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Teaching Civil Procedure Stories (reviewing Civil Procedure Stories, Foundation Press 2004)

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Esther Lett, one of the litigants in *Goldberg v. Kelly*,[1] wrote poignantly about her situation after she and her four children had been dropped from the welfare rolls. In the closing lines of her affidavit, she made the following plea: "[S]omeone will have to correct the mistake, because we are all so much in need of aid. This is an awful thing to happen right here in New York City in 1968."[2] The reader, whether law teacher, law student, lawyer, or judge, senses that Esther Lett is speaking from the heart. Her affidavit offers a counterpoint to the restrained, nuanced language of a judicial opinion. It gives us a window into the pain of the litigant, and into the challenges faced by the lawyer who must translate that pain into a lawsuit and by the judge who must translate it into a judicial opinion. Inevitably, much of that pain is lost in the translation.

Civil Procedure Stories provides a corrective to this imperfect process of translation by revealing the people behind the cases.[3] It offers essays by fourteen experts on landmark cases in procedure. Each essay provides background that does not appear in the U.S. Supreme Court opinion but is nevertheless key to a more complete understanding of the case. Some essays situate the case in the mores of the time or the geography of the place; others provide details about the litigants' concerns, the lawyers' strategies, the lower-court judges' handling of the case, or the Supreme Court justices' approach in related cases. Although the essays vary in their emphases, all provide insights into the particular case that cannot be gleaned from the judicial opinion itself, and thereby provide a useful supplement to those of us who teach these cases.

Civil Procedure Stories, with its wealth of information, works on different levels for different audiences. For law teachers it provides an opportunity to learn what experts think about cases that they have studied closely, researched extensively, and now revisit. For law students, it provides an opportunity to

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1. 397 U.S. 254 (1970). Lett actually filed her affidavit in support of the complaint in Ruby Sheafe et al. v. George K. Wyman et al., 68 Civ. 864, filed Feb. 29, 1968. That case was consolidated with John Kelly et al. v. George K. Wyman et al., 68 Civ. 394, filed Jan. 29, 1968, which eventually became *Goldberg v. Kelly*.
2. Affidavit of Esther Lett in Support of Complaint in Ruby Sheafe et al. v. George K. Wyman et al., 68 Civ. 864, filed Feb. 29, 1968.
3. Ed. Kevin M. Clermont (New York, 2004). Page references appear in parentheses in the text.

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approach a case from the perspective of the litigants, the lawyers, and the lower-court judges—perspectives noticeably absent from U.S. Supreme Court opinions. By seeing the cases from these different perspectives, students also get a clearer sense of how the case was shaped by litigants, lawyers, and trial judges and how it evolved from their decisions, strategies, and even mistakes. As a result, the Supreme Court opinion appears less inevitable and more the product of human beings. First-year students need to learn this lesson, but they often resist it, tending to view Supreme Court opinions as written in stone and not to be questioned. Second- and third-year students start to read Supreme Court decisions more critically; they are willing to ask what is missing from the opinion, what the justices may have gotten wrong, and even, in Elizabeth Thornburg's words, what the "unwritten opinion" (519) might be, the one in which the race, gender, and poverty (519–20) of the litigant comes into play.

This article considers *Civil Procedure Stories* from the perspective of these three audiences. The first section examines what the book offers the law teacher and why it is essential reading for anyone who teaches this subject. The second explores what the book offers first-year students, and the kinds of questions it can help them to ask. The third focuses on what the book offers upper-level students and how it can help them to become critical readers of judicial opinions.

Civil Procedure Stories, edited by Kevin M. Clermont. New York: Foundation Press, 2004.

Sharing Stories

At one level *Civil Procedure Stories* is a conversation among and for experts who write about and teach civil procedure. The contributors have written about cases to which they have given much thought. Turning to any of these experts is like Woody Allen's turning, in *Annie Hall,* to media critic Marshall McLuhan to find out what an expert thinks rather than listening to the uninformed comments of fellow moviegoers. If one wants to learn about *Erie Railroad Co. v. Tompkins,*[4] who better to ask than Edward A. Purcell Jr., author of *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America?*[5] If one wants to learn about *Goldberg v. Kelly,*[6] who better to ask than Judith Resnik, one of the authors of *Procedure*[7] and *Adjudication and Its Alternatives?*[8] All of the contributors to *Civil Procedure Stories* are the Marshall McLuhans in their respective areas of procedure.

