Democracy Begins at Home: Agreements, Exchanges, and Contracts in the American Law School

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III. CONCLUSION

The educational enterprise of the American law school operates by way of broad agreements between the parties in interest. Such agreements, no matter their precise form, may be categorized by the identity of the participants, as agreements: (1) between governing bodies like the American Bar Association (“ABA”) and the law school; (2) between the law school and its professors; (3) between the law school and its students; and (4) between the professors and their students.

The agreements between these parties take many different forms. Some are handed down from above and some are negotiated; some are signed and some are not; some are written and some are pledged orally. These agreements create different relationships between the parties based in part on their origins and forms.

Of all such agreements, the democratic ideal is best represented by the contract. The private law created by a contract “is democratic because a traditional contract must be the agreement of both parties.”¹ The parties to a contract “objectively manifest their mutual intent to be bound to a specific relationship,”² and such mutual consent is “central to the democratic character of traditional contracts.”³ Because the traditional contract binds only the makers of that agreement, “contractual law embodies the democratic ideal of government by and with the consent of all the governed.”⁴

In a time of increased anti-democratic sentiment and governance in the United States and abroad, it is surely sensible and wise to examine the underlying democracy (or lack thereof) in our daily relationships. For many of the readers of this article, such daily life is largely conducted at American law schools.

This article will consider each of the numerous agreements that underlie the functioning of the American law school in terms of contract requirements under both the Restatement (Second) of the Law

¹. W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 530 (1971); see also HANS Kelsen, General Theory of Law and State 311 (1945) (“The contractual creation of law is a democratic procedure.”); F. Eric Fryar, Common-Law Due Process Rights in the Law of Contracts, 66 Tex. L. REV. 1021, 1025 (1988) (“Contracts are an extremely democratic form of law.”) (citing E. Allan Farnsworth, Contracts § 1.2, at 6 (1982) (“The terms of such direct bilateral exchanges are arrived at voluntarily . . . Each party to an exchange seeks to maximize his own economic advantage on terms tolerable to the other party.”)).
⁴. Fryar, supra note 1 (citing Slawson, supra note 1).
of Contracts\textsuperscript{5} and the leading theories of contract\textsuperscript{6} to determine which, if any, of these agreements rise to the level of a genuine democratic contract between the parties in interest.

I. CONTRACTS

A. Contract Requirements

In order to analyze how agreements in the American law school context measure up to genuine, enforceable, democratic contracts, it is first necessary to briefly remind ourselves of the required elements of contract formation. The law school agreements discussed in Part II will then be analyzed in terms of these requirements to see whether or not they amount to contracts.

Jurisdictions differ with respect to what is necessary to form a contract.\textsuperscript{7} However, the classic requirements include the following: (1) offer; (2) acceptance; (3) consideration; and (4) mutuality of intent to contract.\textsuperscript{8}

1. Offer

The Restatement (Second) of Contracts defines an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”\textsuperscript{9} A “mere expression of intention or general willingness to do something” does not amount to an offer.\textsuperscript{10} “An offer must be definite and certain,”\textsuperscript{11} although it “may be made by words, acts, or conduct.”\textsuperscript{12} An offer “is ordinarily a promise, [and therefore] it will typically look to the future.”\textsuperscript{13} Unless a statement made by the offeree “gives the person to whom it

\begin{itemize}
\item \textsuperscript{5} These requirements are Offer, Acceptance, Consideration, and Mutual Intent. See \textit{RESTATEMENT (SECOND) OF CONTRACTS} §§ 17, 24, 50, 71 (AM. LAW INST. 1981).
\item \textsuperscript{6} The theories to be discussed \textit{infra} include: (1) contract as promise; (2) contract as consent; and (3) contract as economic efficiency.
\item \textsuperscript{7} See 17A AM. JUR. 2D \textit{Contracts} § 18 (2018) (collecting elements of a valid contract in different jurisdictions).
\item \textsuperscript{8} See, e.g., City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (the formation of a contract requires “1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance.” (quoting City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990)).
\item \textsuperscript{9} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 24 (AM. LAW INST. 1981).
\item \textsuperscript{10} 17A AM. JUR. 2D \textit{Contracts} § 46 (2018).
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} 1 WILLISTON ON CONTRACTS § 4:7 (4th ed. 2018).
\end{itemize}
is addressed an assurance that . . . that person may conclude a bar-
gain, the statement is not an offer.”

2. Acceptance

Acceptance of an offer is defined as “a manifestation of assent to
the terms thereof made by the offeree in a manner invited or re-
quired by the offer.” Acceptance is required in order to form a
contract, and “[t]he effect of acceptance is to convert the offer into a
binding contract.” The acceptance of an offer “must be communi-
cated to the offeror; a mere secret intent to accept or assent is not
sufficient.” Acceptance of an offer is required to create a contract
because “it takes two to make a bargain.”

3. Consideration

Consideration consists of a bargained-for performance or return
promise. Such a “performance or return promise is bargained for
if it is sought by the promisor in exchange for his promise and is
given by the promisee in exchange for that promise.” A contract
cannot exist without sufficient consideration. Such consideration
“may be a benefit to the promisor or a detriment to the promisee. It
may take the form of a right, interest, or profit accruing to one
party, or some forbearance, detriment, or responsibility given, suf-
fered, or undertaken by the other . . . [or the] creation, modification,
or destruction of a legal relation.” Consideration is “the exchange
or price requested and received by the promisor for its promise.”
Consideration “distinguishes a contract from a gift.”

4. Mutual Intent

Contract formation also requires “a manifestation of mutual as-
sent to the exchange.” This element of mutual intent “is some-
times referred to as a ‘meeting of the minds.’” Such a meeting of
the minds must occur “at the same time, on all the essential elements or terms to form a binding contract.” Which terms are essential “depends on the agreement and its context and also on the subsequent conduct of the parties.” It should be further noted that, “although often treated as a distinct element for a contract, a meeting of the minds is a component of both offer and acceptance, measured by what the parties said and did, and not on their subjective state of mind.” Furthermore, ”mutual assent to enter a contract is . . . normally manifested by an offer and acceptance.” That is to say, following an offer, “an acceptance of the proposal or offer completes the manifestation of assent.”

B. Contract Theory

To further our understanding of contracts and their underlying principles, it is also helpful to discuss what legal scholars consider to be the historical, commercial, and philosophical underpinnings of contract law. These theories will then be applied to the series of law school agreements considered here to help us understand whether, and in what ways, those agreements amount to contracts.

Contracts are one of the earliest forms of private law, their basic tenets and philosophical underpinnings laid out in Plato’s *Laws*, written in the 4th Century B.C.E., Roman, Medieval, early Common Law, and Civil Law also incorporated principles and rules of contract law. From the broadest perspective, the law enforces private agreements such as contracts in order to “enable people to rely on them as a rule and thus make the path of enterprise more secure.” Indeed, contract law in its most general formulation can be compared to an overarching infrastructure: “its most important societal role is to supply frameworks for cooperative ac-

28. Id.
29. Id. § 31.
30. Id.
tivity. Like the proper functioning of say, a highway, contract de-
pends not only on written rules of the road, but also on the reliabil-
ity of contextual practices." Beyond such broad descriptions, modern
scholars have offered many theories considering the philosophical
underpinnings of contract law. For purposes of this analysis,
we will focus on the three most broadly accepted theories (which
also happen to be most directly related to the law school contractual
relationships that this article describes): (1) Promise; (2) Consent;
and (3) Economic Efficiency.

1. Contract as Promise

The classical promise theory of contract is based on the moral and
political principle that individuals have rights, which they are per-
mitted to dispose of as they choose, and the state and the courts
are bound to respect the obligations individuals impose upon them-

selves. Charles Fried, in his important 1981 book Contract as
Promise, argues that “promise is morally binding because it is the
willing invocation by a free moral agent of a convention that allows
him to bind his will.” Fried prioritizes the moral argument that
“to refuse to recognize, or to interfere with, a person’s free choice is
to refuse him the respect of treating him as an autonomous moral
agent.” In this, he rejects the contrary scholarly argument that
collective and paternalistic judgments about the individual’s best
interests may be more accurate than the individual’s own analy-
sis. Instead, Fried sets out the theory that the introduction of
such agreements assures one’s ability to use others’ work for one’s
own purposes, and that this trust became a “powerful tool for our

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39. See, e.g., Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269,
271-91 (1986) (discussing the will, reliance, efficiency, fairness, and bargain theories of con-
tract, and introducing the “consent theory”); Efi Zemach & Omri Ben-Zvi, Contract Theory
and the Limits of Reason, 52 TULSA L. REV. 167, 179-213 (2017) (addressing and critiquing
by means of “legal aesthetics” the promissory, reliance, economic efficiency, and pluralist
conceptions of contract).
40. Michigan Law Review Association, Contract as Promise: A Theory of Contractual Ob-
509, 509 (1981); see also Michigan Law Review Association, supra note 40.
42. Charles Fried, Contract as Promise Thirty Years On, 45 SUFFOLK U. L REV. 961, 972-
73 (2012).
43. Atiyan, supra note 41, at 523.
44. Id. at 523-24.
working our mutual wills in the world.”

Promise, under this theory, “is a kind of moral invention: it allows persons to create obligation where there was none before and thus give free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons.” Promise “implies more than a communication of intention (which we are free to change, though others may be injured); it implies a commitment to a future course of conduct.”

