with knowledge, analysis, and application, and moving to the higher levels of synthesis and evaluation.
5. Importance of "curiosity-based learning."
6. Practical skills: Teach students how competent lawyers go about identifying relevant facts, gathering information to use in theory development, and ways to present that information effectively during settlement efforts and any ensuing litigation.

3. **Fundamental Lawyering Skills: Factual Investigation, Communication, and Theory Formulation**

When reading a case, it is common to take the facts as given, without pausing to consider precisely what evidence was used to establish those facts, how it was gathered, and what other information might have been available to support an alternative legal principle and outcome. This tendency towards abstraction is useful, perhaps essential, to mastering the study of

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18 For example, Dean Nancy Rapoport used the *Peevyhouse* materials as the basis for her integrated contracts and legal research and writing course while at Ohio State.  
20 See generally JEROME FRANK, COURTS ON TRIAL: MYTH & REALITY IN AMERICAN JUSTICE 17–21 (1949) (detailing various factors affecting the accuracy of testimonial evidence).
law. One must be able to identify common fact patterns and corresponding legal principles, organize them by category, and articulate coherent explanations for varying applications. For twenty years the practicing bar, while acknowledging law schools' relative success at teaching doctrine and theory, has encouraged greater attention to fundamental lawyering skills. Law schools must respond to the reality that many graduates will not receive extensive practical skills training after graduation. Many will become sole practitioners. Fewer law firms make the longterm investment in training new associates; new lawyers increasingly are expected to generate sufficient billings to cover their salary, overhead, and profit for partners. As part of the professional training, law schools must do more to equip students for the practice of law.

Reconstructed case histories can provide excellent opportunities for developing a wide range of lawyering skills. The court transcript vividly demonstrates the importance of careful fact-gathering, theory development, clarity of communication, and effective use of exhibits. Older cases, like *Alaska Packers'* and *Peevyhouse*, involve short trials with little or no discovery. By studying the brief record and other available factual information, students can retry the case, formulating a line of questioning that more effectively develops and presents their theory. Hands-on involvement with the record and exhibits also helps students understand the importance of evidentiary rules as practical guidance for case investigation and trial presentation. Historical cases enable students to contrast the rough quality of justice then available with what might be possible today with advanced technology, science, and research capabilities. Perhaps most importantly, students can obtain the first-hand experience of developing a theory, finding supportive evidence, and figuring out how to present it persuasively in a formal trial process.

Existing studies of reconstructed cases, as occasional treats, may serve as templates for students' own investigative efforts. In newer cases, students may try to locate and interview any surviving witnesses or lawyers. I listened with interest to descriptions of case studies produced by (then-professor) Dean Patricia White's torts students here at the University of Utah. While I suspect that this approach caused some students extreme performance

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22I understand this challenge presents difficult resource questions. This is not the time or place to engage in the debate. Instead, I offer the comparison to medical education, which requires a clinical component as part of the degree program. Medical students have practiced on live patients under close supervision before they are turned loose and authorized to accept private patients. Is the law really so different?
anxiety, and uncertainty about whether they were "getting what they needed" (i.e., substantive information needed to pass the bar exam), I have no doubt that these students' grasp of the legal system was deeply enriched by conducting their own case investigations.

III. "THE Peevyhouse PROJECT" (OR, "YOU'RE THE REASON I'M IN OKLAHOMA": THE MEANING OF LIFE IN THE LAW?)

Peevyhouse v. Garland Coal and Mining Co. provoked outrage when I was a law student. Mr. and Mrs. Peevyhouse owned a small parcel of land in rural Oklahoma. They reluctantly agreed to allow coal operators to stripmine on part of their land, provided that, when it was done, the coal operators would do certain remedial tasks to smooth off the spoil banks and allow for safe passage to the untouched land beyond the pit. Their concern that the land be restored was unusual at that time; no state or federal law required any kind of post-mining reclamation. The specially negotiated contract terms reflected their moral, aesthetic, and economic values—that it have continuing utility after the mining was complete. Garland did not perform the remedial tasks, and the Peevyhouses sued. Garland stipulated to breach, thus limiting the dispute to remedial issues. Peevyhouses appealed as inadequate the $5000 jury verdict. Garland cross-appealed. As presented to the Oklahoma Supreme Court, the choice was between the cost to complete the breached remedial provisions ($25,000) and $300 diminution in value to the land caused by the breach. The court held that in a breach of contract action, where the breached provision is "merely incidental to the main purpose in view," which was assumed to be the mutually profitable extraction of mineral resources, and "the economic benefit... to the lessor [landowner] from full performance... is grossly disproportionate to the cost of performance, the damages... are limited to the diminution in value... because of the non-performance."

