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CONTRACT STORIES: IMPORTANCE OF THE CONTEXTUAL APPROACH TO LAW

Larry A. DiMatteo*

[A] right text . . . should be a standing introduction. It should be simple. It should seem to lie open to a student who has never met the law, and give him a footing. He need not fully understand it all, or any of it; but out of each page, each sentence, he should get enough to carry him along, and what he gets should be accurate enough to help him in his work.

—Karl N. Llewellyn¹

[M]uch more important things have commonly been left out of the case-book by the [author] than are left in it for the instructor to leave out.

—Karl N. Llewellyn²

INTRODUCTION

How law is taught is at the center of the debate over the need to change legal education to better prepare students for a difficult and changing marketplace for legal services. This Article analyzes the benefits of using “stories” to teach law. The stories to be discussed relate to contract law: this Article asks whether they can be used to improve the method and content of teaching law. The ruminations offered on teaching contract law, however, are also relevant to teaching other core, first-year law courses.

The use of contract stories to bring contracts alive, and to better tie theory to practice, is based upon the power of narrativity and contextualism to deepen the understanding beyond doctrinal analysis. The narrative approach to teaching law is at its best when it is highly

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1. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 7 (Oceana Publ'ns 1960) (1930) (emphasis in original).

2. *Id.* at 95.

contextualized—including contextual facts of a case (recognized facts); context of the law of precedent as a story of legal development; law creation within context of a particular cultural, economic, and social era; and those elements of case context that are left unrecognized, but likely influence party behavior and conduct (e.g., bias, discrimination). This Article will discuss these different contextual factors in relationship to the narrative approach to teaching law. This broad view of contextualism will show how narrativity not only descriptively conveys the law, but also will show the normative role of law in society and how law can be reformed to enhance that normative role.

Contract law is the quintessential first-year law school course, often taught by the Socratic method of teaching. It introduces students to the doctrinal nature of law—as a series of fixed rules, principles, and standards. The rules-based nature of contracts allows the Socratic stiletto to parse from rule to exception and to exception to exceptions. However, the true Socratic teaching of law no longer holds a dominative perch in law schools, as it did some twenty or thirty years ago. It was a cherished experience when used by my contract law professor, Robert S. Summers, of Cornell Law School. But, alas, even by the second semester of the first year its ability to rivet student attention began to wane. In the end, most of my professors morphed into a lecture-discussion format. The educational benefits of a hard Socratic method of teaching are debatable and whether it is the most efficient method of teaching deductive and analogical reasoning is suspect.³ In the end, it may be efficient in the hands of a truly gifted Socratic teacher as opposed to the lazy, but brilliant, mind able to raise queries with no pre-mediated path in sight. But, even in the hands of a Socratic master, it can be argued that it is a time consuming approach in which the richness of a case cannot be completely exploited. The complexity of modern contract transactions may require a different approach.

The different approach will still be a case-based approach, but one in which the case is the basis of a story—a story connecting iconic case law with modern cases that emphasize the continuity of law, as well as its inherent flexibility. This flexibility allows the law to respond to novel contract disputes. However, often what may seem novel may not be that novel after all. Thus, the tying of cases from different eras of the law into a narrative leads to a greater understanding of the dynamic nature of law.

3. See J. T. Dillon, *Paper Chase and the Socratic Method of Teaching*, 30 J. LEGAL EDUC. 529 (1980).

This Article examines Lawrence Cunningham's use of "contract stories" in his innovative book, *Contracts in the Real World: Stories of Popular Contracts and Why They Matter (Contracts in the Real World)*,⁴ to flesh out the importance of narrative and context for understanding law and its application to real world disputes. Part II provides some initial observations of the Socratic and narrative approaches to teaching law and reviews the structure of the law school casebook and the need to develop a modern legal textbook that uses cases to weave a narrative of the development of legal rules. Part III examines the narrative approach to understanding contract law. Part IV looks at the internal-external; conceptual-contextual; and descriptive-prescriptive dimensions of law and its study. Law is often viewed as an internal, conceptual structure that provides the rules, principles, and standards that form the rule of law. But how law is applied—more specifically, how it can best be applied—is an external, contextual, and prescriptive undertaking. This Article argues that the narrative approach is at its best when it immerses the cases in their real-world context. This Article offers some general remarks on the practical implications of a more contextual-narrative approach to learning law and attuning legal education to real-world practice. Finally, Part V briefly notes that American law schools need to present law in a global context.

One note in passing: it is clear to many, especially law firms seeking to hire new attorneys, that legal education is in need of transformative change. True transformative change would be the creation of a totally new model of legal education. The German legal education system is an example of a completely different approach. In the German legal education system, as is the case in most European countries, law is offered as an undergraduate degree. However, the trend is that many students stay on for a Masters of Law and some for a Ph.D. in the law before proceeding on to practice. The Masters and Ph.D. in the law are not purely academic in nature, but make students more marketable. Following graduation, students must pass a national exam. If successful, they are then placed by the government with a law firm or government legal office for two years of practice training. Following the two years of practice training, students must pass a second bar exam. The idea of making students more "marketable" has taken on added significance after the 2008 financial crisis and the downturn in the legal job market.⁵

4. LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* (2012).

5. See Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 *FORDHAM L. REV.* 2051 (2010).

The German legal education system, or the somewhat similar English system, offers numerous insights into reforming the American legal education system. They produce students with skill-sets and practice experience that make them immediately productive to would-be employers. However, the American law school model is premised on generating three years of tuition revenues. The high costs of legal education and the poor state of the legal job market has resulted in a dramatic decline in law school applications. Ultimately, for law schools to continue admitting the same class sizes they will need to lower admission standards, but they will do that at the cost of being less competitive in attracting quality students. The lowering of standards will make their students less competitive in the legal marketplace, and so it will go. The more likely scenario is that schools will maintain their standards, which will force them to reduce class sizes. It should also lead to a free-market competition to innovate curriculum so that law schools can distinguish themselves as better preparing their students for legal practice. This will be difficult given traditional mind-sets, but it is the challenge that will be necessary to confront.

The exploration of models of legal education brings us back to the questions posed by Karl Llewellyn, some eighty years ago, in his infamous diatribe on American legal education, *The Bramble Bush*:

What a lawyer does in court, and what he does outside, what relationship either court or lawyer has to the law, what relation the law school has to any of these things—around these things, I take it, there floats a pleasant haze.⁶

[W]hat is the orientation of the law school with regard to the profession? . . . Why does it offer some things and not others? What do you need for your practice which it does not offer?⁷

[H]ow does the study of the law here bear upon the work that you will do and the life that you will live when you leave this school and go into the practice?⁸

These are the challenges law school administrators must confront. These challenges come at a time of structural change in the legal job market; they place law schools in a bind between the need to generate revenues and the need for dramatic changes that would likely diminish those revenues. Maybe radically changing legal education to include a practice component will come from the public universities that are not quite as

6. LLEWELLYN, *supra* note 1, at 11.

7. *Id.* at 92.

8. *Id.* at 11.

dependent on tuition-only revenues. Of course, public universities' ability to make such changes would likely be hampered by institutional constraints, internal and external to their law schools and their universities.

The need for "radical" change in legal education is an old storyline going back many decades through the production of numerous studies. As recently as 2007, the "Carnegie Foundation for the Advancement of Teaching . . . concluded that our nation's law schools are failing to prepare graduates adequately for the practice of law."⁹ The *Carnegie Report* supported the *MacCrate Report*¹⁰ sponsored by the American Bar Association some two decades earlier. The *MacCrate Report* emphasized the need for enhanced skills training; the *Carnegie Report* also emphasized the need for a more integrated curriculum. More recently, proposed law school accreditation standards state that each law school "shall identify and publish learning outcomes designed to achieve for its students, upon graduation, competency to represent clients and to participate effectively, ethically, and responsibly [in] the legal profession."¹¹

Law practice and legal education have been under attack for some time, but in the years since the financial crisis of 2008 there has been a shift from intellectual self-critique to professional survival. So change will come slowly,¹² but it certainly will come. For now, the change will be incremental in nature. One of those changes is the topic of the current symposium—changing the materials used to better teach students about law's maddening blend of continuity and indeterminacy.

I. INITIAL OBSERVATIONS

Looking back at some of my classes so many years ago, the hard

9. R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1515–16 (2013) (citing WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12 (2007)).

10. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 259–60 (1992); see also BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

11. STANDARDS REVIEW COMM., AM. BAR ASS'N, APRIL '13 SRC MEETING MATERIALS 73, 82–83 (2013).

12. See Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 366 & n.26 (2006) (noting that the last major innovation in legal education was the introduction of the case method towards the end of the nineteenth century).

Socratic method of teaching was still ingrained in the first year of law school. But, in a number of instances, the pedagogy could not honestly be characterized as either “hard” or Socratic. To the truly gifted teacher, the Socratic method possesses the ability to train students to think critically and analytically. But, for some less gifted professors, the Socratic method devolved into using student questioning in a haphazard way, and not as a guiding force as it was initially intended. Some professors seemed to use it as a way of terrorizing or ridiculing students. But does it adequately serve pedagogical objectives? I will simply repeat what is stated above—yes, if used by a well-prepared, passionate teacher trained in the Socratic method.

