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NOTES ON THE MARGINS OF LAWYERING, IN THREE AND A HALF MINUTES

*Stewart Macaulay**

Mitu Gulati and Robert E. Scott have given us a wonderful study.¹ They tell us about how elite lawyers practice law, and they tell us about the transformation of the process of producing all of the standard form contract terms that govern so much of our economic life.² Moreover, those of us who have done work involving interviewing lawyers can understand what it took to produce this work. One reason that law professors know so little about what lawyers for major economic actors do is that these lawyers are so hard to study. I confess that most of what I know about sovereign debt I learned reading this study. It is not my world. The authors caution about not over-generalizing because things may be different in other areas.³ Nonetheless, I want to speculate about what the changes in elite practice may mean for other areas of creating contracts and dealing with disputes that are likely to follow. I also want to say something about the methods of studying lawyers.

I. SOME COMMENTS SUGGESTED BY GULATI AND SCOTT'S STORY

Gulati and Scott show that law practice aimed at large corporations has changed and will change more.⁴ We can ask what computers and limits on what clients will pay may mean for our thinking about standard form contracts. I would like to see studies of elite practice in other areas,

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1. *See generally* MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (forthcoming 2012) (on file with the Hofstra Law Review).

2. *See id.* (manuscript at 18-19).

3. *See id.* (manuscript at 180).

4. *Id.* (manuscript at 137-39).

asking what the changes will mean for contract planning and dispute resolution.

There are several stories about positive contributions of corporate lawyers in American legal history. Willard Hurst, for example, saw American lawyers in the nineteenth century as “social inventors.”⁵ Lawyers “contrived or adapted institutions (the corporation), tools (the railroad equipment trust certificate), and patterns of action (the reorganization of corporate financial structure or the fashioning of a price structure for a national market).”⁶ He continued: “Much, if not most, of lawyers’ inventions consisted in making old institutions serve new needs. Obviously that did not derogate from the practical importance of their work; to the contrary, it placed it in the normal pattern of social change.”⁷

Spencer Kimball studied insurance in Wisconsin from 1835 to 1959.⁸ He found that courts regulated the administration of insurance claims by using such doctrines as substantial performance and waiver, while construing insurance contracts most strongly against the drafter.⁹ Insurance company lawyers read the cases and responded: “[I]ndustry committees frequently made drafting suggestions for making the contracts so airtight that even a judge with a strong bias against insurance companies could not misunderstand.”¹⁰ While there were limits to what could be accomplished merely by changing the words in insurance policies, the lawyers clearly were on top of what the courts were doing.

Lawyers for wealth and power long have claimed to influence their clients in positive ways. In the 1970s, there was much concern with public interest law. A former corporate lawyer argued in the *Wall Street Journal* that large-firm lawyers engage in real “public interest work” in their everyday practice.¹¹ They do this by suggesting ways that major businesses can accomplish what they desire safely within legal restraints:

Because [business lawyers] advise powerful public and private entities, these lawyers have a more consistent impact on the lives of American

5. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 335-36 (1950).

6. *Id.* at 337.

7. *Id.*

8. See generally SPENCER L. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS 1835-1959* (1960) (discussing Kimball’s study of insurance in Wisconsin).

9. See *id.* at 209-13.

10. *Id.* at 211.

11. Stanley I. Hanover, *Corporate Lawyers Do Public-Interest Work*, WALL ST. J., Feb. 23, 1984, at 28.

citizens than other types of counsel. The typical company seeks their advice to avoid future costly legal battles. Yet, by advising a company of the legal parameters within which it must operate, the business attorney necessarily serves as guardian of the public interest. He has the daily responsibility of ferreting out and making certain his client honors the myriad of pollution, pension, occupational safety, securities and other laws that protect the public.¹²

Gulati and Scott's study makes me wonder to what extent, if at all, these stories of the functions of the elite bar still hold true today in areas other than sovereign debt. The authors explain most of what they uncovered by noting the "deficiencies in the organizational structure of law firms, including hourly billing and compensation, the secondary role given to [research and development], and the manner in which legal services are marketed."¹³ It is not obvious why things would be different outside of the sovereign debt area. A lot remains to be explored.