2. Contract as Consent

Randy Barnett’s consent theory of contract begins with the earliest of human interactions, based on the obligatory allocation of scarce natural resources. Under this theory, certain agreements are legally binding because the parties to the transaction bring certain rights and then “manifest their assent to the transfer of these rights.” Contract law thus “concerns enforceable obligations arising from the valid transfer of entitlements that are already vested in someone,” and any legally enforceable obligation that results is based on the parties’ original voluntary consent. Although the consent theory of contract contains some broad parallels to Fried’s promise theory, Barnett notes that a promisor “may have a moral obligation to do what she promised . . . [but] without more she would not have a legal obligation . . . .” Only when the promisor

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46. Fried, supra note 42, at 962.
47. Michigan Law Review Association, supra note 40, at 905; but see Nicolas Cornell, A Complainant-Oriented Approach to Unconscionability and Contract Law, 164 U. PA. L. REV. 1131, 1175 n.144 (2016) (noting that “the conception of promises as normative and contract as purely remedial . . . seems to motivate Lipshaw . . . who argues that promise and contract are separate because the former concerns obligations and the latter concerns consequences. . . . Lipshaw does not maintain that there could be contracts without promises, but he insists that contract law is not addressed to the moral question of obligation.”) (citing Jeffrey M. Lipshaw, Duty and Consequence: A Non-conflating Theory of Promise and Contract, 36 CUMB. L. REV. 321, 327 (2006)).
49. Id. at 319.
50. Id. at 297; see also id. at 270 (“Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent. Consent is the moral component that distinguishes valid from invalid transfers of alienable rights.”).
51. Id. at 300.
52. Id. at 305; see also Randy E. Barnett, Contract Is Not Promise; Contract Is Consent, 45 SUFFOLK U. L. REV. 647, 655 (2012) (“To promise is to commit to do or refrain from doing something. To consent to contract is to commit to be legally responsible for nonperformance of a promise. So consent is a commitment in addition to whatever moral commitment inheres in a promise.”).
manifests her consent to be legally bound does she incur a contractual obligation.\textsuperscript{53}

3. Contract as Efficiency

The efficiency theory of contract, as laid out recently by Alan Schwartz and Robert E. Scott, follows an economic analysis of contract negotiation, formation, and interpretation,\textsuperscript{54} arguing that contract law “should facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions.”\textsuperscript{55} Contract law should “restrict itself to the pursuit of efficiency alone,”\textsuperscript{56} under the simple premise that “the state should choose the rules that regulate commercial transactions according to the criterion of welfare maximization.”\textsuperscript{57} In this vein, efficiency refers to “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation.”\textsuperscript{58} The efficiency theory of contract is thus utilitarian, “concerned with promoting rules that enhance societal wealth and utility.”\textsuperscript{59} The literature interpreting contract in economic terms is extensive and takes many forms, including normative, descriptive, and interpretative models.\textsuperscript{60} However, all economic contractual

\textsuperscript{53} Barnett, supra note 39, at 305; see also Barnett, supra note 52, at 647 (“Rather than embodying the morality of promise-keeping, the enforcement of contracts can best be explained and justified as a product of the parties' consent to be legally bound.”). Jeffrey M. Lipshaw analyzes this split between the original promise and the subsequent legal contract, arguing that contracts “are constructs of a system of law, whereby the state agrees to enforce certain promises entered into in a certain form . . . [T]here is nothing moral about the contract versus the underlying promise and . . . the conflation of the two is the source of the confusion over the limits of the law of contract. The moral or transcendental aspect of the contract is the underlying promise—its soul, so to speak—but the law can only doctor its body—what shows in the contract.” Lipshaw, supra note 47, at 323.

\textsuperscript{54} Schwartz and Scott are explicit that their theory applies only to contracts between “firms,” defined as corporations with five or more employees, limited partnerships, and professional partnerships such as law and accounting firms. Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541, 545 (2003). Contracts between other types of parties, they argue, should be the province of, inter alia, consumer, real property, securities, employment, and family law. \textit{id.} at 544. As one scholar has noted: “So limiting the theory's domain makes an economic analysis more plausible.” Steven J. Burton, A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation, 88 IND. L.J. 339, 345 (2013).

\textsuperscript{55} Schwartz & Scott, supra note 54, at 544.

\textsuperscript{56} Id. at 545.

\textsuperscript{57} Id. at 544.

\textsuperscript{58} Barnett, supra note 39, at 277 (quoting A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983)).


\textsuperscript{60} Zemach & Ben-Zvi, supra note 39, at 200 (“Normative economic analysis strives to identify and recommend the most efficient doctrinal rule, while descriptive economic theories hold that existing contract doctrine is best seen as serving the goal of maximizing welfare. An interpretive economic theory . . . combines normative and descriptive elements.”).
analysis in essence considers whether or not contracts maximize efficiency and what incentives they create for the parties, making contract “a vehicle for maximizing individual and social gains.”

II. LAW SCHOOL AGREEMENTS

In this section, we will analyze a series of agreements in the American law school context, by way of the required elements of a contract and the main academic theories of contract, in order to determine which, if any, of these agreements amount to a genuine, negotiated, democratic contract.

A. Agreements Between Governing Bodies and Law Schools

This section will consider federal learning accommodations requirements under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (“ADA”). It will then analyze learning outcomes provisions under revised ABA standard 302 and the new “active learning” obligations laid out under ABA standard 304(c).

1. Learning Accommodations

Under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, educational institutions, including law schools, are required to make reasonable accommodations for otherwise qualified students with disabilities. The 2008 amendments to the ADA made clear that the definition of “disability” is to be broadly understood, and although these amendments were intended to clarify matters, discussions and disagreements have continued.

Under the definitions laid out in the Rehabilitation Act and the ADA, one scholar recently estimated that “approximately one in five

61. Id. at 201.
66. Id. at 546; see also id. at 557 (“The 2008 amendments further clarify that ‘reasonable modifications . . . shall be required, unless an entity can demonstrate that making such modifications . . . would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.’”) (quoting 42 U.S.C. § 12112(b)(3) (2012)).
Americans has a condition that would be considered a protected disability.” In the law school context, studies suggest that “approximately ten percent of law students possess a physical or mental disability,” while the number of students seeking accommodations is rapidly increasing. Such accommodations are increasingly sought not just for physical disabilities, but also for a range of cognitive, mental health, and learning disabilities. Law schools have responded by instituting protocols for addressing student disabilities in compliance with the law and by hiring administrators to oversee disability responses. Common protocols adopted include providing administrative assistance, relieving students of certain requirements, or providing extra time to complete required tasks.

However, such accommodations are not always implemented without issue. Most disability decisions in the law school context are the result of a case-by-case analysis, without the benefit of administrative proceedings or litigation, “and with only the guidance of elastic and elusive statutory and regulatory standards.” Alexis Anderson and Norah Wylie have laid out a number of issues with disabilities and accommodations in the law school context, including, inter alia: (1) student under-reporting of disabilities out of shame or fear of discrimination; (2) faculty’s lack of training to assist students with disabilities; (3) disability accommodations raising equity issues for other students in the same classes; (4) lack of appropriate career counseling for disabled students; (5) absence of adequate training for disabled students regarding how to work and succeed in practice. Others have pointed to the increasing concern

67. Id. at 545.
68. Kevin H. Smith, Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach, 32 AKRON L. REV. 1, 1 (1999) (citing Laura F. Rothstein, Disability Issues in Legal Education: A Symposium, 41 J. LEGAL EDUC. 301, 305 (1991); Laura F. Rothstein, Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities, 17 J.C. & U.L. 471, 471 (1991)); see also Anderson & Wylie, supra note 64, at 6 (“Studies have shown a steady increase in the number of law students with disabilities since passage of the ADA.”).
69. Smith, supra note 68; see also Anderson & Wylie, supra note 64, at 6.
71. Anderson & Wylie, supra note 64, at 6.
72. Smith, supra note 68, at 64; see also Anderson & Wylie, supra note 64, at 4 (“Notetakers, special testing and attendance rules, and access to academic support programs are common features of most law schools’ disability law protocols.”); Rothstein, supra note 65, at 556-57 (“Two primary types of reasonable accommodations are available for individuals: the provision of auxiliary aids and services; and the modification of policies, practices, and procedures.”).
73. Smith, supra note 68, at 2.
74. Anderson & Wylie, supra note 64, at 15-16.
about stress and its impacts on students in general and law students in particular.\footnote{Rothstein, supra note 65, at 594 ("More attention is being paid to what to do about the impact of stress during law school. One of the major concerns beyond recognition of the need to do more is the availability and affordability of mental health services and whether such treatment will remain confidential.").}

Some scholars have suggested that, although law schools are not required to proactively identify and reach out to students with disabilities, law schools would best serve themselves and their students by implementing appropriate outreach, starting from the admissions process and continuing through orientation, classes, and exam administration.\footnote{Id. at 574.} The experiences of the increasing number of law students with disabilities are strongly affected by faculty attitudes, faculty approaches, and law school policies and procedures.\footnote{Id. at 601-02.} The measure of reasonable accommodation, writes Kevin Smith, should be whether the law school "acts proactively to assist the student in constructing an individualized, comprehensive accommodation program which takes into account the student’s long-term educational, personal, and professional best interests."\footnote{Smith, supra note 68, at 106. It should be noted, however, that the creation of any individualized plan for student accommodations relies on the professor’s knowledge of the disability, which is often kept private by law school policy. See, e.g., Stone, supra note 70, at 574 ("Law faculty presumably carry the same misunderstandings about persons with disabilities." According to at least one law school official, in order to protect student anonymity, professors have no knowledge of the disabilities of their students.).}

Learning accommodations requirements are handed down from the federal government to all American law schools. They are not the product of an offer from the government, nor of an acceptance on the part of the law schools, which are required by law to abide by the terms of the Rehabilitation Act and the ADA. There is no bargained-for performance or return promise, and therefore no consideration. And because there is no offer or acceptance, there is no mutual intent. Therefore, learning accommodations are not contracts under the terms of the Restatement, but are closer to regulations handed down from above that must be followed. Even to the extent a contract could be found here, it would be a contract of adhesion, defined as one "usually prepared in printed form, drafted unilaterally by the dominant party and then presented on a take it or leave it basis to the weaker party who has no real opportunity to bargain about its terms."\footnote{17A AM. JUR. 2D Contracts § 274 (2018) ("Contracts of adhesion are enforceable unless they are unconscionable, and the presence of an adhesion contract alone does not require a finding of procedural unconscionability. Nevertheless, the fact that a contract is one of ad-}
In terms of contract theory, learning accommodations requirements do not fall under either the promise or consent theories, because learning accommodations are not the result of any promises between or consent of the parties—or even any negotiation between them. In sum, the relationship between the federal government and law schools regarding learning accommodations is not contractual at all, but regulatory, with the rules being handed down from the government for the law schools to implement.

