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Ledwon: Read Henry James

COMMON SENSE, CONTRACTS, AND LAW AND LITERATURE: WHY LAWYERS SHOULD READ HENRY JAMES

Lenora Ledwon¹

“The stone of which this wall was composed was ‘semantic stone.’ The stones of which this wall was composed were mere words . . . the thoughts [people] express or convey are variables, depending on verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). This is true whether the words are in a statute, a contract, a novel by Henry James, or a poem by Robert Browning. A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.”

Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965).

“Who was it she was in love with?”

“The story will tell,” I took upon myself to reply.

“Oh I can’t wait for the story!”

“The story *won’t* tell,” said Douglas; “not in any literal vulgar way.”

“More’s the pity then. That’s the only way I ever understand.”

Henry James, *THE TURN OF THE SCREW* 5 (Bantam 1981) (1898).

I’m against common sense. More accurately, I should say I’m skeptical of it, suspicious that something that passes as plain, ordinary wisdom all too often is a mask for racist, sexist, or classist prejudices.

I am guilty of relying on the “it’s just common sense” argument myself. But ever since Deborah Post asked me to do a

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Law and Literature “take” on common sense and the *Gateway 2000* case, I have been rethinking my own use of the term.² Last semester, I had one of those wonderfully uncomfortable moments of synchronicity where teaching and scholarship collide. We had just finished our first week of Contracts, during which we had read an overview of several current theories of contractual obligation and generally discussed the concepts of will, reliance, efficiency, fairness and bargain.³ (The theme for our course introduction had been, “which promises should the law enforce?”) After class was over, a student who had listened very attentively came up and said that she had wanted to ask a question during class but had been afraid it was a “silly question.”⁴

“I was just wondering,” she asked, “does common sense come into all this anywhere?”

At that moment, I “flashed” on a classic Disney cartoon. Pluto, Mickey’s faithful dog, is deciding whether or not to save a pesky kitten who has fallen into a well.⁵ Up pops a tiny angel

² *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) *cert. denied* 522 U.S. 808 (1997). I do not, of course, speak from any fixed, monolithic Law and Literature viewpoint. Just as it is more accurate to speak of “feminisms” with an “s” rather than the singular “Feminism,” so, too, should we understand that Law and Literature is an extraordinarily varied and diverse movement. If one had any doubt about this, all he or she would have to do to resolve the matter would be to sit down and read a few selections from James Boyd White, Stanley Fish, Robin West and Judge Richard Posner. The only “orthodoxy” common to Law & Literature is a pervasive interest in closely scrutinizing texts (and sometimes an interest in closely scrutinizing orthodoxies, as well).

³ This is per the excellent introductory chapters in Murphy, Speidel, and Ayres’s contracts casebook. See EDWARD J. MURPHY, RICHARD E. SPEIDEL, IAN AYRES, *STUDIES IN CONTRACT LAW* chaps. 1 and 2 (5TH ed. 1997). The casebook excerpts a very useful article by Randy Barnett concerning current theories of contractual obligation. See Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986), excerpted in MURPHY SPIEDEL, AYRES, *CONTRACT LAW* 43-55.

⁴ Whenever a student prefaces a remark with, “this is probably a silly question,” I brace myself, since, nine times out of ten, these are the most probing and difficult questions of the semester.

⁵ This is from the Oscar winning cartoon, “*Lend A Paw*,” available on video in WALT DISNEY’S *THE SPIRIT OF MICKEY: HIS MOST TREASURED MOMENTS*.

next to Pluto's right ear, commanding, "Save the kitty!" Up pops a tiny devil next to Pluto's left ear, snarling, "Ah, let it drown!" What to do? I could reassure her with a comforting, "yes, common sense always applies to contracts." Or I could heap further torment on a person in a situation already fraught with anxiety (first year law studies) by answering, "no, common sense has nothing to do with contract law." Should I follow the angelic path, or the demonic path? And which was which?

"Certainly, common sense comes into play in contracts," I responded, after a beat. I had chosen the demonic path. I opted for simplicity, where complexity was due, for reassurance, when I should have warned, as on ancient maps charting unknown territories, "Here there be dragons." In short, I missed out on a great teaching moment. This article is meant as a more accurate (and redemptive) response, with suggestions from Law and Literature for alternative ways of thinking and reading about common sense.⁶ A persistent underlying question will be, just whose common sense is this?

⁶ Given the vast amount of Law and Literature scholarship, there are relatively few Law and Literature studies that specifically deal with contracts (and none I have seen that focus on contracts and common sense). Brook Thomas's *American Literary Realism and the Failed Promise of Contract* (1997) is one book-length study that uses nineteenth-century realist fiction to examine American contract jurisprudence in the nineteenth century. (For an interesting review essay on Thomas's work that also encompasses works by Owen Fiss and Wai Chee Dimock, see Jonathan Boyarin, *The Legacy of Lochner: Law, Literature, and the Resurrection of Contract*, 24 LAW & SOC. INQUIRY 195 (1999).) Law review articles on contracts and Law and Literature are not too plentiful. A few of the more recent examples include the following: Barbara A. Fure, *Contracts As Literature: A Hermeneutic Approach to the Implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements*, 31 DUQ. L. REV. 729 (1993) (applying the hermeneutics of E.D. Hirsch to argue that the only valid method of interpretation is one that considers all of the circumstances surrounding the text); Amy Kastely, *Symposium on Law, Literature, and the Humanities: Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994) (using literature and storytelling techniques to argue that the objective theory of contract interpretation maintains hierarchies of race, class and gender); Blake Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & LAW 1 (1998) (using literature to argue for flexibility in contract doctrine, particularly in cases involving race and

