Truth in Context: Sketching a (New) Historicism Legal Pedagogy

Randy D. Gordon
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Where does the frame take place. Does it take place. Where does it begin. Where does it end. What is its internal limit. Its external limit. (Derrida 1987: 63)

Introduction

At least as far back as Horace, humanists have postulated an interrelationship of the arts (ut pictura poesis). But the exact nature of this interrelationship has remained a matter of dispute. Gotthold Lessing (1962: 4), for instance, stressed that the ‘similarity of effect’ between the visual and literary arts did not imply coincidence because ‘the two arts differ[] both in the objects imitated as well as in the manner of imitation.’ Rensselaer Lee (1967: 69), however, has more recently suggested—in apparent agreement with Sir Joshua Reynolds—that the two art forms share a deep purpose: ‘the chief likeness of painting to poetry lay not in adherence to a set of precepts borrowed from the sister art, or in any imagined correspondences of form, but in “nobleness of conception.”’ Despite these (and other) different ways of conceptualizing a trans-arts relationship, there remains a strong sense that textual and plastic approaches to creation and representation can each inform the

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1 But as with many statements that become slogans, Horace’s was not a categorical statement of equivalence, as its full context reveals: ‘Ut pictura poesis; erit, quae, si propius stes / Te capiat magis, et quaedam, si longius abstes.’ (My rough translation: ‘As is painting, so is poetry; one grabs your imagination if you stand close to it, the other if you stand at a distance.’)
other. This essay is concerned to test this assumption and—more particularly—consider whether a relationship between the visual, literary and performing arts extends to other disciplines, especially law (and legal texts). In the end, I hope to show that not only is there such a relationship but that the relationship can be exploited not only to explain certain aspects of the law but to teach it as well. To do so, I will ask us to (re)consider a handful of cases that I have often used to make theoretical or descriptive claims about the law and think here about how those cases (and the issues they raise) might be taught using extratextual tools (Gordon 2011).

Teaching Context Without Text

I’ve taught law and literature—sometimes together, sometimes separately—for twenty years or so, and I’ve often remarked to myself (without doing anything about it until fairly recently) how differently I approach a doctrinal law course (like antitrust) from a literature course (like Proust or Americans in Paris). In a literature course, I’ve always thought it necessary not only to supplement the literary texts with non-literary texts (e.g., pairing Gertrude Stein with a dash of Whitehead and Heisenberg) but to go further and look at paintings and listen to music from the same period (e.g., considering Stein’s Autobiography of Alice B. Toklas alongside paintings by Matisse and Picasso and music by Stravinsky, Schoenberg or Thompson). And it isn’t simply a matter of intersecting biographies, interesting as those stories might be. (Hemingway’s A Moveable Feast is a particularly telling example.) Nor is it just a question of expertise—I know a bit about art history but virtually nothing about music other than what my ears ‘sort of’ tell me (i.e., that Stravinsky sounds different from Beethoven in the same way that Stein reads different from Fielding).

So why shouldn’t we do that in law courses? Ultimately, there’s no good reason, and in
this essay I’m going to sketch an argument for teaching at least some part of even a doctrinal law course with a contextual, beyond-textual approach.

Before doing that, though, we need to clear some underbrush to open the field of argument and dispose of an obvious objections to the proposed enterprise. To wit, one might claim a category error and note that, for example, poetry, plays, painting, novels, and sculpture are all modes of expression designed to represent by different means the human condition, express states of emotion, etc. Legal texts, by contrast, are simply statements of rules (or tools to get at those rules). Thus, the fact that William Carlos William’s poem ‘The Great Figure’ (1921) and Charles Demuth’s painting *I Saw the Figure Five in Gold* (1928) can each cast interpretive light on the other (both are snapshots of a fire truck tearing down a wet street on the way to a fire; the poem inspired the painting) doesn’t tell us anything useful about the Volstead Act (1919) from roughly the same period. There is a good argument to be made that such a position is wrong, but I’m not going to take up that challenge here, at least in the broadest formulation. Rather, I’ll assume the more modest position that—in many cases—understanding the genesis of particular laws can be conveyed most efficiently with non-textual resources. As we will soon see, this is important for two independently compelling reasons. First, lawyers (including of course judges) have a duty to reevaluate laws to make sure that they still ‘fit’ before applying them (Cornell 1990: 1060) (citing Derrida for the proposition that—for a decision to be just and responsible—‘it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and

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2 Thanks to one of my graduate students, Heather Shaw, for reminding me of this connection.
free confirmation of its principle’). Lawyers do this all the time and many, many times have
later acknowledged that particular laws were created out of prejudice, ignorance, or bias.3 I
hope to show that non-textual resources can help us get at that history. Second, what
happens when the laws run out, when there’s no clear answer to a novel legal question?
Here, too, I think non-textual resources can help by inspiring moral imagination to show
new perspectives and thereby identify what the right law should be. And in both cases, I
believe that there is a pedagogical angle to be exploited in the classroom.