The authors' title is *The Three and a Half Minute Transaction*. The reference to a "three and a half minute" contract comes from a lawyer's response to their questions about the apparent failure of the sovereign debt bar to deal with *pari passu*¹⁴ clauses:

You have to understand the system. No one pays that much attention to the minute details like this The firm has a computer program. You know . . . one that a junior associate can go to and plug the relevant parameters into—you know, type of issuance, type of issuer, which side we are representing, etc.,—and the computer generates a standard contract. The firm spent [a large amount] on putting together this system. Associates can now produce a contract for one of these deals in three and a half minutes. This is the future of contracting in these markets.¹⁵

Computers churning out standard forms is not a picture limited to contracts in the sovereign debt arena. I first came across the idea in a treatise written by a former general counsel of the Motorola Corporation ("Motorola"). He argued that "knowledge reuse" is:

[T]he creation of a system which anticipates virtually every document and opinion drafting need, assembles every form and clause conceivably used in the legal organization's experience, verifies quality at the point of input, protects the data base from unauthorized alteration, acts as an exhaustive checklist for issues and positions, helps

12. *Id.*

13. GULATI & SCOTT, *supra* note 1 (manuscript at 181).

14. *Id.* (manuscript at 21).

15. *Id.* (manuscript at 16) (alteration in original) (emphasis omitted).

maintain organization policy, keeps organizational consistency, avoids “re-inventing the wheel,” slashes cycle time from hours to minutes, and makes it possible to delegate what was heretofore lawyer’s work to lower cost non-lawyers.¹⁶

Kenneth A. Adams tells us “[d]ocument assembly software is likely to play a significant role in the future of contract drafting.”¹⁷ He stresses its benefits:

You can start each transaction afresh, without being limited by choices made for previous transactions. You’re assured a measure of firm-wide consistency, in that first drafts of a given kind of contract are created from the same pool of preloaded language. The questionnaire includes guidance that explains the implications of the choices offered, so the drafter is provided training when it’s most valuable—while the contract is being drafted. And answering an online questionnaire takes a fraction of the time eaten up by the traditional process, so lawyers can devote more of their time to determining strategy and assisting in negotiations.¹⁸

While we can see the virtues of this kind of standardization, the system rests on some assumptions that will not always be true. Most obviously, those who make contracts for a corporation have to use the wonderful computerized contract system. My late wife was a lawyer and she represented a client who sued Motorola. In her case, a Motorola executive wrote his own contract document, and he did not clear it with the legal department before it was signed.¹⁹ The second point also is obvious but easy to overlook. The first law of computers tells us garbage in, garbage out. One key point in the Motorola general counsel’s treatise is that presumably someone with skill “verifies quality at the point of input.”²⁰ Perhaps Motorola’s legal department was willing to invest in research and development at the point of input. Perhaps Gulati and Scott’s informant who told them about the “three and a half minute” contract worked at a firm that had invested in vetting each comma, phrase, and paragraph in the database. However, apparently the firm had not dealt adequately with the *pari passu* clause.²¹ It was a “minute

16. 1 RICHARD H. WEISE, REPRESENTING THE CORPORATE CLIENT: DESIGNS FOR QUALITY ch. 7, at 7-1 (Supp. 1992).

17. Kenneth A. Adams, *The New Associate and the Future of Contract Drafting*, N.Y. L.J., Apr. 1, 2011, at 4, 7.

18. *Id.*

19. See Professor Peter Linzer’s discussion of *Shore v. Motorola*, No. 98-4227, 2000 WL 51143 (7th Cir. Jan. 18, 2000), in Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 764-72.

20. 1 WEISE, *supra* note 16, at 7-1.

21. See GULATI & SCOTT, *supra* note 1 (manuscript at 21).

detail.” Some law firms and corporate legal departments just might have scanned their firm’s existing standard forms into their database. This would have avoided any risk of offending senior partners or counsel who had drafted part or all of them. In the short run, it would be relatively inexpensive. However, again to state the obvious, putting a poorly drafted clause on a computer does not by some miracle revise the provision into clarity.

