awarded, joint degree programmes, entrance requirements, tuition and fees, length of school year, numbers of full and part-time faculty and the size of the law library including both volumes and microfilm equivalents. All of these data are for the year 1978.

The second appendix is the Minimum Requirements for Admission to Legal Practice in the United States. Although this appendix was originally published in the *Review of Legal Education* (1970), the same table can also be found in Black's Law Dictionary.[9] One advantage of the reproduction here is the use of larger and more easily readable type than that found in Black's.

The third appendix is a directory of state bar examination administrators which probably is only of use to those who wish to practice law in the United States.

Since the investment in this book is reasonable and modest (US$ 6.95), it could be useful to those planning to attend law school in Canada, as long as one remembers that it is aimed primarily at those wishing to enter American law schools. The same or equally valuable information could be gained by a friend currently attending or recently graduated from the law school of your choice. If the information contained in the appendices is of particular interest or use, this book is one convenient source of such information.

JOHN W. REYNOLDS*

[9]*Black's Law Dictionary*, revised 4th ed. (St. Paul: West Publishing Co., 1968), at lxxv-lxxx.

*B.Sc. (Wilmington), M.Sc. (Purdue), Ph.D. (Tennessee), LL.B. candidate, Faculty of Law, University of New Brunswick.

Studies in Contract Law, Barry J. Reiter and John Swan (eds.), Toronto: Butterworths, 1980. Pp. xx, 467. $50.00 (cloth).

Most lawyers are familiar with the observation of Sir Henry Maine that "the movement of progressive societies had . . . been a movement from status to contract". [1] Such an *aperçu* was less than fully accurate even in the nineteenth century (witness the rather strained efforts to recast the institution of marriage in contractual terms) and certainly may be more questionable in contemporary society. Contractual arrangements now appear to be founded on and governed less by individual consensus than by legislative and judicial intervention. In short, the

[1]Maine, Sir Henry, *Ancient Law* (10th ed.) (London: John Murray, 1885), at 170.

bargain theory of contract, the judicial reflection of nineteenth century liberal, *laissez-faire* economic values has been discovered to be an inappropriate analytic construct through which to approach an understanding of contract principles. The bargain model, premissed as it is upon a transactional process of offer and acceptance supported by consideration flowing from the promisee is not an adequate explanatory tool, if indeed it ever was. Certain developments within the contractual sphere — the emergence of contracts of adhesion, increased statutory regulation, judicial recognition of the claims of reliance as meriting remedial protection, articulation of various doctrines of enforceability related to notions of unconscionability — have served to transform the conceptual bases of contract. Contract can no longer be perceived as merely a consensual arrangement voluntarily entered into by two parties of equivalent, economic bargaining power. Simultaneously, the field of restitution has expanded and outgrown its remedial origins and has proven to be a powerful, substantive rival to contract as an instrument whereby the rights possessed and duties owed by one individual to another may be defined. In an analogous fashion, recent developments in tort such as the formulation of liability for negligent misstatement have been introduced into the contractual arrangement as a mechanism for the imposition of liability in a relationship in which theoretically liability can only be incurred by agreement. At the same time, legislative and administrative controls upon the exercise of contracting power cogently reaffirm that the conventional perception of contract as a species of private agreement which is legally enforceable may be misdirected.

However, the alteration which has been effected in the traditional bargain-oriented comprehension of the elements and purposes of the institution of contract does not detract from the essential validity of Maine's recognition of the significance of contract, both legally and socially. While it is true that the favourable response of the legal system to contracts (general enforceability if certain formalities or prerequisites are satisfied) may be a primary determining factor in promoting contract as a relational device, clearly the high incidence of enforceability does not provide a full answer to the question, Why contract? Absent legal recognition, in the form of judicial incentives and sanctions, parties, no doubt, would continue to arrange their affairs according to contractual principles. The economic advantages obtained by the two immediate parties contribute to general social utility and progress in that contract, perceived as a cooperative venture in which, ideally, the claims of self-interest are also fulfilled, promotes the maximized distribution of economic benefits and a co-equal recognition of individual autonomy. The economic gains achieved by the instrumentality of contract are recognized by and reflected in the evolution of the common law. The legitimacy of contract derives from the effective realization of certain social values. The symbiosis of law and life, remarked by Fuller, [2] is

[2]Fuller, Lon, "American Legal Realism", (1934) 82 *U. Penn. Law Rev.* 429, at 452.

