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Teaching Ethics in Context: *Wood v. Lucy, Lady Duff-Gordon* in the First Year Curriculum

Celia R. Taylor*

The opinion in *Wood v. Lucy, Lady Duff-Gordon*[1] is short, weighing in at only 822 words, but as a teaching case, those few words contain multitudes. Of course, any consideration of the case needs to begin with an examination of the rule of law it establishes, but the notion that an obligation of good faith might reasonably be implied in a services contract, and the ramifications of doing so, can be fairly readily addressed.[2] The case then can be fruitfully mined for many other topics; for example, class discussion could take up any number of "law and" approaches to legal analysis. By this I mean the case easily lends itself to considerations of, among others, law and economics,[3] feminist analysis,[4] and law and social science.[5] But Justice Benjamin Cardozo's opinion does even more. As is often the case with a Cardozo opinion, unpacking the stated and unstated

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1. 118 N.E. 214, 222 (N.Y. 1917) (hereinafter "Lady Duff-Gordon") (Although I suppose technically the case should properly be referred to as "Wood" it is universally known by some derivation of the Lady Duff-Gordon appellation.).

2. This is not to suggest that the contours of such an obligation are easily determined. For professors who choose to do so, the discussion of good faith in the context of *Wood v. Lady Duff-Gordon* can easily be extended to the broader conceptualization of good faith underlying all of contract law. *See, e.g.*, Caroline N. Brown, *Important Contract Concepts: Teaching Good Faith*, 44 ST. LOUIS U. L.J. 1377 *passim* (2000).

3. Cardozo calls this approach directly into discussion in his opinion (without, of course, referring to it as a law and economics approach) when he states that "[w]ithout an implied promise, the transaction cannot have such business 'efficacy as both parties must have intended that at all events it should have.'" *Lady Duff-Gordon*, 118 N.E. at 214-15 (citing The Moorcock, (1889) 14 P.D. 64, 68 (U.K.) (Bowen, L.J.)). Professor Walter Pratt provides historical and economic perspective on the case in his article *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 420-57 (1988).

facts, and examining the underlying biases and assumptions of the decision provides a valuable opportunity to examine critically the ethics of the behavior of all the participants in the proceedings.

Some may not agree that it is important to incorporate ethics into a first year contracts course, or any other first year course for that matter. As Deborah L. Rhode succinctly puts it, "[t]he conventional view on most faculties has been that education in professional responsibility is someone else's responsibility,"[6] a position that could easily be asserted by professors already straining to include the teaching of substantive law, critical analysis and the myriad other new disciplines that first year students must grapple with. In support of not including discussions of legal ethics in a contracts or other first year course, professors could point out that most, if not all, law schools include in their curriculum a course (or courses) dedicated solely to professional responsibility taken by students in their second or third year. Further, first year students surely have enough on their plates learning rules and doctrine without overloading them with discussions about ethics that must, by their very nature, be ambiguous and unresolvable.

While I acknowledge these points, in my view, it is never too early to begin to alert students to ethical considerations. To be clear, when referring to ethics in the context of the first year, I do not mean ethics in the more narrow sense of the rules or standards governing the conduct of the members of a profession, which for lawyers are the substantive rules of professional responsibility.[7] Instead I mean a broader notion of ethics, incor-

4. The seminal work in this area is Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (including an in-depth discussion of *Wood v. Lucy, Lady Duff-Gordon*).

5. Gary D. Wexler, *Intentional Interference With Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 315 (1994).

6. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 31 (1992). *See also* Richard H. Underwood, *Modern Methods in Legal Ethics Theoretical and Practical Approaches: What I Think That I Have Learned About Legal Ethics*, 39 IDAHO L. REV. 245, 247-48 (2003) ("I am one of those who believe that it is best to concentrate on 'the nuts and bolts of the rules of professional conduct' . . . rather than attempting to teach 'morality or personal ethics' . . . .").

7. Of course, the rules of professional responsibility are highly relevant to a broader discussion of ethics and will certainly factor into first year discussions. My point here is simply that they are one component of a larger universe—rele-

porating a consideration of the general nature of morals and the specific moral choices to be made by an individual. Such choices are a critical element of many legal decisions, both those reflected in judicial opinions and those made by individual lawyers on a daily basis in the course of their practice.

The centrality of ethics (in the broader sense that I use herein) to the operation of law makes first year courses an ideal place to begin having conversations about the role that ethics can or should play in legal decision making. First year students need to learn from the outset that the morals and ethics they bring with them to law school should not be put away in the process of "becoming a lawyer." The more frequently ethical concerns confronting lawyers are brought to students' attention and made a focus of discussion, the better we serve our students. Ethical concerns pervade every area of law, and as professors we are charged with teaching our students to recognize and resolve legal dilemmas[8] and to help them gain a deeper appreciation for ethical standards and professional responsibility. Calling ethical questions explicitly into issue as early as possible and in as many law school classes as possible helps students understand that even in the hard world of the law, ethics do matter and are an important factor in each participant's behavior. Even early in their first year, law students must grapple with ethical issues underlying doctrinal areas. In a contracts class, for example, such concerns inform discussions about estoppel doctrines, reasonability, unconscionability and countless others. While it is certainly possible to teach these subjects without explicitly acknowledging the importance of ethics, discussions will be richer if that role is called into question directly. Habituating first year students to be attuned to ethical concerns has the added bonus of helping to prevent the marginalization of the rules of professional responsibility that some professors of upper level courses observe.

