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# Integrating Academic Skills into First Year Curricula: Using *Wood v. Lucy, Lady Duff-Gordon* to Teach the Role of Facts in Legal Reasoning

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with  
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*[E]ven when [a] skill is intended to be a central value of a course, the skill as such will be absorbed by the bulk of the students only if the skill is made explicitly, sustainedly, insistently the focus of organization and of class treatment.*<sup>1</sup>

Law professors often lament the quality of the work their students produce on essay exams. This concern seems especially true of faculty who teach first year students. They express disappointment—and surprise—at their students' final exams: missed issues, incomplete or inaccurate rules, poor use of facts—these are only some of the skills students fail to demonstrate at the level their teachers expected. What hap-

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1. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 213 (1948-49).

pens between the class and the exam, and why are our expectations routinely disappointed?

Much has been made of the connection between teaching and testing, and how important it is to "test what we teach." Long a concern in other disciplines, issues regarding testing have increasingly been of concern to law school professors. In discussions among law professors, the most common complaints concerning students' final exams are as expected: students miss issues, state the applicable doctrine incorrectly or incompletely, misapply the rule even when they set it out accurately, ignore relevant facts or rely on unwarranted factual assumptions, write in a disorganized or inefficient style, fail to analyze arguments on both sides, either ignore or abuse policy and make unsupported legal conclusions. In addition, professors report that students' exams demonstrate lack of understanding of some basic legal concepts and structures such as relevance, scope of judicial review, differing burdens of proof and the role of appellate courts.<sup>2</sup> When these same professors are asked to list, from their own course syllabi, the topics that the course covers, these results are also for the most part predictable. Torts classes nationwide cover intentional torts, negligence, products liability, etc. A typical contracts syllabus usually starts with contract formation (some start with damages) and goes on to include defenses, parol evidence and third-party beneficiaries. Civil procedure courses cover personal and subject-matter jurisdiction, the Erie Doctrine, venue, etc.

There is something wrong with this picture. We want our students to learn the legal reasoning skills necessary to develop sound legal argument,<sup>3</sup> yet the message we send them, at least

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2. We recognize that this list is not exhaustive, and it may make students' work appear generally to be worse than reality. Our intention within the scope of this piece is only to highlight some of the major problem areas that stick in professors' minds about their students' work.

3. Karl Llewellyn describes what the case class should be:

[A] cooperative, supervised, systematic exercise in diagnosis of a problem; in organization of data; in the arts of reaching for, building and testing solutions or arguments; of making reasoned judgments of policy and putting them to the test; an exercise in the craft-skill—and the human skill—of accurate, orderly, persuasive formulation in language of thoughts that need such organization and expression in order to accomplish a given purpose.

Llewellyn, *supra* note 1, at 215.

on paper, is that today we are studying homicide, tomorrow theft crimes, next week and for the rest of the semester, doctrine of some other name.<sup>4</sup> While first-year casebooks often have a skills orientation in the form of practice exercises and problems, they typically fail to advise students of any skills purpose underlying the book. Rather, the introduction, table of contents and chapter headings of typical casebooks describe only, or primarily, the doctrine to be covered in the book.<sup>5</sup> So too do typical syllabi list substantive units rather than skills to be covered.

Of course, reasoning skills such as issue spotting, fact identification, fact analysis, rule identification and application of rules to facts are taught in law school classes. At most law schools these skills are taught in separate legal writing and lawyering courses. Typically, however, the legal writing faculty is not tenure-track, the credit allocation is minimal and the course is otherwise marginalized, thereby sending a message to students that such skills work is of secondary importance.<sup>6</sup> Doctrinal professors highlight these skills as they analyze cases

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4. Professor Hornstein laments "the number of casebooks organized about the doctrinal components of the law when compared with the paucity (non-existence) of casebooks organized around the analytic or reasoning component." Alan D. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 347 n.9 (1981). Professor Harry Jones' oft-cited comment from 1948 is no less apt today: "one of the primary problems for law students in the first year is that they have 'no understanding as to what [their] instructors are trying to do.'" Harry W. Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 13 (1948).

5. Professor Wangerin points out that while "all first year case book authors view their books as tools for the development of legal analysis skills as well as for teaching substantive concepts . . . the introductions to many of these casebooks make little or no reference to skills as part of their contents." Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 412 n.4 (1986).

6. See Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 48-49 (2007); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 7 (2001) (discussing the low status teaching positions for legal writing teaching and the resulting gender discrimination); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN'S L. 551, 556-59 (2001) (outlining the history of legal writing professorships and the trend for non-tenure-track legal writing teaching positions); Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 537-38 (1995) (noting that tenure-track legal writing professorships are a recent development).

and other materials, develop the skills when they use hypotheticals and refine the skills during Socratic dialogue (whether “hard” or “soft”). But it seems as if they hardly ever, except in legal methods or legal process courses, explicitly name them as part of the subject matter for the day.<sup>7</sup>

This disconnect is a critical failing of legal education: students in the first year should learn academic skills explicitly, rather than intuit them, so that they are better prepared in their second and third years to focus on the denser doctrines and inclusion of more practice-oriented skills. While academic skills are often taught explicitly in non-doctrinal classes, such as legal methods and legal writing classes, they should also be taught across the curriculum, incorporated directly into doctrinal classes. Case reading is the fundamental skill of first-year law school, and the source of understanding much more than black letter law. But students are intent on finding rules, doctrine and “the law” in cases, and very often overlook the wealth of information about how the law works contained in the cases. In fact, their course syllabi tell them to look for the law and not much else.<sup>8</sup>

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7. Professor Schwartz has criticized law school instruction as requiring “self-teaching.” He explains:

[L]aw professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class. During classroom instruction, law professors hope the combination of their classroom comments and their critiques of students’ comments will enhance students’ legal reasoning, case analysis, issue spotting, drafting, and policy analysis skills, will open the students’ minds to legal theory, will allow the students to understand the doctrine under study, and will encourage students to develop desired values. Law teachers, however, usually fail to identify for their students (and, sometimes, even for themselves) which goals they are teaching at any given moment. This approach requires the students not only to sort the insightful student comments from the comments lacking insight, but also to figure out, from the professor’s comments and questions, both the professor’s instructional goals and the relationships between those goals and the instruction presented.

Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 352 (2001).

