

VIRGINIA LAW REVIEW ONLINE

VOLUME 108

FEBRUARY 2022

72–90

SYMPOSIUM ESSAY

THE CONTEXTUAL CASE METHOD: MOVING BEYOND OPINIONS TO SPARK STUDENTS' LEGAL IMAGINATIONS

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INTRODUCTION

A new student arrives at law school for her 1L year. She knows it sounds corny, but she's here to make the world a better place. She's seen injustice and tragedy (George Floyd, Parkland, climate change). She's protested with Black Lives Matter and March for Our Lives and the Sunrise Movement. She's heard, again and again, how her generation will save us, how they're giving people hope. She sees law as a career that will let her do good; she is hungry to advocate and determined to make a difference.¹

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¹ Tiffany D. Atkins, #Fortheculture: Generation Z and the Future of Legal Education, 26 Mich. J. Race & L. 115, 127–32 (2020) (describing Gen Z and noting that “many . . . consider themselves activists”).

Classes begin. She's assigned the same slate of courses that most law students have taken for the last 150 years.² For each of these classes, she reads judicial opinions, mostly appellate decisions, often trimmed by the authors of her textbooks and organized around discrete legal topics.

The cases she reads deal with human tragedy—a fire that killed 492 people,³ a boy with a badly burned hand⁴—but class discussions ignore these details and instead hone in on the legal rules governing the outcome. Dialogue quickly becomes abstract; the student places facts in one box or another—involuntary manslaughter or not, recoverable damages or not—and concerns about justice or morality are quietly jettisoned.⁵

The student senses something is missing. She reads about gruesome murders in her Criminal Law class, but little about the crimes largely responsible for mass incarceration.⁶ She reads about ownership of dead foxes in her Property class, but little about Indian displacement or slavery.⁷ Race and gender come up on occasion—the Bernard Goetz case prompted a vigorous discussion of how case theories rooted in racial stereotypes can appeal to a jury—but even these discussions focus on past inequities, offering critique with the benefit of hindsight, suggesting that these problems are far behind us.

This seeming disconnect extends to her Legal Writing class, where she represents a client in a criminal appeal. *Finally*, she thinks. *A chance to practice doing some good*. But the conversations focus on how to argue within the limits of the law. Even here, there is little discussion about matters outside the boundaries of precedent, such as racial or gender bias,

² See Edward Rubin, What's Wrong with Langdell's Method, and What to Do About It, 60 Vand. L. Rev. 609, 616 (2007) (describing Langdell's focus on the common law as "real law" and insistence that the first year be composed of mandatory common-law courses).

³ Commonwealth v. Welansky, 55 N.E.2d 902, 907 (1944); Jack Thomas, The Cocoanut Grove Inferno: 50 Years Ago This Week, 492 Died in a Tragedy for the Ages, Bos. Globe, Nov. 22, 1992.

⁴ Hawkins v. McGee, 84 N.H. 114, 115 (1929).

⁵ See Elizabeth Mertz, Inside the Law School Classroom: Toward a New Legal Realist Pedagogy, 60 Vand. L. Rev. 483, 506 (2007) (observing law school classrooms and finding that the class discussions require students to "distance [themselves] from everyday contexts and meanings, and to concentrate upon abstract cognitive features of the environment" (quoting William M. Sullivan et al., The Carnegie Found. for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law (2007))).

⁶ See Alice Ristroph, The Curriculum of the Carceral State, 120 Colum. L. Rev. 1631, 1664–67 (2020).

⁷ See K-Sue Park, Conquest and Slavery in the Property Law Course: Teaching Notes (Jul. 24, 2020) (Geo. L. Fac. Publ'ns & Other Works) (manuscript at 3–5), <https://ssrn.com/abstract=3659947> [<https://perma.cc/MX5M-3U47>].

that may also impact the case. There is little talk about how to combat this invisible evidence in court. There is no discussion of how to reveal what is not said in opinions. There is no acknowledgement of the need to find a way for attorneys to push the envelope of the existing framework of the law to address deeply embedded inequities and pursue meaningful social change.

This student will likely begin to accept the message that she has received, that law, as found in the opinions she is reading, is normal and natural, largely static and unflinching, and something to be understood and sometimes critiqued, but not fundamentally disrupted.⁸ Because in making opinions the primary focus of the first year, law school legitimates and deifies them. A student's legal imagination is not trained to see new possibilities; a radical reimagining of the world seems either impossible or inadvisable.⁹ Students who are shown these opinions as the prime example of legal reasoning, with few counterpoints that introduce outside perspectives or acknowledge alternative realities, are instead subtly encouraged to replicate the status quo.¹⁰

Law students deserve better. Our vision is for a law school, especially a first year, where students do not read opinions in isolation, but in the broader context in which they arose. Where students are asked to assess the opinion not just as a source of rules, but as the product of a human, flawed and biased, who may or may not have been right, who may or may not have been aware of factors beyond the evidence in the case that drove the decision, who is but one player in a far larger legal playing field. Where students are asked to see beyond the boundaries of an opinion to reimagine what the law could be, not just repeat what it is.