Frequent and thoughtful attention to the ethical behavior of all participants in the legal process helps students appreciate

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vant to, but not exhaustive of the ethical (moral) views that first year students may express.

8. *See Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR (the "MacCrate Report").

the pervasiveness of such concerns, and (one hopes), heightens student awareness and sensitivity in the area. This heightened awareness may help keep ethics in the forefront of students' thinking and remind them that as lawyers they will face ethical challenges at many times in their careers. As we all know, lawyers are often perceived by the public as inherently unethical.[9] Incorporating discussions of ethics in the first year, and in a broad variety of courses and settings, habituates students to consider the ethical ramifications of their actions.[10]

Raising ethical considerations early on in the first year serves another, equally important, purpose. In addition to encouraging students to be attuned to ethical concerns, such discussions show students that it is appropriate to challenge the cases they are assigned, to get behind the presentation of facts and the statements of rules of law in order to consider the ethical (or unethical) behavior of the participants in the process. Students in general, and first year students in particular, are far too quick to accept the cases they read as sacrosanct. One of my greatest pleasures as a professor is when a student dares to challenge an opinion (even more so when it is authored by as revered a jurist as Benjamin Cardozo). Because questions about ethics generally engender debate and disagreement, they can be valuable in showing students that no one (not even Cardozo) is immune from challenge. Challenging opinions helps students analyze the legal system and to consider the role and responsibilities of all the participants in that system, a consid-

9. Examples range from the much misquoted, "The first thing we do, let's kill all the lawyers." (which while an accurate quote from William Shakespeare's King Henry VI, Part II, looses its intended meaning when taken out of context. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2. Spoken by Dick the butcher, the line expresses his desire to eliminate impediments to a revolution—recognizing the need to get rid of the lawyers in order to overthrow the government) to the common view that lawyers contributed greatly to the financial implosion surrounding Enron, Worldcom and other instances of corporate malfeasance. *See, e.g.*, Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 955 (2003).

10. *See* Derek C. Bok, *Can Ethics be Taught?*, CHANGE 26, 30 (October 1976) ("Although the point is still unproved, it does seem plausible to suppose that the students in these [ethics] courses will become more alert in perceiving ethical issues, more aware of the reasons underlying moral principles, and more equipped to reason carefully in applying these principles to concrete cases.").

eration that should begin in the first year and continue throughout students' legal careers.

Much more could be said about the utility of teaching ethics in first year courses generally, and in a contracts course in particular.[11] Because I believe there is at least general agreement that it is valuable to include discussions of ethics in the first year curriculum (in addition to teaching professional responsibility in an independent course), rather than continuing to press that point, I turn to two other issues (1) *how* should discussions about ethics be conducted in a first year course and (2) *why* is *Wood v. Lucy, Lady Duff-Gordon* a good vehicle for teaching ethics?

I. How to Talk About Ethics Outside of Professional Responsibility Courses

I must begin by emphasizing that I am by no means an expert in teaching ethics, and in fact, do not believe that ethics are "taught." Rather, I believe that students come to law school with good powers of ethical judgment. The job of the law professor is not to try to change those powers or to profess what a "correct" ethical position is. Instead, the role of the professor is to impress upon students the ubiquity of ethical considerations in the law and to help them impose order and discipline on the ethical sensibilities they already possess.

The following discussion of how to engage fruitfully in ethical discussion in a first year law school course is simply experiential observations from a long-term first year contracts professor. Generating valuable discussion about ethics requires some tact and deftness on the part of the professor. Students may be reticent in expressing their position on ethical matters for several reasons. First, depending on at what point in the course the case engendering the ethical discussion is taught, students may still be feeling out the atmosphere of the classroom and may not be comfortable speaking freely. Second, students may not think that ethical issues matter, particularly in a

11. For more reasons to include ethics in the first year curriculum, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1998); Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961 (2003).

first year course when there is (by necessity) often great emphasis placed on the doctrinal aspects of cases. Third, even when ethical issues are central to a decision, students may fear that their view will be deemed "wrong" or sense that they stake a minority position and therefore be reluctant to speak freely. It may not be possible to get every student to a point where he or she is willing to be forthright on ethical issues (some students never want to discuss *anything*, regardless of how non-controversial), but various techniques can be employed to help overcome this problem.