8. See Llewellyn, *supra* note 1, at 212 (noting that “law teachers themselves have fallen into the general practice of seeing the vital lines of organization of a course (and hence also of the cases to be chosen and arranged) as consisting rather of ‘subject matter’ than of the skills of the lawyer”). Although Llewellyn made those comments almost sixty years ago, they are no less apt today. See David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law*

There are myriad ways in which real legal methods objectives can be directly incorporated into a traditional first-year syllabus.<sup>9</sup> The idea underlying this Article, first set forth in Professor David Nadvorney's 2002 article, *Teaching Legal Reasoning Skills in Substantive Courses: A Practical View*,<sup>10</sup> is to identify particular cases and readings throughout the syllabi of first year courses that would lend themselves to explicit teaching of one or more of the analysis skills we are trying to teach. Those skills would then be incorporated into the syllabus, either by name only or with a short notation. Students would be directed to pay particular attention to a case for its illustration of the skills we expect them to learn for the final exam. Just as the author of the casebook searches out cases that set out a rule of law in a certain way, and just as the professor constructs the syllabus to particular sections of the casebook in a particular order, some of those choices can be matched up with skills instruction, ideally without too much intrusion on the established design of the course.

This Article follows up on Professor Nadvorney's initial proposal with one example. As a prototype, the Article focuses on one skill and one contracts case, useful for teaching that skill. The Article focuses on the "Good Faith and Best Efforts" doctrinal unit in the first-year contracts course, and *Wood v. Lucy, Lady Duff-Gordon*, the leading case on good faith and best efforts, that is included in most contracts casebooks. Specifically, this Article will make concrete suggestions for using the *Lady Duff-Gordon* case as a vehicle to teach the role of facts in legal reasoning. While more and more emphasis has been put on the important skill of fact analysis in recent years, and fact issues are now generally taught at a minimum in clinical and lawyering courses at most schools, most schools still have a continued emphasis on doctrinal reasoning. The core bar courses and elec-

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*School Curriculum*, 52 KAN. L. REV. 105, 143 (2003) (noting that "[d]octrinal teachers organize their law courses around neat subject-matter lines, often ignoring the fluid nature of lawyering, and thus fail to teach students the holistic process required to solve the client's issues.").

9. Although the ideas and methods discussed in this Article are applicable throughout all three years of law school, they are most relevant and powerful in the first-year curriculum.

10. David Nadvorney, *Teaching Legal Reasoning Skills in Substantive Courses: A Practical View*, 5 N.Y. CITY L. REV. 109 (2002).

tives continue to be doctrine-centric, despite the fact that what practicing lawyers do most is “investigate, gather, research, assimilate, and understand the relevance of facts.”<sup>11</sup> *Wood v. Lucy, Lady Duff-Gordon*, which deals with the amorphous and highly fact-sensitive doctrines of good faith and best efforts, is especially good for teaching fact analysis because of the subtle, but artful, use of facts by Judge Benjamin Cardozo.

Part I of the Article discusses the need to reorient students’ thinking about learning the law, highlighting the critical importance of explicitly teaching academic skills—and specifically fact identification and fact analysis—across the curriculum, rather than solely in skills-oriented classes. Part II provides some background regarding the *Lucy, Lady Duff-Gordon* case and the doctrines of good faith and best efforts, which that case is typically used to teach. Part III then critically examines the facts of the case and Judge Cardozo’s characterization of the facts, and sets forth concrete ways the *Lady Duff-Gordon* case can be used to teach the skills of fact identification and fact analysis.

## I. Deemphasizing Doctrine: The Importance of Fact Analysis

*The main part of intellectual education is not the acquisition of facts, but learning how to make facts live. The mark of a master is that facts, which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of this thought, leap into an organic order and live and bear fruit.*<sup>12</sup>

Students typically enter law school under the illusion that the law is something to be “learned” (i.e., memorized), and that if they “learn” (memorize) the doctrine, they will be successful law students and ultimately successful lawyers. Although law professors generally understand the short-sightedness of such a strategy and recognize the need for students to master legal and factual analysis as well as legal doctrine,<sup>13</sup> in teaching legal rea-

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11. Abraham P. Ordover, *Teaching Sensitivity to Facts*, 66 NOTRE DAME L. REV. 813, 814 (1991).

12. Wangerin, *supra* note 5, at 431 (quoting *Judge Holmes Oration*, 3 LAW Q. REVIEW 118, 118 (1887)).

13. In 1996, Professor Steven I. Friedland surveyed law professors nationwide about their teaching methods and goals and found that at least forty-six percent of professors teaching first year courses considered their primary goal to be teaching

soning and interpretation, analyzing facts has always taken a back seat to legal doctrine.<sup>14</sup>

Any theory of legal interpretation that either ignores or deemphasizes the construction of facts is problematic. When jurors are asked to construe "what happened," their analysis is "infused with implicit assumptions" they make based on their own cultural knowledge, experiences and perspectives.<sup>15</sup> Judges, too, have almost unfettered flexibility in interpreting

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critical thinking skills, while only fifteen percent characterized their goal as teaching students substantive legal doctrine. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 20-21 (1996).

14. See Kim L. Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42, 44 (1990) (noting "[t]he debates among the advocates of intentionalism, conventionalism, interpretivism, structuralism, literalism, and the rest proceed as though legal reasoning were merely a matter of understanding a legal text. Understanding the facts drops out as an uninteresting or unchallenging or irrelevant part of the process."); Wangerin, *supra* note 5, at 414 n.4 (noting that although "it is generally agreed that courses traditionally described as 'substantive' serve, or should serve, as vehicles for skills training, at least if skills training includes the skill of legal analysis," such has not typically been the reality).

Professor Llewellyn was a strong advocate of the view that first year law courses have "misemphasized" doctrine. In a notable essay on this subject, he challenged law professors to rethink how we present our craft to the public, to our students and to ourselves:

We have fooled ourselves, we have fooled our law professors, we have fooled the whole bewildered public, into the idea that the essence of our craft lies in our knowledge of the law. And knowledge of the law we do have, and we do need, but such knowledge is but the precondition of our work. . . . Let me say it again: The essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done: any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men. But we do not say this, even to ourselves. Why not? Does it seem too plain, too ordinary, too much like what needs no license via bar examination? I do not know. What I know is that because we do not say it to ourselves we do not study our own essence as we need to, we do not train every lawyer in it, we do not have and cannot yet phrase or apply standards of minimum competence in it, we do not require entrants to qualify in it, we learn it, each one of us, only by slow unreckonable accident, happenstance or inborn artistry.

Karl N. Llewellyn, *The Crafts of Law Re-valued*, 15 ROCKY Mtn. L. REV. 1, 2-4 (1942) [hereinafter *The Crafts of Law Revalued*]; see also Karl N. Llewellyn, *Lawyer's Ways and Means, and the Law Curriculum*, 30 IOWA L. REV. 333, 335 (1945) [hereinafter *Lawyer's Ways and Means*] (describing "misemphasis on 'subject-matter' as the center of courses taught in class").