One way to ease into our discussion is to remark on the many alignments between
law and narrative, both of which are historically situated. As Brook Thomas (1991: 535)
states it, laws and literature both ‘grow out of a particular place and time.’ This suggests
that one way to examine the intersection of various narratives and laws is with the tools of
historicism, whether traditional (e.g., the historical determinism of Hippolyte Taine) or
‘New’ (e.g., the cultural poetics of Stephen Greenblatt). For Taine, independent forces—
not a summoning and exercise of personal will—compel human actors to act as they do
(Taine 1864: 254). With respect to writers, three factors are at work: race, milieu and
moment. Race ‘consists of those innate and hereditary dispositions which man brings with
him into the world and which are generally accompanied with marked differences of
temperament and of bodily structure. They vary in different nations’ (Taine 1864: 258).
Milieu (environment) scoops up sub factors as diverse as climate, political events, and
social-religious conditions: ‘man is not alone in the world; nature envelops him and other

3 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) and Plessy v. Ferguson. 163 U.S. 537 (1896) stand as particularly
stark reminders of this proposition.
men surround him; accidental and secondary folds come and overspread the primitive and permanent fold, while physical or social circumstances derange or complete the natural groundwork surrendered to them’ (Taine 1864: 259). Moment (epoch) signifies ‘the acquired momentum’ at any given point in time. For ‘[w]hen national character and surrounding circumstances operate it is not on a tabula rasa, but on one already bearing imprints. According as this tabula is taken at one or at another moment so is the imprint different, and this suffices to render the total effect different’ (Taine 1864: 260-61).

There is much to criticize in this formulation, but it gets us to an important point—namely, that any historical artifact is situated within a causal stream. It is both producing and produced. Through reverse engineering of artifacts, then, we can learn something about how they issued and what they may have in turn influenced. With respect to literature, Taine says that a ‘work is not a mere play of the imagination, the isolated caprice of an excited brain, but a transcript of contemporary manners and customs and a sign of a particular state of intellect’ (Taine 1864: 254). But this isn’t just a way of thinking about literature. It applies as well to ‘the large stiff pages of a folio volume, or the yellow leaves of a manuscript, in short, a poem, a code of laws, [or] a confession of faith’ (Taine 1864: 254). Each ‘is simply a mold like a fossil shell, an imprint similar to one of those forms embedded in a stone by an animal which once lived and perished.’ So just as we can study a fossil to form some idea of the animal that formed it, so may we study a document to comprehend its author. Under this way of thinking, any document can be described as a momentary fix and snapshot of then-extant cultural crosscurrents. Thus, contra strict textual constructionists, ‘[i]t is a mistake to study [a] document as if it existed alone by
itself. That is treating things merely as a pedant, and you subject yourself to the illusions of a book-worm’ (Taine 1864: 255).

Historicism à la Taine as a mode of literary criticism died out in the middle of the last century in favor of text-based formalism, which found its apotheosis in New Criticism. Around 1980, though, historical criticism began a resurgence, particularly in Renaissance studies, more particularly in the work of Stephen Greenblatt (1980) and Louis Montrose (1980). The practitioners of this New Historicism are many, and, in fact, there are a number of schools of influence at work, ranging from Foucault, to Marx, to Benjamin, to Bakhtin and beyond (Murfin and Ray 2003: 299). Nonetheless, there are some common approaches that I’ll try to quickly round up before turning to the implications that New Historicism might have for law.

