Franco and Hitler: Spain, Germany, and World War II
By Stanley G. Payne

Reviewed by Henry S. Cohn

This book provides a thorough exposition of the relationship between Francisco Franco and Adolf Hitler, and more generally between Spain and Germany during World War II. The author first describes the origin of the alliance between the two nations and the course of that alliance until its zenith in 1942. He then traces the dissolution of the alliance from late 1942 to 1945, as Spain became a neutral power in the war. Finally, the book concludes with the period near the end of the war and immediately after it, when Spain faced the negative reactions of the world community.

Professor Stanley G. Payne begins the book with an interesting discussion of Hitler’s assistance to Franco during the Spanish Civil War. Hitler had three motives in assisting Franco in overthrowing the Spanish republic. First, Hitler wanted to establish a friendly government to the south of Germany in order to block Soviet influence in the region. In this endeavor, he had a willing partner in Franco, who despaired Stalin. Second, Hitler wanted to encourage armed conflict in Spain in order to draw the attention of England and France away from Germany’s rearming in preparation for its invasions of Austria and Czechoslovakia. But Germany’s aid to Franco was limited, because Hitler sought to lengthen, not shorten, the civil war in Spain. Finally, by assisting Franco, Hitler could demand Spanish goods and materials in repayment.

After Franco’s victory and the beginning of World War II, Hitler and his agents continued to dominate Spanish politics. The only time that Franco and Hitler met face to face was early in the war, on Oct. 23, 1940, in Hendaye, France, which is on the Spanish border. A highlight of Franco and Hitler is its description of the planning for this meeting, the course of the meeting (including the dinner menu), and its political and military aftermath.

Payne rejects the myth that Franco outwitted Hitler at Hendaye; Franco did not arrive late at the meeting by design but only because the Spanish trains were delayed. Payne does picture Franco, however, as a crafty negotiator. Hitler urged Franco to assist in the Nazis’ planned takeover of British-held Gibraltar; in exchange, Hitler promised to turn over to Franco parts of Morocco and other African territory that had been under French control before their loss to Germany in 1940. Franco, surprisingly in light of Hitler’s usual bombast, did most of the talking. Payne writes that, according to Hitler, Franco went “on and on about his personal military experiences and many petty facets of Moroccan history and of military affairs; Hitler later said that he would rather have three or four teeth pulled than sit through another conversation with Franco.” Hitler was not shy about making derogatory comments about Franco from that time forward.

Out of the meeting at Hendaye came a protocol signed by Germany and Spain and later by Italy. In the agreement, Spain promised to accede to the Tripartite Pact between Italy, Germany, and Japan by signing on at a date to be determined; agreed to intervene in the war on the side of the Axis in exchange for German economic aid; and agreed to wait to receive its African spoils from Germany. Contingent plans were also drawn up at Hendaye, separately from the protocol, for a joint invasion of Portugal by Spain and Germany. The fascist states feared that Portugal’s dictator, Salazar, had too many ties to Great Britain and that it would not serve their interests to have a true neutral party in the Mediterranean. Germany also expected Spain to cooperate in what was described as an imminent invasion of Gibraltar.

Franco assisted Hitler by providing seaports for German raids in the Mediterranean. Franco also authorized the establishment of the Blue Division, a Spanish-led force that assisted Germany after its invasion of the Soviet Union in 1941. But Franco backed away from his promise to enter the war. He wrote to the German foreign minister, Joachim von Ribbentrop, that the promised German aid was inadequate. Franco said that he needed much more grain and even ships to form a small navy. At the same time, Great Britain and the United States offered aid to Franco contingent on his “good behavior.” Throughout the war, Franco permitted the Allies to have ambassadors in Spain. The British ambassador, Samuel Hoare, represented England with skill, making a favorable impression on Franco. In fact, Franco never declared war on the Allies or otherwise entered the war. The Gibraltar campaign about which Hitler had spoken so forcefully at Hendaye faded from the scene as he began to concentrate on his invasion of the Soviet Union.