In 1982, I began teaching at the University of Oklahoma College of Law. To my dismay, the Peevyhouse case appeared in the first week's material in the contracts casebook. I asked George Fraser, an esteemed colleague well versed in Oklahoma history, how I might approach the case

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23 I often thought the song by David Frizzell and Shelly West, *You're the Reason God Made Oklahoma* on GREATEST HITS: ALONG & TOGETHER (K-Tel 1981), was meant for me. The Peevyhouses are the reason I'm in Oklahoma.

24 382 P.2d 109 (Okla. 1962)

25 Unless otherwise stated, the facts in this section are taken from *Peevyhouse*, 382 P.2d at 111–14.

26 Id. at 114.
in class. He replied, "Have you heard about the bribe scandal?" Shortly after the court's 1962 decision, it was publicly revealed that several members of the Oklahoma Supreme Court had accepted payments for their support in certain cases. At that, I began a long and careful dig to understand the lease transaction, what happened in the litigation, and the local legal culture at that time of Oklahoma history. Special care at historical accuracy was crucial: allegations of corruption always raise sensitive questions of fairness and proof, and the reputations of persons both living and dead could be tarnished.

Self-interested concerns (i.e. denial of tenure, and the risk of defamation liability) encouraged me to take my time with the historical inquiry, establish trusted connections within the local legal community, and become immersed in the technical aspects of the mining industry.

I summarize here a few key findings. As consideration given to obtain Garland Coal's promises to perform the remedial work, the Peevyhouses relinquished the customary right to advance payment of surface damages based on fair market value of the land. That is, they effectively paid three thousand dollars, reflecting the higher value they placed upon having done work which would insure the land's future condition. This fact, which is critical to correct resolution of the case under contract doctrine, was not presented at any stage of the litigation. The legal record is deficient because, I believe, the Peevyhouses' lawyer did not adequately investigate and understand the transaction and its significance under contract doctrine. He was a sole practitioner who practiced primarily in the torts field, in which his fee was based upon a percentage of the total amount recovered. He conceded to me that contracts was not his strong suit, a point confirmed by his contracts professor.

The entire litigation, from beginning to end, was a match between unequals. Garland Coal was ably represented by an accomplished litigator with proven contracts expertise, whose trial and appellate work reflected

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27 The payments began as campaign contributions to support judges' re-election campaigns. Troublesome questions have long existed regarding financial support for judicial elections. See Judith L. Maute, Selecting State Court Judges: The Ballot Box or the Back Room?, U. So. Tex. L. Rev. (forthcoming).

28 This prompted close attention to defamation law, and the need to identify factual premises for my scholarly conclusions.

29 This patience also paid off with personal rewards, acclimating me to a new community, terrain, and culture. Often while writing, especially when not in Oklahoma, I would listen to the album, FOLKWAYS: A TRIBUTE TO WOODY GUTHRIE AND LEADBELLY (CBS Records 1988).

substantial investment of time and other resources. Peevyhouse counsel, by contrast, clearly was operating on a shoestring. Plaintiffs' case was woefully deficient in both fact and law. Vague defense testimony suggested that Garland would have done the remedial work, except the "coal ran a bit thin" on Peevyhouse land. Some contracts scholars suggest that this was a nascent factual basis for an impossibility defense, which would excuse Garland from its duty to perform or be liable for breach damages. My painstaking analysis of the coal operations map indicated that the coal depth on their land was not appreciably different from that on others' land which was mined more extensively. Instead, the coal operator's decision to relocate the mining activity may have been attributable to financial self-interest by one or more of the decisionmakers, who secretly owned the land next mined. Had the case been fully and competently presented, I submit that the court would have found that the remedial provisions were a material part of the contract for which valuable consideration was paid. Garland's failure to perform was a willful and deliberate breach and not legally excuseable. Accordingly, the cost measure of damages was appropriate protection of plaintiffs' expectation interest, and fully supported both by contract policy and principles of economic efficiency.

Was Peevyhouse tainted by scandal? I think not. It was a 5-4 decision; two justices voting with the majority had been implicated by the scandal. One, Justice Welch, had close connections to the defense firm. Upon examination of seventeen "closely decided" cases involving this firm, I found that Justice Welch consistently voted for the firm's client. I concluded, to a .01 level of statistical significance, that this voting pattern did not occur by chance, but rather was the product of improper judicial bias. Indeed, I found clear proof that Justice Welch changed his vote to support Garland at a time when it was determinative. Nevertheless, I do not believe that the decision was the result of bribery; the stakes were small and the case history otherwise did not bear the indicia of other fishy votes. Rather, I believe that Justice Welch did a favor in throwing his weight behind a client of the defense firm.

