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Samuel Williston's Struggle with Depression

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Samuel Williston's Struggle With Depression

ALLEN D. BOYER

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It is not usually desirable to speak of illness especially if nervous in character, but illness and threat of illness have played so large a part in my life that it is impossible to omit reference to them ....

—Samuel Williston

I. INTRODUCTION

In Samuel Williston's autobiography, whole pages are devoted to recollections of playing billiards.¹ Williston recalled passing many

* New York Stock Exchange Division of Enforcement. Opinions expressed in this article are those of the author and are not necessarily those of the New York Stock Exchange, Inc. or any of its officers. Thanks are due, for their assistance and comments, to Edward Wright Boyer, Kathleen Dicks Boyer, Roscoe A. Boyer, Allan Farnsworth, Michael Hofheimer, John Honnold, Willard Hurst, Duncan Kennedy, Alfred Konefsky, Ian Macneil; Edward Murphy, Joseph Perillo, Jack Schlegel, Richard Sherwin, Michael Sinclair, Avi Soifer, and Steve Thel, and to the library staff of the New York County Lawyers' Association. And to the memory of Anthony Barkeley-Smith, il miglior fabbro at the billiard table.

¹ SAMUEL WILLISTON, LIFE AND LAW 59-61, 294-97 (1941) [hereinafter LIFE AND LAW].
afternoons around the table of the old Colonial Club in Cambridge, resort of Harvard teachers and Boston merchants. He recalled walking one or two evenings a week, three miles each evening, to play billiards at a club in Belmont, Massachusetts. He recalled the Century Club in Manhattan and how he had played billiards there.

Williston played with colleagues from Harvard's mathematics and history departments, his friend the college organist, and his law school colleague Edward H. Warren. "In some way my interest in billiards became known to many of my pupils," he added, "and for most of the first ten years of the century I had a weekly engagement with a succession of friendly young men," students who became lawyers and bankers throughout the nation.²

The years in which Williston was playing billiards, from about 1895 to about 1930, were the years in which formalist jurisprudence dominated American law. The vision of Harvard men playing billiards, in fact, provides a striking visual metaphor for legal formalism. This school of thought had been enshrined at Harvard Law School by Christopher Columbus Langdell and his disciples. To have studied law at Harvard, in that era, was to belong to the elite who controlled the courts, the morning-coated gentlemen who argued cases and the black-robed judges who decided them.³

The geometry of the billiard table suggests the geometric precision to which formalism aspired. The game's fixed boundaries, clean angles, and carefully calculated forces stand in for formalism's rigid categories, facile oppositions and gradations, and allegedly unswerving logic. And if billiards can be played too sharply, if players sometimes put english on a ball or quietly hustle a stranger—well, that could be said of formalism, too. Formalism often insisted on hairsplitting grounds of decision—but where vested interests were involved, courts could give concepts like substantive due process an unexpected and preternatural elasticity.

Williston was one of the high priests of formalism. His fondness for billiards can be related to a philosophical predilection for abstraction. It can even be given cultural connotations, when one considers that he learned to play the game in Newport in the early

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2. Id. at 297.
3. Commenting on "the great age of the American law school," Grant Gilmore remarked:
   It may well be that no educational institutions in any country at any time have enjoyed the prestige and achieved the success of the dozen or so national law schools which grew up in the image of Langdell's Harvard. To be accepted as a student—or at all events to survive the cut at the end of the first year—at one of these schools was a guaranty of success. To be a professor of law on one of the great faculties was to hold a passport to fame and fortune.
1880s, and that he once saw Herbert Spencer at the billiard table. This association connects billiards to the opulence of the Gilded Age and to the Social Darwinism which Spencer championed—which in turn connect with the neoclassical economic theory which paralleled such thinking, the formalistic jurisprudence which reflected it, and the Nineteenth Century’s blinkered understanding of contract law.

Such constructs are a little too fanciful. It is true that Williston was one of Langdell’s star pupils. It is also true that he was disposed to let logic, as well as experience, play a part in shaping the law. Much of Williston’s reputation for formalist thinking, however, involves the attribution of guilt by association. A clearer understanding of his treatment of contract law can be gained from his own statements of what billiards had meant to him:

When I began to study law and for ten years thereafter, I rarely touched a billiard cue. Later, when I was slowly recovering from a breakdown, billiards proved a great resource . . . .

During the latter part of my convalescence when I was away from home I was often able to find opportunity for a game and subsequently I have almost always managed to find a friendly enemy.

The breakdown of which Williston speaks here was more than a convalescence. It was a series of nervous breakdowns which hit him very hard, personally and professionally. These collapses cost him more than four years of work, forced him onto a regimen of addictive and highly toxic medication, cycled him through clinics, and depressed him so badly that he tried to resign from the Harvard faculty.

Williston’s fondness for billiards speaks volumes about the definition he gave to contract law. He did not approach the game as an exercise in abstraction; he valued it for having helped him. Similarly, he did not see the structure and order of contract law as a matter of pursuing form for form’s sake; in hope of establishing order, he favored structures which promised stability and certainty.

If Williston’s treatment of contract law sometimes suggested too closely the precision of the billiard table and if he preferred simple answers when issues called for more sophisticated treatment, this also may have been because he had struggled, successfully, to reassert control over a shattered inner life. After his breakdown, he had made his own way back. While billiards helped, the only effective remedy was work—in a sense, the work which made the author. Williston’s concern with precision and structure, on both the per-

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4. Life and Law, supra note 1, at 61.
5. Id.
6. Id. at 294.
sonal and professional levels, reflected an intrinsic need for order. The patterning of forms and principles which produced Williston's treatise on The Law of Contracts was the same structuring process which organized the life of Samuel Williston.

II. WILLISTON'S MALADY

Both achievement and insecurity marked Williston's background. Known for charities and service, his family had also suffered quarrels and estrangement along religious lines. Its prosperity rested on the money it earned—substantial in good times, but never vast enough to be locked away in dynastic trusts. By the time Williston began his own career, the money was not to be counted on, and stress had begun to crack open the fault lines.

A. Heredity and Family Environment

Williston's paternal grandfather, William Richards, was one of the missionaries who sailed from Massachusetts to Hawaii in 1822. Richards organized the island kingdom's first code of laws, influenced the Hawaiian Constitution, Bill of Rights, and Edict of Toleration, and organized the first school system. He labored there for a quarter-century, a vigorous reformer and evangelizer, indefatigable until over-work killed him.7

Samuel Williston, Williston's adoptive grandfather and namesake, was arguably the richest man in western Massachusetts. His fortune came from organizing a business his wife Emily had started: the manufacture of covered buttons. At its height, this enterprise employed more than a thousand families, and from it Samuel expanded to pursue interests in banking and railroads. The Dictionary of American Biography describes him as a philanthropist, who had made gifts to Amherst College, Mount Holyoke Female Seminary, the American Board of Commissions for Foreign Missions and Williston Seminary, now Williston School, which he founded. But while his life seemed to link piety with worldly success in the tradition of New England, the dark side of his Calvinist faith seemed to foresee

7. Williston wrote an article about Richards for the June 1937 issue of The New England Quarterly. Not approving of the editorial changes made by the Quarterly, Williston then wrote a monograph which he had privately printed. See SAMUEL WILLISTON, WILLIAM RICHARDS (1938).

Richards enjoys a modicum of celebrity through the work of another author, whose books rival his grandson's for monumentality. He apparently served as the model for missionary Abner Hale in JAMES A. MICHENER, HAWAII (1959).

Throughout this section, unattributed statements of fact regarding the Williston family are digested from LIFE AND LAW, supra note 1, at 4-35. See also 10 DICTIONARY OF AMERICAN BIOGRAPHY 309-10 (Dumas Malone ed., 1964).
setbacks. His namesake commented:

It seems odd in these days that a man of some education and superior intelligence, with many contacts with the world, should be agonized with fear that he was not one of the elect, and that, irrespective of the propriety of his conduct, he was, nevertheless, fated to eternal damnation; yet such was Mr. Williston's attitude of mind during a large part of his life. . . . In justice to him, it should be said also that when I best remember him he was at least seventy-five years old and that he was oppressed by business anxieties. His successful career as a manufacturer induced him when he was past seventy years old to undertake a new venture—the Williston Mills, devoted to cotton manufacture. The enterprise proved unsuccessful, and I remember hearing him say in my presence that it had cost him half of his fortune.8

Levi Lyman Richards, who would become Williston's father, was born on the island of Maui in 1830. Brought back to New England at the age of seven, he was reared in the Samuel Williston household. Even before William Richards died in the Pacific, the boy had put aside the names his father had given him. It was as Lyman Richards Williston that he chose to be known.

Lyman graduated from Amherst College, taught at Williston Seminary, and became engaged to a prominent minister's daughter. Appointed to teach Latin at Amherst, he touched off a scandal by declaring that he had become a Unitarian. This crisis of conscience angered his family and fiancée. It also disturbed the college, and cost him the professorship. Editorials were written about it. His family eventually welcomed him back; Amherst did not. He moved to Boston and became a schoolmaster—sometimes within the public schools, sometimes as head of a private school for girls. During the late 1870s, needing more money, he decided to make it by speculating in stocks. He lost heavily in 1878 and again in 1882.9 His son remembered new disadvantages, and restricted family income—all of which had to be endured—but Lyman scraped through. He fed and clothed his children, paid the tuition of those who went to college, and ensured that his school stayed in family hands. He was not a Puritan, but something of the ethic survived in him.

Samuel Williston had seven brothers and sisters. Older brother James, the eldest son, belonged to the Boston and New York Stock Exchanges. He served as a broker for James R. Keene and Russell

8. LIFE AND LAW, supra note 1, at 5.
9. Id. at 34, 39. In 1874, when the elder Samuel Williston died, Lyman received a $50,000 bequest of stock in the Williston family enterprises. However, a shift in fashion changed the family fortunes; covered buttons went out of style. "The long, black coats that all well dressed men had worn were superseded for everyday wear by suits of mixed colors with horn buttons." Id. at 33; see also C. D. Collins, A Button That Endowed a Seminary, HOBBIES, July 1941, at 32.
Sage, which, on the Wall Street of those days, was like being a two-fisted sea-captain with Francis Drake or Sir John Hawkins. Arthur was an engineer and college administrator. Constance went to Smith College, taught at girls' schools, and painted. Helen married a college professor. Emily worked as a housekeeper for wealthy families, and later cared for her mother.

Two other sisters, Alice and Mabel, were much less fortunate. Alice, a successful piano teacher, had a nervous breakdown in 1888. She never quite recovered. Over the next two decades, although sometimes well enough to take courses at Radcliffe College or manage the family ledgers, she spent most of her time bedridden, suffering "a tendency to severe digestive attacks." In 1908, she made one last effort at rehabilitation, leaving Boston for the country. "For a time the stimulus of congenial occupation buoyed her up," her brother sadly noted, "but the inevitable reaction came and this time with such severity as to cause her death."

Mabel's fate was even sadder. Williston remembered that she was "a bright and enthusiastic girl, but somewhat afflicted with the shyness that with several of us prevented easy social contacts." She taught in the school her father had started, but at about thirty years of age she suffered, like several others of the family, a nervous breakdown... Proper treatment of such cases was not so generally understood then as now. I think Mabel might easily have been restored to health if she had been sent at once to a good sanitarium, but the family doctor simply put her to bed in charge of a nurse, and allowed her to lie awake all night. Her mind became somewhat unbalanced and turned to destruction, so that she had to be put under restraint in an institution. After several years she was sufficiently restored to return home and made herself helpful there for a few years. But the impulse that had been so strong for years returned in a moment of despondency, and she destroyed herself.

Alice's breakdown marked the real beginning of the Williston family's struggle with mental illness. Mabel's deterioration and death took place over the same span of years in which Williston himself was in and out of sanitariums. In describing his sisters' tragedies, he wrote of suffering he himself had managed to survive.

10. Life and Law, supra note 1, at 11.
11. Id. at 12.
12. Id. at 13-14.
13. Id. at 14.
14. Beset by financial troubles during his son Samuel's last year of high school, Lyman Williston had been admitted to the Sanitarium at Clifton Springs, New York in 1877-78. Id. at 34. Regarding Clifton Springs, see Samuel H. Adams, Life of Henry Foster, M.D.: Founder, Clifton Springs Sanitarium (1921).
B. Illness and Incapacity

For Williston, insecurity seems to have been a persistent trouble. Perhaps the most surprising aspect of his career is the way in which anxieties and doubt gnawed away at him. Describing his boyhood, he wrote:

I did not like to be laughed at. Fear of this not only restrained me from attempting to sing [in school choruses] but also from displaying the incompetence of a beginner in boyhood games.

