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Ronald C. Griffin
ronald.griffin@famu.edu

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HILL'S ACCOUNT: LAW SCHOOL, LEGAL EDUCATION AND THE BLACK LAW STUDENT

RONALD C. GRIFFIN*

INTRODUCTION

There is trouble in River City. Law School and bar admissions tests are depleting the ranks of black lawyers. The nation's law schools could do something about the situation. Donald Hill, Professor of Law, at Thurgood Marshall Law School, lists reasons for being skeptical about these institutions doing much.

HILL'S ACCOUNT

White institutions, opined Hill, serve most of the public at large.¹ They are the custodians of values and economic interests of a dominant culture.² The most one can expect from white schools is poorly implemented affirmative action plans and equal educational opportunity programs.³ Some students benefit from these plans and programs.⁴ Few students will graduate from institutions featuring these plans and programs. Fewer still will be certified for the practice of law. Black schools must produce the law graduates which white schools cannot produce.⁵

Black institutions are stymied by the bar failure syndrome and elitism,⁶ student confusion about legal education, and faculty self-perception.⁷ Black schools labor under a poor public image.⁸ After so many attempts to pass a written test to gain certification for actual practice, many people now believe that minority students coming from

* Professor of Law, Washburn University; B.S., Hampton Institute; J.D., Howard University; L.L.M., University of Virginia.

1. Hill, *Law School, Legal Education, and the Black Law Student* 12 T. MAR. L. REV. 453 (1987).

2. *Id.*

3. Hill, *supra* note 1, at 458 and 473.

4. Hill, *supra* note 1, at 458.

5. *Id.*

6. Professor Hill talks about these topics under different headings. The "introduction" and two other sections are devoted to the bar failure syndrome. See Hill, *supra* note 1, at ____.

7. Hill, *supra* note 1, at 468, 469 and 470.

8. Hill, *supra* note 1, at 454.

black law schools cannot pass the bar exam.⁹ Racism and writing deficiencies were once regarded as the causes of failure among black examinees.¹⁰ When these problems were addressed by the state, experts were left without reasons to explain the black student's poor performance.

Elitism, according to Hill, encompasses a group's shared assumptions about the individual, i.e., that he is bright and competent to perform any task.¹¹ This assumption is assigned to people who are born into the right family or people who have attended the right schools.¹² Since black students are not born into the right families and few attend the right schools, most students labor without the assumption that they are bright and qualified people attending law school.

Additionally, black students are confused about legal education, and bewildered by the graduate environment. They feel threatened by teachers, tests and assignments. They also experience a sense of isolation. Black students mistakenly diagnose elitist actions for racism.¹³ They overlook the possibility that the classroom is a marketplace of ideas.¹⁴ Teachers who spend their precious class time dispelling these feelings have less time to spend on the law and legal reasoning.¹⁵

Black faculties are racists, says Hill.¹⁶ They allow their actions to be governed by assumptions regarding their alleged cultural inferiority. They blame the victims (students) for their failure in the classroom. They force a world of literature on students raised in a world of speech. They invite outsiders, leaders from white institutions who are less familiar with black culture and speech, to tinker with students' communication techniques.¹⁷

Hill urges black administrators to broadcast the fact that minority students, whether attending black or white law schools have similar bar passage rates.¹⁸ Hill believes this will alter the public's perception

9. Hill, *supra* note 2, at 454.

10. Hill, *supra* note 1, at 478.

11. Hill, *supra* note 1, at 463.

12. *Id.*

13. Hill, *supra* note 1, at 466.

14. Hill, *supra* note 1, at 468-469.

15. Hill, *supra* note 1, at 484-487. Hill says teachers are distracted by the desire to publish research and hustle grants. *Id.* at 471-472.

16. Hill, *supra* note 1, at 458, 459, 460 and 461.

17. Hill, *supra* note 1, at 500-501. MCCRUM, CRAM AND MACNEIL, *The Story of English*, 230-231 (1986) [hereinafter MACNEIL]. Hill devotes several pages to black English. When the dominant cultures teaching methodology is assessed against a backdrop of black culture and English, we can see the problems brewing, e.g., classroom frustration, student hostility, and missed opportunities to share important legal insights.