After 1942, German-Spanish joint ventures cooled. A new Spanish foreign minister, Francisco Gomez Jordana y Souza, came to power, replacing Franco’s brother-in-law, Ramon Serrano Suner, a hard-liner with clear Nazi sympathies. Jordana’s ascent happened just as the Allies undertook Operation Torch—the invasion of North Africa that led to the seizure of Tunisia.

Jordana took over the virulent pro-Nazi Spanish press. He pushed Franco toward true neutrality, and Franco’s written correspondence with the Allies became more friendly under Jordana’s influence. By 1944, Spain was describing itself in its diplomatic statements as neutral, in contradiction to the Hendaye agreement.

In his chapters on this changed policy, Payne breaks new ground by demonstrating that, after the war, Spain tried to improve its image, for example, by exaggerating its role in saving Jewish and non-Jewish refugees. He shows that Spain could have assisted the refugees more fully but held back because of German interference and Spanish politics. But Payne reports that Spain did save a significant number of Jews by permitting their entry into Spain and passage to Portugal. He also describes Spain’s off-and-on assistance to Spanish Jews (Sephardim) who lived in France and Greece. Spanish diplomats also assisted Hungarian Jews—the same people whom Raoul Wallenberg helped in
In 1944, the United States threatened to cut off aid to Spain if it did not stop cooperating with Germany. Although Spain made one final shipment of wolfram (tungsten ore) to Germany in mid-1944, Jordana indicated that Spain would no longer honor the Hendaye pact, and the United States withdrew its threat. Hitler’s final remarks about Franco were that he was just a member of a “clerical gang” (that is, he was dominated by the Catholic Church) and had not deserved Germany’s assistance in the Spanish Civil War, although Hitler did acknowledge that Spain, unlike Italy, had not been a major problem for him.

After the war, Spain was punished for its alliance with Hitler by ostracism from the world community, including being denied admission to the United Nations. Ironically, it was the West’s fear of Franco’s old nemesis, Joseph Stalin, that improved Spanish standing in the West during the Cold War.

_Franco and Hitler_ takes a careful and balanced approach to its subject. Payne portrays Franco as more perceptive than his posthumous image as an incompetent had it. The author gives Jordana credit for his skill in bringing Spain toward the Allied position and describes the Hitler-Franco rendezvous in Hendaye accurately, separating fact from fiction. TFL

Henry S. Cohn is a judge of the Connecticut Superior Court.

**Rumpole Misbehaves**

By John Mortimer


 Reviewed by Jon M. Sands

At a certain point, the charming raconteur becomes a churlish curmudgeon. The Rabelaisian barrister and vanquisher of injustices, who once regaled associates with tales at his firm’s watering hole, becomes a cranky windbag, drinking alone. Has this become the fate of Horace Rumpole?

There is cause for concern. Rumpole, the erstwhile battered British barrister and criminal defense lawyer, is in trouble with his chambers. This is not unusual, as most of John Mortimer’s books start with Rumpole jousting with his chamber’s authority figures, engaging in preliminary scrumages before the forthcoming legal battles over principles. And, in _Rumpole Misbehaves_, Rumpole is again breaking the rules. Yes, the reader thinks, it is time to puncture some management pomposity, rail against nitpicking rules, and expose administrative hypocrisy. This time, however, Rumpole’s high dudgeon is directed at a recent ban on smoking in chambers. The reader sympathizes with the beleaguered office manager, who is trying to clear the chamber of secondhand smoke, and finds it hard to root for Rumpole’s right to smoke his beloved cheroots in chambers; one doubts whether such freedoms were enshrined in the Magna Carta. Can one be against Rumpole and, worse, for chambers management? Maybe time has caught up with Rumpole.

