



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2000

Teaching Interdisciplinarily: Law and Literature as Cultural Critique

Deborah Waire Post

Touro Law Center, dpost@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Legal Education Commons](#)

Recommended Citation

44 St. Louis U. L. J. 1247 (2000).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

TEACHING INTERDISCIPLINARILY: LAW AND LITERATURE AS CULTURAL CRITIQUE

DEBORAH WAIRE POST*

I. INTRODUCTION

This special issue of the *Saint Louis University Law Journal* is devoted to articles about teaching contract law. It is a topic broad enough to cover philosophy and methodology as well as substantive law. In some ways, the topic recognizes that there is a relationship among these areas of concern—the way you think about teaching may alter the way you teach or the choices you make with respect to content. The factors just mentioned are presented in a linear way, suggestive of some sort of sequential causality. But the “linear” sequence can be reversed or reordered. It is not that the parts are interchangeable; rather they are interdependent. A holistic analysis is well-suited to the subject of law teaching because it is impossible to separate the “how” of teaching, teaching style or technique, if you will, from the “what” of teaching, teaching goals. And teaching goals can be very complex. Is the goal simply to communicate a body of information; to teach what is called, for lack of a better term, lawyering skills, or to teach students in a way that is emancipatory?¹

Many law teachers develop their own materials precisely because they recognize that teaching goals, teaching style and course materials are connected in a fundamental way. In the end, if a law professor is lucky, this process of assembling materials becomes more formal or more focused and the result is a casebook. That is what happened to us—Amy Kastely, Sharon Hom and me. And when all was said and done, some four years or more after we started the process, we had a casebook that is viewed by some as “unorthodox” and by others as heretical.²

* Professor of Law, Touro College, Jacob D. Fuchsberg School of Law.

1. This has also been described by critical theorists in education as a goal of “self and social empowerment” within the “broad Western humanist tradition.” HENRY A. GIROUX, *TEACHERS AS INTELLECTUALS: TOWARD A CRITICAL PEDAGOGY OF LEARNING* xxx (1988). Probably the most important aspect of this approach is that it tries to bring to the surface questions about the relationship between “knowledge, power and domination.” *Id.*

2. Although I never think of myself or my co-authors as radicals, a few of the people who reviewed our original book proposal certainly thought we were. What follows are excerpts from

Our casebook, *Contracting Law*,³ is not traditional. It is not a “back to basics” kind of book, even though it has a full complement of cases that are contemporary as well as cases that are part of the “canon” in contracts teaching. If you were to survey the consumers of *Contracting Law*, both the adventurous souls who use the book to teach and the students who are taught from or by it, the poetry and literature included in the book would provoke the most comments. And the reaction of students has been varied. There are always students who love the material either because they view it as a welcome relief from what they see as the unrelenting monotony of cases or because they were liberal arts majors who miss the kind of intellectual stimulation they had as undergraduates. But there are also students who just do not see the relevance of fiction to law. This article is an attempt to explain to law teachers both *why* I use literature and *how* I use literature to teach contract law.⁴ Perhaps in the process I can clarify the relevance of fiction to non-fiction and short stories to the “true stories” in judicial opinions.

I think the book’s greatest strength is that it features an interdisciplinary approach. The use of a “law and . . .” approach is not unusual. There are several books that are explicitly or implicitly “law and economics” casebooks,⁵ and at least one casebook with an explicitly sociological or law and society approach.⁶ Our decision to combine law and literature could be seen as an attempt to offer an alternative to the near-monopoly that economics has in the

reviews given to us by a publisher who was considering our book. To be fair, I must say that there was some enthusiasm for the book on the part of some reviewers. But I include here, for the benefit of the reader, only those comments that I think justify my statement that our work is considered “heretical.”

One reviewer speculated that “[i]t may be a book that will be used once, cause student riots, get a bad reputation and never be used again.” A second reviewer repeatedly referred to the fact that the book would be “trendy” and stated emphatically, “Reviewer would prefer authors that are not as extreme. He would feel irresponsible using this book.” But just to show that this was an objective reaction, he also pointed out, “I did another review for you of a book which tried to be very different from what is currently available, about which I was very positive. That book, however, was from two well-respected middle-of-the-road types trying in a very responsible way to respond to and influence where that road was heading. This proposal is anything but.” A third confessed that “given my own biases, I could reject this volume and still leave myself open to another casebook that tries to fill the left of center niche as Singer does. I don’t believe this book will work or that you will be able to move it in the marketplace.” This same reviewer expressed reservations about our credentials: “The first point is that none of the three authors have mainstream reputations outside their own institutions.” (Reviews on file with author.)

3. AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, *CONTRACTING LAW* (1996):

4. I have written this article without consulting my co-authors. Whatever mistakes I have made, any inadequacies in my reasoning or theories, are mine alone.

5. See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* (1995).

6. STEWART MACAULEY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, *CONTRACTS: LAW IN ACTION* (1995).

field of contracts. Alternatively, it might be characterized, more cynically, as an attempt to capitalize on the exciting discussion of the relevance of literature to law.⁷ But ours simply was not a decision made in order to capture a market niche. If I were to try and place this casebook in context, it might be better described as part of the broader movement to create interdisciplinary communities.⁸ If law is a textual community,⁹ as George Marcus defines it, interdisciplinarity is important in creating a "canon of critique," and interdisciplinary courses and materials are the "sites where counter-cans are formed."¹⁰

The decision to include literature was also a natural by-product of our teaching experiences. The choices we made with respect to the material we wanted to teach, and that we thought others might want to teach, reflect our collective experience teaching law students and our commitment to a critical perspective. We all teach students who are bright and highly motivated. Many

7. The period during which the law and literature movement received the most attention was probably the later part of the 1980s. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* (1988); Robin L. West, *Book Review: Law Literature and the Celebration of Authority*, 83 NW. U. L. REV. 977 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP*); Susan Mann, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 STAN. L. REV. 959 (1989); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law as Literature Movement*, 54 TENN. L. REV. 203 (1987). But see the turn the discussion of law and literature has taken in this decade in Martha C. Nussbaum, *Narratives of Hierarchy: Loving v. Virginia and the Literary Imagination*, 17 QUINNIPIAC L. REV. 337 (1997); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477 (1995). Related to law and literature is the "legal narratology" movement (so described by Richard Posner) which is concerned with "the story elements in law and legal scholarship." See Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 737 (1997) (reviewing *NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gerwitz eds., 1996)).

8. Interdisciplinary or cultural studies departments were conceived of as a radical alternative; "an attempt to create a new interdisciplinary space in which critical minded scholars attempt to re-imagine their disciplines under the influence of a number of different signs—critical theory, feminism, postmodernism, the crisis of representation, poststructuralism, and not least, challenges to canons . . ." with the "major source of theoretical novelty entering through literary studies." George E. Marcus, *A Broad(er)side to the Canon: Being a Partial Account of a Year of Travel Among Textual Communities in the Realm of Humanities Centers, and Including a Collection of Artificial Curiosities*, in *REREADING CULTURAL ANTHROPOLOGY* 104 (George E. Marcus ed., 1992).

9. Marcus describes "textual communities" as a "remaking" of Stanley Fish's interpretive communities. *Id.* at 109. Both terms are explicitly sociological or anthropological in that they reference a community that is presumed to operate on the bias of "tacit assumptions" that "limit or circumscribe the possibilities of interpretation." *Id.*

10. *Id.* at 112. Marcus points out that the issue of a "canon" is "distinctively American." He did not find a preoccupation with "specifically textual authority" or the focus on texts as a source of "truth" in the humanities/cultural studies centers he visited in Canberra and Copenhagen. *Id.* at 106.

of them experience their own lives as a testament to the “American Dream” and the possibility of upward mobility. But they have also experienced the way schools reproduce the “ideological and material forms of privilege and domination.”¹¹ That is, they know how hard they had to work here, the obstacles they had to overcome including the cost of a legal education these days, and they also know where they are in the hierarchy of law schools. If I want them to learn the law in a meaningful way, I have to give them more than rules and doctrines. I want to give them back knowledge of their own history and culture and to encourage them to consider all aspects of the human condition. “Literature,” broadly defined, helps with both.