18. Hill, *supra* note 1, at 480.

about the competency of minority students attending black schools.¹⁹ Black teachers ought to highlight the dominant culture's values and interests in assigned cases, and point out the conflict with black cultural values and interests.²⁰ Teachers should model a thinking methodology in the classroom and invite criticism. Teachers should give their students essay examinations. Administrators should give teachers enough time to properly grade them. Black faculties should be more critical of candidates seeking employment at black law schools.²¹ Law schools should redeem one of many promises they made to students: to provide them with teachers who inspire students to read books for information, understanding, enrichment and experience.²²

CRITIQUE

Hill's account germinates questions which mock the liberal tradition. Liberalism tries to purge people of ill-gotten gain.²³ Liberals are committed to the idea that people should be certified for high positions based upon competition (testing) and merit.²⁴ Liberals assume that candidates for high positions have been exposed to the same variety and volume of information, i.e., education.²⁵ If black candidates are exposed to different varieties and volumes of information, those clinging to the smallest amount are the least likely to be certified for anything.

Economic determinists would be amused by this turn of events. They would treat the situation as proof that man cannot alter the work of the "invisible hand." Blacks, they would say, are the victims of the society in which they find themselves.²⁶ If there was a demand for

19. Hill, *supra* note 1, at 479-480.

20. Hill alludes to this solution in the text. Hill, *supra* note 1, at 473, 474, 475 and 477.

21. Hill, *supra* note 1.

22. Hill, *supra* note 1, at 495-496.

23. See FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY, 155 (1983) [hereinafter FISHKIN].

24. FISHKIN, *supra* note 23, at 4 and 5.

25. FISHKIN, *supra* note 23, at 5.

26. This is a line espoused by 19th Century liberals. *E.g.*, GARTEN, STUDIES IN MODERN EUROPEAN LITERATURE AND THOUGHT: GERHART HAUPTMANN, 13, 63-64 (1954). [hereinafter GARTEN]. Supply and demand, for these people, is the appropriate mechanism for allocating resources. See COMMONS, LEGAL FOUNDATIONS OF CAPITALISM, 323-324 (Wis. Press 1959). Individuals and individual initiative produce profits and raise everyone's standard of living. See, *e.g.*, NIETZSCHE, BEYOND GOOD AND EVIL 37-55 (1983); GILMORE, *infra* note 32, at 94-95. A man should make his way through the world (as best he can) with the hand he is dealt, i.e., the family (status) into which he is born and his native talents. There is redemption through suffering, says Hauptmann. GARTEN at 13.

black lawyers, schools would spend their meager resources on producing them. Since the demand for black lawyers is insignificant, it's natural for law schools to do the minimum and for the ranks of black lawyers to be depleted.

On another level, Hill's account germinates questions that could be addressed in contracts.²⁷ There is a contract between the law school and its students. The school promises to provide its students with a legal education. The students promise to pay for what they receive from the institution. If a student fails to attend classes or to complete assignments, the student has breached the contract. If the school does not provide instructors to teach the courses listed in the catalogue, the school has breached its agreement. If the instructor cannot teach the material listed in the course description, the school has breached the contract. If the student cannot pass the bar examination, there is an inference that he did not get the benefit of his bargain.

SOLUTIONS

To avoid the acrimony and the wild insinuations a lawsuit might generate, the nation's law schools should initiate their own reform. Deans, for example, should come from the ranks of master teachers (people who have done well in the classroom). If the school needs a fundraiser as a dean, the task should be assigned to highly regarded vice deans. Students should be exposed to a way of reasoning about human events that is similar to the winnowing process (Socratic Method) farmers employ in farming operations. Students should be given sets of cases, with an instruction to draft a letter to a client or an office memorandum on a legal issue using standard English and legalese.²⁸ Teachers should use symbolic logic in the classroom to bridge the world between writing and speech ($K = P/C$ and $K(\text{fact})$, $K = +/+$ and $K = M*M$).²⁹ Teachers should familiarize themselves with black English,

27. There is a promise (P) supported by consideration (C). The student promises (P) to pay an institution some money if the institution provides the student with a service (C), $K = P/C$. When the institution promises to perform or performs the service, a contract comes into existence. *RESTATEMENT CONTRACTS SECOND*, §§ 62 and 71. *See also* FRIED, *CONTRACT AS A PROMISE*, 7-27, 28-39 (1981) [hereinafter FRIED].

