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Arthur Linton Corbin

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I. Introduction

In the stories U.S. legal scholars tell about themselves, the hero’s journey often involves revolt against the old order. The Legal Realists overturned Langdell’s Formalism; the Critical Legal Studies movement rejected the quietism of Legal Process Theory and exposed the limits of the then dominant liberal rights discourse; Critical Race scholars, in turn, took the Critical Legal Studies scholars down a notch; and coming from a very different direction, early practitioners of Law and Economics uprooted traditional, muddied understandings of the common law, replacing them with clear-headed analysis of incentive effects and social welfare.

In The Death of Contract, Grant Gilmore depicts Arthur Linton Corbin as the hero of just such a story. Corbin was ‘a non-establishment revolutionary,’ who set out to overturn the classical theory of contract built by Christopher Columbus Langdell, Oliver Wendell Holmes and Samuel Williston. On Gilmore’s reading, Corbin belongs to the vanguard of Legal Realism, leading the charge against a doctrinaire, formalist and stultified approach to the law of contracts.

Gilmore’s story does not fit all that we know about Corbin. Although Jerome Frank and Karl Llewellyn included Corbin on their list of

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* Professor of Law, Georgetown University Law Center. This chapter benefitted enormously from the comments of other authors in this volume, and from conversations with William Twining and Guido Calabresi, each of whom shared recollections of encounters with Corbin.


Legal Realists. Corbin rejected the label, explaining in a letter to Llewellyn that ‘[t]here are too many self-styled “Realists” whose eyes were opened and yet saw nothing.’ Nor was the relationship between Williston and Corbin a battle between old guard and new. Corbin’s review of the first edition of Williston’s treatise, though not uncritical, lauded its breadth and attention to detail. Ten years later, Williston invited Corbin to work with him on the first Restatement of the Law of Contracts, producing a work that bears clear marks of each. At the time of Williston’s death, Corbin wrote that Williston was to him ‘above all an affectionate and lovable elder brother.’

The stories Corbin told about himself were of a different type. In them, the hero’s journey is not a fight against an earlier generation, but a personal path from a search for legal certainty to a clearheaded understanding of the law’s contingency, complexity and growth. It is the story that Benjamin Cardozo tells in a passage from his 1921 Storrs Lecture, which Corbin quotes several times in his writings.

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean upon which I had embarked. I sought for certainty, and I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found, with the voyagers of Browning’s Paracelsus that the real heaven was always beyond. As the years have gone by, and I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the

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3 Frank and Llewellyn listed Corbin ‘as figures of central stimulus in the new ferment.’ Karl L. Llewellyn, ‘Some Realism about Realism’ (1931) 44 Harv L Rev 1222, 1226 n 18.
5 Williston wrote of his work on the Restatement:
   My greatest indebtedness was to Arthur Corbin. His mastery of the law of contracts was only equalled [sic.] by his generosity in contributing his best efforts to a work that for the most part would pass under another’s name. He had moreover made a special study of terminology, and his keen eye for ambiguities and inexactness of expression saved me in many slippery places. His friendship and that of the Director [William Draper Lewis] and Professor Thompson remain major benefits to me of my work with the Institute. For a part of the Restatement of Contracts Arthur Corbin assumed the position of reporter and I acted as one of the advisers. Samuel Williston, Life and Law: An Autobiography (Little Brown 1940) 312.
process in its highest reaches is not discovery but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.  

This is the hero’s journey of Plato’s Allegory of the Cave. It is a journey from darkness into light, from illusion to truth.

Nor is it a journey that the hero takes alone. In *The Republic* the Allegory appears as ‘an image of our nature in its education and want of education.’ Similarly for Corbin, the task of both legal education and legal scholarship is not merely to transfer legal knowledge from teacher to student or author to reader, but to disabuse the reader or student of a false sense of certainty about the law and to enable them to see it instead as a contingent, evolving institution, one that builds on generalizations from past experience, but also must attend to the demands of a changing social world.

This Socratic approach accounts for what is so distinctive about *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law*. The work seeks not only to instruct the reader in the law of contract, but also on how to think about the law of contract and the common law more generally. Like any common law treatise, *Corbin on Contracts* synthesizes vast numbers of judicial decisions and stakes out and defends distinctive positions on doctrinal questions. But when read as a whole, the treatise provides not so much a unified theory of contract law—though there are hints of one—as it does a theory of common law adjudication and reasoning.

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7 Benjamin Cardozo, *The Nature of the Judicial Process* (Yale Univ Pr 1921) 166-67. One might wonder whether Cardozo lifted the metaphor from Corbin, who wrote in 1914.


II. Biography

Arthur Linton Corbin was born on a Kansas farm in 1874, as he observed, ‘only nine years after the death of Abraham Lincoln.’ He died in New Haven, Connecticut in 1967, the year of the Summer of Love and two years before Neil Armstrong stepped on the Moon.

Corbin’s grandmother immigrated from Connecticut to Kansas in 1857. The family was part of the Kansas free state, antislavery movement, and were friends with the abolitionist, John Brown. Corbin’s father, Myron, took part in actions led by Brown, then fought in the Civil War as a member of the 12th Kansas Infantry Regiment. After the war, Myron married Elizabeth Linton and worked the family farm in Linn County. Corbin’s parents were committed to education; Corbin’s mother taught in the county schools. When Corbin was fourteen, the family moved to Lawrence for the sake of the children’s education. According to Fredrich Kessler, Corbin said that he walked the 75-mile from Linn to Lawrence in bare feet.

Corbin received his undergraduate degree from the University of Kansas in 1894, taught high school in Kansas for three years, then in 1897 entered Yale Law School, graduating in two. Corbin had been encouraged to come to Yale by his sister, Alberta, who was a PhD candidate there. After receiving his law degree, Corbin spent four years practicing law in the small mining town of Cripple Creek, Colorado. In 1903 he returned to Yale Law as its first full-time faculty member. In that role Corbin was instrumental in transforming Yale from something like a trade school, in which most of the faculty were practicing attorneys, into an academic institution. Especially notable was Corbin’s role in the hiring of Wesley Newcomb Hohfeld and Walter Wheeler Cook as professors, and the appointment of Thomas Swan as Dean. Between 1923 and 1932, Corbin worked closely with Samuel Williston on the American Law Institute’s Restatement of the Law of Contracts. Although the project involved the work of a larger committee, Williston wrote that his greatest indebtedness in the project was to Corbin, and Corbin is listed as Reporter for the chapter on Remedies. Corbin remained a member of the Yale Law faculty until his compulsory retirement in 1943, at age 68. He published the first

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12 Corbin, ‘Sixty-Eight Years’ (n 10) 183-84.
13 Jerry (n 11) 758. Alberta later returned to Lawrence to teach German at the University of Kansas, where she eventually became the dean of women. There is a Corbin Hall on the campus named after her. Ibid.
14 Corbin, ‘Sixty-Eight Years’ (n 10) 185.
15 Ibid.
17 See n 5.
edition of *Corbin on Contracts* seven years later in 1950, the second edition in 1963, and continued to add substantive updates for several years after. Starting in 1959, Corbin involved himself informally in the drafting of the *Restatement (Second) of the Law of Contracts*, commenting in letters to the Reporter both on the project as a whole and on draft chapters. Corbin’s influence on the Second Restatement, however, lay more in his vast body of scholarship than in any suggestions he made in the process. Although Corbin left behind a large number of published works, the Yale Law Library has apparently lost his papers.