15. Scheppele, *supra* note 14, at 62-63.



facts, and since there is always opportunity for redescription or recharacterization of the facts, the judge's interpretation of the facts can dictate the outcome:<sup>16</sup>

It's not easy to see how facts can be recharacterized, once the opinions have been written. . . . Opinion writing tends to obscure alternative versions, to make the version of the facts as presented seem to meet the Walter Cronkite test: "And that's the way it is." But behind every description of facts, there are many other versions, equally true but differently organized. Changes in emphasis, alternative points of view, different symbolic contexts, varying background assumptions all have their effects on which version of a particular story seems the most compelling.<sup>17</sup>

Because of the primary role played by factual analysis and assumptions, doctrine by itself is insufficient to address even the simplest legal problems.<sup>18</sup> Accordingly, law students must shift their thinking away from memorizing doctrine toward analysis. So law teachers must tailor the rules to context, including historical, political, social, economic, relational, moral, ethical, commercial and practical context.

There is no shortage of literature about the need to explicitly teach fact analysis. Professor Karl Llewellyn devoted much of his writing to the importance of the study of facts, based on the notion that "the statement of facts, be it in brief or be it oral, is the complete guts of your case."<sup>19</sup> Professor Robert Marx was also a noted advocate of teaching facts, explaining that for most law students, their first experiences as lawyers will be in trial courts where "the law is usually reasonably clear and well-settled," but the facts are "always in controversy."<sup>20</sup> More recently, Abraham Ordovery, in his 1991 article "*Teaching Sensitivity to Facts*," laments the fact that although "most contentions of law

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16. *Id.* at 48.

17. *Id.* at 49.

18. Caroline N. Brown, *Teaching Good Faith*, 44 ST. LOUIS U. L.J. 1377, 1382 (2000).

19. Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637 (1962) [hereinafter *A Lecture on Appellate Advocacy*]; see also Karl N. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 792-93 (1941); *Lawyer's Ways and Means*, *supra* note 14; Karl N. Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); *The Crafts of Law Revalued*, *supra* note 14.

20. Robert S. Marx, *Shall Law Schools Establish a Course on "Facts"?*, 5 J. LEGAL EDUC. 524, 524 (1953).

are won or lost on the facts,”<sup>21</sup> such fact work is generally not taught in law schools.<sup>22</sup> Many others have written about this pedagogical shortcoming in unified agreement.<sup>23</sup>

Various proposals for “facts” courses that include fact analysis more explicitly in the law school curriculum have been put forth over the years. Professor Robert Marx pioneered a class on “Facts” at the University of Cincinnati Law School in the 1950s that dealt with interviewing the client, finding and interviewing witnesses, presenting facts through expert testimony, discovery and the taking of depositions, marshalling the evidence in preparation for trial, putting forth the facts in trial briefs, and trial techniques for working with facts through direct and cross examination and opening and closing statements.<sup>24</sup> Professor Ordover has proposed various methods for teaching fact sensitivity, including a course in “facts,” use of actual clinical cases and simulations where students are required to interview a client to learn the facts, and an enhanced advocacy curriculum including more skills courses such as pretrial and advanced litigation and basic trial advocacy.<sup>25</sup> Professor Jethro Lieberman has also proposed teaching a course on “the art of the fact.” This course would show students “how difficult it is to uncover facts,”<sup>26</sup> force students to “analyze the nature of

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21. Ordover, *supra* note 11, at 815.

22. *Id.* at 814.

23. For example, Ian Weinstein conceded that “[t]he notion that facts are easily known, static and need only be plugged into doctrine by judges was debunked long ago.” Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 3 (1998). Despite that truth, he points out that the study of fact analysis in the law school classroom remains limited. *Id.* at 4. Professor Jethro Lieberman similarly argues that “[w]e do not teach or even talk about the one thing on which lawyers spend most of their time, namely, ferreting out the facts.” Jethro K. Lieberman, *The Art of the Fact*, 5 LEGAL WRITING 25, 25-26 (1999); see also Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001) (explaining why “no one teaches anybody how to write facts sections” but they should); Larry T. Teply & Ralph U. Whitten, *Teaching Civil Procedure Using an Integrated Case-Text-And-Problem Method*, 47 ST. LOUIS U. L.J. 91, 95 (2003); HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 22 (McGraw-Hill 1972); H. Russell Cort & Jack L. Sammons, *The Search for “Good Lawyering”: A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 440-41 (1980).

24. Marx, *supra* note 20, at 527-28.

25. Ordover, *supra* note 11, at 818-20.

26. Lieberman, *supra* note 23, at 33.

facts,”<sup>27</sup> and “persuade students that the facts are not merely irreducible elements of the universe, but shards of flashes of nuance that it is the lawyer’s task to assemble into a story that will achieve the client’s end.”<sup>28</sup> Professor William Twining’s 1984 article, *Taking Facts Seriously*, describes in some detail the early attempts to establish courses on fact finding, noting that although such courses were uniformly considered successful, almost without exception they did not become established institutional courses.<sup>29</sup>

Still others have urged for expanded coverage of fact analysis in existing skills-oriented classes. For example, Professor David Romantz emphasized the “significance of analysis over doctrine” and the special importance of teaching “how to assess, analyze and manipulate facts,”<sup>30</sup> highlighting the legal writing course as the necessary arena.<sup>31</sup> Based on the work of John H. Wigmore, in the early twentieth century, many others have called for a more rigorous teaching of fact analysis in evidence courses.<sup>32</sup>

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27. *Id.* at 33.

28. *Id.* at 34.

29. William Twining, *Taking Facts Seriously*, 34 J. LEGAL EDUC. 22, 28 (1984) (noting that “[t]he serious study of reasoning in regard to disputed matters of fact is at least as intellectually demanding as the study of reasoning in respect of disputed questions of law”).

30. Romantz, *supra* note 8, at 142-43.

31. *Id.* at 142 (noting that “[c]ase method courses cannot teach students to appreciate the nuance of inference, the subjectivity of truth, or the art of the fact”); see also Foley & Robbins, *supra* note 23; Jones, *supra* note 4, at 14 (arguing that a separate course in legal method would “sav[e] desperately needed law school time,” allowing schools to “forego the luxury of having all four or five first-semester courses taught as if they were all principally courses in the fundamentals of case reading and analysis”); Debra Moss Curtis, *You’ve Got Rhythm: Curriculum Planning and Teaching Rhythm at Work in the Legal Writing Classroom*, 21 Touro L. REV. 465 (2005) (highlighting the lack of consciousness that most legal professors have regarding their pedagogical approach and presenting several legal writing teaching approaches); Schwartz, *supra* note 7.

