



2001

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(CASEBOOK REVIEW ESSAY) Contracting  
Law, 2d ed. By Amy Hilsman Kastely, Deborah  
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Recommended Citation

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# STORYTELLING AND CONTRACTS: (CASEBOOK REVIEW ESSAY)

Contracting Law, 2<sup>d</sup> ed. By Amy Hilsman Kastely,  
Deborah Waire Post, and Sharon Kang Hom.  
Durham, N.C.: Carolina Academic Press, 2000.

Lenora Ledwon<sup>†</sup>

*I also believe that a casebook is a powerful document. The editorial choices within a casebook determine how many readers think about the law of a doctrinal area, about lawyering in that field, about clients, and about legal reasoning.*

*-Mary Joe Frug<sup>1</sup>*

Not one of my casebooks in law school was edited by a woman. I didn't give that much thought at the time, viewing it as another "given" of the intimidating and masculine world of law school. Other givens included the fact that two-thirds of the class were male and that women professors were scarce. (In three years I only had one female professor, who lectured to us on legal writing strategies as part of a pass/fail course.) But I still have my casebooks from law school, packed in an old cardboard box in the garage. I couldn't part with them during law school, even though classmates had advised me to resell them quickly before they became outdated. I remember my first year casebooks, particularly. It was no easy task to lug them several blocks from the bookstore to the dorm, in a time before those ubiquitous little wheeled carts had gained popularity. I remember spreading them out on my desk. They were solid and thick, with dark covers embossed with gold lettering. They looked heavy with learning. Here was the Law. And if it had occurred to me to wonder why not one of the casebooks was edited by a woman, I probably reasoned that the gender of the editors couldn't matter. The law was the law, and surely casebook editors were neutral in their selection and presentation of material.

A few years after I graduated from law school, Mary Joe Frug, in her groundbreaking feminist critique of a contracts casebook, made the point that editorial choices in a casebook and the subject position of reader and editor matter very much indeed.<sup>2</sup> I teach contracts now, as well as evidence and a course in law and literature, and I routinely agonize over what casebooks to

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1. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1068 (1985).

2. *Id.*

choose.<sup>3</sup> Most law professors give a great deal of thought to casebook selection. The first books we require our students to read will have a profound effect on how they view the law and their prospective roles as lawyers. Casebooks that erase difference in the guise of neutrality or that depict women and minorities solely in a negative manner will have a negative resonance for many of our students. Law school should be exhilarating and empowering, but all too often it can be alienating and disabling, particularly for those students situated as "outsiders" by virtue of gender, sexual orientation, race, or class.<sup>4</sup>

Recently, a growing body of feminist and critical race scholarship has addressed the importance of paying close attention to such basic pedagogical choices as drafting a syllabus or selecting a casebook.<sup>5</sup> But one can only choose a casebook from the available pool, and those choices can be limited. Contracts casebooks are overwhelmingly edited by white males whose attention to outsider issues can range along the spectrum from good to middling to poor, with most in the middling range. A few years ago, word spread through the grapevine that three women law professors were putting together a contracts casebook.<sup>6</sup> I first heard about the book from my colleague, Beverly Horsburgh, who also teaches

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3. Every semester, I end up being the last professor to send my book orders to our increasingly frantic campus bookstore. I keep re-thinking my choices of casebooks up till the last minute. I once became so obsessed with the issue of choice of texts that, for my specialty, Law & Literature, I decided to edit my own anthology: *LAW AND LITERATURE: TEXT AND THEORY* (Lenora Ledwon ed., 1996). That experience garnered me a bit of insight into the amount of work that goes into editing. ("Never again!" became my constant refrain during the editing process.)

4. E.g., Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *STAN. L. REV.* 1299 (1988).

5. See, e.g., Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook*, 88 *NW. U. L. REV.* 914 (1994); Anita Bernstein, *A Feminist Revisit to the First-Year Curriculum*, 46 *J. LEGAL EDUC.* 217 (1996); Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 *J. LEGAL EDUC.* 366 (1994); Kimberlé Williams Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 4 *S. CAL. REV. L. & WOMEN'S STUD.* 33 (1994); Nancy S. Erickson, *Final Report: 'Sex Bias in the Teaching of Criminal Law,'* 42 *RUTGERS L. REV.* 309 (1990); Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 *U. CIN. L. REV.* 1223 (1993); Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 *IOWA L. REV.* 55 (1991); Judith Resnik, *Revisiting the Canon: Feminist Help in Teaching Procedure*, 61 *U. CIN. L. REV.* 1181 (1993); Carl Tobias, *The Case For a Feminist Torts Casebook*, 38 *VILL. L. REV.* 1517 (1993). For broader analyses in a similar vein, see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L. J.* 997 (1985); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 *U. PA. L. REV.* 1029 (1992); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid B Contracts, Feminism, Dialogue, and Norms*, 28 *HOUS. L. REV.* 791 (1991).