There are at least two ways that Law and Literature methodologies can provide insight into the vexed space that is common sense: (1) Common Sense as the Failure of Imagination, and (2) Common Sense and the Problem of Ambiguity. Generally, failure of imagination occurs in connection with contract formation issues, and ambiguity with contract interpretation issues. To help elaborate these issues in the contractual universe of Gateway 2000 "pay now, terms later" contracts, I will first draw on the etymology of the phrase "common sense" to discuss the failure of imagination in the contract formation issues in that case and second, I will utilize Henry James' *The Turn of the Screw* to discuss ambiguity and contract interpretation issues.⁷

gender disparity); Daniel Yeager, *Marlowe's Faustus: Contract as Metaphor?*, 2 U. CHI. L. SCH. ROUNDTABLE 599 (1995) (arguing for the importance of law in *Faustus* and disagrees with Judge Posner's interpretation of the Faustian contract as merely metaphorical). Finally, as far as contracts casebooks, the only one that has a true Law and Literature "sensibility" is AMY HILSMAN KASTLEY, DEBORAH WAIRE POST AND SHARON KANG HONG, *CONTRACTING LAW* (1996). In addition to a selection of cases that encompasses issues of race, class and gender, the casebook includes selections from short stories and poems and the editors include suggestions for incorporating film clips (from films such as *THE GRAPES OF WRATH*) into class discussion.

⁷ HENRY JAMES, *THE TURN OF THE SCREW AND OTHER SHORT FICTION* (Bantam 1981) (1898). I feel compelled to give at least a short explanation of my choice of James here. Why a text by a privileged white male? Doesn't this choice simply reinscribe prevailing hierarchies? First, if feminists can find good use for Freud and Nietzsche, then there is no reason to give up on James. Second, *The Turn of the Screw* is a text marginalized by genre. The ghost story has long been considered a marginal genre, a particular kind of mass market, popular culture that critics traditionally denigrate. Thus, the form of such stories places them on the boundaries of critical regard. Boundaries and thresholds are interesting places to examine cracks in the larger structure. Third, James tended to write about outsiders, about people on the borders of certain kinds of society (often about the boundaries between American and European civilization). Finally, James was marginalized by sexual preference. (There is a growing body of work on James' queer sensibility. In fact, in a somewhat lurid link between law and literature, the latest biography of Henry James, written by law professor Sheldon Novick, suggests that the young Henry James may have had a brief affair with Oliver Wendell Holmes shortly after the Civil War. SHELDON NOVICK, *HENRY JAMES: THE YOUNG MASTER* 109-110 (1996).)

COMMON SENSE AS THE FAILURE OF IMAGINATION

The Ethical Imperative to Imagine

The work that literature does is the work of the imagination. This should not be divorced from the work we do as lawyers. A number of Law and Literature scholars, beginning perhaps with James Boyd White, have had the crucial insight that law is a humanity as much as it is a science.⁸ What kind of world do we create in our practices? What kind of people do we become? (And what kind of people do we want to become?) Much depends on the labor of the imagination. By “imagination,” here I mean something approaching empathic vision. This involves forming mental concepts of what is not present by identifying with another. But isn’t this as non-deliberative a process as common sense? No. Imagination differs from common sense because it is dynamic, it involves a creative faculty, it exercises the power of forming new conceptions.

The greatest ethical failure we consistently face, both professionally and personally, is our own failure of imagination; and one of the greatest temptations to betray the imagination comes in the guise of common sense. Not only does our reliance on common sense cut off any further rational analysis, it also stops the imaginative process. Once something is labeled “common sense,” imagining stops. This becomes even more clear when we consider some of the possible meanings of the phrase, “common sense.”

⁸ Three scholars I have found particularly helpful in the discussion of law as a humanity and the ethical implications of that concept are James Boyd White, Robin West and Martha Nussbaum. See generally MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); ROBIN WEST, *CARING FOR JUSTICE* (1997); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); JAMES BOYD WHITE, *HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

Definitions? Once More, "Whose Common Sense?"

Everyone wants to lay claim to common sense but no one wants to define it.⁹ Like many former English majors, when I am interested in exploring the etymology of a word, I turn to the multi-volume set of the Oxford English Dictionary.¹⁰ The O.E.D. gives four definitions for "common sense," each of which is problematic from a Law and Literature perspective that values imagination, the individual voice and the particularities of lived experience. The first definition for "common sense" listed

⁹ There seems to be a popular consensus that the American legal system is gravely lacking in common sense. "In the decades since World War II," writes Philip Howard, "we have constructed a system of regulatory law that basically outlaws common sense." PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 11 (1994). Paul Campos implicitly criticizes American law for its lack of common sense and its tendency to produce Kafkaesque situations: "Until fairly recently the central thesis of this book – that, in its more extreme manifestations, what Americans call 'the rule of law' can come to resemble a form of mental illness – would have seemed an exercise in frivolous or irresponsible hyperbole." PAUL CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* ix (1998). Norman Finkel, in his interesting study of how law conflicts with common sense notions of justice, is one of the few to actually define "commonsense justice": "[I]t reflects what ordinary people think is just and fair. It is embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be." NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 2 (1995). Richard Redding, in a thoughtful analysis of the implications of a "common-sense psychology" approach to psycholegal research, examines some of the ways in which law codifies "common-sense psychology," or "the lay knowledge of human behavior." Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCHOOL ROUNDTABLE 107, 110 (1999). Finally, proposed legislation frequently invokes "common sense" in the titles of Acts, as evidenced by the "Common Sense Product Liability Legal Reform Act of 1996," H.R. 956, 104th Cong. (1996). This had its origins in the ninth tenet of the Republican Party's Contract with America, the "Common Sense Legal Reforms Act." See H.R. 10, 104th Cong., 1st Sess. (1995). All this, of course, is only the tip of the iceberg.