2. Learning Outcomes

In 2014, the ABA, responding to what some have called the “drum beat” of a new emphasis on the assessment of student learning outcomes in American legal education, revised its law school accreditation standards to require the establishment of learning outcomes, the monitoring of student learning, and the self-evaluation of law programs to ensure graduates’ achievement of the core competencies of the professional lawyer. These revisions (the “Revised Standards”) “are extensive and, for the first time, draw explicitly from education and learning theory to focus on what students are learning as opposed to what law schools teach.” The revised ABA standard 302 sets forth the minimum requirements for accredited law schools:

hesion is a strong indicator that the contract is procedurally unconscionable because it suggests an absence of meaningful choice. Therefore, courts determining the validity of a contract often begin with assessing whether the contract is one of adhesion.

80. However, it must be noted that learning accommodations are clearly the result of an attempt by the federal government to implement economic efficiency. Further, the resulting efforts by American law schools to implement these requirements are also “a vehicle for maximizing individual and social gains.” Zemach & Ben-Zvi, supra note 39, at 201.

81. Mary Crossley & Lu-in Wang, Learning by Doing: An Experience with Outcomes Assessment, 41 U. TOL. L. REV. 269, 269 (2010); see also id. at 270 (“[A] system of assessing student learning outcomes seeks to measure how well a population of students is accomplishing stated objectives and, accordingly, how effectively the institution is supporting them in achieving those objectives.”).


83. Charles P. Cercone & Adam Lamparello, Assessing A Law School’s Program of Legal Education to Comply with the American Bar Association’s Revised Standards and Maximize Student Attainment of Core Lawyering Competencies, 86 UMKC L. REV. 37, 42 (2017).

84. Valentine, supra note 82, at 507; see also Carin Cunningham Warren, Achieving the American Bar Association’s Pedagogy Mandate: Empowerment in the Midst of A “Perfect Storm”, 14 CONN. PUB. INT. L.J. 67, 67-68 (2014) (“The American Bar Association’s ... pedagogy mandate ... marks a ‘quantum shift’ in legal education, moving its center from teaching to learning and from curriculum to outcomes (i.e., ‘from what is delivered to students to what students take away from their educational experience’).”) (footnotes omitted).

85. Valentine, supra note 82.
Standard 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.86

These new requirements mark a significant change of opinion regarding the proper framework of legal education on the part of the ABA and the legal academy more generally.87

In practice, every law school now must articulate clearly, in writing, what its students should be capable of upon graduation—its desired “learning outcomes.”88 Then the school must determine how it will assess its students’ success at achieving these outcomes.89 Such assessment “relies on [identifying], and if necessary, changing teaching methods and inputs to ensure student success in meeting learning objectives. It replaces the mystique of [the] Socratic approach with transparency about learning objectives and teaching methods.”90 Under this framework, “the role of the professor is not to deliver information but to design effective learning experiences so that students achieve the course outcomes.”91

86. Id. at 509 (quoting STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, PROGRAM OF LEGAL EDUCATION § 302 (AM. BAR ASS’N 2014)).
87. See, e.g., Crossley & Wang, supra note 81 (“In comparison to other realms of professional education, legal education has remained fairly naïve about the idea that schools should seek to assess whether their students, as a group, are achieving the educational objectives embraced by the school.”).
88. Id. at 270.
89. Id. at 271.
90. Warren, supra note 84, at 68-69 (first alteration in original) (quoting Ruth Jones, Assessment and Legal Education: What Is Assessment, and What the “# Does It Have to Do with the Challenges Facing Legal Education?, 45 MCGEORGE L. REV. 85, 103 (2014)).
91. Id. at 69 (quoting Janet W. Fisher, Putting Students at the Center of Legal Education: How An Emphasis on Outcome Measures in the A.B.A. Standards for Approved Law Schools Might Transform the Educational Experience of Law Students, 35 S. ILL. U. L.J. 225, 237 (2010)).
The introduction of the Revised Standards has also raised questions. For instance, what knowledge or skills amount to “competency,” and how should competency be measured?\footnote{Abigail Lofts DeBlasis, Building Legal Competencies: The Montessori Method As a Unifying Approach to Outcomes-Based Assessment in Law Schools, 42 OHIO N.U. L. REV. 1, 21 (2015).} Also, what types of student assessment are sufficient to satisfy the Revised Standards, and how should law schools address the inevitable subjectivity problems associated with student evaluation?\footnote{Cercone & Lamparello, supra note 83, at 45.} In order to address these and other issues, scholars have begun to set forth principles to guide law schools in their implementation of the new standards.\footnote{See, e.g., id. at 48-49 (laying out the following six steps: “(1) developing program-wide learning outcomes; (2) developing outcome-specific skills; (3) incorporating outcome-specific skills into all syllabi and grading rubrics to enable course-specific assessment; (4) mapping outcome-specific skills throughout the entire curriculum on a course and program-specific (departmental) basis, and program-wide basis; (5) measuring student attainment of a law school’s learning outcomes; and (6) using this information to comprehensively assess the curriculum on a program-wide, program-specific, and course-specific basis, make changes where appropriate”); Valentine, supra note 82, at 529-38 (laying out “Seven Principles to Guide Transformation”).} According to Charles Cercone and Adam Lamparello, the required learning outcomes, and the assessment thereof, “should be developed through a collaborative and faculty-driven process, and each outcome should be focused on training students to develop the practical skills necessary to effectively practice law.”\footnote{Cercone & Lamparello, supra note 83, at 50.}

Despite the general buy-in of most law faculties, the ABA’s Revised Standards, like the learning accommodations requirements under the Rehabilitation Act and the ADA, are closer to regulations than contracts. The implementation of the Revised Standards is required by the ABA in order for law schools to attain or maintain accreditation. The Revised Standards themselves therefore cannot be considered an offer, which is “the manifestation of willingness to enter into a bargain.”\footnote{RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).} Law schools also cannot be said to have “accepted” the terms of the Revised Standards, because to reject them would mean losing accreditation, resulting in the near-certain collapse of the institution. It might be argued that there is consideration in that the ABA promises accreditation while the law school promises to follow the Revised Standards. However, because both offer and acceptance are lacking, there is no mutual intent, and therefore no contract. Instead, the Revised Standards are regulatory requirements handed down by the ABA as the regulating body. Again, even to the extent that any contract is formed with respect
to the Revised Standards, such a contract would be a contract of adhesion, “presented on a take it or leave it basis to the weaker party who has no real opportunity to bargain about its terms,”\(^97\) strongly indicating that “the contract is procedurally unconscionable because it suggests an absence of meaningful choice.”\(^98\)

Analyzed under contract theory, the ABA’s Revised Standards—like the various learning accommodations required by the federal government—do not fit either the promise or consent theories. The Revised Standards are handed down from above, in this case by the ABA—the governing body of the legal profession—which has the power to accredit (and de-accredit) all American law schools. There is no promise in this arrangement, and no genuine consent. There is an element of efficiency in that the Revised Standards are presented by the ABA and accepted by the law schools as “a vehicle for maximizing individual and social gains.”\(^99\) But in all, the ABA’s learning outcomes requirements are not contractual, but rather mere regulatory measures.