28. Hill, *supra* note 1, at 496-497.

29. P/C is synonymous with promise supported by consideration. A promise is defined under § 2 of the *RESTATEMENT OF CONTRACTS SECOND*. $K(\text{fact})$ is applied in situations where contracts are built out of the conduct of the parties. $K = +/+$ is applied to cases where the gains sought by the parties (benefits) are important. Contracts should be "win and win" situations. The parties have decided that the item they have surrendered is less valuable than the item they will get in exchange. If they never get what is sought from the bargain, the contract should not be enforced by a court.

i.e., contractions, syntax, and vocabulary, to help students make the transition to standard English.³⁰ Students should be told that a bar examination assesses an examinee's reading, writing, and logical skills. In a summer session, students should be offered non-credit courses devoted to bar examination taking techniques.

Teachers should model a thinking methodology which students can use outside the class room. Facts, for example, should be examined in light of public policy. Students should be told that facts should be matched with a policy. The policy should be superior to competing policies. The policy should also be compatible with the public's interest.³¹

Students should be told to ignore the disputants or to treat them as abstractions.³² In the initial stage of analysis, in contracts, for example, the most important thing is the communication between the parties.³³ The student should be taught that the law reacts to speech and action. If the law's reaction is both positive and negative, it is a signal to the analyst to examine the problem as a policy issue. The student should be introduced to the Houstonian School of Jurisprudence—a civil rights assessment tool invented by Charles Hamilton Houston, former dean of Howard University Law School.³⁴ Houston's jurisprudence should be modeled in class to assist students who would like to incorporate it in their thinking.

ILLUSTRATION

The "Great Home Solicitation Case" illustrates how a teacher might model clear thinking in class.³⁵ The state attorney general (Kansas) has brought an action for injunctive and restitutionary relief, under a statute authorizing such actions against any "unfair, deceptive, fraudulent or

30. Hill, *supra* note 1, at 496. See MACNEIL, *supra* note 17.

31. Hill, *supra* note 1, at 487-488.

32. In a civilized society, the law is interested in what people say and do. See CONRAD, HEART OF DARKNESS (1983); FRIEDMAN, CONTRACT LAW IN AMERICA 20 (1965); GILMORE, THE DEATH OF CONTRACTS, 41-42 (1974) [hereinafter GILMORE].

33. GILMORE, *supra* note 32, at 42.

34. Smith, *In Memoriam: Professor Frank Reeves*, 18 How. L.J. at 1, 3 & 5 (1974); Griffin, *Gilder, Wealth and Poverty* (Book Review), 57 Notre Dame Lawyer 741, 743 n. 7 (1982). Houstonians think that all (American) men are created equal except blacks. This idea, according to Houstonians, shapes the behavior of some Americans and is embedded in our laws. Houstonians ask: "How close does the law come to a 'pure legal existence' for blacks. If a chasm separates what blacks aspire to become and what they can achieve, if the chasm is broadened by what the law exacts from them, something should be done about the law."

35. This is an edited version of a problem that appears in John Spanogle's book on Consumer Law. J. SPANOGLE & ROHNER, CONSUMER LAW: CASES AND MATERIALS, 166-169 (1979). Some items were added to enhance the problem.

unconscionable sales practices." You are the trial judge and the following evidence (it appears below) has been presented to you. Is there a basis for your court to enjoin these sales practices? What would you put in your teacher's notes? How would you conduct class discussion?

The Facts

You are told that the defendant was engaged in installment sales of educational books and related materials in Kansas and Missouri. Defendant operated under the trade name Educational Services Company. The company's home office was in St. Louis, Missouri.

Sales solicitations were made exclusively through house-to-house canvassing by the defendant's employees. No advance appointments were made with consumers. The solicitors simply descended upon a section of a town and attempted to sell a package of books which was described (in large type) in a form contract as a "complete ten year educational program." The form contained language which indicated that the package was the product of the Junior Institute. Also included on the form was a plea to "give your child its chance."

When engaging sales personnel the defendant sought people who were "sales oriented" and extroverted. They were trained by the defendant's sales manager. The sales force fluctuated in number depending upon the season. The number was greatest in the summer, reaching 30 to 35 people. The defendant's crew leader transported the solicitors by car to the Kansas areas to be covered. The sales force was told to push credit; to take downpayments and promissory notes; to state the credit charge as a flat thirty-six percent; and to push credit life insurance and confession of judgment clauses.

Metropolitan Topeka, Wichita, Manhattan, and Leavenworth were selected as sales sites. They were chosen by the defendant who was familiar with the sites and the class of people to be sought out by its sales force. Within the targeted areas the sales force was told to focus upon minority group consumers and consumers of limited education and economic means. People with incomes of less than \$11,000 a year were favored targets. Some buyers were welfare recipients.