... Doubtless in modern phraseology, I had an inferiority complex in some directions, but I do not think it occurred to me to pity myself or to be unhappy, though I had my bad moments.15

Long after he had been recognized as America's best-known law professor, with a career spanning forty-seven years, he expressed his choice of career as if he had chosen it by default.

The impression received from others in my boyhood and in my college days, which I assumed to be rather well founded, that I was not of much importance outside of my family had been hard to eradicate.

My success as a student in the Law School did indeed convince me that I could do well in the bookish side of the law.... I knew that I was not well fitted for cajoling or dominating hostile witnesses in order to confute them; and the bargaining, negotiating, and compromising that form a large part of lawyers' dealings with one another were not suited to my talents. Especially too, in the art of attracting clients, I felt that I should not be a success.16

During his first year of teaching, student questions often stumped him. Success only introduced new doubts: "I have often feared in later years after I had grown gray and had gained some repute, that there was too polite and facile acquiescence by my students for their own good...."17

Williston was particularly sensitive to matters of money. He had reason to be; he was short of it. Due to his father's investment losses, he had to spend time away from college during his last semester, taking a job connected to the Northern Pacific Railway. Between college and law school, he would spend three years working, two years with the railroad's survey project and one as a teacher in a boarding school. In 1887, after his second year of law school, he became engaged to Mary Wellman. Money was so short that she told him not to buy her an engagement ring until he could buy it out of his first substantial professional fee. This was the first sacrifice she

15. LIFE AND LAW, supra note 1, at 19-20.
16. Id. at 140.
17. Id. at 133-34.
would make. By the time she received her engagement ring, her oldest daughter would be nearly twelve years old.\textsuperscript{18}

When Williston wrote his autobiography at the end of the 1930s, he could recall precisely how much Harvard professors had been paid in 1890.\textsuperscript{19} Even his own home life found itself described in economic terms:

[I]n November [1891] Dorothea, the first of our two daughters, was born, her name being inspired by the heroine of George Eliot's novel of Middlemarch. She proved a difficult and expensive infant to raise. I had hoped that my income, which, for that year, was slightly more than $3,000, would be sufficient for our purposes, but the expenses for the year in fact amounted to about $4,000.\textsuperscript{20}

In the early 1890s, stresses were accumulating. In 1892, Lyman Williston retired from teaching. In 1893, a financial panic sent the nation into a two-year depression. Around this time, the Williston family found itself faced with a number of large expenses: treatment for Alice and Mabel, Constance's tuition at Smith, and the purchase for James of a seat on the New York Stock Exchange.\textsuperscript{21} In Williston's own household, there were the expenses of raising Dorothea and her younger sister Margaret, born in October 1894.

The titles of Williston's early publications reflect these concerns. His first law review article, published in 1888, dealt with tracing commingled trust property, a legal echo of loss and betrayal.\textsuperscript{22} In 1891, he addressed whether an insolvent debtor could insure his life for his wife's exclusive benefit and discussed how to

\textsuperscript{18} Id. at 84, 272.
\textsuperscript{19} From Williston's account of his hiring, it is possible to reconstruct virtually the entire salary structure of the Harvard Law School—the pay of law professors versus the pay of instructors in the academic departments, the pay of full professors versus that of assistant professors, the sliding scale of salary increments and how this correlated with time in service. Id. at 129-31. Williston even set down in excruciating detail why he delayed in leaving private practice:

My salary as assistant professor was to be $2,250 for the first two years, and $2,500 for the remaining three, but my term of service did not begin until September 1st, and as President Eliot carefully explained, Harvard salaries were then paid quarterly and not in advance. So my wife and I decided to remain in Brookline for the ensuing year.

Id. at 131.
\textsuperscript{20} Id. at 135.
\textsuperscript{21} James R. Williston was first admitted to the membership of the New York Stock Exchange on May 12, 1894. In his application, he affirmed, "I have plenty of means to pay for the membership, but as I want more capital my father will put in 30 or 40 thousand dollars." Application of J.R. Williston for Admission: Minutes of N.Y. Stock Exchange Committee on Admissions (May 3, 1894) (on file with the Buffalo Law Review).
\textsuperscript{22} Samuel Williston, The Right to Follow Trust Property When Confused with Other Property, 2 HARV. L. REV. 28 (1888).
carry out attachments on debtors who had fled overseas.\textsuperscript{23}

As an assistant professor of law, Williston consistently turned down opportunities a more ambitious man might have taken: offers of deanships at three other law schools, a position as reporter to the Massachusetts Supreme Court (which was considered a stepping-stone to that august bench). He also faced publication deadlines on three books. One was a supplement to Langdell’s Contracts casebook, another a Sales casebook for a course taught by James Bradley Thayer. He also had under way a revised edition (actually the eighth edition) of Theophilus Parsons’ \textit{The Law of Contracts}. This last project, which assumed a significant shape in his career, Williston termed a “somewhat disappointing experience.”\textsuperscript{24}

In the face of these pressures, Williston seems to have become more intense. He began studying late in the evenings, resolved to teach himself Italian.

In the spring of 1895 I was appointed a full professor from the following September. The salary of a full professor had previously been nominally increased, but it was now put on a more extensively sliding scale than before with $500 less as the initial salary than had been the case. That is, it was fixed for the first five years at $4,000 and after three successive periods of five years it would rise to $5,500. I was in no mood to find fault, however; I was receiving some income in Boston and something from my writing, and my prospects seemed all that I could wish, with no hint of the trouble in store for me.\textsuperscript{25}

The tense detail of those middle sentences belies the confidence of that last sentence. Mary Williston sensed that something was awry. Unsuccessfully, she tried to persuade her husband to slow down.

The first symptoms were bad circulation and loss of concentration. Next came muscle spasms, “severe and increasing nervous reflexes, especially in my left foot, whenever I tried to read or study.”\textsuperscript{26} Insomnia set in. Following a specialist’s advice, Williston tried to work himself out of his discomfort by exercise and “exhausting bicycle rides.”\textsuperscript{27} By November, he felt compelled to take a leave of absence for the rest of the school year.

Travel was advised. Williston went south to Washington,

\begin{itemize}
  \item 24. LIFE AND LAW, supra note 1, at 138-40, 258.
  \item 25. Id. at 141.
  \item 26. Id. at 142. Throughout this section, unattributed statements of fact relating to Williston's breakdowns are digested from LIFE AND LAW, supra note 1, at 142-66.
  \item 27. Id. at 143. As an undergraduate, he had won an athletic letter in track and field sports for riding the high bicycle. Id. at 42-44; see Austin W. Scott, \textit{Samuel Williston}, 76 HARV. L. REV. 1330, 1331 (1963).
\end{itemize}
planning to sit in on the trial of a case he had briefed. This was a mistake. In that distant city, the separate symptoms coalesced into breakdown.

I found the weather chilly and disagreeable. My friends were busy in the daytime, and I was not in a sufficiently comfortable condition for evening amusements, nor could I do much reading even of light fiction, for the reflexes caused by reading were increasingly troublesome. All that seemed possible was to take long walks through the streets. Unquestionably I over-exerted myself and after some days I awoke one night with my head so flushed that I should have thought that I had a fever if my pulse had not still been regular. . . .

Thereafter, I could neither take much exercise physically or mentally, nor could I sleep. 28

A local doctor prescribed bromide (probably potassium bromide). This relieved his insomnia but failed to produce a cure.

From Washington, Williston went directly to a sanitarium at Clifton Springs, New York. 29 At Clifton Springs, they practiced hydrotherapy, “three treatments a day, two wet and one dry; that is, two involved total or partial immersion, and one was either massage or electrical treatment.” 30 The water cure was pursued in conjunction with the rest cure. “Insomnia was a major difficulty, and any excess in physical or intellectual activity, and most of all any emotional stress, accentuated it.” 31

Williston did not leave Clifton Springs until June 1, 1896, more than five months later. Unable to work during the fall semester, institutionalized during winter and spring, he had lost an entire year.

Williston lost the next year, too. Rest and a warmer climate were advised. He spent six weeks in Bermuda and the early part of the spring in Virginia. Money was becoming tight; Harvard had voted to consider him on sabbatical, with half pay. He seemed to be making a recovery. However, in August 1897, just before the fall semester was to begin, he had a relapse, and it was clear that he would not be able to teach during the 1897-98 school year.

A change of scenery was advised. Williston went to California, carrying letters of introduction, looking for “some suitable fruit ranch where [he] could do light work.” 32 He did not know if he could go back to teaching and he did not know how he would earn a living if he could not teach. That troubled him. He knew that his wife was

28. LIFE AND LAW, supra note 1, at 144.
29. Id. at 144-48.
30. Id. at 145.
31. Id.
32. Id. at 155.
rearing two small children alone in a house where the furnace did not work properly, economizing so that he could spend time in a warmer climate. That troubled him, too. But the change seemed to be having an effect. He could pore over briefs for an hour or two at a time now.

During the next academic year, 1898-99, he was back at the law school, teaching a light load—one course on the new Bankruptcy Act of 1898. As soon as the fall semester began, his insomnia returned. With the aid of sedatives, "hypnotics," he weathered the crisis. By the end of the school year, he was able to work five hours a day.

That next fall, September 1899, Williston began teaching a full load of courses: Contracts, Sales, and Bankruptcy. Again he broke down. This time nothing could help him to sleep or relieve persistent back pain.

I therefore abandoned my work and returned to Clifton Springs. This time the treatment there did not restore my sleep. The physicians of the Sanitarium finding the old hypnotics of slight use, abandoned them and tried packing me in a cold, wet sheet, putting ice bags on my spine and head, and other hydropathic devices, but I could get only an hour or two of sleep.33

The doctors tried paraldehyde and sulfonal. Neither worked. Apparently, it was at this juncture that Williston offered his resignation, which Dean James Barr Ames did not accept. The patient's morale sank: "Hope grew gradually dim, and one Sunday morning a wave of despair overwhelmed me with the conviction, by no means unreasonable, that all was lost."34

At this low ebb, in December 1899, Mary Williston learned of Dr. John Gehring, a physician in Maine. She traveled to Clifton Springs, had her husband discharged, and took him north to the Gehring Clinic. Gehring used hypnotism. He also prescribed medication: "heavy doses of bromide of strontium during the day... as well as the sulfonal at night."35

33. Id. at 160.
34. Id.
35. Id. at 161. The Gehring clinic adhered to a strict daily routine. Patients were awakened at six a.m. and denied breakfast if they were not in the dining room by seven. After a brief rest, each patient was required to saw a specified number of logs, the total being checked by the clinic handyman. Dr. Gehring then briefly interviewed each patient in a darkened room, with the patient lying down while Dr. Gehring spoke in a low voice, instructing the patient that the symptoms complained of could not be continued. After lunch, patients engaged in outdoor sports. "In the evening only patients wearing formal dress were permitted to come to dinner, which was followed by readings, dramatic performances, charades, games, lectures, and lantern slides." LAWRENCE KUBE, THE RIGGS STORY: THE DEVELOPMENT OF THE AUSTEN RIGGS CENTER FOR THE STUDY AND TREATMENT OF THE NEUROSES 4 (1960).
Under this regimen, Williston improved. By March he was able to leave the clinic. That fall he returned to teaching a full schedule of courses. "In the following twenty-five years, though more than once troubled by attacks of insomnia for several weeks at a time which compelled me to limit closely my work and exercise, I nevertheless carried on my full work at the Law School..."

Essentially, he had turned the corner. There was one more bad breakdown, in 1903. What precipitated this change, Williston did not record. This time his recuperation was shorter; he spent two months with Gehring, decided the clinic was doing him no good, and went back home. He continued to dose himself with "the only hypnotic that remained effective," a potent "mixture of bromide and chloral." Between 1903 and 1912, whenever troubled by insomnia—"two or three attacks, of perhaps two months each"—he followed a similar pattern.