III. **Teaching**

Corbin’s scholarship grew out of his teaching. He did not engage directly with the major theorists of his day, and late in life wrote, ‘To me, Austin was merely a name,’ and ‘in my early teaching years I knew nothing of Roscoe Pound except that he talked of “sociological jurisprudence.”’ As William Twining has observed, Corbin’s theory of law emerged not from engagement with others’ theories, but from a felt need to address a practical problem: the gap between the ‘primitive and barely articulated assumptions of judges, practitioners, and laymen’ and the law’s actual operation, particularly in judicial decisions. Corbin sought to bridge that gap first as a teacher, and later in his scholarship.

When Corbin was a law student, he was taught using the so-called Yale System, which employed textbooks, recitations, and lectures, and which used cases only as illustrations. At the age of eighty five, Corbin described his legal education at Yales as traditional, rote and ‘not too arduous.’

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19 See Perillo (n 1). According to the Yale Law Journal’s bibliography of Corbin’s publications, Corbin sent to the American Law Institute a draft complete revision of the first Restatement at the beginning of the process. ‘Bibliography of the Published Writings of Arthur Linton Corbin’ (1964) 27 Yale LJ 311, 322-23. Corbin himself reported that he spent ‘the better part of eighteen months in making [a] one-man revision of practically the entire Restatement, including sections, commentary, and illustrations.’ Corbin, Sixty-Eight Years’ (n 10) 187. Corbin’s draft has apparently been lost. Perillo (n 1) 755.


23 Fredrick C. Hicks, *Yale Law School: 1869-1894* (Yale Univ Pr 1937) 34.
The reason . . . was that the teaching was chiefly by lecture and textbook. In each course a few specially selected case reports were added, but these were always chosen as illustrations of the ‘rules’ and principles that were handed out. These cases were always excellent and interesting, but we were never required to study and discuss a group of cases, to pass an immature judgment with respect to conflicting decisions or inharmonious reasoning. In the cases that we studied, the court’s decision was always ‘right.’ *Ipse dixit.*

In the same biographical reflection, Corbin did not celebrate his own accomplishments as a student. Although Robinson’s *Elementary Law* ‘was indeed pretty dull reading, . . . we were docile enough and lazy enough to be willing to be “told” the law.’ Corbin was equally self-effacing about his four years of practice in Cripple Creek. ‘Some of the pleadings I drew in my few civil cases plainly exhibited my lack of training in the analysis of the factual problems involved and in the construction and application of legal “rules” and principles. Fortunately, most of my legal opponents were equally incompetent.’ One might guess that these comments are the false modesty of a highly accomplished octogenarian. But reading Corbin broadly gives one the sense that his humility was also a midwestern habit of mind. In any case, Corbin clearly distinguished himself enough at Yale that, after four years of non-elite practice in a backwater mining town, he was invited to join the faculty.

Corbin reported that when he began teaching law, he found it impossible to implement the Yale System. ‘Mere verbally repeated “rules” created no excitement and aroused no interesting discussions.’ Nor, however, did he switch to the approach that Langdell had introduced at Harvard thirty years earlier, which required students to derive fundamental

\*Corbin, ‘Sixty-Eight Years’ (n 10) 184.

\*Ibid. Robinson’s book is a summary Blackstone’s *Commentaries.* The author explains his approach in the Preface:

> Regarding this treatise as a manual for the use of students, the author has adopted a style as didactic and concise as possible. Nearly every sentence is intended to be an answer to a question, and to embody some maxim, principle, or definition. Illustrations, as well as explanations, have generally been omitted, the student having access to such aids in the textbooks to which he is consistently referred. Conjectures, and expressions of private opinions, have also been scrupulously avoided, and the beaten track of authority has been followed, as nearly as the author could himself discern it.


\*Corbin, ‘Sixty-Eight Years’ (n 10) 185. Corbin was even more blunt in a letter to Llewellyn: ‘the pleadings I drew in four years of practice were a scandal and a crime.’ Letter from Arthur L. Corbin to Karl Llewellyn, 1 Dec. 1960, *quoted in* Twining (n 21) 28.

\*Corbin, ‘Sixty-Eight Years’ (n 10) 185.
legal principles from a highly curated collection of cases. Corbin instead asked his students to grapple with the facts, reasons and doctrines expressed in the cases, with the goal of disabusing them of a naïve sense of legal certainty. ‘The student] soon realizes the inadequacy of his basis for an independent judgment and the extent of the labor that looms before him. It is no wonder that after a few months the student is in a maze of uncertainty. In the process, the student and the instructor each ‘discovers that his own basis for an independent judgment is inadequate, that it is true that “no two cases are alike,” that the “rules” and “principles” laid down by judges and by the text writers are variable and conflicting, and . . . that the rules and principles are in a constant state of evolutionary change. In 1908, Corbin formally recommended that the Yale faculty abandon the Yale System and switch to the case method of teaching. By 1916 the method was widely used at the school.

Corbin’s critical approach in the classroom sought to turn his students into not skeptics, but pragmatic empiricists. He wrote to Karl Llewellyn that in the late 1920s he had to ‘fight for life as a law teacher’ when his students were falling under the sway of a group of young Realists at Yale, ‘all three telling these beginners that there is “no law,” only separate cases . . . and all three (however green behind the ears) telling it with explosive, atomic power.’ Throughout his career Corbin distanced himself from both the skeptical and the reductionist strains of Legal Realism, and especially the claim that judicial decisions were not guided by rules and principles. The point of Corbin’s critical pedagogy was instead to teach his students a modest empiricism:

Throughout my teaching career, my efforts were directed at inducing and compelling my students to acquire a background and a method of analysis that would enable them to form and to maintain opinions and generalizations of their own. The judicial opinions and the ‘great books’ of the past are an essential part of

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28 See Christopher Columbus Langdell, A Selection of Cases on the Law of Contracts (1871) viii (“Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.”).
29 Corbin, ‘Sixty-Eight Years’ (n 10) 185.
30 Ibid 186.
33 See Kessler (n 16) 519 (describing Corbin’s relationship to the Realists at Yale).
that background . . . are the base from which we take the next step forward.\textsuperscript{34}

Corbin sought to teach his students not only that the law was made not discovered, but also that legal rules are best understood as defeasible generalizations from past experience—working rules in a constantly evolving social practice.

Corbin’s most famous student was Karl Llewellyn. Llewellyn entered Yale Law School in 1915 and remained there during the First World War, unable to fight with the US forces due to his participation early in the war on the German side.\textsuperscript{35} The Yale Law student body was at the time about half its normal size, and Llewellyn stood out among his peers. Corbin later reported that he and Llewellyn ‘working hand-in-hand’ together wrote half the comments and case notes in the 1918-19 \textit{Yale Law Journal}, for which Llewellyn served as Editor in Chief.\textsuperscript{36} This was the beginning of a friendship that would last until Llewellyn’s death in 1962. Llewellyn and his wife Soia Mentschikoff both called Corbin ‘Dad,’ and Corbin signed letters to Llewellyn with the same.\textsuperscript{37} The friendship between Corbin and Llewellyn was built on a sympathy of ideas, and no intellectual biography of Llewellyn would be complete without a discussion of his relationship to Corbin.\textsuperscript{38}