The sales force fanned out in the target area in search of door to door sales. There were municipal ordinances (which the defendant ignored or counseled against) requiring it to be licensed and its employees to be registered.

Defendant's education package consisted of the following books and materials:

1. Questions Children Ask (1 Volume)

2. Child Horizon (4 Volumes)
3. New Achievement Library (5 Volumes)
4. High School Subjects Self-Taught (4 Volumes)
5. Science Library (1 Volume)
6. Play-Way French and Spanish Records (250 r.p.m. Records)
7. Tell Time Flash Card Set.

A bonus volume (Negro History, World Atlas or Bible) was offered with the original package or sent to a customer after he had completed his payments.

The printed contract, marked "Retail Installment Obligation" and presented to the customer for signature, consisted of a single sheet covered with printed matter on both sides. The cash (\$249.50) and the time sales (\$279.95) prices, less the downpayment (\$9.00), were printed on the front side. On the back side there was a statement which read: "This order is not subject to cancellation and the set is not returnable," and a confession of judgment clause.

The wholesale price for the basic package, including the bonus items, was \$35 to \$40. The cash price was six or seven times the wholesale price. Defendant's sales personnel were paid on a commission basis. And could earn between \$16.50 to \$33.00 per sale. The amount paid depended upon whether the salesman secured the \$9.00 downpayment; obtained the customer's home telephone number; secured customers who had been employed for a year and a half; or secured customers who were not self-employed. In most cases the commission averaged \$16.50. The crew leaders also worked on a commission basis. They received an override commission of \$5.00 for every approved order of a member of their crew.

The attorney general offered uncontradicted expert evidence that the maximum retail price which should have been charged for the entire package was approximately \$108.00 to \$110.00. He offered persuasive evidence that the books had little or no educational value for the children in the age group and socio-economic position the defendant represented would be benefitted by the books.

The testimony showed that three of the five volumes dealing with nature, science and civilization represented "very poor, watered-down articles which covered the areas very superficially." They were of "extremely little use," or value, as a means of raising the educational level of the group they were supposed to help. Another volume entitled "Getting Acquainted with Your Opportunities in Education" was extremely poor, both in quality and content.

Although the volumes required a tenth grade reading level, it contained articles which the witness characterized as obsolete at the time

it was being sold and irrelevant to ninety-eight percent of its intended readers. "Child Horizons," consisting of four volumes and designed for children six to ten years of age, was said to have no relevance to children whose unfortunate socio-economic condition did not make them susceptible to the concepts and ideas reflected therein. According to the expert, it was like giving calculus to a person who had never studied simple algebra.

As to the "High School Self-Taught," the four volumes were useless for members of minority groups and individuals seeking a basic education. They might, said the expert, have some value for refreshment purposes, i.e., for an individual who had been through high school, "but for one to self teach . . . , it was just impossible." Similar comments were made about other books in the package. Taken as a whole the witness said: "[The Books] will serve no purpose in improving the intellectual level of these children, arousing their intellectual curiosity and compensating for the deficient intellectual climate in which they are being raised." Defendant offered no contradictory proof on this subject.

The attorney general produced twenty-four consumers who testified about their experiences with the defendant's sales personnel which led to the execution of the printed form contracts. In no case was there any real explanation of the obligation being assumed upon signing the contract. Many buyers relying upon the representations of the defendant's agents did not read the form being signed.

Teacher's Notes

Is there a policy covering sellers who deal with customers of limited education and economic means? Does the policy curtail the practices the seller may use against them? Does curtailment take the form of statutes? Did the defendant's customers receive the benefit of their bargain? Can freedom of contract be used to prevent the attorney general from getting favorable relief? What are the legal issues (topics) prompted by the defendant's communicative acts? Will resolution of these issues provide reasons for agreeing with the attorney general?

There is a policy covering sellers who deal with customers of limited means. The policy takes the form of statutes (Uniform Consumer Credit Code and Kansas Consumer Protection Act) which curtail the sellers' sales practices.³⁶ With respect to freedom of contract, a part of the

36. *E.g.*, KANSAS CONSUMER CREDIT CODE, KAN. STAT. ANN. §§ 16a-3-202, 16a-3-306, 16a-5-103; KANSAS CONSUMER PROTECTION ACT, KAN. STAT. ANN. §§ 50-627(1), (4) & (5), 50-640.

law's ancient history, it has been superseded by recent legislative declarations covering sellers' dealings with poorly educated and economically deprived consumers.³⁷ Since the defendant's customers never received the benefit of their bargain, an important consideration in a contract law case, resolution of the legal issues is likely to produce reasons for granting injunctive and restitutionary relief.