By 1912 I found that the new drug veronal was perfectly effective and produced no apparent ill consequences; and my mind being thus set at rest, I was content with the knowledge of the existence of a satisfactory remedy, and though I occasionally, though rarely, made use of a mild hypnotic, I did not take another dose of veronal after 1912 until 1923. It was during these years... that I enjoyed, or at any rate exercised more fully than at any other time, a regained power of work. During these years I wrote my treatise on contracts, consisting of three large volumes with an additional volume of index, and table of cases, and also prepared a much enlarged second edition of my treatise on sales in two volumes, first published in 1909.

Clinics and sanitoria had become a familiar environment. In 1923, "[in consequence, presumably, of allowing myself too great freedom"] Williston's nervous troubles reappeared. He went to Stockbridge, Massachusetts, to a clinic run by Austin F. Riggs, where he stayed for two months. He returned to Stockbridge in the summer of 1924, having worn himself down by playing eighteen holes of golf six days a week and walking five miles on Sunday.

The drugs which Williston took were potentially deadly. Potassium bromide can be deadly; it achieves its soporific effects by slowing down the heart. Sulfonal was a trademark name for sulfonmeth-

36. LIFE AND LAW, supra note 1, at 161.
37. Id. at 163.
38. Id.
39. Id. at 163-64.
40. Id. at 164.
41. In the autumn of 1929, after Mary Williston died, Samuel was admitted to a sanitarium in Cromwell, Connecticut. While a patient there, he was awarded the first American Bar Association gold medal "for conspicuous service to American jurisprudence." Id. at 327.
ane. At Clifton Springs they gave him 15-grain doses; a 30-grain dose would have killed him. Paraldehyde was less toxic than sulfonyl, but equally addictive. Veronal was barbital, an early barbiturate. It too was highly addictive. Chloral hydrate, which Williston took over the longest period of time, was arguably the most dangerous of these medications. Chloral was highly potent: the underworld knew it as the active ingredient of knock-out drops. It was also highly toxic. The standard dosage, 15 grains, had been known to cause death. Moreover, its use frequently led to what was called "the chloral habit."42

Incredibly, given the nature of these drugs, Williston's doctors allowed him to set his own dosages—to determine for himself how much he took and when. This was perhaps the most dangerous aspect of what Williston called "my strained relations with Morpheus."43 It began with Dr. Benjamin Loveland, during Williston's first stay at Clifton Springs.

Bromide of potassium would give me some sleep, but the effect would wear off in an hour or two.... I was given a bottle of the medicine with instructions as to the proper dose, but with permission to repeat it as often as necessary. I was told that the expectation was that I should find myself able gradually to diminish the frequency of the doses and that I should do so as rapidly as I found it possible.

Several but not all of the physicians whom I have had in subsequent years have objected to my knowledge of hypnotics and to my regulation of the doses that I should take. For my own part, I think ... [this] method was helpful in bringing about my recovery and was one of the main reasons why I ultimately became able to do continuous work in spite of my inability to prevent recurrent attacks of my trouble.... [T]he method cultivated the self-dependence which is of vital necessity for a nervous invalid....44

It is clear that Williston considered himself an expert on sedatives. It is equally clear that some of his doctors thought he knew too much. What doses he took is not certain. The level was so high, however, that toxic effects began to show within two days, whenever he began taking the bromide-chloral compound. His behavior also ex-

42. ALFRED W. HERZOG, MEDICAL JURISPRUDENCE 552, 929 (1931). Regarding chloral's toxicity, see Davis v. State, 113 S.E. 11 (Ga. 1922) (addressing murder by poisoning when chloral was introduced into bottle of whiskey); Rosenbarger v. State, 56 N.E. 914 (Ind. 1900) (addressing attempted murder by chloral hydrate). For Agatha Christie, veronal was often the poison of choice. See AGATHA CHRISTIE, THE MURDER OF ROGER ACKROYD (1926); AGATHA CHRISTIE, THIRTEEN AT DINNER (1934).

43. LIFE AND LAW, supra note 1, at 164.

44. Id. at 146. During the academic year 1898-99, Williston's "good friend and family physician, Dr. Herbert B. McIntire," advised him to continue his teaching "with such aid from hypnotics as might be necessary." Id. at 158.
hibited the exhilaration which was symptomatic of chloral addiction.\textsuperscript{45}

To some extent, Williston recognized these dangers: "I do not commend the extensive use of hypnotics that I have made. They are treacherous and I have never been quite happy during the periods that I have taken them. But it has been 'Hobson's choice.' Without them my career would have ended with my thirty-fifth year."\textsuperscript{46}

III. "AMERICAN NERVOUSNESS": NEURASTHENIA AND AMERICAN CULTURE AT THE TURN OF THE CENTURY

Williston generally declined to name what he called "my malady." Only once did he suggest a name: "nervous exhaustion."\textsuperscript{47} From this casual reference, however, it is possible to identify the disorder that plagued him.

In 1869, the New York neurologist George M. Beard coined a term which would achieve great medical and cultural vogue over the next half-century. The term was neurasthenia—literally, nerve weakness. In these decades, as cultural historian Francis G. Gosling has written, neurasthenia would be applied to "practically every nonspecific emotional disorder short of outright insanity, from simple stress to gross neuroses."\textsuperscript{48} Neurasthenia was nervous exhaustion (another phrase Beard favored). It was the nervous collapses people had, after which men were sent West to live the rugged life and women were sent to spas to take the waters. It was shattered nerves. It was artistic temperament. It was the stress of overwork, the tragic strain that cut short promising careers.

The list of symptoms which Beard compiled showed the difficulty of defining the disorder. Neurasthenics suffered from insomnia, flushing, drowsiness, bad dreams, cerebral irritation, dilated pupils, pain, pressure and heaviness in the head, changes in the expres-

\textsuperscript{45} Id. at 163. Williston observed a throat irritation which became severe within "a night or two." \textit{Id.} He noted that, during his breakdowns, "[n]ormal sense of fatigue largely ceased to operate. Often exhilaration rather than a sense of fatigue followed attempts to go beyond what my nervous system would bear." \textit{Id.} at 146. Exhilaration has been identified as a symptom of chloral intoxication. \textsc{Herzog, supra} note 42, at 552 ("[A] chloral habitué is likely to be excited and very talkative in a flighty manner.").

During this same period in Britain, it was also suspected that "addiction to chloral or morphine was the sole cause of functional neurosis" in many patients who complained of continuing nervous trouble. \textsc{Janet Oppenheim, "Shattered Nerves": Doctors, Patients, and Depression in Victorian England} 115 (1991). Dr. Gehring, who was known for restricting his patients' drug intake, was himself plagued by rumors that he personally used such medications. \textit{See Kubie, supra} note 35, at 4.

\textsuperscript{46} \textit{Life and Law}, \textit{supra} note 1, at 166.

\textsuperscript{47} \textit{Id.} at 142.

\textsuperscript{48} \textsc{Francis G. Gosling, Before Freud: Neurasthenia and the American Medical Community} 1870-1910, at 9 (1987). The following discussion draws on Gosling's analysis.
sion of the eye, neurasthenic asthenopia, noises in the ears, atonic nose, mental irritability, tenderness of the teeth and gums, nervous dyspepsia, desire for stimulants and narcotics, abnormal dryness of the skin, joints, and mucous membranes, sweating hands and feet... fear of lightning, or fear of responsibility, of open places or of closed places, fear of society, fear of being alone, fear of fears ....

Beard hypothesized that neurasthenia was caused, specifically, by exhaustion of the nerve cells. Heredity determined how much "nerve force" (quasi-electrical energy) an individual possessed—i.e., how much stress he or she could bear. The neural structures could be overcome by shocks or strains, overwork, fear, grief, or illness, which broke down the neural circuitry. Collapse also threatened if nervous energy were not carefully husbanded. Metaphors of bankruptcy were common. One neurologist likened the patient "to a bank whose specie reserve has been dangerously reduced, and which must contract its business... or to a merchant, who has expanded his business beyond what his capital justifies ...

The most prominent neurasthenics were "brain-workers" who had pushed themselves too hard: businessmen seizing new opportunities, professionals taking on too large a practice, women who insisted on higher education. A breakdown could result if nervous energy were dissipated through sexual or speculative misadventures. However, "if patients were sensitive and refined enough to begin with, neurasthenia could be brought on, irregardless of their moral probity, by simple exposure to the hectic pace and excessive stimuli of modern life." Such individuals could be helped only if they cut back on their expenditures of nerve force.

No organic cause for neurasthenia could be found. The models of personality and cognition, upon which modern psychology relies, had not yet been established. In default of better explanations, neurologists explained neurasthenia in terms of environmental fac-

49. GEORGE M. BEARD, AMERICAN NERVOUSNESS: ITS CAUSES AND CONSEQUENCES at viii-ix (reprint 1972) (New York, G.P. Putnam's Sons 1881). It is likely that Alice Williston's "digestive attacks" were considered a symptom of neurasthenia, as anorexia nervosa was among the disorders comprehended by this diagnosis. See OPPENHEIM, supra note 45, at 212-15.


52. Gosling, supra note 48, at 100 (citing S.W. Hammond, Neurasthenia, 14 VT. MED. MONTHLY 158 (1908)); Edward Howisbrook, Neurasthenia, 9 TRANS. IOWA ST. MED. SOC'Y 188 (1892); Charles H. Hughes, Neurotropia, Neurasthenia, and Neuriatrica, 15 ALIENIST & NEUROLOGIST 215 (1894).

tors—the culture in which its sufferers lived.

Neurasthenia, Beard argued, was due to the intensity of modern life, the sudden onslaught of "steam power, the periodical press, the telegraph, the sciences, and the mental activity of women." 54 It deserved to be called American nervousness because the pace of technological and cultural change was greatest in the United States. "American nervousness is the product of American civilization," Beard triumphantly proclaimed. 55 His disciple A.D. Rockwell elaborated:

In the older countries, men plod along in the footsteps of their fathers, generation after generation, with little possibility and therefore little thought of entering a higher social grade. Here, on the contrary, no one is content to rest with the possibility before him of stepping higher, and the race of life is all haste and unrest. It is thus readily seen that the primary cause of neurasthenia in this country is civilization itself, with all that the term implies, with its railway, telegraph, telephone and periodical press intensifying in ten thousand ways cerebral activity and worry. 56

In short, neurasthenia was the shock of the new.

Williston was clearly familiar with the prevailing explanation of neurasthenia. His family's history of mental illness, he commented, derived from "no other inheritance than a strong physique, derived from my mother's family, insufficiently supported by the more delicate nervous organization on my father's side." 57 In his own case, he admitted to being "in the offensive language of the neurologist, a hypersensitive" 58—but then asserted, quickly and defensively, that his breakdown

was not due to any mental twist. Since entering the Law School as a student, I had been markedly successful, both from an objective standard and from my own point of view. My domestic life was happy, and it seemed to me that I was riding on the top of the wave. I had no worries and there were no "bees in my bonnet." But I had pushed a delicate machine too hard. 59

In the literature of neurasthenia, such explanations are classic. The idea of a mental structure outmatched by its physical frame was a basic tenet of contemporary neurologists' belief in the importance of heredity. Williston's metaphor of the overworked machine was a

54. BEARD, supra note 49, at 96.
55. Id. at 178.
57. LIFE AND LAW, supra note 1, at 14.
58. Id. at 143.
59. Id. at 143-44.
favorite one.\textsuperscript{60} Similarly, the therapies which Williston suffered—electrotherapy, hydrotherapy, and various forms of the "rest cure"—were all prescribed for neurasthenics.\textsuperscript{61}

Williston saw his troubles as central to the story of his life. He wrote: "Illness and the threat of illness have played so large a part in my life that it is impossible to omit reference to them in any autobiographical account...."\textsuperscript{62} Moreover, his struggle to impose coherence on his inner life is reflected in the observations which preface his Contracts treatise:

One who attempts to write on any topic of the law is likely to realize that what Maitland said of the historian is also true of the law writer,—he is tearing a seamless web. . . .