4. 304 U.S. 64 (1938).
5. New Haven, 2000.
6. 397 U.S. 254 (1970).
7. Robert M. Cover, Owen M. Fiss & Judith Resnik, Procedure (Westbury, 1988).
8. Owen M. Fiss & Judith Resnik, Adjudication and Its Alternatives: An Introduction to Procedure (New York, 2003).

These essays by experts constitute a unique resource for law professors who teach these cases. The approach of this series is to provide the "stories" behind the cases—to explore some aspect of the case that is not knowable from the Supreme Court opinion itself, but can only be discovered from documents filed with the lower courts, interviews with the parties or lawyers, or visits to the site. The civil procedure instructor who teaches *Owen Equipment & Erection Co. v. Kroger*[9] will learn about the geography of Carter Lake, Iowa, and how it was possible for litigants, lawyers, and the trial judge to assume that Owen Equipment & Erection Co., a Nebraska corporation, had its principal place of business in Nebraska rather than Iowa (90–100). One who teaches *Lassiter v. Department of Social Services*[10] will learn much more about Abby Gail Lassiter's desperate situation than even Justice Blackmun's dissent reveals—her limited understanding of the court system, her inability to express herself, her myriad legal problems—with the effect of making even more apparent her need for legal representation in the proceeding to terminate her parental rights (497–512, 519–21).

The contributors offer not just the details of their research, as intriguing as they are, but also their vision of the cases. At this level, then, they are writing to fellow academics in the field. As Purcell's essay makes clear, *Erie* is not just a case about Harry Tompkins, who was injured by a train while walking along a track after visiting his sick mother-in-law (37); it also becomes a vehicle for Justice Brandeis, as part of a movement begun by Justice Holmes, to undo the effects of *Swift v. Tyson.*[11] Purcell takes the reader back into the period before *Erie* (21–35). The legal landscape after *Swift v. Tyson,* in which federal judges were free to create general common law and ignore state court rulings, benefited national corporations and harmed persons who had been injured by them. As a result, national corporations tried to remove cases to federal court whenever possible. Brandeis, who found this situation disturbing, had been looking for a vehicle with which to overturn *Swift v. Tyson. Erie* gave him his chance.

Judith Resnik's telling of the *Goldberg v. Kelly* story is on one level the story of the "brutal need"[12] of the welfare recipients who had been cut from the welfare rolls without a hearing prior to termination (455). The affidavits, such as Esther Lett's, begin to tell that story. On another level, though, the case allowed Justice Brennan to express his view of due process as a concept whose meaning changes over time (457).[13]

9. 437 U.S. 365 (1978).

10. 452 U.S. 18 (1981).

11. 41 U.S. (16 Pet.) 1 (1842).

12. Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (1968). Martha F. Davis used the phrase in the title of her book on the welfare rights movement. See Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973 (New Haven, 1993).

13. Resnik identified several other lessons of *Goldberg,* including how causes of action change over time, the changing nature of the roles of courts and legislatures, the way in which the Court paid attention to the capacities of those using the process, and the tension between universal elements of due process and the specifics of the case (457–58).

In providing a broader context for assessing *Goldberg v. Kelly,* Resnik notes that, at the time, the case seemed to herald a due process revolution. Only with hindsight does it become clear that it was both the high-water mark of due process rights and an aberration (479). In the early 1970s the Supreme Court retreated from this broad vision of due process and started to consider cost in its calculation. The three-prong test delineated in *Mathews v. Eldridge,*[14] rather than the balancing test in *Goldberg v. Kelly,*[15] became the test by which claims of due process violations would be assessed.

The contributors in *Civil Procedure Stories* speak to each other as well as to the reader. Robert Bone, in his discussion of *Connecticut v. Doehr,*[16] shows that it is difficult to apply the three-prong test from *Mathews v. Eldridge* without empirical evidence that courts usually lack (187–88). His law-and-economics analysis shows the limitations of the test from that perspective. Resnik explains how it was difficult to know what values to assign, and even whether it was appropriate to try to assign values to the interests in the three-prong test (480–81).

