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# HOW LAWYERS (COME TO) SEE THE WORLD: A NARRATIVE THEORY OF LEGAL PEDAGOGY

*Randy D. Gordon\**

## FOREWORD

The following article is the first in a series to be published over the next three issues of the Review. Each of the articles engages the recent Carnegie Report on legal education from a different angle. In the first article, I spin together two strands generally related to education, one being the popular notion that education should serve democratic ends, the other being the more particular observation that American legal education suffers from a dearth of imagination. I anchor the discussion by examining some of the recurring criticisms lodged against legal education (e.g., those raised in the Carnegie Report) and attend in particular to the casebook method of instruction and identifies a paucity of narrative in that method as a serious deficiency. But this deficiency is not one unique to legal education; in fact, it arises not from law schools per se but from their primary object of study: the appellate opinion. By studying appellate opinions—which by design already squeeze narratives beyond recognition—to extract rules, law students are trained to read (and think) in a narrowly instrumental way. This pedagogical defect is demonstrated through a close reading of cases and several casebooks and concludes with a practical (and relatively simple) suggestion for ameliorating this problem and speculates how the solution will not only improve legal education but also strengthen democratic

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This article benefited from comments received at two conferences, the International Conference on the Future of Legal Education (Georgia State) and Law, Culture and the Humanities (Suffolk). Thanks to Clark Cunningham and Jay Mootz, respectively, for inviting me to participate. Special thanks go to Zenon Bankowski and the late Neil McCormick of the University of Edinburgh for comments on another version of this paper. And thanks, too, to my fellow Fellows of the Dallas Institute of Humanities & Culture, who commented on yet another version during our 2007 Symposium on "Ties That Bind."

institutions.

In the second article, *Arts, Ethics, and the Carnegie Report on Legal Education*, Maksymilian Del Mar argues that the development of ethical education in law schools ought not be restricted to the use of textual resources. Historically, text has been the principal object of analysis in legal theory, legal scholarship, and legal practice. To combat this overreliance on text, he first turns to those traditions of moral philosophy that emphasize the importance of “vision” as a form of moral discipline. Then, moving to the Carnegie Report, Del Mar argues that we ought not subsume the development of ethical education under the canopy of professionalism—a canopy already saturated with text. He posits, rather, that the profession of law can be rescued from its ever-increasing formalism and commercialization only through instruments that lie outside the profession—in a word, through “art.” Finally, he makes a number of policy recommendations based on the results of the Beyond Text in Legal Education project at the University of Edinburgh. These recommendations include specific examples of exercises designed to help us “unlearn” traditional ways of reading legal texts and approaches to legal language.

In the third article, *Vico, Llewellyn, and the Task of Legal Education*, Jay Mootz proposes that contemporary discussions about reforms in legal education should be put into a broader historical, philosophical, and ethical perspective. Specifically, he argues that legal education suppresses law’s rhetorical roots, and that this failure is both textual and non-textual in nature. Mootz draws inspiration from an oration delivered by the Italian humanist Giambattista Vico three hundred years ago and an essay published by the American law professor Karl Llewellyn seventy-five years ago. In his oration, “On the Study Methods of Our Time,” Vico lamented the rise of Cartesian critical philosophy at the expense of the cultivation of imagination, prudence, and eloquence. And because Vico discussed law and legal education as his principal example, his oration provides an incredible resource for contemporary deliberations. Llewellyn, too, saw law as something more than a technical discipline and encouraged his students to discover the rhetorical nature of law’s encounters with the larger social drama within which it subsists. Together, then, Vico and Llewellyn offer potent authority for reforms in legal education—reforms aimed at engaging students in law as a complex and dynamic social reality.

## INTRODUCTION

Commentators from John Dewey to Ronald Dworkin have argued that education is essential to the development of a truly democratic society.<sup>1</sup> But the emphasis of this commentary typically focuses somewhat narrowly on the *content* of secondary education or the general need for *access* to higher education. Dworkin, for instance, believes that many of the most important social issues of the day are so complicated that they are beyond the judgment of many ordinary voters, thus causing them to vote (if at all) for candidates based on religious affiliation or personal attractiveness.<sup>2</sup> As an antidote, he suggests that the secondary curriculum be overhauled to include “courses that take up issues that are among the most contentious political controversies of the day . . . .”<sup>3</sup> This aim, though laudable, is likely difficult to achieve (as Dworkin readily concedes). For this reason, I’ve elected to set my sights somewhat lower and to consider whether a narrative theory of law offers opportunities to introduce reforms in *legal* education that could facilitate democratic ends without creating the political difficulties inherent in Dworkin’s proposal.

It sometimes seems as if there are as many accounts of law as there are theorists to sponsor them: formalistic/scientific, realistic, autopoietic, positivist, pragmatic, feminist, Critical Legal Studies (CLS), institutional, post-colonial, and so on. As I have demonstrated elsewhere, narrative theory offers a partial (yet nonetheless significant) account of some aspects of legal systems and related democratic institutions.<sup>4</sup> It is not a comprehensive normative theory of how judges, legislators, and other legal actors should conduct the business of the law. In this respect, I think the narrative theory, as I have stated it, bears some resemblance to the most current version of law and economic theory. When I say “current,” I am thinking foremost of Judge Posner’s latest reflections on the subject; his thoughts are of special importance because he was an early, and certainly the most visible, proponent of economic legal analysis.<sup>5</sup> Posner once hoped

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1. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (Free Press 1997) (1916); RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

2. DWORKIN, *supra* note 1, at 147-50.

3. *Id.* at 148-49.

4. RANDY D. GORDON, *REHUMANIZING LAW: A THEORY OF LAW AND DEMOCRACY* (2010).

5. Posner’s most influential work in the law and economics vein began to appear in the early 1970s. See, e.g., Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) [hereinafter *The Economic Approach*]. The seminal work in what we now think of as law-and-economics analysis traces to a decade earlier, especially with the work of (now Judge) Guido Calabresi and Ronald Coase. See generally Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); R.H. Coase, *The Problem of Social Cost*, 3 J.L. &

that economics held the interdisciplinary key that would unlock the secret to a perfectly functioning legal system (and explain the breakdowns in less than perfectly functioning legal systems). Thus, in 1975, he was able to opine that:

[An] important finding emerging from the recent law and economics research is that the legal system itself—its doctrines, procedures, and institutions—has been strongly influenced by a concern (more often implicit than explicit) with promoting economic efficiency. . . . The idea that the logic of the law is really economics is, of course, repulsive to many academic lawyers, who see in it an attempt by practitioners of an alien discipline to wrest their field from them. Yet the positive economic analysis of legal institutions is one of the most promising as well as most controversial branches of the new law and economics. It seeks to define and illuminate the basic character of the legal system, and it has made at least some progress toward that ambitious goal.<sup>6</sup>

More recently, however, Posner has retreated from the notion of an all-embracing theory of law formed by yoking the precepts of a unified normative system (like utilitarianism) to the teachings of economics.<sup>7</sup>

But that does not mean that economics does not inform legal analysis in deep and significant ways. For good or ill, economic concepts have swamped all others in my primary practice area (antitrust). In most federal courts, an antitrust plaintiff cannot get out of the gate in most types of cases brought under the Sherman Act unless he can plead—in his initial complaint—that competition has been injured in a market defined in precise *economic* terms.<sup>8</sup> This holds true for all suits, no matter how ruthlessly anticompetitive the conduct at issue is alleged to be. As a consequence, it is impossible to practice or *to teach* antitrust law without having a solid working knowledge of economic concepts. Antitrust law thus illustrates one of many doctrinal corners of the law that has become inherently interdisciplinary both as a matter of practice and pedagogy. As Posner

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ECON. 1 (1960).

6. *The Economic Approach*, *supra* note 5, at 763-64.

7. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 78 (2003) (stating that “[i]t has been many years since I flirted with such an approach” regarding the legal and economical method).

8. See, e.g., *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 628 (5th Cir. 2002) (“Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.”).

aptly observes,

[o]ne by-product of [law and economics] research that has considerable pedagogical importance has been the assignment of precise economic explanations to a number of fundamental legal concepts that had previously puzzled students and their professors, such as “assumption of risk,” “pain and suffering” as a category of tort damages, contract damages for loss of expectation, plea bargaining, and the choice between damages and injunctive relief.<sup>9</sup>

What is important here is the way that economics has been seamlessly integrated into a wide range of doctrinal law school courses, rather than being cabined solely in a “Law and Economics” seminar, as are so many supposed “interdisciplinary” offerings. It is this aspect that is worth exploring at length in the context of narrative theory, but a consideration of broader issues in legal education must come first.