⁸ See Mertz, *supra* note 5, at 504 (finding that the legal analytical process “is capable of devouring all manner of social detail, but without budging in its core assumptions”); see also Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 *Fla. State Univ. L. Rev.* 195, 215 (1987) (“[T]he discourse of courts and lawyers . . . constantly, subtly, almost unconsciously, keeps privileging one possible set of regulatory policies—one possible view of the world—as natural, normal, rational, free, efficient, and *usually* OK and just.”).

⁹ We borrow the term “legal imagination” from the great James Boyd White. See James Boyd White, *The Legal Imagination* (1985).

¹⁰ See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 *J. Legal Educ.* 591, 591 (1982) (“Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world.”); cf. Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 *Legal Comm’n & Rhetoric* 39, 41 (2016) (noting that traditional legal reasoning is like “infrastructure,” in that “we do not see it, we take it for granted, and we do not stop to critically consider its role”).

What might emerge from such an approach may not be a wholesale revolution in legal education. Others have done inspiring work to push for that kind of ground-up, system-shattering change.¹¹ Our proposal instead keeps the traditional case method and the valuable analytical training it provides, but surrounds those opinions with context. By humanizing opinions, by pairing them with other perspectives on the same legal questions, and by exploring the complexities that went unaddressed and the influences that went unstated, professors can encourage students to imagine a different legal world.

The end result may be students who both know how to rearrange apples in the apple cart and “how to upset the apple cart altogether.”¹²

I. THE TRADITIONAL CASE METHOD AND ITS DISCONTENTS

Law school promises to teach students to think like lawyers. At its most basic, this means understanding rules: how to interpret them, how to derive them from legal sources, how to apply them to new sets of facts. The source material students are provided to achieve this learning—at least in the first year—is almost exclusively opinions.¹³ Class time is devoted to dissecting opinions, teasing apart the relevant from the irrelevant, drawing out rules, tracing legal reasoning, and using the knowledge gained from the opinion to address hypothetical new sets of facts.

Looked at one way, this is a re-birth, a molding of a young mind so that it is sharper, clearer, more able to deftly solve legal problems. But looked at another way, it is an indoctrination, a blinding of the mind to considerations beyond the boundaries of the opinion, an acceptance of the system as it is, and a refusal to imagine how it could be. In this latter view, something valuable is shed as the lawyer is born.

This focus on opinions is stultifying along three different axes: First, it narrows the aperture and excludes non-legal circumstances that may have

¹¹ See, e.g., Kennedy, *supra* note 10, at 614 (putting forth a “utopian proposal” that restructures the law school to mandate a doctrine course, a clinical program, an interdisciplinary course, and a flexible third year); Gerald P. López, *Transform—Don’t Just Tinker With—Legal Education (Part II)*, 24 *Clinical L. Rev.* 247, 346–47 (2018) (arguing that law schools should ban the Socratic case method altogether); Bennett Capers, *The Law School as a White Space*, 106 *Minn. L. Rev.* 7, 47–55 (2021) (describing a vision of what a truly inclusive law school would look like).

¹² Capers, *supra* note 11, at 32.

¹³ See Rubin, *supra* note 2, at 649 (“The traditional curriculum provides students with one experience—intensive questioning about the reasoning of judicial decisions.”).

been quite important to the decision, giving students the false impression that only “the law” matters in decision making and that external factors do not play a role. Second, it embraces certainty—certainty of results and certainty of facts—which both denies the rhetorical nature of the opinion itself and gives students little preparation to maximize change-making possibilities in the world of ambiguity they are about to enter. Third, it forces students to accept the worldview of a judge or judges—usually white and usually male—as “the law” and dresses up that worldview as an objective, neutral, correct stance.

All of these problems contribute to a student’s sense that law is stable, just, normal, and “usually OK,”¹⁴ instead of invigorating her imagination as to law’s possibilities and training her to push for legal change.

A. Narrowing the Aperture

The traditional case method’s focus on opinions gives students the impression that it is only the legal rules and rationales that matter, that nothing outside of the law played into the judge’s decision. But as Jerome Frank emphasized nearly a century ago, “*an opinion is not a decision.*”¹⁵ A decision is the outcome of the case, which is based on a multitude of factors, some legal and some non-legal, only a fraction of which make their way into opinions.¹⁶ Opinions are the written justification for the decision, but they do not capture everything that went into the decision.¹⁷

One justification for using opinions as the source material for law school is that opinions are where the legal rules are embedded and the boundaries of the doctrine are defined, and it is the lawyer’s task to unearth and apply those rules to new sets of facts.¹⁸ This is certainly true and a necessary skill for any lawyer to have.¹⁹ Rules have some

¹⁴ See Gordon, *supra* note 8.

