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Teaching Humanities Softly: Bringing a Critical Approach to the First-Year Contracts Class Through Trial and Error

Ariela J. Gross*

INTRODUCTION: THE FIRST TRY

I began teaching Contract Law in 1997, and because I wanted my students to benefit from an interdisciplinary approach to the subject, I chose a wonderful casebook edited by Amy Kastely, Deborah Waire Post, and Sharon Hom, called *Contracting Law*.¹ Rather than the sterile doctrinal analysis of the traditional 1L classroom, I hoped to have my students gain an appreciation of the human dimension of legal problems and the encounters between ordinary individuals and legal institutions. My own research at the time explored the intersection of law and local culture to uncover the way people made race in their everyday lives. I hoped that in the classroom we could similarly think about law in its cultural-historical context. Likewise, I thought that only by situating law in its cultural-historical context could students gain enough purchase to be critical of the legal status quo.

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1. AMY KASTELY, DEBORAH WAIRE POST & SHARON HOM, *CONTRACTING LAW* (1996),

I think it is fair to say that *Contracting Law* was the first (and it may be the only) critical race feminist Contracts casebook. It is also the only Contracts casebook that I know of that attempts to engage the humanities. It is filled with poems and excerpts of novels, in addition to law review articles from a variety of viewpoints. It didn't even look like other casebooks. It was bigger and heavier and the typeface was large enough to read easily. My students hated it.

They hated that it was different. They hated that there were things in it that were "not law." They hated that it appeared to have a perspective. And they hated every time our class appeared to depart from "black letter" law. The literary excerpts elicited not empathy but derision. When assigned O. Henry's "Gift of the Magi," and John Elemans' "The Gift Economy," they did not probe deeper into the bargain-gift distinction. Assigned a chapter from *The Grapes of Wrath*, they did not make the connection between farmers in the Great Depression and the plaintiffs in a promissory estoppel case, *Standish v. Curry*. Reading bell hooks' "Homeplace: A Site of Resistance," and Denise Chavez's "The Wedding" did not make them think more carefully about the emotional distress arising from contract breach and the exclusion of emotional distress damages. Student evaluations said things like, "I didn't pay \$35,000 a year to read poetry." Clearly, I was doing something wrong. My ambition to integrate a humanities approach to introductory legal studies had obviously fallen flat.

I.

A DIFFERENT APPROACH: PLAIN VANILLA BUT WITH TOPPINGS

After three years, I switched casebooks. When I described the students' reaction to my casebook, professors far senior to me advised me to assign a "plain vanilla" casebook, and then teach against the casebook. This is more or less what I have done for the past ten years. I adopted *Contracts: Cases and Materials*, written by Farnsworth, Young, et al., which is now edited primarily by Carol Sanger, Neil Cohen, and Richard Brooks, scholars I admire very much whose own work is hardly standard and doctrinal.² But this casebook is standard and doctrinal.

I became a successful Contracts teacher only after years of teaching the course, and only after I discovered that I could teach a highly critical class, one completely framed by social and intellectual history and critical legal theory, if and only if I did so using my own materials rather than using a casebook where material students perceived as being peripheral to the law took center stage. Today, the only literary excerpts I use are those very directly thematically tied to our subject matter, ones that actually demonstrate a core problem in contract law. Furthermore, I draw heavily from materials that are closer to my own area of expertise, legal history, which allows me to offer a clear theoretical perspective on contract law. This approach is less explicitly recognizable as a

available at <http://www.cap-press.com/pdf/1578.pdf>.

2. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* (7th ed., 2008).

“law and humanities” approach to contract law, yet it fulfills my goals of situating the law in cultural and political context in a way that students do not perceive as at war with their goals of learning to become lawyers, to draft contracts that will hold up in court, and (of course) to succeed in law school exam taking.

I could tell that it was working when my students stopped asking, “Will this be on the exam?” Once the Classical-to-Realist frame started helping them make sense of the bewildering mass of doctrine, once the historical, political and cultural perspective actually revealed a pattern rather than random chaos, they stopped asking, “Do we really need to know this?” and their comments on my evaluations changed. No longer did they find me “really nice and probably a good teacher in her specialty” but “doesn’t know anything about Contract law.” Now they found me clear, well organized, and knowledgeable. By responding to their anxieties about learning “real” law, and explaining to them how history and context could organize and make sense of legal doctrine, I won them over. But I hope that I’ve done more than become a popular teacher; I genuinely believe that their understanding of the human dimensions of legal institutions and processes will make them better lawyers, who won’t just think that one can plug in facts and out will come right answers to legal questions.

II.

