Introduction

This Festschrift is created in Alan Schwartz's image.

We have tried, in constructing the volume, to honor Alan's range of virtues by reflecting them back on him, if not within each individual participant, then across the group of participants taken together. That effort began with the three organizers. We each know and love Alan well; but we've come to him by divergent paths: Robert Scott first co-authored with Alan in 1982; Florencia Marotta-Wurgler's work is deeply influenced by Alan's models; and Daniel Markovits was Alan's junior colleague and, really, his student. Moreover, our intellectual instincts and scholarly methods relate to Alan's in different ways: Bob, like Alan, was one of the first scholars to bring economic theory to bear on commercial law and practice; Florencia devotes much of her work to empirical tests of economic theories, including some of Alan's; and Daniel pursues philosophical reconstructions of the economic phenomena that Alan so incisively describes. We are united, across these differences, in our admiration for Alan—both his work, and his person. And our variety testifies to Alan's range, his intellectual charisma, and his virtue.

More importantly, the articles that follow, and their authors, again reflect Alan's character. We determined that, rather than solicit papers from Alan's cohort, we would look to the most energetic and exciting scholars now writing in the earlier stages in their careers. And rather assign papers that address Alan's work directly, or even that take up a subject from Alan's own scholarly canon, we would ask these scholars to write whatever they wished, in whatever fashion they wished, with the assignment only to produce meaningful and interesting new work. And so these pages include papers on contracts, on corporations, and on bankruptcy; papers that emphasize doctrinal analysis, empirical methods, and theory; and papers built around formal models, hermeneutic reconstruction, and moral speculation. Across all these differences, the papers capture scholars who focus their energies and attention insistently on the future of legal thought. And even as our invitation to the participants expressly instructed them to follow their own ideas rather than react narrowly to Alan's work, the texts that they've produced also testify to the scope and the depth of his influence over legal scholarship. Not one of the papers could have been written except against a backdrop of understanding that Alan helped to create.

The papers best speak for themselves—in their seriousness, their inventiveness, and their commitment to bringing new ideas into the world. We devote the rest of this introduction to some brief reflections on Alan—as a scholar and as a person—each of us writing in their own voice, as is fitting in tributes to a person of Alan's broad liberality. We hope that all these voices, in all these registers, capture some of what Alan has meant to each of us.

It has taken a multitude to capture an image of Alan's career.

Alan and His Work

It was a great pleasure for me to be part of the team organizing this conference honoring Alan Schwartz—a friend, colleague and collaborator for nearly fifty years. And now, we can all celebrate Alan yet again as the papers that were delivered at the conference are published in this issue of the *Yale Journal of Regulation.* Given this occasion, I thought it appropriate to review Alan's 50 years of scholarship.

Since Alan has written more than 100 published papers, any retrospective can only trace the broad themes. To understand the arc of Alan's work, let's begin by recalling that he began as a teacher and scholar of Commercial Transactions. Fifty years ago, Commercial Law was one of the most widely subscribed courses in American law schools (it's hard to believe, but true). The course centered on the Uniform Commercial Code. Much of the scholarship of that period explained how contextual interpretation was being successfully used to resolve disputed transactions ex post. Alan introduced a controversial and revolutionary idea: the focus on the context of the transaction was misguided; commercial law could only be understood in terms of clear rules that facilitate parties' ability to maximize the expected ex ante surplus from their transactions. This insight led to our first project together, a revolutionary casebook (widely cited but less widely adopted) that systematically described the ways that commercial contract law could be understood in maximizing terms.

From the beginning, Alan was committed to using formal tools to confirm and elaborate his economic intuitions. He began using these tools to illuminate some of the foundational principles in commercial law. He analyzed the efficiency of the holder in due course rule in commercial paper, and the logic of cure and revocation of acceptance in sales law. As evidence that this early work rubbed against the conventional grain, these two papers were published in his then go-to journal: the Boston College Industrial and Commercial Law Review.