6. The grapevine is important, since casebook reviews historically have been quite rare. This may be attributed, at least in part, to the relatively lowly status of casebooks as compared with law review articles. As Janet Ainsworth notes, "[C]asebooks are the Rodney Dangerfield of legal scholarship B they just get no respect." Janet Ainsworth, *Preface: Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews*, 20 *SEATTLE U. L. REV.* 271, 272 (1997). However, starting in 1997 the *Seattle University Law Review* inaugurated an annual casebook review issue (its first review issue was devoted to contracts casebooks). Additionally, other articles on casebooks suggest that there may be a growing interest in the analysis of casebooks. See, e.g., E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 *MICH. L. REV.* 1406 (1987) (tracing the history of contracts casebooks from 1871 to World War II); E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 *SW. L.J.* 903 (1988) (discussing the history of casebooks); Jean Stefancic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 *CHI.-KENT. L. REV.* 755 (1998) (studying how casebook editors treat new scholarly movements and ideas).

contracts. Appropriately, in light of the casebook's excellent sections on narrative and storytelling as lawyering skills, a great deal of the buzz around the book came via word of mouth from other women law professors (our own network of storytelling). I was interested to hear that the three authors were a multicultural bunch (Professor Post is African-American, Professor Hom is Chinese-American, and Professor Kastely is Caucasian.) Additionally, all three have an interest in Law and Literature or storytelling, evidenced in their own scholarship.<sup>7</sup> To my delight, this collaboration resulted in a highly teachable casebook that is the most interdisciplinary and multicultural contracts casebook I have yet to see. Fortunately for those of us who teach contracts, Professors Kastely, Post and Hom have done the hard work of editing an excellent casebook (and creating a very practical student workbook) that teaches contract doctrine and lawyering skills with a great sensitivity to the multiplicity of voices that routinely are elided from many first year casebooks.

This review will proceed as follows: (1) a description of the organization and content of the casebook and the Student Workbook, and (2) an evaluation of the text's pedagogical features, with particular emphasis on the casebook's attention to narrative and storytelling as lawyering skills. I conclude that this is the most "literary" of the present-day contracts casebooks, and that this literary quality, with its attendant focus on experience, details, back story, and voice also make it by far the most multicultural and feminist contracts casebook. Let me hasten to add that it also does a darn good job of presenting doctrine (particularly through the problems and exercises in the Student Workbook) and of keeping students engaged and energized through one of the most difficult first year subjects.

### I. ORGANIZATION OF CASEBOOK

*Contracting Law's* general movement is from formation issues to breach and remedies. This is a logical pattern, and thus provides a certain comfort level for professor and student alike. The casebook has ten chapters: (1) Introduction to Contract Law; (2) Contract Formation; (3) Consideration; (4) Promissory Estoppel; (5) Defenses: Explicit Political, Economic, and Moral Controls on Contracting; (6) Content of the Contract; (7) Mistake of Fact, Changed Circumstances, and Agreed Modifications; (8) Breach of Contract; (9) Remedies; and (10) Third Party Interests. The casebook also includes an appendix of authoritative texts (a kind of "greatest hits of contracts" from the U.C.C., the United Nations Convention on Contracts for the International Sale of Goods, and the Restatement).

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7. See, e.g., Sharon K. Hom, *Writing Through the Frame, With Reverence*, 20 B.C. THIRD WORLD L.J. 89 (2000); Sharon K. Hom, *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction*, 53 U. MIAMI L. REV. 1003 (1999); Amy Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132 (1995); Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Deborah Waire Post, *Teaching Interdisciplinarily: Law and Literature As Cultural Critique*, 44 ST. LOUIS U. L.J. 1247 (2000).

Moving from the macrocosmic to the microcosmic, the organization within each broad chapter follows a similar pattern by dividing each topic into a series of logical sub-categories or issues. For example, Chapter Two on Contract Formation is subdivided into smaller sections on Communication, Offer and Acceptance, and Indefinite Agreements. Each of these sub-categories itself is divided into workable topics, so that "Offer and Acceptance" has three discrete sections: (1) Was There an Offer?; (2) The Assent Invited: Acceptance; and (3) Revocation of the Offer Prior to Acceptance. The *Teacher's Manual* offers suggestions for individual lesson plans as well as advice on how to tailor the casebook to a four-credit, five-credit course, or six-credit course.<sup>8</sup>

## II. SELECTION OF MATERIALS IN CASEBOOK

Here we come to the great strength of the casebook: its interdisciplinary scope, with an accompanying depth of attention to the details of lived human experience. Each chapter includes selected cases, history, economics, philosophy, literature, and editorial notes. The effect of all this is a thickness of texture very different from the thin, ahistorical character of traditional casebooks where cases are presented as if in a vacuum. This selection of materials gives context, and context helps cognitive understanding. I want to make particular mention of the case selection and the editors' notes, and save discussion of the literature for the section on the literary qualities of the casebook.