The second question relating to the Socratic method is whether it is an efficient methodology for teaching students how to think like a lawyer. Part of the question is answered by the above paragraph. The other part is that done properly it is a slow device for covering material. Its value is in the development of an analytical skill-set. The cost is much less substantive coverage than a lecture-discussion-exercise format is able to accomplish. In the end, the Socratic method as initially envisioned has been dying in American law schools for decades.¹³

The next tenet of traditional law school teaching is the case method—the use of mostly appellate court decisions to illustrate the nuanced nature of law. It makes clear that black letter law does not get one very far when both parties cite case precedents to support diametrically opposed arguments and outcomes. The student is introduced to the importance of operative facts in finding precedents, whether mandatory or persuasive, and how to distinguish a case from seemingly dense case law. This is good stuff, but the question again becomes: at what costs to other curricular goals? R. Michael Cassidy states that “[p]roviding students with the analytical skills necessary to ‘think like lawyers’ by teaching them to read and dissect appellate decisions may no longer be sufficient to meet the demands of the legal marketplace.”¹⁴

A number of criticisms can be lodged at the traditional case method system. First, it is questionable whether a single case or a series of cases treated as autonomous units is the best way to impart knowledge of the law. Second, cases severed from context provide only a narrow

13. See Christie A. Linskens, *What Critiques Have Been Made of the Socratic Method in Legal Education? The Socratic Method in Legal Education: Uses, Abuses and Beyond*, 12 EUROPEAN J. L. REFORM 340 (2010); Patricia Mell, *Taking Socrates’ Pulse*, MICH. B.J., May 2002, at 46 (“Today’s Socratic method is far less robust in terms of frequency of use and severity of method than was its predecessor of 20 or 30 years ago.”).

14. Cassidy, *supra* note 9, at 1516.

perspective on what internal and external elements may have impacted the case. Internally, who were the parties? What were the arguments given by the opposing attorneys? Were multiple legal doctrines argued in the alternative? Externally, what was the cultural and economic milieu of the case? Has society changed in a way that questions the correctness of the case outcome?

This type of contextual understanding of cases requires changes in the materials used to teach our students. The quality of a course is mostly dependent on the quality of the instructor, but is also dependent on the quality of the course materials. There are some very good casebooks, many more that are mediocre, and some that are outright awful. The awful casebooks simply string cases together, and the cases used may not be the most illustrative or fit the flow of the other cases for the area of law being examined; the “related materials” are spotty at best or almost non-existent; and the case questions lack creativity or are repeated throughout the book. Fortunately, most casebooks try to blend cases with other materials in rational ways. However, the mix of cases and related or explanatory materials is uneven, and the types of materials used can vary significantly. A *Washington Law Review* “Contracts Casebooks Survey” of contract law professors showed that “excessive length” and an “insufficient number of drafting exercises or problems” were the two most common criticisms of current casebooks.¹⁵ Another interesting finding is that “Personal Course Packets” were the third most common “casebook” used among the survey participants. This indicates a possible trend away from the extremely costly traditional casebook to a more multi-dimensional approach to teaching beyond the case method.

The subject of contracts is an example of a subject where a narrative approach to teaching would be beneficial. Numerous theories of contract have been offered to explain—descriptively and normatively—the essence of contract law. In the end, a given theory at best explains part of contract law. Nonetheless, contract theory plays a vital role in helping to understand contract law and how best to reform its shortcomings. The advancement of a unitary theory of contract law, however, ignores the complexity and multiple functions of contracts. Cunningham correctly states that “the best way to account for the vast run of contract law doctrine is pragmatism—a search for what is useful to facilitate exchange transactions people should be free to pursue.”¹⁶ A pragmatic

15. Wash. Law Review, Contracts Casebooks Survey Results 8 (Spring 2013) [hereinafter Wash. Law Review Survey Results] (on file with the Washington Law Review).

16. CUNNINGHAM, *supra* note 4, at 9 (citing Nate B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77 (2009)).

contract law, and pragmatic use of contract law, is premised by a certain degree of continuity, which a narrative approach can highlight, as well as the importance of context to give law meaning and to allow for its pragmatic application.

Changes in methodological approaches to teaching law will require active engagement with faculty training opportunities. Neil Hamilton notes, "Faculty education will be essential to help each faculty member and the faculty as a whole to develop new curriculum and pedagogies that address the challenge. The faculty will need a willingness to experiment and to learn from trial and error in this new kind of teaching."¹⁷ The mistake of traditional legal teaching that emphasized the use of the Socratic method in the presentation of the legal canon was that new professors were rarely schooled in the method and may never have experienced the teaching of it in the proper way; it was assumed that an intellectually gifted new hire would inherently be able to develop the technique without any training or guidance. This mistake must be avoided as law schools and law teachers experiment with new teaching methodologies. It should be acknowledged that many law professors have forsaken the Socratic method for general lecture and discussion formats, and some have taken the more ambitious problem-solving approach that confronts legal problems across different subject categories, but these approaches are mostly used in upper-level courses and seminars. The focus here is the shortcomings of current casebooks and the teaching of the first-year courses. The next two Parts look at the narrative power of law and the role of contextualism in modern contract law.

II. NARRATIVE POWER OF THE LAW

The law as storytelling and the pedagogical benefits of a narrative approach to teaching law has been vetted in legal scholarship.¹⁸ Robert

17. Neil Hamilton, *Law-Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism* 33 (Univ. of St. Thomas Sch. of Law, Legal Studies Research Paper Series No. 13-22, 2013) (citing William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 502, 505 (2013); Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 384 (2011)), available at <http://papers.ssrn.com/abstract=2271410>.

18. See JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002); DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1991); Kathryn Abrams, *Hearing the Call of Stories*, 97 CALIF. L. REV. 971 (1991); Jane Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1993); Christine Metteer Lorillard, *Stories that Make the Law Free: Literature as a Bridge Between Law and the Culture in Which it Must*

Cover famously stated: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”¹⁹ A narrative approach to teaching integrates the descriptive and normative dimensions of law. In the words of Cover, “[True knowledge] requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’”²⁰

The narrative approach, imbued with a full range of contextual information, provides students with a better understanding of the law and how it can best be used in advancing the interests of their clients. It does this, to some extent, by converging the *is* and the *ought* of law. Karl Llewellyn and the legal realists saw the “is” of real world practice—especially in the areas of contract and commercial law—as the “ought” of law. In framing the Uniform Commercial Code, Llewellyn used open textured rules, such as the reasonableness standard, to allow contextual evidence (trade usage, business customs) to refresh and inform the rules of commercial law with the narratives of contract law-in-action.²¹ “It is in these narratives of commercial life where the meanings of contract rules are located.”²² All legal and normative rules are found in the contextual narrative that supplies them “with history and destiny,

Exist, 12 TEX. WESLEYAN L. REV. 251 (2005); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (arguing that legal storytelling will make the law more empathetic to individuals and diversity in legal process); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1 (1990).

19. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

20. *Id.* at 10.

21. Article 2 uses the reasonableness standard over forty times. *See, e.g.*, U.C.C. § 2-201(2) (2012) (providing that the written-confirmation rule requires that the confirmation be sent “within a reasonable time”); *id.* § 2-201(3)(a) (providing that in order to qualify for the specially manufactured goods exception to the statute of frauds the seller must “reasonably indicate” that the goods in the process of manufacture are for the buyer); *id.* § 2-206(1)(a) (providing that unless indicated otherwise in the offer, an acceptance may be sent in “any medium reasonable in the circumstances”); *id.* § 2-206(2) (providing that the beginning of performance may be a “reasonable mode” of acceptance, but an “offeror who is not notified within a reasonable time may treat the offer as having lapsed”); *id.* § 2-207(1) (providing that a statement of acceptance must be “sent within a reasonable time”); *id.* § 2-209(5) (providing that a party who waived a right under a contract “may retract the waiver by reasonable notification”).

22. Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 484 (2004).

beginning and end, explanation and purpose.”²³

Llewellyn’s “ought as is” equation noted above is subject to attack. An astute lawyer can argue in favor of a normative alternative that exists beyond actual commercial practice. The lawyer presents an alternative narrative in which commercial practice is portrayed as something other than what the law should entail—that is, the lawyer’s argument is that the judge should interpret a legal rule or a contract based upon a vision as to what practice should be. The lawyer argues that existing usage or practice is actually bad or inefficient and that the court should interpret the law in a way to encourage the development of a good commercial practice. The conversion of the “is” of real world practice to the “ought” of contract rules is used to determine the meaning of the parties’ agreement. However, using Cover’s concept of “what might be,” the court can use contract law’s regulatory function—represented by such meta-principles as good faith, commercial reasonableness, and unconscionability—to restructure the “is” to the “what might be.”²⁴ The continuing exploration and recognition of the “is” allows the rules and principles of the law to become self-revising. However, in refreshing rules through the recognition of modern practice, the courts at the same time can modify the “is” through the application of an alternative normative narrative.

In learning law and its many nuances, students also need to learn how to apply its rules “to new contexts.”²⁵ These contexts include the stories brought to the practicing lawyer by their clients. “[L]awyers practice their craft, listening to the stories of clients, refashioning and refitting the stories they hear (or the stories they imagine they hear) to fit the language of the law and to accommodate what might be called the ‘law culture’ story.”²⁶

Teaching a narrative view of case law better prepares students to respond to their client stories, for it shows law as something more than being “inert, limited, and formal.”²⁷ James Elkins writes:

23. *Id.* (quoting Cover, *supra* note 19, at 5).

24. Cover, *supra* note 19, at 10 (“To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but . . . the ‘what might be.’”). Another example of the merger of “is” and “ought” is what Richard Parker refers to as “prescriptive-descriptive tenets.” See Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 240 (1981).

25. Cassidy, *supra* note 9, at 1520.

26. James R. Elkins, *From the Symposium Editor*, 40 J. LEGAL EDUC. 1, 1 (1990); see also Leigh Buchanan Bienen, *The Law as Storyteller*, 98 HARV. L. REV. 494 (1984) (book review).