3. Learning Outcomes

The legal academy has also lately recognized the advantages of active learning over more traditional lecture and Socratic method pedagogies. As one scholar points out, “[l]egal educators have been reminded and remonstrated repeatedly that by divorcing practice from theory in our teaching, we are failing to educate our students adequately.”\(^100\) Many have noted that providing students with opportunities to simulate legal practice, including through clinical practice, enhances students’ judgment as well as their analytical, reasoning, and problem-solving skills.\(^101\) Active learning has also been shown to increase content retention, develop problem-solving skills, and increase motivation.\(^102\) In the law school context, Alyson Drake argues that active learning methods provide an effective change-of-pace from traditional lectures and encourage students to

\(^97\) 17A AM. JUR. 2D Contracts § 274 (2018).
\(^98\) Id.
\(^99\) Zemach & Ben-Zvi, supra note 39, at 201.
\(^101\) Id. at 820; see also Christine P. Bartholomew, Twiqbal in Context, 65 J. LEGAL EDUC. 744, 762 (2016) (“At this point in legal education, the gains of active learning methods are well-established. Active learning methods, as opposed to passive learning, ‘require students to engage in higher-order thinking such as analysis, synthesis, and evaluation.’”) (footnotes omitted).
\(^102\) Bartholomew, supra note 101.
work harder because, in an active learning setting, the professor monitors each student’s progress much more closely.\textsuperscript{103}

The ABA, apparently agreeing with such analyses, recently revised its Accreditation Standards to require certain aspects of active learning in the externship context:

A field placement course [must include] the following: . . . (iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student’s academic performance . . . \textsuperscript{104}

The ABA thus now demands a written agreement among the student, the professor, and the supervisor at the placement, laying out the terms of the externship, including active learning requirements,\textsuperscript{105} designed to allow students “to begin forming their professional identities.”\textsuperscript{106}

The new active learning mandate is a further regulatory requirement set out by the ABA for all accredited American law schools. Therefore, like the ABA’s Revised Standards, the active learning requirements are the result of neither an offer on the part of the ABA nor an acceptance on the part of the law schools. Arguably, there is consideration in the ABA’s promise of accreditation and the law school’s promise to follow the active learning requirements. But, again, there is no mutual intent, and therefore no contract, because both offer and acceptance are lacking. Thus, the active learning requirements, like the ABA’s Revised Standards, are

\begin{itemize}
  \item \textsuperscript{103} Alyson M. Drake, The Need for Experiential Legal Research Education, 108 LAW LIBR. J. 511, 521 (2016).
  \item \textsuperscript{104} STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, PROGRAM OF LEGAL EDUCATION § 304(c) (AM. BAR ASS’N 2016-17).
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Drake, supra note 103, at 521-22 (“This overarching goal [the development of practice-ready skills], then, encompasses many smaller goals, including ‘engaging students, understanding unequal social structures, advancing social justice, developing lawyering skills, cultivating professional identity, fostering professional ethics, providing culturally competent client representation to a diverse array of clients, developing sound judgment and problem-solving abilities, gaining insight into law and the legal system, promoting lifelong learning, and learning to work collaboratively.’”) (quoting Deborah Maranville et al., Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering, 56 N.Y.L. SCH. L. REV. 517, 527 (2011-2012)).
\end{itemize}
closer to regulations handed down from above than to contracts. Further, even were a contract to be formed, it would be a contract of adhesion, likely unconscionable because it “suggests an absence of meaningful choice.”  

Under contract theory, the active learning requirements also do not fit either the promise or consent theories due to the lack of meaningful promise or consent. Perhaps there is an element of economic efficiency in the law schools’ agreement to abide by the active learning requirements, but in the end these requirements are handed down by the ABA and are therefore closer to regulations than to any contractual agreement between the ABA and the law schools it oversees.

B. Agreements Between Law Schools and Professors

The principal agreements between law schools and their professors concern employment. Traditionally, employment has been regarded as a contract—the sale of one’s labor in return for a salary, “negotiated in much the same way as any other contract, and depending entirely on the terms to which the parties agree.” However, according to recent scholars, labor law before the industrial age instead treated the relationship between employer and employee (accurately, in this author’s opinion) as a master-servant relationship, whereby the servant owed his master work in return for economic support.

By contrast, contract law arose in the very different realm of commercial dealings, mostly between merchants and between sellers and purchasers of real property—scenarios that differ sharply from

110. Snyder, supra note 109, at 37-38. This includes the traditional notion of at-will employment, whose support continues to this day and which, according to one scholar, “draws its strength from the deeply rooted conception of the employment relation as a dominantservant relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.” Clyde W. Summers, Employment at Will in the United States: The Divine Right of Employers, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).
early master-servant-based employment law in that participation in such commercial dealings is almost entirely voluntary and the participants are, for the most part, equals.\textsuperscript{111}

Employment law and contract law came together in the years following the American Revolution, which led to a general belief that (at least with respect to free white male citizens) “employment is simply a contract between parties . . . . In the eye of the law, [employer and employee] are both freemen—citizens having equal rights, and brethren having one common destiny.”\textsuperscript{112} However, as scholars have noted, the legal philosophy of employment as contract has never quite matched reality,\textsuperscript{113} and the continuing relevance of status, as opposed to contract, in employment law is reflected by the passage of numerous public labor laws and regulations\textsuperscript{114} throughout the 20th Century reflecting little, if any, regard for the desires of specific employers or employees.\textsuperscript{115} In fact, employment today “is regulated by law in a host of ways entirely unrelated to the agreement of the parties, dependent solely upon the relative status of parties as employer and employee.”\textsuperscript{116}

Today, the default understanding of the employment relationship is that it is at-will, whereby either employer or employee may end the relationship whenever it is in their interests—outside of prohibitions on wrongful termination due to discrimination or retaliation.\textsuperscript{117} However, as some have noted, “the at-will rule has become

\textsuperscript{111} Snyder, supra note 109, at 39.
\textsuperscript{112} Id. at 43 (quoting OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, at 550 (Boston 1853) (address delivered by Henry Williams)).
\textsuperscript{113} See, e.g., Arnow-Richman, supra note 108, at 2-3 (noting that contract law requires mutual assent and consideration, while workplace agreements often lack such formalities, leading to a situation where the substance of the commitment “may be vague and indefinite, particularly if it is made orally”).
\textsuperscript{115} Snyder, supra note 109, at 45-46.
\textsuperscript{116} Id. at 34; see also Jones, supra note 109, at 662 (arguing for a public interest in private employment relations that subordinates contract and property law to “a larger redistributive employment ideal”).
\textsuperscript{117} See David Anthony Rutter, Title VII Retaliation, A Unique Breed, 36 J. MARSHALL L. REV. 925, 925 (2003) (“The source of protection for employees in the private sector comes from Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex or national origin. A lesser known, although equally important section of Title VII, intended to serve as a guardian over the anti-discrimination section of Title VII, is the anti-retaliation section of Title VII.”).
a much stickier default in many jurisdictions, rolling like a steamroller over evidence of contrary intent.”\(^{118}\) Beyond the at-will presumption, some scholars argue that, rather than any formal employment contract (which is generally absent), the norms of each workplace combine to form “a relational contract, which is more important to the parties in most situations than any formal written agreement.”\(^{119}\)

In the law school context, there are a number of different types of employment agreements between professors and the law school, usually based on the particular professor’s status. As Debra Moss Curtis explains it, “Generally a law school faculty includes a variety of categories of teachers, including full-time faculty and adjunct faculty, tenured professors and those hoping to someday get tenure, and faculty with short term contracts, long term contracts, or no contracts.”\(^{120}\) Of these distinctions, the most significant, perhaps, is between those professors with tenure (or the possibility of tenure) and those without.

Generally speaking, non-tenured and non-tenure-track law professors fall into three camps: adjuncts, legal research and writing (“LRW”) professors, and clinicians. The employment of adjunct professors aligns closely with typical at-will employment.\(^{121}\) Contractually speaking, LRW professors fall somewhere between adjuncts and tenured and tenure-track faculty, being typically hired on renewable short-term contracts.\(^{122}\) For clinicians, the employment landscape is more varied. Clinics employ “many different staffing

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121. See James Wong, Become an Adjunct, 28 NO. 5 ACC DOCKET 14, 14 (2010) ("[A]n adjunct . . . is an independent contract worker in academia. The contract can be for the period of a term, a year or longer. The position can be full-time, but is usually part-time. Normally, but not always, a payment is made either through the university’s payroll system—or less often as 1099 MISC nonemployee income.").

arrangements, including traditional tenured or tenure-track professors, clinic tenured or clinic tenure-track professors, contract-term professors, visitors, adjuncts, and staff attorneys, who may be on contracts or funded by grants. Many clinics use a combination of these employment arrangements."

By far the most significant and well-known employment arrangement in the law school setting is the tenure track, and its ultimate result—tenure itself. Academic tenure, “accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause.”

Even under this limited definition, tenure significantly “changes the employment-at-will relationship, in which an employee can be terminated for any reason . . . .” In this sense, tenure is “a type of option—where the school is bound to employ the tenured professor if she decides to come back year after year unless there is adequate cause for termination, but where the professor is free to leave after any year without any binding obligation to the school.” In any event, the exact parameters of tenure are set out by the rules and regulations of each individual institution.

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125. Lewinbuk, supra note 122, at 13-14 (quoting Mark L. Adams, The Quest for Tenure: Job Security and Academic Freedom, 56 CATH. U. L. REV. 67, 74 (2006)); but see Badagliacca, supra note 124, at 906 (noting that the court in Branham v. Thomas M. Cooley Law School, 689 F.3d 558 (6th Cir. 2012) found tenure to be no more than a vehicle for academic freedom, “while providing no legal authority for continuous employment outside of their employment contracts” (emphasis added)). This holding “set a precedent against the legal significance of tenure status and bolstered the importance of employment contracts for graduate professors.” Badagliacca, supra note 124, at 916.
126. Badagliacca, supra note 124, at 928. The protections provided by tenure, however, change based on whether the law school is a public or private institution. See, e.g., Mark Strasser, Tenure, Financial Exigency, and the Future of American Law Schools, 59 WAYNE L. REV. 269, 271 (2013) (“Tenure creates a property interest protected under the United States Constitution if the tenure grantor is a state entity. Because state action is required to trigger the relevant constitutional guarantees, the Constitution as a general matter does not afford protection to tenure violations at a private institution. Instead, those rights will be protected as a matter of contract . . . .”).
127. See Strasser, supra note 126, at 309 n.15 (quoting Steven G. Olswang et al., Retrenchment, 30 J.C. & U.L. 47, 48-49 (2003) (“The fundamental source of authority, and the first place to look, is the institution’s own rules and regulations. An institution's policies frame the relationships among the faculty, staff, students, and institution. . . . Some or all such
Being so varied, law professor employment agreements naturally fall into different categories, supported by different contractual and legal bases. However, standard adjunct contracts, renewable short-term contracts typical of LRW professors and clinicians, and most tenure-track positions are all typical at-will employment agreements. Such agreements include an offer of employment by the law school and acceptance of that offer by the professor. Consideration consists of the professor’s promise to teach the assigned course in exchange for the law school’s promise to pay a salary. There is also plainly mutual intent to enter into the agreement.