### THE “DISCIPLINE” OF LAW SCHOOLS



Outside the west entrance to Columbia Law School stands Jacques Lipchitz's massive *Bellerophon Taming Pegasus*.<sup>10</sup> The sculpture towers

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9. *The Economic Approach*, *supra* note 5, at 764.

10. I have drawn the basic factual background on the sculpture from Columbia's own account.

over Revson Plaza, into which it is seemingly spiked, and—with its furious circularity—contrasts neatly with the strong vertical lines of the main Law School building (not so affectionately known to its current and former students as “The Toaster”).<sup>11</sup> I mention its context because this is a case in which context is of extraordinary interpretive importance, as Lipchitz himself suggested: “Don’t expect a blinded lady with scales and all those things from me,” when Columbia Law School approached him in 1964 with the proposed commission.<sup>12</sup> Lipschitz continued, “I will try to think of something else.”<sup>13</sup> What he thought of was a particular Greek myth, the story of how Bellerophon—armed with a golden bridle that Athena provided—tamed Pegasus and used him to complete a series of tests that Zeus had devised.<sup>14</sup> To Lipchitz, the story of Bellerophon represented the dominance of man over nature: “You observe nature, make conclusions, and from these you make rules . . . and law is born from that . . . .”<sup>15</sup>

Against this backdrop, there are, I think, two overlapping ways of looking at the sculpture that are relevant to our discussion, each of which is suggested by a different word in the sculpture’s literal context. First, we can emphasize the word “law” in Columbia Law School. From that vantage point, the bridle represents law, one of the instruments with which man gains dominion over nature. Second, we can emphasize “school.” From that perspective, the bridle represents legal pedagogy, the way that students are taught “to think like a lawyer.” I think one wag of a law professor opened this second line of inquiry—though facetiously, of course—when he told the *New York Times* at the installation ceremony, “That looks like me trying to teach criminal law.”<sup>16</sup>

If we think about the word *education*, and look at the fossilized metaphor within it, “to lead,” we instantly see the link to Bellerophon and his bridle and the further problematic associations of that image: *break* to lead, *break* to ride.<sup>17</sup> The *Carnegie Report* tacitly examines the disturbing implications of this image by, ironically enough, picking through some of

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That information and more can be found at *Flying Horses, Tightrope Walkers and Other Campus Icons*, Columbia Law School, Aug. 2007, [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2007/august07/sculptures](http://www.law.columbia.edu/media_inquiries/news_events/2007/august07/sculptures) [hereinafter *Flying Horses*] (last visited Nov. 3, 2010).

11. *Id.*

12. *Id.*

13. *Id.*

14. See generally ROBERT GRAVES, GREEK GODS AND HEROES 74-76 (1960) for the full story of Bellerophon.

15. *Flying Horses*, *supra* note 10.

16. *Id.*

17. Dean David Schizer speaks from time to time about the ambiguous meaning of the sculpture and its placement.

the talks that Professor Karl Llewellyn gave to his first-year law students at Columbia (decades before the Bellerophon-Pegasus sculpture was installed on the campus).<sup>18</sup> In these talks, which he later expanded and collected in *The Bramble Bush*, Llewellyn explained the process of legal education in terms that frankly admit, and seemingly revel in, its dehumanizing aspects:

It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in the social experience. None the less, it is an almost impossible process to achieve the technique without sacrificing some humanity first. Hence, as rapidly as we may, we shall first cut under all the attributes of *homo*, though the *sapiens* we shall then duly endeavor to develop will, we hope, regain the *homo*.<sup>19</sup>

If there's any doubt that this "cutting under" that Llewellyn identifies is anything other than Bellerophon violence, that doubt is erased as Llewellyn "warms to his theme":

The first year . . . lays a foundation simultaneously for law school and law practice. It aims, in the old phrase, to get you "thinking like a lawyer." The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate the machinery of the law.<sup>20</sup>

Times have not changed all that much, as the *Carnegie Report* confirms in its observation that the "temporary moral lobotomy" is still a prominent feature of contemporary law school pedagogy.<sup>21</sup> Philip Kissam thus likens legal education to a Foucaultian discipline.<sup>22</sup> In his *The*

18. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 77-78 (2007) [hereinafter *CARNEGIE REPORT*] (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 116 (Oceana Publications 1996) (1930)).

19. *Id.* at 78 (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 101 (Oceana Publications 1996) (1930)).

20. *Id.* at 77-78 (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 116 (Oceana Publications 1996) (1930)).

21. *Id.* at 78.

22. PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 4 (2003). Kissam is picking up on Michel Foucault's suggestion that social institutions are built around systems of disciplinary power designed to make people compliant, efficient producers. See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan



*Discipline of Law Schools: The Making of Modern Lawyers*, Kissam is concerned with testing many of the cherished assumptions upon which American legal education has rested since Llewellyn's time and decades before.<sup>23</sup> While his critique is comprehensive, this article focuses on a couple of his points—viz., how law schools teach students to read, write, and therefore think about the law in ways that are ultimately constraining, yet needlessly so:

The discipline teaches *instrumentalist habits of reading and writing* that both empower and limit future lawyers. These habits consist of quick, productive but often superficial ways of reading legal texts and writing about law, and they are linked to the law school's distinctive oral culture, which celebrates oral heroism and tacitly devalues complex reading and writing. The law school's distinctive oral culture in turn rests upon the discipline's case method, its large amphitheater classrooms, its Moot Court exercises and the speech-like forms of effective final examination writing. But this oral culture and the instrumentalist reading and writing habits of law schools tend to subordinate more complicated, more reflective, more critical and more imaginative ways of reading, writing and thinking about the law.<sup>24</sup>

One aspect of this stands out above all others: the reliance on the case law method and the specialized narrative form upon which it is based.

Many observers of legal pedagogy hold that the case method is linked with the popular self-belief that the law school's highest mission is to teach how to—as Llewellyn stated in the quotation above—“think like a lawyer.”<sup>25</sup> When the case method arced into ascendancy in the late nineteenth century, there were few options for learning law other than through apprenticeships or “reading” law, the latter of which amounted to reasoning out legal propositions by seeing what courts had done when faced with different fact patterns.<sup>26</sup> In 1870, the notion of learning law by reading about it was formalized in the system devised by Christopher Columbus Langdell, the then-Dean of Harvard Law School, which promoted the use of casebooks and the study of appellate court opinions as the primary means of learning to apply reason to legal materials.<sup>27</sup> The Langdellian system has

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Sheridan Trans., Pantheon Books 1977) (1975).

23. KISSAM, *supra* note 22.

24. *Id.* at 7 (footnotes omitted).

25. See, e.g., CARNEGIE REPORT, *supra* note 18, at 47; Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 95 (2002).

26. See CARNEGIE REPORT, *supra* note 18, at 47.

27. Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1970 (1999).

without doubt been modified over the course of more than a century, but I think that most law professors in the United States would probably agree that the casebook/case method of instruction still rules the schools, especially in first-year core classes. It thus behooves us to consider exactly what this “method” entails.

Casebooks are, as Kissam aptly and ironically describes them, “large heavy books that are bound in serious, somber colors, blue, black or deep red, and carry serious, somber titles such as ‘Contracts Law: Cases and Materials’ or ‘Federal Income Taxation.’”<sup>28</sup> These books consist largely of excerpts of appellate court opinions (in some subjects mostly from the United States Supreme Court), together with summaries of related cases, blurbs from scholarly writing, and a few discussion questions and hypotheticals. Some casebooks—especially those prepared by editors with cross-disciplinary leanings (e.g., economics)—may also include materials designed to provide an analytical framework within which to evaluate particular decisions. But, as Professor Michael Hoeflich has observed, even in doctrinally expansive casebooks, “the editors rarely consider the broader context of the case as published nor do they suggest that reported decisions may not, in fact, give full accounts of ‘what really happened.’”<sup>29</sup> By “broader context” Hoeflich is thinking principally of things social and historical—i.e., the sort of materials that would make it possible for a reader “to understand and evaluate the origin, historic rationale, or legitimacy of the decision.”<sup>30</sup> As a consequence, Kissam concludes, “[t]he structure of casebooks makes it difficult to understand opinions as comprehensible narratives, as comprehensible parts of larger coherent doctrinal or social contexts, or as useful subjects for the development of legal arguments, counter-arguments and criticism.”<sup>31</sup>

How is it that nearly the entire profession of law teaching came to rely on teaching materials that are so open to criticism? The answer is found in the pedagogical system that the casebooks are intended to serve: the case method.

[This method] rests upon the belief of Langdell that law was a science and that law had underlying and universally applicable laws just as did the physical sciences. He further believed that these rules could best be learned by students through a process of exploration of what he

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28. KISSAM, *supra* note 22, at 31.