27. David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the*

[Law as narrative] is more than the telling or listening aspect of the craft of lawyering that makes narrative (and the perspective it affords us) of interest to lawyers. When we think of law as narrative we think of law differently than we do when we conceive of law as a system of rules or as an adversarial contest or game. Law may indeed be a system of rules, a means of conflict resolution, a game, a form of rhetoric and argument, or a discourse, but it is also a vast reservoir of stories—stories about how we use law and how we come to believe in its necessity.²⁸

The use of narrative or storytelling to understand law has been around for some time. However, it is primarily seen at work as a research methodology in areas such as feminist jurisprudence²⁹ and law as interpretation.³⁰ *Contracts in the Real World* attempts to use stories from canonic and modern cases to tell the story of law in action.³¹

What are the potential benefits to this type of narrative approach to the teaching of law? First, connecting old cases, many considered canonical, with recent cases shows the continuity of law. In fact, the new cases bring the old cases to life; students see their immediate relevancy to the modern world. The instructor can explore factual differences that may be used to distinguish the cases or to show that despite such differences the rule or exception still holds true today.

Second, this intergenerational analysis can also be used to note the inherent flexibility of legal concepts that have been around for centuries but continue to find new areas of application. A few legal concepts that come to mind include the concepts of trust and agency, and the evolution of fiduciary duties in business organizations out of those two earlier

Margin, 40 J. LEGAL EDUC. 3, 18 (1990).

28. Elkins, *supra* note 26, at 1.

29. See Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823 (2005); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992); Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991); Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247 (1999). For an analysis of gender in casebooks, see Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985), and Angela Fernandez, *An Object Lesson in Speculation: Multiple Views of the Cathedral in Leaf v. International Galleries*, 58 U. TORONTO L.J. 481, 503–14 (2008) (discussing how a case becomes canonized in a casebook).

30. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter Dworkin, *Hard Cases*]; Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) [hereinafter Dworkin, *Law as Interpretation*]; Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

31. See Joanna Benjamin, *The Narratives of Financial Law*, 30 O.J.L.S. 787 (2010); Catherine Mitchell, *Narrativising Contract Law*, 29 LEGAL STUD. 19 (2009).

concepts.³² The evolution of the internet, the creation of new types of informational products, and the idea that the license is the product provide other examples. These new “things” raised the question of whether a new body of law or government regulation was needed. In the end, except for some minor tinkering, “old” law was determined to be adequate to facilitate and regulate these new technologies and products.³³ For example, the ancient doctrines of trespass and nuisance have been employed to police inappropriate use of Internet Service Provider’s bandwidth.³⁴

Third, it is important to take the student’s perspective in developing teaching methodologies—different students respond better to different methodologies. Narrative or story-telling should be one of a number of teaching methodologies used to reach the different learning propensities of students. Beyond the excitement and trepidation of the first semester of law school, the benefits of the Socratic and case method have run their course and hopefully served the purpose of sharpening critical

32. Directors and officers are agents by the fact of being employed by the corporation. But historically, corporate law evolved from trust law. Deborah DeMott states: “Not surprisingly, the corporate form of business organization proved to be fertile ground for application and development of fiduciary principles. A corporation’s directors occupy a trustee-like position . . .” Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880 (emphasis in original); see also Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

33. The rise of electronic transactions and information products led to some attempts to create a comprehensive law to regulate the internet and the licensing of informational products. The most important attempt was the drafting of the Uniform Commercial Code (UCC) Article 2B (Licensing). Article 2B was initially sponsored by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), the two organizations that are the traditional sponsors of the UCC and revisions to the UCC. However, NCCUSL eventually dropped its sponsorship and Article 2B was withdrawn. The ALI tried again by drafting a model law—Uniform Computer Information Transaction Act (UCITA), but the UCITA was a failure as Maryland and Virginia were the only states to adopt the law. See A. Michael Froomkin, *Article 2B as Legal Software for Electronic Contracting—Operating System or Trojan Horse?*, 13 BERKELEY TECH. L.J. 1023, 1024 (1998) (arguing that states have managed electronic contracting well with “few legal crashes”); Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643, 643–44 (2003) (“[T]he [UCITA] has weathered the pull-out by the American Law Institute’s contributing drafters’ concerted and well-organized efforts to contest its passage and a very cold reception by the states.”) (footnotes omitted); Katy Hull, Note, *The Overlooked Concern with the Uniform Computer Information Transactions Act*, 51 HASTINGS L.J. 1391, 1391–92 (2000) (arguing that case law can adapt better to the rapidly changing technology that UCITA seeks to govern).

34. For cases that apply trespass doctrine to the internet, see *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000), *aff’d*, 356 F.3d 393 (2d Cir. 2004); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003). For a discussion of applying nuisance law to the internet, see Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 I/S: J.L. & POL’Y FOR INFO. SOC’Y 317 (2010).

thinking skills. But something more is needed to keep students' attention and broaden their search for operative facts and issues. One scholar asks: "How can law schools help to vitally engage their students and lay the groundwork for similar vital engagement in their studies and ultimately their law practice?"³⁵

If the analogy of case law's development as a "chain novel"³⁶ is an overstatement, it is at least a loose-leaf binder, organized by tabs into different bodies or subjects of law—from general principles to specialized bodies of rules.³⁷ Within each generic tab are many sub-tabs of the individual rules, exceptions, and factors used in the application of law to fact patterns of similarly situated cases. Common law reasoning by its very nature is a narrative undertaking. It must look back to find exemplary precedent—this is required for the court to demonstrate its use of authoritative sources to bolster claims of objectivity, impartiality, and the quality of its deductive reasoning. At the same time, the case before the court has at least some level of particularity that separates it from pre-existing case law. The court also must search for any such particularity in the legal precedent. Finally, depending on the type of particularity, the court may feel it prudent to project that particularity or uniqueness into the future to provide guidance to future courts. The court often poses hypotheticals to flesh out likely future developments of the law.³⁸

35. R. Lisle Baker & Daniel P. Brown, *On Engagement: Learning to Pay Attention* 6 (Suffolk Univ. Law Sch., Research Paper No. 13-15, 2013), available at <http://ssrn.com/abstract=2269726>.

36. See Dworkin, *Hard Cases*, *supra* note 30; Dworkin, *Law as Interpretation*, *supra* note 30. The concept of law as a chain novel depicts the law as chapters in a book with a different author for each chapter. In a new case, a judge looks at the legal precedents as if they were chapters in a novel and her job is to write the next chapter. The judge has some discretion as to how she writes the new chapter, but is constrained by the storyline of the previous chapters. For example, if the earlier chapters are in the genre of a traditional murder-mystery, the judge is not free to write a chapter related to the genre of science fiction.

37. Robert Hillman and Nate Oman debated the benefits and costs of general and specialized bodies of law focusing on contract law. See Robert A. Hillman, *Contract Law in Context: The Case of Software Contracts*, 45 WAKE FOREST L. REV. 669 (2010); Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010).

38. Karl Llewellyn listed sixty-four techniques that courts use in dealing with precedent and in deciding cases. Two of the techniques included forward-looking reasoning based upon "prophecy" (hypotheticals): "63. (Anticipatory): The deliberate forward-prophecy [and] 64. (Anticipatory): The deliberate hedge via an alternative which can, on call, render the main ruling 'mere dictum.'" KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 91 (1960) (citing *Harris v. Shorall*, 130 N.E. 572 (N.Y. 1921)). Neil Duxbury notes: "Common-law courts . . . recognize that hypothetical instances can be instructive and compelling . . ." NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 3 (2008). Courts in dicta often pose hypothetical situations that are not

This narrative is both internal and external to the law. The exemplarity of cited case law, as explored by the case method, exposes law students to the conceptual nature of law in which deductive reasoning is used to get students to think like a lawyer. The student learns the roles of rules, standards, and principles, and under a gifted professor, they learn the underlying rationales and public policy behind these various legal norms. But much more has to be learned—why some areas of law are rule-dominated and others are standard-dominated; how a chaotic rules-based regime is sometimes replaced by a standards regime to bring order to the chaos; how standards' application to a wide range of variant cases leads to the development of exceptions or a categorization of the case law into groups of similarly situated cases, transforming the standard into a rules-based regime; the ability to distinguish cases on behalf of a client no matter how minute the differences in the cases; and so forth.

The formal rules of the law are only part of the narrative enterprise. The rules always need to be placed in the factual context of a given case. This is the area of law application—rule to fact. Here the narrative comes from outside of the law; in many instances, the law looks to the real world of practice to infuse a rule with meaning or to guide the court in applying the law to the case at bar. Commercial law, especially the law of sales, looks to business practice—the stories of merchants and how their businesses, industries, and associations have evolved in order to conduct business based on elements of efficiency, certainty, trust, and professionalism.³⁹

Contracts in the Real World demonstrates that the adages of contract law mask the underlying complexity of rule application, of competing policy considerations, and the importance of context. Two examples from the book will be used here to show how a narrative approach reveals the underlying elements of formal contract doctrine. The two examples are the objective theory of contracts and the roles of the Statute of Frauds, plain meaning rule, and parol evidence rule in contract

presented in the case. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1037 (1990).

39. Section 103(a)(2) of the UCC states that one of the UCC's underlying purposes is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." U.C.C. § 1-103 (2012). Section 202 of the *Restatement (Second) of Contracts*, entitled "Rules in Aid of Interpretation," states that "any course of performance . . . is given great weight in the interpretation of the agreement." RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981). It also states: "When reasonable, the manifestations of intention of the parties . . . [should be] interpreted as consistent . . . with any relevant course of performance, course of dealing, or usage of trade." *Id.* § 202(5).

interpretation.