Moreover, the story of the *pari passu* clause reminds us of another obvious point. Even if the quality of each provision in the database was high when the system was created, the world changes in ways that are hard to anticipate. Perhaps most judicial interpretations of standard contract provisions are more or less predictable, but appellate courts now and then do surprise lawyers. Coping with changing conditions would require an investment that is not built into these systems. Gulati and Scott stress that transaction planners do not spend much time keeping up with judicial decisions interpreting standard form contracts.²² A large firm’s litigation specialists read cases, but they do not regularly communicate with the planners. I can imagine the legal department in a corporation such as Motorola assigning to a lawyer the task of following judicial decisions and bringing them to the attention of those in charge of the database. However, just as is true in a large firm, a corporation such as Motorola has a limited budget. It would have to decide that it would pay to invest in keeping its database up to date. Perhaps I am wrong, but this does not sound to me like high prestige work. Of course, transaction planners have many sources that sometimes will alert them to new cases. There are journals and now even blogs on the Internet aimed at these lawyers. Various forms of continuing legal education are widely available, and sometimes they are focused on new developments relevant to such lawyers. Moreover, many corporations are members of trade associations. Some of these associations watch legal developments and even offer suggested language to deal with cases, statutes, administrative regulations, or events in the world that might affect what a standard form attempts to govern.²³

The “three and a half minutes” to create a sovereign debt contract story seems to assume that the law firm could produce a contract

22. *Id.* (manuscript at 10).

23. *See, e.g.*, Donna Valentine, *Force Majeure—Planning for the Unexpected*, EXCEL MEETINGS & EVENTS, http://www.excelmeetings.com/about/documents/Force_Majeur_09.pdf (last visited Mar. 1, 2012). The newsletter offers a model force majeure clause designed to reverse such cases as *Kuhn Farm Machinery, Inc. See 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 909 P.2d 408, 418 (Ariz. Ct. App. 1995) (holding that a convention organizer was not excused from a contract to hold a convention because travelers feared flying during the Gulf War).

document without too much concern for the views of those on the other side. John Flood stresses that there are customs about which side drafts the documents in different types of transactions: “[W]hoever originates the documentation has considerable control over its life course and final composition.”²⁴ While this control may exist, the other side often will want some clauses revised, some provisions added, or both. Perhaps a lawyer could get a draft of an opening proposal into the dance of negotiation. Perhaps the person who decided which standard form provisions would become part of the database may have edited them nicely. However, changes often introduce uncertainty. It is far too easy to add, say, a new clause twenty-five that was drafted by the other side, but then to overlook that it is not entirely consistent with the existing clause ten. Sometimes such an inconsistency will only become apparent when engineers, general contractors, or others run into trouble trying to perform terms negotiated by lawyers, purchasing agents, sales people, or those expert in finance.

Claire Hill has written several articles dealing with the contracts drafted by lawyers.²⁵ She is very critical. She finds that lawyer-drafted contracts are often unnecessarily long and complicated.²⁶ They frequently have ambiguities that allow for multiple interpretations.²⁷ Sometimes parties decide to leave matters uncertain. This way, each side has an argument in any potential litigation. Had they tried to negotiate the matter, they might have been forced to accept a clear rejection of their position. Moreover, some terms are hard to define precisely, and parties may read a term differently. It is far easier to state matters with terms such as “material,” “reasonable,” and “best efforts” than to try to give such matters a precise definition.²⁸ Hill argues that uncertainty increases the costs of litigation, and this creates a bond against precipitous recourse to the courts.²⁹ Each side knows that if it starts a

24. John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35, 65 (2007).

25. See Claire A. Hill, *Why Contracts Are Written in “Legalese,”* 77 CHI.-KENT L. REV. 59 (2001); Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI.-KENT L. REV. 889 (2004).

26. Hill & King, *supra* note 25, at 894.

27. See Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 194 (2009) [hereinafter *Bargaining in the Shadow of the Lawsuit*].

28. *Id.* at 209.

29. *Id.* at 208. She also notes: “Whether a dispute arises depends largely on whether one or both parties becomes unhappy in the relationship, which often turns on the world changing in the way the parties did not expressly anticipate, and in a manner that they did not, and could not, have comprehensively and satisfactorily provided for before the fact. More effort put towards drafting within any reasonable range is not likely to ameliorate the problem commensurate with the added

lawsuit, the other will be able to impose significant costs because “[w]hat the murky contract does is lower the costs for the party being sued . . . to countersue.”³⁰ We can only wonder how far, if at all, the move to putting standard terms on computers makes contracts less murky and decreases cost barriers to litigation. Of course, even if the language of the contract document is relatively precise, often people can make arguments about the facts of the case if not the meaning of the applicable rules of law.