29. M. H. Hoeflich, *On Reading Cases: The Law Student in Wonderland*, 42 SYRACUSE L. REV. 1163, 1180 (1991).

30. *Id.*; see also Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 93 (2001) (“What is going on in the case is very largely incomprehensible.”).

31. KISSAM, *supra* note 22, at 32.

considered to be the raw material of the Common Law: appellate decisions. Thus, the purpose of introducing students to cases in the law school curriculum was *not* to teach them how to read cases critically nor to teach them how the law works in action, nor to teach the relationship between law and society. Rather, the purpose of teaching through cases was to teach students how to read cases for doctrinal rules and teach students how to distinguish between various fact patterns so as to determine which doctrinal rules would apply in new circumstances. This is the essence of what has come to be called “black letter law.” The casebook as a teaching device derives directly from the need of the case method teacher to have a series of cases which clearly and concisely lay out the doctrinal rules that the law professor wants to teach.<sup>32</sup>

This emphasis on rule-identification has of course moderated over time, as witnessed by, for instance, the inclusion of social policy and interpretive theory discussions in casebooks and classrooms. But the method's primacy—especially in first-year classes—remains assured for a variety of reasons that range from the perceived need to conduct large classes in an orderly fashion, to base grading on end-of-the-semester, issue-spotting examinations, and ultimately to prepare students for rule-driven bar examinations.<sup>33</sup>

The case method no doubt effectively serves these needs. This service comes, however, at a significant associated cost, as the *Carnegie Report* makes clear.<sup>34</sup> There is a basic polarity in how lawyers think and thereby perform their greater social functions. In one mode, the analytical, “things and events are detached from the situations of everyday life and represented in more abstract and systematic ways.”<sup>35</sup> This way of thinking promotes stability and consistency. In the other mode, the narrative, “things and events are given significance through being placed in a story, an ongoing context of meaningful interaction.”<sup>36</sup> Things *human* (e.g., meaning and values) reside here. Both modes are vital and significant, but the case method privileges the former over the latter, as the *Carnegie Report* finds:

[The analytical mode] holds out the prestige of academic recognition, likely career success, and the apparent satisfactions of remaining too tough to fall into Llewellyn's “woozy thinking.” [The narrative mode] continues to make appeals to conscience and the ideals of the

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32. Hoeflich, *supra* note 29, at 1178-79.

33. See KISSAM, *supra* note 22, at 37-50.

34. CARNEGIE REPORT, *supra* note 18, at 82-84.

35. *Id.* at 83.

36. *Id.*

profession. However, by now it should be obvious that this is by no means an even contest for the hearts and minds of law students. The first-year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as Llewellyn put it, away from cultivating the humanity of the student and towards the student's re-engineering into a "legal machine."<sup>37</sup>

With this backcloth stitched into place, the next issue is the central feature of the case method, viz. the edited appellate opinion, and what that implies. An appellate opinion almost always takes a narrative shape, but that narrative is highly concentrated and formalized. The final opinion in any given case stands at the head of a series of narrative regressions, those resulting from opinions below, testimony of parties and witnesses, statements and briefs of counsel, and, no doubt, many others. The opinion that we find in a reporter is thus just the last—not the only—narrative in the record of a case, even though over time it may be the only generally available trace of a matter that is left to posterity.<sup>38</sup> But by no means can the opinion be taken as a complete statement of what really happened as a matter of history. At most, the facts as stated are conclusive only in the sense that they may bind the parties and perhaps those in privity with them. In sum, narrative coherence comes at the expense of narrative completeness. And this has undesirable pedagogical consequences because, as the *Carnegie Report* warns, casebook opinions are highly reduced accounts of litigation that can give the misleading impression that "facts" are easily discovered, rather than resulting from multiple (usually conflicting) interpretations and presentations.<sup>39</sup>

The version of an opinion that we find in a casebook (because of editing, topical organization, and surrounding commentary) is in some sense a revision and re-contextualization of a case's final narrative. Though extrajudicial, this type of modification is of great importance because many bedrock cases are never read by lawyers outside of law school. As such, it suffers from two inherent deficiencies. First, as with the full version published in a reporter, the casebook version is cut off from the underlying narrative record upon which it is based. We must thus take it on faith that the judge who wrote a particular opinion did so in good faith and fairly and accurately described the facts, but this cannot always be the case; "we must also, in this post-Realist world, accept the possibility that judges edit the

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37. CARNEGIE REPORT, *supra* note 18, at 84.

38. In a masterful examination of law's untold stories, Robert Ferguson shows how particular narrative pieces of a proceeding can be repressed and contained outside an official trial record. See Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 84 (Peter Brooks & Paul Gewirtz eds., 1996).

39. CARNEGIE REPORT, *supra* note 18, at 53.

facts and analysis which they include in their published opinions.”<sup>40</sup> The reasons for this editing can range from the benign (trying to keep an opinion to a manageable length), to the problematic (tailoring the facts, perhaps subconsciously, to fit a personal or political agenda), to the corrupt (reaching a decision based on bribery). And we must remain largely ignorant of these reasons and editorial choices because we have no way to test the final, published narrative against its building blocks in the overall record—all we see is what the judge wants us to see. In short, the decision to conceal or foreground a narrative is a rhetorical decision that was made long before the printed page passes before our eyes. But we can sometimes catch that decision’s shadow in a case in which multiple judges write opinions.

Let’s take an example. *Ake v. Oklahoma* grew out of an especially horrid multiple homicide that took place outside Oklahoma City in the late 1970s.<sup>41</sup> The crime had a deep public impact, so much so that I recall people still talking about it in private conversations when I practiced law in Oklahoma City some fifteen years later. One of the murderers, Glen Burton Ake, was convicted of the crime, but he appealed to the United States Supreme Court, arguing that the State of Oklahoma had violated his due process rights by failing to provide him with a psychiatrist to testify in his defense.<sup>42</sup> Justice Marshall, writing for the majority, had to say: “Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children.”<sup>43</sup> The remainder of his factual recitation deals with Ake’s mental instability, pretrial psychiatric treatment, and competence to stand trial.<sup>44</sup> Justice Rehnquist, in dissent, had a much different story to tell:

Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12-year-old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other

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40. Hoeflich, *supra* note 29, at 1165.

41. *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985).

42. *Id.* at 73-74.

43. *Id.* at 70.

44. *Id.* at 70-73.

members of her family.

Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and to drive to the home of a nearby doctor. Ake and his accomplice were apprehended in Colorado following a month-long crime spree that took them through Arkansas, Louisiana, Texas, and other States in the western half of the United States.<sup>45</sup>

Why such a contrast between the two opinions? Justice Marshall has concluded that Ake's rights were violated and that his conviction should be reversed.<sup>46</sup> Straying into the facts of the crime itself could only detract from the rhetorical inevitability of that holding.<sup>47</sup> Justice Rehnquist, on the other hand, believed that Ake was a faker and pointed to evidence in the record in which Ake told a cellmate that he was going to "play crazy."<sup>48</sup> Thus, Justice Rehnquist wanted to paint Ake as acting with conscious deliberation as he went about his heinous acts—i.e., he may have been Satanic, but he was sane.<sup>49</sup> A reader, however, cannot go further because there is not enough evidence. But one can see that Justice Marshall must shunt the multiple-murder-attempted-rape-of-a-twelve-year-old story to the side to stake his claim to authority, whereas Justice Rehnquist must do the opposite.

The second point of the analysis is that a casebook editor further eliminates content, generally to draw attention to a particular doctrinal aspect of a case. An editor selects cases because she believes that each of them well illustrates a rule, the development of a rule, or the application of a rule; thus, each case is edited and slotted into a casebook according to the editor's overall organizational rubric. If context adds meaning—and I think it indisputably does—then where an opinion is placed in a casebook adds an important dimension to the opinion. Here is an illustration: I just pulled four antitrust casebooks from my bookshelf, one by Andersen and Rogers

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45. *Ake v. Oklahoma*, 470 U.S. 68, 88 (1985) (Rehnquist, J., dissenting).

46. *Id.* at 86-87.

47. For a thorough rhetorical analysis of *Ake*, see Shulamit Almog, *As I Read, I Weep—In Praise of Judicial Narrative*, 26 OKLA. CITY U. L. REV. 471, 479-84 (2001).

48. *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting).