nowhere evidenced more completely than in the judicial expression of approbation extended to contracting parties. "The role of contract law is thus to enhance the institution of contract, to make it more stable and reliable, and thereby to increase the pervasiveness and efficiency of its use in society." [3]

But while the social manifestations of contract have adjusted to keep apace with shifts in the economic substructure (as exemplified by the use of standard form contracts) the legal system has not illustrated a parallel flexibility and adaptability. Courts do tend to recognize implicitly the social good attained by contract through a uniform insistence upon performance of contractual obligations or the rendering of a satisfactory substitute, if there are no compelling reasons militating against enforceability. In this respect, the aims of contract, as defined by the parties to the agreement and its worth to society generally are ensured. However, the protection of expectations engendered by the act of agreement is achieved by adherance to a model of contract whose parametres do not accord with the features of the variety of contemporary relationships now subsumed within the classification of contract (such as the employer-employee relationship).

Judicial demand for an ascertainable offer and acceptance buttressed by consideration as pre-conditions to enforceability illuminate the fundamentally commercial quality of the first modern contracts, the product of nineteenth century industrialisation. If all contracts repeated the pattern of the commercial bargain, the utilization and adaption of principles developed in the previous century — most significantly, the relatively narrow range of substantive liability and the restrictions upon the types of injury for which a defaulting party could be held responsible — to resolve current disputes would be satisfactory. However, it has been established by Atiyah and others that not all contracts are bargains (the unilateral contract being generically different than the bilateral construct, typical of the classical commercial exchange) and judicial characterization of non-bargain promises as bargains do not transform the essential character of these agreements. While the aspiration towards definition of principles of consistency and ordering is commendable in that it contributes to the establishment of uniform classifications and therefore offers guidance to individuals in arranging their affairs, the imposition of a set of rules developed to respond to a particular type of transaction upon alien agreements merely disguises the basis of judicial intervention and does not provide a coherent rationale which may be elaborated in subsequent litigation. The mere fact that courts still demand, as a prerequisite to judicial interference, that offer, acceptance and consideration be present only diverts attention from judicial manipulation of the elements of the transactional relationship between the parties to create the necessary preconditions. A brief glance at the history of consideration only confirms what most

[3]Reiter and Swan, at 7.

perceive intuitively: in the majority of cases, consideration, properly understood, does not flow between the parties, but is a judicial invention, created to permit recovery by a deserving party. More generally, cases reiterate such maxims — that an offer can be revoked at any time prior to acceptance, that in order for a contract to be enforceable it must be under seal or supported by consideration, that only a party to a contract can sue to recover losses sustained by reason of default or breach by the other party — and yet, every allegedly firm rule has been riddled by numerous exceptions and qualifications. The enumeration of principles could be extended indefinitely; what is most significant is that their application is illusory. While lip service is paid to precepts whose authority is founded upon approval in successive cases, there exists a vast dichotomy between the content of rules and the practise of the courts.

While such thesis is not controversial — indeed, can be supported by a cursory reading of any recent case — textual writing, at least that which is most influential in England and Canada still persists in maintaining the validity of the bargain theory. The existence of a contract is still predicated upon the isolation of offer, acceptance and consideration and early rules relating, for example, to mistake and contract construction, recur in all cases as if the propriety of such rules was beyond question. The primary effort of most writers appears to be directed to a vain attempt to reduce case so as to cause them to conform to traditional theory. In those instances, when the activity is clearly futile, inconsistencies are described as exceptions or aberrations. However, more often than not, the literal application of the rules is avoided and what this suggests is not that there is a large body of deviations from established principles but that, perhaps, established principles are no longer sufficient avenues whereby contract law may be apprehended.

On the other hand, American writers have exhibited a far greater intellectual cognizance of contract as merely an instrument to achieve economically and socially desireable ends. American courts have demonstrated on numerous occasions a willingness to sacrifice the perpetuation of principle and the need for certainty and consistency in favour of the particular claims of a changing society. The greatest of the American judiciary, Frank, Cardozo, Hand, among others, manifest a more overt preoccupation with the social aspects of the legal system and reveal a laudable degree of sensitivity to pragmatic concerns, described as policy considerations and to the influence of fundamental principles. Consciousness of the active and creative role of the judiciary and of the inherent mutability and plasticity of legal rules is a phenomenon resulting from a multiplicity of causes. One may single out, however, the impact of the jurisprudential school identified as Legal Realism. While the tenets of Legal Realism, as articulated by Frank and Llewellyn are far too complex to warrant reduction in a book review, it may be

suggested that the concern for the correspondence of law-in-action and law-in-books and the concommitant realization of the retrograde effect of a too staunch adherence to precedent exerted a vitalizing and beneficial effect upon the judiciary by encouraging a more thoughtful and logical retionalization of the process of decision-making.