What went wrong? Richard Danzig's pathbreaking work on the "capability problem" provides the basis for critical observations, that there are systemic defects in the adversary system of justice. The adversary system is premised on underlying assumptions, that parties to a litigated dispute can participate effectively because they are represented by equally skilled and dedicated advocates and have equal resources to commit to

resolution of the dispute.\textsuperscript{32} We know, from real life experience that there are serious flaws with those basic assumptions. The problem in \textit{Peevyhouse}, similar to that in \textit{Alaska Packers}, is that the parties’ lawyers were not equally skilled, with mastery over the facts and law, and comparable resources to spend on the litigation. In both cases, lawyers for the industrial defendants had long-term relationships with their clients, and understood the industrial context. In both cases, there was little (or no) discovery. At the time of the \textit{Alaska Packers} case, a “trial by surprise” reigned supreme; no formal discovery mechanisms existed. While procedural rules in effect when \textit{Peevyhouse} was tried allowed discovery, none took place. I suspect that the prevailing litigation practice was to shoot from the hip, particularly for contingent fee plaintiffs where there were not obvious avenues and methods of paying for pre-trial discovery. Professor Threedy’s work, like my own, suggests that the defendants in both cases benefitted from superior preparation, trial presentation, and commitment of resources to achieving the optimal legal result for their clients. While her work does not indicate the basis by which libellants’ counsel was paid, I doubt it was on an hourly basis. In both cases, it would appear that defense counsel were compensated more handsomely than plaintiffs’ counsel.

IV. \textit{Domenico} v. \textit{Alaska Packers’ Association}: COMMON THEMES WITH \textit{Peevyhouse} v. \textit{Garland Coal and Mining Co.}

I see three common themes in the \textit{Peevyhouse} and \textit{Alaska Packers’ case} studies: first, the critical importance of viewing any given case in the context of when it was decided, at a particular time in history, and as a reflection of prevailing economic, political, and legal thought; second, the unique role served by judges, and the extent to which their decisions mirror their views and backgrounds; third, issues pertaining to the quality of justice, including disparities in available resources and lawyering skills, and systemic questions about built-in inequities which distort outcomes. The disparities may create an incomplete trial record, leaving room for judges to make assumptions about critical fact questions, which then provide the foundation, or factual underpinnings of legal doctrine.

These themes were extensively developed in the \textit{Peevyhouse} project. In its truest sense, legal archaeology involves both a microscopic examination of the shards uncovered by painstaking digging, and a macroscopic assessment of how the component parts fit together to describe and explain

the culture left behind. The following section briefly sketches some of the major points which may be of interest for future development by Professor Threedy in expanding her work on the Alaska Packers’ case.

A. Importance of Historical Context

Legal novices (including many first year students) often clamor to learn "the rule," or general legal principle which can be applied reliably to determine the outcome of common fact patterns. Support for this view could be found with early Anglo-American legal education, consisting of readings from Blackstone's *Commentaries on the Law.* Studying law as a science, dissecting opinions in order to decipher their meaning, had its advent near the turn of the century with Christopher Columbus Langdell, of Harvard Law School. Legal realism focused attention on larger issues of political, social and economic contexts. While consideration of historical context is now commonplace, standard legal textbooks give relatively little attention to placing doctrinal developments in the context of how legal thought at the time was a reflection of social, economic and political concerns.

The Alaska Packers’ facts occurred in 1900. The United States was at the cusp of major transformation. Eminent legal historian, Lawrence Friedman, describes:

When the blood of the Civil War dried, the Gilded Age began. This was the factory age, the age of money, the age of the robber barons, of capital and labor at war. And the frontier died . . . . By 1900, if one can speak about so slippery a thing as dominant public opinion, that opinion saw a narrowing sky, a dead frontier, life as a struggle for position, competition as a zero-sum game, the economy as a pie to be divided, not a ladder stretching out beyond the horizon . . . . The United States became a “nation of joiners.” . . . Many Strong Interest Groups Developed—labor unions, industrial combines, farmers’ organizations, occupational associations. These interest groups jockeyed for position and power in society. They molded, dominated, shaped American law.

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34See *LaPiana, supra* note 33, at 48.
35Notable exceptions in contracts texts include *Randy Barnett, Contracts Cases and Doctrine* (2d ed. 1999); *Stewart Macaulay et al., Contracts Law in Action* (1995) and *Kastely et al., Contracting Law* (1996).
It was a time of social strife. Captains of industry amassed great wealth and expanded corporate power on the backs of laborers who were poorly paid, suffered under adverse working conditions, and often lived in company towns.37 The prevailing legal regime reinforced laissez-faire economics, which favored the dominant interests of employers. Meanwhile, workers increasingly viewed collective action as necessary leverage, especially in "[t]he struggle against industrial combines—the dreaded trusts—for a 'fair share of the economy.'"38 During the first half of the nineteenth century, American courts condemned concerted activities of workers' associations as "criminal conspiracies."39 In 1886—"called the period of 'the great upheaval'"—nationwide strikes and sympathy strikes arose on slight provocation; labor action meetings were disrupted by violence.40 There was acute class consciousness, especially among unskilled workers.41 Large corporate employers squashed important steelworker and railway strikes in 1892 and 1894.42 Pinkerton guards protected companies' property rights against threats of striking workers. With ready access to the courts, management successfully waged legal battles against collective actions by workers. The common law richly supplied doctrines to support the legal outcomes, often "presented as hallow deductions from empty general propositions."43