Alan's early work was also influenced by a growing interest in search theory and how it might reveal the rationality of commercial law rules that were widely condemned as unfair to consumer interests. A series of important papers with Lou Wilde used search models to describe the conditions under which contract term disclosure rather than regulation could improve the efficiency of consumer markets. As evidence that Alan continues to learn from his critics, he returned many years later to the debate between disclosure and regulation. Together with Ian Ayers, he recently proposed an administrative solution to the "no reading" problem that otherwise impairs disclosure solutions.

Alan has long ignored subject matter barriers to entry, and that explains the extraordinary breadth of his scholarship. His domain is the study of any and all of the transactions that collectively comprise a market economy. And so, he took his contract theory tool box to the world of corporate law. Among other puzzles, he analyzed the efficiency conditions for tender offers and for defensive tactics in takeover disputes. In time, he teamed with Ron Gilson in using experimental techniques to explore the efficacy of MAC clauses in M&A agreements and optimal constraints on private benefits of control.

But Alan was not done with search theory. During the same time that he was muscling in on the corporate lawyers, he decided to tackle torts as well. Here he produced a series of important papers on optimal product liability rules in a world of imperfect information. This led to Alan's service as an advisor on the ill-fated ALI principles on product liability, a service that would fuel his growing skepticism about the various products sponsored by the ALI.

Alan's earlier work had centered on describing the rational structure behind commercial law rules, but he later began to focus on commercial rules that failed to conform to that structure. This normative project focused first on mandatory rules that impeded parties' efforts to write efficient contracts. Alan began his crusade against mandatory contract law in a famous paper (by now he had moved up to the Yale Law Journal) that challenged the rule against contracting for specific performance. Alan showed convincingly that in many contexts specific performance was a more accurate and administratively efficient remedy than expectation damages. It has only taken forty odd years for that argument to take hold, but today Delaware courts quite willingly enforce contracting for specific performance.

Alan then set his sights on Bankruptcy and its enticing array of mandatory rules. Throughout the 1990's, he published a number of articles in which he advanced novel arguments for a contract theory approach to bankruptcy law. Taken together, and depending on your point of view, these various papers either cast doubt on or utterly demolished the foundations for many of the rules of bankruptcy law.

It was also during the 1990s that Alan and I began to puzzle over the incoherence of the legal rules in the UCC. What explained why there were bright line, clear rules governing secured credit and commercial paper and yet only vague prescriptions in sales? This effort produced an important, albeit controversial, critique of the private legislative process that used positive political theory to predict (correctly as it turned out) that the ALI would produce clear, but biased rules in markets dominated by single intrenched interests and vague standards that delegated interpretative authority to courts where interest groups were in competition. Alan and I returned to that theme several years ago in a paper explaining why contract and bankruptcy rules become obsolete.

Meanwhile, Alan had not forgotten about his other bete noir: the number of unnecessary (and costly) default rules that the state supplied even where parties could more efficiently write such terms for themselves. His concern about the inefficiency of vague default rules that incorporated empty standards of "reasonableness" or "ordinary purposes" led to several scholarly strands. A paper on the default rule paradigm and the limits of contract law was the progenitor of Alan's most cited paper in which he and I offered a joint maximization theory of a contract law for firms. Some years later, Alan and I returned yet again to the default rule project. This paper favorably compared the efficiency of the parsimonious transcontextual default rules that have emerged over time in the common law against the array of legislative efforts in the UCC to supplement those defaults with vague standards.

Of necessity, this brief review leaves out too much. In recent years, papers on preliminary agreements, the lost volume problem, good faith purchase and much else have rolled off his computer. Of particular note, Alan's commitment to personal sovereignty in contract has recently led to important work with Daniel Markovits using philosophical arguments to justify the expectation damages rule against moral claims for disgorgement. Even more recently, in work with Simone Sepe, Alan has advanced a full-blown normative theory justifying "true" freedom of contract as a moral value.