In his farewell address to the Yale Law faculty, Corbin described law professors as ‘the midwives who start the infant lawyer and jurist on his way.’\textsuperscript{39} Corbin’s pedagogy was Socratic in the original sense of the term. In the \textit{Theaetetus}, Socrates elicits from his young interlocutor various definitions of ‘knowledge,’ only to find each inadequate—‘all of which our midwife’s skill pronounces to be mere wind eggs and not worth the rearing.’\textsuperscript{40} Socrates’s goal was not to turn his students into skeptics or Sophists. It was to instill in them a form of modesty, both with respect to

\begin{itemize}
  \item\textsuperscript{34} Arthur L. Corbin, ‘Principles of Law and their Evolution’ (1954) 64 Yale LJ 161, 162.
  \item\textsuperscript{35} Twining (n 21) 95, 535-43.
  \item\textsuperscript{36} Arthur L. Corbin, ‘A Tribute to Karly Llewellyn’ (1962) 71 Yale LJ 806, 806.
  \item\textsuperscript{37} See eg Letter from Arthur L. Corbin to Robert Braucher (Nov 2, 1959) in Perillo (n 1) 760, 764; Gerber (n 20) 629, 635.
  \item\textsuperscript{38} See Twining (n 21) 95-97.
  \item\textsuperscript{39} Arthur L. Corbin, ‘Farewell of Arthu r Corbin to the Yale Law School Faculty’ in Guido Calabresi, \textit{The Future of Law and Economics: Essays in Reform and Recollection} (2016) 173, 175. See Plato, \textit{Theaetetus} 150b-151d (in which Socrates compares his skills in teaching youth to that of a midwife). In the next sentence, Corbin describes law professors as ‘the gadflies that sting judges into better action.’ See Plato, \textit{Apology}, 30e-31a (in which Socrates compares himself to a gadfly on Athens).
  \item\textsuperscript{40} Plato, \textit{Theaetetus} in \textit{The Collected Dialogues of Plato} (F.M. Cornford tr, E. Hamilton & H. Cairns eds, Pantheon 1961) 210b.
\end{itemize}
their own knowledge and with respect to the nature and grounds of knowledge.

Then supposing you should ever henceforth try to conceive afresh, Theaetetus, if you succeed, your embryo thoughts will be the better as a consequences of today’s scrutiny, and if you remain barren, you will be gentler and more agreeable to your companions, having the good sense not to fancy you know what you do not know.

I know of no evidence that Corbin read Plato deeply. But his farewell reference to Socratic midwifery nicely captures his own pedagogy. One finds a parallel approach in Corbin on Contracts.

IV. Conceptual Analysis

If Corbin was sometimes mistaken for a Legal Realist, it is perhaps because he was a modernist: an early twentieth-century thinker who did not feel bound by traditional modes of legal argument and analysis, and who sought for a new, clear-eyed approach to the law. The first step in that approach was to diagnose various forms of confusion embedded in legal language, and to develop a new, more transparent vocabulary. Corbin was in this respect in step with his time. Starting at the beginning of the twentieth century, Anglo-American philosophy took what Richard Rorty described as a ‘linguistic turn,’ premised on ‘the view that philosophical problems are problems which may be solved (or dissolved) either by reforming language, or by understanding more about the language we presently use.’ The goal was to escape the intellectual traps that our everyday language lays for us, or as Wittgenstein put it, to show the fly the way out of the fly bottle. In US legal scholarship, Felix S. Cohen described the approach in his 1935 ‘Transcendental Nonsense and the Functional Approach.’ Invoking Frege, Russell, Wittgenstein and other early analytic philosophers, as well as the American Pragmatists, Cohen argued that legal reasoning is too often misled by the ‘vivid fictions and metaphors of traditional jurisprudence,’ whereas it should be attending to ‘the social forces which mold the law and the social ideals by which the law is judged.’

Although Cohen provided one of the most vivid descriptions of the new analytic approach, the founding document appeared some twenty-two

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years earlier: Wesley Newcomb Hohfeld’s 1913 ‘Some Fundamental Legal Conceptions as Applied to Judicial Reasoning’. Hohfeld’s analytic schemas were not novel; he drew from a range of earlier theorists. But his concise analysis of abstract legal concepts appeared at the right time and place, and his conceptual schema was widely used and discussed in early twentieth-century U.S. legal scholarship.

Corbin was an important early champion of Hohfeld and his system. It was Corbin who recommended ‘Fundamental Legal Conceptions’ for publication in the Yale Law Journal, and it was Corbin who facilitated bringing Hohfeld to Yale Law faculty. In 1919, a year after Hohfeld’s death from the Spanish flu, Corbin published a short summary of Hohfeld’s system for students, and he reprinted Hohfeld’s table of jural relations in the introduction in his 1919 edition of Aniston. The next year, in an address to the annual meeting of the American Association of Law Schools, Corbin provided something like a deduction of Hohfeld’s jural relations, together with a detailed defense against critics. Corbin reported later in life that Williston asked him to assist him on the Restatement project because Williston wanted to ensure that the work would be consistent with Hohfeld’s analysis.

Hohfeld’s system is purely analytic. It aims to identify basic legal concepts, to use them to diagnose conceptual confusions, and to develop a technical vocabulary that avoids such confusions going forward. The goal is to clear the ground for substantive legal argument, not to provide the materials for it. As Corbin put the point: ‘It solves no problem or social or juristic policy, but it does much to define and clarify the issue that is in dispute and thus enables the mind to concentrate on the interests and policies that are involved, and increases the probability of sound conclusion.’ Although Corbin’s attraction to conceptual analysis predated his first encounter with Hohfeld, Hohfeld’s work provided him a new

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44 Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16.
49 Corbin, ‘Forward’ (n 45) xii.
50 Ibid xi.
51 In the same year Hohfeld published ‘Fundamental Legal Conceptions,’ Corbin published Arthur L. Corbin, ‘Discharge of Contracts’ (1913) 22 Yale LJ 513. This short article maps the logical space created by two distinctions: Thomas Holland’s differentiation of primary from secondary obligations, Thomas Erskine Holland, The Elements of Jurisprudence (10th ed, OUP 1906) 141-42, and the analytic difference.
powerful toolkit. Throughout his writings, Corbin deploys Hohfeld’s categories to identify conceptual confusion and clarify legal questions. Two examples illustrate: Corbin’s definition of ‘contract’ and Corbin’s approach to the consideration doctrine.

In his 1910 article, ‘Waiver of Tort and Suit in Assumpsit,’ Corbin advances a fairly standard definition of ‘contract’: ‘The great distinctive feature of these transactions is the agreement of the parties, the mutual assent, the meeting of the minds. This agreement is the origin of the obligation attached by the law and called contractual.’ Only seven years later, and four years after Hohfeld published ‘Fundamental Legal Conceptions,’ one finds Corbin rejecting substantive definitions of this type. In ‘Offer and Acceptance, and Some of the Resulting Legal Relations’ (a Hohfeldian title if there ever was one), Corbin instead distinguishes various meanings that, depending on context, ‘contract’ might have.

The term contract has been used without much discrimination to refer to three different things: (1) the series of operative acts of the parties expressing their assent and resulting in new legal relations; (2) the physical document executed by the parties as an operative fact in itself and as the lasting evidence of their having performed the necessary operative acts; (3) the relations resulting from the operative acts, consisting of a right or right in personam and the corresponding duties, accompanied by certain powers, privileges and immunities.

There are two things to note about this passage, which reappears only slightly modified in Corbin on Contracts. First, the analysis is pure Hohfeld. The list of jural relations under the third meaning of ‘contract’—legal rights, duties, powers, privileges, immunities—is drawn directly from the most famous section of ‘Fundamental Legal Relations.’ To understand contract law, one must attend not only to duty to perform, but to the full range of jural relations that pertain to contractual relationships—from the power to make an offer to a party’s immunity against modifications without

between conditions precedent and conditions subsequent—between conditions on the existence of an obligation and obligations that are conditional in structure. Corbin’s article appeared in May 1913, Hohfeld’s in November.