49. See Almog, *supra* note 47, at 483. Justice Rehnquist renders Ake's acts purposeful by carefully selecting active verbs that form a coherent sequence linking the initial acts of quitting a job and borrowing a car to the ultimate crimes of attempted child rape and murder. *Id.*

that I use in the course I teach at Southern Methodist University,<sup>50</sup> one from a practitioners' seminar I took about ten years ago by Areeda and Kaplow,<sup>51</sup> and two others that publishers have sent me for review, the first by Morgan and the second by Goetz and McChesney.<sup>52</sup> I searched through each to see what the editors had done with one of the most-cited cases in all of private antitrust litigation, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>53</sup> Andersen and Rogers edit the case down to a bit more than five pages (including eight of the opinion's original footnotes) and place it as the first case in a section entitled "Private Enforcement."<sup>54</sup> That placement makes sense, given that the case is more important in the civil litigation context than in others, such as criminal enforcement. Morgan slims the case down by another page, largely by using only two footnotes, and lodges it at the end of the first subsection called "The Transition Cases" in a chapter focusing on developments since 1975.<sup>55</sup> Morgan emphasizes history over practical application in his casebook, so he has selected *Brunswick* as one of several examples of the modern Supreme Court's application of economic analysis to antitrust problems and to show how the Court began to change the field of operation of the federal antitrust laws.<sup>56</sup> In short, he locates the case within a historical narrative and uses it as an element of his retelling of that narrative. The other two casebooks, Areeda/Kaplow and Goetz/McChesney, do not reprint *Brunswick* at all. Areeda and Kaplow, however, include a summary of the case and quote the sentence for which *Brunswick* is most often cited in a subsection entitled "Antitrust Injury,"<sup>57</sup>

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50. WILLIAM R. ANDERSEN & C. PAUL ROGERS III, *ANTITRUST LAW: POLICY AND PRACTICE* (3d ed. 1999).

51. PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (4th ed. 1988).

52. THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* (3d ed. 2005); CHARLES J. GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* (3d ed. 2006).

53. *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). This case is important because it limits the category of private plaintiffs entitled to sue under the federal antitrust laws to those who can show "antitrust injury," a concept that has proven slippery in subsequent attempts at application. *Id.* at 489 ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.").

54. ANDERSEN & ROGERS, *supra* note 50, at 754-59.

55. MORGAN, *supra* note 52, at 486-90.

56. To this day, that process continues. For instance, the United States Supreme Court recently held that vertical price fixing (resale price maintenance) should no longer be considered per se illegal and should be viewed under the rule of reason. *Leegin Creative Leather Products v. PSKS Inc.*, 551 U.S. 877, 888-89 (2007). In taking this step, the Court overruled one of its most venerable precedents, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). See *Leegin*, 551 U.S. at 882.

57. AREEDA & KAPLOW, *supra* note 51, at 96-97.

while Goetz and McChesney reprint cases that cite to *Brunswick*.<sup>58</sup>

What do these various approaches tell us? At the one extreme, Goetz and McChesney imply that *Brunswick* itself is less important than the more recent cases that cite it. In some ways, though, this is like reading the last chapter in a novel without reading the first chapter.<sup>59</sup> Granted, a casebook cannot include all—or even many—cases in a series, but it seems to me that foundational cases that have led to splintered or confused subsequent authority are worth direct analysis. One step up the ladder is Areeda and Kaplow's one-paragraph summary of *Brunswick*, which reduces the case to a rule, supported by a few sentences of factual recitation and commentary. If there is a teleology to the case method, then the Areeda and Kaplow approach to *Brunswick* neatly illustrates it: important cases can be boiled to an essence. This may often be true, but it guides students towards a very narrow way of reading. And, as Kissam suggests, it also tacitly teaches students that if that is all there is to the lawyerly enterprise, then there are surely more efficient ways of getting to and mastering rules than rooting them out of musty casebooks like truffles from the forest floor: one common method is to turn to commercial outlines, in which the truffles come pre-rooted.<sup>60</sup> But no matter what option the beginning student takes,

[all this] is likely to encourage an analytical, instrumentalist way of reading to obtain “the rules” of at least “the major” cases, for it is these rules that will seem most available and desirable to a bewildered, disoriented law student or to one who is simply pressed for time. Understanding “the rules” will appear to be a rational means of preparing for class discussions and especially for examinations, where students need a grasp of many legal rules and case holdings in order to identify issues and apply such law quickly to novel situations. This *instrumentalist reading* as a routine will focus students on a certain *analysis* of texts to discover the rules, but it ignores and tacitly discounts other ways of reading that would seek to ascertain the contexts of judicial decisions, solve underlying legal problems, interpret or synthesize complicated legal authorities, or use judicial texts to construct complex arguments.<sup>61</sup>

The other two antitrust casebooks that we have been discussing attempt to avoid the rule-based trap by placing *Brunswick* in a larger

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58. GOETZ & MCCHESENEY, *supra* note 52, at 70, 222, 391.

59. See generally RONALD DWORKIN, *LAW'S EMPIRE* 228-38 (1986) (likening the development of the common law to a “chain novel,” in which successive chapters are written by different authors).

60. See KISSAM, *supra* note 22, at 33.

61. *Id.* at 33-34 (footnotes omitted).



context. I must admit that the practitioner in me favors the Andersen and Rogers approach, five pages of opinion, because it underscores the foundational importance of the case to civil litigation.<sup>62</sup> But, ultimately, this is to locate *Brunswick* and the rule it enunciates within a larger set of rules, principally Section 4 of the Clayton Act, which confers a private right of action on certain persons injured by reason of a violation of the antitrust laws.<sup>63</sup> Morgan, on the other hand, places the case within a historical context, one that reveals an underlying shift in one of the United States' most central public narratives: the story of Big Business.<sup>64</sup> If one reads a novel like Upton Sinclair's *The Jungle*, it's easy to see how that public narrative had tipped in a decidedly populist direction.<sup>65</sup> The Sherman Antitrust Act is a product of that narrative (and the era) no less than the Meat Inspection Act.<sup>66</sup> Furthermore, the Sherman Act's enforcement for the next several decades reflected those origins, since many common business practices were ruled per se illegal, no matter their actual impact on consumer welfare.<sup>67</sup>

In the post-World War II period, the populist, anti-business narrative waned, and by the 1970s—as Morgan points out—the United States Supreme Court increasingly directed lower courts and enforcement agencies to consider the “reasonableness” of practices that had theretofore been deemed unworthy of analysis beyond proof that the alleged conduct had in fact occurred.<sup>68</sup> The reasons for this are complicated and subject to ongoing dispute, but there is no doubt that the Court changed direction and that that change could be marked over the course of the 1960s and 1970s.<sup>69</sup> For our

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62. See ANDERSEN & ROGERS, *supra* note 50, at 754-59.

63. See 15 U.S.C. § 15 (2006).

64. MORGAN, *supra* note 52, at 486-90.

65. UPTON SINCLAIR, *THE JUNGLE* (Penguin 1985) (1906). *The Jungle* attacked a wide range of business practices, ranging from workers' rights, to antitrust, to environmental pollution. *Id.* But it was the disgusting nature of food processing that resonated most deeply with the public. See JAMES HARVEY YOUNG, *PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906* 229 (1989). On the heels of public outcry, Congress passed the Meat Inspection Act, which regulated the conduct of the meat packing industry. *Id.* at 242; see also *IBP, Inc. v. Alvarez*, 339 F.3d 894, 897-98 (9th Cir. 2003). Similarly, the Sherman Act sought to prohibit the economic bad acts (e.g., monopolization and price fixing) of large business trusts—which included the Beef Trust—that resulted in high prices and low quality. See generally MORGAN, *supra* note 52, at 25-31.

66. The current version of this law can be found at 21 U.S.C. §§ 601-695 (2006).

67. See e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 251-54 (1940) (recognizing price fixing as per se illegal); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

68. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 57-59 (1977) (placing territorial restraints on franchisee by franchisor subject to rule of reason); see also MORGAN, *supra* note 52.

69. What Morgan correctly suggests is that change was inevitable by the early 1970s.

purposes, it is enough to note that this narrative revision happened and that Morgan identifies it, thus signaling a possible way of reinvigorating some pedagogical practices. What I am thinking of here are the dimensions that a narrative approach to legal materials might offer. What if—in addition to the public-narrative framework that Morgan employs—students were encouraged to examine the personal narratives that gave rise to particular disputes in the first place? Such an approach would give students a greater sense of how many rules are formed and provide a corrective to the greatest shortcoming of appellate opinions: viz., their inherent narrowness of scope, a subject that calls for greater scrutiny.<sup>70</sup>

### THE PROBLEM WITH APPELLATE PRACTICE AND APPELLATE OPINIONS

Lawyers become so accustomed to reading appellate opinions for rules that it is easy for them to forget how narrowly those opinions are cast—e.g., they have a limited purpose, are subject to powerful generic constraints, and are built on a rhetoric of justification, not description. First, and in some ways most important, appeals are based on particularized points of asserted error in the proceedings below. At the level of the United States Supreme Court, then, it is most unusual for the Court to consider more than one or two narrowly framed issues, and those are selected because of their general importance, not because of their impact on the actual litigants before the Court. These limitations are not a matter of speculation or practitioners' folklore; they are institutionalized in the Court's rules. For example, Rule 10, which sets forth the considerations governing review on a writ of certiorari, specifically states that only extraordinary cases are subject to review, typically cases that involve conflicting decisions among United States courts of appeals or between those courts and state courts of last resort on an "important matter."<sup>71</sup> This means that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

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MORGAN, *supra* note 52, at 467. The economy had become so complex that per se rules could no longer be trusted to produce desired results, and many older decisions either made little sense in the revised context or could not be logically extended to new situations or technologies. *Id.* At the same time, influential critics like Robert Bork and Richard Posner made powerful thrusts against the received wisdom; these critics found sympathetic ears amongst the judiciary, including the Supreme Court, the composition of which radically changed with the turnover of four seats between 1970 and 1975. *Id.*

70. It's also worth mentioning that classroom practices exacerbate the impetus of the appellate opinion to narrow: "instructors encourage students to construct a particular form of knowledge—a legal understanding of events that filters out some aspects of the narratives under analysis while selecting and extracting the legally relevant 'fact pattern' for attention." CARNEGIE REPORT, *supra* note 18, at 63.