32. Wigmore started a movement, now labeled “evidence, proof and facts” or “EPF,” that calls for greater analysis of the power of facts. John H. Wigmore, *The Problem of Proof*, 8 ILL. L. REV. 77 (1913); JOHN H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS* (3d ed. 1937). This concept has been espoused and debated for almost a century. See, e.g., Peter W. Murphy, *Teaching Evidence, Proof and Facts: Providing a Background in Factual Analysis and Case Evaluation*, 51 J. LEGAL EDUC. 568 (2001); Bernard Robertson & G.A. Vignaux, *Taking Fact Analysis Seriously*, 91 MICH. L. REV. 1442 (1993); Jack B. Weinstein, *The*

While the ideas put forth by these scholars are innovative and reflect thoughtful acknowledgment of the need to emphasize fact analysis in law teaching, teaching fact analysis exclusively as a separate “skills” course in the curriculum is problematic on two levels. The first problem is that it perpetuates the distinction between doctrine and skills. It furthers, in the students’ minds, the separation between what goes on in the doctrinal classes, which is what they perceive as being necessary to graduate from law school and to get a license, and the actual skills necessary to represent clients, which are taught in the “lawyering” components of the curriculum.

The second problem is that focusing on teaching fact analysis as a separate course overlooks the enormous untapped potential that exists in doctrinal classes to demonstrate to the students the seamless connection between doctrine and skills. That connection, if exploited, potentially presents enormous power in training lawyers. If faculty do not perceive those doctrinal classes as being the natural place to teach fact analysis explicitly, why use the case method, which is certainly not the most effective way to teach rules?

To be sure, some professors have proposed teaching fact analysis in doctrinal courses, but such proposals have tended to be undeveloped<sup>33</sup> or to look like simulation or clinical models.<sup>34</sup>

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*Teaching of Facts Skills in Courses Presently in the Curriculum*, 7 J. LEGAL EDUC. 463, 469 (1954-55).

33. For example, Professor Wangerin credits Professor Strasser with “hinting at the idea of using the contracts course for skills training in legal analysis,” but points out that “he does not develop these ideas, and his suggestions for change in the course seem to focus heavily on substance.” Wangerin, *supra* note 5, at 412 n.4 (citing Kurt A. Strasser, *Teaching Contracts – Present Criticism and a Modest Proposal for Reform*, 31 J. LEGAL EDUC. 63, 82 (1981-82)). Professor Lieberman also suggests that in tandem with his proposed course on “the art of the fact,” other courses should be reoriented to highlight the importance of fact analysis, to achieve “facts across the curriculum.” Lieberman, *supra* note 23, at 37-38. But unfortunately, this is more of an afterthought, and he too fails to put forth concrete suggestions.

34. For example, Professor Shreve argues that skills should be taught throughout the curriculum. Gene R. Shreve, *Bringing the Educational Reforms of the Cramton Report into the Case Method Classroom – Two Models*, 59 WASH. U. L.Q. 793 (1981). But as Professor Wangerin points out, “after making that observation . . . he describes two models that are, in effect, indistinguishable from clinical/simulation models.” Wangerin, *supra* note 5, at 412 n.4. Similarly, in Professor Keith Findley’s thought-provoking article about curricular reform at the University of Wisconsin he advocates for the integration of lawyering skills into

Other professors have written extensively about teaching skills across the curriculum, but the focus of those suggestions has tended to be on lawyering skills such as drafting or negotiating, with little emphasis on academic skills like fact analysis.<sup>35</sup> There are several noted exceptions. For example, Professor Jonathan Hyman put forth specific suggestions for incorporating practical skills, including fact analysis, into the contracts class using the NITA method,<sup>36</sup> and Professor Kenney Hegland has written about incorporating role-play exercises into the contracts class to illustrate, in part, "how much the 'facts' are a product of client/attorney interaction."<sup>37</sup> But such proposals are few and far between.

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the substantive curriculum throughout all three years of law school, but mostly through simulations or enhanced legal writing, skills and clinical opportunities. Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WISC. INT'L L.J. 295, 327-28 (2006).

35. See, e.g., Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759, 779 (1991) (explaining how and why he incorporates seven skills exercises into his contracts class, while skipping large sections of the casebook); Edith Warkentine, *Why Teach Contracts Transactionally?*, 34 U. TOL. L. REV. 723 (2003) (discussing the benefits of using actual contracts to teach the contracts course); Carol Chomsky & Maury Landsman, *Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS U. L.J. 1545 (2000) (discussing the use of drafting or negotiating exercises in the contracts classroom); Scott J. Burnham, *Using Contracts to Teach Practical Skills: Drafting in the Contracts Class*, 44 ST. LOUIS U. L.J. 1535 (2000); Judith A. Frank, *Lessons and Ideas: Skills Instruction in Large Law School Classes*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 307 (2000) (discussing incorporating lawyering skills into a wills class); Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course*, 3 NEV. L.J. 32 (2002) (discussing incorporating lawyering skills into a property or trusts and estates class).

36. Hyman, *supra* note 35, at 767-68. Professor Hyman proposes an exercise for the Contracts class using *Vines v. Orchard Hills, Inc.*, 435 A.2d 1022 (Conn. 1980), a case about awarding restitution damages to the breaching party. He suggests a short exercise requiring students to "list the facts they would like to collect and the witnesses they would like to hear from in preparing for a new trial," and then discusses their collective list as a class. Hyman, *supra* note 35, at 767-68. Since one of the elements of a claim for restitution is lack of willfulness, the exercise requires students to focus on the facts that would support or counter that element, and the inferences lawyers must make from those facts. *Id.*

37. Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534, 541-42 (1981-82) (noting that "facts are seldom given and that they are always, in the retelling, the partial product of point of view"); see also Wangerin *supra* note 5, at 433 (describing the best class exercises as ones in which students are encouraged to recast facts as sympathetic for each side); Tepley & Whitten, *supra* note 23 (presenting case text and problem method as the best vehi-

With increasing pressure to expand coverage of rules and principles of law tested on the bar, there is certainly some understandable resistance to adding skills work into the doctrinal curriculum. Despite an increased recognition of the importance of analytical skills to the work of a lawyer, in the tradeoff between doctrine and skills, doctrine still tends to win. Some believe that the types of skills at issue cannot really be taught, but rather can be intuited from common sense, while others have suggested these skills are already familiar to law students, having been learned elsewhere in the curriculum or outside of law school.<sup>38</sup> But any loss in coverage from an emphasis on skills such as fact analysis is certainly counterbalanced with the deeper and more profound understanding of the doctrine that comes with learning it in context. And let's face it, doctrine too can be learned elsewhere, through lecture and reading.<sup>39</sup>

## II. *Lucy Lady Duff-Gordon* and the Highly Fact-Dependant Doctrines of Good Faith and Best Efforts

### A. *The Case*

In *Wood v. Lucy, Lady Duff-Gordon*,<sup>40</sup> the defendant, Lady

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cle to cover the complicated analysis and skills needed in Civil Procedure classes); Schwartz, *supra* note 7 (critiquing the "vicarious learning" model and its deficiencies in creating an environment in which all students can learn).