That the Canadian legal system, on the other hand, has not enjoyed a similar renaissance may be attributed to the failure to develop an indigenous jurisprudence. Canadian courts, whose primary allegiance appears to be rather to the propositions of analytical positivism are less familiar with the process of balancing of interests and articulation of policy concerns which is characteristic of American judicial opinions. The features of analytical positivism as enunciated by Canadian Courts are too familiar to require extensive elaboration. The most salient characteristic of this philosophy is, no doubt, the conviction that law can be restated as a series of related precepts whose validity exists independently of intrinsic content. Such a theory which presupposes an initial faith in the formal validity of rules and in the value of adherance to broad and abstract principles justifies itself in terms of stability, predictability and certainty. But clearly the predictive quality of rules is subverted and the integrity of the rules themselves is seriously impaired when the rules become less significant than their exceptions and when their observance is questionable. When a congruence between the content of rules and social circumstance no longer is evident, the interest in predictability and uniformity is a value of dubious worth. Academic and judicial emphasis upon isolation and articulation of rules, upon the abstraction of generalized statements, upon the extrapolation of delineated ratios has encouraged greater concern with the expression of the rule, rather than to the consequences of rule implementation and perhaps explains the stated reluctance of Canadian courts to engage in what has been termed 'judicial legislation'.

Judicial deference to established precedent may also be a consequence of a lack of Canadian writing on the subject of contract. In the first place, the existence of a consolidated and elucidated body of thought by the end of the nineteenth century regarding contracts, supported by commercial reality and a compelling legal philosophy, simplifies judicial activity by restricting the range of choices available to a judge in a single case. The seduction of abstract principles framed as absolutes is apparent and exacerbated by the absence of any equally influential competing analysis. Adherance to precedent obviates the need to develop novel, or radical perspectives. Furthermore, to devise a cohesive model which is intellectually distinct from the dominant theorectical construct is by no means an easy task — witness the length of time and the degree of intense intellectual effort which must have been demanded as necessary to produce an opus such as that of Corbin. Superficially the traditional analysis of contract appears satisfactory: it corresponds to the structure of the simplest bargains and is sufficiently malleable to accommodate permutation.

However, the expansion and transformation of the classical contract necessitates a fresh approach. A more critical investigation of the worth of nineteenth century theory as a tool of dispute resolution is required. Such rules are not to be abandoned merely because they were developed within a less sophisticated commercial context, but clearly their justification must depend upon something other than cumulative repetition. Since law does not emerge *in vacuo* but in response to historical circumstance, it is perhaps arguable that through a process of trial, error and judicial experimentation, contract law will continue to evolve in order to meet the needs of both the parties to the contract and of society, without the aid of academic analysis. Further, the results of most cases, considered individually, intuitively appear correct, even if the reasoning by which such results are ascertained may be suspect. However, judicial recognition of textual commentary is increasing and the elucidation of a lucid and intelligible analysis of contract law cannot fail to assist the judiciary in the formulation of rational and persuasive arguments supporting the outcome of any litigation. An alternative to the bargain model may redress many of the more unsatisfactory aspects of current contract theory and provide a more comprehensive analytical vehicle.

An investigation of the philosophical premises upon which contemporary contract law is founded and a critical inquiry concerning the applicability of these presumptions is the objective of Reiter and Swan's *Studies in Contract Law.* This collection of essays operates as a theoretical compansion to Swan and Reiter's previously published *Contracts: Cases, Notes and Materials* [4] and conceptually identifies itself with many of the propositions advanced by Waddams. [5] The twelve studies contained in this volume are informed by what may be described as the American perspective, as illustrated by Posner, Fuller, MacNeil and Gilmore. While the text is clearly far more than a mere reproduction and duplication of the insights achieved by such theorists, the influence of American writers, particularly those aligned with the school of economic analysis is apparent and welcome. Together with the previous Waddams text, Swan and Reiter both in their casebook and now, in this text, have succeeded in establishing a Canadian approach to contract analysis which is provocative, intelligent and as persuasive as the arguments advanced by exponents of the bargain theory. For this achievement alone, the two editors must be commended.

While the book is a compilation of twelve discrete essays it appears fair to regard it as a single study in that the studies, while individuated and specific in focus, partake of a common philosophical perspective and in a certain sense are merely illustrations of a more generalized view of contracts. This fundamental proposition is isolated by the editors in the statement that "the fundamental purpose of contract law is the

[4]Swan and Reiter, *Contracts: Cases, Notes and Materials* (Toronto: Butterworths, 1978).