71. SUP. CT. R. 10(a).

factual findings or the misapplication of a properly stated rule of law”<sup>72</sup> and assures that only a certain type of case is heard. In addition to Rule 10, Rule 14 assures that the case is narrowly presented in a way that suppresses the matter’s narrative aspects.<sup>73</sup> This rule, which mandates the content (and thereby the non-content) of a petition for a writ of certiorari, reveals a decidedly anti-narrative bias, one focused on narrowly cast legal questions.<sup>74</sup> It essentially directs that all appellants use a one-size-fits-all formula under which:

- The questions presented for review [must be] expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. . . . The questions shall be set out on the first page following the cover, and no other information may appear on that page. . . .<sup>75</sup>
- A concise statement of the case set[s] out the facts material to consideration of the questions presented. . . .<sup>76</sup>
- A direct and concise argument amplif[ies] the reasons relied on for allowance of the writ.<sup>77</sup>
- A petition for a writ of certiorari should be stated briefly and in plain terms. . . .<sup>78</sup>
- The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.<sup>79</sup>

This emphasis on concision, directness, and brevity has certain consequences, the most important being that from the very outset, a Supreme Court appeal will have a tightly circumscribed, rule-focused ambit. It should come as no surprise, then, that most appellate opinions mirror the petitions of which they are mere culminations.

Professor Robert Ferguson has identified a number of generic characteristics in appellate opinions: a monologic voice, an interrogative

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72. SUP. CT. R. 10.

73. SUP. CT. R. 14.

74. *Id.*

75. SUP. CT. R. 14(1)(a).

76. SUP. CT. R. 14(1)(g).

77. SUP. CT. R. 14(1)(h).

78. SUP. CT. R. 14(3).

79. SUP. CT. R. 14(4).

mode, and a declarative tone, all of which cohere in what he refers to as “rhetoric of inevitability.”<sup>80</sup> As Ferguson correctly notes, the question that a court chooses to answer—and the way that it chooses to frame that question—is so fundamental that the process becomes “the methodological anchor of judicial rhetoric.”<sup>81</sup> Not surprisingly, therefore, appellate counsel devote much attention to hitting just the right notes in the version of the question presented that they intend to sponsor because “[t]hey understand what an earlier member of the profession, Francis Bacon, observed four centuries ago: the questions we ask shape our knowledge far more than do the theories we propose.”<sup>82</sup> In practice, this means that every stroke of the oar—from start to finish in the appellate process—will be aimed at guiding the court to a “correct” statement of a question (or a few questions).

By emphasizing the generic importance of questions presented in appellate opinions, it is not meant to deny that those opinions have a narrative dimension. They do. But it is a type of narrative quite different from the complex of narratives that makes up the case prior to its arrival at the appellate court. The appellate narrative is, as Ferguson explains, driven by a declarative tone, one designed at once to simplify and to convey certitude:

The courtroom, as forum, takes the complexity of event—the original disruption that provokes legal action in the first place—and transfers aspects of that complexity into a narrative, the written form of which is a literal transcript of what has been said in court.

The judicial opinion then appropriates, molds, and condenses that transcript in a far more cohesive narrative of judgment, one that gives the possibility of final interpretation by turning an original event into a legal incident for judgment. Judgment, in turn, guides a general cultural understanding of the original event for consumption beyond the courtroom. . . . Every step of the process requires an unavoidable series of simplifications. Judgment must reduce event to an incident and further reduce incident to a narrative about acceptable behavior. This is its mission. Everything about the enterprise, including the listener-reader of the judicial opinion, welcomes the declarative tones that make it possible.<sup>83</sup>

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80. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213 (1990).

81. *Id.* at 208.

82. *Id.* (citing William J. Chambliss, *Toward a Radical Criminology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 230 (David Kairys ed., 1982)).

83. *Id.* at 211. Sanford Levinson has noted how the tone of confidence present in most appellate opinions often obscures an underlying ambivalence. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 189 (Peter

This is just another aspect of the process by which particulars can become universals and of how individual, personal narratives can become strands in a higher-order narrative fabric (e.g., a new legal rule can grow out of the stories told in case of first impression). This process of narrative distillation is effective at *making* rules, but it impedes the process of *understanding* rules because it necessarily obscures their narrative roots. And the editing of opinions for inclusion in casebooks thickens the cloak that is always already wrapped around an appellate opinion. Is there a classroom solvent that will help strip away this cloak?

### (RE)INTRODUCING NARRATIVES IN THE CLASSROOM

This Article proposes such a solvent: more exposure to the narratives, large and small, that underlie case opinions. The method does not suggest an abandonment of all rule-based teaching; rather, it advocates the greater use of narrative material across the curriculum so that students will have another set of tools with which to evaluate and criticize legal propositions.<sup>84</sup> If the original justification for common law rules usually follows the rubric of the normative/narrative syllogism, then in any given case, it would be helpful to know what narrative elements figured, or did not figure, in the formulation of the premises that led to the conclusion.<sup>85</sup> Armed with that information, a reader has an important critical tool with which to evaluate the original legitimacy or the continuing vitality of precedent. As the *Carnegie Report* puts it, “[a]wareness of narrative and context bring[s] . . . principles alive while also giving conceptual nuance to their meaning.”<sup>86</sup> The following examples illustrate the point. First, there are the relatively easy situations in which certain lines of cases are tainted because of corruption. For instance, because of the Oklahoma Supreme Court scandal in the late 1950s and early 1960s, Oklahoma practitioners view many

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Brooks & Paul Gerwitz eds., 1996). “How often,” he asks, “does one find a judicial opinion that frankly says that the question is an exceedingly close one . . . ?” *Id.* Not often. *Id.* The reason, he suggests, is that a turn to judicial modesty in the face of a close call might be taken as a sign of the “terrifying arbitrariness that underlies much of the legal system” and as proof that any decision results from something other than the operation of the rule of law. *Id.*

84. It may be that certain types of narrative materials (I’m thinking especially of literature) may be better suited to some subjects than others. Simon Stern proposes, for instance, that novels may contribute to our understanding of evidence law (and vice versa) because “[t]he legal question of evidence and the literary question of closure converge as aspects of legal aesthetics.” Simon Stern, *Literary Evidence and Legal Aesthetics*, in *TEACHING LITERATURE AND LAW* 13 (Austin Sarat et al. eds., forthcoming 2010), available at <http://ssrn.com/abstract=1378337> (follow “One-Click Download” hyperlink).

85. GORDON, *supra* note 4, at ch. 2 (showing how legal rules are modified over time to encompass new situations while still following an if-then justificatory pattern).

86. CARNEGIE REPORT, *supra* note 18, at 124 (discussing interaction of narratives and legal principles in the context of clinical education).

opinions authored by Justice Nelson Corn with suspicion.<sup>87</sup> But relatively few readers outside Oklahoma know that, and the opinions still appear right there in the Pacific Reporter, waiting for the unwitting to read and rely on them.<sup>88</sup> They bear no facially evident mark of the bribes that may have influenced any one of them. In fact, most of them seem reasonable, and an impartial, uncorrupted judge may very well have decided them the same way. But they are nonetheless illegitimate, and we can only know that through narratives existing outside the opinions themselves.

