



Trying for the EdMal Trifecta: THEORIZING CONTRACT-BASED EDUCATIONAL MALPRACTICE WITHIN HIGHER EDUCATION

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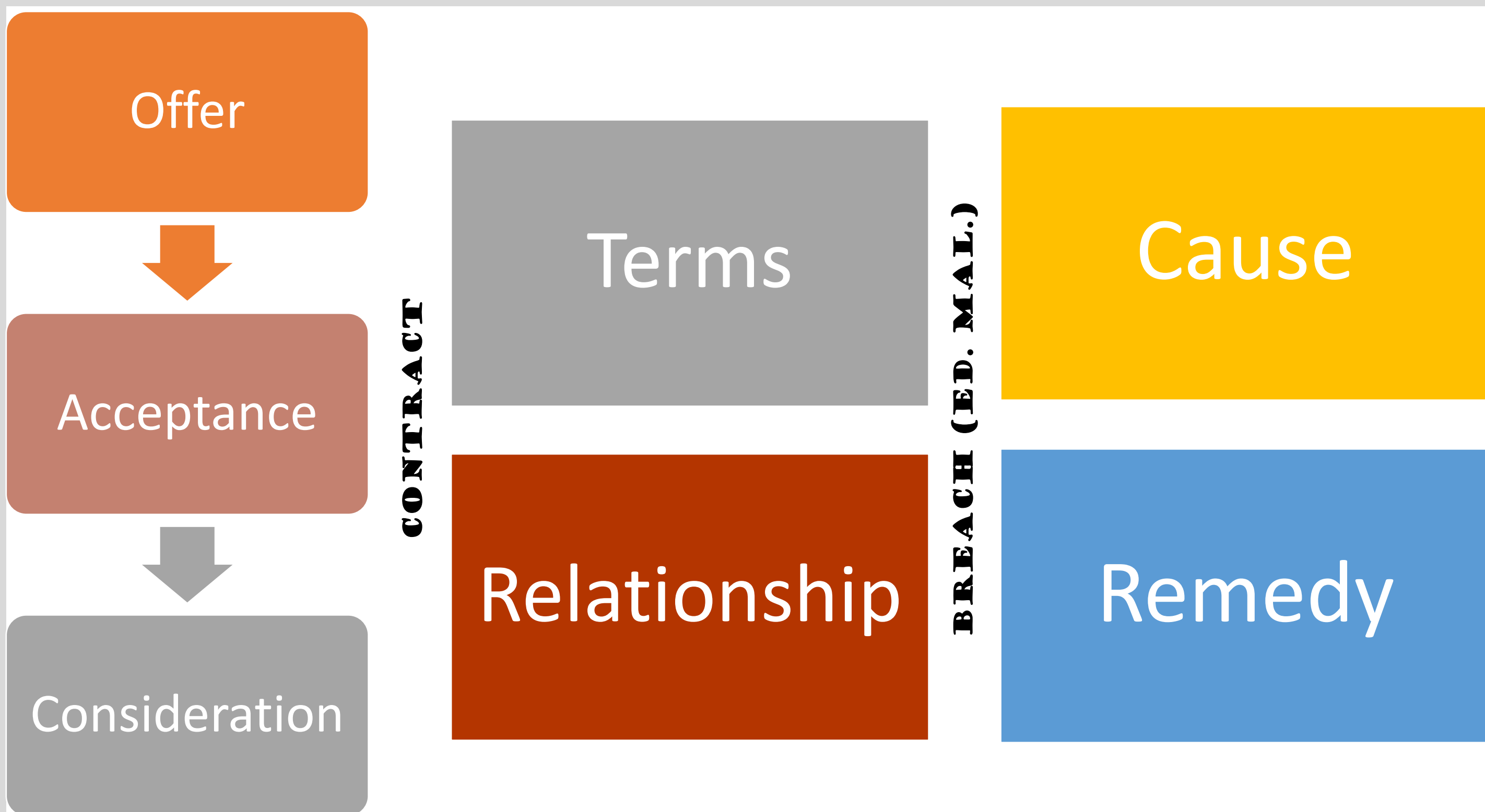
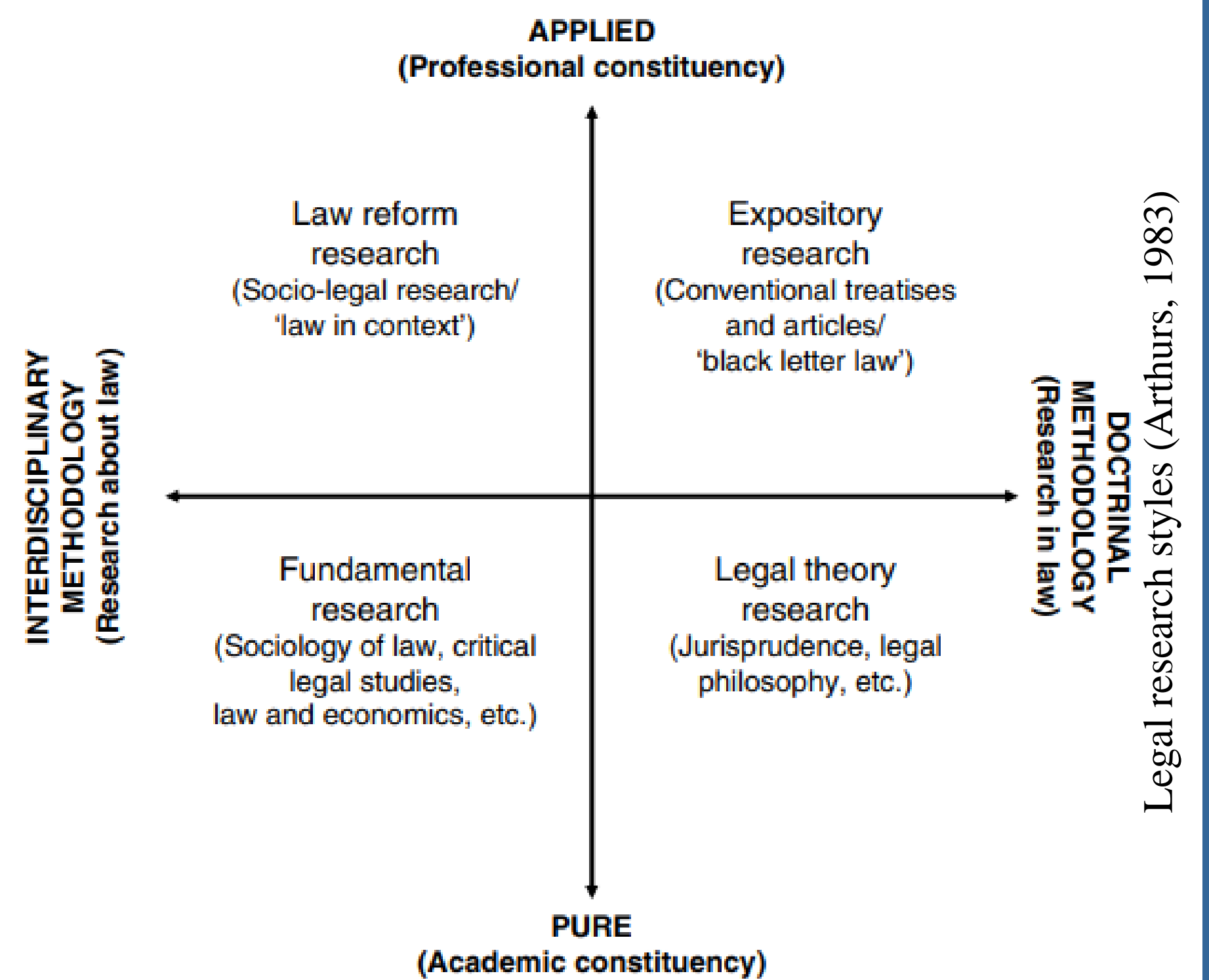
Purpose & Research Questions

Although courts have relatively unanimously chosen to dismiss considerations of educational malpractice as advanced under tort law, this project will theorize consider the feasibility of this concept when built upon a traditional interpretation of contracts as applied to higher education.