[5]Waddams, S.M., *The Law of Contracts* (Toronto: Canada Law Book, 1977).

protection and promotion of expectations reasonably created by contract." [6] The legal system intervenes to ensure that expectations are secured, or to put it more simply, that defeated expectations can be compensated by an available and adequate remedy. Certainly the above principle is not intended to comprehend summarily the underlying rationale for rudicial intrusion into the workings of a private agreement. Occasionally the interest in assuring to one party the value of expectations may be subordinated to other, equally significant objectives — the prevention of unjust enrichment, for example, or the acknowledgment of reliance as an interest meriting protection. Even according to conventional contract theory, the judicial priority placed upon guaranteeing expectation is subject to certain qualifications: a party will not be compensated for loss of expectation if his loss is merely the consequence of a bad bargain (Study 7); similarly, only those expectations communicated to the other contracting party can properly be the object of compensation (Study 3); expectations engendered by careless statements may enjoy only limited recognition (Study 8); even more tellingly, judicial intervention to secure expectation is achieved by the remedy, in the majority of cases, of damages, rather than by specific performance which would appear in the abstract to be a more appropriate mechanism (Study 5). Clearly, not all expectations will be perceived as appropriate subjects of judicial scrutiny. Promises not supported by consideration and the availability of a remedy to the part performer are controversial phenomena in contract analysis and indicate the deficiencies of current theory (Studies 2 and 6).

However, the above observations noted by the contributors to *Studies in Contract Law* do not diminish the plausibility of the central hypothesis — that a contract is an instrumentality, a bilateral arrangement entered into to achieve certain objectives and that the law of contracts is less concerned with the definition of a system of contract as a legal institution that with the attainment of a certain end: that obligations freely entered into will be enforced and that certain interests created by consent — expectation, reliance and restitution — will be judicially recognized. A view of contract as a purposive mechanism encourages consideration of the 'results' of contract law as signified by available remedies for it is the conviction of the editors that the variety of remedies to which the injured party may be entitled reflects the philosophical justifications for the enforcement of contract as a general legal principle. If one accepts that the legal system has attempted to foster entry into contractual relationships, and further that the legal system *ought* to pursue such an objective, this goal can only be achieved "if the law can assure the parties to the contract that they will receive the benefits that they have been promised." [7]

---

[6] *Supra*, footnote 3.

[7] *Ibid.*

The social utility of the institution of contract is a theoretical presumption reaffirmed consistently by courts and the instances of intervention to avoid the obligations imposed by contract (for example, in the case of a fundamental mistake) are exceptional and relatively limited: confined to those cases in which the social interest in promoting contract must defer to the more compelling interest in sanctioning duress, fraud, undue influence or similar phenomena which, if not the subject of judicial disapproval, would effectively undermine realization of the purposes for which parties contract. In such instances, the necessity to penalize what may be regarded as particularized manifestations of unconscionable transactions overrides the normal premium placed upon performance or the rendering of a satisfactory substitute. Furthermore, even when courts are prepared to intervene to ensure to an injured party the value of anticipated performance, the remedy available is limited by certain matters. Firstly, entry into a contract involves the allocation of certain risks to either or both of the parties: the contingency of defective or minimal performance may be a risk either expressly or implicitly borne by one of the parties and it is clear that if the object of contract is to secure only those expectations which are reasonable, no recovery may be permitted for losses suffered which may be deemed to be occurrences, the possibility of which has been forseen by either individual. In an analogous fashion, the law will not compensate for all losses sustained if to do so would be to impose an unduly onerous burden upon a defaulting party and thereby discourage the proliferation of contracts. However, these qualifications upon the general attitude of approbation toward contracts manifested by the courts, merely reinforce and confirm validity of the primary thesis advanced by the authors of the various studies — that the end and purpose of the institution of contract is merely to ensure that expectations reasonably created will compel judicial protection.

The above discussion may be described as the conceptual basis of each of the essays contained in the text. Each essay attempts to fulfill certain stated objectives: most significantly, the text represents an effort to articulate a distinctively Canadian approach to many of the more problematic issues of contract law, such as the role of consideration, recovery for non-economic loss, mistake and frustration as reasons for discharge of contractual obligations and concurrent liability in contract and tort. Most if not all of the essays adopt a risk analysis of the types of responsibilities and entitlements created in a contract and presuppose at least a passing familiarity with the more influential American critics such as Posner, Fuller, MacNeil and Gilmore. Although to this extent the essays are derivative, an economic analysis of the law provides certain insights which are not immediately apparent in the more conventional method of investigation. A perspective which emphasizes the risk-distributing elements inherent in every contractual transaction provides a novel, at least to Canadian students, basis upon which to reformulate principles of contract law, traditionally perceived as issues related to the identification of offer, acceptance and consideration.