Where such agreements fail to amount to genuine democratic contracts lies precisely in their at-will nature. In the United States, “employment is presumed to be at will unless an express or implied contract states otherwise and such presumption is strong.”

At-will employment “is presumptively terminable at any time, with or without cause, by either party.” As a result, an at-will employee “simply has no legally protected interest in his or her employment.” Such flimsy agreements—resulting in no legally protected interest—cannot properly be considered contracts.

The employment contracts of tenured professors satisfy the same elements as those of their untenured colleagues—there is an offer of employment and an acceptance of that offer, consideration in the form of teaching classes and salary paid, and mutual intent to enter into the agreement. Where tenure differs is precisely in the employment guarantees made by the law school to the tenured professor, which significantly alter the presumptively at-will employment agreement. Such an alteration is perfectly legitimate. “The employment-at-will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the parties’ freedom to contract; . . . ‘if the parties include a clear job security provision in an employment contract, the presumption that the employment is at-will may be negated.’”

However, the fact that tenured employment is not strictly speaking “at-will” does not make this employment agreement a genuine contract. Instead, as should be perfectly clear, tenure protects only one party to the agreement—the professor. In fact, “[a]n employee is never presumed to engage his services permanently, . . . indeed, [policies constitute, or at least supplement, the contract between the institution and its faculty. . . . Tenure can mean whatever the parties—limited by the relevant institutional policies and statutes—define it to mean.”).

128. 27 AM. JUR. 2D Employment Relationship § 9 (2018).
129. 82 AM. JUR. 2D Wrongful Discharge § 2 (2018).
130. 27 AM. JUR. 2D Employment Relationship § 9 (2018).
in this land of opportunity it would be against public policy and the
spirit of our institutions that any man should thus handicap him-
self; and the law will presume . . . that he did not so intend.”132 Fur-
ther, significantly, “if the contract of employment be not binding on
the employee for the whole term of such employment, then it cannot
be binding upon the employer; there would be lack of ‘mutuality.’”133
Therefore, even tenured employment agreements would not appear
to be genuine democratically negotiated contracts.

In terms of Contract theory, adjunct contracts, as purely at-will
agreements on both sides, include few, if any, promises—the pro-
fessor may leave or be fired at any time. Neither is consent the
basis of these contracts, because the at-will nature of the contract
does not involve the transfer of any rights between the parties. In
effect, the at-will employment contract is an agreement based on
efficiency alone: as long as it is economically sensible for the law
school to employ the adjunct, and for the adjunct to perform the
requisite tasks for the offered pay, employment will continue. When
such efficiency is lacking for either party, employment ends
and the contract is void.

The renewable short-term contracts under which most LRW pro-
fessors and many clinicians work involve something closer to prom-
ise, in that even the shortest such contracts lay out a period of em-
ployment during which time the professor is promised a job (absent
firing for cause). However, this promise also goes in only one direc-
tion, because as a general matter the professor is free to leave at
any time, without penalty. For the same reason, such contracts are
not contracts of consent (as understood in contract theory) because
there is no “transfer of rights” from the professor to the law school;
the professor retains his or her rights in their entirety. Arguably,
such contracts do reflect a basis in economic efficiency, because law
schools are undoubtedly offering as much as needed (and no more)
to attract qualified candidates for professor positions, while eager
professors will accept what they require in compensation (and no
less) to perform the requisite duties. In this way, such agreements
may indeed be vehicles “for maximizing individual and social
gains.”134

132. Id. (quoting Seals v. Calcasieu Parish Voluntary Council on Aging, Inc., 758 So. 2d
286, 289 (La. Ct. App. 3d Cir. 2000), writ denied, 761 So. 2d 1292 (La. 2000)).
133. Id. (quoting Seals, 758 So. 2d at 289); see also id. (“[S]uch contracts frequently are,
in practical effect, unilateral undertakings by the employer to provide a job for so long as the
employee wishes to continue in it but impose no corresponding obligation upon the employee.
When this is the case, the burden of performance is unequal, as the employer appears to be
bound to the terms of the contract, while the employee is free to terminate it at will.”).
134. Zemach & Ben-Zvi, supra note 39, at 201.
Tenure-track positions also bear little relationship to promise, outside of the specified term of the law school's offer letter—a promise that in any event flows in only one direction, because the professor may leave at any time. With respect to tenure, the law school promises only to consider the faculty member's application for tenure when the time comes—being free, of course, to deny it—while the professor promises nothing, and may leave the law school at any time for any reason, or for no reason at all. There is also no consent manifested by either the law school or the tenure-track professor, because no entitlements are being transferred from either party to the other and neither is legally bound to do anything more than maintain the at-will employment relationship until one party or the other chooses to sever it. This sort of contract too can only be understood as a form of economic efficiency, in which the agreement "facilitate[s] the efforts of [the] parties to maximize the joint gains . . . from transactions."\textsuperscript{135}

Only with the granting and acceptance of tenure, then, do we see anything different in the employment relationship between law schools and law professors. With the tenure offer, the law school promises something significant—the security of employment that may be maintained indefinitely, absent only adequate cause for dismissal. However, the tenured law professor still manages to promise little or nothing, as he or she may always leave, for any reason. There is also little "consent" in the tenure context, because the professor who accepts tenure may still resign his or her post at any time, and does not thereby transfer any significant rights or entitlements to the law school. Finally, like all the professor contracts here discussed (and perhaps all employment contracts), there is an efficiency aspect to the granting and acceptance of tenure. Both parties to the tenure agreement surely accept the terms out of a desire to maximize individual and social gains—the law school by maintaining an experienced, committed faculty, and the professor by the tangible security and intellectual and emotional support that tenure provides.

C. Agreements Between Law Schools and Students

Numerous agreements are formed every year between law schools and their students. In this section we will consider the most important of them, including academic oaths, law school honor codes, and student handbooks.

\textsuperscript{135} Schwartz & Scott, supra note 54, at 544.
1. **Academic Oaths**

Many law schools require their incoming students to take a professionalism oath at the start of 1L year.\(^{136}\) The number of schools administering such oaths to entering law students appears to be on the rise, with many of these oaths being administered recently for the first time.\(^{137}\) The reason cited by some law school deans for such oaths is to create a way for incoming students to understand the responsibilities of entering a profession, with the inspiration of medical schools’ “white-coat” ceremonies often cited.\(^{138}\)

The content of these professionalism oaths naturally varies, but there are a number of notable through-lines. Many start with an acknowledgment of the privileges, duties, and responsibilities of becoming a lawyer.\(^{139}\) They demand that students conduct themselves with dignity,\(^{140}\) integrity,\(^{141}\) civility,\(^{142}\) courtesy,\(^{143}\) and respect.\(^{144}\) A number of the oaths require action without prejudice and with respect for the rights and dignity of others.\(^{145}\) Many of these oaths also lay out the responsibilities and high ideals inherent

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\(^{138}\) See, e.g., ARIZONA, supra note 137.


\(^{140}\) DAYTON, supra note 136; JOHN MARSHALL, supra note 139; SOUTH CAROLINA, supra note 139; SAN DIEGO, supra note 139.

\(^{141}\) JOHN MARSHALL, supra note 139; *Law Students’ Pledge*, U. HAW. MANOA WILLIAM S. RICHARDSON SCH. L., http://www.law.hawaii.edu/students/law-students-pledge (last visited Sept. 10, 2018) [hereinafter HAWAII]; SOUTH CAROLINA, supra note 139; SAN DIEGO, supra note 139.

\(^{142}\) DAYTON, supra note 136; JOHN MARSHALL, supra note 139; HAWAII, supra note 141; SOUTH CAROLINA, supra note 139.

\(^{143}\) JOHN MARSHALL, supra note 139; SAN DIEGO, supra note 139; WASHBURN, supra note 136.

\(^{144}\) DAYTON, supra note 136; SAN DIEGO, supra note 139; WASHBURN, supra note 136 (adding the significant pledge that students will also treat themselves with respect).