This is an argument in favor of theory. An interdisciplinary approach is a theoretical approach. It is not theory in the positivist sense, the overarching, generalizing, universal principle type theory. It is theory in the sense of cultural critique, similar to what one might find in the social sciences, particularly anthropology.¹² Contract theory in this sense invites students to move from the particular to the general; to consider the ramifications of a particular decision on others who might be situated similarly; and to consider how national or international developments, demographic, political or economic changes, are implicated in a particular dispute.¹³

I ask myself: what level of understanding of the law do I want my students to have before they begin to practice? More importantly, what level of understanding would offer the best prospects for the development of the law, if by development I mean the possibility of improvement in human relationships and in the prospect for justice and equity in our society? My answer is that lawyers should understand the particulars of a case and the human dynamics involved, the life experiences that inform the choices the parties made. But they also need to understand how a case fits into a larger scheme, how it repeats and replays issues that are contested culturally and politically.

That belief drives my pedagogy. I want to stimulate conversations that are culturally self-conscious. I want my students to understand the meaning of legal doctrines, legal discourse, and legal institutions and the role these play in structuring and maintaining social relationships. Lawyering, as is repeatedly emphasized, is an exercise in problem solving. Problem solving is not simply a matter of classifying a particular set of facts in the proper way: contract, tort, property. Nor is it solely a matter of recognizing the legal theories or doctrines that can be used in litigation (or in negotiation) because these rules purport to

11. GIROUX, *supra* note 1, at xxix. Nothing is more hierarchical than education and nothing clearer than the relationships between hierarchy and privilege.

12. GEORGE E. MARCUS & MICHAEL M.J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986).

13. *Id.* It is the attempt to combine an interpretive approach and a knowledge of or interest in political economy that characterizes the cultural critique that Marcus and Fischer describe as the “experimental moment” in cultural anthropology and in the production of ethnographies. *Id.*

determine who is right and who is wrong in a particular dispute. It is not just anticipating what the issues might be down the road when counseling clients who are about to enter into or alter a contractual relationship. What a lawyer should know before she begins to practice law, whether or not she is handling a contracts case, is what she believes in and what her conception of justice is. A lawyer should consider the client's problem; the options available to the client; the meaning that the client assigns to the relationship; the expectations the parties have of one another; and the desires or needs or passions that motivate the parties to engage in or disengage from an exchange relationship. Our belief in justice or our conception of justice and the expectations of the individuals who might be our clients are neither individual nor idiosyncratic. They are collective, and they are culturally defined.

Culture has explanatory power. An understanding of the concept of culture is essential to any real understanding of human behavior and human relationships. But what I want students to see is not the spectre of cultural determinism, but culture as a process, and the role they play in that process. Students experience culture as textured and layered. They know that many aspects of culture are contested and that this contest can be emotional and intense. Cultural categories and cultural values are neither inevitable nor inescapable.¹⁴ In making students aware of culture, I hope that I am also making them aware of their own agency.¹⁵ In pointing out the existence of social structures, I hope to demonstrate the process by which structure is created, replicated and replaced.

II. CRITICAL PERSPECTIVES: MAKING CULTURE VISIBLE

"Meaning," in the anthropological sense, particularly when we are talking about the positions people occupy in a social system, is a difficult concept for most students to grasp. It is easier to talk about meaning, though, than it is to talk about culture. When I use the term "culture," I do so reluctantly. But no other term is better suited to describe what it is that I am trying to teach. I want students to see the "world view," the ethos that pervades contract law. Contract law and theory is replete with ideas about who people are, where they belong and what they can and cannot do. There are ideas about entitlement, about power, about the value attached to what we make and what we sell.

14. "Cultures are neither coherent nor homogeneous nor univocal nor peaceful. They are inherently polyglot, conflictual, changeable and open. Cultures involve constant processes of reinscription and transformation in which their diverse and often opposing repertoires are re-affirmed, transmuted, exposed, challenged, resisted and re-defined." BRIAN FAY, CONTEMPORARY PHILOSOPHY OF SOCIAL SCIENCE A MULTICULTURAL APPROACH 61 (1996).

15. "Agents perceive their situation, reason about it, form motives, knowingly act on the basis of this reasoning, and reflexively monitor their action to see whether it produces the desired result. Agents are capable of reflection—explaining, evaluating, justifying, and criticizing their action—and altering them." *Id.* at 64.

There are ideas about human nature and human potential, ideas about good and bad behavior and the duties we owe to one another.

The relationship between social position, power and law seems natural and self-evident to many students because it is so much a part of culture. In addition, there is in the dominant culture a predisposition to denial. We live in a society that denies the existence of class with even greater conviction than it does the existence and meaning of social divisions based on gender, race, ethnicity or sexual orientation. Law students, unlike anthropologists-in-training, usually are not taught to be self-conscious observers of human nature and human relationships. Most of what they believe is not visible to them.

When you direct the attention of students to social structure or social organization, the sentiments and the beliefs that support it and replicate it, you are asking students to peer into their own minds and hearts; to confront the way they think about, organize, explain human conduct and events to themselves. Anthony Amsterdam and Jerome Bruner call this "quicken[ing] consciousness."¹⁶ Whatever we call it, a law teacher who attempts it should be prepared for the particular challenges the risks involved.

This is not simply a matter of style—problem approach versus Socratic method or something like that. It is not about introducing lawyering skills like drafting or argumentation into the core curriculum. I, along with most law teachers in my age cohort, have altered some of my teaching techniques to make learning more "meaningful" for more law students. In an anthropology class, long before I dreamed of teaching law school, I first read the work of Paolo Freire.¹⁷ I took his message to heart and subscribed to the notion that learning should be connected to information the student needs and wants to know.¹⁸ I, like many other law teachers, have experimented with experiential

16. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 4 (2000). The authors begin with the premise of a particular phenomenon—that "our ways of conceiving of things" becomes so routine that "they disappear from consciousness." *Id.* at 1. The law can be as habitual as other cultural practices and "familiarity insulates habitual ways of thinking from inspections that might find them senseless, needless, and unserviceable." *Id.* at 2. The authors propose that we make "the familiar . . . strange" for law students; that a comparative approach—comparing disciplines like literature, poetry and history—is a source of an "estranging methodology." *Id.* at 4. The importance of a comparative approach to critical theory has also been made by anthropologists. See generally MARCUS & FISCHER, *supra* note 12.

17. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1973).

18. Even though law students are all there to learn the "law," the law should be presented in a way that raises questions and poses problems for solution that have some relevance to the students' own situations. One of the difficult issues involves the difference between what students "want" and what they think they "need." Freire assumes that if the dialogic process proceeds in the appropriate manner, there will be no distinction between the two. I am not so sure. Perhaps I am merely clinging to the model of education in which I am both Narrator and Authority. I do agree, however, that students should develop a sense of their own situation, a sense of historical awareness. The educator's task, always a collaborative one that involves the

learning, linking what students study to the kinds of performances that will be expected of them as lawyers. In *Contracts*, I have used drafting exercises and client counseling and appellate style arguments (even before the first years have done their appellate briefs in legal writing/legal methods).

But I have concluded that a practice-oriented approach is not what Freire had in mind. The desire for status or identification with the profession makes young law students anxious to acquire specific skills. An interdisciplinary approach—the incorporation of fiction into the materials of a course—is not perceived by them as a means to the same ends. It is, however, the most recent attempt in my struggle to translate Paolo Freire's example, quite concrete and detailed, of the methods he used to educate illiterate Brazilian peasants, into something that works for graduate students in the United States.