### A. Case Selection

There are plenty of classic contracts cases here.<sup>9</sup> Old friends such as *Kirksey v. Kirksey* on the bargain principle,<sup>10</sup> the pairing of *Mills v. Wyman*<sup>11</sup> and *Webb v. McGowin*<sup>12</sup> on issues of moral obligation and past benefits, *Williams v. Walker-Thomas Furniture Co.* on unconscionability,<sup>13</sup> Cardozo's opinion on implied obligation in *Wood v. Lucy, Lady Duff Gordon*,<sup>14</sup> and *Hadley v. Baxendale* on

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8. AMY HILSMAN KASTELY, DEBORAH WAIRE POST, & SHARON KANG HOM, *CONTRACTING LAW, TEACHER'S MANUAL* 6-7 (1998).

9. Of course, the notion of what exactly constitutes a "classic" case is a bit problematic, so I hesitate over using the term. Part of the project of an ambitious casebook such as this is precisely the questioning of the "legal canon" of cases anthologized in casebooks. See generally Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987) (describing the Critical Legal Studies approach to analyzing legal discourses of power, with focus on teaching contracts); Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977 (1994) (reviewing postmodern and deconstructionist challenges to legal canon and argues the power of classic cases is based on cognitive significance). I believe the point of the editorial decisions in *Contracting Law* is not to discard all the old cases, but rather to look at them with a new vision, one sensitive to gaps and absences as much as to what is present on the surface.

10. *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

11. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

12. *Webb v. McGowin*, 168 So. 196 (Ala. 1935).

13. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. 1965).

14. *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. App. 1917).

foreseeability.<sup>15</sup> Thus, contracts professors need not feel that they will be on completely unfamiliar ground by adopting this casebook.

In addition to the old classics, the editors include an excellent selection of contracts cases that, while explicating basic principles of contract law, address the effects of contract law on outsider groups such as women, racial and ethnic minorities, gays and lesbians, the elderly, and the disabled. Thus, case selections range from an employment contract between sugar plantation workers and owners in nineteenth century Hawai'i,<sup>16</sup> the surrogacy contract in the *Baby M* case,<sup>17</sup> and a breach of contract claim by a gay man against his long-term partner,<sup>18</sup> among others.

The editors also include several very recent and timely cases, including one that is rapidly becoming my all-time favorite teaching case (right up there with *Baby M*), *Leonard v. Pepsico, Inc.*<sup>19</sup> The *Leonard* case encourages students to think through the issue of whether or not a humorous commercial for "Pepsi Stuff" includes a legitimate offer for a Harrier Fighter Jet. This case, along with *Baby M*, consistently makes for some of the liveliest and most intense classroom discussions. The editors also include two recent hotly debated cases dealing with the problem of shrink-wrap terms or terms sent to the buyer inside the box.<sup>20</sup> This issue is particularly timely from a contract law perspective, given the rapid growth of e-commerce. All in all, the case selection is extremely judicious, ranging from reliable standards to new and timely cases, resulting in a highly teachable casebook.

#### B. Editors' Notes

Accompanying the cases in *Contracting Law* are excellent notes and comments which raise discussion questions and situate doctrine in terms of social and political realities. I have to applaud the Introduction and the notes to Chapter One, in particular, for two specific reasons: (1) the attention to language, narrative, and story and (2) the pedagogical guidelines spelled out for students. I knew this was going to be a "literary" casebook (in the best sense of the word) when I began reading the introduction, which discussed how "contract" is both a metaphor and a methodology: a metaphor to describe relationships ("the social contract") and a methodology or tool for organizing relationships.<sup>21</sup> I also knew this was going to be a student-friendly text early on with the inclusion of such sections as a note on "Lawyering and Legal Education," which lists some of the many skills lawyering requires and explains how the text will operate:

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15. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

16. *H.J. Coolidge v. Pua'akiki and Kea*, 3 Haw. 810 (1877).

17. *In re Baby "M"*, 109 N.J. 396 (1988).

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

19. *Leonard v. Pepsico, Inc.*, 39 U.C.C. Rep. Serv. 2d 1 (S.D.N.Y. 1999).

20. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3<sup>rd</sup> Cir. 1991); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7<sup>th</sup> Cir. 1997).

21. AMY HILSMAN KASTELY, DEBORAH WAIRE POST, & SHARON KANG HOM, *CONTRACTING LAW* 3 (2000).

This *Textbook* and the *Contracting Law Student Workbook* have two goals of equal importance: (1) to help students develop skills of working with words, ideas, legal principles, doctrines, and authoritative texts; and (2) to help students learn current contract law, by which we mean contract principles and doctrine as articulated or recognized by contemporary judges, lawyers, and legislators.<sup>22</sup>

The above is the text's own contract with the reader: a promise to work toward these pedagogical goals in partnership with the student.

