general, the difficulties of attempting to launch such a plan through voluntary contract are effectively described by Blum and Kalven.\textsuperscript{11} In the opinion of the reviewer, however, it deserves further study and trial, particularly if its benefit schedules were to be increased and it were to be given statutory support.

Concurrent with its improvement of the insurance product, the insurance business is beginning to overhaul its claims practices under the present system. Many major auto insurers are introducing programs for the advance or timely payment for losses as incurred and for rehabilitation of third party victims.\textsuperscript{12} We expect through such programs to provide a satisfactory answer to one of the major targets of compensation plans outlined by Blum and Kalven: improvement in the timing of payment to victims.\textsuperscript{13}

Blum and Kalven have set the standards for judging all future compensation proposals. In fact, I expect that their work will prevent the widespread adoption of any overall compensation plan. A pluralistic answer to the auto accident reparation problem appears to be emerging. It does seem clear, however, that the fault principle will recede in importance in the future since an opaque veil is being drawn between the at-fault driver and the victim. Future losses are more likely to be borne by insurance institutions than by the individual. For this reason, it becomes even more important to secure remedies for insurance institutions which will stimulate innovations and development in the public interest. In my opinion, Blum and Kalven have made a valuable contribution in helping to formulate responsible public and private policies vitally affecting the future of insurers and their policyholders.

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\textsuperscript{11} Pp. 27-30.
\textsuperscript{12} Henle, Liability Insurance and the Rehabilitation Movement, J. Rehabilitation, May-June 1965, p. 12.
\textsuperscript{13} Pp. 30, 71-74.
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This is a challenging book. The tone is set in the Preface, where Professor Friedman talks of "the devastating obsoleteness of legal education." The law schools "fail to teach the legal system as a whole, let
alone the legal system as part of society; they teach disjointed fragments of a fragment.” The “traditional course-work in contracts” is “outmoded”; it involves “grappling with trivia”; the appellate decisions which form its subject matter “do not pose large issues.” 1 The theme is taken up again in the Introduction: expositions of contract law do not tell us whether particular precepts “pertain to living issues or to rare peripheral situations.” 2 We are also told that “the common-law approach to law in the schools and in legal literature at its worst could be compared to a zoology course which confined its study to dodos and unicorns, to beasts rare or long dead and beasts that never lived.” 3 This is a smaller, and insignificant, target, for no one wants to defend law teaching or writing “at its worst.” But later the attack is again launched on a large scale: “[C]asebooks and treatises confine most of their analysis to extinct situations and moribund problems.” 4 The point here seems to be that most problems in the law of contract are (in Professor Friedman’s view) solved within a fairly short time. “Two generations was longer than most contract type-problems [sic] survived [in Wisconsin].” 5 “If the precise legal issues are examined in relation to the facts of the underlying cases (which alone give meaning to doctrine), we usually discover that the matters debated in text or class have been covered since by statute or drafted into oblivion by the legal profession.” 6

These are serious criticisms and in part well founded. I am better able to talk of law teaching in England than in Wisconsin, and in England it is certainly true that law is still partly taught through a number of leading cases whose actual result has been reversed by statute. 7 It is also true that we spend time on some obsolete situations. But a law teacher must to some extent take into account the attitude of the courts to such “dead” decisions, and in England at any rate the courts continue to follow the legal principle of a decision even after its actual result has been reversed by legislation. 8

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1 P. viii.
2 P. 10. One might ask whether “living” and “peripheral” are opposites.
3 P. 25.
4 P. 202.
5 Ibid.
6 Ibid.
8 The actual decision in Dunlop Pneumatic Tyre Co. v. Selfridge & Co., [1915] A.C.
situations and moribund problems" is, of course, harder to defend, but we do have to ask what these phrases mean. Do they refer to fact situations which no longer arise? Or to situations which still do arise but no longer present problems for the courts because the legal difficulties to which they once gave rise have been solved? It seems that Professor Friedman is concerned with situations of the latter kind, and it may be doubted whether these have anything in common with the unicorn or the dodo. If one must use such an analogy, they might rather be compared with the study of smallpox in a country in which vaccination is compulsory or widely practiced. There is some danger in abandoning the study of "moribund problems" of this nature, and one wonders whether Professor Friedman's enthusiasm for "living issues" has led him to underrate the possible prophylactic effect of legal writing and education.