Justice Frankfurter eloquently addressed the role of law in re-enforcing corporate prerogatives:

The coming of the machine age tended to despoil human personality. It turned men and women into "hands." The industrial history of the early Nineteen-Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an

38FRIEDMAN, supra note 36, at 340.
39RUSSELL A. SMITH ET AL., LABOR RELATIONS LAW CASES AND MATERIALS 3–6 (1979) (describing Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 38 Am. Dec. 346 (1842) as "the first break in the doctrine of criminal conspiracy . . . , enabling labor to shift its emphasis from political action towards 'business unionism' (which seeks improvement through collective bargaining)" [herein after SMITH ET AL LABOR RELATIONS].
40Id. at 9 & n.4.
41See id.
42See id. at 10. Pinkerton guards employed by Carnegie Steel Company shot and killed several workers in Homestead, Pennsylvania. See id. at 10–11 n.8.
43Id. at 20–22 (quoting Oliver Wendell Holmes, Privilege, Malice, and Intent, 8 HARV. L. REV. 1, 3 & 7 (1894)).
expression of life and not merely the means of earning subsistence. But
unionization encountered the shibboleths of a pre-machine age and these
were reflected in juridical assumptions that survived the facts on which
they were based. Adam Smith was treated as though his generalizations
had been imparted to him on Sinai and not as a thinker who addressed
himself to the elimination of restrictions which had become fetters upon
initiative and enterprise in his day. Basic human rights expressed
by
the
constitutional conception of “liberty” were equated with theories of laissez
faire. The result was that economic views of confined validity were treated
by lawyers and judges as though the Framers had enshrined them in the
Constitution. This misapplication of the notions of the classic economists
and resulting disregard of . . . the Constitution led to Mr. Justice Holmes’
famous protest in the Lochner case against measuring the Fourteenth
Amendment by Mr. Herbert Spencer’s Social Statics.44

The West was undergoing massive population growth, fueled by the
pioneer spirit of rugged individualists in pursuit of wealth. The gold rush,
and the lure of new opportunities, brought tens of thousands of new settlers
to the region. In terms of social organization, what traveled west and became
the dominant theme of American law during the last half of the nineteen
century was “a notion quite the antithesis of primitive democracy. The notion
was: “organize or die . . . in every area and arena of life.”45

I have long sensed that Alaska Packers’ involved a collective work
stoppage as leverage to obtain fair wages. Professor Threedy’s findings
reinforce that perception. The facts raise doubt about whether the fishermen
at Pyramid Harbor were earning a decent living wage, in light of their
seasonal employment, costs of living at the camps, and family support
obligations. Their collective action in demanding higher wages is an
understandable human response, when they realized (or perceived) that the
poor condition of the nets resulted in a smaller catch, and consequently,
smaller gross earnings than anticipated. Deductions for the hiring fee paid to
the labor contractor, and lodging costs to the messhouse may have left them
with a net pay far below their original expectations. Their possible feelings
of exploitation may have combined with a sense of empowerment when they
realized the potential for collective action to improve their financial lot.46

44 American Federation of Labor v. American Sash & Door, 335 U.S. 538, 542–43
(1949).
45 FRIEDMAN, supra note 36, at 370.
46 While the above refers primarily to the use of common law and the history of American
labor law, I am also curious about how Alaska Packers’ fits in the context of admiralty law.
The case is, after all, brought in federal court pursuant to its admiralty jurisdiction, and the
dispute involves seamen’s wages. See GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW
OF ADMIRALTY (2d ed. 1975). As noted by Professor Threedy, the district court judge applied
After closer consideration of the historical and legal context and the particular backgrounds of the Ninth Circuit judges deciding the case, I now see other issues that make the case more complex. The balance of this piece begins to develop those other issues.

B. Who Were the Judges?

Judges are creatures of their own time, upbringing and life experience. Their conduct in office reflects their views on the rule of law, legal traditions, and adjudication.\(^\text{47}\) Where some judges were persuaded that organized labor dangerously threatened the balance of power, others were "almost equally afraid of the sinister un-American trusts."\(^\text{48}\) Thus, to understand a case (and origin of legal doctrine) in context, it is helpful to know about a judge's personal and legal background.\(^\text{49}\)

1. Federal District Judge John Jefferson De Haven

Professor Threedy provides some biographical information about Judge De Haven, who presided over the trial in federal court.

John Jefferson De Haven was born in St. Joseph, Missouri, in 1845. He was brought to California in 1849, grew up in Eureka, attended public schools, was admitted to the bar in 1866 and was married in 1872. He had a long political career including terms as a district attorney, county

an admiralty rule, solicitous of seamen, to find the signed releases did not bar their suit for wages. Threedy, \textit{supra} note 2, at 190-91 (stating that because "seamen are usually improvident, and often ignorant of their rights, they are frequently tempted by their necessities to take less than is due them").