In addition to clarifying and recasting the philosophical foundation of the rules of contract by directing attention to the purposive nature of contract law, each study as well undertakes a critical examination of the propriety of certain rules, such as those relating to mistake and foreseeability. The validity of rules is evaluated by reference to the questions which arise from aninitial view of contract as a mechanism of risk allocation: which interests have been engendered by this transaction?, what liabilities or risks have been assumed by either party?, what is the function of the court in a particular case? Risk analysis as a critical tool requires each writer and each reader to rethink the results of any case in terms of the language of the contract, the relationship of the parties and the context in which the contract is formulated. In this effort, both the author and the reader are implicitly directed to evaluate the reasoning employed by the courts and to determine the extent to which established principles either achieve or frustrate the objectives of the contract.

Finally, the judicial institution generally is examined, the central question being the suitability of the courts as the mechanism by which contract rights and duties are recognized and implemented. In this respect, all studies devote at least some space to a consideration of types of legislative and administrative intervention as a controlling force upon the hypothetical absolute postulated by the nineteenth century — that of freedom of contract.

This reviewer has not devoted extensive discussion to an examination of the particular studies included in the work since it is assumed that all the essays exhibit common features, the most salient being an agreement with the hypothesis advanced by Swan and Reiter as to the role of contract law. Further, all studies, in varying degrees are characterized by a concern with the three objectives isolated previously: that is, the restatement of contract rules in terms of interest protected and risks assumed, an examination of the appropriateness of these rules to contemporary transactional relationships, and the function of the court in upholding both the expectations of the parties and the objectives of contract as an influential legal institution. Taken together, the studies canvass most of the major areas of contract. Studies 1, 2, 3, 5, 6, 7 and 8 concentrate upon what one might describe as traditional areas of discussion — consideration, mistake, misrepresentation, resitution, specific relief, damages and the protection of expectations. The remainder of the essays involve an elaboration of contract principles, interpreted according to the risk analysis model, and application of these precepts to a single species of contractual relationship — the employment sphere. While a detailed investigation of an individual phenoneon provides an interesting and concrete example of the limitations of contemporary contract theory as a regulator of a specific transaction, the concentration upon the function of contract in the labour force creates an imbalance in the study. Given the dearth of Canadian writings in the area of contract, a deficiency redressed only

partially by this study, it is to be regretted that the editors did not also address themselves to other aspects of contract of more general interest, such as the problem of privity, the effect of illegality, difficulties in construction of contracts or fundamental breach. The textual preference in favour of the role of contract in the economy appears overly selective and idiosyncratic inasmuch as other more generalized controversial areas are overlooked. As stated before, the content of each essay owes much to the efforts of American writers. The merit of each study however derives from the ability of each author to synthesize and present coherently dominant tendencies in current contract theory and to apply the tenets of such analyses to Canadian cases. As with all collections, not all essays are of equal quality but the general tone established in the text is one of soundness of research and clarity of presentation. The arguments presented by each writer are stimulating; while one may not fully agree with the plausibility of an economic analysis, clearly such an approach encourages thoughtful reflection.

Studies in Contract Law is not the final Canadian analysis of the function and purpose of contract, nor does it purport to be. Swan and Reiter, however, are to be praised for their efforts in consolidating in a single collection the views of the more important Canadian contract writers, such as Waddams and presenting the observations of all the authors in a lucid, readable and intelligible format. The issues raised by the study are significant, the insights achieved by the authors valuable. As a general introduction to an alternative approach to contract analysis, *Studies in Contract Law* fulfills its function admirably. While the individual reader may question the accuracy of specific conclusion, intellectual debate is essential to a more comprehensive understanding of any legal issue and philosophical disagreement concerning the role and nature of the contract is inevitable and fruitful. Swan and Reiter through this text have elucidated a model of contract theory which engenders such controversy and it is perhaps this feature, above all else, which indicates the strength and importance of their study.

MARY ELIZABETH HATHERLY*

*A.B. (Kenyon College), LL.B. (Dalhousie), LL.M. candidate (Osgoode Hall). Assistant Professor, Faculty of Law, University of New Brunswick.