38. See Foley & Robbins, *supra* note 23, at 462-63 (lamenting the fact that this is a common belief among law professors). For example, Professor Weinstein, back in 1954, argued that there is no need for a separate course on facts, because "the kind of students that come to law school are, in the main, bright, imaginative, worldly, and eager to make their way materially." Weinstein, *supra* note 32, at 463-64. These students, he argued, are able to gather what they need to know about fact analysis from the case method, and from "powerful and healthy non-academic educational facilities being available to almost all young attorneys." *Id.* at 464. To the extent he believes fact analysis should be taught, he suggests that it is already successfully taught through the regular curriculum, noting that "[t]he case method is uniquely conceived and designed to build a foundation for an understanding of the relationship of facts to law and for skillful handling of facts," *id.* at 465, and that teaching the use of facts on trial is already properly taught in procedure and evidence courses. *Id.* at 469. For a thorough response to these ideas, see Twining, *supra* note 29, at 33-35.

39. This view was held by Karl Llewellyn, who suggested that law professors "[c]onsider the elimination from the center of a case-course of the present emphasis on 'covering subject matter' in class, with that problem relegated to the outside reading of the student." See Llewellyn, *supra* note 1, at 215.

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

Duff-Gordon, was a top fashion designer<sup>41</sup> ("Lucile" was her couture label<sup>42</sup>). She hired the plaintiff, Otis F. Wood, a top New York advertising agent who represented many celebrities,<sup>43</sup> to manage her product-design and endorsement business.<sup>44</sup> Under the terms of the contract, Wood was to have the exclusive right, subject to Lady Duff-Gordon's approval, to place her endorsements on the designs of others and to sell her own designs or to license others to market them.<sup>45</sup> In return, Lady Duff-Gordon was to receive half of all the profits and revenues derived from Wood's contracts.<sup>46</sup> "The exclusive right was to last at least one year from April 1, 1915, and, thereafter, from year to year unless terminated by notice of 90 days."<sup>47</sup>

Wood brought a breach of contract claim against Lady Duff-Gordon, asserting that he had kept his part of the contract but that the defendant had endorsed other products (a mass clothing line for Sears, Roebuck and an interior design for the Chalmers motorcar<sup>48</sup>) without his knowledge and kept the profits.<sup>49</sup> Lady Duff-Gordon argued that their contract lacked consideration, as Mr. Wood was not bound by anything.<sup>50</sup> She argued that she was required to give her name, making Wood's rights to market her designs exclusive, but he did not actually make any promise in return.<sup>51</sup> While he had exclusive right to place her endorsement on the designs of others and was required to

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41. *Id.* (explaining "[t]he things which she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name").

42. To view designs from the Lucile collection, see *Gown by Lucile Sells for \$38,850 at Doyle New York's November 16, 2004 Auction of Vintage Couture, Textiles and Accessories*, DOYLE NEWS, Nov. 16, 2004, available at <http://www.doylenewyork.com/pr/couture/04CT02/default.htm> (last visited Mar. 5, 2008) (Explaining "Lucile, Lady Duff Gordon . . . was the first internationally celebrated British woman couturier, due not only to her innovative haute bohemian design and dressmaking skills but also her flair for marketing and publicity.").

43. For more background information on Otis F. Wood, see VICTOR GOLDBERG, *FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE* 43 (Harvard Univ. Press 2006), more specifically Chapter 2 entitled *Reading Wood v. Lucy, Lady Duff-Gordon with the Help from the Kewpie Dolls*.

44. *Lady Duff-Gordon*, 118 N.E. at 214.

45. *Id.*; *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576, 577 (App. Div. 1917).

46. *Lady Duff-Gordon*, 118 N.E. at 214; *Wood*, 164 N.Y.S. at 577.

47. *Lady Duff-Gordon*, 118 N.E. at 214.

48. See GOLDBERG, *supra* note 43.

49. *Lady Duff-Gordon*, 118 N.E. at 214; *Wood*, 164 N.Y.S. at 577.

50. *Lady Duff-Gordon*, 118 N.E. at 214.

51. *Id.* at 214-15; *Wood*, 164 N.Y.S. at 577.

pay her half the profits, he never actually promised to place her endorsement on any designs and had no actual duty to market her designs.<sup>52</sup> He could choose to make no endorsements, she claimed, and still not be in breach.<sup>53</sup>

The New York Appellate Division found that the contract was void for lack of consideration.<sup>54</sup> Although the plaintiff promised to collect revenues derived from endorsements, sales and licenses, the promise was not binding unless he actually placed endorsements, made sales or granted licenses, which the contract did not require him to do.<sup>55</sup> The court noted:

The enforcement of his promise to collect and pay over is thus made to depend upon an act which he has not agreed to perform, and which the defendant cannot compel him to perform. He promises to collect revenues from the indorsements, provided he sees fit to place the indorsements.<sup>56</sup>

The court thus concluded that the contract should be carried out as written, even if the effect were to release Lady Duff-Gordon from a contract both parties had most likely intended to be binding.<sup>57</sup>

The New York Court of Appeals, in a landmark opinion written by Judge Cardozo, reversed, holding that the contract contained an implied promise on the part of Mr. Wood "to use reasonable efforts to bring profits and revenues into existence."<sup>58</sup> The court reasoned that in this exclusive dealing agreement, where she gave him an exclusive privilege, and her remuneration depended entirely on his efforts, the court would not "suppose that one party was to be placed at the mercy of the other."<sup>59</sup> Despite the lack of explicit consideration in the contract itself, the court presumed that the parties actually intended for there to be a binding contract.<sup>60</sup> The duty to use best

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52. *Lady Duff-Gordon*, 118 N.E. at 214-15; *Wood*, 164 N.Y.S. at 577.

53. *Lady Duff-Gordon*, 118 N.E. at 214-15; *Wood*, 164 N.Y.S. at 577.

54. *Wood*, 164 N.Y.S. at 578.

55. *Id.* at 577.

56. *Id.*

57. *Id.*

58. *Lady Duff-Gordon*, 118 N.E. at 215.