Corbin on Contracts, vol 1 (n 9) § 3, 5-6.
consent to the secondary duty to pay damages after breach. Corbin’s distinction between the first and third meanings of ‘contract’ is equally Hohfeldian, reprising the latter’s distinction between operative acts and the legal relations to which they give rise. 55 Hohfeld: ‘One moment [“contract”] may mean the agreement of the parties; and then, with a rapid and unexpected shift, the writer or speaker may use the term to indicate the contractual obligation created by law as a result of the agreement. 56

Finally, Corbin’s description of contractual writings, the second meaning of ‘contract,’ incorporates Hohfeld’s distinction between operative facts, which by themselves suffice to effect a legal change, and evidential facts, which are legally relevant only insofar as they are evidence of other facts, operative or evidential. 57

The second thing to note about the definitions Corbin lists is that they are, like Hohfeld’s categories, purely analytic. Corbin’s multipart definition does not describe the acts that give rise to contracts, the types of writings that memorialize those acts, or the jural relations they give rise to. Instead it identifies the logical structure of any contractual transaction: operative acts by the parties, sometimes including a writing, that produce a change in their jural relations.

In his treatise, Corbin observes that courts and scholars commonly provide more substantive definitions of ‘contract.’ Williston and the First Restatement define ‘contract’ as a promise or a set of promises whose breach gives rise to a legal remedy; 58 Anson defines ‘contract’ as a legally enforceable agreement (the definition Corbin had once advocated); 59 and the Uniform Commercial Code defines ‘contract’ as the total obligations which result from such an agreement. 60 Corbin identifies two problems with such substantive definitions. First, they are incomplete. Each names an operative fact—promise or agreement—that itself requires definition and further description. Second and more seriously, substantive definitions tend to import an ‘inarticulate major premise’ as to which acts should suffice to

55 Hohfeld (n 44) 20-25.
56 Ibid 25.
57 Ibid 25-28. Hohfeld attributes his distinction between operative and evidential facts to Thayer. Ibid 25 n 393 (quoting James Bradley Thayer, A Preliminary Treatise on Evidence (Little Brown 1898) 393). In fact, Hohfeld’s conception of operative facts is broader than Thayer’s, which derives from Heinrich Brunner’s distinction between carta and notitia. Heinrich Brunner, ‘Carta und Notitia: ein Beitrag zur Rechtsgeschichte der germanschen Urkunde’ (1877) in Karl Rauch (ed), Abhandlung zur Rechtsgeschichte: gesammeltes Aufsätze von Heinrich Brunner (Herman Böhlau Nachfolger 1931) 458. Brunner and Thayer apply the distinction only to juristic acts, i.e., exercises of a legal power. Hohfeld appears to apply it to any act with a legal effect, such as the commission of an assault. Hohfeld (n 44) 26.
59 Anson (n. 52) 2.
60 Restatement of Contracts (n 18) § 1.
generate a contractual obligation. There is, however, no reason to expect the rules governing formation to be so simple that they can be captured in a single definition. ‘To determine whether a “contract” has been made and what are the resulting legal relations is a matter for the entire treatise, not for an introductory chapter. Instead of simplicity and uniformity, we shall find complexity and variation.’ Substantive definitions might at times be necessary to clarify how one is using a word. But they should never be understood as more than ‘working definitions,’ to be revised as needed and discarded when they cease to capture the rule. And at the outset, it is preferable to define ‘contract’ in terms of its structural features—voluntary acts effecting a change in the actors’ jural relations to one another—rather than by the nature of those acts or the substance of the relations.

One encounters the same analytic approach in Corbin’s discussions of consideration. In his 1920 review of Williston’s treatise, Corbin praises Williston’s treatment of the doctrine. Williston does not posit a single definition of ‘consideration,’ but canvasses the history of the doctrine, proposes two separate definitions, one for unilateral contracts and one for bilateral contracts, then discusses a number of exceptional cases, such as agreements under seal, promissory estoppel, promises by a discharged bankrupt, and a promise to pay a debt barred by the statute of limitations. Corbin considers this treatment admirable in that ‘it shows clearly that in fact the courts enforce many promises for which there was no agreed equivalent given in exchange.’ He draws, however, a distinctly non-Willistonian conclusion:

The complexity of the result and the many admissions that conflict exists and that certain very large classes of cases must be regarded as ‘exceptional’ indicate that in many twilight zones the court must trust to instinct rather than to definition or ‘theory’ or ‘established principle.’ The effect of this is that the doctrine of consideration (or

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61 Corbin on Contracts, vol 1 (n 9) § 3, 7.
62 Ibid. Interestingly, Williston makes a parallel point in the first edition of his treatise. After defining ‘contract’ as a promise or set of promises to which the law attaches legal obligation, he writes:

This definition may seem somewhat unsatisfactory since it is necessary subsequently to define the circumstances under which the law does in fact attach legal obligation to promises, but in order to make a definition which should state these circumstances it would be necessary to compress the whole law of formation of contracts into a sentence, which is impossible.

Williston, Law of Contracts, vol 1 (n 58) § 1, 1. One might say that Corbin’s definition merely goes to the next level of abstraction.
its manifold substitutes) approaches the similarly nebulous doctrine of causa in the Roman Law. 65

In the end, Williston’s sensitivity to the diversity of situations and holdings within the caselaw undermines his own attempt to provide simple substantive definitions of ‘consideration.’

The chapter on consideration in Corbin on Contracts opens not with a definition, but with a question: Is a definition of ‘consideration’ practicable.66 Corbin answers it by telling of his own journey through caselaw. Reading through recent judicial opinions has left him assured that the reasons for enforcing informal promises are many, that the doctrine of consideration is many doctrines, that no definition can rightly be set up as the one and only correct definition, and that the law of contract is an evolutionary product that has changed with the time and circumstances and that must ever consider to so change.67

The only fixed, generic definition one can give of ‘consideration’ is therefore empty and analytic. ‘[W]hen the statement is made that no informal promise is to be enforceable if it is without consideration, it must be understood as a statement that no informal promise is enforceable unless it is accompanied by one of those factors that have been held, more or less generally, to be sufficient to make a promise enforceable.’68 ‘Consideration,’ for Corbin, refers to whatever reasons the law recognizes for enforcing an informal promise or agreement. Such a definition is pure tautology. But this is how it should be. Substantive definitions risk producing legal arguments that avoid the issue.

This is not to say that substantive definitions of legal terms are always wrongheaded. Definition is not destiny, as Williston’s multi-layered discussion of the consideration doctrine illustrates. Corbin does not therefore fault Williston for adopting a substantive definition. ‘Having made a choice and warned his readers thereof, with his reasons, he can be further required only to be consistent.’69 But Williston’s attachment to first principles tends to lead his own analysis astray. Substantive definitions are problematic when one seeks in them answers to hard legal questions.

Corbin finds an example in Williston’s early treatment of an offeror’s power to revoke. The issue is a familiar one: when an offeree can accept by performance only, empowering the offeror to revoke right up to the completion of performance—right up to the moment acceptance

65 Ibid.
66 Corbin on Contracts, vol 1 (n 9) § 109.
67 Ibid § 109, 489.
68 Ibid § 110, 492.
69 Corbin, Review (n 64) 493 (discussing Williston’s definition of ‘contract’).
happens—risks unfairness. The offeree might accomplish almost everything requested, and then due to a revocation receive nothing return. Williston admits the ‘obvious injustice’ of such an outcome, but argues that the consideration requirement demands it. ‘[A]ny other result involves either a violation of recognized principles of contract, or the invention of new ones,’ for the offeror cannot be ‘bound by a promise for which he has not received, and may never receive, the consideration requested.’