Elizabeth Thornburg also examines the test described by Resnik and Bone and shows how it became an even greater obstacle for Abby Gail Lassiter than for earlier litigants (514). In *Lassiter* the justices added to the three-prong test a presumption, drawn from criminal law, that a defendant would be given a lawyer only when threatened with loss of physical liberty (515). When the loss of some *other* form of liberty was at stake, the party seeking a lawyer would have to overcome this presumption. What would it take to overcome the presumption if the results of the three-prong test pointed to the need for a lawyer? Why did the justices distinguish between physical liberty and liberty to be a parent, a distinction found nowhere in the Constitution? Thornburg raises these questions in her discussion of *Lassiter* (525). After having read Bone's, Resnik's, and Thornburg's critiques of the *Mathews v. Eldridge* test and its applications, one is left with the sense that a test the justices devised with the goals of objectivity and predictability had failed on both dimensions.

For law teachers, then, *Civil Procedure Stories* provides a great resource. It allows someone who teaches these cases to learn what experts think about them. This translates into several advantages in the classroom. One can teach a case with confidence after learning its background—who the parties were, what motivated them, what decisions they made, what happened to them in the lower courts, and what happened to them in the end. One also can juxtapose the contributor's view of a case with one's own view so that first-year students begin to realize that there is no one interpretation of a case.

In addition, one can read about cases that one does not already teach and be intrigued enough to add them to the syllabus. For example, I do not teach *Connecticut v. Doehr,* but I teach the due process line of cases beginning with *Goldberg v. Kelly* and including *Mathews v. Eldridge, Lassiter v. Department of Social*

14. 424 U.S. 319, 335 (1976).

15. 397 U.S. at 263.

16. 501 U.S. 1 (1991).

Services, and the more recent *United States v. James Daniel Good Real Property.*[17] The essay on *Connecticut v. Doehr* made me realize that this case has an interesting twist on the application of the *Mathews v. Eldridge* test, and I am now inclined to add it to my syllabus.

Captivating First-Year Students

The Role of Facts

Civil Procedure Stories can help with several transitions that students need to make in their first year of law school. One transition is to go from feeling comfortable reading books and articles as undergraduates to feeling comfortable reading cases (which typically means reading U.S. Supreme Court opinions) as law students. *Civil Procedure Stories* can help students with this adjustment because it provides the background, details, and facts that students typically think appellate opinions should have but don't. It provides the "stories" of the cases that will captivate students and draw them into the drama of the case.

Margaret E. Montoya, in "Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse,"[18] illustrates the difficulty that students have reading a case for the first time. Montoya recalls encountering, as a first-year law student, a case called *People v. Chavez*[19] (albeit in Criminal Law, not Civil Procedure). It involved a twenty-one-year-old unmarried woman, Josephine, who had given birth alone in the middle of the night, without even waking her family. She had hidden the pregnancy and birth from her family until her mother discovered the dead baby's body under the bathtub several days after the baby's birth. Josephine claimed that the baby had been stillborn; the prosecutor concluded that the baby had been born alive but had been drowned in the toilet. Josephine was charged with manslaughter.[20]

Montoya was puzzled by this case. She explained that it was the only time she ever volunteered to speak in class as a law student at Harvard. She wanted to know more about Josephine: "What about the other facts? What about her youth, her poverty, her fear over the pregnancy, her delivery in silence?"[21] Years later, she still wondered about Josephine, and what it had meant to keep the pregnancy secret from her family. She wondered about the embarrassment and stigma that Josephine must have felt, pregnant and unmarried. Montoya wondered about Josephine the person, and the intersection of gender, ethnicity, and class in her life.[22]

The essays in *Civil Procedure Stories* can help to answer some of the questions that law students typically have about the facts of a plaintiff's or a defendant's

17. 510 U.S. 43 (1993).

18. 15 Chicano-Latino L. Rev. 1 (1994).

19. 176 P.2d 92 (Cal. App. 1947).

20. Montoya, *supra* note 18, at 19 (quoting opinion).

21. *Id.* at 18.

22. Montoya, *supra* note 18, at 20–22.

situation. The essays provide the messy details that are part of people's everyday lives but rarely find their way into judicial opinions, especially appellate opinions. By providing these facts to students, rather than leaving them to wonder about them as Montoya was left to do, the essays provide a bridge from the genres that students are accustomed to reading as undergraduates to this new genre of reading as law students.