I am intrigued by the challenge of finding out more about the human actors involved in a case. I am curious to know more about the superintendent, the labor contractor and owner of the lodging quarters, and the principal owners of the ship and canneries. County historical societies and genealogical research may provide fruitful avenues of inquiry. Current availability of information through websites could also make such research feasible.

\(^{47}\)See \textit{FRIEDMAN, supra} note 36, at 36. Judges, members of the same society as their litigants, "shared the general outlook that American life was a zero-sum game." \textit{Id.} at 342. "However much judges liked to clothe doctrine in history and in the costume of timeless values, doctrine was still at bottom flesh and blood, the flesh and blood of \{current\} struggles over goods and positions \ldots." \textit{Id.} at 342.

\(^{48}\)\textit{Id.} at 362.

\(^{49}\)This basic point is exemplified in current struggles over judicial appointments and confirmation. An individual's predilections on the role of law, and general approaches towards certain issues often can be anticipated by close examination of their personal and professional biographies. While judicial independence enables growth and courage in office, dramatic reversals in political and philosophical orientation are rare.
assemblyman, state senator, city attorney, congressman, state supreme court justice, and finally, in June 1897, he was appointed federal district court judge.  

His parents, it appears, were '49ers—part of the cataclysmic inflow of population to the West brought by the gold rush. The sparse biography perhaps sheds some light on his assessment of the evidence presented at trial. Eureka, a Victorian seaport located in northern California near the Oregon border, had its roots in the timber and commercial fishing industries. His parentage, place of upbringing, and career in California politics suggest that he was well in tune with the populism which dominated that era of the state's history. His Alaska Packers' opinion reflects a nuanced understanding of the commercial fishing industry and its relationship to admiralty law, and an empathy for the parties' conduct. For example, he upheld the use of admiralty jurisdiction because the contract was "maritime in nature" even though the men slept, and performed some of their work, on shore. In evaluating the competing lines of authority on the pre-existing duty rule, he opted to find rescission and a new agreement, finding that defendant probably chose not to sue the fishermen for breaching the original contract because of their "inability . . . to respond in damages." Judge DeHaven found that Murray, the Alaska Packers Associations' ("Alaska Packers") general superintendent, was authorized to employ labor while at Pyramid Harbor, including the new contracts for higher wages. While Judge DeHaven invoked the equitable protections admiralty law extended to ignorant and improvident seamen, he deftly avoided application of an admiralty statute which would have denied recovery to the libelants had they been merchant seamen. A crucial finding of fact rejected libelants' claim that the nets were "rotten and unserviceable" because he assumed the association's financial self-interest in a successful season was aligned with the fishermen's interest in maximizing the catch. This finding ultimately doomed libelant's argument that the association's breach of the original contract provided consideration for the new agreements, which was the only hope for sustaining the judgment on appeal. I surmise that Judge DeHaven

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50Threedy, supra note 2, at 188–89.
51See FRIEDMAN, supra note 36, at 363.
53See Alaska Packers", 112 F. at 556.
54Id. at 559.
55See id.
56See id. at 559–60.
57Id. at 556.
determined this key fact based on his understanding of the commercial fishing industry in northern California, which he assumed to hold true for salmon fishing in Pyramid Harbor. As Professor Threedy has suggested in her dig about the nets, perhaps this was a mistaken assumption. Courts' mistaken assumptions of facts are made possible by defects in the litigation process, a point developed in subsection C below.

2. Ninth Circuit Panel: Judges Ross, Gilbert and Hawley

Professor Threedy provides some biographical information on Judge Erskine Ross, author of the Ninth Circuit appellate opinion. My brief independent dig discovered a treasure-trove of information about his life and judicial philosophy, and more generally, the early history of the Ninth Circuit. I commend David Frederick's book *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941.* Should Professor Threedy pursue a more comprehensive archaeological dig into the *Alaska Packers' case, this text may be an invaluable resource in understanding the philosophy and jurisprudence reflected in the decision.

Judge Erskine M. Ross was born in Culpepper County, Virginia, in 1845, "the son of a planter." He attended the Virginia Military Institute and fought on the Confederate side during the Civil War. He came to California in 1868 and lived with his uncle, a state senator and prominent attorney. After studying law under his uncle for two years, he was admitted to the bar and achieved "professional fame and financial prosperity at an exceptionally early age." At the age of thirty-four he was chosen justice of the state supreme court where he served until 1887 when he was appointed a US district judge; and then circuit judge in 1895. Married with a son, he owned one of the largest and most profitable orange orchards in the state, Rossmoyne. "His enlightened firmness in the discharge of judicial duty . . . was well evidenced during the great railroad strikes of 1894." Other available data on him, and Judge William B. Gilbert, provide rich insights on their backgrounds and judicial philosophy. Their thirty year relationship as judicial colleagues was strained by jurisprudential conflicts, to the extent that they often served on the same appellate panel to prevent

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58 See Threedy, supra note 2, at 189–90.
59 See infra Part IV.C; see also Maute, *Feenyhouse Revisited,* supra note 30, at 1446–55.
61 Threedy, supra note 2, at 194 (citing HISTORY OF THE BENCH AND BAR OF CALIFORNIA 657).
either from having too much influence in the development of Ninth Circuit law. They disagreed on so many issues that the outcome of cases frequently was determined by the third panel member. On cases relating to natural resources, however, they both consistently protected the corporate and industrial interests against claims of private landowners and environmental regulation.