¹⁵ Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. Penn. L. Rev. 907, 910 (1933).

¹⁶ *Id.*

¹⁷ See *id.*; see also Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 883, 884 (2010) (“[W]hen we talk about legal authority, using the logical forms of rules and their bedfellows of analogy, policy, and principle, we are actually swimming in a sea of narrative, oblivious to the water around us.”).

¹⁸ See, e.g., Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. Toledo L. Rev. 647, 648 (2000) (describing traditional justifications for the case method, including that it helps students learn legal doctrine, gives students a feel for “boundary problems,” and provides them with experience in applying law to concrete problems); see also Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517, 547–61 (1991) (listing various reasons for adhering to the case method).

¹⁹ See, e.g., Kennedy, *supra* note 10, at 595–96.

constraining function, and good lawyers must know how to deploy them effectively.

Yet to present this as the *only* work of the lawyer gives a distorted and narrow view of the actual foundations of the law. Continued adherence to the traditional case method trusts a judge's recounting of what led to the decision and allows the vision of a decision governed by rules to flourish. Such an approach ignores the possibility that an opinion is simply window dressing for alternate motivations, backfilling "legal" reasons for choices made on other grounds.²⁰

The traditional case method thus both blinds future lawyers to possible injustices baked into the system and leaves them unequipped to counter those injustices when they occur.

First, this focus renders invisible the role of factors other than legal rules, such as bias, assumptions, or policy preferences, in reaching a decision. No judge will ever write, "I am denying this motion to suppress because I trust the testimony of police officers more than I trust the testimony of Black people, and this defendant is Black." She can couch her decision not to suppress in the language of reasonable suspicion or probable cause. But the real reason for the decision could very well be that the judge overvalues the testimony of police officers and undervalues the testimony of defendants, especially defendants of color. Research into this area lends support to the idea that systematic bias and presumptions about police competence are driving these decisions, not reasoned consideration of the facts of the specific case.²¹

Yet the traditional case method misleads students into believing that the legal rules alone led to the result. The opinion may leave no trace of the bias of the judge issuing the decision, or the stock story she believes about police officers as truthful and trustworthy. Failure to contextualize the opinion, leaving the actual drivers of the decision unacknowledged, leads students to trust that the rules are all that matter and that the system is fair and just. It presents a veneer of objectivity and neutrality over a system that is in fact deeply unequal and unfair.

²⁰ See, e.g., Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 Conn. Pub. Int. L.J. 43, 52 (2013) ("[F]rom before the first moment of becoming aware of an event, we have already assumed a perspective, most likely by fitting the facts into a familiar narrative pattern. The question is not *whether* we see the world through the lens of a story, but *which* story lens we will use.").

²¹ See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1997, 2002 (2017) (explaining how structural biases and presumptions about police competence "likely pushed judges to systematically overvalue police knowledge").

Second, a student who does not understand the role bias, policy preference, or other non-legal factors play in decisions will not be as effective an advocate for their client. Knowing that a particular judge is inclined to believe police officers empowers the lawyer to consider ways to neutralize that preference. Perhaps she reminds the court, respectfully, of the importance of its deliberative and impartial role in reviewing these matters—while the rules encourage judges to defer to police expertise, judges are expected to have the advantage of neutrality in assessing the circumstances that gave rise to a stop. A judge who merely validates a police officer’s purported justifications is not adequately performing their role. A lawyer, anticipating bias to influence perceptions of facts, should know the importance of holding the judge to the task of making sure each asserted fact is supported and every inference explained.

Without training beyond opinions, students would not understand the importance of this framing, how it is necessary (but might not be sufficient) to win a case in the face of influences pushing a decision maker to rule against her client. A student who has only read opinions instead turns into the “helpless practitioner . . . ignorant of how the law should be applied and is applied in daily life.”²²

But even more important, the new lawyer also may be unequipped to address the *systemic* problem when this same issue arises in case after case. Perhaps she has accumulated enough experience and professional competence to address questions of bias head-on for her individual clients and has neutralized some of their effect. But the rules themselves allow for, even encourage, deference to the police. The young lawyer’s training in opinion reading has not prepared her to make arguments that could unsettle the very foundations of the rules that place a thumb on the scales in unjust ways. It has not provided her with tools to push the law forward, instead of only mitigating the damage, piece by piece.

B. Denying the Rhetorical Nature of Opinions

The traditional case method also fails students on another front: the embrace of false certainty. Not only do opinions paint a false picture of the actual basis for the decision, but they also can make the outcome seem inevitable and certain, even when the judge herself may have harbored deep doubts about the result. Moreover, the appellate opinions that form the bread and butter of the traditional case method present the facts as

²² Frank, *supra* note 15, at 919 (quoting Judge Crane of the New York Court of Appeals).

decided and not in dispute, even when those facts may have been bitterly contested. Appellate opinions often leave little trace of the arguments that were not favored, the perspectives that were not prioritized.