ALTERNATIVE PERSPECTIVES/PEDAGOGICAL TOOLS IN ACTION

A. From Status to Contracts and Back Again

One of the attractive things about a historical perspective on a doctrinal subject is that it can afford a coherent narrative for the class. The dramatic arc of my Contracts course traces the transition from Classical contract law, with its heyday in the late nineteenth and early twentieth centuries, to Realist contract law, as embodied in the Uniform Commercial Code and the Second Restatement of Contracts. I teach the students about the moral philosophy underlying Classical legal thought, as well as the ways in which neo-classical economics has extended certain aspects of Classical legal thought. I also teach them about the history of legal education in the United States, for example, the way that Christopher Columbus Langdell, who became Dean of Harvard Law School in 1870, established so much of what they are still experiencing. My students relate to this history keenly, especially after half a semester of law school. By this point in their legal careers, they have tremendous faith in the case method, “Socratic” teaching, the modern law school linked to the corporate law firm, and the “science” of law. It is at this point that I attempt to disrupt their hard-won complacency with the law and legal pedagogy. I teach them that Langdell wrote the first Contract Law treatise and casebook, applying his legal science to the problem of the mailbox rule, deriving it from fundamental principles. I want them to see the connections between a certain kind of legal education and practice, and a philosophy of “freedom of contract.” Additionally, I try to show

them the way current debates in contract law—about online contract formation and end-user license agreements that harm consumers, about the parol evidence rule, and about mandatory arbitration—continue to be animated by these fundamentally different theoretical approaches.

By setting up the class as the intellectual history of the rise and fall of Classical legal thought as applied to contract law—or “Status to Contract and back again”—I am able to turn the cases into documents of legal history rather than, as Langdell would have them, the raw materials in a science lab or merely puzzles to work out as they learn to “think like lawyers.” For example, when we learn about objective theories of mutual assent, we talk about the contradiction, best described by the critical legal scholar Clare Dalton,³ between a subjective theory of value and an objective theory of intent. We see the continuum between freedom and coercion in a range of contractual relationships, from employment to intimate exchanges. Justice Cardozo’s opinions become not only brilliant examples of judicial technique but also artifacts of the rising critique of classical legal thought. In addition, I assign examples of contracts that bring into relief the way status can remain a vibrant part of a “free” contract, such as contracts for indenture. I also teach them about the statutes requiring freed slaves to enter into year-long employment contracts or be arrested for vagrancy and about actions for seduction, breach of the marriage promise, alienation of affections, and (my favorite) criminal conversation—the heartbalm actions—in nineteenth-century cases about courtship and marriage. We discuss each type of case we study—primarily employment, family or intimate relationships, construction, consumer, and sale of goods—within its social context.

In each case, as students learn to see structures of legal thought leading to particular doctrinal moves, and cultural context shaping outcomes, they are forced to question some of the knee-jerk responses traditional law-school teaching engenders, especially, in Contracts class, the belief in the “free market” and “free contract” in which the state can just get out of the way and let the market do its work. Whereas law and economics approaches prevalent in the teaching of private law courses like Contracts and Torts often reinforce students’ belief in the naturalness of markets, a critical approach helps them to see both that legal rules determine the existence and functioning of markets, and that the existing distribution of resources and power in our society are not natural or inevitable, but a product of political and legal choices. I hope that this critical perspective will help my students not only to be savvy advocates navigating the legal system as it is now organized, but also advocates for change, who can begin to imagine how legal rules and institutions could be arranged more fairly and efficiently than they are now.

3. See Clare Dalton, *An Essay in The Deconstruction of Contract Doctrine*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 285 (Sanford Levinson & Steven Mailloux, eds., 1988).

*B. The Stories and the Numbers, or,
How I Made My Classroom Safe for the Humanities*

I begin the course with two famous cases, *Hawkins v. McGee*⁴ (“the Hairy Hand case”) and *Sullivan v. O’Connor*⁵ (sometimes known as “the nose job case” or “the Hedy Lamar nose case”). In both of these cases, the issue is the remedy. Should the plaintiff get full expectation, or “benefit of the bargain,” damages when a surgeon breaches a promise to guarantee the results of a cosmetic surgical operation? But these cases offer far more than a discussion of damages. For example, in both of these cases, background materials to the cases are available, including interviews with jurors, participants, and family members; newspaper articles; and trial transcripts. I provide my students lots of these “extra” materials for both cases so that we can begin the course talking about what is left in and out of an appellate opinion, how certain facts become “facts” and others do not, and how the individual plaintiffs in the two cases actually felt about their court victories. Throughout the course, though we never spend as much time on a single case as we do at the outset, I continue to give them materials of social history to put the cases in social, cultural, and political context. This exercise sets up from the beginning of the course that legal outcomes are not necessarily logical outputs of particular inputs. They are shaped by human beings. For example, George Hawkins lost his tort action against Dr. McGee, not necessarily because Dr. McGee wasn’t negligent in the surgery—it sounds like he may well have been—but because in 1929, in the small town of Berlin, New Hampshire, Hawkins couldn’t get any local doctors to testify against the popular McGee (who later became mayor) to say that he failed to meet reasonable standards of care. Throughout the course, I continue to assign these background materials, but keep them brief, fun, and directly related to the case assigned rather than thematically inspired.