Fear not, gentle reader, for, though Rumpole’s fight with chambers may be misguided, his willingness to take on a greater injustice—a violation of the rights of juveniles charged with delinquency—has him back on the side of, well, maybe not angels, but at least not-yet-proved-to-be devils. Rumpole sallies forth against the Home Office’s latest anti-crime initiative, the Anti-social Behaviour Order (ASBO), which provides that once a youth is labeled with an ASBO—he it for a delinquent act capable of being an adult offense, or, as here, for a youthful prank—the next infraction lands the recidivist in detention (that is, prison) and without a trial. An ASBO is a procedural express ticket on a fast track to detention, with no chance to confront one’s accusers and test the evidence before a trier of fact.1

This policy may sound benign: think of “broken windows” law enforcement—the theory that the government should prosecute even the lowest level offenses because, if the first broken window in a building is not repaired, then people who like breaking windows will assume that no one cares about the building and will break more windows, until the building has no

REVIEWS continued on page 68
windows. But this theory is insidious. The Home Office came up with ASBOs as a way to be tough—and to appear tough—on crime. Its use of ASBOs sweeps broadly, catching all manner of mischief, greater and lesser, indiscriminately. Well, maybe not indiscriminately, as ASBO’s greatest effect is on the poor and minorities. The labeling of so many juveniles with ASBOs, even for minor offenses, makes it a catch-and-release program, with the subsequent netting of offenders that much easier. As in the current “just desserts” theory of punishment for adults, retribution replaces rehabilitation. Spare the ASBO, spoil the child. But is the child guilty? To Rumpole, labeling youths with ASBOs constitutes unlawful detention without trial, which the Magna Carta most assuredly forbade.

Rumpole is rankled by this travesty of his beloved rights, but he needs a flesh-and-blood client to get his hackles up (and the story going). This is provided, in the best of Mortimer’s deus ex machina, with a teenager from the Timson clan, a family whose criminal inclinations of all sorts make Rumpole pretty much their lawyer on retainer, and provides Mortimer with ample material—client conflicts be damned. In Mortimer’s recent Rumpole novels, for example, Timson defendants’ cases conveniently let Rumpole take on the causes of immigration, prejudice, and terrorism. It is similar in this tale, in which Rumpole takes up young Peter Timson’s brief. It seems that Peter had a scrape with the law involving a minor property crime, and the Timsons foolishly chose not to engage counsel because, after all, Peter was still a youth. Ah, but he has been labeled with an ASBO. So, when Peter, having sneaked into a private park in a tony section of London to play soccer, errantly kicks a soccer ball and shatters a window of a dowager’s townhouse, he is bound for detention unless Rumpole, by asserting the due process rights established at Runnymede, can stay the heavy-handed approach.

Even though the novel is short, coincidences come fast and furious. It turns out that the house with the shattered window has a connection to the scene of a murder, with the deceased victim having been a prostitute. The defendant in the murder case, Graham Wetherby, caught at the scene by the house manager (read: “madam”), is the head of the Lawyers as Christians Society, which is as moral and priggish as one might imagine. The head of Rumpole’s chambers, having the right moral character, is asked to take the brief (be the lead barrister) in the case, although he knows nothing of criminal defense and is appalled by the messiness of the affair. It naturally falls to Rumpole to try the case.

Attacking the ASBO and defending the murder charge afford Rumpole all sorts of shibboleths to challenge, particularly those of upper-class mandarins, who back a “get tough” juvenile policy for the good of the lower classes. Rumpole’s dogged approach of asking what—or really who—is behind the doors of the Edwardian townhouses reveals the usual hypocrisy: in this case, owners of high-end brothels, with high-class clients (imagine a British Eliot Spitzer), exploiting East European women. I give nothing away to note that Rumpole’s peering into the peerages solves the murder.

One even learns a bit about forensic science in this London version of “CSI” by Rumpole’s looking the dead, literally, in the eyes and using the fact of petechial hemorrhages—evidenced by ruptured capillaries in the eyes—to nab the culprit. The dénouement, as in all Rumpole’s dramas, is rarely in doubt; it is how we get there, and how much cleverness is involved, that makes the story interesting. As for the juvenile, it ends well for him too. The ASBOs remain as policy, but Rumpole’s teenage client gets off. Rumpole, after all, can save his client, but he cannot save the world.