Judges themselves recognize that their opinions plaster a face of certainty upon decisions that are anything but. Justice Brandeis once complained, “[T]he difficulty with this place is that if you’re only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced.”²³ And Judge Patricia Wald noted the role that compromise on multi-judge panels plays in which issues are addressed and which conflicts are papered over: “[T]he opinion writer will usually strive to fashion a rationale that does not even discuss the disputed matter, or buries it in a coverall phrase like ‘other issues raised by the appellant do not merit further discussion.’”²⁴

This practice of ignoring conflict harms law students because the resulting opinions convey the impression that law leads to only one unquestionable result, that other avenues are foreclosed or impossible. Instead of asking readers of the opinion to marinate in the complexity or acknowledge the possible reasonable differences of opinion as to how the law should apply, the opinion provides one correct pathway from problem to solution. On occasion, a dissent is introduced, which problematizes the matter a bit, but in most casebooks, the introduction of this contrary voice is the exception rather than the rule.²⁵

A student is left with the impression that to be a successful lawyer, to be able to predict what a judge would do when presented with a set of facts,²⁶ she must discern what that one true result is in each case. This closes off her legal vision of all the different possible outcomes a set of facts could lead to. She risks becoming myopic in her view of what the law is and unimaginative in her thinking about what it could be.

The other certainty myth perpetrated by the study of opinions is the nature of the facts themselves. Appellate courts are arbiters of law, not fact, and usually accept the facts as they were determined by the trial

²³ Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 *Ohio State L.J.* 1149, 1188 n.235 (2010).

²⁴ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. Chi. L. Rev.* 1371, 1378 (1995).

²⁵ See *infra* notes 44–45 and accompanying text (discussing Justice Stevens’ partial concurrence and partial dissent in *Illinois v. Wardlow*).

²⁶ See O.W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 460–61 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

court. The study of appellate opinions thus presents students with a view of facts as set and fixed and offers them little experience with conflicting witness testimony, fact investigation in the absence of established facts, or narrative framing—all essential parts of competent lawyering.²⁷

Just as a student must understand how factors other than the law influence outcomes, she must also know how to navigate a field of factual ambiguity and conflict. Appellate opinions prepare her to do little of this. They “hide, rather than display, how ‘facts’ are constructed and how more than one narrative can be consistent with ‘raw data.’”²⁸

With appellate opinions as her main lens into the legal world, she is left with a bereft “legal imagination.”²⁹ A law student taught in this way has not been trained to see the possibilities in the ambiguities, the new combinations and legal worlds that can result when law or facts are unsettled. For it is often in that confusing, messy dust of ambiguous facts and ambiguous law that new legal galaxies can be born.³⁰

C. Deifying the Judicial Worldview

A third harm wrought by the focus on judicial opinions is the centering of the judicial worldview and judicial voice in the students’ educational experience. At a time when they are entering the legal discourse community for the first time, students are taught that only the judge’s opinion matters, and that the judge’s thinking should be emulated.

This is problematic on a number of levels. First, that voice is often white and male and thus not fully representative of American society. Many of the “classic” cases students read in their required first-year

²⁷ See Todd D. Rakoff & Martha Minow, A Case for Another Case Method, 60 *Vand. L. Rev.* 597, 601 (2007) (“The opinions state ‘the facts.’ . . . [T]hese factual statements do little to equip students to navigate overlapping and diverging witness accounts, gaps in forensic material, disputes over significance levels in statistical studies, or the influence of a narrative frame.”).

²⁸ *Id.* at 601.

²⁹ *Id.* at 602 (“What [students] most crucially lack . . . is the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills. And unless they acquire legal imagination somewhere other than in our appellate-case-method classrooms, they will be poorer lawyers than they should be.”).

³⁰ See Edwards, *supra* note 17, at 892 (showing how the first sentence of the brief in *Miranda v. Arizona*—“We deal here with growing law”—framed established law as unsettled in order to push for a new path forward).

classes are from the nineteenth or early twentieth century,³¹ a time when women and people of color were rarely allowed to become lawyers, let alone judges. Even today, the vast majority of judges who sit on the federal bench are white or male or both.³² If students read only judicial opinions, they are immersed in an overwhelmingly white and male way of viewing the world.³³

This is problematic not just because it is harmful to our female students and our students of color (and it is, and others have powerfully and passionately made this case).³⁴ But it also means that students' model for how to be a lawyer, how to think and write in this space, is tinted with that worldview. As a result, that worldview—which often does not see the injustices wrought by the current system—becomes their default, the legal voice in their heads.

Second, the judicial voice itself, even when that voice is spoken by a woman or person of color, usually normalizes and accepts the laws and the legal system as it exists. Judges see their work as weighing competing arguments and interests, neutrally determining the result, always with the well-being and integrity of the legal system in mind.³⁵ Some scholars have cast this as the saving grace of the case method, that students take on the

³¹ See *Pierson v. Post*, 3 Cai. 175 (1805); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928); *Hawkins v. McGee*, 84 N.H. 114 (1929); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Commonwealth v. Welansky*, 55 N.E.2d 902 (1944).