Contracts in the Real World shows how a narrative structure in telling the story of contract law can be done succinctly. In 212 pages, it weaves old cases and sensational new ones to place contract law in its historical context and, at the same time, make the relevancy of its rules to modern transactions apparent to the student. Cunningham covers the traditional topics of contract law: contract formation (gift promises vs. enforceable contracts, invitations to offer vs. offer, acceptance, mutual assent);⁴⁰ illegal contracts (unconscionability, familial relations, gambling, surrogacy agreements);⁴¹ performance (express and implied terms, duty of good faith, unanticipated circumstances, modification, accord and satisfaction);⁴² breach and substantial performance;⁴³ remedies (compensatory damages, mitigation, liquidated damages, specific performance);⁴⁴ contract interpretation, Statute of Frauds, and parol evidence;⁴⁵ restitution and unjust enrichment;⁴⁶ third-party beneficiaries and assignment;⁴⁷ and tortious interference.⁴⁸

In addition, Cunningham uses many of contract law's iconic cases, including *Alaska Packers' Ass'n v. Domenico*;⁴⁹ *Allegheny College v. National Chautauqua County Bank*;⁵⁰ *Carlill v. Carbolic Smoke Ball Co.*;⁵¹ *Hadley v. Baxendale*;⁵² *Hawkins v. McGee*;⁵³ *Hotchkiss v. National City Bank of New York*;⁵⁴ *Jacob & Youngs, Inc. v. Kent*;⁵⁵ *Krell v. Henry*;⁵⁶ *Lucy v. Zehmer*;⁵⁷ *Marvin v. Marvin*;⁵⁸ *Masterson v. Sine*;⁵⁹

40. CUNNINGHAM, *supra* note 4, at 11–34.

41. *Id.* at 35–58.

42. *Id.* at 148–71.

43. *Id.* at 181–82, 186–93.

44. *Id.* at 84–108.

45. *Id.* at 126–47.

46. *Id.* at 109–25.

47. *Id.* at 194–202.

48. *Id.* at 202–05.

49. 117 F. 99 (9th Cir. 1902).

50. 159 N.E. 173 (N.Y. 1927).

51. (1893) 1 Q.B. 256 (C.A.) (Eng.).

52. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

53. 146 A. 641 (N.H. 1929).

54. 200 F. 287 (S.D.N.Y. 1911).

55. 129 N.E. 889 (N.Y. 1921).

56. (1903) 2 K.B. 740 (Eng.).

57. 84 S.E.2d 516 (Va. 1954).

58. 557 P.2d 106 (Cal. 1960).

59. 436 P.2d 561 (Cal. 1968).

Matter of Baby M;⁶⁰ *Mitchill v. Lath*;⁶¹ *Newman v. Schiff*;⁶² *Pacific Gas v. G.W. Thomas Drayage*;⁶³ *Paradine v. Jane*;⁶⁴ *Parker v. Twentieth Century Fox*;⁶⁵ *Peevyhouse v. Garland & Co.*;⁶⁶ *ProCD, Inc. v. Zeidenberg*;⁶⁷ *Raffles v. Wichelhaus*;⁶⁸ *Sherwood v. Walker*;⁶⁹ *Taylor v. Caldwell*;⁷⁰ and *Wood v. Lucy, Lady Duff-Gordon*.⁷¹ These older canonical cases are woven together with modern cases, many featuring celebrity disputants.⁷² Cunningham's stories demonstrate the continuity and incredible flexibility that contract law brings to bear on modern contract disputes. He demonstrates that contract law is more than mere doctrine but is a vibrant, living law. The student is made aware of the importance of contract law in daily practice.

In the end, the narrative approach, as a technique of teaching legal reasoning, is captured by the terms exemplarity and typicality or atypicality. Legal philosopher Maksymilian Del Mar describes exemplarity as follows:

[F]or the purposes of analysing legal reasoning, exemplarity is profitably understood as a complex concept with the following dimensions: first, typicality; second, atypicality; and third, modelling for the future. These dimensions can also be usefully thought of in temporal terms: typicality is backward-looking, atypicality is present-regarding and modelling is future-oriented. Any instance of exemplarity delicately balances these dimensions. This is equally so for any legal reasoning process, which must balance respect for the particularity of the present case, with respect for relevant past decisions and respect for the

60. 537 A.2d 1227 (N.J. 1988).

61. 160 N.E. 646 (N.Y. 1928).

62. 778 F.2d 460 (8th Cir. 1985).

63. 442 P.2d 641 (Cal. 1968).

64. (1647) 82 Eng. Rep. 897 (K.B.); Alyen 26.

65. 474 P.2d 689 (Cal. 1970).

66. 382 P.2d 109 (Okla. 1962).

67. 86 F.3d 1447 (7th Cir. 1996).

68. (1864) 159 Eng. Rep. 375 (Exch.); 2 Hurl. & C. 906.

69. 33 N.W. 919 (Mich. 1887).

70. (1863) 122 Eng. Rep. 309 (K.B.); 3 B. & S. 826.

71. 118 N.E. 214 (N.Y. 1917).

72. See, e.g., *In re Marriage of McCourt*, No. BD514309, 2010 WL 5092780 (Cal. Super. Ct. Dec. 7, 2010). In this case, a husband and wife disputed ownership of the Los Angeles Dodgers, where there were two sets of original post-nuptial agreements—one set giving the Dodgers to the husband, and the other set splitting ownership of the Dodgers between the husband and wife. *Id.*

way in which the case might be used by future courts⁷³

Del Mar asserts that the best method for demonstrating the continuity of law, at least in its idealized version, is through a narrative accounting. *Contracts in the Real World* represents a general approach to teaching law under Del Mar's exemplarity-narrativity analysis. First, common-law reasoning is "full of exemplarity and narrativity,"⁷⁴ in which cases are tied to the past (narrativity) and also distinguished from prior cases (exemplarity). Second, such reasoning "combine[s] narrativity with exemplarity" and by doing so creates "a temporally-organised matrix of happenings,"⁷⁵ reaching into the past, dealing with the present, and looking to the future, "that resonates emotionally with the audience."⁷⁶

Narrative helps the student probe deeper into the indeterminacy of law:

[T]he concept of exemplarity is bound to experience some dialectical vertigo: thinking of the typicality of an example, one cannot but help to think of its a-typicality (for why was that sample chosen, and not another), and in thinking of its a-typicality, one cannot but help to think of its normativity (for was it not chosen not only because it is unique, but also because it is unique in some positive way?).⁷⁷

A selection of a case for inclusion in casebook, whether universally accepted as being canonical (e.g., *Hadley v. Baxendale*,⁷⁸ *Hawkins v. McGee*,⁷⁹ and *Raffles v. Wichelhaus*⁸⁰) or merely as one of many cases that could be selected, is meant to exemplify or illustrate a rule or principle of law. At the same time, a case that is treated as an exemplar is also unique or a-typical because in some way it stands out against the rest. The very nature of choice also implicates a normative dimension—the case is meant to point the student in the right direction, to provide guidance as to how future cases should be decided.⁸¹

73. Maksymilian Del Mar, *Exemplarity and Narrativity in the Common Law Tradition: Exploring Williams v. Roffey I*, (Queen Mary Univ. of London, Sch. of Law, Legal Studies Research Paper No. 139/2013, 2013), available at <http://ssrn.com/abstract=2247937>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 2.

78. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

79. 146 A. 641 (N.H. 1929).

80. (1864) 159 Eng. Rep. 375 (Exch.); 2 Hurl. & C. 906.

81. Cunningham's discussion of a famous Cardozo decision shows the competing notions of typicality and a-typicality. The case involved a "typical" construction contract dispute in which an owner-buyer withholds final payment due to a defect in construction. The doctrinal answer was

The exemplarity of a given case—its typicality and a-typicality—allows the instructor to build a narrative structure tying the case to the earlier cases. In any new case, the professor, lawyer, or judge seeks to tie their arguments and opinions to an ongoing legal narrative that is at the center of the evolution of common law rules. This is the essence of common law reasoning. The typicality and a-typicality of cases allows attorneys on opposing sides to cite the same case law and pose diametrically opposed arguments: one emphasizes the case's typicality (mandatory precedent), while the other stresses its a-typicality (distinguishing).

The narrative approach also allows the particularization of law's generality. Broad principles, vague standards, as well as fixed and open-ended rules, can be shown at work in the particular facts of a case. Even more, in telling a story of the use of the principle, standard or rule in a series of cases, the characteristics of choice, nuance, and creativity are exposed in the law. The dialectical relationship between generality and concreteness can be shown in telling a story beginning with the general rule—seeing its applications to different fact scenarios, seeing the tension of general principle or rule and novel facts, the crafting of an application, and the creation of exceptions. It demonstrates the duality of law to fact and fact to law—the law imposing its will on a case based upon precedent, certainty, and predictability; the case at bar and the particularity of its facts influence how the law should be applied and how it should be changed.

In *Contracts in the Real World*, Cunningham shows the dialectical relationship between rule and fact, and, more broadly, between law and context. At the same time he demonstrates the ability of the narrative approach to cover complicated areas of law with great brevity of text. In twenty-two short pages he covers the story of the statute of frauds and parol evidence rule, as well as their roles in contract interpretation.⁸² Many of the cases used are very recent cases involving celebrities and sensational fact patterns. The cases feature the rap artist Eminem,⁸³ newsman Dan Rather,⁸⁴ a case relating to the production of the Golden

clear that since the contractor had not fully performed the final payment was not yet due. Cardozo focused on the a-typicality of the case—use of an unspecified brand of pipe of equal quality and the lack of real damages to the owner-buyer—to fabricate the substantial performance doctrine. CUNNINGHAM, *supra* note 4, at 189 (discussing *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921)).

82. *Id.* at 126–47.

83. *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

84. *Rather v. CBS Corp.*, 886 N.Y.S.2d 121 (N.Y. App. Div. 2009).