Paolo Freire discusses the process of "invasion" by which subordinated communities internalize the "values, standards, and goals" of the dominant group. These become obstacles to learning that are so deeply rooted they become a matter of faith.¹⁹ The methodology he uses so effectively to allow those peasants to see and understand their own life circumstances and the structure of the relationships in their society may not work with students who have grown up in a complex, large-scale, late capitalist society like the United States. Or perhaps the problem is simply that I do not have Freire's "faith in the power of the oppressed to struggle in the interests of their own liberation."²⁰ I do not doubt that the oppressed will struggle for their own liberation. But will they struggle to eliminate the structures that are oppressive or merely to reposition themselves socially so that they are not among those who are oppressed? What has surprised me the most in my seventeen years of

participation of the "students," should be to "re-present" the world and the themes the students have identified as important as problems that have to be solved. Consciousness and awareness are preliminary to intervention and action, both of which are viewed as liberatory. *Id.* at 101.

19. *Id.* at 89-93. "Patterns of domination" may be "so entrenched . . . that renunciation would become a threat to their own identities." *Id.* at 154.

20. GIROUX, *supra* note 1, at 109. I think that the use of the word "faith" is instructive, not just because Freire is associated with Liberation Theology, but because faith is a belief sustained in spite of evidence that seems to contradict it. There are, as Giroux acknowledges, students who do not wish to be liberated.

Ironically, emancipatory forms of knowledge may be refused by those who could most benefit from such knowledge. In this case accommodation to the logic domination by the oppressed may take the form of actively resisting forms of knowledge that pose a challenge to their world view. Rather than a passive acceptance of domination, knowledge becomes instead an active dynamic of negation, an active refusal to listen, to hear, or to affirm one's own possibilities. The pedagogical questions that emerge from this view of domination are: How do radical educators assess and address the elements of repression and forgetting at the heart of this domination? What accounts for the conditions that sustain an active refusal to know or to learn in the face of knowledge that may challenge the nature of domination itself?

Id. at 115-16.

teaching is the anger that students express, their emotional reaction when a belief that has been accepted as a matter of faith is challenged by conflicting facts or logical arguments.

A couple of years ago I had a group of students in a contracts class who could not make any progress in reviewing and commenting on a contract I had given them. It was a contract to provide consulting services with respect to socially responsible investing. To them, the situation was totally unrealistic and completely artificial, even though they knew the contract had been drafted by a classmate's brother, a non-lawyer. They could not get past their disbelief which arose from the subject matter of the contract. What the students told me as I sat and talked to them was that they could not believe that an investor would ever have any goal other than the maximization of profits. And, they said, making the decisions based on other values, a concern for the environment or human rights, would necessarily result in lower profits.

I was not unsympathetic to their plight—the mental paralysis that comes when you can't get beyond your own beliefs to consider an issue. I was once confronted with a similar situation as a student. My family law teacher, Frank Sander, called on me and asked me to formulate an argument on behalf of a man who did not wish to pay child support. I sat there for a moment, several months pregnant, in complete silence and then admitted that I could not imagine any circumstances or any legal argument for that client. Actually, I should have said, "I cannot imagine even having that person as a client."²¹

I should have known from my own experience that a student's world view, his assumptions about shared values and ideals, his notion of the way the world is structured, will affect his ability to imagine solutions to legal problems. I now know, or I have learned, that there is a difference between imagining what the world looks like from another perspective; seeing the arguments that can be made from that perspective, and adopting or embracing that perspective or view. We tell our students this all the time. We tell them, using the adversarial system as both explanation and justification, that they must be able to anticipate the arguments that someone else will make in order to counter

21. I reject any suggestion that being able to contemplate the argument that would be made on behalf of a client or the opposing party in a case means that lawyers are or should be "hired guns." See, e.g., the description of various "archetypes" of lawyers in THOMAS L. SCHAEFFER & ROBERT F. COCHRAN, *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994). Although the authors argue for a friendship model of lawyering in which the lawyer and the client discuss the moral issues raised by the client's instructions/representation. A more preliminary question, a threshold issue, might be whether or not the attorney will accept a case or agree to represent a particular client. In any event, those who oppose the "hired gun" approach assume that attorneys can and should make moral judgments, a position not shared by many law students. See, e.g., the discussion of the ethic of "individual relativism and liberalism" that lead students to resist the idea that lawyers can or should provide moral counseling to their clients. Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. J. 1 (1995).

them effectively. I wonder whether it might not be better just to tell them that being able to see issues or problems from different perspectives is valuable because otherwise we are unaware of the fact that we *have* a perspective and a view. There is no other way to see the unexamined or unquestioned beliefs that inform our sense of right and wrong, fair and unfair, just and unjust.²²

Most judicial decisions are written with the dispute between two or more parties in the foreground. In the background, like a backdrop in some theatre production, are a number of unstated assumptions. Our eyes are drawn to the action, the drama of the conflict between the protagonists that may be set out with some attention to detail. But what sort of sense can we make of an acontextual narrative?²³ Would a cowboy singing “and the corn is as high as an elephant’s eye” make the same sense against the backdrop of a Manhattan skyline or a rice field in Louisiana? It is often the background, the cultural context, that makes the story convincing; that provides us with clues as to the proper outcome and the just result.

Contracting Law is not an attempt to compare literary genres, however instructive that might be. It is certainly not an attempt to re-present the same event, a la *Rashomon*, through the eyes of different viewers. This is our attempt to provide a different backdrop, a *different* perception of the setting within which the particular dispute or many disputes arise. In the use of fiction, we are emulating the approach taken by anthropologists experimenting with different forms of texts—carving out space for the voice of informants to speak about their own cultures. Fiction is not just a story; it is a source of data, particularly if it is written by those whose lives have been or are being observed and described. It presents a counterpoint to the description offered by the anthropologist, an opportunity for a polyphonic description of culture.²⁴ In a casebook, fiction offers the readers an alternative view of the social context of particular disputes; of the existence of “multifaceted social realities.”²⁵

22. See MARCUS & FISCHER, *supra* note 12, at 123 (“[T]he inescapable availability of other beliefs, other social arrangements, and other cultures made the study of the ‘the other’ central to modern consciousness, and fostered an ironic attitude toward one’s own culture.”).

23. See generally CLIFFORD GEERTZ: LIVES AND WORKS, THE ANTHROPOLOGIST AS AUTHOR (1988) and discussion of the similarities between ethnography and social realist literature in MARCUS & FISHER, *supra* note 12. See discussion of social realist literature and the literary imagination of judges in Martha C. Nussbaum, *Poets as Judges*, *supra* note 7.

24. See generally MARCUS & FISCHER, *supra* note 12, at 75. Marcus and Fischer have described what they call the “experimental moment” in cultural anthropology. The notion that culture is coherent has been undermined by ethnographies that are self-reflexive, dialogic and polyphonous. Ethnographers are letting indigenous people speak for themselves and they are examining the fiction and literature of the peoples they study as “a form of auto-ethnography that in particular concerns itself with the representation of experience.” *Id.* at 74.

25. See the description of the social narrative in RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1993).

There is in this approach an explicit acknowledgment of the cloaking function of hegemony. In *Contracting Law*, we use examples from a profoundly heterogeneous American society. Cultural and social heterogeneity is proved not just through the selection of cases, but also in the use of literature, film, news articles and essays. What is revealed is not just information about people often thought of as "the other." Information is provided about the dominant culture—populist and agrarian sentiment; the tradition of the enlightenment with its emphasis on rationality and scientific progress; democratic principles and the value placed on individual autonomy; the social expectations created by wealth, age, sex, sexuality, physical and mental impairments among others; and the commitment to a free market and to progress that is often tied to technological development.²⁶

III. RECOGNIZING THE FACTS IN FICTION

The only thing unconventional about the approach of *Contracting Law* is the fact that the students are given direct access to material that I know, use and appreciate in my own attempts to describe, explain and teach the law to them. I think it is better for me as a teacher and better for my students to have this supplemental vision of reality²⁷ offered to them in a variety of ways and by a variety of people with different "voices," preferably in a form that connects the view with a lived experience.

What ethnographies, "exemplary ethnographic texts"²⁸ and "social realist fiction"²⁹ have in common is attention to detail. They both offer "richly

26. There is a distinction drawn between social and cultural anthropology and between social organization or structure and culture. By this definition, culture begins as something that is a mental construct but can be expressed through human behavior. Law deals with both the mental constructs (the ideas we have about the way the world is) and with actual behavior. Law is both a part of culture and legal rules and legal institutions are influenced by culture.