\(^{145}\) JOHN MARSHALL, supra note 139; SOUTH CAROLINA, supra note 139; HAWAII, supra note 141 (pledging "[t]o advance the interests of those I serve before my own, . . . [t]o guard zealously legal, civil and human rights which are the birthright of all people, [a]nd above all, [t]o endeavor always to seek justice").
in the learned profession of the law, noting that students' actions reflect not only upon themselves, but also upon the university and the legal profession. The oaths also ask students to pledge diligent performance of their duties and responsibilities in law school, including being prepared for class, studying hard, and upholding standards of academic integrity and ethics. The vows are "solemn[,]" and often end with the phrase, "This pledge I take freely and upon my honor." It may not seem like much these days to take a pledge upon my honor, but such oaths tend to have a stronger impact than one might expect. The psychology of an oath, especially the physical act itself "may heighten an otherwise nebulous concept into a moral obligation." This is particularly true at the start of law school, where students are acutely aware of entering a new profession, with new rules and responsibilities. According to Carol Rice Andrews, "Even the simple oath can prompt ethical reflection, as the actual act of taking the oath is a moment of high ethical aspiration." However, not all observers are quite so sanguine about these increasingly popular oaths. For instance, Robert Steinbach writes that he views "with significant skepticism the growing movement at law schools wherein brand new students are asked to swear to professionalism oaths.” Steinbach notes that the entering students rarely, if ever, have any say in the drafting of the oaths and are asked to swear to them without any consideration in return. Further, because the oaths set out largely undefined obligations

146. DAYTON, supra note 136; JOHN MARSHALL, supra note 139.
147. DAYTON, supra note 136; WASHBURN, supra note 136; SOUTH CAROLINA, supra note 139; SAN DIEGO, supra note 139.
148. JOHN MARSHALL, supra note 139; WASHBURN, supra note 136; SOUTH CAROLINA, supra note 139; SAN DIEGO, supra note 139; HAWAII, supra note 141.
149. WASHBURN, supra note 136; SOUTH CAROLINA, supra note 139.
150. DAYTON, supra note 136; JOHN MARSHALL, supra note 139; SAN DIEGO, supra note 139.
152. See id. (citing TIMOTHY MAZUR, COMPLIANCE PROGRAMS & THE CORPORATE SENTENCING GUIDELINES § 12:28 (2013) (discussing the act of signing an honor code or honesty pledge and suggesting how “delivering a message promoting compliance immediately prior to a moment of risk can have a powerful, positive impact on behavior”)); Lipshaw, supra note 47, at 334 (discussing precontractual negotiations, and suggesting that a “ritual act, like signing, dripping wax, or stitching with special string, changes its legal character”).
155. Id.
such as “professionalism,” the students do not know what they are promising and the schools do not know what their students have promised, leading to possible under- or over-enforcement issues. Steinbuch also notes that any such oath obligations should involve a discussion between the parties regarding the meaning of taking an oath and the opportunity to decline to do so, both of which appear to be lacking at most schools.

Analyzed in terms of standard contract formation, there is neither offer nor acceptance in the professionalism oath. There is no consideration. And there is no mutual intent, because the students have no choice but to take the oath if they want to continue as students. Further, these oaths are handed down from above, and any “contract” formed would be a contract of adhesion, likely unconscionable because it “suggests an absence of meaningful choice.”

In the language of contract theory, an academic oath is not contract as promise, because the incoming students are not permitted to dispose of their individual rights as they choose; such an oath is not, in the words of Charles Fried, “the willing invocation by a free moral agent of a convention that allows him to bind his will.” These oaths are also not contract as consent, because there is no effective voluntary consent on the part of the students, and therefore no legally enforceable obligation. The oaths come closest to the contract as economic efficiency, in that such an oath, at the very beginning of law school, may be a source of “welfare maximization” because the law school receives a solemn promise from every incoming student that he or she will behave according to the norms and standards of the school; however, the welfare maximized in such cases surely leans in the direction of the law school, which drafts, demands, and receives a promise to abide by its own terms.

2. Honor Codes

Another source of agreements between law schools and students may be found in the honor codes that most law schools require their students to follow. In general, these codes “are intended to express ethical standards and do not serve merely as a list of rules and sanctions,” focusing instead on values such as honesty, integrity, and

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156. Id.
157. Id.
159. Fried, supra note 42, at 972-73.
160. See Barnett, supra note 39, at 300.
161. Schwartz & Scott, supra note 54, at 544.
Part of the intention behind honor codes is to signal to the law student, at the earliest stage of his or her career, that the profession they are about to enter requires certain standards of action “necessary to preserve the spirit of the law and the profession.”\textsuperscript{163} As such, law students “should be required to follow an honor code which is representative of the ethical standards of the legal profession.”\textsuperscript{164} The hope, of course, is that by learning the professional standards expected of them, and by following these standards, law students will continue to observe professional ethics once in practice.\textsuperscript{165} Some scholars emphasize that such an introduction to the ethical standards and professionalism required in legal practice must begin in law schools, which have “not just the opportunity, but arguably the responsibility, to develop attitudes and dispositions consistent with professionalism.”\textsuperscript{166}

The normative goals for law school honor codes are quite broad. Scholars argue that such codes should provide, first of all, “a clear regulatory regime for safeguarding the integrity of the basic academic functions of teaching and evaluation.”\textsuperscript{167} Such a regime should consist of a detailed set of rules designed to enhance equity in the evaluation and review of student work and fairness in academic competition among students.\textsuperscript{168} In order to perform this role, honor codes should provide clear descriptions of impermissible conduct, enforcement procedures, and sanctions to be imposed in the event of code violations.\textsuperscript{169} Considering that attending law school


\textsuperscript{163} Nicola A. Boothe-Perry, Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism?, 89 NEB. L. REV. 634, 636 (2011).

\textsuperscript{164} Carlos, supra note 162, at 941 (quoting the student conduct code at the University of Arkansas School of Law).

\textsuperscript{165} Id. at 941-42; see also id. at 942 (“The commitment to ethics and to the professionalism that the legal profession demands should begin at the very moment law students start their legal education. This commitment to ethics in the legal profession is strengthened and enhanced by honor codes. Honor codes can be seen to serve the same function as professional ethics codes, thus creating a system of self-governance and self-regulation.”); Boothe-Perry, supra note 163, at 636 (“Awareness and conformance to rules and regulations governing the appropriate and acceptable scope of behavior for students pursuing law degrees will provide practice and reinforcement for professional behavior in subsequent practice.”).

\textsuperscript{166} Boothe-Perry, supra note 163, at 636; see also id. (“Throughout the tenure of a lawyer’s professional life, law schools are the singular institutions with the opportunity, the resources, the institutional capacity, and the leverage to effectuate meaningful training in professionalism. It is therefore critical that they should have the right to promulgate and administer reasonable rules and regulations to fulfill that responsibility.”).


\textsuperscript{168} Id. at 849.

\textsuperscript{169} Id.
on its own appears to have “very little impact on the moral development of law students,” honor codes are considered by some to play a vital role in this aspect of legal training.

Nonetheless, there are also issues with law school honor codes. For some, this sort of moral training is too little, too late for what ought to have been learned by the undergraduate level. For example, by the time they reach law school, most students are presumably aware of and understand most of the conduct proscribed by honor codes, such as plagiarism, improper collaboration, and cheating. On the flip side, honor codes (like all codes) are regularly accused of ambiguity, leaving students to complain that they often cannot tell whether or not they have breached the terms of the code. A more serious pedagogical issue may be that honor codes, by emphasizing proscribed joint behavior, often discourage collaborative learning.

Honor codes, like professionalism oaths, feature neither offer nor acceptance. No consideration exists, because there is no bargained-for performance or return promise on the part of the law school. There is no mutual intent, and therefore no contract, because honor codes are handed down from above, and would amount at most to a likely unenforceable contract of adhesion.

Like academic oaths, honor codes do not fall under the contract as promise model, because they do not allow students to promise away their rights by choice, but rather demand student acceptance of unnegotiated norms, with no reciprocal obligation on the part of the law school. For the same reason, there is no voluntary consent to the transfer of any otherwise held entitlements—in fact, consent is required on the part of the students if they wish to remain enrolled. As with other one-sided agreements we have examined, honor codes come closest to the efficiency model of contracts, in that students agree to abide by the law school’s honor code as a means

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170. Id. at 820.
171. Id. at 824.
172. See, e.g., id. at 819-20 (“[W]e would expect students at the graduate level, as a result of their greater age, educational, and life experiences, to have obtained a higher level of moral reasoning than undergraduate students. For this reason, it may be that the aspirational and educational aspects of a code of conduct are less important at the graduate level than at the undergraduate level.”).
173. Id. at 820.
175. Willauer, supra note 174, at 536-37.
of gaining from the transaction—in this case, gaining a law degree—while law schools gain a student body that promises to play by the school’s rules.

3. **Student Handbooks**

Another source of agreements between law schools and their students is the law school student handbook or student manual. Such handbooks are prepared in order to provide information to students about the law school,\(^{176}\) as well as establishing standards that the law school expects students to meet.\(^{177}\) In the words of one scholar, student handbooks “are a kind of road map identifying significant informational mileposts and explaining how the institution operates.”\(^{178}\) Whether the drafting of student handbooks and their assignment to students amounts to a contractual relationship between the student and the law school is the source of some confusion and disagreement.\(^{179}\)

It is true that numerous cases of disciplinary process against students based on provisions of the student handbook have been litigated in U.S. courts.\(^{180}\) Such litigation has occurred when, for example, factual situations not addressed in the handbook arise,\(^{181}\) when procedures for addressing violations have not been followed,\(^{182}\) when expectations are ill-defined or subject to different interpretations,\(^{183}\) and especially when the law school attempts to alter the student’s current relationship with the institution.\(^{184}\)

As one scholar notes, “[c]ase law is replete with references to the relationship between . . . students and educational institutions as


\(^{177}\) Id.

\(^{178}\) Id.

\(^{179}\) See, e.g., id. at 1049.


\(^{181}\) Mawdsley, *supra* note 176, at 1032.

\(^{182}\) Id. citing Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 246-47 (D. Vt. 1994) (private college ordered to reinstate or grant new hearing to student found guilty of disrespect to persons, after having been found not guilty of rape, where student had been provided notice of charge of rape, but not charge of disrespect to persons); Kalinsky v. State Univ. of N.Y., 161 A.2d 1006 (N.Y. App. Div. 1990) (student denied enrollment after having been found guilty of plagiarism entitled to new hearing where neither hearing committee nor dean would reveal evidence on which they had based their decisions, a requirement in the student handbook).

\(^{183}\) Mawdsley, *supra* note 176, at 1032.