In view of this it might be thought the part of wisdom to be content to work within smaller compass; but the law of contracts suffers from a difficulty opposite to that which has hampered the development of the law of torts. . . . Only in recent years has much effort been made to knit together with broad general principles the various kinds of torts. The law of contracts, on the other hand, after starting with some degree of unity now tends from its very size to fall apart.\textsuperscript{63}

The seamless web torn by the legal writer might be the law's existence as a comprehensive and interrelated system; but these words can also describe that scholar's psyche, strained by the effort and ambition of such an undertaking—as Williston thought his own had been. To work within a smaller compass may exemplify a narrowed, penetrating legal analysis—but this is also what neurasthenics were taught to do, to conserve nerve energy by restricting activity. And when Williston portrayed the law of contracts as falling apart—at the very moment when he had just completed a massive treatise, organizing tens of thousands of cases along lines of principle and logic, producing a formalist masterpiece which unified different kinds of legal agreements into one great empire of contracts—he characterized his task as a Sisyphean one. This recalled, in a different context, the endless cycle of useless therapies he had endured.

Williston's introduction to the study of contract law draws on the rhetoric of neurasthenia—which means that it deals with his presentation of the law in the same terms which had defined his psychological struggle. His preface expressly presents contract law in terms of the contrast between order and disintegration, between

\textsuperscript{60}. See Gosling, supra note 48, at 104 (citing William O. Stillman, Neurasthenia, 40 MED. & SURGICAL RPRTR. 398 (1879)).

\textsuperscript{61}. Id. at 108-27.

\textsuperscript{62}. Life and Law, supra note 1, at 142.

\textsuperscript{63}. Samuel Williston, The Law of Contracts at iii (1920) [hereinafter Law of Contracts].
process and entropy. This personal connection is inescapable. To understand the forms in which Williston presented the law of contract, we must consider his work in light of his inner battle.

IV. FORMALIST LEGAL CULTURE

A. Formalism

The age of neurasthenia was the age of legal formalism. Today, no one has anything good to say about formalism, no more than contemporary psychologists make diagnoses of neurasthenia. As Thomas Grey has remarked, legal historians have published "nearly a century of polemics against 'mechanical jurisprudence,' 'Bealism,' 'transcendental nonsense,' and similar targets, set up for summary demolition." To this list of pejoratives one might add "classical orthodoxy," Grey's own term, and "classical legal thought," a phrase coined by Duncan Kennedy.

So one-sided has been the discussion of formalism that only with some effort can we describe the jurisprudential system underneath its caricatures. Nonetheless, some things are certain. The practitioners of formalist jurisprudence believed that they had embarked on a scientific enterprise. They asserted (and may have believed) that law operated as a value-free, apolitical, objective, logical system. The law could answer every question put to it, there was one right answer to every legal question, and every issue could be rightly resolved through reference to principle. Formalism, Professor Grey has aptly written, "describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decisions, whether from highly particular rules or quite abstract principles." If law was a complete and comprehensive system, it was also a beautifully symmetric system. Formalism held that the bottom-line rules which decided cases could ultimately "be derived from a small number of relatively abstract principles and concepts, which them-

64. In the second edition of the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 40-41 (2d ed. 1968), neurasthenic neurosis was described as "chronic weakness, easy fatigability, and sometimes exhaustion." When the third edition was issued in 1980, neurasthenia no longer appeared except as a subcategory of minor depressive episodes. GOSLING, supra note 48, at 26-27.
selves [formed] a coherent system.\textsuperscript{66}

*Stare principiis* was one of the axioms which defined formalism. Dean Langdell made this phrase a formalist watchword with his celebrated postulate that "["]law, considered as a science, consists of certain principles or doctrines."\textsuperscript{69} His related observations, that "the number of fundamental legal doctrines is much less than is commonly supposed" and that the "vast majority" of reported cases were "useless, and worse than useless," as illustrations of legal principles in operation, gave formal thought the imprimatur of ideology.\textsuperscript{70}

Langdell’s most rigid disciples would treat lawmaking as a process of rigorous deduction from such basic principles. Joseph Beale would assert that "the decision and judgment of a court, determining a particular controversy...can in no sense be regarded as in itself law."\textsuperscript{71} "What is the law as Beale defines it?" Jerome Frank sarcastically asked.

"Law...is made in part by the legislature; in part it rests upon precedent; and in great part it consists in a homogenous, scientific, and all-embracing body of principle..." This all-embracing body of homogenous scientific principle constitutes a "philosophical system." Such systems are "truly law" even "though no court has lent its sanction to many of their principles."\textsuperscript{72}

In short, Beale believed that law was precisely what Justice Holmes said it was not, a brooding omnipresence in the sky.\textsuperscript{73}

Another facet of formalism was its belief in fine lines and neat categories, distinctions which were purportedly cognizable on logical grounds. Distinctions made differences. Judicial decision-making was viewed as the recognition of proper distinctions rather than the active shaping of government policy. Lines were drawn between public and private realms (ignoring the role played by the state in protecting individuals’ agreements and interests). Distinctions were drawn between substance and procedure, so that procedure became an end in itself.\textsuperscript{74}

\textsuperscript{68.} Id. at 8.

\textsuperscript{69.} C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS at viii (1879).

\textsuperscript{70.} Id. at viii-ix.

\textsuperscript{71.} JEROME FRANK, LAW AND THE MODERN MIND 48 (2d ed. 1931).

\textsuperscript{72.} Id. at 51-52.

\textsuperscript{73.} This satirical point was made by Frank. Id. at 55.

\textsuperscript{74.} Courts reserved consideration of the substantive issues in order to issue procedural rulings which effectively decided the case in question—overlooking the fact that adjective law had been designed to facilitate the resolution of substantive issues. In one instance of great particularity, a court, construing a statute which provided for partial summary judgment within a class of defendants, drew a distinction between judgment in favor of Defendant A and judgment against Defendant B. Roscoe Pound cited this case, Egaard v. Dahlke, 109 Wis. 366 (1901), as "the acme of technicality." Roscoe Pound, *Me-
Formalist jurisprudence represented the ossification of earlier stages in the development of American law.

The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application as well as the conceptions [in which courts envisioned their work] and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules.

Existing rules were elevated into the category of self-evident verities. In practice, this meant that the law turned a blind eye to social and economic concerns—thereby setting itself, deliberately or unwittingly, against social change.

This intransigence toward social evolution (and the reform legislation which made it manifest) lies behind the blackest charge against formalism. Customarily, it has been assumed that formalist claims of objectivity and neutrality were subterfuges which masked a program of savage political reaction, a campaign by conservative judges to slap down the modern age. History makes out a prima facie case for such interpretation: the landmark decisions of the formalist age are those which strike down laws regulating business or protecting workers.

Dividing the law into neat compartments limited the possibility of change and reform. The state's power of eminent domain had once posed the possibility that the government might be able to re-distribute wealth. The power to condemn assets and reallocate the

chanical Jurisprudence, 8 COLUM. L. REV. 605, 618 n.53 (1908).

75. Pound, supra note 74, at 611-12.


77. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (holding that a statute limiting length of work week was an invalid infringement of liberty-of-contract rights of workers who might wish to work longer hours); In re Debs, 158 U.S. 564 (1895) (approving a federal injunction for use against strikers); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the Sherman Act which barred monopolization of "commerce" did not apply to monopolization of "manufacture"); In re Jacobs, 98 N.Y. 98 (1885) (invalidating a ban on cigar making in tenements as an infringement of individual's right to follow any lawful calling).

78. See Aviam Soifer, The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921, 5 LAW & HIST. REV. 249, 250 (1987) ("[U]nder the guise of a formalistic, unitary vision of categories such as individual autonomy and citizenship, the Justices subdivided and manipulated legal doctrine about suitable protection in a way that arrogated tremendous discretionary power to themselves.").
property rights which they represented seemed potentially that broad. Such actions, when they resulted in lawsuits, were discussed in the politicized language of public benefit and economic improvement. Formalism tamed this possibility, which had been exemplified in cases involving mills and streams, by reading the decisions which employed it as riparian-rights cases. Rather than possessing a general power to reallocate property rights, the state wound up with the ability to authorize the building of mill-dams. “By ‘formalizing’ the inquiry—that is, by reclassifying the problem into a supposedly nonpolitical doctrinal category—[the courts were] able to defuse its general redistributive significance.”

Formalism willingly turned the force of the law against those outside acceptable society. It followed the letter of the law in excluding would-be immigrants of Chinese nationality. Under the belief that separate would and could be equal, it upheld Jim Crow laws across the South. Moreover, formalism sanctioned private violence against marginalized populations. Fine lines helped make this acceptable. Owen Wister, who had studied law at Harvard (alongside Williston, his undergraduate friend), took space in The Virginian to defend lynching law on the Western plains. There was a crucial distinction, Wister argued, between burning Southern Negroes in public and hanging Wyoming rustlers in private.

Where courts smiled on the drawing of distinctions, one could legitimate any course of conduct by distinguishing it from something that was worse. Contrasted with the indefensible, the questionable became arguable—even acceptable.

B. Williston and Formalism

Williston and his work have been discussed as part and parcel of this black legend. Thus, in 1937, it was written that “Williston’s work must command respect from all those who value coherence and thoroughness; but it is meeting with an ever increasing volume of


Silas Weir Mitchell treated Wister for neurasthenia by sending him to recuperate in Wyoming, where he developed his sympathy for what he called “popular justice.” Mitchell was the same neurologist who treated Charlotte Perkins Gilman for neurasthenia by sending her to a darkened room and instructing her that she must never write again. Wister authored The Virginian and Gilman wrote The Yellow Wallpaper.
discontent from those who wish to understand how the law actually works and what social realities determine its development." More recently, in 1977, it was written that the jurists and law professors of the Gilded Age could elaborate a legal ideology of formalism, of which Williston was a leading exemplar, that could not only disguise gross disparities of bargaining power under a facade of neutral and formal rules of contract law but could also enforce commercial customs under the comforting technical rubric of "contract interpretation."

And even more recently, in 1991, it was written that the law of contracts, as formulated by Williston, "was a matter of precise sequences, objectively manifested intentions, reciprocated actions, and absolute consequences," a formalism that would "be crystallized in the serial declarations, absolute as any other catechism, which became the Restatement of Contracts."

The nineteenth century's conjectures about neurasthenia, all the theories and therapies which were so acceptable at the turn of the century and now seem to be the work of quacks and crackpots, should teach us to beware of explanations which rely upon perceptions of culture. Many labels have been applied to formalist jurisprudence, and many of these have been projected onto Williston. This is unwise. Generalizations relate only generally to particular cases and culture cannot entirely explain the individual. Sooner or later, we must put aside the reputation and come to grips with the man.

In his day, Williston was diagnosed as neurasthenic. Today he would be treated for depression, with a better prognosis for recovery. Legal thinking should be at least as open to change as medical analysis. If comments about Williston in the 1990s merely recapitulate what was said about Williston in the 1930s, our thinking may be due for reappraisal. It may be just as misleading to treat Williston as a formalist exemplar as it was to treat him as a neurasthenic.

V. THE UNEASY FORMALIST

The man whom one encounters in the pages of Williston's writing is not the blithe, unruffled platonist whom legal history has made familiar. He is just as genteel, just as scholarly. He is just as


84. Horwitz, supra note 79, at 201.

85. Boyer, supra note 82, at 678-79.
neat. With his courtly manner and bushy white moustache, he is just as much the charming old professor. He lives comfortably within existing society and believes that there are good reasons for things being as they are. There is, however, little which is reactionary about his philosophy—and, from a reactionary's point of view, he is disturbingly soft on the modern age. He believes law is a science, but not an exact science. He likes to quote people who talk about public policy and sociological jurisprudence. The formalist age had its exemplars—ogres like Justice McReynolds, amiable muddlers like Chief Justice Fuller, stern and persuasive prophets like Langdell—but the man who authored Williston's *The Law of Contracts* is not exactly of their company.

A. Form and Structure in Willistonian Contract Theory

Clearly stamped on Williston's methodology was a conscious desire for form and structure. His jurisprudence featured certain watchwords: *stability, certainty, predictability, rule, principle, general, harmonize*. All these terms might have been found in the same section of a legal thesaurus. To bring them together bespoke a vision of law as an organizing and stabilizing system.

Williston held up simplicity and certainty as intrinsic values toward which the law should aspire.