But life in the law is not lived in a vacuum. It is part of a pervasive world of culture. If law is to work for the people in a society, it must be (and must be seen to be) an extension or reflection of their culture. Therefore we shall have to explore as well what culture is, how it operates and through what instrumentalities.

AMSTERDAM & BRUNER, *supra* note 16, at 2.

27. I am opposed to the idea that there are "alternative realities" or the argument that these realities are equally valid. One can see something similar in the embrace of students "intentionality," which has been called "subjective realism" by some social theorists. GIROUX, *supra* note 1. Hegemony is not the elevation of one version of reality over others that are equally valid, it is the concealment of a reality in which some people are powerful and privileged and others are subordinated and oppressed.

28. "[T]he reading of exemplary ethnographic texts has been the major means of conveying to students what anthropologists do and what they know." MARCUS & FISCHER, *supra* note 12, at 21. The ethnographic text is produced in a particular way. "Ethnography is a research process in which the anthropologists closely observes, records, and engages in the daily life of another culture—an experience labeled as the fieldwork method—and then writes accounts of this culture, emphasizing descriptive detail." *Id.* at 18.

described experiences of everyday life.”³⁰ It is the richness of the description, even with all the flaws that have been brought to light in recent years, that lends credibility to the entire project and that makes these works important and relevant even today. It is this same level of detail in fiction that lets students see what they have overlooked in their own lives, homes and communities.

For instance, the source and consequences of poverty has always been one of the most difficult issues to discuss with students, and it is even more problematic in this era of welfare reform. Contract cases and literature offer students the chance to examine their own knowledge and understanding of poverty. In our chapter on the consideration doctrine, we include *Lawrence v. Ingham County Health Department*, a suit against a government-sponsored free clinic that provided prenatal care.³¹ In *Lawrence*, there was a problem with the delivery of Jessica, and the parents, Douglas and Ethel Lawrence, sued the clinic, the hospital and the doctors whom they felt were responsible for their daughter’s brain damage. The case was resolved using the doctrine of consideration. According to the judges, there was no bargained for exchange because the couple did not pay for the medical treatment which the mother received while she was pregnant or at the time of her delivery. On an intuitive level, most students believe that both the reasoning and the outcome in this case are right. But what are the assumptions that support this view?

As a companion to this case we include a short story by a black woman writer, Paulette Childress White, *Getting the Facts of Life*.³² It is told from the perspective of a young woman who accompanies her mother to the welfare office to ask for money to buy school clothes. It is a story about the shame and indignities poor people are made to suffer at the hands of government officials whose job it is to help them.³³ It is about paternalism, the judgments that are made about people who find themselves in desperate circumstances, and the

29. While acknowledging that the kind of realism that readers find in Dickens or Hardy (two examples used by Marcus and Fischer and probably by the theorist they discuss, Raymond Williams) is more difficult in contemporary society, they propose a literary (and ethnographic) style in which “experience, the personal, and feeling all refer to a domain of life that, while indeed structured, is also inherently social, in which dominant and emergent trends in global systems of political economy are complexly registered in language, emotions, and the imagination.” *Id.* at 78. See also the discussion of social realist fiction, specifically Charles Dickens and Richard Wright, in Nussbaum, *Judges as Poets*, *supra* note 7, at 1487-93.

30. MARCUS & FISCHER, *supra* note 12, at 78.

31. *Lawrence v. Ingham County Health Dep’t Family Planning/Pre-Natal Clinic*, 408 N.W.2d 461 (Mich. Ct. App. 1987).

32. Paulette Childress White, *Getting the Facts of Life*, in *MEMORY OF KIN: STORIES ABOUT FAMILY BY BLACK WRITERS* (Mary Helen Washington ed., 1989).

33. Whether the government has any obligation to the poor is uncertain at this time. See N.Y. Times story on food stamps and complex application process that prevents the poor from getting food stamps, Nina Bernstein, *Bingo, Blood and Burial Plots in the Quest for Food Stamps*, N.Y. TIMES, Aug. 12, 2000, at A1.

liberties that are taken in commenting on the life choices poor people make that could not or would not be taken with anyone else.

How does this story add to the understanding of *Lawrence*? At the level at which most students read the case, one that focuses on the plight of the particular individual involved in a dispute, people who have no money to pay for prenatal care may take on substance. A poor person is a human being who has feelings and emotions, someone who has experienced a serious loss. At another, more abstract level, the story and the case are about the way we treat the poor and the assumptions we make about entitlements, including the right to complain when an agent of the government mistreats you or causes you injury. *Lawrence* is about values, the notion that only money gives you the right to demand competency from service providers. *Lawrence* is also about the trust people put in professionals and the idea that the trust cannot be vindicated if you are poor. A case about a tragic result of a pregnancy also invites a discussion of the way health care is provided in our society, the duty of government to the people who are governed and the duty that family members owe to one another.

Getting the Facts of Life illuminates the underlying assumptions in the case, the notion that if you get something for free, you have to take whatever comes with it, including incompetence or negligence that results in injury to you. The short story is a valuable tool. It teaches students about the particular and the general, about the dignity of one poor person and the plight of poor people in our society.

Judicial decisions, ethnographies and short stories are all forms of story telling that make different but similar truth claims in the sentiments they evoke and the descriptions they provide of human relationships. Writers of fiction have much in common with ethnographers, if not judges, because of their talent for observation—a talent that may involve skills such as insight, imagination and empathy.³⁴ The aspiration of the ethnographer might even go beyond empathy to an “altered state of consciousness through the learned categories of another culture.”³⁵

Some of these learned categories are in play in the cases that are reprinted in contracts casebooks. Contract cases often characterize contractual duties as “voluntary,” but there has never been a clear line between contractual duties and systems of obligation defined by status, by the roles imposed on us or assumed in the course of a lifetime. Status relationships, particularly kinship

34. That insight, imagination, empathy, and the like are indispensable in the human sciences as techniques for inquiry is a proposition, surely, with which almost everyone (except for unregenerate or born again behaviorists) would agree. Melford E. Spiro, *Cultural Relativism and the Future of Anthropology*, in *REREADING CULTURAL ANTHROPOLOGY* 139 (George E. Marcus ed., 1992).

35. MARCUS & FISCHER, *supra* note 12, at 69.

relationships, are most often used as the point of origin in the evolution of the law. But we have not abandoned kinship; it plays an important role in the economic organization of society, one that is recognized with greater frequency in the studies of contemporary economists.³⁶ Kinship involves both ascribed and assumed status, relationships that are biological and contractual.³⁷ We are born into some kinship relationships; but we enter into others through a process of exchange.³⁸ And it is the exchange relationships between family members, consanguinal and affinal, that provide some of the most interesting material for first-year law students. These cases provide insight into the relationship between the legal regime, social position and individual expectations. And once again, literature serves a dual purpose. It is the description of life by someone who is a trained observer that makes visible those things students might overlook, and it is the attention to detail that can make students compare what they know is true or real with the reality the author describes.

I would venture a guess, without doing any kind of survey, that no subject has received more attention from writers of fiction than the relationship

36. Household economics has been the focus of research over the past twenty years. It has come to the attention of law professors in the work of people like Gary Becker (although he uses conventional neoclassical economic theory in his work). See GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981). As two critics have described the shortcomings of these studies:

Models of household operating within the NHE (new household economics) framework, however, face major empirical and theoretical difficulties. The assumption of labor substitutability between household members is empirically problematic, as is the assumption that households pool their resources when seeking to maximize their utility. Such a problem is but compounded by a concept of the household predicated on optimizing individuals with uniform and not gender specific production functions. These problems are most starkly revealed in the major difficulties surrounding the construction of a joint utility function, difficulties that can only be overcome through the assumption that the household is governed by a benevolent dictator capable of imposing upon a household a utility function. Such an approach does not explain how or why the dictator has arisen.

Lucia C. Hanmer & A. Haroon Akram-Lodhi, *In "the House of the Spirits" Toward a Post Keynesian Theory of the Household*, JOURNAL OF POST KEYNESIAN ECON. 415, 416 (1998). Later in the article the authors note that an alternative theory describes the household as a "site of struggle" or a "site of cooperative conflict." *Id.* at 418.