If some law firms or corporate legal departments do not invest in keeping computerized standard forms up to date, the courts may be asked to interpret fuzzy language or fill gaps. If judges become more aware of what Motorola’s former general counsel called “knowledge reuse,”³¹ how will the judges respond? At one time, the U.S. Court of Appeals for the Seventh Circuit refused to invest much effort in relieving major businesses from a literal reading of the text of their contract documents.³² The court noted: “This policy of upholding the integrity of written contracts and favoring written terms over extrinsic evidence is particularly relevant in cases of this nature involving a written contract between two large corporations presumably represented by competent counsel.”³³ Of course, it would be easy to offer examples of courts helping large corporations “presumably represented by competent counsel.”³⁴

Let us assume that the conditions of modern law practice may discourage innovation, and those lawyers who plan transactions are not watching appellate reports and responding quickly with contract revisions. What about lawyers influencing clients to at least make some pretense of complying with the law? Gulati and Scott’s story at least suggests that a law firm would have to find a way to get a client to ask for such service so that the firm could bill for it.³⁵ Big firms do write newsletters for potential clients, and these documents often suggest that the firm can ward off the monster of regulation rising from the deep to

cost.” *Id.* at 217. See also Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 891 (2010) (“A vague clause . . . imposes litigation costs on the parties, and when that cost is nontrivial, it can *selectively* eliminate the parties’ incentive to litigate ex post.”).

30. *Bargaining in the Shadow of the Lawsuit*, *supra* note 27, at 213.

31. 1 WEISE, *supra* note 16, at 7-1.

32. See *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1115-17 (7th Cir. 1983).

33. *Id.* at 1116. One of the lawyers for the buyer in *Binks* told me that the contract document actually had been drafted by the firm’s purchasing agent. He was a former high school teacher who had no legal training.

34. See *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 596-97 (7th Cir. 1991); *Aluminum Co. of Am. v. Essex Grp., Inc.*, 499 F. Supp. 53, 91-92 (W.D. Pa. 1980).

35. See GULATI & SCOTT, *supra* note 1 (manuscript at 108, 162-63).

swallow the client's company. But we could well ask whether clients read these documents and respond with a retainer. Gulati and Scott tell us: "[L]awyers working in areas such as [mergers and acquisitions], tax and private equity have suggested that our findings are idiosyncratic; that their clients demand contract provisions that are carefully negotiated and that every term is well understood by both client and lawyer."³⁶ This should prompt us to ask, what is it about these areas that is different from the world of sovereign debt? In those other areas, have contract documents been put into a computer database? If they have been downloaded, how can a firm bill to keep up with judicial decisions and other changes in the world that might call for research and redrafting of various provisions? Perhaps, we might wonder whether these lawyers working in these other areas are correct that "every term is well understood by both client and lawyer."³⁷

Lawyers have innovated in the not too distant past. Gulati and Scott point to the fashioning of "poison pill" structures that make hostile takeovers less attractive.³⁸ Lauren Edelman and her co-authors report that employment lawyers set up various internal procedures to help employers cope with the developing legal limitations on their powers to hire and fire at will.³⁹ Also, those who teach contracts are well aware of the arbitration ploy that lawyers have crafted to undercut various consumer protection and employee rights victories of the 1960s and 1970s.⁴⁰ Arbitration triggers all of our assumptions about alternative dispute resolution and decisions by experts, rather than jurors and judges with little knowledge of the context of a dispute. However, the lawyer who dreamed up the provisions used by Gateway computers created a structure that served to allow Gateway to come close to selling its computers "as is" and "with all faults" without disclosing this information.⁴¹ The lawyer's innovation also created a whole new area of

36. *Id.* (manuscript at 177).

37. *Id.*

38. *Id.* (manuscript at 164-65).

39. See Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1412, 1435 (1990) [hereinafter *Legal Environments and Organizational Governance*]; Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 75-77 (1992).