- How if at all could higher education be at risk for education malpractice under a contract theory?
- What specific conditions, if any at all, create improved standing for contract-based educational malpractice success in higher education?
 - Do the institutional actions and student reactions in the wake of campus interruptions due to the COVID-19 pandemic present evidence of contractual liability sufficient enough to sustain claims of educational malpractice?
 - Does the increased recruitment and reciprocal expectations built into the institution-student athlete relationship create higher susceptibility for institutional educational malpractice liability?
 - Do the prolific advertising and increased recruitment practices prevalent in the for-profit college industry create higher susceptibility for institutional educational malpractice liability?

Methodology

- “[r]ooted in the historical nature of the law and its reliance on precedent” as the researcher must “look to the past to locate authority that will govern the disposition of the question under investigation” (Russo, 2006, p. 7).
- However, if finding only cases “contrary to [the researcher’s] position, then [the researcher] will seek to distinguish [her or his] case by attempting to show that it is sufficiently different and inapplicable to the facts at hand” (Russo, 2006, p. 7).
- Doctrinal analysis “involves the development of scholastic arguments for subsequent criticism and reworking by other scholars, rather than any attempt to deliver results which purport to be definitive and final” (Chynoweth, 2008, p. 31).
- Legal research equates to “an exercise in logic and common sense rather than in the formal application of a methodology as understood by researchers in the scientific disciplines (Chynoweth, 2008, p. 31).



Conceptual Framework

Envisioning the three-stage process that defines the higher education institution-student relationship supported by contract law and recognized by courts (*Anthony v. Syracuse University*, 1928).

- *Contract Formation* – The establishment of a legal contract by way of offer, agreement, and exchange of consideration.
- *Relationship expectations* – Understanding the explicit and implicit terms of the contract between parties
- *Beyond the breach* – Identifying potential opportunities for unfulfilled promises and methods of restitution

Discussion

Courts’ understanding of duty necessary for tort-based educational malpractice in various K-12 situations has not been successfully applied to colleges or universities...but the long-recognized, contract-based, higher education institution-student relationship provides an alternative construction under law.

Specially Situated: Student Athletes

- **Rationale:** Athletic recruitment often includes additional academic, opportunity, and resource promises by the institution to prospective students.
- **Precedent:** *Ross v. Creighton University* recognizes contractual relationship and relative expectations established between student-athlete and institution during recruitment period.

Specially Situated: Student attending For-Profit Institution

- **Rationale:** Increased marketing & recruitment efforts by for-profit institutions motivate greater outcome expectations for students.
- **Precedent:** Governmental scrutiny, legislative efforts (e.g. Students Before Profits Act) and building caselaw precedent has demonstrated ongoing liability for fraudulently misleading students.

Special Situation: COVID-19 Pandemic

- **Rationale:** Campus shutdowns deprived students of essential elements of their contracted and expected educational experience.
- **Precedent:** Institutional settlements (Columbia University) reinforce state legislation (Kansas) and several lawsuits that have been allowed to continue in state (*Ford et al v. RPI*) and DC Circuit court.

References

- *Anthony v. Syracuse University*, 224 App Div. 487, 231 N.Y. Supp. 435 (1928)
- Chynoweth, P. (2008). Legal Research. In Knight, A., & Ruddock, L. (Eds.), *Advanced research methods in the built environment* (pp. 28-38). Wiley-Blackwell.
- *Ross v. Creighton University*, 957 F.2d 410 (Ill.App.Ct. 1992)
- Russo, C. J. (2006). Legal research: The “traditional” method. In S. Permuth & R.D. Mawdsley (Eds.), *Research methods for studying legal issues in education* (pp. 5-24). Dayton, OH: Education Law Association.