³² Danielle Root, Grace Oyenubi & Jake Faleschini, *Building a More Inclusive Federal Judiciary*, Ctr. for Am. Progress (Oct. 3, 2019), <https://www.americanprogress.org/article/building-inclusive-federal-judiciary/> [<https://perma.cc/2VQF-XJM7>] (“[M]ore than 73 percent of sitting federal judges are men and 80 percent are white.”).

³³ See The U.S. Feminist Judgments Project: *Rewriting Law From a Feminist Perspective*, Univ. of Nev. L.V. William S. Boyd Sch. of L., <https://law.unlv.edu/us-feminist-judgments> [<https://perma.cc/J5ZJ-TFYA>] (last visited Feb. 11, 2022) (“The touchstone of the project is that the rewritten opinions must use the facts and precedent of the original opinion, but bring to the process of judging a feminist perspective that takes into account race, class, gender, disability and other status groups historically marginalized by the law.”); cf. Capers, *supra* note 11, at 31 (“The problem . . . is that the whiteness of the curriculum goes unsaid and unremarked upon.”).

³⁴ See Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, ABA J. (Oct. 15, 2020, 11:23 AM), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [<https://perma.cc/HA9Z-65AT>] (noting that casebooks “are not teeming with race-conscious messaging” and that the learning of law for racial minorities can be “intellectually violent” because it is “unforgiving, can feel unrelenting and often goes unnamed”).

³⁵ See Kronman, *supra* note 18, at 649–50, 653.

judge's "public-spirited attitude" and "care with new intensity about the good of the legal system and the community it represents."³⁶

While this perspective is valuable, emphasizing the judicial voice comes at a cost. By asking students to emulate this voice, we are telling them to respect the boundaries, to prioritize consistency within doctrine, to learn how to preserve the status quo. We are dissuading them from making arguments that push the limits of the law, that incorporate different methods and different worldviews, that ask different questions than those allowed for by the law as it exists.

* * *

In short, the traditional case method, for all its benefits, risks freezing legal imaginations and draining young minds of their ability to see injustice and argue for wholesale change.

II. THE CONTEXTUAL CASE METHOD AND TEACHING FOR CHANGE

There are no easy solutions to this problem. The traditional case method has been decried for much of its century and a half of existence.³⁷ Yet it endures. And it endures because it does something valuable: it trains students in fundamental skills of rule identification and application, issue spotting, and analogical reasoning. These skills have value to practicing lawyers and can even be used to critique and advance law.³⁸ Yet pairing opinions with other materials would better prepare students to become more effective advocates and change agents.

Our proposal is simple: move from the traditional case method to a *contextual* case method. To do this, we must assign additional materials—perhaps other documents in the case, like briefs, or legal scholarship or non-legal writing that provide a different perspective on the questions answered in the opinion. We must surround the opinion with other voices, other arguments, other approaches, to open the students' minds and allow them to envision other modes of legal argument or new frameworks for the law.

We are not the first to propose something along these lines. Some professors have made great strides in situating opinions in the broader

³⁶ Id. at 653.

³⁷ Rubin, *supra* note 2, at 611 ("The great irony of modern legal education is that it is not only out of date, but that it was out of date one hundred years ago.").

³⁸ Kennedy, *supra* note 10, at 595–96 (noting that these skills "represent a real intellectual advance" from students' legal reasoning at the outset of their law school experience).

context in which they emerged.³⁹ But we can do more. Many first-year law students still see their experiences reflected in the Introduction to this Essay; they feel hemmed in by opinions and unprepared to move beyond the status quo.

The contextual case method would instead teach students about new perspectives. It would acknowledge that legal decisions involve choices and offer students opportunities to recognize where these choices are made. Ultimately, it would allow students to sharpen their ability to see where some experiences and realities are relevant but nonetheless ignored in legal discourse and thus find spaces to advocate for change.

A. Putting Cases in Context

One way to encourage students' legal imaginations is to expose them more often to the advocate's role. Students are often introduced to legal opinions unaccompanied by lawyers' briefs. This approach disconnects the lawyers' work from the courts' decision making; it fails to show how advocates' efforts impacted the case. And it misses an opportunity to engage students, exposing them to the full breadth of arguments that advocates raise and offering an example of how they can fight for change.