New Historicist critics often assume that a literary work is not stable in the sense of self-containment. The text points outward to the world, but the world points back as well. And these referential cross-currents are not just between works of literature. Greenblatt and Catherine Gallagher (2000: 13) put it this way: ‘[w]e are intensely interested in tracking the social energies that circulate very broadly through a culture, flowing back and forth between margins and center, passing from zones designated as art to zones apparently indifferent or hostile to art, pressing up from below to transform exalted spheres and down from on high to colonize the low.’ Greenblatt’s technique, as Brook Thomas (1991: 39) describes it, is to accrete historical details (‘thick descriptions’ in New Historicist lingo) before directly engaging a literary work. ‘Starting with the analysis of a particular historical event, he then cuts to the analysis of a particular literary text. The point is not to show that the literary text reflects the historical event but to create a field of energy
between the two so that we come to see the event as a social text and the literary text as a social event.’ In the hands of a New Historicist, then, a Shakespearean play can be seen as a political event, and royal pageantry can be read as a dramatic act (Orgel 1994: 44) (arguing that the full force of Caroline idealism is found in the masques of Inigo Jones, ‘not in the promulgation of edicts, erratically obeyed, nor in military power, inadequately furnished . . . ’).

The application of a New Historicist method to law ‘means both that the law’s supposedly prosaic, instrumental process of weighing interests and defining entitlements is a contested social process of self-definition, and that the law’s literary legibility in no way implies its refinement or transcendence of venality’ (Binder and Weisberg 2000: 479). Gregg Crane (1997: 772) offers a useful way of approaching the task: [i]nstead of theorizing an essential barrier between [legal and literary] discourses, one might situate these discourses in the historical moment (for example, the proximity of each to state power, the various roles that each has played in reproducing or challenging dominant notions of the social order, the types of institutional and material support each has received, and the effects on each of commercial or professional development).’ The point would be to ‘trace the patterns of influence between law and literature’ by ‘analyzing their points of thematic and figural intersection.’ To fix these abstractions somewhat and to show how the interplay of incongruent or hidden social discourses can influence legal outcomes and rules, I want us to consider two well-known cases: *Peevyhouse v. Garland Coal & Mining Co.* and *Life Ins. Co. of New York v. Hillmon*. I picked these cases because they are often
taught in law school (and excerpted in casebooks) and—for very different reasons—each has intersected with my own experiences in one way or another.⁴

Although Peevyhouse is interesting for a number of reasons, I want us to focus here principally on one aspect. But first, let me recap the facts and the holding. In the mid-1950s, Willie and Lucille Peevyhouse leased their farm for five years to Garland Coal for the purpose of strip-mining coal. In addition to standard lease provisions, the Peevyhouses bargained for and obtained Garland’s agreement to remediate the land at the end of the lease. But when term of the lease expired, Garland refused to perform the promised restoration, which would have cost nearly $30,000 dollars, yet—if performed—would have increased the market value of the land by only $300. Ultimately, the Oklahoma Supreme Court held that the Peevyhouses were entitled to only the lesser amount (not the $5000 that they had won at trial) and announced the rule that ‘where the economic benefit which would result to the lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.’

In casebooks and classrooms, Peevyhouse is often paired with Groves v. John Wunder Co., a case standing for the opposite proposition and one that Peevyhouse itself is at some pains to discount and distinguish. To teach and understand Peevyhouse, then, one strategy would be to undertake a fresh comparison of the two cases, retrace the comparative analysis taken in Peevyhouse, and then discuss whether one rule is right and the other is

⁴ Throughout this piece, I from time to time drawn distinctions between personal (i.e., ontological) and higher-order (e.g., public) narrative forms. In doing so, I’m drawing on work done by, among others, Margaret Somers (1994).
wrong, or whether the rules can peacefully coexist because they are getting at fundamentally different deep issues. But that only gets us so far. So what else might we do? To suggest a partial answer, I need to step back into my own personal narrative for a moment.

When I was practicing law in a large Oklahoma City law firm many years ago, one of the perennial rights of passage for a new lawyer (especially one, like me, who had been trained out of state) was for the new lawyer to endure an interrogation that went something like this:

SENIOR PARTNER: I’ve been going over the memorandum you prepared on [subject x]. I see that you’ve relied almost exclusively on Smith v. Jones. Is that good law?

HAPLESS ASSOCIATE: Uh . . . I think so . . . I Shepardized it and it has never been overruled . . . so . . . uh . . . yeah—I mean yes—it’s good law.

SENIOR PARTNER: Hmmm . . . In what year was that case decided?


SENIOR PARTNER: Are you aware of the Oklahoma Supreme Court scandal?

HAPLESS ASSOCIATE: Uh . . . well . . . um . . . No.

SENIOR PARTNER (tossing reading glasses on top of memorandum and leaning back in chair): In 1964, there was a big bribery scandal involving several Justices on the Supreme Court. Some of the specifics came out as part of the investigations and trials, but nobody knows for sure exactly which cases from the late ’50s and early ’60s were involved. Just the same, though, they are all suspect to one degree or another. So any lawyer worth his salt will back up citations to cases from back then with additional authority. Think maybe you can do that?