59. *Id.* at 214

60. *Id.* The court stated:

The defendant insists . . . that [the agreement] lacks the elements of a contract. She says the plaintiff does not bind himself to anything. It is true



efforts reflects social norms and shared values of reciprocity, and since people normally intend to comply with social norms, the court must have reasoned, a duty to use best efforts must have been within the normal expectations of the parties under these circumstances.<sup>61</sup>

The Appellate Division and Court of Appeals opinions reflect an ongoing debate about the reliability of language, the inherent meaning of words, and how far language can be stretched.<sup>62</sup> The *Lady Duff-Gordon* case epitomizes the turn of the century trend toward a contextualist approach to contract interpretation, allowing reduced specificity and greater uncertainty in contracting and a greater role for courts in enforcing contracts.<sup>63</sup> An agreement that certainly would not have been enforceable years before was enforced in *Wood*, and would routinely be enforced in years to come.

#### B. *The Doctrines of Good Faith and Best Efforts*

The fact-sensitive doctrines of good faith and best efforts are especially good for teaching fact identification and fact analysis. The notion of good faith is largely resistant to any universal definition.<sup>64</sup> The Restatement (Second) of Contracts provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforce-

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that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her design. We think, however, that such a promise is fairly to be implied.

*Id.*

61. *Id.* (noting "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal").

62. At the heart of the debate is the conflict between individual choice and social control—whether implying an obligation of good faith and best efforts into every contract is a socially imposed standard of behavior (i.e. externally imposed requirements), or an accurate reflection of the parties' actual intentions (i.e. self-imposed controls), and whether self-imposed controls are more legitimate than socially-imposed. On the one hand, contracts should be freely created by individuals, not imposed on individuals by society, and it is unfair to hold parties to something they did not agree to. But at the same time, people should be held to certain social norms so that contracting parties can rely on their legitimate expectations. Additionally, concepts like good faith may equalize bargains where there is no or very little bargaining power, recognizing social interests greater than freedom of contract in some cases.

63. Walter F. Pratt, *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988).

64. Brown, *supra* note 18, at 1380.

ment.”<sup>65</sup> According to the Restatement, good faith includes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.<sup>66</sup> The definition excludes conduct characterized as bad faith, including overt action or inaction, evasion of spirit of bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with the other party’s performance.<sup>67</sup> The Uniform Commercial Code defines good faith as “honesty in fact and observance of reasonable commercial standards of fair dealing.”<sup>68</sup> The related duty of best efforts typically arises in the specific factual circumstance when one party has discretion and requires a party to make reasonable efforts in light of that party’s ability and the means at its disposal and of the other party’s justifiable expectations.<sup>69</sup>

The common thread running through these definitions is that each involves standards of “reasonableness” and “fairness,” requiring application of the rule to be flexible, and its meaning and effect to vary tremendously, depending on the context. Since divergent inferences about good faith can almost always be drawn from any set of facts, the good faith doctrine is especially useful for showing the critical relationship between facts and rules, and the role that facts play in legal analysis.

### III. Using *Lady Duff-Gordon* to Teach the Role of Facts in Legal Reasoning

If the doctrine of good faith and best efforts is an ideal vehicle for teaching the importance of fact identification and fact

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65. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

66. *Id.* § 205 cmt. a.

67. *Id.*

68. U.C.C. § 1-201(b)(20) (amended 2003). The United Nations Convention on Contracts for the International Sale of Goods (CISG) states, “regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade,” leaving it to the courts to define the term “good faith.” United Nations Convention on Contracts for the International Sale of Goods, Art. 7(1), April 11, 1980, U.N. Doc. A/CONF.97/18, Annex 1. The CISG refers to the doctrine of “good faith” only once. John Klein, *Good Faith in International Transactions*, 15 LIVERPOOL L. REV. 115, 120 (1993). See generally Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*, 7 VINDOBONA J. INT’L COM. L. & ARB. 63 (2003).

69. J.C. Bruno, “Best Efforts” Defined, 71 MICH. B.J. 74 (1992), for a discussion on the difference between good faith and best efforts.

analysis, then *Wood v. Lucy, Lady Duff-Gordon* is the ideal case. Written by Judge Benjamin Cardozo, the facts set the stage for the landmark conclusion that an obligation of best efforts was implied in the contract.

A. *Use of Facts, Grammar and Word Choice in Legal Writing*

*In-Class Exercise Part I: Ask the class to consider the facts as presented by the court. What facts did the court highlight? Which, if any, did the court downplay? How did the court use grammar and word choice, if at all, to strengthen its position?*

In legal writing, the importance of storytelling techniques such as specific word choice and grammatical structure, organization, point of view, voice, style and description, cannot be overstated. In describing fiction writing techniques that can be adapted to legal writing, Professors Brian Foley and Ruth Anne Robbins assert that word choice is paramount:

What we call something goes a long way toward what or how a reader will think of that thing. For example, do we call the dog that bit the plaintiff a “pet,” a “guard dog,” a “Doberman,” or, simply by its name “Chocolate?”<sup>70</sup>

Similarly, they explain, “how the writer defines the conflict goes a long way toward how a reader will want the conflict resolved.”<sup>71</sup> For example, commonly in fiction writing, themes are presented in terms such as “Man Against Man,” “Man Against Self” or “Man Against Machine.”<sup>72</sup> If lawyers can characterize the facts to frame the issue in a way that pits the client in a struggle against a less sympathetic entity, it will give the reader an interest in seeing that client prevail. So “if the reader pitches a conflict as Man Against Society, or Man Against Machine, in the sense of the ‘little guy’ v. ‘big guy,’ many readers instinctively root for the ‘little guy.’ If the conflict is Man Against Self, most readers want the person’s better nature to prevail.”<sup>73</sup> The order in which the writer presents the information is also critical.<sup>74</sup> For example, the lawyer should include background information as a way to orient the reader with re-

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70. Foley & Robbins, *supra* note 23, at 466.

71. *Id.* at 470.

72. *Id.* at 469.

73. *Id.* at 470.

74. *Id.* at 475.

spect to the nature of the conflict, making it clear for whom the reader should root.<sup>75</sup>

Finally, grammatical structure can play a critical role in the persuasiveness of ideas.<sup>76</sup> Grammar is both a mechanical set of rules concerning tense, syntax and the like, and a shared set of linguistical ploys that operate as persuasive shorthand.<sup>77</sup> For example, short, bold, conclusory sentences can reflect a heightened level of certainty, while longer, more sinuous sentences generally create the impression of complexity.<sup>78</sup> Similarly, active voice typically denotes strength and confidence, while passive voice connotes a more ambivalent position, particularly in situations where the legal determination will likely be a “close call.”<sup>79</sup> The passive voice obscures the actor behind the information presented, either because the actor is unknown or the fact presented is unfavorable and the writer wishes to deflect the reader’s attention.<sup>80</sup>

It has been widely observed that in the *Lucy, Lady Duff-Gordon* case “readers . . . know who will ultimately win by the time they read the third word in the case.”<sup>81</sup> And if they do not know by then, they will certainly figure it out by the time Judge Cardozo finishes setting forth the background facts. In a lecture delivered by Professor Karl Llewellyn in 1962, he discussed how Judge Cardozo uses, or even manipulates, the facts to paint a sympathetic plaintiff. The case begins:

The defendant styles herself a creator of fashions. Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things

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75. *Id.*

76. See Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 J. ASS’N LEGAL WRITING DIRECTORS 75 (2006) (discussing the role grammar plays in clearly expressing ideas, and how poor grammar can be both a distraction and an obstacle to comprehension).