[A]s to some things investigation is not necessary to prove that they are of social advantage. The proposition for instance can safely be made that, other things being equal, simplicity of law is desirable. So also the greater degree of certainty with which a court's decision on a given state of facts can be predicted, the better it is for society, other things being equal.86

The law should be envisioned as simply as possible, and should be established as certainly as possible, in order to provide "rules of action which may be relied upon without litigation."87 He elaborated: "A system of law cannot be regarded as successful unless rights and duties can, in a great majority of instances, be foretold without litigation."88

Certainty could be attained through effective generalization. "Broad general rules are simple," Williston declared.89 The way to achieve certainty, through broad general rules, was to follow principle. "Founded on sound principles" was Williston's highest praise,

86. SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 151 (1929) [hereinafter MODERN TENDENCIES].
87. Id. at 95.
88. LIFE AND LAW, supra note 1, at 209.
89. MODERN TENDENCIES, supra note 86, at 95.
and "to follow principle" was for him the path of merit and virtue. Williston's favorite principle, of course, was bargain consideration. The presence of consideration, as if it were a chemical tracer, was an infallible indicator of an enforceable agreement. The absence of consideration was so notable a failing that it precluded many reasonable arrangements. It hindered the collection of rewards, allowed offerors to revoke offers which by their terms stated that they would be kept open, and prevented the compromise of debts. It put at risk people who had to complete a performance before receiving the compensation which had been promised in return, whether they were walking across a bridge or laboring for a year without interim salary payments.

In one particularly sinuous passage, Williston explained how consideration analysis meant that people who had offered bonus payments to their employees were free to go back on their word:

Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him. . . . On principle the second agreement . . . is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was

90. This is perhaps most clearly shown in Williston's comments on other scholars' work. See Samuel Williston, Book Review, 29 HARV. L. REV. 114, 114 (1916) (reviewing PHEROZESHAY N. DARUVALA, THE DOCTRINE OF CONSIDERATION (1914)) (criticizing the author for his "little attempt to coordinate in accurate statements of principle the author's conclusions"); Samuel Williston, Book Review, 25 HARV. L. REV. 575, 576 (1912) (reviewing CLARENCE ASHLEY, THE LAW OF CONTRACTS (1911)) (commenting that the author's method of "seeking the sound and reasonable principle rather than merely stating what courts have decided [is] the most interesting feature of the book").

91. According to Williston,

[In order to make a bargain it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested that promise must be made absolutely and unqualifiedly. LAW OF CONTRACTS, supra note 63, § 73.

92. Id. § 74.
93. Id. § 55.
94. Id. § 120.

95. Williston wrote: "The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated." Id. § 60b. No better example of formalist line-drawing could be offered. "Though the majority opinion in Petterson v. Pattberg [161 N.E. 428 (N.Y. 1928)] does not follow Section 45 of the Restatement of Contracts, the excellent opinions in that case would have been impossible without Professor Williston." Ira P. Hildebrand, Book Review, 17 CORNELL L.Q. 319, 320 (1931-32) (reviewing SAMUEL WILLISTON, CASES ON CONTRACTS (3d ed. 1930)).
entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done.\footnote{96}

With certainty went objectivity. Williston’s test for the admissibility of parol evidence—\textit{i.e.}, for determining whether a written instrument contained the entire agreement between the contracting parties—hinged on whether the asserted additional terms were reasonably related to the written document.\footnote{97} Most notably, in the area of contract formation, Williston was instrumental in replacing the earlier “subjective” test for contract formation, which depended upon the contracting party’s intent, with a test which analyzed only the communications exchanged between offeror and offeree.

\textit{[T]he test of a true construction of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.}\footnote{98}

A person’s intent to contract was to be measured not by his or her actual intention, but by what he or she had actually said.\footnote{99}

Williston was willing to pursue simplicity even if this meant sacrificing sophistication. At a meeting of the American Law Institute, Walter Wheeler Cook criticized Williston’s proposed definition of “contract,” which identified “promise” with “contract,” due to the desirability of distinguishing carefully between the ‘factual events’ (the promises) and the resulting ‘legal relations’ attached by the law to the promises. Professor Williston replied that he felt “satisfied that to make the restatement in that form would make it unintelligible to a large part of the Bar and Bench and destroy its practical value.”\footnote{100}

\footnote{96. \textit{LAW OF CONTRACTS}, supra note 63, § 130. When discussing Williston, it is traditional to cite this passage. \textit{Compare} \textit{GRANT GILMORE, THE DEATH OF CONTRACT} 23 (1974) \textit{with} Charles Thaddeus Terry, Book Review, 34 \textit{HARV. L. REV.} 891, 894 (reviewing \textit{SAMUEL WILLISTON, THE LAW OF CONTRACTS} (1920)).}

\footnote{97. \textit{SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS} § 633 (3d ed. 1957); \textit{see} \textit{JOHN D. CALAMARI \& JOSEPH M. PERILLO, THE LAW OF CONTRACTS} 147-50 (3d ed. 1987).}

\footnote{98. \textit{LAW OF CONTRACTS}, supra note 63, § 94. Historically, Williston traced the reasonable exception analysis to earlier forms of the common law: “Neither of the two earlier actions (an action on the case for deceit and an action of debt) from which the action of assumpsit was derived, involved as a necessity mutual assent to the creation of an obligation.” \textit{Samuel Williston, Freedom of Contract}, 6 \textit{CORNELL L.Q.} 365, 368 (1921) [hereinafter \textit{Freedom of Contract}].}

\footnote{99. Williston was left unscathed in \textit{JEROME FRANK, LAW AND THE MODERN MIND} (1930). However, Frank made up for this omission by criticizing the objective theory of contract in a dissenting opinion from the federal bench. \textit{See} \textit{Ricketts v. Pennsylvania R. Co.}, 153 F.2d 767, 760-70 (2d Cir. 1946) (Frank, J., dissenting).}

Williston’s belief that legal rules could be made simple rested upon the belief that language could be made simple—that words had plain, infallible, unmistakable meanings. In drafting the Restatement, Williston recalled, one of the codifiers’ tasks had “involved the expression of our rules with brevity in language that could not be misunderstood.” He admitted that eradicating ambiguity had been hard, but did not doubt that this goal had been attained.

In fact, this represented a willingness to believe that customary meanings were plain ones, to rely upon the accepted. In seeking a phraseology that could not be misinterpreted, Williston did not analyze and reanalyze familiar concepts, splitting a general meaning ad infinitum into its constituent parts. Where he stopped, and that he sometimes stopped too soon, was pointed out by Arthur Corbin. Williston opened his treatise, Corbin noted, by defining a contract as “a promise or set of promises to which the law attaches legal obligation.” But the term’s actual meaning was never quite explained.

It is only in a later chapter that [Williston] attempts to define “promise” and nowhere does he analyze or define “obligation.” These terms are not self-explanatory. In section 24, it is said that “A promise from the very meaning of the word involves an undertaking to do something in the future.” But what is “the very meaning of the word”?

Williston treated his definition of “contract” as what it could not be, a self-proving proposition.

Simplicity of paradigm was equally desirable—and, in reality, proved equally illusive. Williston’s paradigmatic contract was the one-shot sales transaction. While business entered the era of telecommunication, the multi-division corporation, and government price controls, he continued to teach contract law through hypotheticals involving the sale of a horse named Dobbin.

101. LIFE AND LAW, supra note 1, at 311 (emphasis added).
103. Id. With the shudder of someone who had mastered Hohfeldian terminology only to see it used improperly, Corbin further noted one sentence which confused the concepts of privilege, right, and power: “The personal privilege of the infant is a right which can be exercised against anyone.” Id. at 944.
104. Dobbin was sometimes accompanied by a cow called Bossy. See George C. Thompson, Book Review, 26 CORNELL L.Q. 369 (1941) (reviewing SAMUEL WILLISTON, LIFE AND LAW (1941)).
In treating contract law as a single realm unified by common principles, Williston found it necessary to smooth over tensions and gaps within the case law. In drafting the Restatement of Contracts, he recalled that one challenge related to stating for all the United States a single rule upon points where the decisions of the courts in the several states had established divergent rules. This difficulty could not be wholly avoided, but the only way that we could choose was to select as the rule of the restatement that which seemed best to harmonize with the general principles of the subject, unless reasons of practical convenience made this undesirable.105

The goal was to promulgate the best of all possible rules. Logic offered the means of suppressing conflict as well as the rationale for doing so.

Such analyses, however, could not magic away into obscurity all "divergent" cases. If principle were to provide a truly comprehensive theory of contract law, all cases had to be dealt with. When decisions could not fit within the rule, they could be treated as exceptions. This allowed for a semblance of order. No matter how severe the conflict in the decisions, all cases could be described as either present (within the rule) or otherwise accounted for.106

In fact, if the rules were to be stringent—and Williston meant that they should be—the exceptions were necessary.107 Labeling inconsistent holdings as exceptions to the rule meant that the rule reflected only those cases most consistent with it. Covering a smaller universe of cases, a rule could be stated more categorically.

When Williston turned to stating positive law, his approach was responsible for the most notable doctrinal innovation of twenty-year or shipment on approval, the agreement to sell goods lying in warehouse under nonnegotiable receipt—these are not one-stroke transactions. They involve, each one, a complicated series of actions of varying significance. They involve a period, often an extended period, during which matters [of "ownership" or "title"] are in temporary suspension or are in active flux between the parties . . . .

Karl N. Llewellyn, Through Title to Contract and a Bit Beyond, in 3 LAW: A CENTURY OF PROGRESS 80, 85 (1937).

105. LIFE AND LAW, supra note 1, at 311.
106. Sometimes exceptions became omissions. Life insurance cases had developed a substantial jurisprudence establishing that coverage became effective before the formal acceptance. See Edwin W. Patterson, The Delivery of a Life-Insurance Policy, 33 HARV. L. REV. 198, 207-08 (1919). Most of the cases establishing this divergent rule, however, did not find their way into the treatise. See Cook, supra note 100, at 514.
107. Corbin noted the "noble effort" Williston made to defend consideration, but concluded: "[T]he complexity of the result and that the many admissions that conflict exist and certain very large classes of cases must be regarded as 'exceptional' indicate that in many twilight zones the courts must trust to instinct rather than to definition or 'theory' or 'established principle.'" Corbin, supra note 102, at 944.
eth-century contract law. In drafting the Restatement, Williston joined Corbin in vigorously insisting that promissory estoppel be included as a ground for enforcing promises. He was just as insistent, however, that this rationale be set aside in its own pigeonhole, which became Section 90. He did not want it included as some variant species of consideration, fearing that this might sully the definition of bargain consideration, which was meanwhile preserved sacrosanct in Section 75. Ironically, this fostered the acceptance of promissory estoppel; given its own territory, the doctrine flourished.108

Such thinking places Williston within the formalist tradition—inextricably, perhaps, but not irredeemably. It is misleading, however, to view his implicit belief in simplicity, structure, and certainty as a commitment to the politics behind formalism, or as a conscious rejection of importing social concerns into the law. In later years, he would voice doubts about the New Deal, but these seem to have been the remarks of any very old man about very new innovations.109 In an age when anti-Semitism characterized much of American life, social and academic, he befriended Felix Frankfurter—who repaid him with worshipful respect—and seems to have been a professor whom other Jewish students sought out.110 His own discussion of “liberty of contract” is surprisingly positivist in tone: he blandly discussed the factors which had led to the theory’s rise, identified it with the generation preceding his own, noted its apex in Lochner, then noted its decline.111 Where Holmes saw change in terms of monumental shifts, viewing it through a poet’s eye, Williston recorded change with the matter-of-factness of a treatise-writer. He was, however, equally open to accepting it.


109. See, e.g., LIFE AND LAW, supra note 1, at 334-35. Williston wrote: “Like most old men, I dislike the present outlook . . . . One who has believed in the theories of Emerson and Franklin cannot fail to be troubled by confirmed deficit spending and centralized bureaucratic, paternalistic regimentation.” Id.

110. See Felix Frankfurter, Samuel Williston: An Inadequate Tribute to a Beloved Teacher, 76 HARV. L. REV. 1321 (1963); Jacob J. Kaplan, Mr. Justice Brandeis, Prophet, NEW PALESTINIAN, Nov. 14, 1942, at 27, cited in PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 32 (1984) (recalling that when Kaplan sought advice from Williston on whether he should take a position with Brandeis’s law firm, Williston commended the firm and said that he had gone there himself when he needed counsel).