In his 1920 review, Corbin provides a two responses. First, Corbin deploys Hohfeld’s categories to diagnose a confusion in the argument. The offeror who cannot revoke his offer is not yet under a duty. Irrevocability is not a duty but a disability: the offeror does not have the power to extinguish the offeree’s power of acceptance. The duty to perform comes into existence only if and when the offer is accepted. If consideration is the sina qua non of contractual duties, a rule that the beginning of acceptance by performance renders the offer irrevocable does not violate the consideration doctrine.

But proper classification does not of itself resolve the question. Corbin’s second response is that the existing doctrine of consideration is not a straightjacket. If irrevocability upon the beginning of an acceptance by performance requires the invention of new principles, courts should invent them. ‘The history of the law consists chiefly in the destruction and modification of old theory by new practice.’ Here Corbin was prescient. Section 45 the first Restatement provides that the beginning of acceptance by performance binds the offeror to perform conditional on completion of performance. The comments identify two independent grounds: part performance provides sufficient consideration for a subsidiary, implied promise not to revoke, and the offeree’s justifiable reliance can suffice to make the offer binding.

For Corbin, substantive definitions of legal terms should be treated always as ‘working definitions,’ and statements of legal rules as ‘working rules,’ subject to revision and possible rejection based on new evidence, experience and examples. This explains why Corbin could sign on to the first Restatement’s treatment of the consideration doctrine. The Restatement provides a simple, substantive definition of ‘consideration,’ but then goes on to identify a long list of exceptions to the consideration requirement.

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70 Williston, Law of Contracts, vol 1 (n 58) § 60, 100.
72 Corbin, Review (n 64) 944.
73 Ibid.
74 Restatement of Contracts (n 18) § 45.
75 Ibid cmt b.
76 Ibid §§ 19 & 75.
Whether one defines ‘consideration’ narrowly and then allows exceptions to the requirement, or broadly as anything facts that support legal enforcement, they key is to remain open to the many grounds for enforcement at work in contract law.\textsuperscript{78}

V. Theory of the Common Law

If analytic clarity is for Corbin the path out of the Cave, it is not the end of the journey. ‘Rules of law are not constructed by mere analysis and mere logic.’\textsuperscript{79} Conceptual analysis tells us neither what the law is nor what it should be. The Legal Realists who addressed those questions tended either to fall into rule skepticism, typified in the quip that a judge’s decision can often be explained by what they ate for breakfast,\textsuperscript{80} or to fall back on one or another of the emergent social sciences.\textsuperscript{81} Corbin, in distinction, seeks to reconstruct and defend a distinctive form of common law judicial reasoning, one that both recognizes the law’s contingency and affirms its rational basis.

Having thus been freed from illusion and delusion, the study must be continued until it demonstrates that useful working rules and definitions can be found and stated; that such rules and definitions, if well constructed, are useful guides to justice even though they are not absolute and eternal.\textsuperscript{82}

In Corbin’s farewell letter to the Yale Law Faculty, written when he was still in the middle of writing the first edition of his treatise, Corbin defends the modesty of this approach.

I believe that there is greater hope, of human welfare and happiness, if we are conscious of our limitations, if we abandon the quest for absolutes, if we confess that justice is wholly relative and human, and if we erect our temple of peace upon a foundation, made as stable as we can by a neat balancing of interests,

\textsuperscript{78} Corbin makes essentially this point in Corbin on Contracts, vol 1 (n 9) § 116, 504.

\textsuperscript{79} Corbin, ‘Jural Relations and Their Classification’ (n 48) 237.


\textsuperscript{81} See Neil Duxbury, Patterns of American Jurisprudence (OUP 1995) 79-97; Twining (n 21) 41-55, 60-67.

\textsuperscript{82} Corbin on Contracts, vol 1 (n 9) § 109, 489 (discussing the definition of ‘consideration’).
determined by as careful and complete a study of human experience as possible.\footnote{Corbin, ‘Farewell’ (n 39) 174-75. Calabresi suggests without explanation that the letter was written in 1941, \textit{ibid} 10, though Corbin retired from the Yale Law Faculty in 1943.}

The core idea reappears in the subtitle Corbin chose for his magnum opus: \textit{A Comprehensive Treatise on the Working Rules of Contract Law}.

Corbin’s theory of the common law can be restated in five interlocking claims: the work of the common law judge is empirical; sound judicial judgment draws from multiple sources; the law should, and generally does, reflect existing social values or mores; because social structures and mores change over time, the law too must evolve; consequently, legal rules and principles should be understood to be ‘working rules,’ subject to revision and even wholesale rejection should the need arise.

For Corbin, common law judicial reasoning is not deduction from facts and rules to case outcomes. Precedent and principle do not sufficiently constrain judicial decision-making for that to be so. ‘[H]owever “well-settled” the rules may be, their application to life is always uncertain. . . . In all cases the judge must construct his own major premise.’\footnote{Corbin, ‘The Law and The Judges’ (n 7) 239.} The judicial process requires instead a form of inductive reasoning, one that begins with the facts and decisions of past cases and ends with a judgment as to the best resolution of the case at bar. In 1954, Corbin told a story about a lunch he had around 1920 with some of the young Legal Realists on the Yale faculty. When they posed the question, ‘Do you think there is such a thing as a legal principle?’, Corbin allowed that legal principles are not things ‘handed down from on high,’ but maintained that there are useful generalizations based on long human experience; that although no two cases are ever exactly alike, there are groups of cases that have much in common; that by careful and imaginative analysis and comparison of these cases it is possible to construct general rules, doctrines, principles, which are of great value in directing and predicting future human and judicial action in similar cases.\footnote{Corbin, ‘Principles of Law’ (n 34) 162.}

The idea of ‘imaginative analysis’ is key. Judicial empiricism, for Corbin, is not mere scientific induction. It does not count past factual scenarios, \textit{ratios decidendi} and case outcomes so as to project a rule into the future.\footnote{The above sentence describes one of the approaches taken by the Reporters for the American Law Institute’s draft Restatement of the Law of Consumer Contracts. See Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, ‘Searching for
instead the imaginative projection of a proposed ruling onto past facts and decisions, as well as future cases, as a means of testing ruling and the rule in a wide range of instances against the balance of reasons and the judgments of oneself and others.

To say that judging is an inductive process using imaginative projection is not yet to provide an account of how judges do or should decide cases or establish rules. It is here that one finds Corbin’s pluralism. The sources of individual judicial decisions are, and should be, manifold.

The rules come from all possible sources—from constitutions and statutes; from the decisions of other judges; from legal writers, ancient and modern, in this and in other countries; from books of religion and morality; from the general principles of right and wrong in which the judge was trained from his youth up; from the rules of action customarily followed in the community, lately referred to by Lord Chancellor Haldane as Sittlichkeit; from the judge’s own practice and interest and desire. The judge, if honest, lays down either a rule that has been approved or acquiesced in by the community in the past, or a rule to which he believes the community will in the future give approval and acquiescence.\(^87\)

Pluralism of this type entails a high degree judicial discretion. No matter how much a judge claims that the law compels the result in a case, in fact the judge always has a choice in both outcome and result. If established legal rules are manipulable and the sources of judicial judgment are multiple, then there is no one correct outcome to the novel case.