More troublesome are opinions that are driven by bias, yet manage to mask the fact with an admixture of authoritative tone and high-sounding rhetorical devices.<sup>89</sup> This is to say that not all biased decisions proudly announce themselves as such in the transparent manner of *Plessy*,<sup>90</sup> *Muller*,<sup>91</sup> or *Bowers*.<sup>92</sup> Hoeflich neatly illustrates this in a discussion of *Taft v. Hyatt*,<sup>93</sup> a case that is often cited for a basic contract principle and is sometimes anthologized or summarized in casebooks.<sup>94</sup>

First is a summary of the case, followed by Hoeflich's conclusions

87. See Judith L. Maute, *Peavyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1462 (1995). Justice Corn was convicted and imprisoned for evading federal income tax on bribes that he had taken while sitting on the Oklahoma Supreme Court in the 1950s. See *The Law: Oklahoma's Shocking Scandal*, TIME, Apr. 16, 1965, available at <http://www.time.com/time/magazine/article/0,9171,841846.00.html>.

88. A similar—and more widely known—example is that of Judge Martin Manton, a former Chief Judge of the United States Court of Appeals for the Second Circuit. Hoeflich, *supra* note 29, at 1167. Judge Manton was widely admired for his skill in handling bankruptcy cases. But, alas, Judge Manton fell upon hard times himself (he had built a considerable real estate empire in New York that suffered after the Crash of 1929), and he began to entertain bribes. *Id.* Thereafter, “[h]e continued to write model decisions in bankruptcy cases complete with factual and analytic narratives appropriate to the results. What he did not include in these published decisions was the fact that really decided the cases: who paid him the highest bribe.” *Id.*

89. I am not offering these observations as a sponsorship of a Realist or CLS claim that all legal decisions are arbitrary, political, or elitist. That argument is for another day. Here, I intend for us to test the notion that, for instance, there are prosaic cases that may have been covertly influenced by the type of racial animus that is overtly stated in *Dred Scott* or *Plessy*. We can do this, I think, without deciding how far one should push Llewellyn's famous fillip that “our government is not a government of laws, but one of laws through men.” Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243 (1931). For a summary of CLS positions on judicial discretion and indeterminacy, see Stephen B. Presser, *Some Realism about Orphism or The Critical Legal Studies Movement and the New Great Chain of Being*, 79 NW. U. L. REV. 869 (1984).

90. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

91. *Muller v. Oregon*, 208 U.S. 412 (1908).

92. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

93. *Taft v. Hyatt*, 180 P. 213 (Kan. 1919).

94. See Hoeflich, *supra* note 29, at 1167-79.

based on his reading of it, followed in turn by an analysis of observations that would leave a law class suspended in a state of indeterminacy that is nonetheless instructive.<sup>95</sup> The case was essentially an interpleader action in which members of a group that had offered a reward for the apprehension of a criminal pled (i.e., paid) money into a court so that rival claimants could set up their respective claims to the reward.<sup>96</sup> One of the three claimants had prevailed in the trial court.<sup>97</sup> The background facts are these: on May 16, 1917, residents of a small southeastern Kansas town, Parsons, learned that Agnes Smith—the wife of a local physician, Dr. Asa Smith—had been assaulted (she later died).<sup>98</sup> Another physician, Dr. Robert Smith, was suspected of the crime; he soon went into hiding.<sup>99</sup> All three of the Smiths were African-Americans.<sup>100</sup> At some point before the afternoon of May 17, a local group that Hoeflich identifies as the Anti-Horse Thief Association (referred to as A.H.T.A. in the opinion) offered and publicized a \$750 reward for the arrest or information leading to the arrest of Robert Smith.<sup>101</sup> Dr. Asa Smith was a member of this group.<sup>102</sup>

During the afternoon of May 17, William Hyatt, a Parsons attorney, learned that Robert Smith wanted to meet with him.<sup>103</sup> Hyatt went to Smith's hideout, where "[t]he two talked together for an hour or more, but were unable to reach an agreement as to the employment of Hyatt to defend Smith."<sup>104</sup> Before this meeting, Hyatt knew of the reward.<sup>105</sup> In what may be a recurring lawyer fantasy (unacted upon, one would hope) in the face of a potential client unwilling to put up a retainer, Hyatt returned from the meeting and immediately told the county attorney where Smith was hiding.<sup>106</sup> He even accompanied the deputy sheriff on the mission to arrest Smith.<sup>107</sup> But in the meantime, Smith had been spirited away to nearby Oswego, Kansas, by a group of five members of the Lodge of Colored Masons and Thomas Murry, the chief of police of Parsons, all of whom considered Smith's fears of mob violence well-founded.<sup>108</sup> Before the party

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95. See Hoeflich, *supra* note 29, at 1167-79.

96. Taft v. Hyatt, 180 P. 213 (Kan. 1919).

97. *Id.* at 213-14.

98. *Id.* at 214.

99. *Id.*

100. *Id.*

101. *Id.*; Hoeflich, *supra* note 29, at 1169.

102. Taft v. Hyatt, 180 P. 213, 214 (Kan. 1919).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Taft v. Hyatt, 180 P. 213, 214 (Kan. 1919).

left for Oswego, where Smith was ultimately placed in the custody of the Labette County Sheriff, Murry placed Smith under arrest.<sup>109</sup> At the time of that arrest, Murry knew of the reward; the rest of the group did not.<sup>110</sup> Hyatt, Murry, and the five members of the Colored Masons all claimed that the reward was theirs.<sup>111</sup>

At trial, Hyatt prevailed, and the other claimants appealed that judgment.<sup>112</sup> The Kansas state supreme court took each of the rivaling claims in turn and found them all wanting.<sup>113</sup> Hyatt, the court held, was not eligible to receive the reward because his actions (even setting aside his unconscionable use of prospective client information for his own pecuniary gain) did not lead to the arrest of Smith.<sup>114</sup> It surely could have—had Smith remained at their meeting place—but it did not. Specifically, the court found: (1) the information Hyatt gave would have led to the arrest of Smith, had the authorities acted promptly, and (2) the fact that his information did not lead to an arrest was through no fault of his own.<sup>115</sup> But none of that helped Hyatt's case because, in fact, others were the producing cause of the arrest.<sup>116</sup> Thus, the court curtly concluded, "Hyatt might as well have kept his information to himself."<sup>117</sup> Murry's actions, on the contrary, actually did lead to Smith's arrest—he in fact arrested him.<sup>118</sup> But the court acknowledged and relied on well-settled law that a police officer may not "claim a reward for merely doing his duty."<sup>119</sup> In other words, because Murry was the chief of police, he had a duty to arrest fugitives and others criminal suspects. So even though he had no warrant, he nonetheless had reasonable grounds for believing Smith had committed the offense charged.<sup>120</sup>

That left the collective claim of the members of the Colored Masons. It is this claim that led to the establishment of the rule for which the case is most often cited.<sup>121</sup> The critical facts for the court were that this group of

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109. Taft v. Hyatt, 180 P. 213, 214 (Kan. 1919).

110. *Id.*

111. *Id.*

112. *Id.* at 214.

113. *Id.* at 214-15.

114. *Id.* at 215.

115. Taft v. Hyatt, 180 P. 213, 215 (Kan. 1919).

116. *Id.*

117. *Id.* at 215.

118. *Id.* at 214.

119. *Id.* at 215.

120. *Id.*

121. See, e.g., Alexander v. Russo, 571 P.2d 350, 358 (Kan. App. 1977). As stated in *Taft v. Hyatt*:

A private offer of reward for the apprehension of an accused person stands, as a general rule,



claimants “had not heard of the offer of the reward until after the accused had been surrendered to the sheriff” and acted out of a desire to protect Smith from mob violence, not to bring him to justice.<sup>122</sup> These facts, coupled with the legal holding that a private—as opposed to a statutory—offer of a reward should be analyzed under contract principles, stymied the group’s attempt to secure the reward.<sup>123</sup> To reach this conclusion, the court reasoned that a private reward offer is a “mere proposal” that, once accepted, solidifies into a contract.<sup>124</sup> So until someone takes affirmative steps in reliance on the offer, there is no contract. But the court went even further, stating that there must be an actual “meeting of the minds,” which cannot happen if the claimant performs his services before knowing of the reward offer.<sup>125</sup> Here, the facts were undisputed that the claimants simply assisted Smith in surrendering: “Their testimony is that what they did was for the purpose of protecting him from mob violence. They had never heard of the reward, and of course, are not entitled to any part of it.”<sup>126</sup>

This holding, as Hoeflich notes, was not compelled in any legal sense.<sup>127</sup> The issue presented was one of first impression in Kansas, as the Court’s citation to a single out-of-state opinion reveals.<sup>128</sup> From this, Hoeflich begins to wonder whether there was something else afoot, so he

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upon a different footing from an offer made by virtue of a statute. When accepted, the offer becomes a contract; until it is accepted by some person, who upon the strength of the offer takes some steps to earn the reward, there is no contract; and where a claimant of the reward was not aware that it had been offered until after he had acted, he is not entitled to claim the reward.