Globe Awards,⁸⁵ the McCourts' divorce battle that determined the fate of the Los Angeles Dodgers,⁸⁶ country music personality Cliff Dumas,⁸⁷ Academy Award-winning actress Jane Fonda,⁸⁸ and the cosmetics icon Elizabeth Arden.⁸⁹

Cunningham covers much ground in a little space, laying out the classic rules of contract, as well as showing the disunity in the application of the rules to similar fact patterns across different states. We learn that the statute of frauds traces its origin to 1677 and that the rationales for its invention have long passed.⁹⁰ Still, the rule requiring a written instrument to enforce certain contracts persists to the present.⁹¹ We learn that when a writing, whether required by the statute of frauds or not, is intended to be the final integration of the parties' agreement, then the parol evidence rule precludes the use of extrinsic evidence to supplement the contract (although the word "contradict" the contract may be a better choice).⁹² The judge applies the plain meaning rule to interpret the contract unless she decides the contract is ambiguous.⁹³ If the judge decides the latter, the jury decides the interpretation as a matter of fact with the aid of extrinsic evidence presented by the parties.⁹⁴

In deciding the existence of an ambiguity, Cunningham gives the modern standard of "whether the language is reasonably susceptible to . . . competing interpretations"⁹⁵ However, the narrative story is a bit incomplete. It would have been wise to advise the student of the practicality of this standard. It provides a great deal of discretion to the court. In the event that a "plain meaning" interpretation would lead to an unjust or ludicrous outcome, courts will be tempted to allow extrinsic evidence to be admitted for the court to determine if there is a reasonable

85. CUNNINGHAM, *supra* note 4, at 132–36 (discussing how Dick Clark Productions contested the termination of its rights to produce the Golden Globe Awards show by claiming that the contract provided for automatic renewals).

86. *In re Marriage of McCourt*, No. BD514309, 2010 WL 5092780 (Cal. Super. Ct. Dec. 7, 2010) (addressing claims by a husband and a wife for ownership or shared ownership of the Los Angeles Dodgers due to conflicting language in their postnuptial agreement).

87. *Dumas v. Infinity Broad. Corp.*, 416 F.3d 671 (7th Cir. 2005).

88. *Rosenthal v. Fonda*, 862 F.2d 1398 (9th Cir. 1988).

89. *Crabtree v. Elizabeth Arden Sales Corp.*, 110 N.E.2d 551 (N.Y. 1953).

90. CUNNINGHAM, *supra* note 4, at 142.

91. *Id.*

92. *Id.* at 134–35.

93. *Id.* at 127–29, 146.

94. *Id.* at 127.

95. *Id.*

alternative interpretation (opposed to the plain meaning interpretation).⁹⁶ If the court recognizes the plausibility of the alternative meaning, then it can declare an ambiguity, switching the determination from one of law to one of fact.

In regard to the *Eminem* case, Cunningham explains the importance of “linguistic structure and cues” in determining whether the purchase of downloads and ringtones were sales for which the royalty rate was fixed at twenty percent or licenses for which Eminem would receive a royalty rate of fifty percent.⁹⁷ Here the appellate court focused on the prefatory language of the license provision that followed the sales provision that stated “[n]otwithstanding the foregoing.”⁹⁸ It interpreted that to mean that in cases of doubt the residual category was a license, and thus held that Eminem was entitled to the fifty percent royalty rate. The moral of the story is two-fold. First, in complex contracts legal cues, like “notwithstanding,” are ways of signaling the more important or broader terms. Second, the case shows the importance of “think[ing] through plausible future scenarios” in the drafting of long-term contracts.⁹⁹

In the *Rather* case, the issue was conflicting terms between an original contract and an amendment to that contract.¹⁰⁰ The original contract had a “pay-or-play” clause that gave the broadcasting company the option of paying Rather, not using his services, and not being required to release him from the contract in order to work for another network. The amendment indicated that if released from his news anchor position the network was required to place him in another specified show (a removal-and-reassignment clause). The court held that since the later clause was preceded by the phrase, “except as otherwise provided in this contract,”¹⁰¹ the pay-or-play clause controlled. Cunningham implicitly makes the point that this was a case of poor contract drafting. The lawyer, in negotiating the amendment, should have cross-referenced the pay-or-play clause and made sure that the removal-and-reassignment clause was replacing the previous clause.

In the *Golden Globe* case, the dispute pertained to the renewal of the right to produce the awards show.¹⁰² The production company argued

96. *Id.* at 127–29, 146.

97. *Id.* at 129 (discussing *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010)).

98. *Id.* at 128.

99. *Id.* at 129.

100. *Id.* at 130–32 (discussing *Rather v. CBS Corp.*, 886 N.Y.S.2d 121 (N.Y. App. Div. 2009)).

101. *Id.* at 132.

102. *Id.* at 132–36.

that the contract granted them the right to an unlimited number of options to produce the show. The contract, meant to be a final integration, required the court to directly interpret the meaning of the clause and precluded it from using extrinsic evidence by the parol evidence rule. Despite the existence of a commonly used merger clause, the court held that a traditional principle of contract interpretation is that individual terms are to be interpreted in the context of the contract as a whole. The “open-ended” renewal clause was preceded by a clause that granted the producer eight options. The court reasoned that if the second clause granted unlimited options then there would be no reason for the first clause’s stipulating a fixed number of options. The court also noted that the parol evidence rule did not bar the admission of course of performance or post-contract evidence. The facts showed the producer always formally requested a renewal and received the express consent of the owner of the show and thus supported the argument that the options were not automatic or unlimited.¹⁰³

The *McCourt* case involved a post-nuptial agreement dividing the couple’s property, but the agreement left unclear who was to be allocated the ownership of the Los Angeles Dodgers.¹⁰⁴ A number of the original copies of the contract stipulated that the team went to the husband, while other copies equally divided the ownership between the husband and wife. Cunningham describes this case as one of a “scrivener’s error” and references two older cases—the case of the “fraudulent architect”¹⁰⁵ and the 1941 case of the “erroneous deed.”¹⁰⁶ In the fraudulent architect case, two contracts were prepared with vastly different contract prices.¹⁰⁷ However, the case was distinguishable because the divergence was intentionally caused by the architect in order to fraudulently induce the parties to enter the contract. The *McCourt* case involved a drafting error, but no fraud. In the erroneous deed case, a deed was drafted describing the transfer of an entire parcel of land, while the parties had agreed on a sale of only a portion of the parcel. The court held that the case was one of mutual mistake, and not one simply caused by a scrivener’s error and, therefore, the normal remedy for scrivener’s error—the remedy of reformation—was not applicable.¹⁰⁸ In the end, the court in the *McCourt* case held that its case was also distinguishable

103. *Id.* at 136.

104. *Id.* at 136–41.

105. *Id.* at 138–39.

106. *Id.* at 139–40.

107. *Id.* at 138.

108. *Id.* at 140.

from the scrivener's error cases, since there was conflicting evidence of what the parties actually intended.¹⁰⁹ Therefore, the contract was held to be unenforceable with resolution to be decided under divorce law.¹¹⁰

The notion that law is an exact science was implicitly dismissed in the above cases that demonstrated the practice of distinguishing cases. The Dumas case¹¹¹ notes that courts use the reasons behind rules as guides to rule application.¹¹² It further illustrates the problem of applying a rule when the reasons for the rule have run out. The classic example is the statute of frauds, created in 1677, requiring a written instrument in certain types of contract transactions. The Dumas case dealt with the negotiation of a five-year employment contract via a series of e-mail exchanges. In the end, the court held that the exchange of e-mails did not satisfy the statute of frauds. However, this is a weak case for illustrating the need to use "horse sense" in applying the statute because the court held that no contract was formed due to indefiniteness, meaning that the statute of frauds issue was irrelevant to the decision.¹¹³

The Jane Fonda¹¹⁴ and Elizabeth Arden¹¹⁵ cases illustrate the lack of unity in the area of the statute of frauds. In general, courts have loosened the rigidity of its requirements in order to avoid dismissing meritorious claims. However, what the statute actually requires varies across the states. Most states do not require the agreement to be a single document, and instead most states allow the writing and signature requirements to be met by piecing together numerous documents.¹¹⁶ However, some states require the documents to cross-reference each other, while other states do not.¹¹⁷ Cunningham summarizes the material presented in the

109. *Id.* ("Testimony conflicted about [what] the couple intended . . .").

110. *Id.*

111. *Id.* at 141–42 (citing *Dumas v. Infinity Broad. Corp.*, 416 F.3d 671 (7th Cir. 2005)).

112. *Id.* at 142 ("[C]ourts often look to a statute's purpose or history.").

113. *Id.* ("Judges rely instead on horse sense.").

114. *Id.* at 142–44 (discussing *Rosenthal v. Fonda*, 862 F.2d 1398 (9th Cir. 1988)).

115. *Id.* at 144–45 (discussing *Crabtree v. Elizabeth Arden Sales Corp.*, 110 N.E.2d 551 (N.Y. 1953)).

116. *See* U.C.C. § 2–201(1) (2012) (providing that the statute of frauds is satisfied by "some writing"); JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 784 (5th ed. 2003) ("If there is more than one record and all of the records are signed by the party to be charged and it is clear by their contents that they relate to the same transaction," then the statute of frauds is satisfied; or if all are not signed then "extrinsic evidence is admissible to help show the connection between the documents and the assent of the party to be charged."); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 2-4, 58 (2d ed. 1980) ("Presumably several writings can be pieced together to satisfy the requirement, writings which taken alone would not be sufficient.").

117. PERILLO, *supra* note 116, at 784 (noting that in some states, if the signed document is "not

Jane Fonda and Elizabeth Arden cases by tapping into the longstanding debate between those arguing for formal versus contextual methods of interpretation: “[I]t is hard to find a court that inflexibly adheres to . . . pure literalism or pure contextualism. Both strands influence the analysis and resolution of disputes over the meaning of words and the scope of documents.”¹¹⁸ Thus, the formalism of the rules relating to the statute of frauds are not as formalistically applied as they were in the past due to the shift to a contextual approach to interpretation and application of law.