First, talk about ethics frequently. The more often ethical concerns are raised in the classroom, the more comfortable students get with discussing them. Obviously, not every class can talk about the ethics of the parties to a case, or the appropriateness of the actions of the lawyers involved, and there will be many class sessions where ethics are not called into play at all. However, it does not take much imagination to see ethical issues in many cases, including many classics of the first year curriculum.[12] When the opportunity is presented, even a short mention of ethics keeps its relevance in students' minds.

When there is room and opportunity for a more full blown discussion of ethics, it helps if the professor is explicit about the nature of the conversation and clearly establishes ground rules for the class. It never hurts to remind students that from the moment they walked through the law school doors, they assumed the obligation to act as ethical attorneys—an obligation that includes listening to and debating diverse points of view with intelligence and respect. It is also critical that the professor lives up to this high standard and truly listens to student input. Discussions of ethics are valuable in that they allow students with widely varying backgrounds and experience to contribute, but students will be willing to do so only if they believe their input will be heard and valued—not necessarily agreed with, but acknowledged as adding to the dialogue.

12. For example, the standard first year contracts course contains many cases that raise myriad of ethical issues. Some of these include *Allegheny College v. National Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927) (enforceability of charitable subscriptions), *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W. 2d 768 (Tex. App. 1987) (enforceability of "agreements to agree") and *ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (timing of offer and acceptance in electronic contracts).

It is also important to stress that in many cases, there will be no "correct" answer. Of course, if a model rule or provision of the disciplinary code does apply directly to the issue at hand, the professor must point that out. However, when ethical concerns arise in first year courses, they tend to be in more grey areas and will not be readily answerable by reference to a rule. Ethical issues will often cause tension and conflict and prove difficult to resolve. Student responses will be informed by their individual experiences, beliefs, intellect and wisdom, and thus will vary widely. Posing a set of ethical questions as open-ended discussion vehicles gives students an opportunity to appreciate the complexity of these matters and to appreciate that a wide range of responses is both possible and appropriate.

That said, it is also important to avoid the trap of undermining moral value by refusing to impose any judgment on ethical positions that may be stated by students. A "steady diet of insoluble dilemmas and regulatory failures . . . can inadvertently foster skepticism, relativism, and cynicism. All too often, an atmosphere meant to reinforce tolerance can end up undermining conviction."[13] As professors we must often acknowledge that some answers are, in fact, "better" than others—in that they are more reasoned, logical, consistent and coherent. Responses to questions of ethics can be assessed using similar criteria. It may be difficult to strike a balance between staying value neutral so as to encourage free and full expression of multiple ethical stances and devaluing all ethical positions by refusing to deem any one more "correct" than another. However, that challenge should not prevent us from engaging in the discussions.

One choice a professor must make for himself is whether to disclose his own position on a particular ethical issue. There are good arguments on both sides of the debate, which I need not re-hash here. I tend to fall on the side of disclosure (perhaps because it is often too difficult to remain reticent when lively conversations are going on in the class room). If the professor does choose to reveal personal positions, it is critical that it is done as part of a true discussion and dialogue and not as a dictatorial statement. Regrettably, regardless of the best pro-

13. *See* Rhode, *supra* note 6, at 49.

fessorial intention, some students will hear any opinion voiced by a professor as a statement that cannot be challenged. However, when we as professors strive to encourage full open conversations about sensitive matters we should be willing to participate in those dialogues without holding back.

II. Why Use *Wood v. Lucy, Lady Duff-Gordon* as a Vehicle for Teaching Ethics in the First Year Contracts Course

a. *The Background: A Brief Recap of Justice Cardozo's Opinion in* Wood v. Lucy, Lady Duff-Gordon

The value of *Lucy, Lady Duff-Gordon* as a case to base a discussion of ethics may not be immediately apparent. The case is ubiquitous in contracts casebooks,[14] and needs little review. In 1915, Otis Wood and Lucy, Lady Duff-Gordon entered into an agreement pursuant to which Wood was to "have the exclusive right . . . to place [Duff-Gordon's] indorsement on the designs of others."[15] This arrangement made good economic sense for each party. Lady Duff-Gordon, who began her enterprise by making "personality" dresses—dresses custom designed for each particular customer[16]—was an adept businesswoman, capable of changing with the times. As economic conditions changed, she expanded her business, moving from custom design to a more mass-produced approach, "marketing multiple copies of the same design . . . and hiring a manager for her branch office."[17] She also recognized the value of advertising and thus looked for an arrangement with Wood that would allow her to "concentrate on her special skill, designing, while Wood concentrated on his presumptive specialty, advertising."[18] For Wood, the arrangement with Lady Duff-Gordon was beneficial in that it granted him exclusive access to a customer base with no fear of competition, a large advantage in the economic climate of the times.

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14. Although I have not conducted a formal investigation into the matter, a casual perusal of the many contracts casebooks in residence on my office shelves reveals that each contains the case.

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

16. *See* Pratt, *supra* note 3, at 429.

17. *Id.* at 430.

18. *Id.* at 432.