40. See *Legal Environments and Organizational Governance*, *supra* note 39, at 1405-07.

41. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-50 (7th Cir. 1997). Paul D. Carrington discussed the problem in depth. See Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 385-86, 391 (2002) ("I conclude by toasting the lawyer who is the first to risk his professional energy and reputation to impose a substantial liability on an unconscionable law firm for writing unconscionable terms into a standard form contract."). *But see* Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 786-

litigation and appeals when his Gateway clause was found to be unconscionable.⁴²

Whatever we think of creating arbitration as a way to blunt individual rights, we can ask how lawyers learned about both the possibilities of arbitration and the costs of having to battle unconscionability cases. We can also ask how all of this legal activity on both sides was financed. Do practices in large law firms allow for similar innovations in the future? How would a firm get clients to pay for something such as this? Elite law firms have moved to outsourcing much work formerly done by young associates. Indeed, a firm based in India has moved activities to Texas where it hires American lawyers as temporary workers at much less than the salaries typically paid to associates in large law firms.⁴³ However, it has been reported that a few elite lawyers have been able to raise fees to over \$1000 an hour.⁴⁴ We can ask what kinds of services command this price from which clients? Are these lawyers concerned with coping with legal regulation by standard form contracts? Do these high fees suggest that other areas will not command services at this price? Gulati and Scott tell us: “Law firms have ceded much of the production of innovative transactions to non-law organizations, such as investment banks, marketing consultants and commodities exchanges.”⁴⁵ Nicholas Argyres and Kyle J. Mayer argue that the best design of commercial contracts entails involving the knowledge of engineers and managers as well as lawyers, although too often contract drafting is left to the lawyers.⁴⁶ If those other than lawyers see drafting better contracts as worth the effort, we will see a new kind

87 (2003) (“Lawyers who advise businesses on dispute resolution issues can and should not only advise clients that pre-dispute arbitration provisions are valid and enforceable under law, but also identify the concerns raised by critics of arbitration and seek to address them.”).

42. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574-75 (App. Div. 1998). See also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44-48 (2006); Anthony Niblett, *Tracking Inconsistent Judicial Behavior 10-12* (July 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1434685>.

43. Heather Timmons, *Where Lawyers Find Work*, N.Y. TIMES, June 3, 2011, at B1. See also John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1 (“Now, thanks to advances in artificial intelligence, ‘e-discovery’ software can analyze documents in a fraction of the time for a fraction of the cost[]” of “a platoon of lawyers and paralegals.”).

44. Vanessa O’Connell, *Big Law’s \$1,000-Plus an Hour Club*, WALL ST. J., Feb. 23, 2011, at B1.

45. GULATI & SCOTT, *supra* note 1 (manuscript at 181).

46. Nicholas Argyres & Kyle J. Mayer, *Contract Design As a Firm Capability: An Integration of Learning and Transaction Cost Perspectives*, 32 ACAD. MGMT. REV. 1060, 1065-66 (2007).

of innovation. However, the following passage captures what I have found to be the attitude of many business people:

Bruce considered Ross a tremendously smart man, which was a mixed blessing in a lawyer; the smarter lawyers are, the more sides to a question they see, and the more complicated they want to make everything. Bruce drew a distinction between his world of “business points” and Ross’s realm of “legal points.” The former had to do with money in the here and now: who spent what, who got how much. The latter had to do largely with the what-ifs, the potential for things to go wrong and the remedies and sanctions that could be applied. It wasn’t that Bruce didn’t believe that things could go wrong. On the contrary, he knew that thousands of things would go wrong, most of them totally unpredictable, unforeseen, and beyond the scope of even the most comprehensive legal draftsmanship. And in that case the solution would be found in the real world and not in the carefully crafted and scrupulously numbered paragraphs of the agreements. Ultimately he would be thrown back on his own resources, to rant and deal as best he could. To spend \$200 an hour pretending otherwise struck him as an expensive form of voodoo.⁴⁷

II. A FEW ADMIRING COMMENTS ABOUT METHOD

Gulati and Scott write, I hope with a smile on their faces: “We attempt to shed light on the question of sticky boilerplate using what will undoubtedly strike some readers as a naive technique.”⁴⁸ If we accept the authority of the *Concise Oxford English Dictionary*, “naive” means “natural and unaffected.”⁴⁹ But it also refers to a kind of art that “has a bold directness resembling a child’s work.”⁵⁰ While I would say that this study “has a bold directness,” it is far too sophisticated to ever be seen as child-like in any way.