III. ASCENDANT CONTEXTUALISM: IMBUING LAW WITH MEANING

It is repeatedly stated that we are all realists now. An equally apt statement is that we are all contextualists now!¹¹⁹ Despite the arguments of neo-formalists,¹²⁰ law and legal reasoning is only a part of understanding how the legal process works in fact. Karl Llewellyn noted that in teaching law “it becomes vital in a new way to remember that the sound quest cannot be the simple-via-the-shallow; it must drive on despite all defeat toward the simple-via-the-deep.”¹²¹ Oliver Wendell Holmes, Jr.’s oft-cited prediction theory¹²² recognizes that a successful lawyer requires something broader than just thinking like a lawyer or, alternatively stated, that the phrase “thinking like a lawyer” needs to be more broadly understood as something beyond legal reasoning or critical thinking. In Holmes’ words: “The object of our study, then, is prediction, the prediction of the incidence of the public force through

attached to or does not expressly refer to the unsigned” document, then “the unsigned document is not sufficiently authenticated” (citing *Young v. McQuerrey*, 508 P.2d 1051 (Haw. 1973); *Hoffman v. S.V.*, 628 P.2d 218 (Idaho 1981); *Owen v. Hendricks*, 433 S.W.2d 164 (Tex. 1968)).

118. CUNNINGHAM, *supra* note 4, at 147.

119. The rise of contextual interpretation of law and legal instruments, likely accelerated by the adoption of the UCC, has shattered the idea that contracts or statutes can ever be bastions of plain meaning interpretation. *See, e.g.*, Catherine Mitchell, *Entire Agreement Clauses: Contracting out of Contextualism*, 22 J. CONTRACT L. 222 (2006).

120. *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORD. L. REV. 869 (2002); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Robert E. Scott, *A Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907 (2011); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971.

121. LLEWELLYN, *supra* note 1, at 8.

122. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

the instrumentality of the courts.”¹²³ The need to institute a more contextualized approach to teaching law was noted in a 1914 Carnegie Foundation report “that recommended a more holistic and contextualized approach be taken in educating lawyers and preparing them for the practice of law.”¹²⁴ A fuller understanding of context and its importance allows a lawyer a greater chance of predicting what the law and the courts will do. This ability enables the lawyer to better serve her clients.

Contracts in the Real World continuously emphasizes context in teaching a deeper understanding of contract law and its application. A father’s gifting of the family home and a promise to pay off the mortgages encumbering the home in exchange for one dollar was a legal gift (handing over the deed), but the promise to pay off the mortgages was unenforceable because the “context of the event left no doubt the father was giving a gift” and not entering a contract.¹²⁵ In a case involving the borrowing of money in order to escape Nazi-occupied Greece, the amount of the loan was in dispute, as well as whether the loan agreement was a forgery. The court held that the issue of forgery was secondary given the “context” of a desperate need to leave Greece and, therefore, mere inadequacy of the consideration did not void the contract.¹²⁶

The above two cases illustrate that “contracting parties inhabit two different worlds, a real one created by them and an artificial one created by the law.”¹²⁷ Catherine Mitchell takes issue with the “two worlds” view of parties engaging in two separate transactions—the business and the legal transaction. She admits that law may, at times, diverge from real world practice, leaving contract doctrines with a veneer of “artificiality and irrelevance.”¹²⁸ However, Mitchell asserts that even though such divergence may occur, “the connection between contractual relationships and contract law is much more complex and nuanced than the ‘two worlds’ idea suggests.”¹²⁹ In the end, she argues that what is needed is a type of legal reasoning that recognizes “the operation of

123. *Id.* at 457.

124. DAVID I.C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* 18 (2009).

125. CUNNINGHAM, *supra* note 4, at 40 (discussing *Fischer v. Union Trust*, 101 N.W. 852 (Mich. 1904)).

126. *Id.* at 39 (discussing *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. App. 1949)).

127. Catherine Mitchell, *Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal*, 29 O.J.L.S. 675, 676 (2009).

128. *Id.* at 677 (internal quotation marks omitted).

129. *Id.*

formal contracts and relational norms as *integrated* phenomena.”¹³⁰

While socio-legal scholars differ over the precise implications of relational theory for contract law and legal reasoning, most generally agree that a contextual approach to contracts regulation is preferred over an inflexible doctrinal method. Feinman, for example, states that relational analysis is “contextual with a vengeance,” requiring a pragmatic, differentiating approach depending on contract type.¹³¹ “[C]ourts should recognize that the documents may serve a variety of purposes depending on contractual context and the quality of the parties’ relationship.”¹³²

The use of relational norms in the interpretation of contracts “requires not [just] the construction of the parties’ agreement, but the reconstruction of it—the reassembly of its constituent parts and the expectations and motivations, both documented and undocumented, that helped create it.”¹³³ The use of relational norms in the interpretation process, especially in long-term contracts, can be justified because it is in the use of these norms and the contextual evidence needed to flesh them out that a court can best determine the expectations of the parties in the formation and performance of their contract.

What are the elements of context that influence courts and are important to understand when learning about the law? There is no easy answer to this question because there are many dimensions of context—the context of the dispute (characteristics of the parties and their transactions within a given relationship and industry); the context of the case within a greater societal, cultural, and economic environment; and the context of the case within pre-existing and future case law. Appellate cases provide some of the operative facts of the case, but not a full or complete factual accounting. The appellate opinion may touch upon some of the external societal forces at play in a given dispute, but often ignore many important underlying factors, such as discrimination, bias, and stereotyping.¹³⁴ A narrative approach to teaching law provides an opportunity to weave in these heretofore forgotten or neglected

130. *Id.* (emphasis in original).

131. Jay Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 737–38, 742 (2000).

132. Mitchell, *supra* note 127, at 702.

133. *Id.*

134. The issue of social-class bias has been examined by Miriam Cherry. See Miriam A. Cherry, *Exploring (Social) Class in the Classroom: The Case of Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 235, 240–45 (2008) (discussing *Williams v. Walker Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968); *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891)).

contextual elements.

Many of the key facts and influences in a case are not found in excerpted appellate court cases; they are found in the nitty-gritty of trial court materials. This was demonstrated in a 2008 symposium dedicated to better understanding the iconic 1917 case of *Wood v. Lucy, Lady Duff-Gordon*,¹³⁵ the seminal case in which Justice Cardozo salvaged exclusive-agency contracts by implying a duty of best efforts on the agent in the procurement of endorsements for its principal.¹³⁶ The case included Cardozo's famous adage for the judicial authority to imply terms into such a contract (and others) where the promise is "'instinct with an obligation,' imperfectly expressed."¹³⁷ Deborah Zalesne takes issue with Cardozo's opening characterization of Lady Duff-Gordon: "The defendant styles herself 'a creator of fashions.' Her favor helps a sale."¹³⁸ Zalesne notes that the characterization of Lady Duff-Gordon's "business" is somewhat frivolous in nature.¹³⁹ In fact, she was a savvy businessperson in a man's world who helped shape the fashion world through the mass-marketing of designer clothing.¹⁴⁰ The case could be used to show the nature of stereotyping and gender bias underlying the facts of the case or as they existed at the time of the case.

The duty of best efforts is best rationalized as being dictated by the duty of good faith. Yet Nicholas Weiskopf notes that in researching the New York case law he found the courts rejecting good faith as a ground for the implication of terms.¹⁴¹ Thus, the case was not the watershed event that it could have been due to its narrow interpretation as simply implying a given duty in a unique form of contract—the exclusive-agency contract.

Miriam Cherry's article illustrates how the *Duff-Gordon* case can be

135. 118 N.E. 214 (N.Y. 1917).

136. Symposium, *The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 161 (2008).

137. *Duff-Gordon*, 118 N.E. at 214 (citing *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (N.Y. App. Div. 1909)).

138. *Id.*

139. Deborah Zalesne with David Nadvorney, *Integrating Academic Skills into First Year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning*, 28 PACE L. REV. 271, 290 (2008).

140. *Id.*

141. Nicholas R. Weiskopf, *Wood v. Lucy: The Overlap Between Interpretation and Gap-Filling to Achieve Minimum Decencies*, 28 PACE L. REV. 219, 220 (2008) (discussing how the New York Appellate Division reviewed the case law and in a 5–0 vote held there was not any good faith duty in the law that would allow the court to imply a duty into a contract, such as the duty to use best efforts).

used to place a case within its overall social context.¹⁴² In examining social class, she “open[s] [an] inquiry into the distributional nature of contract law” and encourages “students to think about issues of economic stratification more critically.”¹⁴³ The richness of such cases or storylines is demonstrated by Celia Taylor’s article, *Teaching Ethics in Context: Wood v. Lucy, Lady Duff-Gordon in the First Year Curriculum*, which shows how the *Duff-Gordon* case can be used to teach professional ethics.¹⁴⁴ Finally, a further example of the narrative-contextual use of an iconic case to teach a deeper, more nuanced, and more realistic view of law and its application is Zalesne’s demonstration of how such cases are “ideal vehicles for explicit teaching of analytical skills.”¹⁴⁵ He argues the importance of the broader use of such cases because of the current “disconnect” between doctrinal instruction and analytical skill training.¹⁴⁶

In prior scholarship, I have noted that Cardozo’s decision in *Duff-Gordon*, like most of his opinions, demonstrated his contextual mode of interpretation.¹⁴⁷ His ability to use context to look outside the immediate doctrinal formalities is what enabled him to profoundly change and modernize American contract and tort law. I argued that the implied duty of good faith already existed at the time of the *Duff-Gordon* case and that the case’s importance was due to its use of a contextual means of interpretation to construct the implied duty of best efforts.¹⁴⁸ The importance of context, and not just reading formalized law, to the actual practice of law needs to be more fully emphasized in casebooks. The narrative approach is one means of capturing such all-important context.

Duff-Gordon’s extension to modern developments in employment law provides an example of the importance of context in creating a story of law; it also shows the interconnectedness and discontinuities of law.

142. See Cherry, *supra* note 134.

143. James J. Fishman, *The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 162, 175 (2008).

144. Celia R. Taylor, *Teaching Ethics in Context: Wood v. Lucy, Lady Duff-Gordon in the First Year Curriculum*, 28 PACE L. REV. 249, 249–50 (2008).