### III. THE STUDENT WORKBOOK

Frankly, I wish I had a workbook like this when I was in law school. The *Student Workbook* is organized to track the chapters in the casebook. One of the first things I noticed about the workbook is that it contains doctrinal charts on tricky areas like agency, the statute of frauds, the parol evidence rule, and other areas that really need to be diagrammed in order for students to grasp the nature of the rules. These charts also make the teacher's job easier; for example, the chart on "Authoritative Texts in Contracts Law" makes a world of difference in those first few weeks of class, when students need to differentiate between the significance of primary authorities and secondary authorities such as the Restatement.<sup>23</sup> In addition to doctrinal charts, the workbook provides five other types of exercises for students: fact diagrams, case briefs, case grids (facilitating comparison of cases), checklists and feedback forms, and review problems.<sup>24</sup>

The great advantage of such a workbook is that it encourages students, step by step and day by day, to methodically build their analytical skills while imagining themselves in the many different roles lawyers play. The exercises encourage mental flexibility, analytical ability, storytelling, and acquisition of doctrine.

### IV. STORYTELLING AND THE "LITERARY" CASEBOOK

#### A. *Three Structural Problems With Standard Casebooks*

Casebooks as a genre have a structural tendency towards abstraction. There is a general "flattening out" of story and humanity in casebooks, no doubt due in large part to what editors and publishers see as the structural restrictions of a casebook. Out of a vast universe of contracts cases, editors must select a finite number (for six-credit classes, most casebooks run between 800 and 1,000 pages of text). Once the editors pick the cases, they must then edit down the appellate decisions. Depending on the editor, a thirty-page opinion might be cut down to five pages or less. The effect of such narrowing of focus is threefold: a loss of story, a loss of complexity, and a loss of the text's ethical potential. First, the traditional structure of casebooks illustrates what one Law and Literature scholar

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22. *Id.* at 24.

23. *Id.* at 1181-1253.

24. *Id.*

identifies as “a stripping away of the narrative from the law.”<sup>25</sup> How can we expect students to be engaged with cases that have had the life edited out of them? The traditional, abstract casebook sometimes goes so far as to reduce individuals to components in an equation (“If *A* conveys Blackacre to *B*, and *B* conveys Whiteacre to *C*. . . . “ Who are these people?). No wonder Scott Turow famously described reading case opinions in law school as akin to “stirring concrete with my eyelashes.”<sup>26</sup>

Second, a movement toward oversimplification (typically done in the name of efficiency) erases real-life complexities. In the Introduction to their casebook, under a section titled, “Law, Fact, and Legal Reduction,” the editors quote Patricia Williams as follows:

That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is, it seems to me, necessary for any conception of justice.<sup>27</sup>

One of the lawyering skills students need to acquire is an ability to read critically and to be able to recognize and identify gaps or cracks in the structure of a narrative, gaps often caused by a rhetorical move towards oversimplification. We do our students no service if we suggest that the law is made up of simple, noncontradictory truths. We need to encourage students to ask on whose body the hard effects of this law are felt.

The third effect of a casebook’s move toward abstraction is the loss of the text’s ethical potential. It no longer should seem strange to think of a casebook as a “moral act,” after such texts as Gerald Frug’s *Local Government Law* with its

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25. Elizabeth Villiers Gemmette writes:

Modern legal studies perpetuate a stripping away of the narrative from the law. Consider what happens to already truncated versions of the underlying narratives as related in judicial opinions once they become part of the material in law school textbooks. After substantial abridgment by textbook editors, students further abbreviate the material by engaging in an activity known as ‘case briefing.’ Taken to the extreme, the search for meaning from each case involves not hearing and understanding the original stories of the characters engaged in the conflict; rather, it becomes a constant striving for reduction of the text, reduction aimed ultimately at extrapolating the black letter law. If time is short, why even bother to read the judicial opinion? Why not resort to Gilbert or Emmanuel for our pre-digested legal reading?

Elizabeth Villiers Gemmette, *Filling in the Silence: Domestic Violence, Literature, and Law*, 32 LOY. U. CHI. L.J. 91 (2000).

26. SCOTT TUROW, ONE L 23 (1977). In Turow’s account of life as a first year law student at Harvard, he describes the experience of trying to read a case for the first time:

O.K. It was nine o’clock when I started reading. The case is four pages long and at 10:35 I finally finished. It was something like stirring concrete with my eyelashes. I had no idea what half the words meant. I must have opened *Black’s Law Dictionary* twenty-five times and I still can’t understand many of the definitions. There are notations and numbers throughout the case whose purpose baffles me. And even now I’m not crystal-clear on what the court finally decided to do.