111. Freedom of Contract, supra note 98 (discussing, inter alia, Lochner v. New York, 198 U.S 45 (1905)).
B. Williston and Sociological Jurisprudence

In 1908, at the annual meeting of the Association of American Law Schools, Williston delivered an address titled *The Necessity of Idealism in Teaching Law*. His opening sentence made clear his overall posture: "By idealism in teaching law I mean aiming to teach the law as it ought to be rather than simply as it is." Williston elaborated:

[The teacher of law] must keep his own mind and that of his students constantly addressed to the general rule, free from arbitrary exceptions, and must use particular cases to bring the rule out, rather than emphasize the importance of inconsistencies and peculiarities. For the ideal of the law is towards a few general principles, while in practice, with the increasing complexity of human affairs, the number of minor rules and applications is always increasing.

... Nearly every one will agree that some attention should be given to the law as it ought to be. Few will deny that the law as it is must receive some attention, even when it is not what it ought to be; but I believe that there is little danger of erring on the side of overemphasis of the theoretically right rule.

So far, this was unexceptionably formalistic. But then, at its conclusion, the address sounded a note of veiled and diplomatic sarcasm.

We cannot all, like Blackstone, find a reason for the perfection of existing rules, so that the burning of female murderers, instead of hanging them, becomes right because of the decency due to the sex, and the allowance of ten days for appearance after the return day of a writ becomes logical, because it is beneath the dignity of a free man to do anything exactly when he is told to do it.

These were not the insights upon which a formalist would insist. These were the words of a jurisprudent who saw how formalism served to invent excuses for the status quo.

To speak of free men, with a sarcastic edge in one's voice, recalled how seldom men were really free. To scoff at Blackstone's claim that the law respected freedom and dignity was also to scoff at liberty-of-contract doctrine; decisions like *Lochner* also claimed to uphold freedom and dignity. To deride one assertion cast doubt on the other. And Williston saw how little women had gained from the law's supposed solicitude—was it a privilege to be burned to death?

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113. *Id.* at 201-03.

114. *Id.* at 203.
Within the well-turned phrases, there lurked a piquant black humor—which means, an articulate awareness of the gulf between is and ought.115

This awareness is common in Williston's writing. It may be reflected most clearly, perhaps, in Some Modern Tendencies in the Law, a series of lectures published in 1929, which represent his longest sustained discussion of jurisprudence. The aphorisms and generalizations found in this work reveal a stabilizing self-awareness and a healthy distrust of pure theory:

Law has been variously defined... but for the purpose of the present discussion it consists of rules of conduct conformity with which society through some governmental agency enforces, or non-conformity with which it penalizes.116

In the formation of the English law that we inherit it has been only a section of the people and, until recently, not a very large section that has had a hand in the work. . . .

. . . The English law of distress which allowed a landlord to seize for rent any goods on the leased premises, whether belonging to the tenant or anyone else, would hardly have been developed had not the landowners rather than tenants, settled the rule and made that customary which was, it must be presumed, always obnoxious to most of the community.117

Courts are unwilling to admit that they manufacture new law . . . .118

A rule of law is but a prophecy of what the courts will decide, and it is plain that courts should and will so far as the traditional limits of the judicial functions permit endeavor to conform the law to changing social conditions.119

There is something about the practice of the law that breeds not merely a contentment with things as they are, but a belief that law cannot be otherwise administered.120

In some parts of the law doubtless deductive logic plays little part; but in

115. Williston's sarcasm was subtle. Felix Frankfurter wrote that his old teacher possessed "that delicacy of touch and refinement of innuendo in phrasing that characterize a great musical artist." Frankfurter, supra note 110, at 1322. In 1938, when Harvard University sent Williston a letter—a letter sent to all faculty who had reached the age of seventy-five—stating that his resignation had been graciously accepted, Williston "stormed" into the university president's office and angrily exclaimed that his resignation could not be accepted because it had not been offered. DICTIONARY OF AMERICAN BIOGRAPHY 792 (Supp. 7, 1981). Yet in Life and Law, Williston spoke only of this incident as "a wise rule of the Harvard Corporation" which had prevented him "from lingering longer in the lap of [his] alma mater." LIFE AND LAW, supra note 1, at 333.

116. MODERN TENDENCIES, supra note 86, at 8.

117. Id. at 11-12.

118. Id. at 82.

119. Id. at 142.

120. Id. at 149.
others it plays a large part. Yet it is seldom "remorseless." . . .

. . . Logic supplies a probability but it is not remorseless. 121

Drawing on Holmes was not atypical. An examination of the sources Williston cited in Some Modern Tendencies in the Law reveals three citations to Holmes and two to Roscoe Pound. There is one to Wesley Hohfeld, one to John Maynard Keynes' Treatise on Probability, and six to Public Policy in the English Common Law, by Percy Winfield, an article which drew progressive insights from legal history. 122 But by far the most common citations, at least thirteen, are to the works of Benjamin Cardozo. The source upon whom Williston preferred to rely was one of the greatest and most adeptly progressive of judges.

This social awareness, this desire to involve legal analysis with fact and practice, is not merely a counterpoint to Williston's emphasis on principle; rather, the two are harmonics of the same chord. 123 For Williston, "principle" was not what it had been for Langdell. Langdell had been one to follow logic inexorably. 124 Williston, by contrast, preferred to treat "principle" more as a generalized conclusion than as a premise.

What I have been saying may be summarized more simply by an adoption of the illustration of Socrates. If we can say, almost all men are mortal, though occasionally one may be found who is not, the judicial conclusion in a particular case is likely to be that Socrates is mortal unless it can be shown that there are some peculiar circumstances in the facts of his case rendering the rule that applies to most men inapplicable to him. A great deal of legal and judicial reasoning is like that. Logic supplies a probability but it is not remorseless. Presumptions and probabilities have their importance in the determination of the application of a rule of law as well as in determining a disputed issue of fact. 125

121. Id. at 154-57.
123. Felix Cohen used this awareness as an excuse to criticize Williston for ambivalence and vacillation:
[T]he discussions of a Williston will oscillate between a theory of what courts actually do and a theory of what courts ought to do, without coming to rest either on the plane of social actualities or on the plane of values long enough to come to grips with significant problems. This confused wandering between the world of fact and the world of justice vitiates every argument and every analysis. Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 841 (1935).
124. At one point, Langdell had argued for reversal of the mailbox rule, then established and accepted throughout the common-law world, on the grounds that consideration theory demanded its reversal. See Grey, supra note 65, at 4.
125. MODERN TENDENCIES, supra note 86, at 156-57. This assertion is supported with a citation to Keynes, whom Williston knew through Cardozo's work. Id. at 157 n.2.
To follow principle, as Williston used the term, meant to seek "logical coherence" and "logical coordination" across the law. It meant to draw useful analogies.\(^{126}\) It meant to achieve harmony and congruence where feasible, rather than maintain differences based on the traditional division between law and equity or the medieval forms of actions. In its purest form, it was insight.

It is the mark of a great scientist that he can correlate [scientific] facts and deduce a general law. In the same way he is not a great lawyer who knows the rule that is applicable to a large number of special situations. It is the capacity to generalize and to see relations between the rules governing particular states of fact, which mark the great lawyer. As a great lawyer has said: "The mark of a master is, that facts which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit."\(^{127}\)

Yet while Williston believed in working from fact, he described the result in terms of abstractions.\(^{128}\) Aware of the myriad promises which courts had enforced, aware of the myriad justifications courts had found sufficient for enforcing them, Williston nonetheless sought to express enforceability in terms of a single general function. He had litigated commercial cases and drafted uniform commercial statutes, acquiring thereby first-hand experience with how business law and business conduct intersected. Nevertheless, even here he could not conceive the law in terms of interaction, in terms of tension, fluidity, and process. He described law in terms of principle—guidelines in which the provisional would only slightly temper the eternal. (So to speak, his perspective was Newtonian rather than Heisenbergian.) Fully cognizant of the law's shortcomings, he became a codifier rather than a revolutionary. The question of Williston's story, ultimately, is understanding why a man who saw so clearly the realities with which law must deal described those realities so formally.

\(^{126}\) For example, Williston treated conditional sales as if they were mortgages, as the Uniform Code would do. See, e.g., U.C.C. § 9-302 (1984); U.C.C. § 9-401 cmts. (1984); MODERN TENDENCIES, supra note 86, at 41-45.

\(^{127}\) MODERN TENDENCIES, supra note 86, at 123-24. The great lawyer quoted is Holmes.

\(^{128}\) Willard Hurst has commented that Williston "was a most courtly, benign figure (a type of style not then or later conspicuous at [Harvard] Law School). His teaching was almost like basic geometry or physics/1930's type. In retrospect I've wondered that a man as immersed as he was in working details of marketplace dealings should have let almost nothing of this creep into his classroom presentations." Letter from William Hurst to Allen Boyer (Nov. 23, 1992) (on file with the Buffalo Law Review).
C. **Methodology and Psychology**

Jerome Frank once quipped that a case’s outcome depended on what the judge had eaten for breakfast.\(^{129}\) If this criticism has value, it is in suggesting that analytical methodology is a function of personal psychology. A jurist’s customary manner of addressing issues may relate to his or her individual temperament and experience—that is, to psychological factors.

The work of writers and philosophers, even of scientists, has been usefully analyzed from the psychological vantage point.\(^{130}\) More recently, such consideration has been applied to legal thinkers—in particular, to Justice Holmes.\(^{131}\) And to relate work to psychology is amply warranted in the case of Williston, who described himself as a hypersensitive with an inferiority complex.

The best explanation for Williston’s formalism may be psychological. The focus should not be on the self-control that Williston lost, but on the self-control he managed to regain. Ultimately, it is less important that Williston broke down than that he recovered, and that he worked himself through to recovery. It is less important that he dosed himself with sedatives than that he insisted on retaining personal control of the drugs which were administered to him. The process through which he reasserted control over his own life left its stamp on Williston’s presentation of law.\(^{132}\)

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132. Ignorance or denial of Williston’s psychological struggle has limited appreciation of this influence on his work. The tension is illustrated by a marginal comment made by Judge Charles Wyzanski in his copy of *Life and Law*: “L.H. [Learned Hand] wrongly thought S.W. [Samuel Williston] devoted too much space to his illness.” *Life and Law*, *supra* note 1, at 142 (Judge Charles Wyzanski’s copy of *Life and Law*, on file with the author). Williston’s personal history is highly relevant to understanding his preference for order and stability; without it, political ties or aesthetic choices have seemed the most likely explanations for his order-driven jurisprudence.

A discreet silence concerning Williston’s breakdowns played a part in this. The official history of Harvard Law School, for example, noted only that two lecturers “took some
Williston’s fondness for billiards is more than a metaphor for his formalist tendencies. Psychologically, play is an important and revealing activity. Playing games helps the player master situations in which stimuli have become overwhelming. It may allow an outlet for wish-fulfillment. Anna Freud suggested that play is part of a developmental process which leads to and ends in work. Through play, the individual acquires control over his or her impulses and reactions, and the ability to sublimate internal pressures and work toward goals.

Against this background, Williston’s fondness for billiards reveals a preference for precision and certainty. It reveals a compelling personal need for regularity and order. Billiards may be the most geometric of pastimes. The game can be described in terms of lines and points. It scatters spheres randomly across a plane, and vectors them off the sides of a rectangle. Built around the careful measurement of angles and the accurate balancing of velocity against inertia, it is a pastime for thinkers. To play billiards well is to have mastered, within the table’s limits, the principles of Newtonian physics. Overall, the game is about the shattering and restoration of order. For a man who had been incapacitated, billiards offered a realm he could control.

Williston was an insomniac who could give up sedatives and go 

of Professor Williston’s courses during his illness” and that “the condition of his health” compelled Williston to decline the deanship in 1910. CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 52, 58 (1918).

Reviewers of Life and Law were often less frank in discussing Williston’s “nervous exhaustion” than Williston had been in describing it. Roscoe Pound spoke obliquely of Williston as one “who by steady perseverance in spite of much ill health and recurrent break downs, achieved far more than the more physically robust of his generation,” with a “serene common sense” which “held him above depression under repeated cause to be depressed.” Roscoe Pound, Book Review, 41 COLUM. L. REV. 566, 569 (1941) (reviewing SAMUEL WILLISTON, LIFE AND LAW (1941)). As recently as 1987, the psychological nature of Williston’s difficulties was cautiously avoided. Allan Farnsworth wrote: “Williston, who had been plagued by illness [in the first years of the century], had a dramatic improvement in his health in 1912.” E. Allan Farnsworth, Contracts Scholarship in the Age of the Anthology, 85 MICH. L. REV. 1406, 1424 n.103 (1987). The turning point mentioned by Farnsworth was Williston’s discovery of veronal.