The arrangement between Wood and Lady Duff-Gordon proved to be short-lived. In 1916, Lady Duff-Gordon, exhibiting more of her keen business acumen, entered into a contract with Sears, Roebuck to have her dresses marketed in Sears' mail order catalog, a move that was championed as "by far the most spectacular bid for prestige which this daring advertiser [Sears] has made since it first announced the new handy addition of the Encyclopedia Britannica."[19]

Upon learning of this arrangement, Wood sued Lady Duff-Gordon, claiming breach of contract. In response, Duff-Gordon argued that because Wood never explicitly promised to take an action to place Duff-Gordon's endorsements, her agreement with Wood lacked the mutuality of obligation necessary to create an enforceable contract. Wood prevailed at the trial level, where the judge found that the agreement's requirement that Wood use his "bona fide judgment" in placing endorsements placed sufficient obligation on Wood to find mutuality.[20]

The appellate court disagreed, finding that because Wood assumed no explicit duty to place endorsements, the agreement between the parties lacked mutuality of obligation[21] and therefore was unenforceable.[22] Wood did not cede his argument however, and appealed yet again, this time to the New York Court of Appeals, where in a four-three opinion, Justice Cardozo ruled in Wood's favor. The reasons for his so deciding require closer examination.

The opinion is a classic of Cardozo's writing. After making several sly characterizations of the defendant,[23] Justice Cardozo

19. *Id.* at 439 (citing *Sears-Roebuck's Latest Advertising Coup*, PRINTER'S INK, Sept, 21, 1916, at 28).

20. *Id.* at 440 (citing Wood v. Lucy, Lady Duff-Gordon (N.Y. Sup. Ct. Jan. 6, 1917), *reprinted in* Papers on Appeal at 13, Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917)).

21. Wood v. Lucy, Lady Duff-Gordon, 164 N.Y.S. 576, 578 (App. Div. 1917). Mutuality of obligation at that time was a contract law of long-standing, requiring that each party to a contract have an obligation under the contract in order for that contract to be enforceable. *See, e.g.*, WILLIAM BLACKSTONE, 2 COMMENTARIES *445; JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 360 (The Law Book Exchange Ltd. 2005) ("Mutual promises . . . must be both made at the same time, or else they will be both *nuda pacta*.").

22. *Lady Duff-Gordon*, 164 N.Y.S. at 578.

23. "The defendant styles herself 'a creator of fashions.' Her favor helps a sale . . . [t]he things which she designs, fabrics, parasols, and what not, have a new

admits the essential truth of Lady Duff-Gordon's complaint—Wood did not explicitly promise to do anything in exchange for the use of Duff-Gordon's name. "It is true that he [Wood] does not promise in so many words that he will use reasonable efforts to place [Duff-Gordon's] indorsement and market her designs."[24] This causes Cardozo little problem however as he goes on to state "[w]e think, however, that such a promise is fairly to be implied."[25] Straightforward, non-controversial and allowing little argument, Cardozo makes the implication of an obligation of good faith seem both inevitable and uncontroversial.

One senses that Cardozo would have been happy to leave the matter there, but, to the delight of legal scholars through the ages, he goes on to justify his conclusion, demonstrating once again his facility with legal reasoning and the artful use of facts. As noted by no less a luminary than Karl Llewellyn, Cardozo "was a truly great advocate, and the fact that he became a great judge didn't at all change the fact that he was a great advocate. And if you will watch . . . you arrive at the conclusion that the case has to come one way."[26] Cardozo manages to convince readers of the seeming unquestionable correctness of his ruling in the case primarily by reference to economic realities.[27] He cannot imagine that in a business relationship "one party was to be placed at the mercy of the other."[28] He finds support for this assertion first in the identity of the parties, noting that "the things [Duff-Gordon] designs . . . have a new value in the public mind when issued in her name" and that "Otis F. Wood possesses a business organization adapted to the placing of such endorsement as the said Lucy, Lady Duff-Gordon has approved."[29]

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value in the public mind when issued in her name." *Lady Duff-Gordon,* 118 N.E. at 90.

24. *Id.*

25. *Id.*

26. Karl Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637 (1962).

27. Using economic arguments to justify judicial outcomes was a favorite tactic of Cardozo, amply demonstrated by his rationale in cases such as *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921), and *Allegheny College v. Nat'l Chautauqua Co. Bank*, 159 N.E. 173 (N.Y. 1927).