The essays also provide a vehicle for discussing these facts in the classroom so that they become part of the accepted classroom discussion and not just something that a student must raise on her own, while worrying that such facts have no bearing on the case. A book like this one, which raises the very facts that students are likely to wonder about, also will reassure students that such material is within the purview of the course and the study of the case.

These essays also provide answers to one of the questions first-year students ask most often: What happened to the parties after the litigation? For example, the reader learns that as *Erie* wended its way through the appellate process, the railroad tried to settle with Tompkins, but his lawyers dissuaded him from accepting and at some point kept his whereabouts unknown so that he could not receive additional offers (42 n.62). After the Supreme Court overturned *Swift v. Tyson,* which meant that the federal court would apply Pennsylvania law rather than general common law, it was clear that the railroad owed no general duty of care to Tompkins, a trespasser under Pennsylvania law. No longer able-bodied as a result of the accident and no longer able to work, Tompkins received small amounts of money from time to time from his lawyer, who eventually lost touch with him (63). No one involved in the case knew where he ended up or what had become of him (63).

In contrast, Geraldine Kroger, the plaintiff in *Owen v. Kroger,* met with a happier ending. Even though she did not fare well in the U.S. Supreme Court, she was able to file her lawsuit in state court. She took advantage of a state statute that tolled the statute of limitations and allowed her to proceed with her suit in state court (111). Owen's insurer eventually settled with Kroger for the same amount as the invalidated federal judgment: $234,756 (111).

By providing endings to these cases, *Civil Procedure Stories* brings a kind of closure to students who want to know what happened to the parties and whether justice was done as a result of these lawsuits.

The Role of Lawyers

Civil Procedure Stories also provides a vehicle for teaching first-year students about the role of the lawyer in the cases they study. Many of us try to teach first-years this role through a variety of methods: having students draft legal documents such as an affidavit or complaint,[23] or having them assume the role of a lawyer in discussion of the case and provide the advice they would give the client. Many of the essays in this collection teach important lessons about the

23. See, e.g., Judith Resnik & Nancy S. Marder, Suggestions for and Reflections on Teaching Adjudication and Its Alternatives: An Introduction to Procedure 41–281 (New York, 2004) (providing sample drafting exercises).

roles lawyers play by showing how they shaped the lawsuit, whether through good strategic decisions *(Connecticut v. Doehr)* or poor ones *(Owen v. Kroger),* and what happened when a lawyer was unavailable to a party *(Lassiter v. Department of Social Services).*

Bone's essay on *Connecticut v. Doehr* shows how the lawyers' areas of expertise shaped the case's development in unusual ways (153). John DiGiovanni and Brian Doehr got into a fight after DiGiovanni's golf practice and Brian and Chris Doehr's kite-flying intersected. DiGiovanni suffered an injury that required medical attention. He incurred medical costs and sought compensation from Brian Doehr. DiGiovanni consulted Joseph Patrucco, an acquaintance who was a real estate lawyer in Connecticut. Connecticut had a statute that allowed a party to seek prejudgment attachment of another's property without prior notice, as a way of ensuring that the property owner would pay the judgment if he were found liable. DiGiovanni's lawyer, drawing on his expertise in real estate practice, sought such a prejudgment attachment on Doehr's property even though payment of DiGiovanni's medical expenses had nothing to do with Doehr's property.

Doehr also consulted a lawyer whose area of specialty shaped her view of the case—Joanne S. Faulkner, a sole-practitioner consumer-rights lawyer with a specialty in creditor-debtor law. In her practice she had seen creditors often seek such attachments. She filed suit in federal court, on behalf of Doehr and three other plaintiffs, claiming a violation of their right to due process.

The prejudgment attachment procedures, which required a judge's decision based only on a brief affidavit from the moving party and which did not give notice to the opposing side or the opportunity to give any explanation or to contest any facts until after the property had been attached, could nevertheless cause serious harm to the property owner. For example, in Doehr's case, the attachment made it impossible for him to sell his property at a time when he and his wife were looking to move.

In *Doehr,* unlike most ordinary creditor/debtor cases, there was much dispute as to the facts that gave rise to the injuries, including who was at fault for DiGiovanni's injuries (154 n.2). Joanne Faulkner's familiarity with the types of cases in which the prejudgment attachment procedures were typically used had made her aware of the way these procedures violated due process by imposing harm before Doehr had a chance to tell his side of the story. The creative lawyering in this case occurred on both sides—by a real estate lawyer who thought to use prejudgment attachment procedures in a tort suit, and by a consumer-rights lawyer who saw the due process violation that such procedures caused debtors in general, and a tort defendant in particular.