37. Marriage is an affinal kinship tie and is often characterized as a contractual relationship although it is part of the complex of kinship relationships. See generally DAVID M. SCHNEIDER, *AMERICAN KINSHIP, A CULTURAL ACCOUNT* (1980). Americans make the distinction between consanguinal kinship: "relations between persons by blood" and affinity: "relationship to a spouse's consanguineous relatives." THE CONCISE COLUMBIA ENCYCLOPEDIA 438 (Barbara Chernow et al. eds., 1989).

38. In some societies, the economic value of marriage is recognized with rules on brideprice, dowry or groom service. But kinship ties are made more binding by the material obligations that inhere in them. See, e.g., Andrew B. Kipness, *The Language of Gifts: Managing Guanxi in a North China Village*, 22 MOD. CHINA 285 (1996).

between people who are related by blood or marriage. In our introductory chapter we include O. Henry's classic: *The Gift of the Magi*.³⁹ Most students remember *The Gift of the Magi* as a fable about the ideal of complete selflessness, a cliché in this age of the "material girl," or material guy for that matter. Even O. Henry's story, written at the very beginning of the twentieth century, blurs the lines between self-interest and generosity and complicates the simple dichotomy between market and private transactions or exchange. It is a story that features various examples of human behavior by those engaged in commerce, behavior that could be described as acts of generosity or altruism and some that evinces greed and complete self-interest. And Jim and Della Dillingham, the protagonists, spend a significant amount of time discussing the acquisition of material goods—a necessary correlative of establishing a household and beginning a family. And I think it is appropriate to remark on the different resources available to husband and wife, heirloom and body part, respectively, foreshadowing discussions about the commodification of women's bodies that will occur when we discuss surrogacy later in the semester.

The Gift of the Magi is a way of introducing students to their own preconceptions about families as an economic unit; why they think there is a difference between market and non-market transactions; why and how exchanges are enforced; what systems, informal or formal, are appropriate to use in resolving conflicts in both areas.

Students' beliefs and values may differ, but for all of them, context matters. It matters when they have to decide whether the value of the labor of marital or other domestic partners can and should be quantified; whether equitable distribution is appropriate when a gay couple separates;⁴⁰ whether it is appropriate to enforce an implied promise to compensate a woman who survives the man with whom she cohabited.⁴¹

A similar opportunity to get at culture—values and ideals—occurs when we reach defenses. Students are exposed to doctrines that work to protect individuals who are members of a class—infants, those who suffer from some form of mental incapacity and those who are poor, old, uneducated—those who are easy prey for economic predators. Some students dislike these cases because they despise the people in them—welfare mothers, alcoholics, the mentally ill. They repudiate the lack of self-reliance and the weakness of these people. It is here we have included an excerpt from Annie Proulx's *Shipping News*, the story of a born loser, Quoye, a man who is short on self-esteem and

39. O. Henry, *The Gift of the Magi*, reprinted in WILLIAM SIDNEY PORTER, *THE COMPLETE WORKS OF O. HENRY* 7-11 (1953).

40. See *Van Brunt v. Rauschenberg*, 799 F. Supp 1467 (S.D.N.Y. 1992).

41. See *In re Estate of Steffes*, 290 N.W.2d 697 (Wis. 1980).

sound judgment, the world's most gullible man.⁴² Did he make a mistake when he bought a boat that no self respecting Newfoundlander would buy? Did the seller misrepresent the quality of the boat to him? Should he be able to rescind the contract? Somehow it is all right to make fun of Quoye, to air sentiments about his weaknesses. These are comments that students wouldn't dare say about poor welfare mothers (assumed to be black) or mentally impaired people or even alcoholics. But having said them, we can discuss why it is that the faults of the buyer are foremost in their minds while they are willing to overlook or ignore the faults of the seller, verging on fraud.

The vast majority of students attending the law school where I teach are students who have been raised privileged by parents willing to give them the best advantages within their means or students who have struggled to pull themselves up by the bootstraps, escaping their working class (not poor, usually) backgrounds to reach the solid middle class. About 27% of them are minority, but this category encompasses South Asian, Asian, Middle Eastern, Latino, African American and Caribbean students. The minority students are often privileged in an economic sense, but most of them know or have experienced discrimination.

The privileged students cannot imagine what it would be like to be average and without the resources that assure a person the kind of education and job that will maintain them in the middle class. The working class student often thinks that anyone who does not have the same drive and motivation that he or she has is somehow deficient. Both groups believe in and appreciate the significance of hierarchy. They are committed to being on top, not on the bottom.

But they do see; they can't help but see that there are little cracks in the myth of meritocracy that supports this hierarchy. They rankle at the idea that their worth or potential as a lawyer could be measured by a single examination, the LSAT. So *Dalton v. Educational Testing Service*,⁴³ which we include in the casebook, is particularly appealing to them. It is the tremendous power that ETS has to ration out a resource that arguably should be available to all who are willing to work for it (and pay for it, of course) that gets them going. The case is followed by an essay by Amy Tan in which she uses her own experience in school to reveal cultural biases in the educational system, to explain why a standardized test can be confusing for a person who comes from a home where English is a second language; why it is wrong to assume that there is only one way to reason, one form of logic, one way to understand and appreciate the relationship between words.⁴⁴

42. E. ANNIE PROULX, THE SHIPPING NEWS (1993).

43. 663 N.E.2d 289 (N.Y. 1995).

44. Amy Tan, *Mother Tongue*, in DONALD MCQUADE & ROBERT ATWAN, THE WRITERS PRESENCE: A POOL OF ESSAYS (2d ed. 1997).

The fact is that social position is not always outside or down below.⁴⁵ Sometimes it is right in the middle—the middle of the class structure, of the culture, of the political regime. And for law students to really learn something, they have to know where they are positioned, that they have to look up *and* down to understand the meaning of legal doctrines. But for their choice of graduate program, the students in my classes could well be the engineers in *Flight Concepts Ltd. v. Boeing Co.*,⁴⁶ struggling to build a plane they designed. Boeing successfully avoided liability on a contract with this small start up company, a company that might have been in competition for a government contract if Boeing had not offered to finance the research and development and the production of its plane. The written contract contained a term that made all oral assurances and promises unenforceable, a fact that only became evident after Flight Concepts' principals discovered Boeing had been competing for the contract and had access to information that gave it a competitive advantage.⁴⁷ The court held there was no misrepresentation, just as there was no fiduciary obligation—because the contract said so.⁴⁸

Human capital, the favorite phrase of economists and some judges,⁴⁹ doesn't buy you much without the other more familiar forms of physical capital—money or property. The people who have physical capital usually also have control over the writing that is the contract and the legislatures that could intervene and redistribute some of that power—giving the person with human capital a little leverage. Knowledge and creativity are worth money, but contracts can deprive the people of the bulk of the value of their own creations. In *Platzer v. Sloan-Kettering Institute for Cancer Research*, the plaintiff doctors developed a drug used on patients undergoing chemotherapy

45. I realize that one of the cutting edge pieces written in the area of critical race theory exhorted us to look to the bottom. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). I think it is important for those who are situated to look to the bottom and also to look to the top, to recognize the extent to which they too are subordinated.

46. *Flight Concepts Ltd. P'ship v. Boeing Co.*, 38 F.3d 1152 (10th Cir. 1994), reprinted in KASTELY, POST & HOM, *supra* note 3, at 581.

47. Whatever representations Boeing made to the parties, the fact that there was a term in the contract that reserved discretion to Boeing, that stated that Boeing had no obligation to produce the plane, the court felt there was no misrepresentation or fraud. Nor was there an obligation, apparently, to disclose the plans Boeing had to develop a plane, Project Vision, that would compete with the Skyfox and provide access to classified government information. KASTELY, POST & HOM, *supra* note 3, at 582.