77. Bruce A. Markall, *Truth?*, 72 IND. L.J. 1115, 1118 (1997) (discussing how various forms of legal argument create a “grammar of legal justification” that can be used to support a legal claim); see also Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 693 (2005) (discussing the “grammar of justification” as the central device in the practice of law).

78. Hardwick, *supra* note 76, at 77.

79. Wangerin, *supra* note 5, at 438.

80. Kathleen Dillon Narko, *Sentences: Short and Sweet*, CBA REC. (Chicago Bar Association), Nov. 19, 2005, at 58.

81. Wangerin, *supra* note 5, at 437.

which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her turn this vogue into money.<sup>82</sup>

"The defendant 'styles herself' a creator of fashions."<sup>83</sup> This is not a neutral statement about her job, but a deeper implicit statement about her character. Llewellyn points out that Judge Cardozo "subtly" paints a picture of a "nasty person,"<sup>84</sup> gradually building up sympathy for Wood and setting up Lady Duff-Gordon's certain failure in this action. Cardozo continues:

He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return, she was to have one-half of all profits and revenues derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days.<sup>85</sup>

The way these facts are presented, they can lead to but one conclusion—that the parties intended to enter into a binding agreement.<sup>86</sup> Without explicitly stating so, Cardozo describes a detailed business transaction, using legal and contracting language such as "exclusive right," "subject to her approval," "license others" and "terminated by notice of 90 days."<sup>87</sup> And then, as if it were not already clear, Cardozo describes the hallmark of any serious commercial contract: "The agreement of employment is signed by both parties. It has a wealth of recitals."<sup>88</sup> Despite the fact that the agreement resembles a contract in every way, and against all reason, the defendant "*insists* . . . that it lacks the elements of a contract."<sup>89</sup> Is there any doubt that the court will find a binding contract?

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

83. *Id.*

84. *A Lecture on Appellate Advocacy*, *supra* note 19, at 637.

85. *Lady Duff-Gordon*, 118 N.E. at 214.

86. *A Lecture on Appellate Advocacy*, *supra* note 19, at 637 (commenting "what wonderful legal language, to make it legally enforceable" and "[m]y heavens, isn't this legal?").

87. *Lady Duff-Gordon*, 118 N.E. at 214.

88. *Id.*

89. *Id.* (emphasis added).

Moving on to the legal analysis, Judge Cardozo appears to rely exclusively on the fact that the agreement very strongly resembles a contract, with a “wealth of recitals” and the signatures of both parties, in implying the existence of consideration.<sup>90</sup> He notes that although the plaintiff does not promise “in so many words” to do anything in exchange for getting the exclusive right to make indorsements, such a promise “is fairly to be implied.”<sup>91</sup> Cardozo draws this conclusion based on his now famous statement that “a promise may be lacking, and yet the whole writing may be instinct with obligation, imperfectly expressed.”<sup>92</sup> To justify this conclusion, he again points to the details of the writing, specifically the fact that Lady Duff-Gordon “gave an exclusive privilege,” with “no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff,”<sup>93</sup> and the fact that her “sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff’s efforts.”<sup>94</sup> These provisions, Cardozo explains, only make sense in a context that requires the plaintiff to make such efforts—otherwise she gets nothing. So, ultimately, Cardozo convinces readers that the extensive and detailed terms of the contract suggest that the parties intended to conclude a deal, and the deal only makes sense if Lady Lucy is to get something in return for her grant of exclusive agency to Wood.

In addition to characterizing the power dynamic between the plaintiff and defendant through word usage, Cardozo also uses grammatical devices to demonstrate the relationship established between the parties. In particular, Cardozo uses short, conclusory sentences, such as “[h]er favor helps a sale,” and “[i]t has a wealth of recitals,” that underscore the pro-plaintiff tone of the opinion.<sup>95</sup> He also speaks in the authoritative voice of the collective “we,”<sup>96</sup> assuring the reader that the

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Cardozo refers to the court in the collective “we” on multiple occasions. After paraphrasing the defendant’s argument that no express promise was made, he states, “[w]e think, however, that such a promise is to be fairly implied.” *Id.*

framing of facts is solid, and that the conclusions drawn by the court are the only rational outcomes.

### B. *Making the Losing Party's Case*

*In-Class Exercise Part II: Ask the class to rewrite the court's statement of facts to generate sympathy for the losing party, Lady Duff-Gordon, and to justify a holding in her favor. Have them use only what they can gather about the parties and the context from the opinion itself, including the sophistication of the parties, the nature and detail of the agreement and any social norms that might have come into play. Have them emphasize helpful facts, and explain or deemphasize harmful facts. Have them pay particular attention to their grammar and word choice, in painting a subtle but emotional or expressive picture of the time and place.*

Then show the class Karl Llewellyn's masterful retelling of the story, using the identical facts:

*The plaintiff in this action rests his case upon his own carefully prepared form agreement, which has as its first essence his own omission of any expression whatsoever of any obligation of any kind on the part of this same plaintiff. We thus have the familiar situation of a venture in which one party, here the defendant, has an asset, with what is, in advance, of purely speculative value. The other party, the present plaintiff, who drew the agreement, is a marketer eager for profit, but chary of risk. The legal question presented is whether the plaintiff, while carefully avoiding all risk in the event of failure, can nevertheless claim full profit in the event that the market may prove favorable in its response. The law of consideration joins with the principles of business decency in giving the answer. And the answer is no.*<sup>97</sup>

Behind every set of facts is another version of the same story—another perspective of the same set of facts. Llewellyn suggests that if an appeal has any merit, any “competent technician” can craft the “letter perfect case,” and the question becomes “which view, among the possibilities, is the court going to accept?”<sup>98</sup>

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Later, as Cardozo lays out the factual support for his conclusion he writes, “[w]e are not to suppose that one party was to be placed at the mercy of the other.” *Id.*

97. *A Lecture on Appellate Advocacy*, *supra* note 19, at 638.

98. *Id.* at 629.