¹⁰ This is available in a condensed one-volume edition that comes with a magnifying glass (for reading the near-microscopic print), and also on CD, but I prefer using the multi-volume set.

in the O.E.D. describes common sense as if it were a person, a sort of master phenomenologist: "An 'internal' sense which was regarded as the common bond or centre of the five senses, in which the various impressions received were reduced to the unity of a common consciousness."¹¹ In other words, common sense sits inside your head like a miniature judge and sorts out all the information you receive through sight, sound, touch, hearing, and smell. Common sense is separate from the qualities of imagination and remembrance, for the illustration (from Burton's *Anatomy of Melancholy*) states that there are three different inner senses: common sense, "phantasie," and memory.¹² Common sense, it seems, is distinct from imagination and from memory. All this was rather worrisome to me. Common sense doesn't include our imaginative faculties? It doesn't include our past stories?

The second definition was much more familiar to me and, I suspect, is what most people think of when they hear the term. "The endowment of natural intelligence possessed by rational beings; ordinary, normal or average understanding; the plain wisdom which is everyone's inheritance."¹³ The illustration for this definition includes the rather pithy statement that, "By a man of common sense we mean one who knows, as we say, chalk from cheese."¹⁴ But "normal" understanding begs the question. Who decides the norm? (Whose chalk and whose cheese?)

The third definition is the communal or democratic definition: "The general sense, feeling, or judgement of mankind, or of a community."¹⁵ In other words, just take a public opinion poll. Of course, a "majority rules" determination of common sense will exclude minority views and re-marginalize the disenfranchised.

The final definition of "common sense" is the "faculty of primary truths"¹⁶ Common sense is "that power of the

¹¹ III OXFORD ENGLISH DICTIONARY 573 (2nd ed. 1989).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ III OXFORD ENGLISH DICTIONARY 573 (2nd ed. 1989)..

mind which perceives truth, or commands belief not by progressive argumentation, but by an instantaneous, instinctive, and irresistible impulse; derived neither from education nor from habit, but from nature.”¹⁷ Again, this definition worried me. This is common sense as a non-deliberative process. What counts as an “instinctive” reaction may very easily be the most deep-seated, ingrained prejudices.

In summary, all these meanings of common sense should trouble us. They should trouble us because they are not merely quaint historical tidbits, but are powerful modes of rhetoric present in real judicial opinions. The *Gateway 2000* decision exhibits elements of all four definitions of “common sense,” and in doing so reveals a deficiency in imagination.

Common Sense And Contracts: Gateway 2000

Hill v. Gateway 2000 is but the latest example of a “pay now, get your contract terms later” case.¹⁸ Rich and Enza Hill

¹⁷ *Id.*

¹⁸ Prior to *Gateway 2000*, the two most notorious cases on the federal level were *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (enforcing shrinkwrap licenses) and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (enforcing a forum-selection clause included in the terms attached to a cruise ship ticket that the plaintiff received only after payment. In *Carnival Cruise Lines*, however, the Court scrutinized the forum selection clause for fairness and determined that the requirement that all disputes be litigated in Florida was reasonable). There have been a number of helpful articles on these type of cases. See, e.g., Darren C. Baker, Note: *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 NW. U. L. REV. 379 (1997); Jean Braucher, *Some Basics of Software Contracting, Without Draft UCC Article 2B*, SD30 ALI-ABA 475 (1998); Lorin Brennan, *The Consumer Interest in Disclosure of Terms: A Strategic Analysis*, 557 PLI/PAT 739 (1999); Stephen Y. Chow, *Contracting in Cyberspace: The Triumph of Forms?*, 41 BOSTON B. J. 16 (May/June 1997); Mark A. French, *Recent Development: Hill v. Gateway 2000, Inc.*, 12 OHIO S. J. ON DISP. RESOL. 811 (1997); Kristin Johnson Hazelwood, Note: *Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers*, 44 WASH. & LEE L. REV. 1287 (1998); Christopher L. Pitet, Note and Comment, *The Problem With 'Money Now, Terms Later':*

ordered a computer over the phone and charged it to their credit card. When the computer arrived, inside the box was a document setting forth terms and conditions, including a requirement that all disputes go to arbitration. The document stated that unless the buyer returned the computer within 30 days, the enclosed terms would govern the sale. The Hills experienced a number of problems with the computer but kept it longer than the 30 day period. Judge Easterbrook, writing for the Seventh Circuit, held that the contract terms in the box were binding on the Hills because they did not return the computer within 30 days.¹⁹ Judge Easterbrook makes several appeals to common sense (without specifically using the phrase) to justify enforcing the terms in the box. In particular, he uses common sense in the following passage to accomplish two objectives: (1) to refuse to limit an earlier Seventh Circuit decision enforcing shrinkwrap licenses to software transactions and (2) to suggest that the *Gateway 2000* case is good for consumers:

Plaintiffs ask us to limit *ProCD* to software, *but where's the sense in that?* [emphasis added] *ProCD* is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential

ProCD, Inc. v. Zeidenberg and the Enforceability of 'Shrinkwrap' Software Licenses, 31 LOY. L.A. L. REV. 325 (1997); Jean Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, 71 FLA. B.J. 8 (Nov. 1997).