In contrast, as John Oakley describes in his essay on *Owen v. Kroger* (75–128), Warren C. Schrempp, the "colorful" lawyer for Kroger (86), was accustomed to filing lawsuits first and doing research afterward (86, 90). His approach meant that he made mistakes and failed to follow up on several leads. Kroger went to Schrempp's office with a wrongful death claim. Her husband (and father of four young children) had been electrocuted by a power line while performing his job. Schrempp's approach seemed to be to

file lawsuits for everybody who walked in the door and to see which ones went forward; his approach also involved delegating the actual work of the lawsuit to junior lawyers (86–87).

In retrospect, the lawsuit that Schrempp filed on behalf of Kroger was filed against the wrong defendant in the wrong court. Schrempp filed suit against Omaha Public Power District, but OPPD did not own the power line that had caused the electrocution. Schrempp tried to correct this mistake by later filing an amended complaint after OPPD had impleaded Owen Equipment, which owned the crane. He filed the amended complaint against Owen without double-checking Owen's principal place of business. This would not have mattered had he filed suit in state court, but he filed in federal court under diversity jurisdiction, so the citizenship of Owen Equipment was a critical piece of information: Owen could not have the same citizenship as Kroger. Owen's citizenship (based on both its state of incorporation and its principal place of business) did not come out until the third day of trial, though there had been some indication during one of the depositions as to Owen's principal place of business. Schrempp had failed to follow up on the deposition information, in part because Owen had admitted in its answer that it was incorporated in Nebraska. Schrempp had relied on that admission rather than doing further checking. His lackadaisical attitude toward research and fact-checking nearly had disastrous consequences for his client. Kroger's lawsuit had a happy ending because she was able to re-file in state court in spite of her attorney's bungled efforts.

Geraldine Kroger was left in a better position than Abby Gail Lassiter, who was without legal representation when North Carolina terminated her parental rights toward her son William. Although *Lassiter v. Department of Social Services* is usually taught as part of a due process line of cases, it also can be understood, as Elizabeth Thornburg describes it (489), as a testament to the importance of having an attorney. Justice Blackmun's dissent suggests several lines of inquiry that a lawyer could have pursued to challenge the state's effort to terminate Lassiter's parental rights.[24] He points to the standard that the state had to meet and the hearsay evidence to which the social worker testified as two approaches that a lawyer could have taken to assist Lassiter.[25]

Thornburg's essay expands upon Blackmun's point and shows how little Lassiter understood about the proceedings, how a lawyer could have helped to explain what was happening to her, and how a lawyer could have translated Lassiter's emotional plea that her mother be permitted to take care of William into a legal argument that the state had not met its burden of showing why Lassiter's parental rights should be terminated (506–12). This last function of a lawyer would have reduced the frustration of the trial judge, who had lost all patience with Lassiter because she was unfamiliar with legal terms, court procedures, or the goal of the proceeding (506–12).

Thornburg's essay draws liberally from the transcript of the hearing, which makes clear that Lassiter had trouble understanding why she was in court,

24. 452 U.S. 18, 35 (1981).

25. *See id.* at 44–46, 53, 56.

what the state was attempting to do, and what her role in the proceeding was. She did not understand why the state was trying to terminate her parental rights. Her mother had said that she was willing to care for William. Lassiter did not want William's connection to the family to be severed; she believed that he knew who his siblings were and that they knew who he was, and she wanted everyone to stay together. The judge kept asking her to "cross-examine" the social worker, who was testifying on behalf of the state, but it was clear that Lassiter did not know what cross-examination was, much less how to do it (505). She kept making statements about what she wanted, rather than asking questions of the social worker.

A lawyer would have explained to Lassiter beforehand what the state was attempting to do and why, so that she would not have been so mystified by what was happening. Similarly, a lawyer would have challenged the state, as it was clear Lassiter disagreed strongly with the state's intention to terminate her parental rights. Unfortunately, Lassiter had limited intelligence, limited command of language, and no background in the law. In spite of these limitations, she was expected to represent herself on the most emotional issue a parent can face—loss of one's child. Although a lawyer would have benefited Lassiter enormously, a lawyer also would have benefited the trial judge, who was frustrated by Lassiter's inability to assume the lawyer's role.