48. *Id.*

49. See, e.g., Judge Easterbrook concurring in *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (distinguishing between physical capital and human capital; the migrant workers had neither).

to stimulate the growth of blood cells.⁵⁰ Drs. Platzer, Welte and Mertelsmann thought they were entitled to one half of the not inconsiderable profits earned when this drug was marketed but Congress, their research institution and the major pharmaceutical company decided otherwise.⁵¹ The companion piece is Andrea Barrett's short story, *The Behavior of the Hawkweeds*.⁵² This is a story about Mendel and the science of genetics, appropriate under the circumstances, but it is also about the expectations, ambitions and disappointments of scientists or creative people. It is also about power and powerlessness; the effect that social structure and limited choices may have on the recognition of merit or genius and future productivity. *Sloan Kettering* and *The Behavior of the Hawkweeds* are both about contests, but not simply political contests. There are people in both stories who occupy subordinate positions in the social hierarchy and both contest what it means to be so positioned.

Position, power, values and ideals—all are part of the amorphous concept: culture. Culture provides the template that students use when they assign meaning to the facts in every case and when they evaluate the way in which particular doctrines, for example, the third party beneficiary doctrine, has been applied in a case. The doctrines do not answer the questions students may care about: who should finance medical research; who owns the property created by medical research; who should profit from the discovery; and how should this property, so essential to the well being of many citizens, be distributed to those in need? In selecting a doctrine and applying it, would it not be wonderful if students could see the relationship between the particular case and these broader issues?

IV. EMPIRICISM, TEXTUAL COMMUNITIES AND TEACHING IN A HERMENEUTIC DISCIPLINE

I suppose I have what might be called a modernist sensibility when it comes to the social sciences. The distinction some people draw between the physical sciences and the social sciences does not persuade me that the social sciences are interpretive rather than empirical. Mendel might methodically transfer pollen from one pea plant to another and observe the outcome of this experiment. An anthropologist like Margaret Mead sat among inhabitants of the Manus Islands and wrote down everything she saw.⁵³ Both involve the collection of data—data about peas or data about people, it is still data. And as

50. 787 F. Supp. 360 (S.D. N.Y. 1992), reprinted in KASTELY, POST & HOM, *supra* note 3, at 1014.

51. Sloan-Kettering licensed G-CSF to Amgen Inc. for \$50,000,000. It distributed 5%, \$505,490, to each of the doctors. 787 F. Supp. at 362.

52. Andrea Barrett, *The Behavior of the Hawkweeds*, in ANDREA BARRETT, *SHIP FEVER: STORIES* 11-33 (1966).

53. Margaret Mead, *More Comprehensive Field Methods*, AM. ANTHROPOLOGISTS, Jan.-Mar. 1933, at 1.

far as I am concerned, both are empirical. The difference is two-fold. One is our faith in the ability of the person recording data to get it right. The other is the disagreement we have about what can or should be done with the data.

Many law professors, but not all, have a theory that informs their teaching of a particular subject area. I think, however, that I am engaged in theorizing in a very different way. Law schools are textual communities, communities whose members spend a significant amount of time reading works that are part of a canon, or debating what should be part of the canon. We are nothing more or less than a hermeneutic discipline.⁵⁴ The fact that we are engaged in the process of interpretation does not mean, however, that we are not testing, in a systematic way, theories about the organization of human society. Nor is the organization and presentation of cases and commentary anything less than an attempt at a historically sensitive exploration of both the changes that have occurred over time and, more importantly, the persistence of certain beliefs and ideals.

Human conflicts that arise from differences in social position and power repeat themselves. Although powerful people see the world in a particular way, hegemonic though that vision may be, not everyone will agree with it. The vision will be contested.⁵⁵ The contest is ongoing, enduring and provides frequent opportunities for the expression of alternative ideals and the affirmation or rejection by the legal system of prevailing or dominant values.⁵⁶

54. See discussion of textual communities *infra* note 53 and accompanying text.

55. Jay Feinman made this point many years ago. In his argument that an empirical approach to contract law "does not resolve the defects of classicism," he points out that "[i]n many contracts cases, the problem is precisely that the parties do not share beliefs in what is appropriate commercial behavior . . . People's 'expectations' and merchants' notions of 'good faith' are to some extent dependant on the positive, public expression of norms by contract law itself." Jay Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983).

The conflict to which he refers suggests that these are internal conflicts but in reality, the conflicts are between groups of people who occupy different positions in the social structure. It is not that all merchants do not agree, it is more likely that buyers and sellers disagree about the need for liquidated damages, disclaimers or warranty or the exclusion of all remedies. The same could be said of manufacturers and consumers. The conflict may be described as one that exists within a community, but generally that "community" can be broken down into other groups whose "values" are different. For that reason, I would not have chosen the example he uses—excuse because of supervening impracticability. There is a political disagreement about the courts filling the gaps in people's agreements and impracticability is seen sometimes as a judicially-imposed gap filler. Does this reflect a wide divergence of values in the business community? How are we defining "value"? What value is at stake in a debate over whether there is a need for a doctrine to relieve a party of a contractual obligation when conditions for performance are drastically different from those that existed at the time the bargain was made? It is a question of fairness, but is it a question about power and the relative position of the parties to the contract?

56. "Culture is also an arena of struggle and contradiction, and there is no one culture in the homogeneous sense. On the contrary there are dominant and subordinate cultures that express

Persuasion is the largest part of teaching. Whether it is Brandeis writing about the working conditions of women or Corbin piling up cases that show the existence of something called “promissory estoppel,” empirical evidence and persuasion are linked.⁵⁷ In the classroom as well, repetition is crucial in this process of knowing as well as in the process of learning. Students cannot learn an idea or concept that they believe is untrue. Some students see a different truth, or the possibility of a truth they had not contemplated when there is repetition; when they have seen or read enough cases to see a pattern emerge. Repetition has an effect when the person confronted with “evidence” begins to see patterns emerge. She learns something she didn’t know; she gains insight she didn’t have. A knowledge of history is essential to any cultural critique. In constructing this casebook, we have tried to use repetition to illustrate both cultural change and cultural continuity over time.

Our original idea was to begin with *In the Matter of Baby M*.⁵⁸ Ultimately, however, we decided to begin with the nineteenth century case, *Coolidge v. Pua’aiki and Kea*.⁵⁹ The contract in *Pua’aiki* is an employment contract. There are many people who ask us why we start with such a difficult, and for lack of a better word, remote case. I am using the word remote to signal temporal distance—distance in time, it is a case decided in the 1870s—and social distance—it involves a conflict between a privileged class of white planters and members of a conquered indigenous community working as contract laborers. In short, many students and faculty (except, perhaps,

different interests and operate from different and unequal terrains of power.” FRIERE, *supra* note 17, at 117. Friere was talking about pedagogy but the same can be said of law, which is another cultural product.

57. The story of Arthur Corbin’s role in the creation of section 90 of the Restatement of Contracts has been retold in various forms until one is tempted to say that it has mythic proportions. See, e.g., Peter Linzer, *Section 90 and the First Restatement—The Gilmore Version and the Evidence From the Time*, in A CONTRACTS ANTHOLOGY 338-39 (Peter Linzer ed., 1995). Patrick Atiyah once described his aspirations as a student of contract law as “Corbinian”; that he wished to do for English law what Corbin had done in the U.S. in the 1930s, namely to employ “a close analysis of the actual decisions of the courts” to make a case against consideration doctrine. P.S. ATIYAH, *ESSAYS ON CONTRACT* 179 (1986). Louis D. Brandeis is remembered, among other things, for his commitment to a modernist epistemology; the relevance of social context and facts to judicial decision-making. That commitment is found both in his work as a lawyer; in his brief in *Muller v. Oregon*, the renowned Brandeis Brief; in his legal scholarship, see, e.g., Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916); and in his decisions as a Supreme Court Justice. See generally the discussion of Brandeis’s reputation as an “epistemological modernist” in G. Edward White, *Biographies of Titans: Holmes, Brandeis and other Obsessions: The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995).

58. 537 A.2d 1227 (N.J. 1988). We moved *Baby M* to the chapter on defenses, which begins with a discussion of public policy.

59. 1877 WL 7574 (1877).

students in Hawaii) initially feel that this book has nothing to do with them. But *Pua'aiki* is one of the ways we show cultural continuity.