28. Lady Duff-Gordon, 118 N.E. at 214 (citing Hearn v. Charles A. Stevens & Bro., 97 N.Y.S. 566, 569 (App. Div. 1906)).

29. *Id.*

Cardozo next turns to the language of the agreement between the parties (a move that warms the hearts of contracts professors!). He acknowledges that in that agreement, Wood did not explicitly "promise in so many words that he will use reasonable efforts to place [Duff-Gordon's] indorsements and market her designs."[30] Cardozo points out that the agreement between the parties contained financial terms—specifically, Lady Duff-Gordon's "sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from [Wood's] efforts."[31] Further, Wood promises in the agreement that he will "account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may in his judgment be necessary to protect the rights and articles affected by the agreement."[32] Cardozo acknowledges that these may be seen as illusory promises as nothing in the agreement itself compelled Wood to try to market anything or to attempt to place Lady Duff-Gordon's endorsement.[33] For Cardozo, however, the promise justifies the court in implying an obligation of good faith, because it supports an interpretation of the agreement that places obligation on Wood. If Wood did not undertake some effort to market goods and place Lady Duff-Gordon's endorsement, he stood to gain nothing from the arrangement, and no one would enter into an agreement pursuant to which there was nothing to gain. For Cardozo then, Wood's "promise to pay [Lady Duff-Gordon] one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence."[34]

Cardozo's analysis of the relationship of the parties and their intentions towards each other is ingenious. He seemingly engages in a formalist approach towards contractual obligation by not looking beyond the four corners of the document and attempting from the language contained within those four corners to honor each party's intent. At the same time, however, he

30. *Id.*
31. *Id.*
32. *Id.* at 215.
33. *Id.*
34. *Id.*

supports the "modern judicial propensity"[35] to err on the side of enforcing agreements by implying the good faith effort commitment on the part of Wood necessary to find consideration and thus bind the parties' to their word. Also in true Cardozian form, he supplies information that supports his position, and omits some that might detract from his argument. For instance, it is worth noting that at the same time that Wood was negotiating his agreement with Lady Duff-Gordon, he was in another agreement with Rose O'Neill (the inventor of the Kewpie doll) that contained an express best efforts clause.[36] In the context of considering the ethics of Cardozo's opinion, it is interesting to speculate as to whether he was aware of that contract and chose to ignore it because it weakened his position, or whether he was in fact, ignorant of its existence.

b. *The Subtext: Ethical Issues in* Lady Duff-Gordon

1. Overarching Ethical Issues

So what about this simple fact pattern makes the case a good one to generate ethical discussion? Beginning with the general (a more specific list of directive questions relating to the case follows), the case raises an immediate question about the proper role of judicial action in resolving contractual disputes. The fact that Cardozo is willing to look beyond the agreement of the parties and supplement their understanding with additional terms calls into question the appropriateness of his action, and by extension, all "judicial activism." Whether viewed as paternalism or rational implication based on economic realities, the fact remains that a judge elected to take action where no such action necessarily compelled. By implying an obligation of good faith into the parties' agreement in order to prevent Wood's promise from being illusory, Cardozo arguably did not radically alter then current contract law precedent.[37] But *not* implying such a term would also have been perfectly in keeping

35. Victor P. Goldberg, *Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-306 on Contract Interpretation*, 68 OHIO ST. L.J. 103, 109 (2007).

36. *Id.* at 108.

37. Arthur Linton Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 39 COLUM. L. REV. 56, 56-57 (1939).

with the doctrine at the time of the case.[38] Cardozo had a choice to make, a choice that required a balancing of equities and outcomes. Immediately, one's ethical juices start flowing. Understanding that the rule of law established in *Lady Duff-Gordon*—specifically that parties have an implied obligation of good faith in carrying out their contractual duties—rests upon a choice made by the author of the opinion can easily lead to a discussion about not only the choice made, but the appropriateness of having it be the judge who gets to make it.

Wood v. Lucy, Lady Duff-Gordon also presents an excellent opportunity to consider explicitly the ethical underpinnings of judicial action more broadly. In addition to raising the issue of party autonomy versus judicial intervention, the case allows students to challenge a Cardozo opinion. Even at a fairly early stage in the first year, most students have encountered Cardozo and formed strong opinions about his writing. First year students often have a difficult time questioning the "correctness" of an opinion in their casebook, a problem that is only magnified when that opinion is authored by so revered a justice as Cardozo. Encouraging (forcing?) students to challenge the ethics underlying judicial reasoning regardless of the eminence of the jurist both aids in the development of critical thinking, and reminds students that ethics matter in every legal action.

On that front, numerous ethical concerns can be raised by a careful consideration of the authorial style and tone of Cardozo's opinion. As has been amply demonstrated,[39] it is possible to view the opinion as sexist in a number of ways. Students might see Cardozo as belittling Lady Duff-Gordon when he states that she "styles herself a creator of fashions."[40] Clever wordplay without doubt, but it could easily be read as implying that she alone had the belief, or as a reference to days when the "little women" were responsible for house and home and noth-

38. *See, e.g.*, Northrop v. Hill, 57 N.Y. 351 (1874).

39. *See, e.g.*, Frug, *supra* note 4; Arthur Austin, *The Post Modern Buzz in Law School Rankings*, 27 VT. L. REV. 49, 74-75 (2002); Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Woman Partners*, 46 HASTINGS L.J. 17, 49 (Nov. 1994); Lenora Ledwon, *Storytelling and Contracts: (Casebook Review Essay Contracting Law 2d Ed. By Amy Hilsman Kastely, Deborah Waire Post, and Sharon Kang Hom. Durham, N.C.: Carolina Academic Press, 2000)*, 13 YALE J.L. & FEMINISM 117, 120 (2001).