Llewellyn's restatement of the facts of course places premier emphasis on the fact that the parties did not include a best efforts clause in the contract itself. He implicitly uses the same facts as Cardozo—the extensive and detailed terms of the contract—to suggest that if the parties had intended to include a best efforts clause, they would have done so. They were sophisticated parties who took care in preparing the form. Indeed, the plaintiff prepared the agreement himself, most likely with the input of an attorney. This was no case of sloppy drafting, but rather, intentional omission of a key term on the part of the contract drafter, so as to take advantage of a chance at great profit with little accompanying risk.

### C. Omitted Facts

*In-Class Exercise Part III: Ask the class to consider what additional facts, if true, might have changed the outcome of the case.*

Many professors have criticized the case method for failing to teach students to identify and work with relevant facts because of the limited facts reported in the typical case and casebook. Professor Weinstein, for example, has noted that “[w]e may analyze how a judge stresses or ignores a fact to support an outcome, but appellate case analysis is not a vehicle for studying how facts are included or excluded from the record altogether.”<sup>99</sup>

But this shortcoming of the case method can be turned to the teacher's advantage. Professor Wangerin would seize on this limitation of the case method as an opportunity to teach about the use of facts:

Inventive use of the reported facts in casebooks and speculation about facts not reported give students an excellent introduction to the role of facts in legal disputes. In fact, a commonly criticized

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99. Weinstein, *supra* note 32.; see also Schwartz, *supra* note 7, at 352 (asserting that “requiring and encouraging the use of cases already studied and discussed in class does not test whether students have developed the skills of reading and analyzing new court opinions”); Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000) (advocating the document-based approach over the case method because it “combines the very best of the problem method and the simulation method” and emphasizes the skills necessary to train students to practice transactional and preventive law).



aspect of many casebooks, that the statements of facts are too condensed, can be a great tool for learning. The absence of specific facts creates a broad opportunity to speculate about the real facts in a dispute.<sup>100</sup>

Similarly, Llewellyn suggests approaching a given case “from the front,” as a problem for solution, rather than “from the rear,” as a problem already solved.<sup>101</sup> According to Llewellyn, rather than blindly relying on the recitation of facts in any given case, case discussions should emphasize the materials available to work with, before the decision and in the decision, with intensified discussions of background facts and policy, and a “vastly more sustained discussion of details more fully presented and more clearly seen . . . .”<sup>102</sup>

The facts included in the *Lady Duff-Gordon* case, together with one key omitted fact, can be used to illustrate the risk of relying too heavily on the facts as reported in the opinion. In an article comparing the *Lady Duff-Gordon* case to a case brought by the same plaintiff against Rose O'Neill, the developer of the Kewpie doll, Professor Victor Goldberg points out that the Kewpie contract, signed shortly before the *Lady Duff-Gordon* contract, explicitly included a best efforts clause. The inclusion of such a clause in a prior contract suggested that the lack of specificity in the *Lady Duff-Gordon* contract might not have been sloppy drafting, but rather an intentional omission.<sup>103</sup> This bit of context highlights the extent to which Judge Cardozo ably used the facts to justify the implication of a clause that could easily have been written into the contract.

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100. Wangerin, *supra* note 5, at 439 n.20; see also Dean Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 172 (1984) (noting that “a skillful teacher will lead students to read opinions imaginatively, with attention to the human possibilities that lie beneath their abstract language”).

101. Llewellyn, *supra* note, 1, at 213. Llewellyn argues that the more common, but less vital approach, looks at a case

as a something done and complete, a something which provides an authoritative datum about the state of the law, a something to be tested, therefore, for how far it reaches, how solidly it may be expected to stand up under later events, and—on a sharply different level—for how wise it is or how it fits together with other decisions or principles of law.

*Id.*

102. *Id.* at 214.

103. Victor Goldberg, *Reading Wood v. Lucy, Lady Duff-Gordon with Help from the Kewpie Dolls*, in FRAMING CONTRACT LAW 43 (2007).

These exercises can be done with any case, but the *Lady Duff-Gordon* case is especially effective because of Judge Cardozo's brilliant use of the facts to craft the story he wanted to tell. The exercises are meant to show how the facts can be used to set the stage for the overall legal theory developed later in the argument. They can be used to help students identify and distinguish between legally significant and immaterial facts, and to become aware of, or maybe more alert to, how the facts can be used and shaped in litigation. The exercises force students to consider the world and culture in which the transaction takes place, and the effect that may have on the parties' understandings. They highlight the danger in assigning the facts a singular, monolithic meaning, forcing students to consider the importance of the way the facts are characterized, from the choice to highlight or omit a fact, to the style or tone, down to the specific word choice.

Ideally these exercises can be done with minimal intrusion into course coverage. Students can be asked to prepare answers to the questions in advance of class in preparation for the discussion of the case, the exercises can be used as in-class or take-home writing assignments or posted on TWEN site discussion forums, or these issues can be examined through the use of break-out groups during class time, as time permits.

#### IV. Conclusion

*There is . . . a serious dissonance between our higher aspirations as teachers and our examination and grading practices. We aspire to teach mental habits that transcend substantive law but we do not try very hard to find out how well we are succeeding.*<sup>104</sup>

In our work with beginning law students, we urge them to try to resist, at least a little, the overwhelming seductive power of doctrine, and to remember that one of their major tasks in their first year is to learn how the law works, and not only what the law is. It is an uphill battle, confounded by convention in both legal education and the materials law professors tend to use. But it is becoming increasingly clear that we can integrate the teaching of reasoning skills into substantive courses more

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104. David P. Bryden, *What do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 480 (1984).

effectively, and that doing so will enrich both the teaching and the learning of law.

Applying the law to the facts of a given case lies at the heart of legal analysis. But the depth to which doctrinal teachers often restrict themselves in their conception of fact analysis is to allocate facts to elements and sides (i.e. this fact supports this element, this fact supports that element), thereby treating facts as concrete, immutable truths as opposed to the product of manipulation, or an otherwise conscious choice about language. The very existence of a fact is not rooted in reality. Whether it was raining depends on whether the side that wants it to be raining gets the evidence admitted. Then, there is the matter of interpretation. Might the answer depend on how the question is framed ("Was it raining?" versus "Was it raining or pouring?") or whether a drizzle amounts to rain? How the lawyer characterizes the facts can be the most important determinant of the outcome of the case.

A given fact can often be used in different ways to support opposing positions—accordingly, different conclusions can be drawn depending on the significance assigned to that fact. Students who are able to recognize the importance and complexity of arranging the events in a particular order, paying close attention to language, word choice, and grammatical structure, and constructing the facts to weave a sympathetic tale, will be forced to examine more closely the nuances of the rule, will become more nimble in applying the rule to the facts, and ultimately will be better prepared to take essay exams and will be better lawyers.