Rumpole does right by the law, but at a cost to him. Smoking the cheroots stays banned (not that it stops him). No, the disappointment comes when, at long last, he is put up for “silk”—that is, to be a Queen’s Counsel, or QC, and to ascend the legal hierarchy to the first rank. Rumpole has always disparaged the silk, but that was a form of defensiveness. He had even made peace with himself that it would never be. But there is a chance now, when his wife, Hilda (“She Who Must Be Obeyed”), who—and this stretches the imagination—decides to use her bridge-playing friendship with Rumpole’s judicial nemesis, the Honorable Leonard Bullingham, to influence him on Rumpole’s behalf. Hilda, who played a backstage role in most of the early Rumpole books, providing snatches of domestic life after the courtroom drama, has emerged in Mortimer’s past several efforts. This is unfortunate, because Mortimer does not have an ear for Hilda, and because her role here is unnecessary; it is not implausible that Rumpole, given his experience and tenure, would be put up for the silk on his own merits. Whether he got it would depend not on his merit, but on his political skills, personal wooling, backslapping, and belonging to the right clubs. In other words, Rumpole must do things that he has never desired to do before.

But Rumpole tries to make these gestures, although his insolence sabotages his application. Perhaps he does not want to risk becoming something other than the outsider he is, although maybe Mortimer just wanted to give him an opportunity to say what he thinks of the hierarchy. In any event, we get Rumpole at his best when he is being interrogated by the judicial committee that is considering his application. Asked to describe his “dirty-shirt” criminal practice to those who defend “white-collar” corporate civil clients (lawyers and clients both probably share the same custom tailors), Rumpole extols the sheer vitality of defending the indigent: “Because if you go down to the Old Bailey, you’ll find that all life is there, the real world with all its sins, mistakes and occasional beauty and good behaviour. Go and watch the huge international companies suing each other in the Queen’s Bench Division and you move into a world of fantasy and make-believe.” To the charge that Rumpole has been discourteous to judges, he replies that this is the case “only when they act as leading counsel for the prosecution. Only when they indulge in such tricks as responding to the defence evidence with a sigh of disbelief. Only when they jump down from the bench to fight in the arena for a conviction. Then I feel they...
deserve a touch of discourtesy. Otherwise some of my very best friends are judges.” Of course, he is hard-pressed to name any.

Finally, we get what surely must be Rumpole’s creed when it comes to defending a client:

“So you defend people you know to be guilty?”

“I don’t know. It’s not my business to decide that. That’s for the judge and jury. But if Mr. Timson, or anyone else, tells me a story that’s consistent with his innocence, it’s my duty to defend him.”

“Even if you don’t believe it?”

“I suspend my disbelief. My disbelief has been left hanging up in the robing room for years. My job is to put my client’s case as well as it could be put. The prosecutor does the same and then the jury chooses to believe one of us. It’s called our judicial system. It seems to work more fairly than any other form of criminal trial, if you want my opinion.”

“So it means that you appeared for some pretty terrible people?”

“The more terrible they are, the more they need defending.”

“So morality doesn’t enter into it?”

“Yes, it does. The morality of making our great system of justice work. Of protecting the presumption of innocence.”

It should be clear that Rumpole is not destined for the QC silk and that the Home Office, which had a black eye over the ASBO affair, will make sure of it.

Can we ascribe Rumpole’s beliefs to Mortimer? It is always dangerous to conflate an author with a character, but can we resist doing so here? A recent review of a biography of Mortimer notes that Mortimer himself was a QC and a powerful advocate for free speech. “Mortimer believed that we all play roles and that performance counts in the courtroom as much as it does in the theatre. As he grew older … John Mortimer QC looked increasingly like his creation Rumpole, appearing in court with his shirt hanging out, food stains on his waistcoat, trousers held up by an old tie.”

I don’t know about Mortimer, but we should cut Rumpole some slack. He is getting old and cranky, and his stories are becoming more improbable, if not fantastic. But their telling is theatrical, and the teller, as vespers closes in the bar across from the bar, still holds the remaining listeners spellbound. TFL

Jon M. Sands is the federal public defender for the District of Arizona.

Endnotes

1In Great Britain, this book was titled, The Anti-Social Behaviour of Horace Rumpole.