What I have found so remarkable in our long collaboration is Alan's total commitment to the scholarly ideal. He believes in his bones that ideas matter, that good ideas matter more than mediocre ones, and that a true scholar is always open to criticism and revision. No comment we received about our joint work over the years, no matter how disdainful of the project, was left unaddressed. When, as was typical, he concluded that the comment was misguided, his instinct was to labor harder to explain and persuade the reader of the merit of the central ideas. Even today, all these years later, he dutifully sends out his papers to student-edited law reviews, oblivious to the changes in law review culture and tastes, and he is disarmingly perplexed when the student board in question is uninterested in the ideas he has submitted to them. Naïve perhaps, but wonderful nonetheless.

Alan and I have worked together for over 46 years, a collaboration that has produced three books and nearly a dozen major articles. During all this time, I have benefited enormously from his deep commitment to the scholarly enterprise as well as the generosity of spirit and uncommon loyalty he gives to his friends. But as we continue to say to each other, ignoring the passage of years, there is more work still to do.

RES

Alan's Insight and Influence

Alan and I became friends almost two decades ago. We often found ourselves in the same conferences—sometimes in beautiful locations, other times, less so—and writing on related topics. It is easy to become friends with Alan: he is incredibly funny, a good listener (and therefore a great person to complain with), a terrific person to discuss paper ideas with, and a stimulating dinner companion whether in person or, indeed, during a pandemic, over Zoom.

For all of us who have had the opportunity to get to know him personally, what also stands out is his intellectual generosity and curiosity. Alan has a rare ability to get to the core of an argument quickly, often by asking what sounds like a simple question but what turns out to be exactly the right one. Alan has had an enormous influence on how we think and write about contracts, consumer markets, and disclosure regulation. Among Alan's many brilliant contributions (including those with his long-time coauthor Bob Scott), I would like to highlight his famous article with Louis Wilde on the "informed minority." It has been especially influential in shaping modern thinking, including my own, about consumer contracts and disclosure regulation.

At the time, disclosure regulation rested on a straightforward assumption: consumer markets suffered from imperfect or asymmetric information, and mandatory disclosure could reduce search costs and improve decision-making. The problem is that most people fail to become informed. Alan and Louis fundamentally recast that picture. They pointed out that such markets might still function reasonably well even if most consumers never read contractual terms, so long as some informed minority of buyers searched and disciplined sellers largely by themselves. Therefore, the effectiveness of disclosure did not rely on the implausible foundation of widespread readership, which in turn made the case for mandatory disclosure quite a bit weaker.

That observation became influential because it provided a theoretical framework for disclosure-based regulation at a moment when disclosure was becoming a dominant paradigm. It helped shape a way of thinking about solutions to consumer market problems. It implied that improving the flow of information, even if only partially effective at the individual level, could have an outsized effect on disciplining markets and improving economic efficiency for the benefit of all. The article also framed many of the empirical and conceptual questions that scholars would subsequently ask, such as whether consumers actually read, whether disclosure succeeds in practice, and whether contract law is the right framework for thinking about modern consumer transactions.

In my own work, I did not find the informed minority that Schwartz and Wilde theorized. In the markets that I've looked into, I've found that consumers too rarely read standard form contracts, even when disclosure is available and easy to access. Others have explored readership in other contexts, as well which types of disclosures, or terms, are likely to be read. Alan has always proudly claimed that he never lets facts get in the way of his theory. That is fine, because the framework of Schwartz and Wilde allows us to think clearly about different market setups that lead to disparate empirical results, carefully and case by case, providing a clarity that otherwise wouldn't exist. The work of many contemporary scholars of commercial contracts has benefited a great deal from this contribution.

The new observations and insights from this conference and associated volume will likely find themselves in Alan's ongoing work, as he is retiring only to write more. I look forward to years more of discussions about new ideas with him. I am grateful to the participants of this conference volume, which so clearly illustrates Alan's wide-ranging contributions to date.