The issues are legality³⁸ and home solicitation contracts,³⁹ confession of judgment clauses⁴⁰ and unconscionability,⁴¹ misrepresentation of fact⁴² and duty to read,⁴³ taking promissory notes⁴⁴ and exacting a 36 percent credit charge on a credit sale.⁴⁵

The first issue is legality.⁴⁶ Contracts procured in violation of a statute (ordinance) are invalid. If the statute (ordinance) is a revenue raising measure, as opposed to a law enacted to promote health or safety, legality may be circumvented by a seller seeking compensation under a quasi contract. If a buyer seeks restitution, he must show that the violated statute (ordinance) was enacted to promote health or safety. Without evidence of the purpose for which these ordinances were enacted, it's inappropriate to grant the plaintiff a remedy based upon legality.

The next issue is home solicitation contracts.⁴⁷ The Kansas Consumer Protection Act gives the buyer a three day option to cancel such a contract.⁴⁸ Since the state has granted the buyer a statutory right

37. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274-76 (Bantam Ed. 1968); UNIFORM CONSUMER CREDIT CODE (Model Statute) §§ 2.201, 3.502. KAN. STAT. ANN. §§ 50-626, 50-627.

38. The failure to get licensed is a weak argument. Although violation of a statute is a criminal offense, in RESTATEMENT (FIRST) OF CONTRACTS § 580(d), there is a lingering question: Can a person recover compensation for services rendered without a license? If the dispute was between defendant and his employees, the defendant would argue "no compensation." See, e.g., *McConnell v. Commonwealth Picture Corp.*, 166 N.E.2d 494 (N.Y. 1960). If the dispute was about the sum to be paid for the books, the nature of the statute, e.g., revenue raising measure, would determine whether the defendant could recover the money. See CALAMARI & PERILLO, CONTRACTS § 22-7 (2nd ed. 1977); FARNSWORTH, CONTRACTS § 5.6 (1982) at 354-356 [hereinafter FARNSWORTH].

39. KAN. STAT. ANN. § 50-640. See UNIFORM CONSUMER CREDIT CODE (Model Statute) § 3.502.

40. KAN. STAT. ANN. §§ 16-a-3-306, 50-640(b)(4).

41. KAN. STAT. ANN. § 50-627.

42. See *Kannavos v. Annino*, 247 N.E. 2d 608 (Mass. 1969). It might contain language too limited to deal the communication of fragmentary information in this case.

43. CALAMARI AND PERILLO CONTRACTS § 9-44 (2nd ed. 1977) at pages 336-340. See KAN. STAT. ANN. § 16a-3-202.

44. KAN. STAT. ANN. § 16a-3-307.

45. KAN. STAT. ANN. § 16a-2-201.

46. See FARNSWORTH, *supra* note 38, at 354-356.

47. KAN. STAT. ANN. § 50-640.

48. KAN. STAT. ANN. § 50-6401.

which the defendant purports to take away by contract, the conflict must be resolved in favor of the state. The clause negating the buyer's right to cancel is invalid. The seller cannot accelerate the date when the contract becomes effective.

Confession of judgment clauses is the next issue. It is a device sellers use to force the judiciary to act at a quicker pace, i.e., to get a favorable remedy, when the buyer has breached his contract.⁴⁹ Under the Kansas version of the Uniform Consumer Credit Code these clauses are invalid.⁵⁰ Since the defendant has attached one to its book contracts, it's not likely that he will be allowed to use it.

The next issue is unconscionability. To treat the topic thoroughly, one has to talk about price unconscionability and the method by which the book contracts were procured. There is a presumption of unconscionability when the seller receives a sum of money which is twice the retail price of the goods.⁵¹ The presumption can be rebutted by a seller when he demonstrates that the higher price is attributable to doing business with poorly educated and economically deprived consumers.⁵² Since the defendant did not proffer reasons for charging the higher price, there must be a conclusion that the price for the books is unconscionable. The defendant should not get the price it sought from its customers.