But of course Professor Friedman is not a merely destructive critic; he has something to put in the place of the orthodox legal writing and teaching which he condemns. He "undertakes to examine the relations between the law of contract and the general life of society (particularly economic life) in one state (Wisconsin) over the course of a century, beginning with the period of intensive settlement prior to the Civil War and ending with the 1950s." The materials are taken from three periods: 1836 to 1861, 1905 to 1915, and 1955 to 1958. They consist of the decisions of the Wisconsin Supreme Court, which "form the basic material of the study," and of the output of the Wisconsin legislature, which constitutes "the second major source material." The greater part of the book is in fact concerned with the decisions of the court. Thus Professor Friedman, after all, deals with the orthodox raw materials of legal study. But is this an effective or adequate way of studying "the relations between the law of contract and the general life of society," or "contract behavior"? Towards the end of the book we get what is, in effect, a series of negative answers to this question: "[T]he power of the court to create broad principles depended on a flow of work and the character of the docket—features over which the court had little control." "Events had conspired to rob the court of

847, was reversed by the Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 25, but the legal principle stated in the case was applied in Scrutons, Ltd. v. Midland Silicones, Ltd., [1962] A.C. 446. See new Resale Prices Act, 1964, c. 58, § 1.
9 "Drafted into oblivion" suggests this.
10 Pp. 9-10.
11 P. 11.
12 P. 12.
13 P. 9.
14 P. 11.
15 P. 198.
some of the most vital parts of the contract docket.”16 Was it necessary to tabulate 553 cases17 to reach this unsurprising conclusion? The legislature is, of course, not so limited in its choice of material; the "general life of society" is much more directly reflected in its output. This may be one reason why the chapter on "Contract Law and the Legislature" is much the most interesting part of the book.

Professor Friedman defines his subject matter—"contract questions"—in the following way: "The 'pure' law of contract is an area of what we can call abstract relationships. 'Pure' contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells and what is bought and sold . . . . Contract law is an abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed."18 Thus, "when the relationship of the parties to land is treated as creating distinctive legal issues, simply because land is involved, this is land law or property law, but not contract."19 So it seems that we are not talking "pure contract" when we discuss contractual capacity,20 or public policy, developments which have "systematically robbed contract of its subject-matter"; this is even more true of legislation which "defines and limits" contract law.21 The law of contract is "the law of unregulated economic transactions"; it is "residual."22

I cannot, unfortunately, in the least agree with these views. If Professor Friedman wants to attack writers and teachers who deal principally or exclusively with his abstraction, I am with him. But where, in the common law world today, are they to be found? Many "specialised" parts of the law of contract are, of course, taught in separate courses. But are these divisions dictated by anything except the length of academic terms and examinations? It is very hard to justify the exclusion of all the topics which Professor Friedman regards as outside the sphere of "pure" contract law from a study of the "relation between the law of contract and the general life of society." It is at least arguable that this relationship becomes most interesting precisely where the law does draw distinctions according to persons or subject matter. This is another reason why the chapter on "Contract Law and the Legislature" is, in my opinion, so much more successful than those dealing with the cases. For in this chapter Professor Friedman does not confine him-

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16 P. 213.
17 P. 12.
18 P. 20.
19 Ibid.
20 Pp. 19, 83.
21 P. 24.
22 Ibid.
self to "abstract" contract law, that is, to statutes laying down general principles irrespective of person or subject matter. Instead, he discusses the ways in which the legislature has responded to particular problems by passing laws, the whole point of which was to make special provisions for particular groups of persons or for particular kinds of subject matter. And this, in my experience, is also a common way of discussing the case law of contract. Is it not a commonplace that the availability of an injunction to restrain breaches of contract may depend on the subject matter of the contract? Have not similar points been made in relation to such topics as excuses for nonperformance, breach, frustration, and assignment, to name only a few? Are all discussions along these lines for this reason "not contract"?

Professor Friedman can hardly be surprised by these questions and objections. Why, then, did he limit the scope of his study in such a way? The answer seems to be that he believes that his "abstract" idea of contract had an economic counterpart. "The abstraction of classical contract law," he says, "is not unrealistic; it is . . . a deliberate relinquishment of the temptation to restrict untrammeled individual autonomy or the completely free market in the name of social policy. The law of contract is, therefore, roughly coextensive with the free market." But Professor Friedman's abstraction and the free market have no necessary connection at all. In theory, a principle of contract law could require that all contracts must be fair, or that existing contractual rights must not be abused. Such a principle might be perfectly "abstract," that is, it might apply regardless of persons or subject matter. But it would not be even "roughly coextensive with the free market." What may have favoured the free market was the content of classical contract law, not its abstraction. If this is true, the case for confining the present study to "abstract" contract law appears to evaporate.

This conceptualism, moreover, causes Professor Friedman constant trouble. Thus he says: "All insurance cases imply an underlying contract; but they are theoretically divisible into insurance elements, and 'contract' elements." How can such a distinction be relevant to a study of "contract behavior"? Elsewhere, we are told that the "largest

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23 P. 20.

24 A similar point arises at page 118 where Professor Friedman says: "Abstraction demanded that the law allow contract rights of all sorts to be absolutely and freely assignable." It seems that abstraction only demanded that the law should have some perfectly general rule on the question; abstraction alone could not determine what that rule should be. I do not know whether the Wisconsin rule ever was "abstract," but the English rule certainly never was.