FMW

Alan as Teacher and Friend

In the year after I joined the Yale Law School faculty, Alan Schwartz gave the Faculty Workshop, presenting a draft of what would become his and Bob Scott's classic article, *Contract Theory and the Limits of Contract Law*. The article was then, as it remains now, the leading comprehensive theoretical elaboration of a functionalist account of contract law—of contract understood as an allocative device to coordinate investment and production in the service, ultimately, of consumption. It is a tour de force of theoretical imagination, articulated with doctrinal precision, and applied with a surefooted understanding of actual legal and commercial practice.

Towards the end of the workshop, I asked a question that challenged the fundamental conceit behind the manuscript (and much of Alan's other work), proposing that contract should be understood through form rather than function and as an integrative rather than an allocative practice. The question flatly ignored the manuscript's many virtues and asked, in effect, whether Alan was looking at the wrong thing and seeing it in the wrong way; whether the most important thing about contracts might be not that they are useful in pursuing contracting parties' antecedent ends but rather that they establish a relationship between the parties that is valuable in itself. The details of the exchange matter much less—then, and certainly now—than the character of Alan's response. Alan remained—and remains—committed to the legal worldview that he so powerfully elaborates and applies, but he appreciated the thrust of the question, and he welcomed rather than resisted a new voice trying develop a competitor view. Although we didn't really know each other, and although he had no particular reason to respond to sniping from the peanut gallery, Alan suggested that we have lunch. A now nearly quarter-century-old collaboration and friendship had begun.

That friendship has meant as much to me as any relationship in my professional life. Things I've learned from Alan include: specific and particular substantive ideas, for example about how to model textualist and contextualist approaches to contract interpretation; general and widely-applicable scholarly craft skills, for example, how to stress test a model to see whether it captures real-world phenomena, and in what domains; and foundational and universal intellectual virtues, for example how to revisit a one's own completed arguments with fresh eyes, capable skeptical and improving scrutiny. I have never sat a minute in any formal class Alan led; but he's taught me wide and deep. When I was recently asked, in a parlor game, which teacher has served as the north star for my own scholarship, I answered Alan Schwartz.

As in our initial encounter, so across all his working life, Alan's intellectual commitments are matched only by his intellectual welcome. On the one hand, Alan has an unrivaled energy for developing his own ideas. Anyone who has written with him knows that Alan will keep at a manuscript—making small changes and large—until he's managed to say exactly what he believes in the clearest and most powerful way possible. As I write these words, my computer contains a draft of an article we're writing together that's labelled "version 71." On the other hand, Alan has an equally peerless interest in other people's ideas, including in ideas that he rejects. I've never met anyone who reads as much as Alan does; he is proof of the falsehood of the old saw that an intellectual can either read or write, but not both. I've also never met anyone who reads as widely, including on topics—art, politics, ancient history—that are distant from his own work and also in styles—impressionistic, narrative, elliptical—that his own methods reject. Alan is almost infinitely curious and admires the amazing variety of what people can do when they try hard and well. He's one of the world's few practicing pluralists.

Alan's style of pluralism—which combines an intense commitment to his own view with an equally powerful admiration for the best statements of ideas that he rejects—is perhaps connected to his being a lawyer-economist. Lawyers must, without being torn apart by it, hold a zealous loyalty to their clients in one hand and an equally deep commitment to law and justice on the other. Economists have a split perspective of their own: they have to figure out not just how to model the actions of the individual firms that compete in the market, but also how to model the markets in which these firms act. Seen in this light, Alan enjoys the benefits of his training, and his practical pluralism captures that core virtues of the intellectual fields to which he has devoted his working life. But of course, training sometimes (often) doesn't take: any number of lawyer-economists fall short of the ideals that their disciplines recommend; and many don't even aspire to them. Alan may vindicate the values of his disciplines. But it's one thing for an intellectual tradition to contain multitudes, and quite another for an individual person to manage it. And in this, Alan remains utterly exceptional.

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