The word "unconscionable" is an adjective describing an unenforceable contract.⁵³ The label is assigned to agreements procured after a seller has made a misleading representation of fact. If the defendant's book contracts were procured after it made a misleading representation of fact (defendant told part of the truth about the value of the books), the agreements would be labeled unconscionable. If the defendant (seller) tried to get a remedy after a customer breached one of these agreements, the court should deny the remedy.

There are the issues of taking a promissory note⁵⁴ and charging thirty-six percent interest on a credit sales.⁵⁵ These actions and those charges are forbidden or suspect under the Uniform Consumer Credit

49. See *Overmeyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972); *Osmond v. Spence*, 359 F. Supp. 124, 126-128 (Del. 1972); GREENFIELD, CONSUMER TRANSACTIONS, 542 (1983).

50. KAN. STAT. ANN. §§ 16a-3-306, 50-640(b)(4).

51. *Jones v. Star Credit*, 298 N.Y.S. 2d 264 (1969); KAN. STAT. ANN. § 50-627(b)(2). See Griffin, *Standard Form Contracts*, 9 N.C. CENT. L. REV. 158, 162 (1978) [hereinafter GRIFFIN].

52. Griffin, *supra* note 51, at 162.

53. FRIED, *supra* note 27, at 92 and 93.

54. KAN. STAT. ANN. § 16a-3-307.

55. KAN. STAT. ANN. § 16a-2-201. Cf. UNIFORM CONSUMER CREDIT CODE (Model Statute) § 2.201.

Code and the Federal Truth in Lending Act.⁵⁶ Sellers cannot take a promissory note as consideration for a credit sale,⁵⁷ but the Code allows a seller to exact a thirty-six percent charge on a credit sale of \$300.00 or less.⁵⁸

Finally, people have a duty to read their contracts.⁵⁹ Individuals who breach that duty are bound by the contracts they sign. That notion, which has guided individual action for centuries, has been overridden by recent legislative or judicial pronouncements.⁶⁰ If the person is a consumer, poorly educated and economically deprived, he cannot be held to the consequences which flow from his failure to read a document.

For policy reasons, the defendant's actions and the character of his book agreements the plaintiff could and should be granted equitable relief.

Classroom Discussion

There are seventy-five students in the contract class. The professor has decided to tap students on the shoulder to get their attention and answer his questions. The case is *Attorney General v. Educational Services Company* (home solicitations sales).

Scene I

Teacher: Who is the plaintiff in this case?

Student: The Attorney General.

Teacher: I guess Educational Services is the defendant?

Student: Yes.

Teacher: Did the defendant make contracts with people in Kansas?

Student: Yes.

Teacher: What did the defendant promise to do?

Student: He promised to sell people books.

56. UNIFORM CONSUMER CREDIT CODE (Model Statute) § 2.202(2)(a); KAN. STAT. ANN. § 16a-2-201(2)(a); 16 C.F.R. §§ 226.17(a), 226.18.

57. KAN. STAT. ANN. § 16a-3-307; UNIFORM CONSUMER CREDIT CODE (Model Statute) § 3.307.

58. UNIFORM CONSUMER CREDIT CODE (Model Statute) § 2.201(2)(a); cf. KAN. STAT. ANN. § 16a-2-201(2)(a).

59. CALAMARI AND PERILLO, *supra* note 43, at 336-340.

60. *Id.*

Teacher: Did the people promise to pay for the books?

Student: Yes.

Teacher: Are you acquainted with *Hamer v. Sidway*?

Student: Yes.

Teacher: Is it linked with $K = p/c$ (SYMBOLIC LOGIC)?⁶¹

Student: Yes.

Teacher: Does "p" stand for promise?

Student: Yes.

Teacher: Did the defendant promise to sell books?

Student: Yes.

Teacher: What did the defendant solicit as consideration?

Student: A promise to pay for the books.

Teacher: Are you acquainted with section 71 of the Restatement (Second) of Contracts?

Student: Yes.

Teacher: Is it devoted to consideration?

Student: Yes.

Teacher: Does it define consideration as something composed of bargain, exchange and promise?

Student: Yes.

Teacher: Did the defendant's customers make a promise?

Student: Yes. They promised to pay for the books.

Teacher: Was there an exchange?

Student: Yes. In the contract, the defendant promised to sell the books. The customers gave the defendant a promissory note. There is an inference that promises were exchanged.

Teacher: Was there bargaining?

Student: No. The terms of the written contract were never discussed.