2“The question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the government has carried its burden to prove its allegations while respecting the defendant’s individual rights.” Mitchell v. United States, 526 U.S. 314, 330 (1999).


Liberty’s Blueprint: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World

By Michael I. Meyerson

Reviewed by Charles S. Daskow

We are accustomed to thinking of the Founders in pairs: Jefferson and Adams (collaborators on the Declaration of Independence and later rivals for presidency), Jefferson and Madison (formulators of democratic theory and partners in Republican politics), Hamilton and Burr (bitter political enemies, who fought a fateful and fatal duel), and Jefferson and Hamilton (whose rivalry in President Washington’s cabinet led to the formation of the political party system that dominates our politics today). But pairing James Madison and Andrew Hamilton, who are both named in the subtitle of this book? The collaboration and ultimate estrangement of these two great men is one theme of Michael I. Meyerson’s Liberty’s Blueprint. The other theme is that the Federalist Papers are one of the seminal documents of American history and a major influence on our democracy; hence the book’s subtitle: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World.

It has been fashionable in some historical circles to denigrate the Federalist Papers, which were, in fact, simply political tracts written to promote the ratification of the Constitution by New York state. Meyerson, a professor at the University of Baltimore School of Law, shows us that the Federalist Papers constitute a treatise on a republican form of government and that, by explaining the intent of the Constitution, they laid the foundation for the structure of our government today.

In telling the story of the Federalist Papers, Meyerson illuminates the relationship between Hamilton, the illegitimate child from the Caribbean island of Nevis, whom John Adams once called “the bastard brat of a Scottish pedlar” and Madison, a member of Virginia’s slavocracy. The contrasts between the two men are dramatic. Hamilton was, according to his biographers, oversexed and something of a libertine; whereas Madison was a shy bachelor until his 40s and, by all evidence, highly uxorious thereafter. What the two men had in common was their height (both were short) and their commitment to the union of the states. Their friendship did not survive the first Washington administration, when Madison’s alliance with Jefferson, who was Hamilton’s rival in Washington’s cabinet, put an unbearable strain on their relationship.

The collaboration of Hamilton and Madison antedated the Federalist Papers. They were the two men most

REVIEWS continued on page 70
responsible for calling the 1787 Constitutional Convention. When only five of the 13 states sent representatives to a 1786 conference in Annapolis, which had been called to discuss trade issues, Hamilton called for the 13 states to meet in Philadelphia on May 15, 1787, and revise the Articles of Confederation. In doing so, however, he used incendiary language that nearly destroyed any chance for a consensus. Madison was more tempered in his approach and urged Hamilton to take a more conciliatory position. Hamilton took Madison's advice, and the call to the Philadelphia Convention went out.

Hamilton's role at the Constitutional Convention was limited. He made one speech, in which he put forth ideas that none of the delegates accepted. He was one of three representatives of New York state but was outvoted by his two fellow delegates, and, because the voting was by states, he was not able to have his vote recorded on the few days that he was present. Madison, by contrast, is known today as the father of the Constitution. His informal daily notes (no minutes were taken at the convention) are our basic source of the chronology of the convention. He was deeply involved in all the convention's major decisions.

When the convention ended, ratification was by no means assured, in part because in New York there was substantial opposition to the expansion of federal power that the Constitution represented. Between October 1787 and May 1788, Hamilton, Madison, and John Jay wrote a total of 85 essays arguing in favor of ratification—all under the name Publius. These essays, published in book form even before all were written, are what make up the Federalist Papers.

Why did the authors use a pseudonym? It was common at the time to conduct debates on political matters in the press. Shielding the author's name focused on the content of the debate rather than on the writer. Moreover, Madison and Hamilton wished to conceal their identities because their constituencies disagreed with some of the views they expressed in the Federalist Papers. Though the authors' identities generally became known in the years immediately after their publication, it was not immediately disclosed who wrote each essay. In 1804, two days before his fatal duel with Aaron Burr, Hamilton prepared a document identifying each author. He claimed to have written 63 of the essays and credited Madison with 14, and Jay with five; and he stated that three were jointly written by Hamilton and Madison. However, in 1818 Madison made a list of authors in which he credited himself with writing 29 essays, Hamilton 51, and Jay five. (Madison's list credits himself with three essays—Numbers 18–20—that both Hamilton's list and my Modern Library edition credit to Hamilton and Madison jointly.) Twentieth-century research, including analysis of word usage patterns, confirmed Madison's count.