The Role of Judges

Civil Procedure Stories helps first-year students to approach cases as a judge would. The contributors help students to do this by providing facts about the case that would have been known to the judge, but were not included in appellate opinions. Many of the contributors also help by incorporating parts of the court papers from the case in their essay—several lines from the affidavit of Esther Lett in *Goldberg v. Kelly* (455–56), an excerpt from the trial transcript in *Lassiter v. Department of Social Services* (505–12), and part of the complaint from *Conley v. Gibson* (295). Others do this by providing maps, as in *Owen v. Kroger* (84), or brief descriptions of the findings from empirical studies, as in *Colgrove v. Battin* (377–83). Indeed, the Web site for *Civil Procedure Stories* contains an impressive collection of documents pertaining to each of the cases discussed in the book.[26]

One advantage of this method is that students begin to understand what a judge has to work with when drafting an opinion. *Civil Procedure Stories* gives students a flavor for what judges will have before them when they consider a case, helping to challenge the idea that the opinion the Court writes is the only one that could have been written, a notion that first-year students in particular seem to hold about Supreme Court opinions. It becomes clear that opinions are shaped by the attorneys and the judge, each of whom has a role in the process.

By providing first-year students with these materials, *Civil Procedure Stories* helps students to begin the process of becoming what Kevin Clermont de-

26. See <http://civprostories.law.cornell.edu>.

scribes in his Introduction as "active students" (5). The book encourages students to become familiar with the materials that were used to develop each case and to examine these materials as the judge would. Rather than simply reading the U.S. Supreme Court opinions passively and accepting what they say, students can look at the court documents and the lawyers' recollections and think about how they would resolve the case if they were the judge.

The book also helps to delineate the different levels of courts and the different roles of judges. The trial judge's role differs from the appellate judge's role. The trial judge will have before him facts that the appellate judge will not need to sift through as closely because the legal issues are the focus of the appeal. Since most, though certainly not all, civil procedure cases are drawn from the U.S. Supreme Court, students have less familiarity with the work of trial judges than with that of appellate judges. The contributors to this volume help remedy this by highlighting the procedural posture of the case, and how it made its way from the trial court to the court of appeals to the U.S. Supreme Court.

Challenging Upper-Level Students

Civil Procedure Stories can help upper-level students in an advanced civil procedure course to learn to read cases more critically than they did as first-year students. Whereas first-year students have to be urged to question what has been written in a judicial opinion, upper-level students need to consider what has been left out of the opinion, what the judge's assumptions are, and what might happen to the case after the court has spoken on the issue.

Understanding the Debate

Casebook writers tend to strive for coverage of course material without adding girth to the casebook; they do this by severely editing cases, to the detriment of law students. When a judicial opinion is greatly abridged, students are unable to see that there is a debate between the majority and the dissent. When all that is included is some abridged version of the majority opinion, students do not get a sense of the arguments and counterarguments, the points of agreement and disagreement. In addition, the opinion sounds more authoritative and less open to question than if the separate opinions, including dissents, had been included. When students read only a majority opinion, they lose sight of the fact that there was a dissent; instead, the majority opinion seems to be the only right answer. Because dissents can provide the seeds of arguments that will eventually be adopted by a majority in a future case, it is important for students to see how these arguments were originally made and to follow their development over time. Yet another disadvantage is that when opinions are so heavily edited that all that remains is the holding, students begin to lose track of the fact that there was a case, brought by parties, argued by lawyers, and decided by judges. This is where *Civil Procedure Stories* can play a key role in teaching students about what was left out of the opinion.

The book puts back into the landmark cases much that was omitted through years of casebook editing. But it goes even further—not just providing a rich

depiction of facts, but also recreating the tenor of the times, the legal landscape into which the case entered, and how the case was transformed by later cases. Thus, it provides, for upper-level students, a necessary corrective to the paring down of cases undertaken in most casebooks.[27] It reminds them that there is more to a case than the holding. It invites students to enter into the debate created by the case and to see the case in its fullness, including what the parties wanted, how the lawyers translated those desires into legal actions, how the trial judge viewed the case, whether the appellate court agreed or disagreed and why, and finally how the Supreme Court understood the issue, complete with arguments made by those in the majority, those in the dissent, and even those writing separate concurrences. If most cases were presented this way in a casebook, there would be less need for *Civil Procedure Stories*, but until such a transformation occurs, this book is indispensable for giving students a more complete, nuanced picture of what a case entails.