Teacher: Can I draw the conclusion that defendant's customers failed to convey consideration?

61. "P" stands for promise. "C" stands for consideration. These contract concepts are dealt with under sections 2 and 71 of the Second Restatements of Contracts. This symbolism is introduced in *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891); FARNSWORTH, *CONTRACTS: CASES AND MATERIALS*, 45 (3rd ed. 1985). There is a discussion about defects in consideration and ways, i.e., through "benefit" and "detriment" theory, to cure them. See *Kirksey v. Kirksey*, 8 Ala. 131 (1845), FARNSWORTH, *CONTRACTS: CASES AND MATERIALS*, 64 (3rd ed. 1985); FARNSWORTH, *supra* note 38, at 46; Bronaugh, *A Secret Paradox of the Common Law*, 2 *LAW AND PHILOSOPHY*, 193, 210-212 (1983) [hereinafter BRONAUGH].

Student: Yes.

Teacher: Can you use benefit theory, i.e., $K = p/c$ (benefit),⁶² to cure a defect in consideration?

Student: Yes.

Teacher: Can a benefit take the form of a marketable asset?

Student: Yes

Teacher: Can a debt be a marketable asset?

Student: Yes.

Teacher: Didn't Kansas convey a debt to the defendant in the form of a promissory note?

Student: Yes.

Teacher: Could that be consideration for the promise to sell the books?

Student: Yes.

Teacher: "p/c" is the classic formulation for contracts. Consideration is the thing solicited (s) by the promisor, i.e., $p + s/c = K$.⁶³ What did the promisor (defendant) solicit in this case?

Student: He solicited a promissory note.

Teacher: Did the defendant's customers give him promissory notes?

Student: Yes.

Teacher: I take it we have the consideration needed to support this contract.

Student: Yes.

Scene II

Teacher moves to another student to discuss the promissory note and the Uniform Consumer Credit Code (UCCC). The student is startled by the teacher's tap on her shoulder.

Teacher: Did the defendant's customers give him a promissory note?

Student: Yes.

Teacher: Did the defendant accept them?

Student: Yes.

62. FARNSWORTH, *supra* note 38, at 46. Bronaugh, *supra* note 61, at 210-212.

63. "P" stands for promise. "S" stands for solicitation of consideration. "C" stands for consideration. It is a refinement of the sign $K = P/C$.

- Teacher: Does the defendant qualify as a creditor under the UCCC?
- Student: Yes. The section covering that is 1.301(18).
- Teacher: I call your attention to 3.307 of the UCCC. Are creditors allowed to take promissory notes?
- Student: No.
- Teacher: I call your attention to 5.201 of the UCCC. Does that section permit makers of such notes to recover actual damages?
- Student: Yes.
- Teacher: Was the defendant in the business of making home solicitation contracts?
- Student: Yes.
- Teacher: Did the form contain a clause negating the buyer's right to cancel the contract?
- Student: Yes.
- Teacher: Did the form contain a "confession of judgement" clause?
- Student: Yes.
- Teacher: Do these clauses clash with language in the UCCC?
- Student: I don't know.
- Teacher: Is the language found at sections 3.306 and 3.502 helpful?
- Student: Yes.
- Teacher: Does the friction between the contract and the Code fuel speculation about "unconscionability?"
- Student: Yes.
- Teacher: Was the defendant making money (profits) off the poor?
- Student: Yes.
- Teacher: Does it matter?
- Student: I think so.
- Teacher: If the defendant was making private arrangements against a backdrop of conditions he did not create, why should he shoulder the burden of remedying the situation by having his contracts declared unconscionable?
- Student: This is a distributive justice question, teacher. In public forums society makes laws to deal with people's misfortune: people get their welfare benefits; people are taxed in accordance with their ability to pay; salesmen are denied the right to use some gadgets when dealing with consumers who are poor and poorly educated.

Teacher: Is there legislation denying salesmen the right to use confession of judgement clauses and clauses negating the buyer's right to cancel a home solicitation contract?

Student: Yes.

Teacher: Are these clauses invalid?

Student: Yes.

Teacher: Are these clauses unconscionable?

Student: Yes.

Teacher: See Fried, *Contracts as a Promise*, pages 92 and 93, 103 thru 111. Take a look at *Kluger v. Romain*, 279 A.2d 640 (1971).

Scene III

The Teacher shifts the discussion to policy issues. He moves to a student who knows that it is his turn to recite. He has read the assignment and seems prepared to answer the teacher's questions.