135. ANNA FREUD, NORMALITY AND PATHOLOGY IN CHILDHOOD: ASSESSMENTS OF DEVELOPMENT (2d ed. 1980).
136. A revealing parallel comes from the history of mathematics, a discipline which, like law, accords the solidity of concrete objects to imaginary constructs and postulated relationships. Blaise Pascal, suffering from chronic depression and physical pain, found himself free of these discontents when he thought about the cycloid curve. STUART HOLLINGDALE, MAKERS OF MATHEMATICS 154-55 (1989).
to sleep naturally once he learned that an effective drug was available. Knowing that the remedy existed was enough; he did not actually have to take it. In this respect, he showed himself to be the same man who thought it good that open issues be anticipated by the promulgation of rules. In both cases, he felt (or found) that providing for a solution effectively remedied the problem. Related to this was his implicit belief in simplicity and structure, his belief that language could be made error-proof and that all enforceable agreements could be modeled on the simplest. This equated pattern and structure with coherence and meaning.

Duncan Kennedy has addressed the way in which legal methodologies, raised to the level of systems, mediate societal and intellectual tensions.

One of the functions of systems of legal thought—one of the reasons for their existence—is the reconciliation of what appear to be conflicts between institutions and contradictions among ideas. In other words, system is necessary not just to permit us to deal in a cognitively effective way with the chaotic mass of rules. It is also necessary because the theorist wishes to show that where many perceive confusion, danger, insecurity, rivalry, and aggressive action, there exists a latent order that has a legitimate claim to our respect. This order, once recognized, is both a reassuring fact and a goal for constructive striving.¹³⁷

This speaks directly to the psychological comfort Williston found in the strictures of formalist thinking.

Williston’s desire for certainty transparently responded to the insecurity he had felt in youth. At Clifton Springs, he had found that any tension aggravated his symptoms. It is easy to recognize particular ways in which he sought the emotional reinforcement of stability in life and work. He chose to stay at Harvard, despite dissatisfaction with his salary and offers of higher-paying jobs elsewhere, because his emotional capital was invested in the institution. As his intellectual home, Harvard was a valuable refuge: the law school was the first place where he had shown any particular accomplishment. By remaining there, Williston avoided the tension and uncertainty of change.¹³⁸ Similarly, in assigning to law the role of avoiding disputes, as well as settling them, Williston gave a high priority to preventing conflict—avoiding tension. This transposed

¹³⁸. Williston’s home life supports this suggestion. The Williston family lived in a rented house, decade after decade, installing two furnaces, electric lights, an electric stove, and other improvements: “Hardwood floors and two additional bathrooms complete the list of major improvements that I was glad to make on a house that I did not own.” LIFE AND LAW, supra note 1, at 168. Apparently, renting from year to year provided environmental security by avoiding the uncertainty of moving and the risk of large-scale financial commitment.
his psychological concerns into the legal realm. Most notably, Williston's preference for analyzing law as a matter of rule and exception also offered a means of minimizing tension. So to speak, in explaining why agreements were enforced, oftentimes the law said both-and. Bargain consideration was one reason to enforce a promise, but other reasons would do. Thinking in terms of rule and exception let Williston declare that the law actually said either-or. It let him state the issue as a clear-cut choice. Either there was bargain consideration, and an enforceable contract, or there was not—although of course the courts might nonetheless find a different reason for enforcing the agreement.

Phrasing enforceability as an either-or question let Williston present this issue as a clear-cut choice. Choices which seem clear-cut are the easiest to justify. Where there seems to be no ambiguity, it is harder to be ambivalent. This means less tension, less friction in the decision-making process. Where the contrast between alternatives seems sharp, the person who makes the decision appears to exercise less personal responsibility for the choice and thereby experiences less tension in making it. Rationales and excuses are readily at hand. In the circumstances, there was only one solution. As it was put, the question answered itself.139

Crucial to Williston's personal psychology was an insistence on personal autonomy. Where most neurasthenics submitted entirely to having their lives and therapies controlled by doctors, he controlled his own medication.4 The other side of this was a deep-seated fear of being out of control, a fear of formlessness—the despair he had felt during his breakdown in 1899.

This pattern, too, is reflected in Williston's jurisprudence. To insist that doctrine controls the law means rejecting the very defensible hypothesis that law is a relatively unstructured constellation of single decisions by individual judges.141 To believe in objectivity is to

139. Again, the mathematical parallel is helpful. Isaac Newton hated tension and controversy; his first nervous breakdown had been preceded by an epistolary disputation with a group of English Jesuits. An "abnormal dread" of controversy was the other side of his elegant proofs and precise intuitions. To avoid such tensions, he went so far as to conceal his authorship of some early mathematical papers and to withhold some others from publication. E.N. da Costa, Isaac Newton, in 1 THE WORLD OF MATHEMATICS 255, 270-71 (James R. Newman ed., 1956).

140. At the Riggs Clinic, they gave Williston placebos. This he resented: "I have never quite forgiven the deceit involved in giving me a capsule with no sedative . . . ." LIFE AND LAW, supra note 1, at 165.

141. Williston spoke of "the preference that men have to be subjected rather to what seems an inanimate rule than to the unbridled will of one of their fellow creatures . . . ." MODERN TENDENCIES, supra note 86, at 2. He added that "submission to the unrestrained personal opinion of arbitrators is not likely to become a generally popular method of settling all classes of disputes." Id. at 57.
insist that there are external, verifiable truths. To insist that rules apply is a way of denying chaos.

VI. WILLISTON AND "WILLISTON"

Williston’s treatise on contracts was immediately recognized as a classic text. It was also immediately recognized as the order. Not only did it encapsulate the existing law; new schools of thought would also test themselves by rebelling against it. As a landmark, it retains much of its original eminence. Rare would be the review of a new text on contracts that did not invoke its name, making it an exemplar for either comparison or contrast.\(^1\)\(^2\)

Practically speaking, the treatise revolutionized business law. It may even be said to have defined it. It has been suggested that the Uniform Sales Act, which Williston drafted, cannot be effectively employed without reference to the treatise. Because it complemented the statute so fully, it was considered to be of equal stature.\(^3\)

Equally remarkable was the transformation which the treatise wrought in Williston’s own life. When he died in 1963, at the age of 101, he received the signal tribute of an article in Time magazine. Under the headline “A Yankee Socrates,” his reputation was immortalized:

The titles of his fat, cloth-covered tomes would hardly thrill a random bookstore browser. But in a lawyer’s den or a judge’s chambers, the four volumes of Williston on Sales or the nine volumes of Williston on Contracts never gather dust. . . .

Legend holds that Williston was the last Harvard professor to wear a

\(^{142}\) See, e.g., Friedrich Kessler, Book Review, 61 YALE L.J. 1092, 1092 (1952) (reviewing ARTHUR L. CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW (1950)).

\(^{143}\) Grant Gilmore wrote:

Statutes like the Uniform Sales Act were not statutes at all. That is, they were not designed to provide rules for decision. Drafted in terms of loose and vague generality, they were designed to provide access to the prevailing academic wisdom. The rules for decision in sales cases were to be found, not in the Uniform Sales Act which had been drafted by Samuel Williston of the Harvard Law School, but in Professor Williston’s treatise on the law of sales. This aspect of the codification was, apparently, generally understood. The courts—and counsel—paid no attention at all to the Sales Act; they paid enormous attention to Professor Williston’s treatise.

GILMORE, supra note 3, at 71-72 (citation omitted).

At least one court confused the two, mistakenly citing to the treatise when it intended to cite the Restatement. See Port Huron Mach. Co. v. Wohlers, 221 N.W. 843, 844 (Iowa 1928) (citing § 139 of Williston’s treatise rather than § 90 of the Restatement of Contracts), cited in Hildebrand, supra note 95, at 319-20.
starched wing collar while lecturing, but his delivery was folksy, drawing on imagery that enlivened dull debates on commercial law. He would begin in his Yankee twang, "I'll trade my horse Dobbin for your minced pie," and his rapt listeners would be carried off on another excursion into the law that was more social science than cold cases. . . .

On Williston's retirement from Harvard in 1938, his students gave the dean of U.S. law education a silver bowl. It was inscribed, In consideration of natural love and affection. White-thatched Williston, who always knew when a contract was binding, replied with gentle legal wit, "The feeling is mutual, so that makes it bilateral." 144

None of this would have seemed likely in 1901. Williston noted the inauspicious circumstances in which he had begun the century: "I found myself, after my illness, when about forty years of age, in debt for $2,000 and with no assets except a little life insurance and two not very profitable casebooks." 145 He lived in a rented house in a distant suburb, so far from his native Cambridge that he and his family relied on a windmill for water and spent their evenings by the light of kerosene lamps. Repairs and renovations would consume his spare capital for years to come. His family had struggled for years on half-pay. He had never brought in a substantial legal fee; after fifteen years, Mary Williston was still waiting for her engagement ring. 146

Writing on sales and contracts brought Williston out of this slough. As the demands upon him grew, a new energy and industriousness emerged to meet them. Beginning in 1902, he was at work on several projects of law reform—most notably, the Uniform Sales Act, the Uniform Warehouse Receipts Act, and Pomerene Bill. 147 He resumed publishing in the law journals, working toward his treatise on Sales and then his treatise on Contracts. It was during these years that he thought he worked better than at any time since his breakdown. Writing became routine. He hired a secretary, who took dictation and pored over his longhand drafts for the next thirty years. 148

145. LIFE AND LAW, supra note 1, at 272.
146. She finally received the engagement ring in the summer of 1903, when her husband's work on an appellate brief netted him a $3,000 fee. See id. In the following years, royalties from the treatise and Williston's other publications provided an increasingly solid financial foundation. Despite stock-market losses during the Depression, Williston was nonetheless able to afford to remodel the house he and his sister Emily occupied in his last years, making alterations which included installing an elevator. Id. at 330.
147. Id. at 217-29.
148. Id. at 262. There were some drawbacks to this industry. Williston developed a phobia of unorganized cases. He periodically counted up the number of volumes which
[M]y habits of work, though not involving long daily hours were regular and persistent. During the thirty-three years that I lived in Belmont I did not often go out in the evening; I worked not only six days in the week, but, rightly or wrongly, also on Sunday. In summer vacations, except when actually travelling, I usually was able to take some material with me on which I would work for a part of each day.  

His breakdowns came now when he was not working, when he ventured outside the weekly cycle of class schedules and daily writing. His 1903 collapse took place at the end of the spring semester; he managed to get over it in time for the fall term. The breakdowns of 1923 and 1924 were also confined to the summer months.

It is not known how consciously Williston identified his work in bringing order to contract law with the task of restoring order in his personal life. He had some psychological training; the extent remains vague. He had heard of the inferiority complex; he never said whether he had heard of compensation, the complementary idea that someone who feels inferior in one area of life may offset this with achievement in another. It can be certain, however, that the process of completing the treatise re-established Williston’s control of his inner life, and that a man who had been badly battered by chronic depression stabilized himself by rigorously working out a vision of law which was remarkable for its insistence on order and principle.

VII. WILLISTON, PARSONS, AND THE LAW OF CONTRACTS

If completing the treatise established Williston as a scholar in his own right, it also established his independence of earlier jurisprudents. He identified his work with a new regime of contract law. Williston’s *The Law of Contracts* was everything that his earlier book-length study of contract law, his 1893 edition of Theophilus Parsons’ *The Law of Contracts*, had not been. He was proud to claim

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had to be searched and cases which had to be accounted for.  
For the purpose of showing the bulk of the existing sources of the common law, I have had a rough count made of American law reports existing in 1939. I have also had a count made of the volumes containing the American case law at about the end of the years 1928, 1914, and 1885. . . .

I find that there were in the year 1939 about 14,000 American law reports. At the end of 1928 there were slightly more than 11,000. At the end of 1914, there were about 8,600. At the end of 1885, there were slightly more than 3,500.  

149. Id. at 307-08.  
150. At the Riggs Clinic, patients received some basic orientation to psychology. Id. at 165. Apparently this was imparted through pamphlets and twice-weekly lectures. See KUBIE, supra note 35, at 27-29.
his treatise as his own work, but this was hardly true of the earlier book.