Imagine that the 1L student is now in class and her professor has assigned students to read not only the opinions in *Illinois v. Wardlow*, but also excerpts of legal briefs filed in the case.⁴⁰ There, the Court held that a *Terry* investigative police stop was supported by reasonable suspicion when an individual ran upon seeing police in an area that police described as known for narcotics trafficking.⁴¹ In reaching its decision, the Court acknowledged that people can flee from police for innocent reasons and that some people stopped lawfully pursuant to *Terry* may be innocent.⁴² Describing *Terry* stops as a "far more minimal intrusion" than an arrest

³⁹ See, e.g., Richard H. Chused, *Cases, Materials and Problems in Property* vii (3d ed. 2010) (calling his approach to Property "contextualist," noting that "full understanding of legal materials is impossible without knowing about the context in which cases, rules and statutes develop"); Park, *supra* note 7, at 1 (describing a Property course that "show[s] how race has structured property and property law in America"); L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 *Stan. J. C.R. & C.L.* 201, 237–44 (2020) (arguing that students should be taught "transformative legal analysis," which uses analysis of briefs and other materials beyond law's immediate sources to help students become more adept at articulating visions of what the law should be).

⁴⁰ 528 U.S. 119 (2000).

⁴¹ *Id.* at 125.

⁴² *Id.* at 125–26.

based on probable cause, the Court pronounced that “*Terry* accepts the risk,” as does the broader Fourth Amendment.⁴³

Unlike the majority opinion, Justice Stevens’ opinion, in which he concurs in part and dissents in part, points out Court language in prior cases describing the severe intrusion even a brief stop can have upon an individual’s security.⁴⁴ In lengthy footnotes, Stevens goes on to describe police discrimination against racial minorities and demeaning practices in police stops that go beyond what is authorized by law.⁴⁵ Textbooks often include both opinions, and reading them in tandem offers students an opportunity to recognize some of the tensions in the case and to have a glimpse beyond the majority’s neat framing of the issues and recitation of the facts.

But the briefs add even more depth. There, the student is introduced to the competing arguments that the lawyers put before the Court for its consideration before the case was decided. The opinions are no longer cast as mere statements of judges’ reasoning, but as products of an adversary process: Amicus raised the issue of widespread police harassment of African Americans and other minorities.⁴⁶ By contrast, the prosecution described police harassment as “isolated incidents” of a few “rogue police officers.”⁴⁷

The briefs also offer a broader view into the Court’s decision-making process, revealing arguments that advocates made to the Court that it chose not to discuss. One criticism of the *Wardlow* decision is that “high crime areas” are not well defined nor geographically limited, or subject to certain requirements.⁴⁸ Following *Wardlow*, police can label many

⁴³ *Id.*

⁴⁴ *Id.* at 127 (Stevens, J., concurring in part and dissenting in part) (noting the Supreme Court’s prior recognition that “‘Even a limited search . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must be an annoying, frightening, and perhaps humiliating experience.’” (quoting *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968))); *Wardlow*, 528 U.S. at 127 n.1 (Stevens, J., concurring in part and dissenting in part) (“[A] *Terry* frisk ‘is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.’” (quoting *Terry*, 392 U.S. at 17)).

⁴⁵ *Id.* at 132 n.7, 133 nn.8 & 10 (Stevens, J., concurring in part and dissenting in part).

⁴⁶ Brief for the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 606996, at *9–21.

⁴⁷ Reply Brief for Petitioner, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 712587, at *14.

⁴⁸ See, e.g., Ben Frunwald & Jeffrey Fagan, The End of Intuition-Based High Crime Areas, 107 Cal. L. Rev. 345, 396 (2019) (finding that designations of high crime areas are only

areas as high crime and then rely on the ambiguous fact of defendant's flight alone to establish reasonable suspicion. Justice Stevens noted in his opinion that the facts in *Wardlow*'s case do not explain what the specific circumstances were on the street when *Wardlow* was stopped or whether he actually was in an area that had been labeled as high crime.⁴⁹ But beyond that, there is no mention of these concerns in the *Wardlow* opinions.

While students reading just the *Wardlow* opinions may assume that potential police abuse of the high crime area designation to bolster otherwise weak claims of reasonable suspicion is an issue that the Court simply did not anticipate, the briefs reveal otherwise. Respondent, in his brief, warns of this very issue, yet the Court chose to offer no guidance in its opinion about what qualifies as a high crime area and how these designations are to be made.⁵⁰ Knowing that a lawyer raised these issues before the Court adds important context to the Court's decision, revealing a concern that went ignored in that case, but may provide a fruitful avenue for argument in the future. Additionally, in reading the briefs and recognizing what went unsaid, a student may realize that they need to look beyond the opinion to determine the complex motivations and interests that really drove a court's decision.

B. Acknowledging Law's Rhetorical Nature

Once a student has a clearer sense of the arguments that were before the Court, she can better see the choices underlying legal decisions that are often presented as certainties in legal opinions. A declarative statement of truth may be exposed as the Court's choice to embrace a familiar worldview and disregard a less familiar one. A clear fact may be revealed as one possible interpretation of the evidence that aligns with a particular bias.

After reading the opinions in *Wardlow*, the student continues to struggle to articulate why she believes the Court's decision was in error. The majority opinion states that determinations of reasonable suspicion must be "based on commonsense judgments and inferences about human

weakly correlated with actual crime rates, and the racial composition of a neighborhood and the race of officers are strong predictors of whether police designate an area as high crime).