What is the problem when we ask questions of the leaders of a tribe? Our informants may not know the answer, but they may be unable to concede this. After all, they were asked the question because they

47. JERRY ADLER, *HIGH RISE: HOW 1,000 MEN AND WOMEN WORKED AROUND THE CLOCK FOR FIVE YEARS AND LOST \$200 MILLION BUILDING A SKYSCRAPER* 206 (1993). Some of the same attitude is reflected in a *Dilbert* cartoon. Dilbert complains to the representative of a vendor that his contract document is in “incomprehensible weaseleze[.]” Scott Adams, *DILBERT* (Sept. 15, 2001), <http://www.dilbert.com/strips/comic/2001-09-15>. Dilbert then says: “My only choices are to sign something I don’t understand or get my lawyer involved and miss my deadline!” *Id.*

48. GULATI & SCOTT, *supra* note 1 (manuscript at 18).

49. *CONCISE OXFORD ENGLISH DICTIONARY* 949 (11th ed. 2008).

50. *Id.* I have to concede that the *Concise Oxford English Dictionary* also offers as a definition: “lacking experience, wisdom, or judgement.” *Id.* Those terms also do not apply to Gulati and Scott in any way.

were supposed to know the answer. They may make up an answer that sounds plausible, but it is inaccurate. They may want to entertain the person asking questions, and so they may draw on the most unusual or shocking story they know. The atypical may be offered as what happens every day. Moreover, Gulati and Scott are law professors of some reputation.⁵¹ They wanted to know why their lawyer informants had failed to do something. Just by asking the question, Gulati and Scott may have conveyed the idea that they thought that the lawyers should have done something about the Belgian court's interpretation of the *pari passu* clause. Many of the senior lawyers sidestepped the researchers' questions by offering "origin stories."⁵² If only we knew, they said, why the clause first appeared in sovereign debt contracts, we would understand its purpose and what role it might play today.⁵³ Gulati and Scott accepted this challenge. They traced the clause back in history, but this did not produce a great revelation.

Gulati and Scott challenged their informants by asking them about the various theories explaining the stickiness of contract terms.⁵⁴ They looked at the explanations and tested them against the facts that they gathered.⁵⁵ They did a major piece of detective work, tracing the history of contracts with *pari passu* clauses.⁵⁶ They found differences in the language used in these clauses, and there were minor changes from time to time.⁵⁷ To put it mildly, Gulati and Scott were not about to accept what they were told just because of the authority of their interviewees. Even their final conclusions are set off with caveats. They offer a qualified explanation for contract stickiness that may not apply to everyone involved in sovereign debt or to other fields.

Perhaps readers who might see the research method as naive would worry about other threats to validity. The authors used the so-called "snowball" technique of finding informants.⁵⁸ They knew Lawyer A and talked with him. Lawyer A sent them to Lawyer B, who, in turn, sent them to Lawyer C. This is a good way to find those few who know something about an area. However, it risks being confined to those who "are in the club." We have to question whether Lawyer A would send

51. See Frances Presma, *Mitu Gulati: A 'Renaissance Man' in Law*, DUKE TODAY (Oct. 26, 2006), available at <http://today.duke.edu/2006/10/gulati.html>; Robert E. Scott, COLUMBIA LAW SCH., http://www.law.columbia.edu/fac/Robert_Scott (last visited Mar. 1, 2012).

52. GULATI & SCOTT, *supra* note 1 (manuscript at 90-91).

53. See *id.* (manuscript at 91).

54. See *id.* (manuscript at 65-66).

55. See *id.* (manuscript at 156-68).

56. See *id.* (manuscript at 134-55).

57. See *id.* (manuscript at 155).

58. *Id.* (manuscript at 66).

you to Lawyer Z, who Lawyer A does not respect or who is known to do things very differently than Lawyer A's practices. However, Gulati and Scott interviewed so many lawyers that it seems likely that if Lawyer A would never send them to Lawyer Z, Lawyers M, N, or O probably would have done so if there was any reason to think that Lawyer Z could add to the story.⁵⁹

Furthermore, if one is interviewing lawyers, she or he faces the problem of secrecy. Part of this may be related to the attorney-client privilege. Part may just be most lawyers' caution in talking about the private dealings of clients. As a result, you seldom can identify respondents in the report of the study. We must trust Gulati and Scott when they tell us that they interviewed a large portion of the important players in the sovereign debt game.⁶⁰ Both the "snowball" technique and not revealing the identity of the informants means that, as Gulati and Scott acknowledge, other scholars might be hard pressed to replicate their work.⁶¹