My other technique at the beginning of the course, which I owe to Barbara Fried,⁶ who generously passed on her teaching notes when I began in the classroom, is to turn from social history to economic theory within the first week of class. Of course, I am as far as can be from an economist, and the economic approach is almost opposite my own humanities orientation, yet I find it extremely strategically useful. First of all, by doing numbers, I establish my authority in the classroom, because most of my students are afraid of numbers. Second, by giving a sympathetic reading to the “efficient breach hypothesis,” of which I am highly skeptical, I allow my students to generate its critique, which we will draw on again and again throughout the course. By doing so, I have almost completely eliminated a certain kind of knee-jerk “freedom of contract” response from my students to policy questions that arise during the semester. And I give myself added credibility when I bring in other

4. 84 N.H. 114 (1929).

5. 363 Mass. 579 (1973).

6. William W. and Gertrude H. Saunders Professor of Law, Stanford Law School.

disciplinary perspectives on contract law.

For example, I assign Robert Gordon's wonderful piece, "Unfreezing Legal Reality,"⁷ about *Vokes v. Murray*, a case in which a hapless middle-aged woman, Audrey Vokes, is flattered into buying thousands of hours worth of dance classes at Arthur Murray Dance Studios.⁸ She wins her case on a theory of misrepresentation: the dance teacher lied to her about her dancing ability, and her purchases of lessons were premised on the material misrepresentation of the underlying fact that she would never improve. Through Gordon's deconstruction of the case, we see that *Vokes v. Murray*, despite its benign outcome, remains true to the framework of classical contract law: that but for a procedural defect, the "right" outcome would have occurred. The article allows the class to home in on the possibility that what is really wrong with this case is not silly, snookered Audrey Vokes—who is patronizingly portrayed as a female so elderly and addled that she could not think for herself—but instead the substantive terms of the deal: a contract in which one's resources are tied up for years, possibly decades, much farther in the future than most of us can reliably estimate our future preferences. We then look at the statute drafted by Gordon's contract law students at Stanford, and adopted by the California legislature in 1985, Civil Code Section 1812.53 (2010), which provides in part that "No contract for dance studio lessons and other services shall require payments or financing by the buyer over a period in excess of one year from the date the contract is entered into, nor shall the term of any contract be measured by the life of the buyer." Finally, we go online and look at the hilarious video that Georgetown Law Center students created about the *Vokes* case, inspired by Gordon's article.⁹ By couching critical theory in a humorous medium, this approach allows me to bring issues like "rules vs. standards," "legislative vs. common-law solutions," and, most fundamentally, classical contract law and its critique, to the students in an accessible and meaningful way.

CONCLUSION

I still look wistfully at the Hom, Kastely, and Post casebook on my bookshelf every now and then. I wish my students enjoyed thinking about law in literature the way I do. But I realize that I am more comfortable teaching my students the human dimensions of contract law through history and critical theory than through literature. I also find that by giving my students a casebook that looks familiar to them, and "sneaking in" the theory and history, always emphasizing its practical usefulness, I can keep them on board with me without triggering the anxiety that we are departing from "real law." Unfortunately, I have rarely found that literature works that way for most of my students, at least not in the small bites that we are able to assign in a first-year law class. I

7. *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. App. 1968).

8. *Id.* at 906–07.

9. *Vokes/Arthur Murray Dance Case*, XTRANORMAL, <http://www.xtranormal.com/watch/7539521/vokesarthur-murray-dance-case?page=1> (last visited Dec. 20, 2011).

have been a more successful law teacher using social history and critical theory than I was when I tried to bring in poems and novels.

I would like to end by observing the timeliness of this symposium on humanities in the mainstream law curriculum. We are at a moment in legal education when the pressures of a weak economy are leading to a resurgence of perennial calls for law schools to do a better job in training lawyers for service to corporate America. For many critics of contemporary law schools, this is a convenient moment to accelerate a battle against interdisciplinarity and intellectualism in legal academia, and reassert the law school as primarily a trade school. Yet I believe passionately that our duty in training lawyers is not only to help them memorize some useful rules or techniques of advocacy, but to help them make sense of the way law works in daily life—that is, in its political, economic, and cultural context—and to prepare them not only to apply the law but to make it better.