*Id.*

27. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 10 (1991), quoted in KASTELY, ET AL., *supra* note 21, at 22.



focus on the casebook as an empowering tool for improving local government.<sup>28</sup> But too many casebooks squander such ethical potential through an insidious veneer of neutrality. Just as there are no innocent readers (we all bring our own world views, assumptions, and experiences with us when we read), so there are no truly neutral casebooks. (To think, for example, that a casebook is neutral because it teaches contract doctrine through Law and Economics is to be gravely mistaken.) Casebooks, despite their traditional lowly status in academia, can have a profoundly normative impact on students.

But why does abstraction affect a text's ethical potential? A move toward abstraction and oversimplification disconnects the reader from the text; it decreases our ability to feel empathy, and this dehumanizes not only the subjects in the text, but us as well.

### B. *The Literary Casebook: Potential Solutions to These Problems*

What is the poor casebook editor to do? She cannot include every case and she must edit the cases she does include. Otherwise a student will not be able to lift the casebook off the desk. One potential solution is, after judicious selection and editing of cases, to re-contextualize the cases. The editors of *Contracting Law* provide context and the details of lived experience by including interdisciplinary materials along with the cases. In particular, they include literature, history, economics, philosophy, and political theory materials in their casebook. I would like to focus on their use of literature.<sup>29</sup>

First, literature helps resolve the problem of loss of story by reminding us of the power of storytelling and narrative. For example, in the chapter on Frustration of Purpose, the editors include Raymond Carver's story, *A Small Good Thing*.<sup>30</sup> Students who may struggle with the abstract concept of excuse in commercial exchange will never forget Carver's powerful narrative of a baker, trying to get payment for a child's birthday cake, who is unaware the child has died after being hit by a car. Carver's painful narrative highlights the complexities of even the simplest of exchanges, foregrounds the concept of saying "I'm sorry" (too often a novel concept in the law), and leaves open the possibility for reconciliation in the most tragic of circumstances. After the baker learns the truth about the customers (the parents) he has been harassing by phone, he asks them to eat some of his bread:

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28. Joan Chalmers Williams, *The City, the Hope of Democracy: The Casebook as Moral Act*, 103 HARV. L. REV. 1174 (1990) (book review).

29. To those who might object that fiction is unhelpful in learning a common law based on "real" cases, I have two responses. First, fiction (albeit bad fiction) already is a staple of many problem-oriented casebooks and of classes in which professors utilize the Socratic method. Hypotheticals are fictions. Second, without getting into the debate over the nature of "truth" or "reality," it is important to understand that many of the fictional excerpts in the casebook can seem more real, and more powerful, than a majority of the cases in traditional casebooks. This is an important pedagogical point, because once you have engaged students—once you have fired their imaginations—they will be better learners.

30. KASTELY, ET AL., *supra* note 21, at 899.

“You probably need to eat something,” the baker said. “I hope you’ll eat some of my hot rolls. You have to eat and keep going. Eating is a small, good thing in a time like this,” he said.

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“Smell this, “ the baker said, breaking open a dark loaf. “It’s a heavy bread, but rich. “ They smelled it, then he had them taste it. It had the taste of molasses and coarse grains. They listened to him. They ate what they could. They swallowed the dark bread. It was like daylight under the fluorescent trays of light. They talked on into the early morning, the high, pale cast of light in the windows, and they did not think of leaving.<sup>31</sup>

Carver’s profoundly moving story reminds us of the power of narrative. By including stories such as this in their casebook, the editors of *Contracting Law* effectively re-story the casebook genre.

Second, literature restores the complexity of human life to first year studies, a complexity routinely erased in casebooks. In *Contracting Law*’s section on Unconscionability, the editors include James Alan McPherson’s short story, *A Loaf of Bread*. The story involves a grocery store owner who charges more at his store in an African-American neighborhood than at his stores in white neighborhoods. After this practice is discovered, Green, the owner of the grocery stores, brings his account books to a meeting with Reed, the leader of a community protest:

They met at the lunch counter, shook hands awkwardly, and sat for a few minutes discussing the weather. Then the grocer pulled two gray ledgers from his briefcase. “You have for years come into my place, “ he told the man. “In my memory I have always treated you well. Now our relationship has come to this. “ He slid the books along the counter until they touched Nelson Reed’s arm.

Reed opened the top book and flipped the thick green pages with his thumb. He did not examine the figures. “All I know, “ he said, “is over at your place a can of soup cost me fifty-five cents, and two miles away at your other store for white folks you chargin’ thirty-nine cents. “<sup>32</sup> The store owner insists he is not an evil man, and that since he has to pay more for insurance and window bars in the poor neighborhood he must raise prices in order to make a profit. The two men cannot agree, however, on what is a fair profit:

“Place yourself in *my* situation, “ he said, his voice high and tentative. “If *you* were running my store in this neighborhood, what would be *your* position? Say on a profit scale of fifteen to forty percent, at what point in between would you draw the line?”