145. Fishman, *supra* note 143, at 175.

146. *Id.*

147. Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315, 340–44 (2008) (reviewing Cardozo’s use of extrinsic or contextual evidence in interpreting contracts).

148. *Id.* at 318–24 (discussing the unoriginality of Cardozo’s decision in *Duff-Gordon*). Cardozo’s rejection of the four-corners analysis of formalism in favor of the use of context evidence is borne out by his assertion that “[w]e are not to suppose that one party was to be placed at the mercy of the other.” See *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

Robert Bird examines the application of “instinct with an obligation” as a rationale for extending the duty of good faith into the employment relationship.¹⁴⁹ Along the same lines, Emily Gold Waldman criticizes the New York courts for failing to extend the implied duty of good faith into the employment context.¹⁵⁰ In the end, the symposium on *Duff-Gordon* shows that “[w]e should teach . . . fewer cases and do more with the cases we teach and use other methods for conveying doctrine.”¹⁵¹ Or, as another contract law professor states: “Depth is more important than breadth . . . [L]earning how to extract from an opinion a coherent story of what happened in the case and understanding how the court applied legal doctrine to the facts . . . are far more important than obsessing about doctrine as such.”¹⁵²

A type of legal scholarship that emphasizes the role of depth over breadth is legal archeology. Legal archeology attempts to fill in the gaps in the official appellate court opinion. It places a case (usually an older, iconic one) in the context of the times. It explores evidence that was unreported in the formal decisions and places the case in the context of similarly situated cases. A fine example of this type of scholarship is Debora Threedy’s *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*.¹⁵³ Threedy weaves a narrative of the role of gender stereotypes in one of contract law’s most iconic series of cases—the Arthur Murray dance studio cases.¹⁵⁴ My first-year contract casebooks include an Arthur Murray case used to introduce the doctrine of undue influence. I find it interesting that some thirty-four years later the case remains vivid in my memory. In thinking about the present Article, the answer for this retention now seems clear—the case simply told a good story. But, as Threedy shows, it did not tell the correct or, at the least, the complete story.¹⁵⁵ A further discussion of Threedy’s

149. Robert C. Bird, *An Employment Contract ‘Instinct with an Obligation’: Good Faith Costs and Contexts*, 28 PACE L. REV. 409 (2008).

150. Emily Gold Waldman, *Fulfilling Lucy’s Legacy: Recognizing Implicit Good-Faith Obligations Within Explicit Job Duties*, 28 PACE L. REV. 429 (2008).

151. Wash. Law Review Survey Results, *supra* note 15, at 11.

152. *Id.* at 16.

153. Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010).

154. See *Staples v. Arthur Murray, Inc.*, 61 Cal Rptr. 103 (Cal. Ct. App. 1967); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968); *Parker v. Arthur Murray, Inc.*, 295 N.E.2d 487 (Ill. App. Ct. 1973).

155. The cases found in the casebooks depict lonely, elderly women as victims of overreaching by male dance instructors leading them to be unduly influenced in purchasing a large number of dance lessons. See RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 991 (4th ed. 2008); CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 557 (6th ed.

analysis provides numerous insights into the law as applied and on how it should be taught.

Threedy researched a significant number of old Arthur Murray dance studio cases and came upon a stunning realization that a number of the cases involved not only elderly women but also elderly men. Based upon this realization, she analyzed the different characterizations of the plaintiffs by the courts based on gender and, in some cases, the reaching of different outcomes in cases of almost identical fact patterns.¹⁵⁶ Unknown to law students, and subsequent practitioners, gender played a key role in the application of contract doctrine in these cases. The widowed old women were hoodwinked in buying an exorbitant number of dance lessons. The women were victims of overreaching as the studio used attractive male dancers to prey on the ladies' loneliness.¹⁵⁷ Subsequently, the women sued for a refund under the doctrines of undue influence and misrepresentation. The courts focus on their vulnerability and the hope to become proficient in dancing to fill a void in their lives. In contrast, the old men were not hoodwinked because they were not vulnerable and were getting exactly what they paid for—the touch of a beautiful woman, or, putting it more vividly, a type of sexual encounter.¹⁵⁸ Of course, the elderly women, all grandmothers, could not possibly have had such thoughts!

Blake Morant, in his work on racial bias in the law, uses contextualism as both a descriptive and a normative device.¹⁵⁹ The

2007). Threedy notes, "Not all of the plaintiffs in the Arthur Murray cases are women, however. Some of the plaintiffs are men." Threedy, *supra* note 153, at 759–60.

156. Threedy sketches out the different gender narratives in which the elderly women are "vulnerable" to overreaching and the elderly men are astute purchasers of companionship. Threedy, *supra* note 153, at 761–67.

157. Threedy provides a composite story taken from two of the cases:

Lonely, vulnerable, typically elderly widow/spinster attends a dance class or demonstration at an Arthur Murray Studio. There, an attentive, presumably attractive, young male dance instructor "sweeps her off her feet" and in no time at all, she has signed up for hundreds, if not thousands, of hours of dance instruction, costing her thousands, if not tens of thousands, of dollars.

Id. at 761 (discussing *Vokes*, 212 So. 2d at 907–08; *Syester v. Banta*, 133 N.W.2d 666, 669–70 (Iowa 1965)).

158. Threedy states that the Arthur Murray Dance Studios featured "touch dancing," which she describes as "rhythmic movements [that] all invoke—let's be frank here—a sexualized experience . . ." *Id.* at 767. She also asserts that "men as a class have greater access to economic resources and thus can more easily be the consumer of companionship or sex." *Id.* at 768.

159. See Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1 (1998) [hereinafter Morant, *Law, Literature, and Contract*]; Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997) [hereinafter Morant, *Race and Disparity*]; Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH.

influences of bias in the law and the application of law are a descriptive reality that can be fleshed out through an expanded contextual analysis.¹⁶⁰ However, contextualism as a method to uncover illicit factors (such as racial or gender bias) in the law is also a device for legal reform to neutralize those factors (such as remedying biases when interpreting a contract or recognizing acts of bad faith). Once uncovered, law can overcome racial, gender, and other biases by formally recognizing them as part of the contextual factors a court should weigh in rendering its decision. James Elkins states:

Some stories imagine law as the bulwark of tradition and, miraculously, the means by which we can free ourselves from the shackles of history. Other stories, particularly those of women, people of color, and those for whom the American Dream has been a cynical lie, are also implicated in stories of law.¹⁶¹

These parallel stories are often not sufficiently told in casebooks.

Morant asserts that law can be made more objective through the admission of more contextual evidence: “[T]he operation of contractual rules within the reality of human conduct belie the facade of objectivity.”¹⁶² He then poses a positive theory of contextualism to help make contract law true to its mission of objectivity. First, “judicial decisions should be evaluated contextually, as well as literally, in order to gain complete comprehension of its reasoning.”¹⁶³ Second, “[w]hile [race, gender, and disparity] are not necessarily important in all contexts, they should be explored whenever they conspicuously or tacitly impact either the bargainers’ actions prior to formation, or the decisionmaker’s adjudication of the formed bargain.”¹⁶⁴ The introduction of these factors as part of judicial analysis results in an initial deconstruction of contract law¹⁶⁵ by “shatter[ing] contract law’s illusion of objectivity.”¹⁶⁶ When

ST. L. REV. 925 [hereinafter Morant, *Procedural Unconscionability*]; Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63 (1998) [hereinafter Morant, *The Teachings of Dr. Martin Luther King, Jr.*].

160. See, e.g., Morant, *Procedural Unconscionability*, *supra* note 159 (contending that in order to understand the disproportionality of power in bargains, courts must more fully scrutinize the context of the bargain).

161. Elkins, *supra* note 26, at 1.

162. Morant, *Race and Disparity*, *supra* note 159, at 891.

163. *Id.* at 893.

164. *Id.* at 938.

165. Morant, *The Teachings of Dr. Martin Luther King, Jr.*, *supra* note 159, at 71–72 (“The principal term here is realism—where theoretical constructs of bargaining relationships are deconstructed to allow for more proactive measures to counter pejorative conduct.”).

courts and substantive law openly acknowledge the influence of factors, such as bias and discrimination in contracts, the law is able to work towards greater objectivity and impartiality.¹⁶⁷ In Morant's embrace of contextualism, his brand of deconstruction is not to be equated with nihilistic destruction, but as a means to mold the current structure of contract rules to be more truthful and realistic, by broadening the scope of acceptable contextual evidence. This broadened narrative recognizes the impact of bargaining disparities (power) and biases (discrimination, stereotyping) to the application of legal rules.¹⁶⁸

In a previous work, I argued for the benefits of using works from other disciplines to illustrate the rationales for law, the greater context in which the legal order operates, and the relationship between law and society.¹⁶⁹ Education theorists see the use of analytical frameworks from other disciplines as a method of teaching students to view a legal problem or issue from "multiple fram[es]."¹⁷⁰ The law student, through the use of narrative, is asked to answer questions not just from a legal viewpoint, but from an economic or historical perspective as well. This allows students to view the law from internal and external perspectives.

The internal view only exposes the student to the conceptual nature of law. The external view allows the student to critically analyze the law. The internal view trains the student to change their arguments as evidence dictates; to remain focused on the point or issue in question; and to deal with complex legal problems in a rational and efficient manner. The external view trains the student to keep an open mind; take into account the entire context of the case; look for options not internal to the law; and be sensitive to the other party's position.¹⁷¹

The narrative approach and other interdisciplinary approaches to understanding law and legal practice can be used to develop students' emotional engagement and empathy—these skills are needed to better

166. *Id.* at 70.

167. *Id.* ("It also commensurately prompts discussion of methods to cure the transitional ills resulting from those problems.").

168. Morant, *Law, Literature, and Contract*, *supra* note 159, at 4 ("The goal is not to demolish contract rules, but to enhance their efficacy and remedial potential.").