\(^{184}\) Id.
contractual in nature.” However, the question of whether a student handbook is part of that contractual relationship depends, like any contract, on the intent of the parties, and as a general matter, “the concept of handbooks as part of a contract with commitments and expectations on both sides does not necessarily seem to have universal acceptance.” This is especially true where, as is more and more often the case, the student handbook explicitly states that its terms do not form a contract between the student and the institution.

Assuming, however, that the law school student handbook does set out at least part of the terms of a contract between student and law school, what kind of a contract is this? Student handbooks, like professionalism oaths and honor codes, make no provisions for offer or acceptance, meaning no mutual intent. There is also an absence of consideration, in the form of the law school’s performance or return promise to the student for his/her agreement to abide by the handbook. Further, student handbooks are crafted by one party only, with the other party handed nothing more than “an absence of meaningful choice.”

Like the academic oaths and honor codes discussed above, student handbooks—which are not negotiated, but amount to rules handed down by the law school—lack the fundamental elements of negotiation and exchange that underlie both the promise and consent models of contract. Instead, to the extent that following the rules in the student handbook permits law students to pursue their chosen degree while authorizing law schools to regulate student behavior, the student handbook is closest to the efficiency model as, arguably, “a vehicle for maximizing individual and social gains.”

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185. Id. at 1033 (citing Peretti v. Montanna, 464 F. Supp. 784, 786 (D. Mont. 1979) (“This contract is conceived as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school’s disciplinary regulations, and in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof”)); see also Mawdsley, supra note 176, at 1033 (“[L]egal actions by students against higher education institutions will generally be grounded in contract.”).
186. Mawdsley, supra note 176, at 1034.
187. Id. at 1049.
188. See, e.g., Brooklyn Law School Student Handbook 2017-18, https://blsconnect.brooklyn-law.edu/administrative/policies/Pages/Student-Handbook.aspx (“Although you are expected to follow the rules and policies in this Handbook, the Handbook does not form a contract of any kind.”).
190. Zemach & Ben-Zvi, supra note 39, at 201.
D. Agreements Between Professors and Students

1. Syllabi

The most common form of contracting between Law Professors and their students is familiar to everyone—the humble syllabus. Syllabi typically set out “the order of march for the course, including the course materials and the reading assignments for each day or week, and any assignments that have to be handed in during the semester,” as well as the nature of evaluation and the means of calculating grades.\footnote{Paul Bateman, Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row, 17 QUINNIPIAC L. REV. 397, 422 (1997).} Syllabi requirements and other elements vary from course to course and even from professor to professor teaching the same class; such differences “are generally accepted as reflecting the academic freedom and autonomy of the individual faculty member.”\footnote{Terrence Leas, The Course Syllabus: Legal Status and Implications for Practitioners, 177 EDUC. L. REP. 771, 774 (2003).} The most useful syllabi will address student and professor roles and responsibilities, including expectations regarding student preparation and participation, and professor feedback and fairness.\footnote{Gerald F. Hess, Collaborative Course Design: Not My Course, Not Their Course, but Our Course, 47 WASHBURN L.J. 367, 374 (2008).} Syllabi also address expectations and policies associated with attendance, deadlines, and academic integrity.\footnote{Id. at 373-74 (“The syllabus is often the first contact students have with the teacher—it leaves a lasting impression. A syllabus that is clear, organized, thoughtful, comprehensive, and engaging conveys to students a model of professional thinking and performance. Conversely, a syllabus that is sloppy, disjointed, incomplete, and misleading communicates a lack of competence, respect, and professionalism.”).}

The purpose of the syllabus is not only to enumerate and communicate necessary class details, but also to establish a tone for the class\footnote{Id. at 373.} and to “memorialize [course] design decisions” such as goals, class materials, assignments, teaching and learning methods, and evaluation procedures.\footnote{Id.} By plainly laying out such details, the syllabus allows both student and professor to refer back to and rely upon them throughout the course.\footnote{Id.; see also Brown, supra note 151, at 136 (“For some professors, it seems shocking, and disrespectful, when students balk at following the rules and complain that professors impose unrealistic deadlines and penalties for failure to follow submission requirements. To curtail this type of attitude from the beginning of a professor-student relationship, syllabi should be explicit in providing context of why such rules are in place, and what aspects of professionalism they are intended to teach . . . .”).}
While it may seem strange at first to consider a syllabus a contract, scholars have been doing so for years. Nor is this necessarily a negative depiction; as one scholar explains, “the syllabus should serve as a contract between teacher and students, which delineates their respective responsibilities and guides their behavior during the course.” Nonetheless, the increasingly detailed obligations and requirements laid out in more modern syllabi can adopt some negative contractual elements such as the use of legal-ese, and may result in demand-oriented contracts that tend to place burdens on students. As one writer recently put it, “[T]he notion of the syllabus as a contract has grown ever more literal, down to a proliferation of fine print and demands by some professors that students must sign and attest that they have read and understood.”

In terms of the rules of contract formation, however, there is no room for either offer or acceptance with respect to the syllabus. Consideration is absent. Finally, there is no mutual intent, because a student has no choice but to accept and abide by the syllabus if he or she wishes to succeed in (or even pass) the class. Syllabi are by their nature handed down from above, and any contract formed would be a contract of adhesion, likely unconscionable.

Syllabi, which, as noted, are generally not subject to negotiation, also fall outside of the promise and consent models of contract in that there is no willing transfer of the student’s rights. Instead, acceptance of the requirements of the syllabus is closest to an economically efficient trade-off in which the student agrees to follow the syllabus requirements in exchange for the increased possibility of a higher grade at the end of the semester.

2. Course Policies

In addition to traditional syllabi, many law professors are now providing detailed course policies, spelling out and clarifying the rules and agreements governing the professor’s expectations of the

198. See, e.g., Bateman, supra note 191, at 422 (“[T]he reality is that we all have a student learning contract in place by means of our course syllabi”). Kevin H. Smith, "X-File" Law School Pedagogy: Keeping the Truth Out There, 30 LOY. U. CHI. L.J. 27, 40 (1998) (“The syllabus is, in essence, a contract between you and your students.”). Jeff Todd, Student Rights in Online Course Materials: Rethinking the Faculty/University Dynamic, 17 ALB. L.J. SCI. & TECH. 311, 333 (2007) (“[T]he syllabus is a contract”).

199. Hess, supra note 183, at 374.


201. Id.
students. Such course policies contain information regarding, for example, assignments and submissions, attendance, conferences, penalties, and grading. In addition to providing such details, course policies can in themselves be an effective pedagogical device, laying out the detailed requirements for any legal submission; as one scholar explains, such requirements “mirror court rules for written submissions, itemizing deadlines and clear standards for substantive components, formatting, citation, font, margins, line spacing, page numbering or word count, and electronic or hard-copy transmission to the grader.”

One criticism of course policy documents is that the rules set out may be so detailed and complex that they discourage careful study by students or, worse, provide for overly harsh penalties and unrealistic expectations that students may have difficulty achieving. Heidi Brown pushes back against such criticisms, noting that professors generally put a great deal of time and care into drafting effective course policies, with their only goal being to provide a learning experience regarding the actual procedural practice of law.

Course policies, like syllabi, generally feature neither offer nor acceptance. Consideration is lacking. Mutual intent to contract does not exist, and there is therefore no contract, because course policies are merely handed down from above, without the benefit of negotiation, and amount at most to a likely unenforceable contract of adhesion.

In terms of contract theory, course policies, like syllabi, do not fit within the promise or consent models of contract. Rather, they

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202. See, e.g., Maureen Arrigo-Ward, How to Please Most of the People Most of the Time: Directing (or Teaching in) A First-Year Legal Writing Program, 29 VAL. U. L. REV. 557, 575 (1995) (“All [California Western School of Law] students receive a detailed description of course policies and procedures. . . . [These] policies are lengthy and the students are required to read them on their own. . . .”).


204. Brown, supra note 151, at 134.


206. Brown, supra note 151, at 151 n.163.

207. See Leas, supra note 192, at 772-73 (“The department or the faculty member develops the curriculum, and the faculty member develops a course syllabus incorporating that curriculum and the rules governing the faculty member’s course. In rare cases, a faculty member will permit students to negotiate some of the elements of the course; generally, however, the faculty member dictates the substantive elements of the course and consigns the student to ‘take it or leave it.’”). This sort of top-down structure is (at least at times) in contrast with that of learning contracts; see infra Section II.D.3.
amount to efficiency exchanges, in which students accept the professor's demands in hopes of receiving an acceptable grade in return.