HAPLESS ASSOCIATE (slowly backing out of corner office): Uh . . . yes, sir . . . will get right on it.

_Peevyhouse_ is one of the cases often suspected to have resulted from a bribe. Judith Maute (1994-95), in an engaging and thorough investigation and analysis of the case, ultimately concludes that the case is tainted, but probably from a mixture of much bad lawyering and some judicial bias (one of the Justices had cosy relationship with defence
counsel) rather than bribery (because the case didn’t involve enough money). Nonetheless, the naked text of the opinion bears no trace of taint or scandal—it certainly looks like a ‘legal’ text, and its reasoning—though pro-business—is still recognizable as ‘legal’ reasoning and it is not the only case to hold that ‘diminution in value’ is a proper way to monetize injury to real estate. How, then, does a teacher get to the non-facial problems with *Peevyhouse*. The answer is that the teacher needs to get beyond the casebook text. And Maute has done just that. Her article brims with photographs, charts, maps and even a ballad—as well, of course, with documents and textual analysis. The point here is that she effectively assembles textual and non-textual materials in a way that allows students to see *Peevyhouse* in its historical context and judge its central holding in light of that context. It may be that some students, lawyers and judges will hew to the case’s stated holding, but they will be doing so from a vantage point superior to that offered by the case opinion alone.

Interesting and helpful as Maute’s approach may be, it still gets us only part of the way ‘beyond text.’ To take us further into the beyond, I want us to (re)consider a hoary evidence case, *Mutual Life Ins. Co. of New York v. Hillmon* (1892), that fits neatly with my own ontological narrative as well as a couple of others. The case begins, as do I, on the Great Plains of Kansas, only a few years before my grandfather (who lived until the late 1980s) arrived in Kansas in a covered wagon with his parents and siblings. To keep the length of this story manageable, I’ll have to compress and condense considerably, but Marianne Wesson has written at great length about the case as part of an investigation that
is on-going, and her efforts are readily available to round out the story for the curious (2006, 2007).\footnote{Wearing her novelist hat, Professor Wesson is working on a fictionalized account of the case. The factual account that I’m reciting is based on the Supreme Court opinion cited above, fleshed out here and there by Wesson’s investigatory findings.}

Towards the end of 1878, John W. Hillmon purchased $25,000 of life insurance (a considerable sum in those days) before setting out from Lawrence, Kansas for points west. The ostensible purpose of his trip was to meet up with a friend, John H. Brown, who would accompany him on an expedition to find and purchase land for a ranching operation. Brown and Hillmon connected in Wichita sometime in February, 1879 and around 5 March headed southwest towards Medicine Lodge, where they stayed for a few days before decamping for a relatively unpopulated area called Crooked Creek. There, tragedy befell Hillmon: Brown’s rifle discharged as he was unloading it from a wagon and a bullet struck Hillmon in the head. The verdict after two coroner’s inquests was ‘accidental death.’ That probably would have been that had not Hillmon’s wife of six months, Sallie, made a claim on the insurance policies, setting in motion a litigation of Bleak-Housian proportions, spawning six trials (and two trips to the Supreme Court) and spanning the turn of a new century. Only one of those trials, the third, will be our object of study.

Sallie Hillmon’s claim bore facial indicia of fraud: Hillmon was of relatively modest means (compared to the amount of insurance), a relative had paid part of the insurance premiums, the couple had been married only a short time, and Hillmon’s ‘death’ came right on the heels of the multi-policy purchase. Unsurprisingly, given these circumstances and a general proliferation of insurance fraud in the late nineteenth century,
the insurance companies refused to pay voluntarily and litigation ensued. In 1888, after two trials had already resulted in hung juries, the third trial came on as a consolidation of three separate actions (one against each insurance company).

At trial, Sallie’s case rested on evidence supporting the gun-fell-out-of-the-wagon story that I just described. Defendants, however, ‘introduced evidence tending to show that the body found in the camp at Crooked creek on the night of March 18th was not the body of Hillmon, but the body of one Frederick Adolph Walters (1892: 287).’ There was ‘much conflicting evidence’ on the point but in the defendants’ telling ‘Walters left his home at Ft. Madison, in the state of Iowa, in March, 1878, and was afterwards in Kansas in 1878, and in January and February, 1879; that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he had not been heard from since March, 1879.’ To tie Walters to the corpse at Crooked Creek, the defendants tried to introduce two letters from Walters, one written to his sister, one to his fiancée. The sister’s letter had been lost, but the fiancée’s letter was available. The trial court refused to allow the sister to testify as to the contents of her letter or to allow the contents of the fiancée’s letter to be read to the jury. For the Supreme Court’s purposes, the two letters contained evidence of the same operative fact, so I’ll focus on the letter that was physically available.