The case is a good place to start because, if nothing else, the case shows the contradictions inherent in the ideology of consent and the unrepentant dishonesty of a dramatically coercive legal system, working hard to preserve the power of those who buy labor over those who sell their labor. If you want to focus attention in a pointed way on the disconnect between discourse and social realities, there is no better choice to be made than a case which features language about "voluntariness" in the context of laborers who have breached their contract while being forced to work for free for a period twice the length of the original contract.

Over and over again throughout the book we try to contrast the reality of the limited choices that people have with the use in contract discourse of the powerful idea that people are acting "voluntarily." There are countless opportunities to look at the double standards that abound in the law. For example, the standards applied to unwed mothers, workers, gay men or the poor—imposing a duty to read, a duty to be self-reliant—assume that terms are negotiable if the less powerful party had merely raised the issue. These standards exist in opposition to rules that forgive the more powerful participants; rules that suspend or displace more general rules that work to the disadvantage of the more powerful party to the contract. In *Pua'aiki*, the court imposes a criminal sentence on the workers while acknowledging that employers are seldom prosecuted and virtually never imprisoned when they breach employment contracts. There are also plenty of contemporary cases that provide an opportunity to examine such asymmetries and to ask important questions about incentives and disincentives for skepticism and caution, due care and self reliance, on the one hand and honesty, fairness and trust on the other. There are discussions that can be started about power, control over the contract and issues of risk allocation.

To return to *Pua'aiki* for a moment and the lessons we learn from history about cultural continuity, it is important and necessary, of course, to point out that Hawaii was not part of the U.S. at the time of this case; that anti-peonage statutes were adopted in the U.S. after the Civil War that should, theoretically at least, have outlawed a system where breach of contract was criminalized. But even on the mainland, that was a legal battle fought well into the twentieth century.⁶⁰ The more modern peonage cases are against employers who have lured and then imprisoned immigrants in the U.S. But in these cases the courts

60. See, e.g., *Pollock v. Williams*, 322 U.S. 4 (1944).

resort, once again, to the notion of choice and voluntariness. Theirs is a very narrow and limited notion of coercion.⁶¹

The circumstances that existed at the time of *Pua'aiki* continue to recur. We are living in a time reminiscent of the era when Coolidge, Pau'aiki and Kea litigated their contract, when there were labor shortages in Hawaii and a strong desire on the part of the colonists to transform Hawaii's economy. Today, employers in the U.S. are also faced with labor shortages. They too want low cost labor, and the market exigencies motivate governments to do what they can to relieve that shortage.⁶² While the Federal Reserve Chairman Alan Greenspan worries over the possibility that labor scarcity will lead to wage increases and inflation, farmers and high tech companies lobby for changes in the immigration laws to admit unskilled workers as temporary laborers and skilled laborers as permanent residents, respectively.⁶³

When students say of *Pua'aiki* and Kea, "*That* couldn't happen today," it seems quite appropriate to ask them what the "*that*" is they think can't happen today. The Hawaiian government, complicit in the enterprise of supplying cheap labor, attempted to protect the workers. There were statutory provisions that were designed to put laborers on notice of the terms of the contract. And the additional formality of requiring a witness, a government appointed notary, in *Pua'iaki* is mirrored today in a variety of contemporary statutes in which the potential for exploitation and unfair terms exist. The potential for injury or harm is an issue in adoption statutes,⁶⁴ pre-nuptial agreements,⁶⁵ and

61. *U.S. v. Shackney*, 333 F.2d 475, (2d Cir. 1964). Judge Friendly at least expresses his distrust of the working class, the people protected by such statutes. They would, he thought, fabricate stories of coercion to get even with employers:

But before deciding to make such conduct a felony, punishable with up to five years' imprisonment, a legislator would wish to weigh the advantages to society in providing deterrence and retribution where the conduct had in fact occurred against the risk that innocent employers might be victimized by disgruntled employees able to convince prosecutors, and ultimately juries, of their story

Id. at 487.

62. Breach of contract (by workers) was criminalized in the early twentieth century by the Maine legislature. The laborers in Maine were immigrants who were lured to jobs in logging camps but who left before they completed the full term of their employment contracts. Is evicting poor people from shelters unless they agree to work the equivalent of forced labor? We can try and draw fine distinctions about the relevant coerciveness of either policy but in each case it is the state that brings its power to bear on the unfortunate or hapless laborer.

63. For an article critical of the legislation increasing the number of H-1B visas available to the high tech industry see Carrie Kirby, *H-1B Leaves Minority Workers on Sidelines*, SAN FRAN. CHRON., Oct. 19, 2000, at B1. The success of the high tech industry has refueled the demand for an increase in the number of "guest workers" admitted to the country seasonally to do farm work. See Jim Barnett, *Newhouse News Service, Senators Push For Special Farm Worker Visas*, THE TIMES PICAYUNE, May 9, 2000, at C12.

64. See generally KASTELY, POST & HOM, *supra* note 3; but the Uniform statute theoretically builds in protections for the natural parent consenting to adoption. See UNIF.

surrogacy contracts.⁶⁶ Each of these species of contracts is dealt with legislatively and in most cases the statutes attempt either to limit the contractual excesses which the more powerful party might attempt or alternatively, to buttress the assumption that the less powerful party entered into the unequal relationship voluntarily.

Contract law treats employers and employees differently. But why? Part of the reason may be found in class bias, in the sentiments expressed in cases like *Roe v. Montgomery Ward*.⁶⁷ It is not a sentiment that is unfamiliar to our students. It is a sentiment they can recognize and that they sometimes express in a counter critique when I point out the asymmetries mentioned earlier. *Montgomery Ward* is a case about the presumption of at will employment. The case has many dimensions to it, including the court's reliance on class distinctions to explain what an employment candidate can expect. An executive's understanding and expectations are different from someone who walks in off the street and applies for a simple line position.

But there are other ways of showing what is true or real to students. This way is "empirical" as well. Literature offers an "inside view" of aspects of human behavior, the internal as well as external; what people think and feel and why they behave as they do. Both kinds of information are critical to this enterprise. Long before we get to *Montgomery Ward*, we have talked about the expectations of people who work on commission. The students have already

ADOPTION ACT § 2-406 (1994), 9 U.L.A. 54 (1994): "A consent must state that the parent or guardian executing the document is voluntarily and unequivocally consenting to the transfer of legal and physical custody to, and the adoption of a minor by, a specific adoptive parent whom the parent or guardian has selected." See also UNIF. ADOPTION ACT § 2-408:

In a direct placement of a minor for adoption by a parent or guardian, a consent is revoked if: (1) within 192 hours after the birth of a minor, a parent who executed the consent notifies in writing the prospective adoptive parent, or the adoptive parent's lawyer, that the parent revokes the consent, or the parent complies with any other instructions for revocation specified in the consent, or (2) the individual who executed the consent and the prospective adoptive parent named or described in the consent agree to its revocation.

65. For an example, see discussion of the TENN. CODE ANN § 36-3-501 (Repealed 1991) in *C.L. Randolph v. Virginia Henley*, 937 S.W.2d 815 (Tenn. 1996) ("[A]ny antenuptial or prenuptial agreement entered into . . . shall be binding . . . if such agreement is determined in the discretion of the court to have been entered into by such spouses freely, knowledgeably and in good faith and without the exertion of duress or undue influence upon either spouse.").

66. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6 cmt. (9B U.L.A. 206-09) (Supp. 2000):

The interests of the surrogate are also protected by Section 6. The bracketed version of section 6(a) would require appointed counsel to represent her interests and, at the least, counsel will be permitted for her. The findings required by section 6(b)(5) and section 6(b)(7) will protect the surrogate against the possibility of overreaching or fraud.

Id.