Teacher: Did the defendant make efficient book contracts?

Student: I don't understand the question.

Teacher: What does the word "efficient" mean?

Student: (Pause)

Teacher: In the context of this case it refers to contracts wherein the parties have decided that their concessions are less valuable than the things (gains) they'll get in exchange, i.e., $K = +/+^{64}$ (SYMBOLIC LOGIC).

Teacher: What did the defendant get out of the book contracts?

Student: He got debts. Customers gave him promissory notes.

Teacher: Were these debts marketable?

Student: Yes. You can sell promissory notes for cash.

Teacher: Could we regard that as a gain (+)?

Student: Yes, if the notes were more valuable than the books. That seems to be the case or the inference since it sought negotiable instruments for books.

Teacher: What did the defendant's customers get?

Student: They got books.

64. $K = +/+$ signifies benefit of the bargain theory. See FARNSWORTH, *supra* note 38, at 40, 812-13.

- Teacher: Were these books obsolete or useless?
- Student: Yes. There is uncontroverted "expert" opinion evidence on that.
- Teacher: Could we treat that as a loss (-)?
- Student: Yes.
- Teacher: Should we uphold a contract where there is a gain and a loss, (K = +/-)?
- Student: No Maybe . . . (Pause).
- Teacher: Look! The buyers gave their promises freely. They had the option to do nothing. The promises were made in a formal setting. The buyers had an opportunity, indeed a duty, to read their contract to determine whether it was a bad bargain. It's their fault that they bound themselves. Why should you punish the defendant for a situation he didn't create?
- Student: I agree with you . . . but the price the defendant is getting for these books is outrageous.
- Teacher: This is a distributive justice question, a matter of policy. We can use different models (SYMBOLIC LOGIC) to build or dismantle the contract. We could ferment appealing reasons to support the model we embrace. If a legal forum, i.e., legislature or court, has spoken on this form of misfortune we are bound to follow it.⁶⁵ Have you read *Jones v. Star Credit*?
- Student: Yes.
- Teacher: In that case, did the court discuss price unconscionability?
- Student: Yes.
- Teacher: When a seller receives a sum of money that is twice the retail price for the goods, is price unconscionability at work?
- Student: Yes.
- Teacher: In a price unconscionability case, can the court prevent the seller from recovering the sum recited in the contract?
- Student: Yes.
- Teacher: Is that what we are confronted with in the Educational Services Company case?
- Student: Yes.

65. E.g., KAN. STAT. ANN. § 50-627(2).

Teacher: Is their comparable language under the Kansas Statutes Annotated, e.g., Kansas Consumer Protection Act and Uniform Consumer Credit Code (Kansas Version)?

Student: Maybe. . . .

Teacher: What about sections 16a-5-107 and 50-627?

Student: O . . . yes. I see it.

Teacher: Take a look at sections 50-628(1) and 50-632(2). Can the Attorney General use those sections to enjoin the defendant from recovering the sums recited in the contracts?

Student: Yes.

Teacher: Has the plaintiff (Attorney General) plead the statute?

Student: No.

Teacher: I take it the court is without a ground for granting a remedy?

Teacher: The teaching points are

CONCLUSION

Professor Hill has made a contribution to legal education. He has fueled a debate concerning what is to be done to help minority students. He ties elitism and racism to teachers who, he says, are the cause of student temperament. He cites the dominant culture's values and interests as reasons for the academies weak response to the needs of minority students. His work is an example of egalitarianism, leveling education to identify inequalities (merit) through competition (testing). He reminds me of Arthur Radley, a shadowy and virtuous character in *To Kill a Mockingbird*. Radley gives us trinkets, icons and life. Hill gives us a holiday which coincides with Martin Luther King's birthday, minority teachers, meaningful classroom reform and time to make life better for the next generation of students.

GRAND PATRONS

PROFESSOR JESSE & GAIL BETHELThurgood Marshall
School of Law
Houston, Texas

BROWN & HIXON, ATTORNEYS-AT-LAWHouston, Texas

PROFESSOR MCKEN V. CARRINGTONThurgood Marshall
School of Law
Houston, Texas

DEAN JAMES M. DOUGLASThurgood Marshall
School of Law
Houston, Texas

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School of Law
Houston, Texas

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School of Law
Houston, Texas

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ATTORNEY-AT-LAWHouston, Texas