The fiancée, Alvina D. Kasten, testified that she was 21 years of age, a resident of Ft. Madison, and engaged to Walters, whom she last saw in March of 1878. After Walters left, she corresponded regularly with him, receiving a letter from him about every two weeks until March 3, 1879, which was the date on which she received his final letter. That letter was dated at Wichita, March 1, 1879 and signed by Walters; the envelope was postmarked ‘Wichita, Kansas, March 2, 1879.’ Here’s what it said:
Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and, as he promised me more wages than I could make at anything else, I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best part of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it would not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down. Then I want you to answer it (1892: 288-89).

The trial court ruled that this letter (and the one to Walters’ sister) was inadmissible hearsay. So when Sallie prevailed at trial, the defendants included this evidentiary ruling as a point of error on appeal.

In the Court’s view, ‘[t]he matter chiefly contested at the trial was the death of John W. Hillmon’—i.e., ‘whether the body found at Crooked creek on the night of March 18, 1879, was his body or the body of one Walters.’ The defendants introduced evidence tending to show that Walters was at Wichita in early March, that he had not been heard from since, that his body had been found at Crooked Creek, and that he went to Crooked Creek between early March and March 18. Thus, ‘[e]vidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and to his betrothed were the natural, if not the only attainable, evidence of his intention.’ And ‘whenever the intention is of itself a distinct and
material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party (1892: 294-95).’

Thus is born the modern ‘statement of intention’ exception to the hearsay rule. This exception has been much criticized, and it does seem overbroad. (Could a statement that ‘I’m going to do my homework’ be used later as collateral proof that the dog did eat it?) So why did the Court (largely) invent this exception? Wesson makes a good structuralist (without using that term) argument that ‘narrative exigencies’ rather than ‘policy views’ drove the Court’s decision (2006: 350). Specifically, she argues that the Court was compelled to read the story before it as a ‘romance’, into which the ‘Dearest Alvina’ letter (in its very artlessness) fits perfectly as a signifier of truth. Without disagreeing with this assessment, I would offer something different, tied back to the idea of cultural context.

In The Significance of the Frontier in American History, a book that influenced more than a generation of American historians and literary critics, Frederick Jackson Turner (1893) equated the frontier with lawlessness: ‘I have refrained from dwelling on the lawless characteristics of the frontier, because they are sufficiently well known. The gambler and desperado, the regulators of the Carolinas and the vigilantes of California are types of that line of scum that the waves of advancing civilization bore before them, and of

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6 For a very good application of structuralist principles to legal fact-finding via narrative, see Jackson (1988: 61-88) (discussing Bennett and Feldman’s theory of fact-finding at trial: “People carry around with them a stock of socially-constructed narratives, acquired through the whole range of their social experience (including their education). A significant factor affecting the plausibility of a newly-communicated story is the degree to which it fits a narrative which already exists within this stock of social knowledge.”)
the growth of spontaneous organs of authority where legal authority was absent.\textsuperscript{7} When Jackson says that the lawlessness of the frontier was ‘sufficiently well known’, I think he’s simply identifying the public narrative that had grown up to both describe and define life on the frontier (especially to those not living there).\textsuperscript{8} If that’s right, then the Supreme Court was in some sense constrained to read the facts of the \textit{Hillmon} case in light of that narrative. In other words, the Court created a rule of evidence that would allow the construction of a better, more truthful story—one in which John Hillmon was a murdering, thieving desperado who preyed on a hapless young adventurer out to ‘strike something better’ on the frontier. But as Wesson shows, that’s probably not the case: the ‘Dearest Alvina’ letter is either an outright fake or at best full of lies.\textsuperscript{9} In either case, it’s probably an invention of the insurance companies.

The \textit{Hillmon} opinion, like a work of art, is a historical product, which is to say that it is a product of a multiplicity of discourses—of narratives. Its authors (I’ll assume more

\textsuperscript{7} Turner’s positions have been qualified and debunked over the years, so I don’t offer them for the truth of the matter—maybe as a “state of the American mind” exception to hearsay.