67. 473 N.W. 2d 268 (Mich. 1991).

read an excerpt from *Death of a Salesman*.⁶⁸ They have seen Dustin Hoffman's powerful rendition of Willie Loman's accusation that "there were promises made across this table . . . You can't eat the orange and throw away the peel—a man is not a piece of fruit."⁶⁹ The excerpt from Arthur Miller's play appears in close proximity to *Embry v. Hargadine, McKittrick Dry Goods Co.*,⁷⁰ a case that is traditionally used to teach the requirement that there be a "mutual manifestation of assent" and that meaning of the objective test. The reasonable person test articulated in *Embry* stands in stark opposition to the cases involving plant closings⁷¹ and contracts, like *Rowe*, where the courts construct a version of reasonableness without reference to the social position of the workers.

To reinforce what was learned with the use of *Death of a Salesman*, so that we can understand why Mary Rowe thought she had a right to leave work and keep the purpose of her errand to herself, we use a short essay by Louise Harmon describing the distinctions between what is private and what is public for those who work in sales.⁷² What Louise describes is the sense of autonomy and freedom a person has when he or she is on the floor, in what would normally be thought of as public space. But the storeroom, where the employees took breaks while removed from the eye of the public, was a place where the employee had no expectation of privacy.

In the storeroom, where goods and people were stacked in a very deliberate way, there was hierarchy—the suffocating proximity of the manager and the managed, the coffee break out in the open, under fluorescent scrutiny, the unwritten code of the right way to be. There were no whispers or secrets, not even conversations, since every word spoken in the storeroom is universally owned.⁷³

It makes it easier to see why Mary Rowe thought that her firing was unjust. It is harder to understand how the court could disregard behavior on her part that showed, unequivocally, that she did not understand her contract to be one at will and that she never assented to this term.

And as they read the holding in *Rowe*, that it is unreasonable for anyone to understand that he or she can only be fired for cause in the absence of an express written agreement to the effect, the students might recall prior cases that suggest this "unreasonable" belief might not be unusual—cases where the

68. Arthur Miller, *The Death of Salesman*, in ARTHUR MILLER'S COLLECTED PLAYS (1957).

69. *Id.*

70. 105 S.W. 777 (Mo. Ct. App. 1907).

71. *United Steelworkers of America, Local 1330 v. United States Steel*, 492 F. Supp. 1 (N.D. Ohio 1980); *Abbingtion v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983).

72. Louis Harmon, *Privacy and the Parking Lot Faces*, in LOUISE HARMON & DEBORAH W. POST, *CULTIVATING INTELLIGENCE* 151 (1996).

73. HARMON & POST, *supra* note 72, at 152, reprinted in KASTELY, POST & HOM, *supra* note 3, at 698.

employee alleged just such an understanding and where the conduct of the employer seemed to justify that understanding. Students can see that legal presumptions, purportedly grounded in shared experience and common understanding of the world, are contested.

Yet none of this is an argument against the one offered by my student in defense of the decision in *Montgomery Ward*. The traditional rules of offer and acceptance should not apply in employment cases, he said. If an objective test that looks at what was said by an employer and what would have been understood by a reasonable person in the position of an employment candidate were applied, the courts would be overwhelmed with frivolous claims. Employees would lie. Not a particular employee, all employees. This is not an argument about facts. This is an argument about beliefs. This is an argument about the qualities of character that belong to a group of people, qualities that make members of that group less credible. Is it possible to show the sentiments that operate silently, invisibly in the development and the application of contract law? It is if we choose the right cases, if we invite students to discuss the reasons why they think cases are wrong or right.

V. CONCLUSION

I am going to end this piece with a discussion of a case that is not in our casebook. It is the case that brought me to the place I am now; it made me think about what I want students to see and recognize when they read the law, examine the relationship between individual disputants or think about the groups those individuals represent.

I have never discussed this case in any article but I did use it in a speech I gave at the University of Michigan Law School, an institution at which the contemporary version of our national preoccupation with racial entitlements and racial supremacy is being fought.⁷⁴ We might all acknowledge that while gender and class are hard issues to raise in the classroom, race is the hardest of all. Imagine my surprise then when in the course of my research into Texas partnership law, I found a case in which the social and cultural significance of race was made explicit. The case is noteworthy because the court changed one of the rules that governed partnership (contract) formation. Before the Uniform Partnership Law was adopted in many jurisdictions, there existed in the common law of partnership formation an idea that if a person received a share of the net profits of a business, he should be treated as a partner. This was particularly true in the case of creditors, but it was also true in criminal

74. The speech was given at the University of Michigan on Feb. 23, 1998. The topic was "Understanding Race: (De)Constructing Paradigms and Implications for Legal Education, Session Three—Does Race Belong in Contracts Law?" I didn't choose the title. For a discussion of the anti-affirmative action lawsuit at the University of Michigan, see Don Wycliffe, *Lee Bolinger: President, University of Michigan*, CHI. TRIB., Oct. 8, 2000, at 3.

cases involving charges of embezzlement. In *Butler v. State*,⁷⁵ the Texas Court of Criminal Appeals abandoned this bright line rule.

In its decision, the majority adopted language that made the combination of “capital, labor or skill for the purpose of a business for their common benefit” the definition of partnership but it also emphasized the importance of intent.⁷⁶ The court further announced that where one person put up money, it was more likely than not that the person who put in labor was his agent, not his partner, particularly when both parties testified that they did not intend a partnership.

Intent is supposed to be objective, not subjective. The relationship between the two—objective and subjective—can be the site of a contest over cultural meanings. If one intends something that the dominant culture rejects as a possibility, that intent can be subversive. That which is subversive is often abhorrent to those whose power or privilege is being threatened. Members of subordinated communities may have good reason to oppose a meaning the dominant culture has assigned to certain conduct. But a “reasonable person” defined hegemonically, does not contemplate such possibilities. In *Butler*, there were two groups, white and black, who assigned different meanings to race. Publicly, in the conduct of the business, Butler might have challenged the meanings that Dillingham and the white community attached to his status as the descendant of slaves. But within the legal system, on the witness stand, even with his freedom at stake, he could no longer challenge that meaning. Cultural norms—ideas about the relationship between blacks and whites—supplied meaning for the court and supplied rules for interpreting the conduct of the parties; made it impossible for the defendant to argue that the rules demanding social, political and economic inequality did not apply in his case.⁷⁷ As the dissent in *Butler* points out, in Texas in 1908, no white man and no black man could be partners because partners were social and economic equals, the co-owners of a business.⁷⁸ If it had not been for the dissent, the role that race played in the court’s deliberations would have been invisible.

75. 111 S.W. 146 (Tex. Crim. App. 1908).

76. *Id.* at 147.

77. The dissenting judge adopted and quoted from the brief prepared by the attorney for the defendant, who in his zealous advocacy on behalf of his client, whom he denominated “an ignorant negro” pointed out what should have been self evident to anyone living in the segregated South.

Of course the negro did not know what a partnership was, and had he known it, he would have been loath in a court of justice to claim partnership with a white man; nor did it occur to Dillingham that his contract with a negro constituted them partners. Dillingham would doubtless have scorned such a relationship.

Id. at 148.

78. *Id.*

Any legal rule that would have produced a result antithetical to the most fervent belief in the social and economic inequality of the Negro could not stand. The movement from bright line rules to a test of intent was something that was "in the air" so to speak in the early part of the twentieth century.⁷⁹ But the fact that existing precedent would have produced an anathema to the white community must have given the Texas courts incentive to adopt an alternative approach to partnership formation.

We make much of the process of legal change when we teach law school. We like to use cases that we think show the way judges move the law along, respond to changing social conditions or emerging norms. But here was a case where the law changed to keep the social conditions the same.

The point is simple. Legal change is not always about progress and the improvement of the human condition. Sometimes legal change, a change in legal doctrines, is used to maintain the status quo. But the law is also about the importance of struggle even in the face of loss. The stories we have chosen for the book are meant to give the students the sense that there are some struggles that are ongoing. The battle is neither won nor lost because of the outcome in a particular case.

The law plays an important role in this contest, and students of the law should know what that part is. They should never participate blindly without knowledge of the impact the work they do can have on themselves, their family and friends, complete strangers and the world that they are living in or the world they would like to create.

79. See Deborah W. Post, *Continuity and Change: Partnership Formation Under the Common Law*, 32 VILL. L. REV. 987 (1987).