25 P. 62.
single group"²⁶ of cases discussed concerns illegality and public policy. "Many of the cases lie on the frontier between contract and not-contract; they test the border between contract law and the 'special' fields and this constant redefinition of boundaries is an abiding task of the law of contract."²⁷ Might not a contract lawyer be better employed in examining the territory on both sides of these "boundaries"? Professor Friedman draws the boundaries so as to include within the law of contract "areas where 'public policy' as defined by statute had not completely ousted the law of contract, but simply added a 'defense'"—he excludes from the law of contract cases where "sweeping legislation created entire new fields of law."²⁸ Again one has to ask whether such a distinction (if it can be drawn with any degree of precision) helps in a study of "contract behavior." We are also told that "abstraction... had to give way whenever it interfered with a greater goal."²⁹ This implies that "abstraction" was in itself a goal, but Professor Friedman does not adduce any evidence to show that any Wisconsin judge ever thought so. One is left again and again with the uneasy feeling that Professor Friedman has based his study on a concept which never had any existence except in some classrooms, and there only for a limited and very humble purpose.

Professor Friedman spends about half the book analyzing the selected cases. They are first divided into factual categories based on the subject matter of the contract.³⁰ Twelve categories are used, such as contracts dealing with land, labor, and sales. Particular stress is placed on the frequency with which cases in these categories came before the courts, but we are warned that the cases "do not give an accurate or complete picture of the economy."³¹ This is not, perhaps, surprising, especially in view of the "abstract" notion of contract on which the selection of cases is based. The same cases are then analyzed "according to legal concepts," that is, according to whether they deal with such matters as capacity, formalities, or illegality.³² Here Professor Friedman is mainly concerned with showing how social pressures affected the development of legal doctrines, and, although he does not for this purpose make a great deal of use of the foregoing factual analysis,³³ there is much interesting and penetrating legal analysis. Professor Friedman concludes from this sur-

²⁶ P. 111.
²⁷ Ibid.
²⁸ Ibid.
²⁹ P. 186.
³⁰ Pp. 27-81.
³¹ P. 42; cf. pp. 45, 48, 54.
³² P. 82.
³³ He does make some use of it, e.g., at pp. 111, 114.
vey that increasing legislative activity narrowed "the ambit within which the law of contract was allowed to operate."\textsuperscript{34} Contract law came to be used "not for purposes of policing an abstract system, but for solving disputes of unique particularity."\textsuperscript{35} The change in the nature of the cases coming before the court "affected deeply the court's mode of handling its cases."\textsuperscript{36} Being less troubled by the need to initiate general principle, the court came to be more concerned with "fault" and, where it could find none, favoured loss-splitting solutions. The court's importance as a creative force declined for various reasons. The most interesting of these is what Professor Friedman calls the court's "social distance" from the life of the community: judges became a class apart, less intimately connected than in the earlier periods with the "social and business life of the community."\textsuperscript{37} "It was now the court which dispensed sympathetic and particularized help; the legislature laid down general rules."\textsuperscript{38} The courts abandoned "abstraction as a working principle"\textsuperscript{39} with the result that "as a working body of law, the law of contract was weakened and warped by the court's attention to the particulars of its cases."\textsuperscript{40} These conclusions may well be correct, but Professor Friedman's manner of stating them gives rise to at least two questions.

In the first place, the conclusions do not seem to be very closely related to the factual analysis of the cases. For example, we read: "The kind of contract cases coming before the Supreme Court in Period III helps explain why the court could freely indulge its urge to reach the 'fair' result . . . ."\textsuperscript{41} The reference can hardly be to all the Period III cases; some more specific reference is surely desirable to make it clear exactly what Professor Friedman has in mind and also to justify the elaboration of the factual analysis. In a very few places Professor Friedman does precisely correlate the factual analysis and the conclusions;\textsuperscript{42} one wishes he had done so more often.

The second, and most deeply disturbing, matter is the attitude of acquiescence, and even fatalism demonstrated toward the cases. Professor Friedman is not in the least troubled by the idea that a court

\textsuperscript{34} P. 186.
\textsuperscript{35} P. 189.
\textsuperscript{36} P. 190.
\textsuperscript{37} Ibid.
\textsuperscript{38} P. 198.
\textsuperscript{39} P. 204.
\textsuperscript{40} P. 213.
\textsuperscript{41} Ibid.
\textsuperscript{42} P. 191.
should “freely indulge its urge to reach the ‘fair’ result”; that “technical and treacherous doctrines . . . were manipulated as artifacts of policy”; that “if the court smelled injustice, it was fairly easy to ‘find’ arbitrary or collusive behavior”; or that “the court used its conceptual tools to enhance the values it felt should be furthered through appellate litigation.” I hardly expect this transatlantic grumble to fall on very fertile ground, though some of the statements just quoted may be a little extreme, even by American standards. But Professor Friedman’s acceptance of the idea that the court should simply do justice is particularly disturbing when it is combined with the fact that he does not, even once, suggest that a decision was wrong, either in law or in the result, thereby abandoning the role of the critic. Many of those who teach and write about law attach great importance to this aspect of their work. Has Professor Friedman overlooked one of the major virtues of those whom he condemns?

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43 E.g., pp. 111, 114, 204.
44 P. 191.
45 P. 107.
46 P. 123.
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