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31. *Id.* at 905-906.

32. *Id.* at 645-646.

Nelson Reed thought. He sipped his coffee and seemed to chew the liquid. "Fifteen to forty?" he repeated.

"Yes"

"I'm a church going' man," he said "Closer to fifteen than to forty."

"How close?"

Nelson Reed thought. "In church you tithen ten percent."

"In restaurants you tip fifteen," the grocer said quickly.

"All right," Reed said. "Over fifteen."

"How much over?"

Nelson Reed thought.

"Twenty, thirty, thirty-five?" Green chanted, leaning closer to Reed.

Still the man thought.

"Forty? Maybe even forty-five or fifty?" the grocer breathed in Reed's ear. "In the supermarkets, you know, they have more subtle ways of accomplishing such feats."

Reed slapped his coffee cup with the back of his right hand. The brown liquid swirled across the counter top, wetting the books. "Damn this!" he shouted.<sup>33</sup>

Is there ever a truly "equal" exchange? How is choice (a basic assumption of contract law) constrained by systems of oppression? The short story emphasizes, in a way most edited appellate cases do not or cannot, the complexities underlying exchange in market transactions.<sup>34</sup>

Third, literature helps redeem a casebook's ethical potential. In particular, literature can help us exercise our capacity for empathy. A good lawyer needs the skill of empathy, the imaginative and moral capacity to place oneself in another's shoes. Robin West expresses a similar point when she contrasts "economic man" with "literary woman."<sup>35</sup> While Law and Economics is a commonly used approach to contracts (and in fact *Contracting Law* includes a variety of excerpts relating to economics), Law and Literature is less commonly associated with the study of contracts. West suggests that the economic man imagined by legal economists is a problematic figure, best tempered by the characteristics of a figure she characterizes as literary woman. In particular, West argues that the two major assumptions surrounding the character of economic man (that he is a rational maximizer of his own utility, and that he is uninterested in the subjective well-being of others) are not always true.<sup>36</sup> In contrast with economic man,

33. *Id.* at 646-647.

34. For further explication of the relationship between literature and contracts, see Amy Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132 (1995) (analyzing contemporary contract theory and arguing that it is better to imagine ourselves as cyborgs, active and with multiple social connections, than as Grant Gilmore's cogs in a social machine); and Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994) (examining ways embedded racist narratives perpetuate white racism in law).

35. Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1989), reprinted in LAW AND LITERATURE, *supra* note 3, at 127.

36. LAW AND LITERATURE, *supra* note 3, at 128-129.

literary woman (as imagined through literary theory) is multimotivational and has great empathic potential.<sup>37</sup> It is particularly this capacity for empathy that West, among others, views as holding out moral promise for law.

The literary excerpts in *Contracting Law* open up the casebook genre. Instead of the shutting down of narrative, and the consequent dehumanizing of text and reader, the casebook encourages a moral use of imagination through empathy. For example, the editors juxtapose a breach of contract case involving U.S. Steel's Youngstown plant closings with the poem, *Blue Collar Goodbyes*, by working class poet, machinist and mother, Sue Doro.<sup>38</sup> Even a short sampling from this poem is powerfully evocative of the human realities of plant closings:

blue collar goodbyes are a jumpstart  
on a frozen battery midnight parking lot  
peering out of second shift propped open coffee eyes  
from a toolbox back at the radial drill machine  
in Allis Chalmers Tractor Shop  
Where the only African American on the housing line  
teams up with the only female in the maintenance repair  
to move those tractors out the door<sup>39</sup>

The setting of a "frozen battery midnight parking lot" and the tiredness of "second shift propped open coffee eyes" add the human element to a case that all too easily might be analyzed solely within an economic framework.

The editors include many other superb literary excerpts which can help encourage empathy, but let me end with just one. In the chapter on Consideration, the editors include a case where the Michigan Supreme Court decided that a low-income woman could not maintain a breach of contract claim against a free government health clinic for actions that caused brain damage to her child because there was no consideration for the contract.<sup>40</sup> The majority and the dissent discuss the doctrines of lack of mutuality and adequacy of consideration, but the lived realities of the case seem flattened and distanced. Immediately after the case, the editors include a piece by Paulette Childress White, *Getting the Facts of Life*.<sup>41</sup> The story describes Minerva, a young girl, accompanying her mother to the welfare office on a hot August day. Minerva experiences shame, anger, and a growing appreciation of the "facts of life" for women struggling with poverty:

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37. *Id.* at 129-130.

38. KASTELY ET AL., *supra* note 21, at 143-144.

39. *Id.* at 143.

40. *Lawrence v. Ingham County Health Dept.*, 408 N.W.2d 461 (Mich. 1987), *reprinted in* KASTELY ET AL., *supra* note 21, at 304.