[M]y hope of making [Parsons'] book of much value to legal scholarship was doomed to disappointment. ... [T]he author had aimed to make the book so inclusive that it professed to cover a field impossible to deal with satisfactorily within the permitted space. There was even a chapter on contributory negligence, a topic hardly appropriate for a treatise on contracts. ... Finally much of the text was never of the first quality and in many places was completely antiquated. But the book had been quoted and used by courts and lawyers for so many years that an editor was not expected to tamper with the text. If he did so in order to correct a positive error, his insertion must be put in brackets. The notes of previous editors also already overloaded the book. ...

... The edition was published in 1893. I have no pride in it, though I do not think my work was discreditable when the nature of Parsons' book is considered.\textsuperscript{151}

This passage suggests a close connection between Williston's need for control, his belief in principle as "logical coordination," and the therapy he had found in scholarship. Revising Parsons—or, rather, being unable to revise Parsons—had meant frustration. He had been forced to accommodate other people's failings. Two decades later, after his recovery, working on his own, he had defined a law of contracts, sorting and organizing cases until such logical coordination had built up three volumes' worth of manuscript. Williston's \textit{The Law of Contracts} was as different from the eighth edition of Parsons' \textit{The Law of Contracts} as the academic mandarin of 1925 was from the harried assistant professor of 1893.

The scorn Williston felt for Parsons' treatise—and, perhaps, for his own acquiescence in its shortcomings—was the same scorn he had shown toward Blackstone's apologias for the senseless. The same tone was heard in his dismissal of what law had been in Blackstone and Parsons' day, before it was organized along lines of principle.

It is not only a function of the law to make a just determination of litigated controversies, but quite as important a function is to provide rules of action which may be relied upon without litigation. While the law is uncertain, this latter function cannot be performed. 

Complexity of law is opposed to simplicity. Broad general rules are simple. Where distinctions and exceptions are numerous, even if the distinctions are well settled, the law is complex. If the distinctions and exceptions are founded on unsubstantial grounds, the complexity is unnec-

\textsuperscript{151} \textit{Life and Law, supra} note 1, at 137. Commentary indicates that the book was just as unsuccessful as Williston suggested. \textit{See} Book Note, 3 \textit{Yale L.J.} 105 (1893) (reviewing \textit{Theophilus Parsons, The Law of Contracts} (1893)) (criticizing the work for anachronisms and failure to correct errors of previous editions).
... Complexity is always accompanied by uncertainty. Wherever there are numerous lines of distinction it becomes increasingly plausible to argue that the case at bar falls on one side or the other of some of the lines. Law tends to become a game in which logomachy plays too great a part.\textsuperscript{152}

Williston quoted Tennyson to describe the former regime of law:

\begin{quote}
The lawless science of our law,  
The codeless myriad of precedent  
That wilderness of single instances.\textsuperscript{153}
\end{quote}

The wilderness of single instances, for Williston, had been the era before 1870, when Langdell replaced Parsons at the helm of Harvard Law School. In Parsons' day, Williston wrote:

\begin{quote}
[L]aw was taught from treatises and from lectures. The authors of the treatises and the lecturers gained their knowledge from the reported decisions of the courts. The knowledge thus acquired was retailed at second hand to the students. There was little disposition to question the validity of precedents or to compare the logical consistency of decisions in one category with decisions in other categories.\textsuperscript{154}
\end{quote}

To follow the cases was not to follow principle; forcing the shift from one rule to another had been the essence of the Langdellian revolution. Williston saw a great gulf fixed between \textit{stare decisis} and \textit{stare principiis}. Before principle had been chaos. The haphazard sprawl of Parsons' treatise, which preserved the old precedents decade after decade, went with the Blackstonian rationalization of the legal status quo. The tangle of senseless rules grew out of the chaotic jumble of precedents.\textsuperscript{155}

\begin{thebibliography}{99}
\bibitem{152} MODERN TENDENCIES, supra note 86, at 95-96.
\bibitem{153} Id. at 7 (citation omitted).
\bibitem{154} LIFE AND LAW, supra note 1, at 198.
\bibitem{155} Scholarship confirms Williston's views of what Harvard Law School had been under Parsons. Classes appear to have been ill-attended and dull, with one student writing in his journal "at this point Parsons [became] Pathetic," and then ceasing to take notes. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: AMERICAN LEGAL EDUCATION 1800-1920 (forthcoming 1993) (manuscript at 122, on file with author) (citation omitted). The atmosphere "was still charged with the complacent optimism of Sir William Blackstone and the other 'venerable sages of the law.'" Id. at 123 (citation omitted).
\bibitem{156} Allan Farnsworth has noted:
\begin{quote}
The early American treatise writers were heavily influenced by their fascination with the particular and gave little attention to matters of organization. Thus a reader of the 1853 edition of \textit{Parsons} encountered twenty-two chapters on "Parties to a Contract," including "Outlaws, Persons Attainted, and Persons Excommunicated," before coming upon "Consideration and Assent."
\end{quote}
Farnsworth, supra note 132, at 1435. This structure was scrupulously preserved in the 1893 edition and even Williston, in organizing his treatise, was subjected to the structure imposed by his predecessors.
\end{thebibliography}
Such connections open an intricate complex of psychological rhymes. One pattern connects the shapelessness of what law had been to the rambling inclusiveness of Parsons' treatise—a disappointment Williston had gone through in the tension before his breakdown. Another pattern brings together form and principle (the coherence Williston saw in the law of his own generation) with Williston's Contracts treatise (which had used such principles to achieve such coherence) and these with the stability Williston had regained in completing the treatise. When Tennyson paired the "codeless myriad of precedent" with the metaphor of wilderness, he connected legal randomness and jumble with emptiness and desolation. In repeating the lines, Williston reiterated this connection. But the phrase also alluded to another myriad of precedents, the vast volume of decisions which Williston had marshalled and explicated.

To speak of "Williston on Contracts" has been to refer to both the author and the text. That the same reference comprehends man and book reflects the process and structure that had given each identity.

VIII. CONCLUSION

Octavio Paz, the Mexican essayist and Nobel laureate, has described what he calls the tradition of rupture.\textsuperscript{156} There have often been great differences between various literary generations, Paz has observed—for example, between pastoral poets and writers who proclaimed themselves first among the avant-garde. But even though the avant-gardists had no intention themselves of writing in measured cadences about country life, they had studied their predecessors and learned from them. There was a continuity one could trace, even if its course was marked by sharp, free-wheeling changes of direction.

Paz spoke of literature, but his insight holds true for other disciplines. It describes the way in which new work responds to work which has been done before. Something of this sort can traced out even in the history of commercial law. When Karl Llewellyn published his Cases and Materials on the Law of Sales, Williston shared the honors of its dedication.\textsuperscript{157} Arthur Corbin hailed Williston warmly as his older brother in the law, and praised his leadership of the Restatement working committee; it had been Williston who

\textsuperscript{156.} See, e.g., OCTAVIO PAZ, LOS HIJOS DEL LIMO 15 (1974).
\textsuperscript{157.} KARL LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930); see also WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 406 (1973); Karl Llewellyn, Book Review, 16 A.B.A. J. 809, 810 (1930) (reviewing SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW (1929)) (describing the work as "a master's book [which] maintains the master's standard").
brought him into the project.\textsuperscript{158}

If the new generation of commercial lawyers appeared to break with Williston, part of the reason was that Williston held back from joining them. In 1929, when he quoted Tennyson in \textit{Some Modern Tendencies in the Law}, the wilderness of single instances was clearly meant to refer to the past—to the legal jumble Parsons had amassed and Blackstone had rationalized. By 1941, however, when Williston quoted Tennyson again in \textit{Life and Law}, the wilderness of single instances was something to be feared from the future.

Philosophically, Williston’s jurisprudence took an idealist perspective. It sought out the similarities in different forms and kinds of agreements. Karl Llewellyn, by contrast, took a decidedly nominalist tack. Williston had aspired to broad general rules; Llewellyn advocated “narrow issue thinking.” Llewellyn rejected the idea that all contracts could be treated alike.

Transactions between professionals (or merchants) should be treated differently from transactions in which a professional sold goods to a non-professional (or consumer). Sales for resale should be treated differently from sales for use. Distinctions should be made between sales for cash and sales on credit; present sales and future sales; one-shot or single delivery transactions and long-term contract arrangements.\textsuperscript{159}

Williston regarded narrow issue thinking as his missionary grandfather might have regarded a revival of paganism. He saw it as a recrudescence of pre-Langdellian chaos. He viewed Legal Realism as the leading edge of “the so-called functional approach,” which sought to achieve the best possible result in each individual case, regardless of precedent.\textsuperscript{160} “[N]arrowing categories always involve a loss [of clarity] because of increased complexity,” he warned.\textsuperscript{161} While

\begin{footnotes}

\textsuperscript{158} TWINING, supra note 157, at 397 n.31 (quoting letter from Corbin which notes that Williston asked Corbin to ensure that the \textit{Restatement} was consistent with Hohfeldian analysis); Arthur L. Corbin, \textit{Samuel Williston}, 76 HARV. L. REV. 1327 (1963); see also Joseph M. Perillo, \textit{Twelve Letters from Arthur M. Corbin to Robert Braucher}, 50 WASH. & LEE L. REV. (1993) (discussing Corbin’s recollections of Restatement work).

\textsuperscript{159} GILMORE, supra note 3, at 82-83.

\textsuperscript{160} LIFE AND LAW, supra note 1, at 208.

\textsuperscript{161} \textit{Id.} at 214. To the end of his career, he defended this position. In his last article, published when he had reached the age of 88, he criticized the “firm offer” rule of the proposed Uniform Commercial Code for not going far enough.

Section 2-205 proposes to change the existing law of contracts by making binding without consideration an offer stated to be “firm” or otherwise irrevocable for a period not exceeding three months. . . . I strongly favor enactment of some such statute . . . . It is, however, unfortunate that there should be a different rule for contracts for the sale of goods from that governing sales of shares of stock or of land, or indeed for any other offer or promise. It would be better to enact a general statute on the subject than to make this special rule for the sale of goods.
\end{footnotes}
finding some merit in nearly all points of Llewellyn’s methodology, he felt “a direct frontal attack” was needed on one: “the belief in the desirability of grouping legal situations in narrower categories than has been customary, especially when the severance into different categories is based merely on the fact that differences of decision have heretofore existed. Such a line of thought...substitutes precedent for reason.”

In criticizing Legal Realism, Williston made again, verbatim, the criticisms he had made of pre-Langdellian contract law. He reprinted word for word the sentences which had attacked complexity and uncertainty, that had derided logomachy, and that had praised principle as the basis for coherence and logical coordination. Even his clinching metaphor was the same: “If the so-called functional approach is pushed to its limit, a rule must be established for each separate state of facts.... This would make of the law what Tennyson called... a ‘codeless myriad of precedent,’ a ‘wilderness of single instances.’”

Seeing new issues in terms of old disputes, Williston mistook Llewellyn for Parsons. This misjudgment cost him. Williston did not contribute to the Realist solution, and so, to later generations, he seemed more and more to have been part of the formalist problem. The methodology he had championed fell into disrepute and finally desuetude; Grant Gilmore called its decline the death of Contract.

Such errors do not bear repeating. To remain alert to the possibilities of the future, this last chapter of Williston’s history suggests, one should not cling to fixed judgments about the past. As to our own past, re-examining Williston offers a start.

Re-examining Williston is a step toward understanding that classical legal thought was not a monolithic ideology—that one can think in terms of form and principle without becoming a vulgar formalist, just as one can draw on Marxist thinking without becoming a vulgar Marxist. Llewellyn and Corbin dispelled the ancient phobia of grappling with facts. Reassessing Williston may help dispel the post-modern skepticism of logic and consistency. And ultimately we may recognize the zig-zag continuity in how Williston rebelled against Blackstone and Parsons and how Corbin and Llewellyn in


162. LIFE AND LAW, supra note 1, at 213.

163. Compare LIFE AND LAW, supra note 1, at 213 (criticizing Legal Realism) with MODERN TENDENCIES, supra note 86, at 96-98 (criticizing pre-Langdellian contract law). The later passage repeats the former, word for word; phrases first written as criticisms of Parsons and his school are pressed into service as a criticism of Legal Realism.

164. LIFE AND LAW, supra note 1, at 208.

165. See generally GILMORE, supra note 96.
turn broke away from Williston. If we properly understand such ruptures, we may recognize that contract, rather than being a dead body of theory, survives as a healthy tradition.