One may speculate upon the influence of their contrasting backgrounds. Ross, the youngest of four sons of a plantation owner and his wife, was just fifteen years old and a cadet at the Virginia Military Institute when the Civil War broke out. His military service was cut short so he could complete his education at the prestigious military academy. At times considered California's leading Democrat, Ross was first elected to a three year term, and then to a full twelve year term on the Supreme Court. Generally, he was held in high esteem as a judge, respected for his "razor-sharp" intellect, and sometimes was mentioned for possible appointment to the United States Supreme Court.

President Grover Cleveland appointed Ross to the federal district court, where he served from 1886 to 1895. While on the trial bench, in 1893 he acquired a national reputation for his strict enforcement of the Geary Act, which excluded Chinese laborers from immigrant status, and for his tough handling of the Pullman rail strike in 1894. Judge Ross' anti-Chinese judicial enforcement won popular approval from Los Angeles and the labor community, both of which jealously protected limited job opportunities for unskilled workers from immigrant competition.

Early in 1895 Judge Ross was named as the third judge to the Ninth Circuit. Within weeks of his appointment, he was designated to serve as trial judge in a suit brought by the United States against the estate of Leland Stanford, a principal shareholder of the Central Pacific Railroad, to recover fifteen million dollars in government loans which financed railroad construction. The continued existence of Stanford University, which was created and funded by a bequest from the estate, depended on the outcome. Recall, this was the gilded era of robber barons who became fabulously

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62 See FREDERICK, supra note 60, at 118, 121.
63 See id. at 29.
64 See id. at 114-19.
65 See id. at 21-26, 38.
66 See id. at 22-23, 65.
67 See id. at 22, 64-67.
68 See id. at 66.
69 FREDERICK, supra note 60, at 23.
70 See id. at 23, 35-36.
71 See id. at 36.
wealthy in railroads, industrial trusts, and industrial expansion. From the federal perspective, with widespread popular support, the shareholders' assets should be available to repay the federal loans. For present purposes, the technical legal issues are not important. Judge Ross ruled in favor of the Stanford estate, based on his unique interpretation of state and federal law.\textsuperscript{72}

In his appellate capacity, Judge Ross rigorously scrutinized for error the lower court proceedings, giving little deference to the rulings of the trial judge.\textsuperscript{73} His judicial philosophy tended towards formalism.\textsuperscript{74} He was a strict constructionist in the interpretation of both statutes and written documents. For example, in an opinion denying specific performance of a contract for lack of specificity, Judge Ross wrote that the parties' intent could neither add to, nor detract from the written document: "To read by construction into the written contract of the parties such a requirement [making explicit certain obligations] is therefore to read into it a most important provision not there found."\textsuperscript{75} As owner of substantial acreage in southern California, he was especially sensitive to issues of property rights. Throughout his judicial career, his rulings reflected his views on the sanctity of property rights.\textsuperscript{76}

By comparison, much less is known of his colleague Judge William B. Gilbert. Judge Gilbert was appointed as second judge of the Ninth Circuit in 1892, where he served until his death in 1931. Like Ross, he was also born into a prominent Virginia family. The similarities end there. His Unionist family did not share in the Confederate views of their neighbors; they moved to Ohio before onset of the Civil War. He did not serve in the military, but rather pursued his education at Williams College, and later, his law degree at Michigan. He practiced in Portland for twenty years before his appointment to the appellate bench.\textsuperscript{77} Judge Gilbert was "[t]ireless, industrious [in his work], and possessed of great charm . . ., [a man who] zealously guarded his privacy . . . [with a] 'passion for inconspicuousness.'\textsuperscript{78} In sharp contrast to Ross, Judge Gilbert was deferential to the trial court's fact-findings and application of legal standards; he was not inclined to find an abuse of discretion.\textsuperscript{79} On matters of both statutory and contract interpretation, Judge

\textsuperscript{72}See id. at 37–43. A respected legal commentator, Seymour Thompson, strongly criticized the opinion. Ultimately, the decision was upheld by both the Ninth Circuit and the United States Supreme Court, literally saving Stanford University from certain demise. See id. at 39–51.

\textsuperscript{73}See id. at 28.

\textsuperscript{74}See id. at 102.

\textsuperscript{75}Id. at 101.

\textsuperscript{76}See id. at 99–100.