169. Sandra K. Miller & Larry A. DiMatteo, *Law in Context: Teaching Legal Studies Through the Lens of Extra-Legal Sources*, 29 J. L. STUD. EDUC. 155 (2012).

170. *Id.* at 158–59 (citing William M. Sullivan, Report on the Business, Entrepreneurship, and Liberal Learning Project of the Carnegie Foundation for the Advancement of Teaching (handout for the Sixth Annual Liberal Education and the Disciplines Breakfast Forum) (Jan. 29, 2011), available at http://www.aacu.org/leap/can/documents/Bill_Sullivan_Handout.pdf).

171. *Id.* at 160–61 (citing Robert H. Ennis, *Critical Thinking and Subject Specificity: Clarification and Needed Research*, 18 EDUC. RESEARCHER 4, 4–10 (1989)).

relate to clients and to understand the position of opposing parties. Judge Posner has emphasized the importance of what he terms “good judgment” when deciding cases that lack clear-cut solutions—it is “an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense.”¹⁷² The narrative approach provides those “other” details of the story not formally reported, which allows the student to better observe and sympathize with the human and societal dimensions of a case or series of cases. Judge John T. Noonan’s *Persons and Masks of the Law* warns of the tendency of lawyers and judges to allow abstract rules of law to obscure the human beings to whom those rules are applied.¹⁷³ Noonan asserts that beginning with Holmes the law has been personified as a sort of living being: “By a form of misplaced concreteness, [Holmes] attributed to an abstraction the action of living men and women.”¹⁷⁴ When that happens, the rules become masks that hide and render irrelevant the humanity of those affected by the law.¹⁷⁵ The mere indoctrination of students in the substance of the law and the art of legal reasoning fails to develop these important skill sets.

IV. STORIES IN A GLOBAL CONTEXT

Legal scholars and practitioners have increasingly recognized the importance of placing American law and legal education in the context of comparative and international legal orders.¹⁷⁶ Judge Merritt in the case of *In re Desilets*¹⁷⁷ asserted that multijurisdictional practice was a

172. RICHARD POSNER, HOW JUDGES THINK 117 (2008).

173. See JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 6 (2002).

174. *Id.* at 4.

175. Noonan explains the detachment of rules from the humans for which they were created or applied as follows:

Little or no attention is given to the persons in whose minds and in whose interaction the rules have lived—to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it.

Id. at 6.

176. See Carrie Menkel-Meadow, *Why and How to Study “Transnational” Law*, 1 U.C. IRVINE L. REV. 97 (2011); Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL EDUC. 161 (2006); see also Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1 (2011) (advocating that law schools should incorporate an International Legal Analysis course into first-year curriculum).

177. 291 F.3d 925 (6th Cir. 2002).

“quotidian” part of modern legal practice.¹⁷⁸ R. Michael Cassidy argues that “[l]awyers need a more panoramic view of the law to argue from analogy for an extension or novel application of domestic law.”¹⁷⁹ For example, comparative law analysis demonstrates to the student that American legal rules are matters of choice among alternative rules. These alternative legal choices taken by other legal systems provide a source for advancing innovative arguments on behalf of clients and gaining insights on how best to reform existing law.

Most recently, a Symposium entitled *Building Global Professionalism: Emerging Trends in International and Transnational Legal Education*¹⁸⁰ included a number of articles providing case examples of how knowledge of international and comparative law directly impacts legal practice.¹⁸¹ A 2006 issue of the *Journal of Legal Education* provided a number of thought-provoking articles making the case for incorporating transnational and comparative law in first-year civil procedure, constitutional, criminal, and tort law.¹⁸²

From a practice point of view, international, comparative, and transnational perspectives are needed for lawyers to properly advise clients working in a global marketplace.¹⁸³ Students graduating with such knowledge and perspectives will become increasingly marketable. Law schools recognize this fact and increasingly offer upper-level courses in international and comparative law. A few schools require such a course as part of the first-year curriculum.¹⁸⁴ Although these

178. *Id.* at 925.

179. Cassidy, *supra* note 9, at 1522.

180. 5 DREXEL L. REV. 285 (2013).

181. Kerstin Carlson, *Found in Translation: The Value of Teaching Law as Culture*, 5 DREXEL L. REV. 407 (2013); Kath Hall, *Educating Global Lawyers*, 5 DREXEL L. REV. 391 (2013).

182. See Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479 (2006); M. Stuart Madden, *Integrating Comparative Law Concepts into the First Year Curriculum: Torts*, 56 J. LEGAL EDUC. 560 (2006); Saqid Reza, *Transnational Criminal Law and Procedure: An Introduction*, 56 J. LEGAL EDUC. 430 (2006); Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law*, 56 J. LEGAL EDUC. 201 (2006).

183. Anil Kalhan, *Thinking Critically About International and Transnational Legal Education*, 5 DREXEL L. REV. 285, 288 (2013) (citing Claudio Grossman, *Building the World Community Through Legal Education*, in *THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION* 21, 30 (Jan Klabbers & Mortimer N. S. Sellers eds., 2008)).

184. See generally Anthony A. Tarr, *Legal Education in a Global Context*, 36 U. TOL. L. REV. 199 (2004) (arguing that law schools should develop strong international and comparative law programs). Some law schools have taken the step of changing their first-year curricula to include and international or comparative law course. In 2006, Harvard Law School announced that first-year law students would be required to take “one of three specially crafted courses introducing global legal systems”: Public International Law, International Economic Law, or Comparative Law.

courses are beneficial, weaving foreign narratives in core courses is needed to more effectively develop international and comparative law perspectives in the student skill set. The core casebooks (contract, tort, civil procedure, and so forth) need to provide international, comparative, and transnational law and practice materials. Teachers need to embrace these changes and proactively use them in teaching their courses.¹⁸⁵

The problem is that casebooks are already too long to include comparative law materials. The answer may be the use of a narrative approach that uses fewer cases, but provides additional contextual materials to examine the cases in depth and allow for teaching law much like a storyteller spins a tale. However, just providing these materials and leaving it for the teacher to construct the stories is not very efficient. The more radical and beneficial casebook would provide the stories that weave together different cases from different eras to show the development of legal rules, as well as the context and reasons behind those developments.

CONCLUSION

This is a time of great reflection involving all facets of legal education. This Symposium focused on one of those facets—the traditional casebook and case method of law instruction. The stack of appellate cases assembled by Christopher Columbus Langdell in 1871¹⁸⁶ rightly gave way to a more “realist” casebook beginning in earnest in the 1930s. The “related materials” vary among major casebooks, but the template has remained relatively unchanged. It is not a novel suggestion that it may be time for a new type of casebook. The next generation of casebooks should, at least, partially apply a more narrative style as exhibited by Lawrence Cunningham’s highly original book, *Contracts in the Real World: Stories of Popular Contracts and Why They Matter*.¹⁸⁷ The case-centered focus of legal education will remain the coin of the realm, but its presentation in a narrative format, connecting a series of

Rethinking Langdell: Historic changes in 1L curriculum set stage for new upper-level programs of study, HARVARD LAW SCH. (Dec. 2006), www.law.harvard.edu/news/today/dec_hlt_langdell.php. The University of Washington School of Law also provides a required first-year course entitled Comparative and International Law Survey. See *Courses 2013 – 2014: LawA508: Comparative and International Law Survey*, U. OF WASH. SCH. OF LAW (last updated Feb. 5, 2013, 8:40 AM), <http://www.law.washington.edu/CourseCatalog/Course.aspx?YR=2013&ID=A508>.

185. Cassidy, *supra* note 9, at 1523 (“Many U.S. casebooks in core subject areas are beginning to incorporate comparative perspectives.”).

186. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

187. CUNNINGHAM, *supra* note 4.

cases back in time and setting those cases in their appropriate contexts, should be explored.

It may be time to scrap the label of “casebook” and return to what other disciplines simply refer to as a textbook or course pack.¹⁸⁸ A legal “textbook” captures the essence of the task at hand to blend cases with practice-focused materials and comparative and international materials. The incorporation of the narrative approach into a new generation of law school “textbooks” will serve a number of important substantive goals. First, the acquisition and retention of substantive knowledge will be enhanced. The Arthur Murray case provides an example of the learning power of the narrative approach.¹⁸⁹ The narrative approach, if properly used, can illustrate the variance between formal rules of law and law in action. Alternatively stated, it can show how case facts and the search for a seemingly just outcome leads to a divergence of formal from operative rules. Finally, the narrative approach shows how the spirit of law may be lost in the interest of doctrinal purity.

A proper narrative approach illustrates the role of context in understanding judicial decisions. This context includes the acknowledged context found in the judicial opinion and the “unknown” contextual factors that likely influenced the decision, but were left outside the recognized legal canon. The power of narrative can expand the bracketed context of the formal text to include the range of factors and influences not reconcilable to the view of law as objective and impartial. It is in this deeper understanding of the realities of case decisions that practitioners of law can determine the factors, explicit and implicit (proper and improper), which are most predictive of a judicial outcome. It is in that deeper knowledge that a lawyer can best frame an argument on behalf of a client.

A good story is easier to recall than a mere memorization of formal rules, exceptions, and legal nuance. The history of the effectiveness of oral histories, before the advent of written memorialization, attests to the power of the narrative approach. Stories may prove to be a more efficient means of knowledge acquisition, thus allowing for more time to introduce other core competency features into the curriculum, such as problem solving, drafting, counseling and negotiation exercises in the first-year courses. In the end, a re-tooling of the traditional law school casebook and the introduction of additional teaching methodologies in

188. A *Washington Law Review* survey shows that among textbooks and other materials, the use of “Course Packs” rated as the third most popular form of course materials used, beyond two more popular casebooks. Wash. Law Review Survey Results, *supra* note 15, at 3.

189. *See supra* notes 153–158 and accompanying text.

the first-year curriculum will not cure the ills of American legal education, but they should be explored as part of the overall revamping of how and what we teach in our law schools.