40. Wood v. Lucy, Lady-Duff Gordon, 118 N.E. 214, 214 (N.Y. 1917).

ing further. Such a characterization of Lady Duff-Gordon grossly misrepresents the magnitude of her accomplishments as a woman operating a business at the time.[41]

Conversely, some students might argue that Cardozo portrays Lady Duff-Gordon as a heartless money grubber, guilty of "greedy fickleness" whose "claim that the contract lacked mutuality of assent seems like a technical attempt to dodge responsibility."[42] Knowing that Lady Duff-Gordon wanted to conduct business with Sears Roebuck may heighten this perception.[43] Regardless of where students stand on the spectrum of possible views of judicial presentment of party identity, the fact that the spectrum exists creates a rich platform for discussion. Students can debate about the role and responsibility of the judge in understanding and portraying the parties in an action before her and the possibility that judges may manipulate their portrayal of parties to serve an ultimate objective. Perhaps such manipulation is inevitable? Desirable? Reactions to such inquiries can spark lively interactions.

In addition to examining the language of *Lady Duff-Gordon*, students could be asked to consider the theoretical approach towards the law favored by Cardozo in the opinion, and to consider alternatives to it. Cardozo was plain in his belief that "[e]thical considerations can no more be excluded from the administration of justice . . . than one can exclude the vital air from his room and live."[44] For Cardozo, deciding a case based on ethical concerns required choosing one social good over another when logical arguments support both positions.[45] Determining the "social good" necessitated consideration of both

41. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 569 (2001) (advocating that Lucy, Lady Duff-Gordon was "an innovative designer and shrewd businesswoman who supported a husband and family in an era where that was uncommon").

42. Frug, *supra* note 4, at 1084.

43. Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 439 (1988) (describing Lady Duff-Gordon's arrangement with Sears to sell her dresses).

44. Benjamin N. Cardozo, The Nature of the Judicial Process, 66 (Yale University Press 1946) (1921) (quoting JOHN F. DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 178 (Little, Brown, and Company 1895) (1894)).

45. Benjamin Andrew Zellermeyer, *Benjamin N. Cardozo: A Directive Force In Legal Science*, 69 B.U. L. REV. 213, 219, n.34 (1989) (citing CARDOZO *supra* note 44, at 30).

"public policy, the good of the collective body" and "the standards of right conduct, which find expression in the *mores* of the community."[46] He recognized that the balancing required by this approach could lead to uncertainty, but was willing to accept this if the result was a societally preferable outcome than one based on rigid contractual doctrine.[47] Students could be asked about what societal values Cardozo is supporting. There may be great societal value in adherence to "rigid contractual doctrine"—in fact that rigidity has a long history and has not vanished entirely from "modern" contract doctrine.[48] Clearly, this conversation will overlap to some degree with the above mentioned issue of explicit judicial activism, but there are further nuances to explore when ethics are so boldly made a basis of decision.

Those nuances can spark a conversation about whether ethics *should* have any role in judicial decision making. If, as is often asserted, contract law is meant to be amoral,[49] what right do judges making contract law decisions have to inject ethics and morality into that process? As with so many questions about ethics, students may have very different perspectives on this issue as well.

2. Specific Ethical Questions Raised by *Lady Duff-Gordon*

For the reasons discussed above, I believe *Lady Duff-Gordon* can fruitfully be used to raise many important ethical questions in a general and global manner, to the benefit of first

46. CARDOZO *supra* note 44, at 71-72.

47. Cardozo is explicit about his position in *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) ("Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of distinction are so wavering and blurred.").

48. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (explaining the rise of "new formalism"); Robert E. Scott, *Relational Contract Theory: Unanswered Questions A Symposium in Honor of Ian R. MacNeil: The Case for Formalism in Relational Contract*, 94 NW. U.L. REV. 847 (2000).

49. Many of contract law's prominent figures argued for the amorality of contract doctrine. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). *See also* ARTHUR L. CORBIN, 5A CORBIN ON CONTRACTS § 1123, at 7 (1964). Professor Farnsworth also argues in favor of keeping issues of moral right and wrong out of the law. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 12.17a, at 276-77 (1990).

year students. Before engaging in conversations about the ethical issues raised by the case, class discussion needs to focus on the facts and the law established by the opinion. This will greatly aid any ensuing consideration of ethics because not only do first year students tend to be unwilling to engage in broader theoretical discussions if they are still searching for the "hard law" of the case, but because a careful explication of the facts will provide the context necessary for meaningful ethical consideration. Once the doctrinal examination of the case is completed, the professor can pose a wide-ranging series of questions that are more directive than the general inquires set forth above. While those general inquires tend to question the ethics of Cardozo's judicial role, and through those questions the role of judges more generally, the more specific ethical inquiries broaden the lens of examination. They are designed to call into question not just the ethical nature of judicial behavior, but the ethical behavior of all of the participants in *Lady-Duff Gordon*, and by extension, the behavior of parties in each case students encounter.