\textsuperscript{77}Id. at 19–20.

\textsuperscript{78}Id. at 20.

\textsuperscript{79}See id. at 101.
Gilbert was willing to look beyond technical deficiencies, and to fill gaps by implication of what the drafters must have intended. In the specific performance case mentioned above, Judge Gilbert dissented, stating: "Where a contract is susceptible of a construction in accordance with justice and fair dealing, the court should adopt it." Judge Gilbert authored the Ninth Circuit opinion in the Stanford case, affirming Judge Ross’s decision that the shareholders were not liable to repay the government loan. While Ross’s rationale was based on state corporation law, and reflected suspicion of national power, Gilbert based the appellate decision on federal law, where the statutory omission of shareholder liability was interpreted as governmental indifference, thus waiving its right to collect from the company.

Federal district court Judge Thomas Hawley of Nevada sat by designation to serve as the third member of the Ninth Circuit panel. He had served on at least three other important panels: the Stanford shareholder case; a Chinese immigration case; and a federal environmental enforcement action. In the last one, Mountain Copper Company v. United States, Judge Hawley dissented to a majority opinion authored by Ross and joined by Gilbert. The United States filed a nuisance action in its capacity as owner of public lands, seeking a permanent injunction against smelting operations which irreparably damaged timber. Despite their jurisprudential differences in other areas of law, Ross and Gilbert shared a common objective in supporting economic development of natural resources in the West, consistently ruling in favor of business interests that exploited natural resources to the detriment of the environment. This 1906 decision typified their commitment to such industrial development, rejecting the government’s claim as an ordinary landowner to relief that could not be justified by a cost-benefit analysis. Judge Hawley’s eloquent dissent “admonished Ross’s ledger-balancing approach and maintained that a profitable corporation ‘has no right . . . to destroy the property of the individual landowners in the vicinity or seriously to impair and injure the health of those living upon their own lands in the vicinity of its works.”

Id. at 100-01.

Id. at 101.

See id. at 45–46. Seymour Thompson, a legal commentator, also strongly disapproved of Judge Gilbert’s opinion. See id. at 46.

See id. at 69. A unanimous court preserved the right to appeal from the district court immigration order. This was a notable vestige of 1880’s federal judicial protection of Chinese immigrants against hostile federal laws. See id.

142 F.625 (1906).

Id. at 115–16.

Id. at 116 (quoting Woodruff v. North Bloomfield Gravel Mining Co., 18 P. 753 (C.C.D. Cal. 1884)).
What light is cast on the Alaska Packers’ case by virtue of looking at the biography and legal perspectives of the panel judges? The decision was unanimous; Ross wrote for the court in reversing the decision below. Consistent with Frederick’s observations of his judicial method, Ross independently examined the trial court record, showing little deference to Judge DeHaven. Two findings of fact were upheld: that Alaska Packers could not obtain replacement workers and that the fishing nets were not defective.  

The latter finding is, as we well know, key to the legal conclusion that the promise for additional pay was not supported by consideration. Judge Ross then rejected the trial court’s suggestion of waiver, finding uncontradicted the superintendent’s testimony disclaiming authority to change the contract.  

It could not justly be held that there was any voluntary waiver by Alaska Packers to the terms of the original contract. Having recast the determinative facts, the Ninth Circuit decision is premised on traditional contract doctrine: absent consideration or voluntary waiver, the promise to pay more was not enforceable. To the doctrinally-oriented first year contracts student, the case is a straightforward example of the ancient common law pre-existing duty rule.

The archaeological dig enables one to go beneath this superficial learning. In keeping with the judicial philosophies of Judges Ross and Gilbert, Alaska Packers’ supports industrial development of natural resources—the catch and canning of salmon in the wilds of Alaska. It does not trigger long-term environmental concerns of importance to Judge Hawley. Perhaps the foregoing biographical inquiry disproves my initial take that it is a nascent collective bargaining case. The issues were far more complex. If collective organizing efforts were to be legally sanctioned, the contract bargaining had to take place in an orderly fashion, and not perpetuate fears of anarchy or criminal conspiracy. That many of the libelant fishermen were immigrants further works against enforcement of the promised extra pay. Labor’s support of anti-Chinese immigration laws may suggest an overriding concern, to keep available jobs and benefits for those who join in lawful collective action. A major challenge for the early labor movement was to persuade diverse workers that they had common interests in uniting. To the extent that a subgroup of workers could, subsequent to the original contract, obtain additional pay through their own collective action, it could dilute the reason many would have for joining forces with the union. Organized collective bargaining of a labor contract through designated representatives in San Francisco is tame in comparison to an unruly gang of