Meyerson writes that, “in describing how the Constitution would work, Publius made logical sense of the document as a whole,” expressing not only the national will but “a rational will.” Madison's first essay was Number 10, which Meyerson regards as the linchpin of the Federalist Papers. In the essay, Madison addressed the contention of Brutus, an anti-ratification essayist, that the United States was too large to be ruled by anything “short of despotism.” Madison argued, in an “elegant, logical structure,” that a “well constructed union” was the best hope for controlling the ill effects of factions, and that a larger republic would have more competing interests, which would prevent a majority faction from oppressing the minority. Meyerson writes, “The insights contained in Madison's essay were so novel and so profound that most people, including those at the Constitutional Convention, those in states ratifying conventions, and the general readership in the nineteenth century, simply 'failed to comprehend the argument.'”

Many, including George Washington, praised the Federalist Papers during the period of the ratification debates. Whether the essays had a direct effect on the delegates to New York state's ratification convention is the subject of disagreement. Despite the essays having been widely circulated to the New York state delegates, Meyerson notes that a majority of these delegates came to the convention opposing ratification. Hamilton's political machinations at the convention are usually considered as having been decisive in obtaining the desperately needed favorable result.

Meyerson disagrees with historians who downgrade the influence of the essays. Although not widely printed in newspapers outside New York state, the essays were mailed to leaders in other states and to the pro-ratification groups.

Meyerson tells us that the Federalist Papers have been cited in more than 300 Supreme Court decisions. John Marshall found them entitled to “great respect,” but added that, “in applying their opinions to the cases which may arise in the progress of our government, a right to judge their correctness must be retained.” Meyerson does not tell us, however, what influence the Federalist Papers had on the outcome of any of those 300 cases. But this is a minor cavil about an extraordinarily well written and engrossing book. Any book that brings to life the final decades of the 18th century, when our republic was formed, merits the attention of all who are interested in the birth of our democracy. TFL

Charles S. Doskow is dean emeritus and professor of law at the University of La Verne College of Law in Ontario, Calif. and past president of the FBA Inland Empire Chapter.

Framing Contract Law: An Economic Perspective

By Victor Goldberg

Reviewed by Carol A. Sigmond

Victor Goldberg’s Framing Contract Law is one of the most intellectually challenging books I have ever read. Reading the book would benefit law school professors who teach contract law or Article 2 of the Uniform Commercial Code, litigators who deal with contract issues arising under Article 2, and acquisition professionals working in the private sector.

Framing Contract Law is a collection of 21 previously published es-
says, some materially revised for this book. The premise of the book is that certain shortcuts used in forming contracts bring about economically irrational results when a transaction fails. These shortcuts include relying on the doctrine of good faith and fair dealing, on Uniform Commercial Code implied terms that are applicable to resolving the interminable “battle of the forms,” and on the use of the phrase “best efforts” to mandate contract performance. Goldberg maintains that, rather than relying on these shortcuts, attorneys should take the time to consider all the implications of commercial deals and should draft clauses designed to anticipate and provide for all eventualities.

Goldberg, however, acknowledges a practical flaw in this advice: “Maintaining lawyers on the loading docks is not cheap.” The shortcuts that he criticizes substitute for the overly expensive lawyers on the loading docks, allowing business people to engage in person-to-person negotiations efficiently. Notwithstanding this fact, however, Framing Contract Law makes for worthwhile reading.

Each chapter of Framing Contract Law examines a well-known contract case and critiques its outcome based on purely economic principles, without regard to the drafting shortcuts of which Goldberg is so critical. Typically, Goldberg begins each chapter with a detailed history of the case, drawn not only from the court opinions but from any surviving record on appeal and from contemporary news accounts. To illustrate, I will discuss two of the book’s chapters: the one devoted to the doctrine of “good faith and fair dealing” and the one devoted to the concept of “best efforts.”