The questions that follow are nothing more than a template of suggested, more specifically focused, questions intended to highlight ethical concerns. The precise scope and content of what can be asked is unlimited and will often turn on what arises in the doctrinal portion of the class discussion of the case. The questions listed below may not be the "best" ones and are certainly not the only ones, but they give some sense of the scope of the ethical issues that underlie the opinion. My intent by including such a list is simply to give a flavor of the richness of this case as a vehicle for generating discussions about ethics in the context of a first year contracts course.

As mentioned earlier, I believe it aids discussions of ethics if the professor is explicit about the task at hand. Let the students know that the following questions are intended to force them to challenge the seeming ease of Cardozo's opinion, and perhaps in so doing, to challenge their own notions of both the case and the roles that all participants in the process play. Students may not have enough specific knowledge about the facts behind the opinion to provide definitive responses (although a thorough treatment of the factual context of the case will allevi-

ate this possibility and many casebooks provide illuminating historical information about the parties involved).[50]

The Ethics of the Parties to the Case

The behavior and underlying motivations of both Wood and Lucy, Lady Duff-Gordon are worthy of consideration as each raises ethical concerns that are common to many contracts cases.

1. Why would Wood and Lady Duff-Gordon have agreed to enter into the agreement as it was originally drafted? Do their intentions at the time of contract execution matter?

2. Was it ethical for Lady Duff-Gordon to argue that the "agreement" between the parties was not binding? Do you think her motivations matter?

3. Would it have been (a) ethical, and (b) legally possible, for Lady Duff-Gordon to seek to enforce the agreement against Wood if Wood had been the party refusing to honor such agreement?

4. Was it ethical for Wood to seek to enforce the agreement? Is there more information you'd like to have before you can answer that question? Do his motivations matter?

The Ethics of the Attorneys for the Parties

Given the way most casebooks are structured, first year students do not often get an opportunity to consider the actions of the attorneys involved in reported cases. The questions that follow require some speculation and allow for some role-playing as students must imagine what motivations underlie the actions of the attorneys for each of Wood and Lady Duff-Gordon. This helps remind first year students that the job they are preparing for comes with its own set of ethics and responsibilities. Professional responsibility rules will provide answers to some ethical concerns, but there are many, day to day, situations that present ethical dilemmas. The more frequently these are

50. *See, e.g.*, CHARLES L. KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 432-35 (5th ed. 2003); *see also*, RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 416-23 (3rd ed. 2003); ROBERT E. SCOTT, CONTRACT LAW AND THEORY 347, 359 (3rd ed. 2002).

drawn to students' attention, the more their importance is highlighted.

5. If you were Lady Duff-Gordon's attorney and she approached you for advice about whether she was bound to honor her agreement with Wood, what advice would you give her? Does the fact that there was no certainty that an implied obligation of good faith would be found to exist influence your advice?

6. Given the uncertainty of how a court would rule on the binding nature of the agreement between Wood and Lady Duff-Gordon, could the attorney for Lady Duff-Gordon have suggested a different solution that might have avoided the need to go to court? If such an alternative solution to the dispute between the parties was available, did the attorney for Lady Duff-Gordon have an ethical obligation to explain it to her client?

7. If you were Lady Duff-Gordon's attorney and were responsible for drafting an agreement that would achieve her goals, how would you proceed?

8. Assume it is possible to draft a legally binding agreement that essentially gives your client the freedom to withdraw from that agreement at any time, for any reason and with no penalty for doing so. Should you draft such an agreement on your client's behalf? Is there more information you would like before making that decision?

9. Assume it is possible to draft a legally binding agreement that essentially gives your client the freedom to withdraw from that agreement at any time, for any reason, and with no penalty, but that circumstances do not exist that make you feel comfortable engaging in that task. What could you/should you do instead?[51] Would your response change if you knew that ABA Rule of Model Rule of Professional Conduct 2.1 states that: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other consider-

51. This question may generate significant student discussion. First year students may be very comfortable with the idea that their job is to represent the best interest of their client, but not so comfortable with the idea that they are entitled to disagree with what constitutes that best interest, and even to try to convince their client of the error of their ways. When the ethical stances of lawyer and client differ, that clash can lead to problematic situations. It seems fruitful to encourage students to begin to consider those difficult circumstances while in their first year.

ations such as moral, economic, social and political factors, that may be relevant to the client's situation."[52]

The Ethics of the Judge

If a general discussion of the ethical posture of the opinion was engaged in prior to consideration of these more directive questions, some of what follows may be repetitive. The professor may choose to skip those questions that have already been fully discussed, or may raise the issues presented by them again on the theory that a little repetition is not necessarily a bad thing, especially when dealing with first year students.