¹⁹ Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).

buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.²⁰

Easterbrook is a terrific writer and a good part of his strength comes from a style that is invigorated by a "feel" for common sense. Take a look at his diction in the above passage: "sense," "practical considerations," "benefits," "simple." This is a passage infused with connotative meanings. The sound reinforces the sense. The totality of this passage resonates with the rhetoric of common sense or, perhaps more accurately, resonates with something believed by certain readers to be common sense. (That this particular concept of common sense is not for everyone is clear from the furor the case has provoked.)

Easterbrook's decision has elements of all four definitions of "common sense." It is similar to the first definition in that it lacks a certain quality of imagination (but more on this later).²¹ As for the second definition (normal, average understanding), Easterbrook's passage evokes a kind of practical wisdom, the sort of sensible statement we would expect from someone who knows chalk from cheese. Per the third definition (the general sense of the community), the passage draws on a bit of old fashioned communal well-being: the decision is good for customers and good for vendors, both sides benefit and everyone should be

²⁰ *Id.* at 1149.

²¹ It is not that Easterbrook fails to be imaginative (he clearly imagines a particular scenario) but that he is not being imaginative enough. He imagines only one side of a scenario. Perhaps, as Tom Joo suggested to me, Easterbrook fails to imagine that manufacturers, too, might one day be purchasers. Particular imaginative qualities (such as full empathy) are absent from his commonsensical use of imagination. Whether this is deliberate or not is, of course, another matter.

happy. Finally, in accord with the fourth definition (“primary truths”), the argument seems compelling precisely because common sense bypasses argument. It is non-deliberative, instinctive, “natural.” Easterbrook’s passage commands truth not so much through argumentation but through reliance on a common sense that usurps the place of deliberation.²² This also discourages counter-argument, for who, after all, can argue with common sense?

For the disenfranchised, for consumers, for buyers with less power than global corporations, such “common sense” can be disabling rather than enabling. Whose common sense are we talking about? This is the same problem that has surfaced repeatedly with standards of reasonableness in cases involving battered women, rape, racial and sexual discrimination – what is the assumed “norm”? (If a reasonable man would not keep silent but loudly complain about sexual harassment, why was Anita Hill silent for so long? Why ask why?) As feminist, critical race, and queer studies scholars (among others) have known all along, this is an insidious problem, made all the more treacherous because the terms “sound” so good. Who wants to be against “reasonableness?” Who wants to be against “common sense?” But we must remember that different buyers and sellers do not universally share one particular “common sense.”

Returning to our first (phenomenological) definition and the point about imagination, Judge Easterbrook imagines a certain kind of scenario to reach his conclusion: that a consumer with common sense doesn’t want the contract terms before he or

²² In a book review of Judge Posner’s *THE PROBLEMS OF JURISPRUDENCE*, Nancy Levit critiques Posner’s “practical reason” as a form of common sense. In particular, she criticizes common sense as “one of the intellectually weakest methods of analysis,” a method that is “concerned with cultural transmission and replication,” and as such is “conservative in orientation and method.” [fn. om.] Nancy Levit, *Book Review: Practically Unreasonable: A Critique of Practical Reason. A Review of The Problems of Jurisprudence*, 85 NW. U.L. REV. 494, 502 (1991). By way of further illustration, a thoughtful article by Maria Ontiveros points out the many problems with evidence law’s reliance on “common sense psychology.” See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337 (1999).

she pays. It makes for a good story, but it carries the baggage of race, class and gender assumptions. Whose common sense is this? What assumptions are made? Is Easterbrook's consumer who responds with "rage" over the phone an upper class white male, who has never lived from paycheck to paycheck and for whom a computer is not an enormous investment? Who would prefer to pay up front and consider it an advantage to have to return goods that are unsatisfactory? Who is missing from the scenario?

Consider the single working mother of color whose eight-to-five job, plus 45 minute commute each way, leaves her little time to shop for, let alone return, a computer. Her children have been begging her for months for a computer. She reads Gateway's advertisement during her 15 minute coffee breaks at her secretarial job and while at work sneaks onto the Gateway internet site to make sure the computer is a good deal. When she finally purchases the computer, it is a large investment relative to her modest income.

After delivery to her home, the computer never works as promised. The 24 hour technical support hotline promised in the ads constantly is busy. The speakers don't work right. Her children are disappointed. She is frustrated.

But returning the computer is a real burden. The post office is not yet open when she leaves for work in the morning and is closed by the time she gets home at night. The only time she can return it is on a Saturday morning, when she also has to do a week's worth of shopping, laundry, and bills. She has to find the packing tape and hope she hasn't thrown the box away. It is expensive to ship a computer. She feels like crying. She also feels enraged.

Whose common sense is at work? Judge Easterbrook assumes that returning the computer would be easy. (Perhaps it would be, if you have a servant do it, or your wife.) But the commonsensical assumptions embedded in his opinion evidence a failure of imagination.

COMMON SENSE, INTERPRETATION AND THE PROBLEM OF AMBIGUITY

A second way in which Law and Literature studies can be helpful in scrutinizing the limitations of common sense is in the area of ambiguity.²³ If our first topic (imagination) fits well in the contract formation area, ambiguity is central to contract interpretation.