The check on judicial decisions, for Corbin, lies not in the existing law or the principles that organize it, but in the broader community’s sense of justice. Although though the individual judicial decision has multiple sources, one among them provides the ultimate criterion of correctness: Sittlichkeit, or social mores. Here one sees the influence of the Yale sociologist William Graham Sumner and Sumner’s student Albert Galloway Keller on Corbin’s thinking.\(^88\) And although Corbin reported he was

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87 Corbin, ‘The Law and The Judges’ (n 7) 240.
88 A former student recalled that Corbin made frequent reference in his Contracts course to Sumner’s Folkways, which ‘served as a constant reminder that the law is a part of changing civilization and that the history of law is the history of man and society.’ Douglas Arant, ‘Professor Arthur L. Corbin’ (1964) 74 Yale L J 212, 214. See William Graham Sumner, Folkways, A Study Of The Sociological Importance Of Usages, Manners, Customs, Mores And Morals (1907). And whereas several scholars have traced Karl Llewellyn’s sociological jurisprudence to German sources, Corbin attributed it in part to the influence during Llewellyn’s
Arthur Linton Corbin

unfamiliar with Roscoe Pound’s work when he began teaching, one also hears echoes of Pound’s 1907 call for a sociological jurisprudence: ‘In all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end. Sooner or later what public opinion demands will be recognized and enforced by the courts.’ Like Pound, Corbin posits that correspondence between law and social mores is both desirable and inevitable. The law should be an expression of community values, and a legal rule that offends community values will not endure. If the judge ‘constructs and applies rule that is in conflict with the interests and desires and customs of the many, . . . [t]he man-mountain will quake, and the house of logic that the judge built will come tumbling about his ears.’

As the conditions of social life and social values change over time, the law therefore should and will evolve with them. Here the common law’s particularistic approach is of special value. Legal reform should not be outsourced to economists, sociologists, moral philosophers or other high theorists. ‘Ardent reformers and confident legislators often believe that they are wise enough to generalize for the future; but experience indicates that the best way to turn mores into law is to do it piecemeal by the “molecular motion” of the courts.’ The driving force behind progress in the law is not theory or sweeping legislative change, but the hard case: the case in which the existing legal rule is out of step with the community’s sense of justice. ‘When a stated rule of law works injustice in a particular case; that is, would determine it contrary to the “settled conventions of the community,” the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction.’ As in natural evolution, the common law achieves progress not by design, but by a process of variation and selection.

Consequently, the law is at all times a mix of both the old and the new. ‘There will always be two large fields of legal uncertainty—the field of the obsolete and the dying, and the field of the new born and growing.’ Here we return to Corbin’s insistence that legal rules be understood always as mere working rules. ‘Those of lesser wisdom and more self-conceit will


89 See n 21.


91 Corbin, ‘The Law and The Judges’ (n 7) 250.


94 Corbin, ‘The Law and The Judges’ (n 7) 243.
state their doctrines as absolutes and eternal. A law that is composed of tentative, working rules is indeed a human law; but it is also a natural law—it is as “natural” as rain, as “natural” as birth and death.\textsuperscript{95}

This understanding of the common law accounts for Corbin’s early enthusiasm for the American Law Institute’s Restatement project. The Restatements for Corbin were not attempts to identify the fundamental principles of contract law, which would involve a return to a formalism, a refusal to admit the variety and contingency of legal rules. They were empirical undertakings. In 1929, while the committee was still working on the Restatement of the Law of Contracts, Corbin described the Restatements project:

\begin{quote}
The work of the Institute is an attempt to state anew what the practices and customs of this great and seething community now are, as they are evidenced by innumerable instances of judicial action at the pin-points of strain and conflict. It is an attempt to demonstrate and to state in words the uniformities (the rules) that are to be found in those innumerable instances and to make a selection and a recommendation from among competing rules and practices. It is an attempt to analyze and classify and define, at a time when such reorganization work appears to be loudly demanded, and thus supply a guiding hand to those who may desire guidance in directing the strong arm of the state.\textsuperscript{96}
\end{quote}

The great advantage of the Restatement form lay in the fact that it was not binding on courts. A civil code represents the final statement of an authoritative body, freezing the law in place and inviting textual analysis and argument from definition. Civil codes reify and stultify. Because a Restatement is not binding, it should not ‘become the basis of extended commentaries or the subject of textual interpretation.’\textsuperscript{97} Nor should it ‘operate to limit the development of the law in accordance with changing conditions, practices, and mores.’\textsuperscript{98} Rather than a statement of fundamental legal principles or rules, a properly formed Restatement contains a concise depiction of the working rules at one stage of the law’s evolution, thereby providing legal practitioners the materials they need for those rules’ refinement, modification and even possible rejection.

The major elements of Corbin’s theory of the common law appear as early as his 1914 essay, ‘The Law and the Judges.’ Fifty years later, the 1964 Pocket Supplement to Corbin on Contracts summarized and reaffirmed the same vision.

\textsuperscript{95} Corbin, ‘Principles of Law’ (n 34) 163.
\textsuperscript{96} Corbin, ‘The Restatement of the Common Law’ (n 96) 38.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid.
A study of the appellate court decisions can never decrease in value or interest, for the reason that they constitute the living evidence of the continuing evolutionary process of our judicial system, both in the statement of its ‘working rules,’ and as to its success or failure in the administration of ‘justice.’ Such a study necessarily demonstrates the possibility of constructing reasonably definite ‘working rules’ to serve as guides to the lawyer in giving advice to his client and to the courts in reaching and justifying a decision. These rules can never be absolute and eternal; as ‘guides’ they cannot be infallible; but if well constructed they can be useful. At the same time confusion and injustice are the sure result of the uncritical repetition of verbal formulas handed down from the past. A worded rule is of little value apart from the facts to which it is applied; and the very existence of a ‘rule’ depends upon the sum-total of its applications. With the expansion of population, the changes in social, economic and physical conditions, and the variations in the prevailing notions of men as to justice and morality (the mores of the time), all ‘rules of law,’ constitutional, statutory and judge-made, must likewise change. Certainty is an illusion, and the illusion of certainty is the mother of injustice and turmoil.

Corbin was not a philosopher. From his earliest writings to the last, he does not make the case for the above theory of the common law so much as pronounce it. And the theory is open to obvious criticisms. Although Corbin acknowledges that individual judges often issue rulings based on confusion or corruption, he assumes that the great judge has access both to the wisdom embodied in past decisions and to the community’s present sense of justice. And he largely ignores the role of wealth, class, race and politics in determining who gets on the bench, which arguments make it into court, and which legal rules are likely to survive. It is not that Corbin neglects such factors entirely. The Preface to Corbin on Contracts allows that ‘[it] cannot be said that the law operates uniformly with respect to the promises of the rich and the poor, the employer and the employee,’ But mostly Corbin draws his picture of the common law cathedral from within. As arguably befits a treatise author, Corbin takes the perspective of a cautious believer. Although he was happy to knock down false idols, Corbin had no desire to tear down the church.

VI. Reasonable Expectations and Contract Interpretation

Corbin’s regular reflections on judicial practice, the nature of the common law, and the relation of law to society are among the most

99 Quoted in Corbin, Sixty-Eight Years’ (n 10) 188.
100 Corbin on Contracts, vol 1 (n 9) § 2 at 3.
distinctive features of *Corbin on Contracts*. In the Preface to the first edition, Corbin acknowledges and explains his penchant for theorizing.

A general treatise on some one special branch of law, even though that branch is as broad and inclusive as the law of contracts, may be thought not to be the place for a discussion of general theories of jurisprudence. But one who prepares a treatise on any branch of the law cannot avoid applying theories of jurisprudence.\(^{101}\)

That said, it would be negligent in a chapter devoted to Corbin not to pay a bit more attention to what he had to say about the law of contracts. This section discusses two aspects of Corbin’s approach to contract law: his quiet attachment to a reliance theory contract and his account of contract interpretation.