41. KASTELY ET AL., *supra* note 21, at 317.

At Jefferson, we turned left and there it was, halfway down the block. The Department of Social Services. I discovered some strong feelings. That fine name meant nothing. This was the welfare. The place for poor people. People who couldn't or wouldn't take care of themselves. Now I was going to face it, and suddenly I thought what I knew the others had thought, *What if I see someone I know?* I wanted to run back all those blocks to home.<sup>42</sup>

After waiting for three hours, Minerva and her mother finally get their turn to talk to the social worker:

Then I heard our names and ages B all eight of them B being called off like items in a grocery list.

"Clifford, Junior, age fourteen." She waited.

"Yes."

"Born? Give me the month and year."

"October, 1946," Momma answered, and I could hear in her voice that she'd been through these questions before.

"Stella, age thirteen."

"Yes."

"Born?"

"November 1947."

"Minerva, age twelve." She looked at me. "This is Minerva?"

"Yes."

No. I thought, no, this is not Minerva. You can write it down if you want to, but Minerva is not here.

"Born?"

"December 1948."

The woman went on down the list, sounding more and more like Momma should be sorry or ashamed, and Momma's answers grew fainter and fainter. So this was welfare. I wondered how many times Momma had to do this. Once before? Three times? Every time?

More questions. How many in school? Six. Who needs shoes? Everybody.

"Everybody needs shoes? The youngest two?"

"Well, they don't go to school . . . but they walk."

My head came up to look at Momma and the woman. The woman's mouth was left open. Momma didn't blink.<sup>43</sup>

This narrative pulls us back to earth, after the more abstract appellate opinion. The lived effects of the law include real human pain, which too often is a latent, unacknowledged subtext underpinning the dry language of an appellate decision. With such resonant excerpts as the above piece, students will have

42. *Id.* at 319.

43. *Id.* at 321.

ample opportunity to begin developing the lawyering skills of storytelling, appreciating complexities in life and law, and empathy. The editors' use of literature re-stories, reminds and redeems: it re-stories by emphasizing the importance of narrative, it reminds us of human complexities, and it redeems the ethical potential of the casebook genre.

#### V. STORYTELLING AND THE FEMINIST CASEBOOK

I want to make one final point about the benefits of a "literary" casebook: it is precisely its literary quality that makes *Contracting Law* by far the most feminist (and multicultural) of the various contracts casebooks now available. Nowadays it has become commonplace to state that storytelling is important to feminist jurisprudence. Consciousness-raising (a practice that focuses on telling and sharing stories about one's lived experiences) and positionality (insisting on the importance of individual perspective) are just two well-established feminist strategies/modes of thinking that resonate with storytelling.<sup>44</sup> Further, scholars of feminist jurisprudence have been greatly interested in approaching the law via a relational worldview.<sup>45</sup> Such interest has its roots in part in the influential and groundbreaking work of such theorists as Nancy Chodorow and Carol Gilligan, who studied the psychological and cultural factors that contribute to many women experiencing a sense of self as relational/other-connected and many men experiencing a sense of self as individualistic.<sup>46</sup> These insights, along with Gilligan's suggestion that women may be more embedded in a morality of care than a morality of rights,<sup>47</sup> necessitate a concomitant interest in story. All the details of lived experience, the whole story, becomes particularly important from the perspective of a great deal of feminist jurisprudence. (In fact, storytelling has proven highly conducive to a variety of "outgroups," as Richard Delgado describes them,<sup>48</sup> whose members are marginalized by race, class, gender, or sexual orientation. Derrick Bell, Patricia Williams, William Eskridge, Jr., among many others, have generated an influential body of legal storytelling.<sup>49</sup>)

44. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (delving into the meaning of feminist reasoning).

45. I am thinking here particularly of Robin West's work. E.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

46. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

47. See generally GILLIGAN, *supra* note 46.

48. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

49. For a good sampling of what is a wonderfully broad and far-ranging field of articles, see generally Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (particularly his section, "The Chronicle of the Slave Scrolls") (using fantasy and storytelling to explore racial myths in America); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (using creative stories, including conversations between professor and fictional lawyer, to tell story of racism in America); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (constructing pragmatic case for gaylegal narrative methodologies); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (analyzing a variety of storytelling strategies as advocacy tools for gay men and lesbians); Patricia Williams, *THE ALCHEMY*

Therefore, a casebook that clearly announces that acquiring sensitivity to storytelling is one of its pedagogical goals makes a good “fit” for an interest in feminist methodologies.