⁴⁹ See *Wardlow*, 528 U.S. at 138–39 (Stevens, J., concurring in part and dissenting in part).

⁵⁰ Brief for Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 607000, at *31–36 (arguing that a high crime area should be sufficiently localized to ensure that an individual's privacy expectations are not subject to unfettered police discretion).

behavior.”⁵¹ The Court then concludes that the police were justified in suspecting that Wardlow—who ran upon noticing police while in what was deemed a high crime area—was involved in criminal activity.⁵² The decision is presented as a clean application of law to facts.

The majority’s use of the word “commonsense” makes the conclusion that follows seem like an inevitable result; it suggests that there is only one way for the Court to reasonably consider these facts. Thus, this language serves to legitimize one possibility—flight from police is suggestive of guilt—while labeling another as aberrant or unusual. But flight from police could just as easily be a fearful response, a point made in the briefs and picked up in Justice Stevens’ opinion.⁵³

The student is heartened in class to have a discussion of how the Court’s writing choices are masking uncertainties in the case. While the Court has made the choice to present its conclusion in a definitive manner, the facts are not as clear as the majority’s writing suggests: The “fact” that the defendant was running *from* police is based on a few police accounts of where the defendant was looking and an assumption that he recognized the police.⁵⁴ And details about the area in which Wardlow was stopped are not settled, leaving readers to construct their own image of the setting of a high crime area and Wardlow’s placement within it in their own mind.⁵⁵

⁵¹ *Wardlow*, 528 U.S. at 119 (citation omitted).

⁵² *Id.* at 120.

⁵³ Justice Stevens discusses this alternative perspective in *Wardlow*, noting that for some citizens, including minorities and those residing in high crime areas, there is a possibility that their flight is entirely innocent and motivated by fear. *Wardlow*, 528 U.S. at 132–34 (Stevens, J., concurring in part and dissenting in part) (stating that “[f]or such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal’” and “evidence . . . too pervasive to be dismissed as random or rare”).

⁵⁴ See *id.* at 138 (Stevens, J., concurring in part and dissenting in part); see also *id.* at 139 n.17. Justice Stevens notes that the police may have been traveling in unmarked cars and it is unclear how many were wearing uniforms, further complicating the matter. *Id.* at 138.

⁵⁵ The Court in *Wardlow* relies heavily upon the image of a “high crime area,” even starting the opinion with the sentence “Respondent Wardlow fled upon seeing a caravan of police vehicles converge on an area of Chicago known for heavy narcotics trafficking.” Notably little description is provided in the Court’s opinion about why the area was thought to be a high crime area and how the location actually appeared when the police arrived. It would seem important to know whether there was a crowd, if the area seemed rampant with crime, and whether there was drug paraphernalia scattered in the streets or if Wardlow was standing alone on a quiet street. The Court leaves much of the meaning of “high crime area” to the reader’s imagination. See *id.* at 139 (noting the “absence of testimony that anyone else was nearby when respondent began to run”); Brief for Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 607000, at *34–35 (noting that in *Wardlow* the Court was presented with a “vast,

Briefs offer an alternative reality, a different worldview, that the majority decided not only to reject but to hide through its writing. Amicus raise the issues of police misconduct and harassment of minorities and cite to examples of stops and frisks that go well beyond the scope of even lawful arrests. Here, a view of the encounter is presented from the defendant's perspective—offering another explanation for the defendant's flight.⁵⁶

Confronted with these arguments, the majority chose nonetheless to describe *Terry* stops as a “far more minimal intrusion, simply allowing the officer to briefly investigate further.”⁵⁷ While the brief pointed to instances of harassment specific to minorities, the Court spoke of the law's acceptance of the risk that police may stop innocent people, suggesting that this burden is equally shared. Even more the very use of the term “high crime area” denies the possibility that arrest rates may be impacted by racially discriminatory police practices.

Briefs thus expose the rhetoric within court opinions, which changes the way that students see the law. The 1L student is learning not just what the law is, but how to pierce through the surface of the opinion and get a better sense of how human biases and other external factors may influence legal decision making. Briefs lay bare the opinion's rhetorical nature, its papering over of conflict, its reliance on factors outside the law to reach its conclusion. And in revealing discrete choices underlying decisions, they make opinions seem more vulnerable to critique, smaller, less certain—and therefore able to be changed.

C. Elevating Other Experiences

Once students better understand the advocates' role and can identify choices that judges make in the legal decision-making process, they should have a better understanding of where they can focus their advocacy. They should be able to see how a judge's sense of how the

undefined, heavily populated area,” “a neighborhood of nearly 100,000 people,” and observing that “regardless of the neighborhood's high level of crime, large numbers of innocent persons still live and work there”).