Fourteen years before Lon Fuller’s 1931 ‘The Reliance Interest in Contract Damages,’\(^ {102}\) in an explanation of the objective approach to contract interpretation, one finds Corbin asserting that the goal of contract law is not to realize the probable intentions of the parties, but ‘to secure the fulfilment of the promisee’s reasonable expectations as induced by the promisor’s act.’\(^ {103}\) Despite Corbin’s aversion to high theory, *Corbin on Contracts* opens with an affirmation of the same thesis.

That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.\(^ {104}\)

It is this reasonable expectations thesis that Gilmore emphasizes in *The Death of Contract*, arguing that Corbin was responsible for section 90 of the first Restatement (recognizing promissory estoppel), thereby planting the seed of reliance-based liability that would grow to destroy the exchange theory of Holmes, Langdell and Williston. Although the story Gilmore tells does not square with the evidence, it is notable that Corbin chose to open his treatise with this broad assertion as to the underlying purpose of contract law.

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\(^{103}\) Corbin, ‘Offer and Acceptance’ (n 53) 205.

\(^{104}\) *Corbin on Contracts*, vol 1 (n 9) § 1, 2.
Corbin does not treat the reasonable expectation thesis as a first principle from which to deduce legal rules. Perhaps the most charitable reading of it, given Corbin's methodological commitments, is as an empirical generalization, based on his reading of a vast number of judicial decisions (although one finds him articulating the thesis as early as 1917). But the thesis does play a substantive role in *Corbin on Contracts*, occasionally clearly nudging the analysis in a particular direction. It shows up, for example, in Corbin’s argument that consideration does not serve as evidence of the parties’ intent to be bound, but is ‘evidence that the expectation of performance was reasonable and that refusal to enforce would not satisfy the community.’[^105] And Corbin devotes an entire chapter to ‘Reliance on a Promise as Ground for Enforcement.’[^106] The thesis also plays a central role in Corbin’s highly influential account of contract interpretation.

Corbin’s understanding of interpretation bears the mark of Hohfeld. To interpret the meaning of parties’ words and actions is to determine the character of an operative act, an act that effects a legal change. Interpretation does not specify the act’s legal effects: the resulting change in the parties’ legal duties and other jurial relations. For that we require a separate rule. Corbin translates this Hohfeldian point into Francis Lieber’s distinction between interpretation and construction. As Corbin expressed the distinction:

> By ‘interpretation of language’ we determine what ideas that language induces in other persons. By ‘construction of the contract,’ as the term will be used here, we determine its legal operation—its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties.^[107]

Interpretation, whether done by a judge or a jury, is on this understanding a purely factual inquiry, one that precedes and provides the materials for

[^105]: *Corbin on Contracts*, vol 3 (n 9) § 534, 498.
[^106]: Chapter 8: ‘Reliance on a Promise as Grounds for Enforcement,’ *ibid*, vol 1A §§ 193-209, 187-271.
determining of the parties’ legal relations according to one or more rules of construction.\textsuperscript{108}

Corbin’s account of the nature of contract interpretation is shaped by two further claims. The first concerns the nature of meaning and its relation to context, and can be found in one of the best known passages in \textit{Corbin on Contracts}.

\textit{Corbin on Contracts}, vol 3 (n 9) § 554, 219. The same idea can be found in Corbin’s discussion of offers: ‘There are two kinds of questions that are presented to the courts for their solution. First. What were the facts that occurred or existed? This question must be answered by making a historical investigation, by receiving oral testimony and other evidence, and drawing inferences therefrom. Secondly. What is the legal operation and effect of the facts that are found to have existed.’ \textit{Ibid}, vol 1 § 11, 24.


Still, this is the conception of meaning Corbin advances. And it has two important implications for his theory of interpretation. First, context always matters. ‘No language, however, fully and carefully “integrated,” applies itself to the persons and objects and performances involved.’

Because the ideas a speech act induces always depend in part on the context, one cannot identify meaning (in Corbin’s sense) without considering the circumstances of use. Second, the same words might induce different ideas in separate occasions of their use, and might induce different ideas in separate individuals on a single occasion of their use. Consequently, words and speech acts commonly have multiple meanings, any of which can legitimately be said to be their meaning.

Because a single speech act can have different meanings for different persons, we need a rule to determine which meaning governs. ‘In every case of interpretation, even though the contract is “integrated,” the first question is: Whose meaning and understanding is it to which it is the purpose of the law to give legal effect.’

Unlike interpretation, this is a legal question. If interpretation identifies the various meanings a speech act has, we need a rule of construction to specify which of those meanings is legally operative.

It is here that the reasonable expectation thesis makes an overt appearance, marking the second pivotal moment. In the case of a will or a sealed document on which no one has yet relied, it is the testator’s or promisor’s meaning that governs. But that is not the rule of construction for contractual agreements. When the parties to an agreement attach different meanings to the words one or both use, one reasonable and the other unreasonable, it is the reasonable meaning that governs. Corbin finds the explanation for this rule in reasonable expectations thesis.

The foregoing result is reached because, as our system of contract law has grown, one of its chief purposes is to secure the realization of expectations reasonably induced by the expressions of agreement, when this can be done without running counter to other expectations and understandings that were also reasonably induced.

In short, the objective theory of interpretation, for Corbin, flows from the reasonable expectation thesis. If A and B attach different meanings to their agreement, A’s unreasonable and B’s reasonable, B’s must govern.

It is not the meaning that A gave; or the meaning that a normal user of English would have given; or the meaning that the court may hastily think is ‘plain and clear.’ . . . [All these] are merely steps in

111 Corbin on Contracts, vol 3 (n 9) § 538, 70.
112 Ibid § 537, 41.
113 Ibid § 537, 45.
the evidential search for B’s meaning and A’s reason to know it; no one of them is the one that must prevail.\textsuperscript{114}

Because the goal of contract law is to protect parties’ reasonable expectations, the only meanings that matter are the ones that one or both parties actually attached to their agreement.

Corbin maintains that the above holds true without regard to whether the words at issue appear in an integrated writing. If the legally salient meaning of words the ideas they induce in one or both parties, and if those ideas always depend on context, then context is always relevant to interpreting a writing. Williston had argued that when parties agree to an integrated writing, they typically agree to be bound by the words’ plain meaning, without regard to whether that meaning corresponds to their individual understandings.\textsuperscript{115} Corbin rejects this account of integration. ‘It is true that in such cases, the parties are found to have assented to the written words as the definitive operative expression of their minds. This is an assent to those words, not to any particular meaning of them.’\textsuperscript{116} Here again Corbin recurs to principle: ‘A court exists for the purpose of doing justice to the parties before it, and should not be misled into doing something else by some third person’s definition of a word even though the contracting parties both assented to a writing containing it.’\textsuperscript{117}

Corbin’s influence on the \textit{Second Restatement} sections on contract interpretation is unmistakable. Section 202 provides as the first rule in aid of interpretation that ‘[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.’\textsuperscript{118} The comments to sections 201 and 202 read as though they had been lifted directly from \textit{Corbin on Contracts}. ‘Words are used as conventional symbols of mental states.’\textsuperscript{119} ‘[T]he context of words and other conduct is seldom exactly the same for two different people.’\textsuperscript{120} ‘The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding.’\textsuperscript{121} ‘The meaning of words and other symbols commonly depends on their context.’\textsuperscript{122} And whereas the first \textit{Restatement} suggested a separate rule for the interpretation of integrated writings, the \textit{Second Restatement} advocates a unified