10. What do you think of the tone of the opinion? Does a judge have an ethical obligation to remain neutral when writing opinions?[53] Would "justice" be better served if judges did?

11. Historical research on the case suggests that Justice Cardozo is somewhat less than fully forthcoming in setting forth the factual context for his decision. To what extent should a judge be free to pick and choose among the available facts when drafting an opinion?

12. Cardozo implies an obligation of good faith into the parties contract, justifying his action by saying "[a] promise may be lacking, and yet the whole writing may be 'instinct with and obligation,' imperfectly expressed." Is this a case where an intended obligation between the parties was simply "imperfectly expressed?" What facts support Cardozo's conclusions about the parties' intent? Would your answer change if you knew that at the time Wood entered into his agreement with Lady Duff-Gordon, he was also a party to a contract that contained an explicit best efforts clause?

13. Are there reasons that the parties might not have included an explicit provision imposing obligations on Wood? If

52. MODEL RULES OF PROF'L CONDUCT R. 2.1.

53. On this point, it is interesting to note that many writers view Cardozo's opinion as somewhat disparaging towards woman. *See, e.g.* Frug, *supra* note 4; KNAPP, *supra* note 50. If students concur with this position, it is useful to refer them to Cardozo's assertion that a judge should stay removed from personal bias when considering a case. Cardozo believed that a judge's task was to engage in "free scientific research . . . free, since it is . . . removed from the action of positive authority; scientific, at the same time, because it can find its solid foundations only in the objective elements which science alone is able to reveal to it." CARDOZO, *supra* note 44, at 9.

there are, was it ethical of Cardozo to suppose that the parties must nevertheless have intended that such a provision be implied?

14. What ethical considerations was Cardozo promoting in his opinion? Whose role is it to determine what ethical position or belief should be given legal sanction?

The Ethics of the Rule of Law Established

As with the ethical underpinnings of the judicial action in *Lady Duff-Gordon*, the ethics underlying the rule of law established by the case may be fully fleshed out in a general discussion of the opinion. If not, it is worth highlighting the issue by posing a specific question on the point.

15. In *Wood v. Lucy, Lady Duff-Gordon*, Justice Cardozo implies a term in order to create the "mutuality of obligation" typically thought necessary to establish an enforceable contract. Should mutuality of obligation be a necessary contractual element? Could parties willingly enter into an agreement where only one of them was legally bound? If so, is it proper for a court to refuse to enforce such an agreement?

16. In *Wood v. Lucy, Lady Duff-Gordon*, Justice Cardozo is willing to sacrifice some degree of certainty in order to achieve "fairness." Is "fairness" a higher value for our legal system than certainty? What are the strengths and/or weaknesses of concluding that our laws should strive to reach a "fair" outcome?

17. It is sometimes said that contract law is or should be "amoral."[54] Do you agree? If so, what consequence does that decision have on the role that ethics should play in legal decision making?

18. Implying an obligation of good faith by necessity requires that "courts [will be] much more involved in supervising the performance of contracts."[55] Does that heightened role reduce parties' freedom to contract? Is that policing function an appropriate role for the courts?

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54. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 73-74, 192-93, 197 (Oxford University Press 1992). *See generally* DANIEL A. FARBER, ECONOMIC EFFICIENCY AND THE EX ANTE PERSPECTIVE, IN THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54, 66-69, 79-80 (Jody S. Kraus & Steven D. Walt eds., 2000) (discussing the intellectual history of law and economics).

55. Pratt, *supra* note 3, at 443.

III. Conclusion

For those who believe that ethics in the broad sense of moral choices and consequences matter a great deal in the law and lawyering, the first year of law school is an ideal time to begin to engage students in discussions concerning ethics. While not ignoring or downplaying the importance of the formal rules of professional responsibility, first year students can be shown that the ethical concerns of lawyers are more encompassing than those addressed specifically by those rules.

Wood v. Lucy, Lady Duff-Gordon presents an ideal opportunity to challenge first year students to engage in deep consideration of the ethical behavior and stance of all participants in the case. Justice Cardozo's opinion in the case is like most of his writings, artful, deliberate and well worth parsing closely. Most first year students, upon first reading the case, will not focus on the ethical underpinnings of the decision beyond perhaps questioning the wisdom of implying an obligation of good faith and considering what the contours of such an obligation might look like. While those issues are interesting, and at some level, central to the decision, they only begin to scratch the surface of the ethical questions raised by the opinion. Directive questions can help to heighten awareness of the myriad ethical issues subsumed within Justice Cardozo's elegant language. Using *Wood v. Lucy, Lady Duff-Gordon* as a vehicle for in-depth consideration of ethical concerns serves many purposes. From the perspective of teaching ethics, it can help first year students begin to be more critical thinkers and habituate them to seeing the important role that ethics plays in all aspects of legal decision making. Inculcating this awareness in the first year will help law students throughout their legal career and may help them avoid ethical quagmires of their own down the road.