Common sense moves to fill the void created by ambiguity. Common sense tells us that there cannot be unresolved ambiguity. Common sense is uncomfortable with the wholly ambiguous and desires a binary script, an “either/or” ordering, rather than something oscillating between. Law will provide a way to name experience. There must be a way to articulate a preferred meaning.

²³ Although I am focusing on how literature can help us understand ambiguity, other arts (such as painting and music) can be helpful as well. In his analysis of ambiguity in *The Turn of the Screw*, Shlomith Rimmon discusses the drawings of Escher as well as the shifting images of such well-known drawings as a duck that turns into a rabbit or an urn that becomes two profiles. SHLOMITH RIMMON, *THE CONCEPT OF AMBIGUITY: THE EXAMPLE OF JAMES* (1977). In opera, the recent revival of interest in more authentically Baroque countertenor singing creates a (sometimes uneasy) sense of ambiguity in the listening audience. A countertenor sings in a high, falsetto, head voice so that he sounds very much like a woman singing mezzo soprano. Handel and others wrote roles for castrati; today, those roles can be sung by women or by countertenors. See generally Albert Innaurato, *Music: Hairy-chested sopranos. Guys who sing like girls are all the rage in the opera world these days. What's that about?*, FORBES, Aug. 9, 1999, at 154; Ken Ringle, *Opera's Prime Cut: 'Caesar' Sans Castrati; Handel Masterpiece Requires Creative Casting*, WASHINGTON POST, Feb. 6, 2000, at G01; P.Y.VAN, *So What's a Countertenor Anyway?*, BUS. TIMES (SING.), Jan. 22, 2000, at EL2. I recently heard the Florida Grand Opera production of Handel's Julius Caesar, which included two countertenors in major roles (David Daniels as Caesar and David Walker as Tolomeo). Hearing what sounded like a gloriously rich female voice emerge from the energetic, bearded, boyishly masculine Caesar, I kept finding myself doing the mental equivalent of flipping back and forth between the duck/rabbit drawing. By the end of the production, I was exhausted (not so much because the production was three and a half hours, but from all the extra imaginative exertion) and completely hooked.

There has been a great deal of innovative work done in Law and Literature studies on the topic of interpretation.²⁴ Relatively little has been done specifically in the area of contract interpretation and Law and Literature. However, one of the many interesting moments in the long-standing critical exchange between Stanley Fish and Judge Richard Posner involves the ambiguity of a hypothetical contract. Posner states:

If a document states that it is the complete integration of the parties' contract, and the price stated in the document is \$100 per pound, the parol evidence rule will prevent the seller from later offering testimony that in the negotiations leading up to the contract the parties had agreed that the price would be \$100 per pound only for the first ten pounds after which it would be \$120 per pound. The document is not ambiguous.²⁵

Fish comments as follows:

But Posner misses the point. The document is neither ambiguous nor unambiguous in and of itself. The document isn't anything in and of itself, but acquires a shape and a significance only within the assumed background circumstances of its possible use, and it is those circumstances -- which cannot be in the document, but are the light in which 'it' appears and becomes what 'it,' for a time at least, is -- that determine whether or not it is ambiguous and determines too the kind of

²⁴ This is such a rich area that a comprehensive footnote would be longer than this article. However, among the influential scholars in this area are Ronald Dworkin, Stanley Fish, Owen Fiss, Sanford Levinson and Richard Weisberg.

²⁵ Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351,1371 (1986).

straightforwardness it is (again for a time) taken to possess.²⁶

What is particularly interesting in this exchange is what it suggests about juridical habits of reading in the face of potential ambiguity. Fish goes on to state:

As things stand now in our culture, a person embedded in the legal world reads in a way designed to resolve interpretive crises (although as Walter Michaels reminds me, after he was reminded of it by a practicing lawyer, at some stages in the preparation and even the arguing of cases, the proliferating of interpretive crises is just the skill called for), while someone embedded in the literary world reads in a way designed to multiply interpretive crises.²⁷

Thus, habits of reading can influence our interpretive processes.

Is there a problem of ambiguity in *Gateway 2000*? If so, is common sense rushing to fill the void? And can Henry James help out? Initially, the *Gateway* situation seems purely a formation problem. When was the contract formed? Did the contract bell ring when the Hills paid for the computer, or not until the Hills kept the computer for 30 days and had an opportunity to peruse the standard terms and conditions included in the box?²⁸ This is a formation issue. As first year students soon learn, 2-207 is seldom about the existence of a contract. It is about content, and whose terms apply. In fact, there may be an interpretation issue in *Gateway*. Certainly, there seems to have been some difference of opinion as to what exactly the Hills were purchasing or what it was that *Gateway* had advertised.

²⁶ Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 784 (1988).

²⁷ *Id.* at 787 [fn. om.].

²⁸ The helpful concept of the contract bell ringing is from the editors' introductory notes to chapter three in the computerized disk Teacher's Manual to MURPHY, SPIEDEL, AYRES, *supra* note 3.

The difference between the system the Hills received and the system they expected to receive might be explained as a mistake (whether unilateral or mutual), as a case of misleading or false advertising, as a breach of warranty, or, possibly, as a problem in interpretation. The interpretation issue is intertwined with the formation issue, but not in an obvious way. Generally speaking, the formation issue takes precedence because we first want to address the issue of whether or not a contract exists before we argue over the contents of the agreement.²⁹ But in a “pay now, terms later” agreement, the formation issue subsumes an equally significant interpretation issue. There is an elision in the judicial opinion, a gap that is filled by common sense. It is common sense that we must address the formation issue first. But what happens if we consider interpretation first, or at least simultaneously? What happens if we try (pun intended) to “think outside the box?”