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\textsuperscript{114}Ibid \textsection 537, 49.
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\textsuperscript{115}Williston, \textit{Law of Contracts}, vol 2 (n 58) \textsection 607, 1167.
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\textsuperscript{116}\textit{Corbin on Contracts}, vol 3 (n 9) \textsection 539, 77.
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\textsuperscript{117}Ibid \textsection 539, 80.
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\textsuperscript{118}\textit{Restatement (Second) of the Law of Contracts} (ALI 1983) \textsection 202(1).
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\textsuperscript{119}Ibid \textsection 201, cmt a.
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\textsuperscript{122}Ibid \textsection 202, cmt b.
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approach to all contractual communications.\textsuperscript{123} Again the explanatory comment could have been written by Corbin. ‘It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in context.’\textsuperscript{124}

Viewed form the distance of several decades, Corbin’s approach to contract interpretation exhibits from significant blind spots. One is Corbin’s conception of the meaning as ‘the ideas that “contractual acts” induce in the mind of some individual person who uses or hears or reads them,’\textsuperscript{125} I have suggested that, given Corbin’s broader commitments, this claim is most charitably read is as an empirical generalization regarding how courts in fact interpret contractual agreements. But thousands of judicial decisions have articulated and applied a different conception of meaning, embodied in the so-called plain meaning rule. ‘When parties set down their agreement in a clear, complete document, . . . [e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.’\textsuperscript{126} Plain meaning, on this conception, is the meaning reasonably attached to the words of a writing stripped of much of the evidence of the context surrounding its original use.

Corbin’s response is to deny that language ever has a plain meaning. ‘A study of many cases shows that however “plain and clear” may be our chosen definition of the term “integrated,” its application to the facts of any particular case may be very far from “plain and clear.”’\textsuperscript{127} But the appellate case that make up the bulk of Corbin’s evidence hardly present a representative sample. And Corbin’s claim about the inherent ambiguity of language draws on his narrow definition of ‘meaning.’ The fact that words in a writing can induce different ideas in different persons and in different contexts does not entail that they do not have a conventional meaning discoverable without that added context. To respond that that conventional meaning does not count as ‘meaning’ in the relevant sense is to fall back on precisely the sort of argument from definition that Corbin elsewhere rejects.

In addition to his narrow definition of meaning, Corbin’s account of interpretation assumes a narrow conception of the act of contracting. Corbin understands contractual agreements as, first and foremost, agreements about what one or both shall do, to which the law happens to attach legal effects, not as juristic acts, in which the parties decide for

\textsuperscript{123} Restatement of Contracts (n 18) §§ 230 & 232; Restatement (Second) of Contracts (n 118) §§ 202 cmt b; 212(1) (‘The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this chapter.’).

\textsuperscript{124} Restatement (Second) of Contracts (n 118) § 212 cmt b.

\textsuperscript{125} Corbin on Contracts, vol 3 (n 9) § 536, 27-28.

\textsuperscript{126} W.W.W. Associates, Inc. v Giancontieri (1990) 77 NY2d 157, 162.

\textsuperscript{127} Corbin on Contracts, vol 3 (n 9) § 539, 79-80.
themselves what their legal relationship will be.\textsuperscript{128} One sees this naturalized picture of contractual agreements in Corbin’s account of integration. The parties’ agreement to integrate a writing is not, for Corbin, an agreement that the writing will have a particular legal effect: that it shall serve as the sole legal evidence of the terms contained in it. It simply an agreement that all prior agreements shall by discharged or merged into the present one.\textsuperscript{129} This is why Corbin can so confidently claim that an integration is an assent to the words in a writing, ‘not to any particular meaning of them.’\textsuperscript{130} Because integration is not a juristic act, there is no reason to think that the parties understand their words in anything but their everyday meanings.

Accordingly, Corbin rarely if ever considers the impact that one or another legal rule might have on parties’ understandings or behavior. Contract interpretation should track parties’ everyday understandings and expectations, not seek to shape them. But some parties contract in the law’s shadow; their expectations and actions are shaped by the law. In such transactions, it is by no means obvious that a party’s assent to the words in an integrated writing is not also an assent to whatever meaning courts will to give those words. This was precisely Williston’s point: when sophisticated parties contract in a jurisdiction that employs a plain meaning rule, each reasonably expects to be bound by the plain meaning of their integrated writing—whether or not it corresponds to their individual understandings. Sometimes assent to a writing might well be assent to a meaning of the words in it that neither party holds.

Finally, Corbin never asks what rule of interpretation parties, at the time of contracting, are likely to prefer. The role of courts in contracts cases, on Corbin’s theory, is strictly backward looking: to protect the parties’ reasonable expectations and do justice between them. It is not obvious, however, that this is what parties want. Justice is often expensive, and it can be difficult to predict what courts will consider a just outcome in any given case. Parties might prefer to be bound by a meaning that is cheaper to discover, easier to predict, and more difficult to manipulate—even if it does not always correspond to their individual understandings.

In short, Corbin’s account of interpretation is premised on his claim that the primary purpose of contract law is to protect parties’ reasonable expectations. My own view is that the claim is not wrong, but incomplete. Contract law additionally serves to enable exchange transactions between parties who do not otherwise trust one another, to guide parties to efficient and socially valued forms of interaction through default and mandatory rules, and often to realize parties’ legal intentions.

\textsuperscript{129} Corbin on Contracts (n 9), vol 3 § 574, 371-79
\textsuperscript{130} Ibid § 539, 77.
It is difficult to fault Corbin for failing to integrate these aspects of contract law into his thinking. When Corbin on Contracts first appeared in 1950, the will theory, Langdell’s formalism, and Holmes’s dogmatic division between law and morality were all within living memory. And it was still ten years before the appearance of Ronald Coase’s ‘The Problem of Social Cost’\(^{131}\) and the subsequent rise of law and economics. If arguments from party incentives and expectations, from the value of predictability, and from the minimization of litigation costs today seem obvious, it is because legal scholars have now been applying economic analysis and game theory to contractual transactions for more than fifty years. Corbin would not be surprised by any of this, given his own understanding of the law as in a constant state of flux. Corbin’s understanding of contract law was of its time.

VII. Conclusion

Although this chapter has focused on the broad strokes of Corbin’s work, Corbin spent most of his time as a scholar attending to the fine lines drawn in judicial opinions. The theory of the common law Corbin published in 1914, after only ten years in the academy, is almost identical to the ones he articulated in 1954 and in 1964.\(^{132}\) Having arrived early at his own view of the common law, Corbin spent most of his scholarly life deep in the caselaw and on the construction of his treatise. When Corbin was in his 80s, he could still be found in the Yale Law Library reading room poring over recent judicial opinions. Guido Calabresi, who was a student at the time, reports the light there was so poor that Corbin would bring his own reading lamp and, refusing offers of help from students, would crawl under the table to plug it in himself.\(^{133}\) When William Twining went to interview Corbin at his home nearly a decade later, Corbin had a box full of index cards sitting next to his armchair. Then in his 90s, Corbin was still taking notes on the appellate opinions for the supplements to his great treatise.\(^{134}\) It was this passion for the actual, often messy work of courts, combined with analytic clarity and a clear-eyed vision of the common law’s evolutionary logic, that gives Corbin on Contracts its authority and accounts for its enormous influence.

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\(^{132}\) Corbin, ‘The Law and the Judges’ (n 7); Corbin, ‘Principles of Law’ (n 34); Corbin, Sixty-Eight Years’ (n 10) 188.

\(^{133}\) Author’s conversation with Guido Calabresi (May 25, 2021).

\(^{134}\) Author’s conversation with William Twining (May 10, 2021). Twining reports that he interviewed Corbin in 1964 or 1965.