Many would feel more comfortable with hard data derived from a true random sample analyzed with state of the art statistics. However, questions about the practices of elite lawyers seldom, if ever, could be answered this way. I can only smile at the reaction that I would expect if I were to send these people a lengthy questionnaire without a promise of anonymity. These lawyers are not college sophomores required to gain experimental points. These lawyers are extremely busy people, and they work in a world where their valuable time is billed to wealthy clients. They usually will be flattered to be asked their opinion as experts in the matter, but some, at least, see law professors as not true professionals. We are the sports reporters while they are the players who take the field and play the game. We watch while they do things that count. Of course, some lawyers enjoy educating professors who remind them of those who gave them so much trouble in law school.⁶² As I read *The Three and a Half Minute Transaction*, I was impressed by how well the authors dealt with all of these concerns. If we are going to study elite lawyers, this study represents the state of the art.

I also want to applaud all of the hard work that went into this project. Gulati and Scott worked for almost six years to produce the

59. See *id.*

60. *Id.* (manuscript at 117).

61. See *id.* (manuscript at 66).

62. After I spent more than an hour with a lawyer asking many questions, he walked with me out to my car. As we arrived at the car, he said that he knew something that I did not know. "I'll bet that you don't know who gave me my lowest grade in law school. You did!"

manuscript.⁶³ They talked to more than 100 senior professionals working in the field of sovereign debt.⁶⁴ They interviewed more than a dozen less senior associates to be sure that people at their level were unlikely to decide what to do with the *pari passu* clause.⁶⁵ Gulati and Scott together did most of the interviews in New York.⁶⁶ Gulati did others at sovereign debt conferences in London, Paris, and Frankfurt.⁶⁷ Those who have never tried to interview elite lawyers should stop and think about the amount of work involved. Each interview had to be arranged, and this meant coordinating the schedules of at least three people in most cases. Afterwards, notes had to be transcribed and then analyzed.⁶⁸ What their informants had said was challenged by what Gulati and Scott had learned from analyzing the text of their large collection of sovereign debt contracts and the practices in the industry. All of this took more time and effort. Then the pair of authors had to find a way to write and polish a manuscript. Gulati told me how much he enjoyed working with Scott. Collaborations do not always produce pleasant memories such as this.

In an e-mail, Gulati told me that 176 pages was a lot to read regarding “a story about an obscure case and [a] three-line contract provision.”⁶⁹ Gulati is an extremely nice person (so is Scott), and he did not want to blow his own horn. However, *The Three and a Half Minute Transaction* is a very important achievement. It has something to say to those who study contracts and those concerned with learning more about an important part of the legal profession. It is fairly easy to read a collection of appellate opinions and apply your imagination or the theory in which you have placed your faith. Do not get me wrong—reading cases is important. It is just not enough. Appellate courts play a significant part in dealing with only a tiny portion of all of the economically important contracts formed in any nation. Appellate courts offer default rules, fill in gaps, and, at times, play games to get the “right” result. Often, the major function of actual and potential litigation and appeals is to coerce the parties to settle. Much of the work is done by those who produce contracts, and often these are collections of standard form clauses. Not infrequently the lawyers’ work is affected by the

63. GULATI & SCOTT, *supra* note 1 (manuscript at 9, 64).

64. *Id.* (manuscript at 65).

65. *Id.* (manuscript at 66).

66. *Id.* (manuscript at 64).

67. *Id.* (manuscript at 60).

68. *Id.* (manuscript at 66). The authors tell us: “Our initial plan had been to tape the interviews. But the reluctance of the initial respondents to permit taping led us to abandon that course of action.” *Id.* This was my experience interviewing lawyers as well.

69. E-mail from Mitu Gulati to author (June 11, 2011, 9:30 EST) (on file with the Hofstra Law Review).

attitudes of business people and engineers. They often have little respect for the lawyers' concern with what they see as unlikely contingencies. As Gulati and Scott report, now elite law firms and major corporations have moved much of the effort to clauses embalmed in a database on a computer.⁷⁰ What positives and negatives are likely to flow from this? We need a new legal realism to understand the disputes that get through all of the filters and make it into the courts.⁷¹ Gulati and Scott have made a real contribution for all of us who try to teach law students something about what lawyers do in relation to our subject and what difference it might make.

70. See GULATI & SCOTT, *supra* note 1 (manuscript at 104).

71. See Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1166 (2006); Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 385-86.