For his critique of the doctrine of good faith and fair dealing, Goldberg uses Judge Benjamin N. Cardozo’s oft-cited opinion in Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917), as his point of departure. Wood is a particularly favorite of mine, so I found Goldberg’s detailed historical account of the case fascinating. Lady Duff-Gordon was a famous fashion designer in the early part of the last century, best known for high-end fashions. She entered into a promotion agreement with Otis Wood, who was the son of Fernando Wood, the first mayor of New York City elected by the Tammany Hall machine. Fernando Wood served three terms as mayor and was a member of Congress during the Civil War, which he, being a supporter of slavery, opposed; along with his brother Benjamin, he impeded the war by helping to lead the New York draft riots. Fernando Wood was also the ousted administrator of the estate of his aunt, Ida Wood, Benjamin’s wealthy widow.

The story becomes especially interesting when you learn that Fernando Wood and Boss Tweed assisted Cardozo’s father, Albert, gain an appointment to the New York Supreme Court (the trial court in that state). Moreover, Albert Cardozo ruled in favor of Fernando Wood in New York v. Wood, 3 Abbott Practice Reports 467 (Sup. Ct. 1868)—in which Wood had been accused of procuring a lucrative lease arrangement from the city by fraud or bribery. (This was not one of the cases that led to Albert Cardozo’s resignation from the bench after being confronted with impeachment.)

In Wood v. Lucy, Lady Duff-Gordon, the parties had an agreement that gave Otis Wood half the revenue of certain sales of Lady Duff-Gordon’s designs in mass production. Exactly what Otis Wood was supposed to do for Lady Duff-Gordon is not evident from the record, but Goldberg finds that he did no work for her. It is clear, however, that Lady Duff-Gordon fulfilled her end of the bargain by promoting her goods and taking in the revenue from their sales. She sued Wood for breach of contract, and he asserted that the contract between them was void for lack of consideration. Benjamin Cardozo, writing for a 4-3 majority, found a binding promise and an implied duty of good faith and fair dealing. The case ended at that point by settlement.

Goldberg argues that Cardozo got it wrong: Otis Wood was right; he had made no promises and there was therefore no consideration for the agreement. Personally, I think that Goldberg goes too far when he maintains that the doctrine of “good faith and fair dealing” born in Wood v. Lucy, Lady Duff-Gordon has no place in contract law. In a nation founded by debtors, where most people earn their livings in small businesses, engaging in unfair competition and taking unfair advantage in business are considered unacceptable. Fair play is such a basic value in American culture that the implied duty of “good faith and fair dealing” seems natural in our society.

To demonstrate the misplaced use of the concept of “best efforts,” Goldberg discusses the apparently inequitable result in Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978), aff’d, 601 F.2d 609 (2d Cir. 1979). The facts in Bloor were that Ballantine Beer, suffering from falling sales, had sold its label and distribution network to Falstaff Brewing, which agreed to use its “best efforts” to sell the product. In Falstaff’s hands, however, sales of the brand fell precipitously. Traditionally, Falstaff has been seen as having breached the contract by failing to have used its “best efforts” to sell Ballantine beer, but Goldberg believes that Falstaff had maximized the value of the sales network to promote sales of Falstaff beer. Goldberg also views the use of the words “best efforts” in the contract as lazy drafting. “Best efforts,” however, is a technique business people find useful, particularly on a small scale, where resources to employ lawyers are limited. As Goldberg notes, “lawyers on the loading docks” are expensive, and are too expensive for small businesses in particular.

An intricate book to read and digest but one that is well worth the effort, Framing Contract Law will have a place on my bookshelf. From now on, as I draft agreements or litigate contract matters that deal with issues such as impossibility, options to terminate, or one of the other dozen concepts that Goldberg discusses in detail, I will carefully consider Goldberg’s analysis. TFL

Carol A. Sigmond is a partner at Dunnington, Bartholow & Miller in New York City and is a member of the New York County Lawyers’ Board of Directors and of the New York State Bar House of Delegates.