⁵⁶ See Brief for the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 606996, at *9 (arguing that widespread fear of police encounters is a significant factor relevant to understanding why inner-city African Americans would flee from police); see also *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part) (noting the possibility that fleeing can be entirely innocent based on a belief that contact with police can itself be dangerous).

⁵⁷ *Wardlow*, 528 U.S. at 126.

world works can influence legal decisions and appreciate the connection between raising awareness of other perspectives and creating change. They can begin to see the value of learning about other people's experiences and finding ways to bring those experiences to their important work as lawyers.

But these experiences so often do not find their way into legal opinions. And, in turn, experiences beyond the judge's worldview are diminished in the law school classroom as well. Even if most legal opinions do not recognize all voices and embrace every experience, it is important that these voices have a place in our teaching about the law. Offering room for these ignored perspectives not only makes our classrooms more inclusive, but it allows our students to gain a broader understanding of the challenges faced by others that are too often ignored. Law schools should expose law students to outside perspectives so they can begin to see where they are important to legal issues, but nonetheless absent in the law.⁵⁸

Briefs can shine a light on experiences that a court may not only disfavor, but also fail to acknowledge or engage. When available, dissenting and concurring opinions may offer a hint at this perspective cast in the framing of the non-winning argument. Briefs can do more, offering a perspective from a more equitable position as a competing argument in the case. When professors emphasize the briefs, they bring these hidden narratives to the forefront, elevating those voices so often silenced in the legal process.

In *Wardlow*, for example, Amicus put forth the argument that police treat African Americans and other minorities more harshly than their white counterparts and raised the possibility that African Americans may be motivated to run from police out of fear rather than guilt. To support their claim, Amicus not only cited to legal cases but also to studies, investigations, scholarly articles, news reports, and even literature, to shed light on the nature and scope of police racial discrimination and

⁵⁸ The focus of the discussion here is on the importance of exposing students to the legal briefs surrounding decisions. But students also should be encouraged to read, and even engage in, other legal writing that critiques and challenges the law. While theory and practice are often seen as competing areas of focus in legal education, it is important for students to be taught how these two forms of advocacy complement one another. Legal scholarship can help lawyers see the law in new ways, articulate the problems that specific laws create, and develop strategies to overcome them. Moreover, students should be introduced to scholarly writing as an opportunity to challenge the law and to argue for ways to improve it.

violence.⁵⁹ As discussed above, this argument was not successful there and went largely unacknowledged in the majority opinion.

In a more recent case, however, a Massachusetts trial court considered the experiences of African Americans in its legal analysis and limited the weight it gave to a defendant's flight in its assessment of reasonable suspicion.⁶⁰ A 1L student who is introduced to these arguments and exposed to that legal opinion will see a modest example of how other forms of advocacy outside of the courtroom can lead to change within. But a student who is familiar with the briefs from *Wardlow* will also be able to appreciate the connection between lawyers' long fought efforts to expand the discussion beyond the courts' narrow worldview and a judge's choice many years later to acknowledge the existence and impact of "racial profiling" and the "reality for black males in the city of Boston."⁶¹

CONCLUSION

Despite the legitimate complaints about legal education—and there are many—no lawyer disputes that the first year of law school is transformative. One's pathway through problems is reoriented to a more rule-based, logical approach.

Yet, at the same time, the traditional case method trains students in a form of thinking that denies alternate realities of how the world works and closes off new visions of how it could be. It asks students to accept the law as it is and does not encourage them to midwife a new legal world into being.

Opinions tell stories of human tragedy often without acknowledging the suffering. They seem to rely only on rules without acknowledging the non-legal drivers of the result. They put a veneer of certainty on a world of complexity. They privilege the speaker—the judge—and make him (and it is usually a him) seem like the unbiased arbiter of purely legal

⁵⁹ See generally Brief for the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 606996.

⁶⁰ See *Commonwealth v. Warren*, 58 N.E. 3d 333, 342 (Mass. 2016) (citing to a local (Boston) police department report documenting a pattern of racial profiling and concluding that a Black man approached by police "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity," and noting that a judge should consider the report's findings in weighing flight as a factor for reasonable suspicion); see also *United States v. Lewis*, 295 F. Supp. 3d 1103, 1113 (C.D. Cal. 2018) (citing to *Warren* and giving no more than "scant weight" to the defendant's decision not to wave at or greet a border patrol officer).

⁶¹ See *Warren*, 58 N.E. 3d at 342.

questions. And they make the law seem set in amber, insulated from the prospect of radical change.

But it does not have to be this way. If we moved beyond opinions—especially in the core first-year courses—by deconstructing their rhetorical nature, by surrounding them with other arguments and perspectives, we could pair the valuable thinking-like-a-lawyer training in what the law is with visions of what law could be and examples of how to advocate for that change. It might require paring back topics, going deeper into certain subject matters, and leaving others out altogether. But this is a worthwhile trade, if the end result is law students who become lawyers who change the system from the inside out.