This is no more strange than deciding that the Hills have “agreed” to a contract without knowing its terms. If we can imagine an agreement that is floating in time (goods and money are exchanged, but the agreement is on “hold”), then perhaps we should consider terms that are floating in space (the words in the Gateway ads, what the Gateway representative told the Hills, consumer expectations, or industry standards).³⁰ By answering

²⁹ Apparently, neither the plaintiffs in the *Gateway 2000* case nor the plaintiffs in *Carnival Cruise Lines* raised interpretation issues. In *Carnival Cruise Lines*, the plaintiffs attempted to argue that the terms on the back of the cruise ticket were hard to read because they were buried amongst a great deal of fine print. In *Gateway 2000*, the plaintiffs didn’t argue that the terms were hard to understand, but argued that the Hills did not bother to read them, implying that consumers were unlikely to read a lengthy set of terms and conditions included with a computer. These arguments raise the specter of procedural and substantive unconscionability.

³⁰ As far as industry standards go, another pertinent question is, precisely which industry are we talking about? Companies that routinely use the “pay now, terms later” include insurance companies, the travel industry, and mail order and phone order companies. What counts as standard practice in a brave new world? We are on the brink of (if not already immersed in) an explosion in e-commerce. So it’s a bit disingenuous to say the industry standard is “X” when the norms of industry are changing as we speak.

the formation question first, and in a particular way, we foreclose interpretation. But that, of course, is common sense.

WAYS OF READING AND RE-READING

My experience teaching both law students and undergraduates has been that, generally speaking, law students are much more unhappy with ambiguity than their undergraduate counterparts. This may be related to different mindsets or different approaches to what students see as their missions (and perhaps to what different professors see as their own pedagogical missions, as well). Law students like to perceive themselves as problem-solvers, focusing on practical applications of rules to clients' fact-patterns. The students need for there to be a solution (and this is not an insignificant need). In the first year of Contracts, in particular, a sense of desperation fills the classroom when it becomes apparent that ambiguity is going to be an issue.³¹ Undergraduates, no matter how grade-driven, seem willing to engage in and even enjoy moments of free play among signifiers. What happens between undergraduate education and law school education? Does the process of thinking like a lawyer mean we must abandon old habits of reading? Several scholars have suggested that law school trains us to read "only for useful bits," a style of reading that is "reductionist" and merely a matter of paraphrase.³² There is certainly nothing wrong with knowing how to read for the useful bits. But we need not abandon other ways of reading.³³ The point of law school

³¹ This desperation, I hasten to add, is not solely on the part of the students.

³² (And perhaps the above sentence is a prime example.) See Philip C. Kissam, *Disruptions of Literature: Disturbing Images: Literature in a Jurisprudence Course*, 22 LEGAL STUD. FORUM 329, 330 (1998). For the point about "paraphrasing," Kissam refers to Elizabeth Fajans and Mary Falk's excellent article, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 163-70 (1993). Kissam also suggests that lawyers read "from the top down," starting by forcing a particular analytical framework on the text. Kissam at 330, (citing JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 9-43 (1986)).

³³ I remember one Law and Literature class taught by James Boyd White at the University of Michigan Law School in which we discussed Mark Twain's *Life*

education, I continue to hope, is not to jettison everything you have learned up to now, but to build on what you carry with you.

Law students, lawyers, law professors, and judges need to be reminded of their familiarity with and acceptance of very uncomfortable ambiguities. Such familiarity makes it easier to accept the accompanying process of re-reading and re-cognition (in the sense of a new, perhaps contradictory understanding) that opens up a text. But isn't this a bad thing? Don't we want to close down texts, close down meaning? Isn't it common sense that our job as lawyers is to put an end to interpretation, to make a case that there is only one correct story and it is our client's story?

Not necessarily. There are the instances (to which Fish alludes) when we may be interested in opening up a text. Perhaps we need to argue that a term is ambiguous and hence unenforceable, for example, or more generally and perhaps more subtly, we -- lawyers, judges, law students, professors -- may need to acquire a certain comfort level, a sensitivity, a particular "feel" for ambiguity.

So what can Henry James offer as far as common sense and contract interpretation are concerned? Let's take the case of James's novella, *The Turn of the Screw*. A young, inexperienced governess accepts a position in an isolated country house. Her two young orphan charges, Miles and Flora, are lovely and angelic children. The governess has complete responsibility over them. (The children's dilettante uncle has hired the governess on the condition that she never contact him with any problems.) Things soon take on a sinister hue. The governess receives a letter from Miles's headmaster forbidding Miles's return to school, but not specifying what Miles has done wrong. She learns that the previous governess (also young and beautiful) has died, but no one quite knows the details of the death. The governess sees a strange, malevolent-looking figure who appears to be Peter Quint, the dead servant of the uncle. The governess also sees the ghost of Miss Jessel, the prior governess. No other

on the Mississippi. In one passage, Twain ruminated over the different ways he had looked at and appreciated the Mississippi River over time (the different ways he "read" the river).

adults can see the ghosts. (Whether the children can see them is not certain.) Soon, the governess becomes convinced that Quint and Jessel, who had been lovers and who had a strange and possibly corrupting influence over the children in life, are trying to extend that influence over Miles and Flora from the grave. The governess desperately wants to save Miles and Flora. She wages a battle of wills with the ghosts. Finally, she saves the souls of the children, but at the cost of Flora's health and Miles's life.