Taft v. Hyatt, 180 P. 213, 213 (Kan. 1919).

122. *Id.* at 215.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Hoeflich, *supra* note 29, at 1173-75. Cf. Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 327 (1988). In a discussion of how formalists sometimes “smuggl[e] policy choices into the premises for logical reasoning without analysis or even acknowledgement,” Judge Posner suggests that there may or may not be good reason to recognize a claim for a reward only if the claimant knows of the reward:

Consider this question of perennial fascination to students of contract law: should a person be allowed to claim, as a matter of contractual entitlement, a reward for returning a lost article, if he did not actually know that a reward had been offered? Langdell said no. And he said it on logical grounds: a contract requires—is defined to require—conscious acceptance; if the person who returned the lost property did not know about the reward he could not have accepted that unilateral offer, and therefore there is no duty to reward this person. Langdell’s mistake was to impose a definition on the word “contract” without considering why one might want to make some promises and not others enforceable and what the effect of making this promise enforceable would be. Would it lead to more returns or fewer? Actually this is a difficult question but it is one that Langdell thought he did not even have to consider.

*Id.*

128. See Taft v. Hyatt, 180 P. 213, 215 (Kan. 1919).

digs deeper.<sup>129</sup> The opinion itself tells us that Hyatt and Smith were “unable to reach an agreement as to the employment of Hyatt to defend Smith” and at least part of the reason was because “they did not agree upon the fee to be paid for the defense.”<sup>130</sup> Hoeflich’s investigation of the appellate record shows that at trial only the members of the Colored Masons were asked *why* they wanted the reward.<sup>131</sup> One claimant’s response (as abstracted in the record) is particularly telling: “Witness testified that he was a friend of Dr. Smith; that he was interested in seeing that mob violence was not resorted to; *that he did not obligate himself or pay anything towards the defense of Smith.*”<sup>132</sup> In other words, the group wanted the reward to pay for Smith’s defense.

Because these questions have no relevance to the issue of knowledge of the reward, Hoeflich is compelled to ask *why* they were asked.<sup>133</sup> Could it have something to do with the setting and circumstances—i.e., a black man accused of murder in small Kansas town that was already on the verge of forming a lynch mob? Did the townsfolk want to prevent Smith from mounting an adequate defense through the use of the reward money? Could this have influenced the outcome at trial and, perhaps, even on appeal? It is of course impossible to answer these questions with certainty. It is logical to conclude that the appellate court would not have been directly swayed by a desire to withhold the reward money to keep Smith from using it for his defense for the simple reason that Smith had by that time been convicted and that conviction had already been affirmed.<sup>134</sup> On the other hand, there are good reasons to think that the supreme court may have been indirectly influenced, if only because of the institutional tendency to show deference to trial court decisions. And—based on a further investigation of the underlying murder case—there are even better reasons to think that the trial court may have been swept along by the racial undercurrents that Hoeflich senses in *Taft v. Hyatt*.

In *Taft*, the murder of Agnes Smith was reduced to the passing reference that she had been “assaulted” and then, in a parenthetical aside, to the fact that she had died and that Robert Smith had been charged and convicted of her murder.<sup>135</sup> But this was no ordinary murder. The narrative has plot elements straight out of Greek tragedy and is reminiscent of

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129. Hoeflich, *supra* note 29, at 1173.

130. *Taft v. Hyatt*, 180 P. 213, 214-15 (Kan. 1919).

131. Hoeflich, *supra* note 29, at 1174.

132. *Id.* (quoting Abstract of Appellants at 14, *Taft v. Hyatt*, 180 P. 213 (Kan. 1919) (No. 21879) (emphasis added)).

133. *Id.*

134. *See generally* *State v. Smith*, 174 P. 551 (Kan. 1918) (affirming Smith’s conviction).

135. *Taft v. Hyatt*, 180 P. 213, 214 (Kan. 1919).

modern Greek-influenced dramas like Eugene O'Neill's *Desire Under the Elms*.<sup>136</sup> The list of major dramatis personae might read something like this:

Dr. Asa Smith—A black physician; once widowed; now over 60.

Robert Smith—Also a black physician; now 33; employed by Asa Smith since he was 13.

Agnes Smith—Wife of Asa Smith for one year; lived with the first Mrs. Smith prior to her death; partially educated by Asa; now 24.<sup>137</sup>

The respective ages of the players suggest a couple of familiar plotlines, one of which is borne out by the facts of the case. At trial, Smith was convicted largely on the strength of Mrs. Smith's "dying statement," a large portion of which was read to the jury as an exception to the general rule against hearsay:

"I know that I am about to die and this is my statement in the fear of death. Bob Smith came in at about 11 o'clock A. M., May 16th and says, 'Why don't you treat me better—why have you got it in for me?' I picked up some scissors, off the table, and he started for me and he took them away from me and seized me by the throat and choked me and threw me on the floor. He choked me and poured something in my mouth and face and ran out, and I got up and got to Mrs. Neighbors' and lost consciousness."<sup>138</sup>

From the testimony of one of the attending physicians, we learn what the "something" was that led to her particularly gruesome and drawn out death (she survived for about a week):

Agnes Smith was found to be burned with carbolic acid. Dr. Boardman testified that:

"The odor was very strong. The acid was up in her hair, over her face, and down on her upper chest. The acid was upon her cheeks, around the back of her neck, and around her ears. Her eyes were entirely burned. One had turned entirely white. \*\*\* She was unconscious."<sup>139</sup>

On appeal, Smith's most significant claim of error was that Agnes

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136. See EUGENE O'NEILL, *DESIRE UNDER THE ELMS* (1994), reprinted in *THREE PLAYS* 1 (Vintage 1995).

137. *State v. Smith*, 174 P. 551, 551-52 (Kan. 1918).

138. *Id.* at 552.

139. *Id.* at 552.

Smith's dying declaration should not have been received into evidence.<sup>140</sup> For reasons that are unimportant to the discussion, the court concluded that the statement was proper evidence.<sup>141</sup> More telling, perhaps, was the court's quotation of the portion of the statement that was *not* read to the jury: "I told him to get out of the house, and \*\*\* *I feared he would rape me.*"<sup>142</sup> Since this excised portion of Agnes Smith's statement was not directly at issue in the appeal, it seems to me that it may signal the crux of the matter for the supreme court. If one recalls that the dominant racial narrative in predominantly white interpretive communities in the *late* twentieth century portrayed young black males as feral and threatening to civil society (think of the King-beating case), then this would undoubtedly have been the case in the *early* twentieth century.<sup>143</sup> In other words, the supreme court may well have concluded that Smith was just another out-of-control black man unable to control his appetites, despite overwhelming evidence of his good character and at least something more than a mere suggestion that Agnes Smith was suicidal. In other words, a murder and attempted rape could have seemed like the only coherent narrative available to the all-white, all-male Kansas supreme court of a hundred years ago. It may be overreaching a bit, but there is an echo of racial stereotyping in the court's last substantive paragraph: "The record leads to the inevitable conviction that the cruel and atrocious crime charged was committed, and *whatever influences actuated him, or whatever their source*, the defendant was legally found guilty."<sup>144</sup>

At a minimum, all this buttresses Hoeflich's suspicion that race may have played some part in *Taft v. Hyatt*.<sup>145</sup> It does not mean that that the supreme court strained to deprive the Colored Masons of the reward for racist reasons. Perhaps nothing was amiss at all. But perhaps there was a desire to keep solidarity with the decisions of the trial court below and with the court's own holdings only a year before in *State v. Smith*. The point is, though, that one cannot even have this type of discussion—cannot engage in critical reading—without going outside the four corners of an appellate opinion. A fortiori, one cannot have this type of discussion when salient facts have been bobbed from a casebook version or, even more to the point, when the facts have been sanitized so as to present an intentionally

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140. *State v. Smith*, 174 P. 551, 556 (Kan. 1918).

141. *Id.*

142. *Id.* at 555 (emphasis added).

143. The Rodney King case arose from an arrest, which was recorded on videotape, and a subsequent trial that repeatedly invoked racial stereotypes, including references to King as a "gorilla." See JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED 51 (1996).

144. *Id.* at 556 (emphasis added).