Discerning the Unwritten Opinion

Civil Procedure Stories can help upper-level students to discover the "unwritten opinion" and the limitations that judges, as human beings, necessarily have. Elizabeth Thornburg's essay on *Lassiter* suggests that judges are as subject as anyone to being influenced by the race, gender, and poverty of litigants, and that this is not something they acknowledge in their opinions (519–21). The reader must question the roles race, gender, and poverty might play in the way a judge decides a case.

In *Lassiter,* the trial judge grew impatient with Abby Gail Lassiter because she was unable to represent herself. She could not cross-examine a witness or make a legal argument. She could not even express herself in complete sentences, as the transcript makes clear (505–12). She was a poor young African-American woman with five children. She had been convicted of murder and was serving a prison sentence. The trial judge treated her with impatience, if not contempt. Would he have been equally dismissive of an affluent white man in his mid-fifties who was a banker or a businessman? To what extent does one's position in society affect how one is treated by the courts? These are questions that upper-level students need to to ask when they read a judicial opinion.

Similarly, Justice Potter Stewart's majority opinion in *Lassiter* begins by explaining that Lassiter is in prison, having been convicted of murder.[28] He provides detailed information about the murder in his first footnote, even though it has nothing to do with the kind of parent she is. Men who are in prison still retain their parental rights. Indeed, it is clear that Stewart has made a judgment about Lassiter: she is a bad mother. He views her due process

27. Just how necessary the antidote is was brought home to me by the comments of two upper-level students. One thanked me for using unabridged cases in my upper-level course Juries, Judges & Trials. This third-year student said he had had few opportunities in law school to read Supreme Court opinions in their entirety. A second student complained about my use of unabridged cases in that same course. He said that he was accustomed to reading abridged cases. I wondered how he would find practice when he had to read unabridged cases.

28. 452 U.S. 18 (1981).

claim through the prism of that judgment. He believes that she has not taken an interest in her child; if she had, she would have made an effort to see him. Stewart overlooks certain facts: Lassiter is in prison, there are few prisons for women, and female prisoners' families are often far away with few resources and limited public transportation that would enable them to visit. Even though application of the *Mathews v. Eldridge* three-prong test suggests that litigants in Lassiter's position should have the assistance of a lawyer, he adds the presumption, and applies the test plus presumption to Lassiter, rather than sending the case back to the trial court and letting it apply the newly created test to her.[29]

Lassiter can be seen as a case in which the trial judge's and Supreme Court justices' assumptions about poor African-American women, and what kind of mothers they are, can shape the legal claims they are raising in ways that should have little to do with the issue, and yet are determinative. Sometimes these assumptions will be noted and raised by the dissenters; at other times, they are shared by all involved in the case because they are products of their time.[30] It remains the task of critical readers to look for the unspoken assumptions of judges and lawyers and to consider how these assumptions shaped the way they saw the case.

Exposing Limitations

Another way in which upper-level students learn to be active readers is by developing an understanding of the limitations of the judicial role. This does not require students to become cynical, though often this is their first response. Rather, the goal is to encourage them to read opinions critically and to teach them to recognize the limits of the judge's role without losing faith in judges.

Civil Procedure Stories helps in this task by showing the limits of judges' use of empirical evidence. Jeffrey Rachlinski's essay on *Colgrove v. Battin*[31] focuses on the case in which the Supreme Court considered the minimum size that the Constitution requires of a civil jury (371). In an earlier case, *Williams v. Florida*,[32] the Supreme Court had held that a six-person criminal jury does not violate the

29. 452 U.S. at 31–32.

30. Compare Lassiter, 452 U.S. at 57 (Blackmun, J., dissenting) ("But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights.") with Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872) (holding that Mrs. Bradwell had no due process right to practice law even if she satisfied all of the requirements for the license). Both Mrs. Bradwell's lawyer and Justice Bradley, who wrote a separate concurrence, shared the view that there were differences between the sexes. Whereas Mrs. Bradwell's lawyer thought that clients might appreciate those differences, see *id.* at 137 ("There are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve.") (quoting Matthew Hale Carpenter), Justice Bradley thought that those differences had to be protected and if women entered the profession of law those differences would be lost. See *id.* at 141 ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.") (Bradley, J., concurring).