Is this a ghost story or is the governess hallucinating?³⁴ Does she save the children or destroy them? *The Turn of the Screw* has been called a "chameleon text," capable of taking on a great variety of critical interpretations.³⁵ But it is precisely the story's quality of ambiguity that has most interested recent critics and that is most pertinent for our purposes.

"I remember the whole beginning as a succession of flights and drops, a little see-saw of the right throbs and the

³⁴ The most influential early work suggesting that the ghosts are not real but are hallucinations is Edmund Wilson's 1934 Freudian essay, "The Ambiguity of Henry James." See Edmund Wilson, *The Ambiguity of Henry James*, in *A CASEBOOK ON HENRY JAMES'S THE TURN OF THE SCREW*, 2d ed. 115 (Gerald Willen ed., 1969). There are a great many critical works discussing the issue of ambiguity in James's story. In fact, it is difficult to find an analysis of the story from the last 50 years that does *not* address the issue of ambiguity. Rimmon's study from the late 70's is still a very pertinent work. SHLOMITH RIMMON, *THE CONCEPT OF AMBIGUITY - THE EXAMPLE OF JAMES* (1977). The most useful and recent overview of the voluminous body of criticism on *The Turn of the Screw* is Peter Beidler's text. PETER G. BEIDLER, *CASE STUDIES IN CONTEMPORARY CRITICISM: HENRY JAMES, THE TURN OF THE SCREW* (Peter Beidler, ed., 1995).

³⁵ "Depending on who is reading it, the story can be a gothic tale in the tradition of Poe, a romantic tale in the tradition of Hawthorne, or a realistic tale in the tradition of Howells. It can be a Freudian tale of sexual repression, an allegory of good and evil, a detective story about murder and deception, a call for better treatment of children, or a reflection of hidden truths about its author. It can demonstrate its author's knowledge of scientific research on ghosts, his rejection of that knowledge, his accord with the social structures of his time or his rejection of those structures. It can be read as a Marxist statement, a feminist statement, or a homosexual statement." PETER G. BEIDLER, *About This Volume*, in *CASE STUDIES IN CONTEMPORARY CRITICISM: HENRY JAMES, THE TURN OF THE SCREW* viii (Peter G. Beidler ed., 1995).

wrong.”³⁶ So begins the governess’s record of the story. This beginning also foreshadows the reader’s experience with the text. This pattern of up and down, right and wrong sensations, recapitulates our experience of ambiguity (and the thinly-veiled desire that is at one and the same time psychosexual and also a desire for mastery over the story).

Terry Heller is quite correct in stating that the first reading of *The Turn of the Screw* is, for most readers, as a ghost story, with subsequent rereadings becoming more uncertain.³⁷ The ghost story reading, ironically, is the initial common sense reading because we have certain set expectations of the genre. Both the setting of the story and James’s *Preface* suggest that what is to follow will be a ghost story. The frame narrative (by an unidentified narrator) begins in the nineteenth-century tradition of telling ghost stories on Christmas Eve:

The story had held us, round the fire, sufficiently breathless, but except the obvious remark that it was gruesome, as on Christmas Eve in an old house a strange tale should essentially be, I remember no comment uttered till somebody happened to note it as the only case he had met in which such a visitation had fallen on a child.³⁸

James’s *Preface* begins by locating the seed of his idea for the novella in a half-remembered ghost story related by a friend.³⁹ Authorial intent here, as is the case of statutes or constitutions, is not as helpful as we might hope. In the *Preface* to the 1908 edition, James comments on the story:

³⁶ JAMES, *supra* note 7 at 9.

³⁷ Terry Heller, *The Turn Of The Screw: Bewildered Vision* 31 (1989).

³⁸ JAMES, *supra* note 7, at 3.

³⁹ HENRY JAMES, PREFACE TO 1908 EDITION OF THE TURN OF THE SCREW, in BEIDLER, *supra* note 34, at 117-18. James, in fact, wrote *The Turn of the Screw* under a contract to write a ghost story for the magazine, *Collier’s Weekly*. Peter G. Beidler, *Introduction: Biographical and Historical Contexts*, in CASE STUDIES IN CONTEMPORARY CRITICISM: HENRY JAMES, THE TURN OF THE SCREW 3, 13 (Peter Beidler, ed. 1995).

It is an excursion into chaos while remaining, like Blue-Beard and Cinderella, but an anecdote — though an anecdote amplified and highly emphasized and returning upon itself; as, for that matter, Cinderella and Blue-Beard return. I need scarcely add after this that it is a piece of ingenuity pure and simple, of cold artistic calculation, an *amusette* to catch those not easily caught (the “fun” of the capture of the merely witless being ever but small), the jaded, the disillusioned, the fastidious.⁴⁰

All this suggests that lawyers might just be the perfect audience for James.⁴¹

But if the first common sense reading of the story as purely a ghost story is the only reading, we are missing out. A reader who is not just reading for “useful bits,” who has not long ago reached the common sense conclusion that this must be just a ghost story, might come to the last passage in the story and be troubled. In the final tense scene, the governess is engaged in a battle of wills with the ghost of Peter Quint for the soul of young Miles. Triumphantly, the governess calls to Miles, “*I have you,*” but what follows is very strange:

[H]e uttered the cry of a creature hurled over an abyss, and the grasp with which I recovered him might have been that of catching him in his fall. I caught him, yes, I held him — it may be imagined with what a passion; but at the end of a minute I began to feel what it truly was that I held. We

⁴⁰ Henry James, *Preface To 1908 Edition Of The Turn Of The Screw*, in BEIDLER, *supra* note 34, at 120.