3. Learning Contracts

Another form of agreement between professor and student, albeit a much less common one, is known as the learning contract. For decades, professors have periodically attempted to work with their students at the start of the semester to negotiate a contract for the learning project on which they are preparing jointly to embark.\textsuperscript{208} Some of the issues on which negotiations have centered include assignments, pacing, deadlines, the method of teaching, and even the content of the class.\textsuperscript{209} Although such negotiations would seem to match up extremely well with the subject matter of the law school curriculum, apparently very few law school professors have attempted such an experiment.\textsuperscript{210}

One of the main goals of the learning contract is “to encourage individualized learning by tailoring the educational experience to the objectives of individual students.”\textsuperscript{211} Naturally, professors may be reluctant to completely reorganize their classes on the basis of student requests; however, especially in smaller classes and seminars, professors are generally willing to consider the goals and desires of their students in designing a course significant to all parties.\textsuperscript{212} A positive side effect of such negotiations is that they provide the student and the professor with opportunities to learn about each other’s concerns; naturally the professor and the students may have different goals, but different students may have different goals as well.\textsuperscript{213} Once such differences have been identified, negotiations may begin in earnest.\textsuperscript{214}

The goals of learning contracts include: allowing students to set the proper pace for the course, providing students the opportunity to work directly with professors in the negotiation process, and cre-

\textsuperscript{209} See generally id.
\textsuperscript{210} Bateman, \textit{supra} note 191, at 421-22; but see id. at 422 (“In the last few years, however, interest in the use of the learning contract has increased as an option for providing appropriate supervision in law school clinical programs as well as an option for including an interactive component in student learning.”).
\textsuperscript{211} Aiken et al., \textit{supra} note 208, at 1048.
\textsuperscript{212} \textit{Id.} at 1049.
\textsuperscript{213} \textit{Id.} at 1048.
\textsuperscript{214} \textit{Id.} at 1048-49.
ating a less hierarchical structure between professor and student.\textsuperscript{215} But perhaps the most important goal of the learning contract is motivational, the theory being that students who are permitted to play a role in designing the course will be more invested in the learning process accompanying it.\textsuperscript{216} Indeed, studies have indicated that students who negotiated and signed learning contracts “developed a greater sense of personal responsibility for acquiring and applying improved study skills” than other students.\textsuperscript{217} Further, use of such contracts has led to a “level of commitment that was significantly more pronounced . . . than among previous students.”\textsuperscript{218}

There are of course potential issues with the implementation of learning contracts in the law school setting. For instance, some students will always believe that it is the professor’s job to design the course, and may look upon required student involvement as undermining the integrity and seriousness of the class.\textsuperscript{219} Others may be unnerved by early uncertainty regarding the structure of the course or may balk at the use of class time for negotiations rather than teaching content.\textsuperscript{220} Some have warned that it is the professor’s

\textsuperscript{215} Id. at 1049; see also Susan Sturm & Lani Guinier, Learning from Conflict: Reflections on Teaching About Race and Gender, 53 J. LEGAL EDUC. 515, 517 (2003) (“By sharing power and encouraging experimental learning formats, I was able to create a space that opened new intellectual doors for me. Students and faculty renegotiated their relationships to each other, and through that process we each began to understand our roles as life-long learners. Teaching intellectually serious graduate students and learning from them became exciting, even fun.”).

\textsuperscript{216} Aiken et al., supra note 208, at 1049; see also Bateman, supra note 191, at 422 (“The value of a student learning contract lies in three characteristics. First, since students become more involved in their own learning and mastery of a subject, they are more motivated to learn and therefore work harder. Second, because the contract is formed with the student’s input, at least part of the course design can take into account the student’s own learning preferences and the student can learn at an individualized pace. This, of course, presents the problem of whether the student’s own perceived pace is adequate enough for course coverage. That problem, though, can be overcome through the negotiation of the contract. Third, the student learning contract changes the balance of power between student and professor, which some professors may see as an advantage, others as a distinct disadvantage.”).

\textsuperscript{217} Aiken et al., supra note 208, at 1049 (quoting Goldman, Contract Teaching of Academic Skills, 25 J. COUNSELING PSYCHOL. 320, 323 (1978)).

\textsuperscript{218} Aiken et al., supra note 208, at 1049 (quoting Barlow, An Experiment with Learning Contracts, 45 J. HIGHER EDUC. 441, 446 (1974)); see also Aiken et al., supra note 208, at 1050 (“Results of controlled experiments using learning contracts in various settings suggest that contracting produces benefits [including] increased study time and improved test scores . . . . The impressionistic articles in favor of learning contracts are equally positive . . . ”).

\textsuperscript{219} Hess, supra note 193, at 377.

\textsuperscript{220} Id.
duty to ensure that students maintain responsibility for course design only to the extent that they are able to exercise mature judgment on such matters. 221

Nonetheless, overall the literature is extremely positive regarding the results and benefits of learning contracts, 222. Perhaps this is not surprising, in that learning contracts, unlike virtually every agreement considered in this article—covering multiple permutations of contractual, semi-contractual, agreement-based, and exchange-related relationships in the law school context—is openly and plainly negotiated between the parties. The learning contract is the product of genuine offer and acceptance as a culmination of negotiations, amounting to mutual intent to enter the agreement. There is consideration in the form of the professor’s promise and the student’s return promise to each abide by the negotiated terms. 223

Thus, the learning contract is a genuine, democratically negotiated contract.

With respect to contract theory, learning contracts clearly fit within the promise model, where the student and professor, as free moral agents, promise certain actions in the course of their relationship, forming not “a communication of intention . . . [but] a commitment to a future course of conduct.” 224 Likewise, the learning contract follows the structure of the contract as consent, in that the student and the professor bring certain rights to the table and then “manifest their assent to the transfer of these rights.” 225 Learning contracts also follow the economic efficiency model, because the deliberate negotiation and tradeoffs between professor and student truly “facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions.” 226 Indeed, of all the contracts, semi-contracts, agreements, and exchanges governing relationships in the law school context, only one—the learning contract—appears to fit within all three theories of contract. Learning contracts are

221. Maryellen Weimer, Learner-Centered Teaching: Five Key Changes to Practice 43 (2002).
222. See, e.g., Aiken et al., supra note 208, at 1090 (“We . . . know that our methodology, part of which involves using learning contracts through which we divest ourselves of some of our power, is well received by most of our students. It inspires many of them to realize that they can make intelligent decisions about what and how to learn, in law school and thereafter. We have seen students balk at accepting responsibility, identify their fears, and overcome them.”).
223. See Restatement (Second) of Contracts § 71 (Am. Law Inst. 1981) (“To constitute consideration . . . a return promise must be bargained for . . . [A] return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).
226. Schwartz & Scott, supra note 54, at 544.
thus discernibly the most fairly negotiated and democratic contractual relationships in the law school universe. As such, they are, at the very least, deserving of further study.  

III. CONCLUSION

This article considers the various agreements, exchanges, contracts of adhesion, and genuine contracts that underlie the functioning of the law school as an organization. We have considered and analyzed agreements between the federal government and the ABA and the law schools they regulate, between law schools and professors, between law schools and students, and finally between professors and students.

Some of these agreements lack any negotiating power on the part of one party—including learning accommodations under the ADA and the ABA’s learning outcome and active learning requirements. Such agreements lack offer and acceptance and mutuality of intent, as well as consideration, and therefore are, at best, contracts of adhesion, likely unconscionable because they suggest “an absence of meaningful choice.” These agreements also reflect none of the elements of contract under the promise, consent, or efficiency theories because they are not really contracts at all, but regulations handed down from above.

Law professors’ at-will employment agreements, while incorporating the required elements of contract formation—namely offer, acceptance, consideration, and mutual intent—fail to amount to genuine contracts due to their at-will nature. Because an at-will employee “simply has no legally protected interest in his or her employment,” such agreements cannot be seen as contracts because neither party must abide by them. Short-term and long-term contracts, as well as tenure agreements, also feature the required contract elements, but fail to amount to genuine contracts because they protect only the professor (to varying extents), and not the law school, thus demonstrating a distinct lack of mutuality. In terms of contract theory, law professor employment agreements do reflect the promise theory, but only in a single direction. That is, most law professor contracts reflect an employment promise on the part of the law school but no return promise on the part of the professor. In addition, such agreements are generally not contracts of consent.

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227. The author of this article is currently at work on such a study, entitled: A Meeting of the Minds: The Promise of the Learning Contract in Law School Pedagogy.
228. 17A AM. JUR. 2D Contracts § 274 (2018).
229. 27 AM. JUR. 2D Employment Relationship § 9 (2018).
(as understood in contract theory) because there is no transfer of rights from the professor to the law school. Rather, the professor retains his or her rights, including the right to quit and take up different employment at any time. Law professor contracts do generally reflect the economic efficiency theory, in that law schools offer and professors accept only what is needed to bring the parties to agreement, thus “maximizing individual and social gains.” However, this is not sufficient to transform such agreements into genuine contracts.

With many other agreements examined here, including academic oaths, honor codes, student handbooks, syllabi, and course policies, one party has such a dominant position in the negotiations that the resulting agreements cannot be said to include either offer or acceptance. Consideration too is absent. Mutual intent to contract does not exist, and therefore there can be no contract, because such “agreements” are handed down from above, and amount, at most, to unenforceable contracts of adhesion due to “an absence of meaningful choice.” These agreements fail to reflect the promise theory, which allows a “free moral agent . . . to bind his will,” the consent theory, which demands “the valid transfer of entitlements” based on the parties’ original voluntary consent. In such cases, the resulting exchanges at best “maximize the joint gains . . . from transactions,” reflecting the economic efficiency theory of contract.

In point of fact, the only contract in the law school context that appears to reflect the democratic negotiations of independent parties is the so-called learning contract. These contracts feature genuine offer, acceptance, mutuality of intent, and consideration in the form of exchanged promises. Learning contracts accurately demonstrate the promise theory in that they reflect “the willing invocation by a free moral agent of a convention that allows him to bind his will.” They further reflect the consent theory in that they result from “the valid transfer of entitlements” based on the parties’ original voluntary consent. Finally, learning contracts also demonstrate economic efficiency in that their democratic negotiation and

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231. Zemach & Ben-Zvi, supra note 39, at 201.
232. See Leas, supra note 192, at 772-73.
234. Fried, supra note 42, at 972-73.
236. Schwartz & Scott, supra note 54, at 544.
237. Fried, supra note 42, at 972-73.
rough equality of bargaining power represent “a vehicle for maximizing individual and social gains.”

At any time, but particularly in these days of increasing antidemocratic sentiment in the United States and abroad, such fairness of bargaining power and the genuine contracts that result are perhaps what the legal academy should aim for in governing its own affairs.

239. Zemach & Ben-Zvi, supra note 39, at 201.