31. 413 U.S. 149 (1973).

32. 399 U.S. 78 (1970).

Sixth Amendment of the U.S. Constitution. The Court reasoned that there is nothing magical about the number twelve and that there are no discernible differences between the functioning of six- and twelve-person juries.[33] At the time, there had been little empirical work on jury size so the Court had little research to rely on; it simply surmised that a six-person jury would be as effective as a twelve-person jury in engaging in robust deliberations.

In 1973, when *Colgrove* was decided, some empirical evidence suggested that the Court's dual purposes—of encouraging venires drawn from a fair cross-section of the community and promoting effective deliberations—were on a collision course with an effort to reduce jury size in the name of greater efficiency. The empirical studies suggested that smaller juries reduced the representation of minorities and led to more outlier decisions. In spite of this growing body of empirical research, the Court relied on the few studies that had not noted any differences (380–82).

By the time the Court decided *Ballew v. Georgia*[34] in 1978, there was an impressive body of empirical literature on jury size. It suggested that jury size affected deliberations (making it harder for hold-outs on a six-person jury than a twelve-person jury), representation of minorities on the jury (resulting in fewer minorities on the smaller juries), and verdicts (increasing the likelihood of outlier verdicts, particularly with damage awards, on smaller juries). The Court relied on the growing body of empirical studies to reach its holding that a criminal (and by implication civil) jury could not go below six persons.[35]

Although the Court embraced the empirical literature in *Ballew*, it found itself in an awkward position. It had no principled basis for holding that a six-person jury was constitutional but a five-person jury was not. The empirical literature that it had relied on in *Ballew* to conclude that a five-person jury was unconstitutional should have led it to conclude that a six-person jury was unconstitutional in *Colgrove*. But it had, in Jeffrey Rachlinski's words, made "shoddy use of social science" in *Colgrove* (382).

Recognizing the Broader Framework

Finally, *Civil Procedure Stories* can help teach students that as important as courts and their decisions are, they do not always provide the last word; rather, they are part of a broader governmental scheme. The book provides several examples where legislatures stepped in after the courts had finished their work, sometimes codifying what courts had done and sometimes undoing what courts had done. The legislatures' actions remind us that courts are part of a government with other institutional actors.

Civil Procedure Stories provides some nice examples of how legislatures step in after courts have done their work, reinforcing the notion that courts are not

33. *Id.* at 102–03 ("We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'") (citation omitted).

34. 435 U.S. 223 (1978).

35. *Id.* at 232–39.

always the end of the process, but simply part of the process. Congress responded to *Owen* with 28 U.S.C. § 1367, codifying the Court's holding.

More typically, legislatures responded by expressing their disagreement with what the Court had done. After *Lassiter*, the North Carolina legislature amended the state statute so that it provided for counsel in cases of parental termination; today all but seven states provide counsel as a matter of right to indigent parents who request counsel in parental termination hearings (522 & n.82). Similarly, after *Doehr*, the Connecticut legislature amended the statute so that it provided for notice and a hearing prior to any prejudgment attachments with a few narrow exceptions (179). After *Shaffer v. Heitner*,[36] Delaware enacted a new director-consent statute, in which a director of a Delaware corporation consents to be sued in Delaware in any suit against the corporation of which he is a necessary party or in which he is alleged to have violated his duties as director (146).

* * * * *

Civil Procedure Stories can be used, albeit selectively, in a first-year civil procedure course, and certainly more broadly in an advanced civil procedure course. In an upper-level course, where I am less concerned about coverage and more concerned about teaching students to read carefully and critically, I would dip generously into the in-depth case studies that this boook provides.

In fact, so convinced am I of the benefit of using this fact-based, highly contextual approach in the classroom, that I would urge the editor of this series to consider adding new volumes. Although most of the series is geared toward upper-level courses already,[37] other courses could still benefit from this approach. For example, *Jury Stories* and *Criminal Law Stories* are just waiting to be written. If the stories behind the cases are as interesting as they are in *Civil Procedure Stories,* I have no doubt that students will be hooked.

36. 433 U.S. 186 (1977).

37. I note that of the eighteen books in the series thus far, either thirteen or fourteen (depending on whether Constitutional Law is taught in the first or second year) are geared toward upper-level courses.