In addition to storytelling’s importance to feminist theory, it is equally important to feminist practice in the courtroom. In order to be effective advocates, it is necessary to understand that how a story is told often is just as important as what is told. The way in which the law allows stories to be told all too frequently evidences a gender bias. Numerous feminists have made the point that because of the way women experience the world and tell stories about those experiences, they are at a disadvantage in a gendered legal system.<sup>50</sup> Lenore Walker found that while many women view and describe events in a highly contextual, relational, process type of analysis, it is precisely that type of storytelling which may be excluded as inadmissible opinion testimony at trial.<sup>51</sup> In discussing battered women in the criminal trial system, Walker notes that men generally function better than women under such a system: “[w]omen often prefer to explain incidents by telling stories; they give a reliable narrative account of events, and of how they and others feel about them. But narrative stories are not admitted as evidence, even when the narrator is on trial for her life.”<sup>52</sup> Thus, the “hows” of storytelling are significant to feminist law practice.

Finally, in addition to the focus on storytelling, the case selection in *Contracting Law* features a particularly broad spectrum of women litigants. (As mentioned earlier, the litigants in the cases also cover the spectrum of race, class, gender, sexual orientation, and disability.) Women are well-represented, and not simply in one case out of a hundred, or solely as impecunious widows. The women litigants are in a variety of subject positions: powerful or weak, high or low.

The first chapter is particularly significant, given the extra attention and focus students give to those first few cases they read in law school. In the very first case, a nineteenth-century woman manages the business of a sugar plantation in her husband’s absence, making business deals and signing agreements.<sup>53</sup> Later in the chapter, we read how Mrs. Kirksey moved herself and

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OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR (1991) (using storytelling to discuss jurisprudence of rights in terms of gender, race, and class). Of course, there have been attacks on legal storytelling as a field of jurisprudence, the most notable (and virulent) being DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (critiquing Critical Race Theory, Radical Feminism, and Gay Legal Studies, in which, the authors argue, the storytelling methodology is irrational and manipulative).

50. E.g., Kathy Mack, *Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327 (1993); Aviva Orenstein, “My God!”: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159 (1997); Myrna S. Raeder, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System*, 69 S. CAL. L. REV. 1463 (1996); Myrna S. Raeder, *Proving the Case: Battered Woman and Batterer Syndrome*, 67 U. COLO. L. REV. 789 (1996); Elizabeth M. Schneider, *Hearing Women Not Being Heard*, 63 FORDHAM L. REV. 33 (1994).

51. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 256 (1989).

52. *Id.* at 257-258.

53. *H.J. Coolidge v. Pua’akiki and Kea*, 3 Haw. 810 (1877).

her children to start a new home and cultivate land, based on her brother-in-law's promises.<sup>54</sup> We learn how Vanessa Redgrave sues the Boston Symphony for canceling her performance after she generated negative publicity with some of her political comments.<sup>55</sup> We see Katie Scothorn suing her grandfather's estate to enforce her grandfather's promise to pay her money, a promise on which she relied when she quit her job.<sup>56</sup> We read a recent case in which a dairy farmer and her husband sue their bank for its failure to extend credit to them for their farm.<sup>57</sup> And we read the story of a mentally incompetent woman sued for the care and support provided by her brother-in-law.<sup>58</sup>

In the first chapter, women play a key role in six out of nine cases. (Women continue to be well represented throughout the rest of the casebook.) The editors take care not to have women be invisible in the history of contract law. Thus, *Contracting Law* is feminist both in methodology (storytelling) and in choice of cases (being inclusive of women).

#### CONCLUSION

*As you set out toward Ithaca,  
Hope the way is long,  
full of reversals, full of knowing.*

\* \* \*

*Hope the way is long.  
May there be many summer mornings when,  
with what pleasure, with what joy,  
you shall enter first-seen harbors...  
C.P. Cavafy, Ithaca<sup>59</sup>*

I like to begin my first Contracts class of the year by reading *Ithaca*, a poem by the early 20<sup>th</sup> century Greek poet, C.P. Cavafy. It is a poem about journeys and destinations. Ithaca is home, Odysseus' ultimate goal in *The Odyssey*. Throughout the long journey of Odysseus, all the years he is outwitting gods and monsters, his final destination is Ithaca. However, the destination must not obscure the importance of the journey. In the first year of law school, it is too easy for students to focus on goals and destinations and ignore the journey. But to live this way is to ignore life. It is tempting to live reductively, to be so goal-oriented that we reduce everything to the achievement of the next goal and then the next goal until, when we finish our goals, we look back and wonder what has happened to life along the way. The Kastely, Post and Hom casebook reminds us to give our attention to the particularities of daily experience, and by doing so

54. Kirksey v. Kirksey, 8 Ala. 131 (1845).

55. Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985).

56. Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

57. State Bank of Standish v. Curry, 500 N.W.2d 104 (Mich. 1993).

58. Sceva v. True, 53 N.H. 627 (1877).

59. C.P. Cavafy, *Ithaca*, in *BEFORE TIME COULD CHANGE THEM: THE COMPLETE POEMS OF CONSTANTINE P. CAVAFY* 11 (Theoharis Constantine Theoharis trans., 2001).



this most literary of casebooks sets a new standard for all other casebooks in the field.