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87 See Alaska Packers’, 117 F. at 101.  
88 See id. at 102.
fisherman far from an established legal system. The Ninth Circuit had significant prior experience with chaos and violence arising from lawless efforts to grab the rich natural resources of Alaska.\footnote{See Frederick, supra note 60, at 78–97 (describing “Intrigue at Anvil Creek,” which culminated in a 1901 opinion authored by Judge Ross, involving “high-handed and grossly illegal proceedings initiated almost as soon as [newly appointed territorial] Judge Noyes and McKenzie had set foot on Alaskan territory at Nome... [which] may be safely and fortunately said to have no parallel in the jurisprudence of this country”). Judges Ross, Gilbert, and Morrow served on the panel of the case involving insubordination by district court officials at the behest of a corrupt claim jumper. Afficionados of popular culture may know the story line, depicted in Rex Beach’s novel, The Spoilers (1905) and three movies by the same name (1930, with Gary Cooper); (1942, with John Wayne, Gary Cooper, Marlene Dietrich, and Randolph Scott); (1955, with Anne Baxter). Id. at 94, 274 n.41.} Amply supported by the majority of precedent and these substantial policy considerations, the court’s decision to deny enforcement makes perfectly good sense. In view of the historical context, the outcome seems quite right. One might consider the social consequences had the decision gone the other way.

C. The Capability Problem: Strains on the Quality of Justice

Richard Danzig’s germinal work on the capability problem inspired renewed study by contract scholars of the litigation process, and the process inherent structural constraints that may distort accurate outcomes.\footnote{Danzig, supra note 31, at 1–2; see also Maute, Peevyhouse Revisited, supra note 38, at 1446–47. Twentieth-century realists began this task in earnest, with Arthur Corbin and Karl Llewellyn making enormously important contributions in the field of contracts.} Effective partisan participation is an underlying postulate to the adversary system. This postulate assumes that parties are ably represented by counsel who are roughly equal in skill, dedication and resources.\footnote{See generally Murray L. Schwartz, The Zeal of the Civil Advocate, 1983 AM. B. FOUND. RES. J. 543, 546–48.}

Professor Threedy’s impressive work develops important industrial and economic data which enables the student to better understand the case. The fishermen, like the Peevyhouses, were represented by a sole practitioner. The Alaska Packers Association, like Garland Coal, were represented by law firm attorneys who had an established, on-going relationship, which enabled a more comprehensive mastery over both the industrial facts, and the subtleties which could be used to litigation advantage.\footnote{See generally Marc Galanter, Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change, 9 L. & SOC’Y REV. 95, 95–151 (1974) (repeat players in litigation obtained outcomes superior to occasional litigants).}

In one possible theory, Professor Threedy suggests that Alaska Packers deliberately structured the nets to catch only that quantity of salmon which
it could can before spoiling. In modern economic jargon, the association could operate at its optimal marginal utility. It would only have to pay the fishermen for the salmon which could be processed for sale. Had the nets yielded a higher catch, Alaska Packers would have to pay the fishermen more for their labor, but could not profitably can the additional fish. For each fish caught beyond the optimal marginal utility, Alaska Packers would lose money. If this were so, but not fairly contemplated by the terms of the original bargain, it would lend credence to the fishermen's contention that the association breached the contract by not providing serviceable nets.

Certainly we would not expect Alaska Packers to voluntarily present evidence that was disadvantageous to its case. The hallmark of partisan presentation is that each side competitively marshals and presents the evidence most strongly supporting its view of the case. Because the case arose long before emergence of civil discovery, libelants had no way of obtaining the information or understanding its significance. Besides this built-in constraint on the late nineteenth century adversary process, the vast geographical distances between San Francisco (location of trial) and the Alaskan worksite virtually assured that libelants counsel could not casually (or cheaply) obtain useful information about defendant's industry and practices. Because libelants lacked access to potentially valuable information, they could not create a solid trial record to establish the nets were defective, and hence a breach of the employers' duty to provide adequate equipment.

As a doctrinal matter, compromise of a bona fide dispute about the employers' breach could have provided sufficient consideration to enforce the promised additional pay. Libelants' inability to persuade a sympathetic trial judge on this key point left room for Judge DeHaven to make his own factual assumption, based on his localized understanding of the northern California fishing industry. Even had they successfully persuaded the trial judge, Judge Ross' habit of carefully scrutinizing the trial record would leave such a finding vulnerable to reversal on appeal. I suspect their lack of proof on this issue presented an insurmountable barrier to recovery.

In traditional civil litigation when a few individuals assert relatively small claims against an industrial defendant with long-term concerns for precedential value, mismatches in resources, adversary skill and dedication are predictable. Modern discovery rules and the class action device go far (some would say too far) in balancing the litigation forces.

93See Threedy, supra note 2, at 211-13.
V. CONCLUSION

Professor Threedy's ambitious undertaking has provided rich food for thought about this old fish tale. I commend her efforts and urge that she pursue the project further. Besides incorporating the contextual, historical, and biographical materials, I suggest she then step back for a perspective on contracts doctrine, theory, and policy. For the researcher, doing legal archaeology is arduous. When the product is complete, it yields great benefits to understanding the development of the law. I thank her for her labors.