145. See Hoeflich, *supra* note 29, 1173-75.

unparticularized statement of the case, presumably to minimize distraction from the statement of universalized doctrine. Take, for example, the version of *Taft v. Hyatt* that appeared in Lon Fuller and Melvin Eisenberg's contracts casebook:

Smith, a member of a masonic lodge, was suspected of a murder which had aroused the indignation of the community. Smith conveyed his fears of mob violence to certain of his masonic brothers and asked their protection. They accompanied a police officer to his hiding place and in the company of the officer took Smith to the sheriff, who placed him in the county jail. Just before the party got into the cab to go to the sheriff's office, Smith was told by the officers that he was under arrest. The masons now claim a reward of \$750 which had been offered by the husband of the murdered woman "for the arrest or information which will lead to the arrest" of Smith. Held, they were not entitled because (1) they did not know of the offer until after Smith was arrested, and (2) they merely assisted Smith in surrendering himself and therefore did not arrest him or give information leading to his arrest within the meaning of the offer.<sup>146</sup>

Every hint of race is erased from this summary, making it impossible to ask the questions about the case that we just asked.<sup>147</sup> In fairness, casebook editors have to make choices and not every case can be presented in an extensive form. Also, learning to extract legal rules from cases and manipulate them is a valuable lawyerly skill. Nonetheless, I think that law students should learn to dig in to cases from time to time (maybe three or four cases per semester) as a way of sharpening their critical reading skills and, thereby, their analytical writing skills.<sup>148</sup> Now is a perfect time to

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146. Hoeflich, *supra* note 29, at 1178 (quoting LON L. FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW 414-15 (3d ed. 1972)).

147. I don't mean to suggest that the technique that I am sponsoring is simply a way to reveal bias in a Realist sort of way. For example, I think one could take a case like *Brunswick* and show how it represents the waning of a public narrative that had romanticized (and legally protected) mom-and-pop businesses and vilified big business from at least the time of Teddy Roosevelt.

148. See Kissam, *supra* note 27, at 2006-09 (discussing, among other things, the link between reading critically and writing well). The *Carnegie Report* puts it this way: "It is important . . . that instructors also give students experience with fuller accounts of cases in which students can grasp the different meaning of 'facts' from opposing points of view." CARNEGIE REPORT, *supra* note 18, at 53. And I am inclined to go beyond actual case materials. Robert Ferguson has spoken of the "continuum of publication" that marks a trial, from things like pleadings to things like fictional projections. Ferguson, *supra* note 38, at 84. I thus think it makes sense to compare various narrative approaches. To take one example, one could juxtapose opinions of the various courts involved in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), with the movie *Silkwood*. In the court opinions, Karen Silkwood's personal narrative is reduced to a few lines and then silted over with page upon page of the history of and intent behind the Atomic Energy Act of 1954 and its subsequent amendments. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). In the film,

implement this type of curricular change because it has never been easier to accomplish. As most courts have migrated to electronic filing, all manner of case materials have become readily available for downloading. It has therefore become a much simpler matter to build a case file that includes pleadings, briefs, documentary evidence, and testimony. The value of the reading-for-narratives approach can be expressed in a number of ways, but none is more important than the possibility of revealing the narratives that competed for victory, universalization, and institutionalization in any particular case. In that way, young lawyers can more fully understand that litigation is often no more than a competition to convince *this* judge, *this* jury, and a majority of *this* appellate panel that one story or another deserves favorable judgment. But it may be that in another time and place that story is no longer convincing. In short, as Robert Ferguson suggests (following Thoreau), we must carefully attend to what we read:

“Books,” writes Henry Thoreau, “must be read as deliberately and reservedly as they were written.” The judicial opinion deserves the same injunction. Judges use words to secure shared explanations and identifications; they also use them as weapons of control. Deliberation with reservation explores that distinction, and the result is more than understanding. Here and elsewhere, a practiced appreciation or resourcefulness in language is the first safeguard in a republic of laws.<sup>149</sup>

### DEMOCRATIC EDUCATION AND THE LAW

What is being argued for here is a more thorough melding of black-letter law and theory in legal education.<sup>150</sup> The advantages of this type of approach would not, however, be limited to placing yet another argumentative arrow in the future litigator’s quiver. Rather, Ferguson is exactly right to suggest that a “readerly” approach to the law can help shore up the democratic values that the easy rhetoric of formalism and the rules

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she emerges as far more than a “decedent,” and we are left to wonder whether anything approaching justice was done in her case. I am, by the way, untroubled by the use of “fiction” in the classroom setting—after all, teaching by way of hypotheticals is a law school stock-in-trade. Wouldn’t most law professors (at least grudgingly) concede that Nora Ephron (the author of the screenplay) is better at constructing a nuanced, full-blown hypothetical than they are, if only because she was able to devote countless hours to the construction of her narrative? The same could be said of Melville, Camus, Browning, Glaspell or many other authors that form the stock in trade of law and literature scholars.

149. Ferguson, *supra* note 80, at 219 (footnotes omitted).

150. I think the *Carnegie Report* is correct in positing (after Amsterdam and Bruner) “that the narrative structure of legal reasoning provides a natural deep structure capable of uniting theory and practice.” *CARNEGIE REPORT*, *supra* note 18, at 42.

that drive it so often obscure.<sup>151</sup> Over twenty years ago, Neil MacCormick suggested:

[T]here are six questions to which any serious approach to higher education ought to allow of some answer, preferably one reached after substantial reflection. In quick and summary form, the questions are: (1) What is there? (2) What is the structure of the things there are, and how do different kinds of existence interrelate? (3) How do we know what there is, and how do we have acquaintance with the things that exists [sic]? (4) By what method should we explain and expound the various matters open to our knowledge? What is the place of human beings as rational agents in relation to whatever else there is? and (6) In light of all this, how are we to live and conduct ourselves?<sup>152</sup>

None of these questions is peculiar to law, but that is MacCormick's point. For if one is truly to understand law, one must learn more than the substance of a set of legal rules, rules that are always subject to defeasance at the whim of a legislature or high court. This "more than" is not a single identifiable technique but rather a range of skills that permit one to evaluate laws critically in their social context. MacCormick's six questions mark a path along which to gather these skills and, also, to build the quality of intellect necessary to maintain the cornerstone role that law-as-profession holds within a thriving democracy:

The questions are ones which ought to remain open and alive for every law teacher, law student and indeed legal practitioner of whatever rank and eminence. That they are fundamental for lawyering and for legal education is one reason why a jurisprudence course is of structural and vital importance to any law degree within the tradition of the Democratic Intellect . . . .<sup>153</sup>

But this is not all. Legal education must be infused with matters of theory and philosophy across the curriculum, not just through the pro forma addition of an offering or two in jurisprudence or critical theory to the upper-level run of law school courses. To underscore this position, MacCormick invokes Zenon Bankowski and Geoff Mungham's *Images of Law*, which warns of the temptation to lodge—and thereby emasculate and marginalize—all matters critical and theoretical in separate courses.<sup>154</sup> For as the earlier discussion of *Taft v. Hyatt* shows, a critical approach may be

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151. Ferguson, *supra* note 80, at 219.

152. Neil MacCormick, *Democratic Intellect and the Law*, 5 LEGAL STUD. 172, 177 (1985).

153. *Id.* at 180.

154. *Id.* at 181 (citing ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* 1-6, 49-72 (1976)); see also CARNEGIE REPORT, *supra* note 18, at 84 ("It is noteworthy . . . that jurisprudence is rarely given an important place in the North American law school curriculum.").

of most value in core, traditionally doctrinal subjects:

If theory courses and substantive law courses run on quite different tracks, the theory part can become a purely decorative fifth wheel. Moreover, theorists risk the criticism (which is in some cases more than amply justified) that they lack any real interest in real law. So theory and law are driven apart.<sup>155</sup>

In the end, the programmatic and structural issues that I have sketched with respect to legal education are a specific application of a larger cultural critique. When Professor Edward Said called for a “democratic criticism” rooted in humanism, he was urging scholars to find ways of overcoming the burden of too much (yet too facilely packaged) information, on the one hand, and too much balkanized (and jargon-laden) expertise, on the other:

We are bombarded by prepackaged and reified representations of the world that usurp consciousness and preempt democratic critique, and it is to the overturning and dismantling of these alien objects that, as C. Wright Mills put so correctly, the intellectual humanist’s work ought to be devoted. . . .

. . . .

. . . . Expertise as a distancing device has gotten out of control, especially in some academic forms of expression, to the extent that they have become antidemocratic and even anti-intellectual.<sup>156</sup>

The remedy lies, Said suggests, in forms of discourse that mandate reflection and are built on what he calls “detail,” a word that he uses in much the same sense that I have used “narrative” throughout this article.<sup>157</sup> For lawyers, this means that each of us must work to read legal texts in ways that allow us to penetrate the omnipresent fog of rules and see the stories for which those rules are often more or less accurate shorthand and to write our own legal texts in ways that are both revealing and intelligible to non-specialists. All this is to say that we should teach and practice law democratically.

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155. Neil MacCormick, *Democratic Intellect and the Law*, 5 LEGAL STUD. 172, 181 (1985).

156. EDWARD W. SAID, HUMANISM AND DEMOCRATIC CRITICISM 71, 73 (2003).

157. *Id.*