⁴¹ Lawyers tend to be a bit jaded and disillusioned and to pride themselves on such qualities. In my first year as an associate at a corporate law firm, a well-meaning partner took me aside and suggested, “Look, you’ve just got to learn to be more cynical.”

were alone with the quiet day, and his little heart, dispossessed, had stopped.⁴²

This is a disturbing ending. How does the governess know she has won? What is it, exactly, she has won?

Other earlier sections now begin to take on an ominous light with re-reading. For example, at one point the governess interrogates Miles concerning his bad behavior at school. She pauses for a moment:

I seemed to float not into clearness, but into a darker obscure, and within a minute there had come to me out of my very pity the appalling alarm of his being perhaps innocent. It was for the instant confounding and bottomless, for if he *were* innocent what then on earth was I?⁴³

In fact, the more we puzzle over the story and go back to re-read portions, the more ambiguous it becomes. The governess herself articulates this dilemma, discussing her experience with the children: "No, no – there are depths, depths! The more I go over it, the more I see in it, and the more I see in it the more I fear. I don't know what I *don't* see – what I *don't* fear!"⁴⁴

In his great study of the fantastic in literature, Tzvetan Todorov describes *The Turn of the Screw* as an example of the pure fantastic, that is, a work that is wholly ambiguous: "[the text] does not permit us to determine finally whether ghosts haunt the old estate, or whether we are confronted by the hallucinations of a hysterical governess victimized by the disturbing atmosphere which surrounds her."⁴⁵

⁴² JAMES, *supra* note 7, at 101.

⁴³ JAMES, *supra* note 7, at 101.

⁴⁴ JAMES, *supra* note 7, at 37.

⁴⁵ TZVETAN TODOROV, 43 *THE FANTASTIC* (Richard Howard tr., 1977). Todorov defines the "fantastic" as the border between the uncanny and the marvelous. *Id.* at 43-44.

So what connections can we make between ambiguity in the Gateway case and ambiguity in James' novella? One irresistible connection is that both are, in a sense, phantasmagorical stories which begin in the ordinary, the everyday, and end by creating a profound sense of uneasiness in many readers. (How appropriate that the corporation's name is "Gateway," evoking as it does the mysterious question of portals and thresholds. Gateway to what?) But of course this is too fanciful. And unlike James' story, a lead case rarely will present a problem of complete ambiguity. (Perhaps one of the closest examples is the classic case of *Raffles v. Wichelhaus*, with its two ships named "Peerless" each sailing from Bombay with a load of cotton and no way for the court to decide what was meant by a contract to purchase cotton from the Peerless from Bombay.)⁴⁶

Rather, the ambiguity in *Gateway* stems from the issue of intent. What precisely did Gateway and the Hills intend? What common sense assumptions paper over potentially ambiguous words or acts? The Hills did not return the computer within 30 days. How are we to read this conduct? What was their intent? Easterbrook determines the Hills had an opportunity to read everything in the box and to return the computer, and cites the general rule that a party has a duty to read the contract or else accept the risk.⁴⁷ But contemporary commercial transactions over the telephone or the internet can be fraught with ambiguity. Failure to return the computer within 30 days might be assent, but then again, it might not. Such a failure could be typical consumer passivity, an acknowledgment of one's own powerlessness as a consumer (an acknowledgment that seems legitimated by this case), general exhaustion with our overloaded, multi-tasking, 21st century lives, or perhaps even an honest belief that terms will not be imposed unilaterally and after payment.⁴⁸

The experience of ambiguity is something lawyers rather desperately shun, when we should instead appreciate, if not

⁴⁶ *Raffles v. Wichelhaus*, 2 H.&C. 906, 159 Eng. Rep. 375 (1864).

⁴⁷ *Hill*, 105 F.3d at 1148.

⁴⁸ I am grateful to Deborah Waire Post for her suggestions concerning the possible intent issues in *Gateway*.

embrace it. Starting as first year law students, our legal education can be very much like reading *The Turn of the Screw* and being faced with ambiguity at every turn. (I have a colleague who takes great pride in never answering a question in class but always responding with another question.) In the face of ambiguity, students will fall back on common sense explanations as to why one interpretation is preferable. Practitioners most typically will be interested in closing down texts, in hammering out unitary, common sense explanations. Judges, too, will prefer common sense interpretations to uncomfortable ambiguities (although a judge, as “master reader,” is a reader who should know that the story does not end with this one particular case).

Recognizing, reading, and re-reading for ambiguity are skills that fall by the wayside when common sense enters the discussion. Reading for ambiguity not only enables us to be more sophisticated readers, it also allows us a measure of comfort. One of the hardest things is living with indeterminacy, in our practices, in our lives. The ability to recognize and understand ambiguity is an enabling quality and just one of the many reasons lawyers should read Henry James.

Finally, perhaps, the issues of imagination and ambiguity come together. Faced with an ambiguous situation, a failure of imagination can limit our ability to understand while a successful appeal to imagination can allow us to derive a richer, more complete meaning from the story. Such a meaning should not be limited by overly simplistic, narrow appeals to common sense. Rather, one potential goal for us as legal readers is not to cease reading, but to find a provisional resting point, a good spot for repose. The opening quotes to this article, from Corbin and James, remind us of the difficulties of interpretation, and implicitly critique any too easy interpretation based on a transcendent appeal to common sense.

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