\textsuperscript{8} The image of places like Dodge City and Tombstone as pits of teeming lawlessness were exaggerated (as were the legends that grew up around Bat Masterson, the Earps, Bill Cody and others) and fueled by an endless supply of dime-novel Westerns and ludicrous newspaper reports. (Jones 1978.) Those images persist to some degree today, even though the academic literature (and the literature-literature) has moved off this flat-footed position since Turner’s time (Reid 1996, Shepard 1981).

\textsuperscript{9} Wesson’s conclusion is based on several factors. At one point, she was convinced that the letter was a simple forgery, but she came around to the view that Walters probably did write the letter—just not when and where stated. She found persuasive evidence that Walters was alive well after he was supposedly killed, that the insurance companies had fabricated other evidence, and—based on modern forensic tests—that Hillmon probably was the person killed at Crooked Creek.
than one hand in the opinion) therefore could not stand outside that narrative stream as ‘objective’ observers of the evidence. Rather, they read the evidence in light of (among other things) a stock public narrative of the lawless frontier. In that light, the ‘Dearest Alvina’ letter made it easier to find ‘facts’ that fit into a story that coordinated with that public narrative. In other words, the letter had to be admissible. And so it was.

Now, the question becomes, ‘How best to teach the historical point of a case like *Hillmon*?’ Plainly, one could effectively create context by pairing the Supreme Court opinion with other readings—perhaps one of Wesson’s articles and one of Turner’s essays. Those items would most certainly lay an ample predicate for a discussion focused on the idea of a public narrative that served as a lens through which the Justices would have viewed the facts of the case. But I think a more economical—and perhaps more effective—approach would be to show students a few dime-novel covers, like these:
To my mind, these novel covers convey the then-current attitudes about the West every bit as effectively as does Jackson’s prose. Even more important, the cover paintings force observers to make the types of connections that Wesson is making for them—i.e., they are being offered clues upon which to build an analysis rather than being handed that analysis fully cooked. And that is a valuable lawyerly skill—far more valuable, in fact, than being able to recite the statement-of-intention exception to the hearsay rule.

Before leaving this point, it’s worth noting how well it squares with aspects of recent critiques of contemporary legal education. For example, the Carnegie Report notes that ‘[a]ctual legal practice is heavily dependent on expertise in narrative modes of
reasoning’ (Sullivan, et al. 2007: 97). This is so because abstract legal principles remain largely unintelligible, absent narrative frameworks to give them concrete, cognizable form. But we must remember that the narrative contained in any particular legal text is highly distilled and that knowing how to place that distilled narrative back into its larger context can reveal analytical flaws, biases, and the like that are obscured after the distillation process is finished. In practicing the art of recontextualizing and supplementing narratives (like Hillmon), students gain a skill critical to the practice of law: namely, actively building narratives both comprehensively and contextually, rather than passively accepting what a client or witness claims to be ‘what really happened.’ And this skill, when yoked to the type of detached analytical thinking encouraged by traditional legal education, is, I think, one way to bridge the gap between what the Carnegie Report identifies as, on the one hand, ‘thinking like a lawyer’ and actual ‘lawyering’ on the other. I’ll return to this theme in a bit.

**Provoking Moral Imagination Without Text**

In a pair of poems in the *Lyrical Ballads*, ‘Expostulation and Reply’ and ‘The Tables Turned’, William Wordsworth neatly stakes the bounds of what I think of as the textual and non-textual educational camps.\(^{10}\) In both these short poems, ‘William’ and ‘Matthew’ debate the efficacy of two principal ways of learning. Matthew gets the first word, exhorting William to get up off ‘that old grey stone’ upon which he is ‘dream[ing his] time away.’ For Matthew, there is a surer path to knowledge and insight:

> ‘Where are your books? —that light bequeathed

\(^{10}\) Thanks to my fellow Dallas Institute Fellow Willard Spiegelman for suggesting Wordsworth and Shelley as sources of commentary on the idea of moral imagination.
To Beings else forlorn and blind!
Up! up! And drink the spirit breathed
From dead men to their kind.

You look round on your Mother Earth,
As if she for no purpose bore you;
As if you were her first-born birth,
And none had lived before you!

William suggests that Matthew’s books lead down too narrow a path, and—as a better alternative—‘That we can feed this mind of ours / In a wise passiveness.’ In the companion poem, William leaves no doubt as to what this passiveness entails and, paradoxically, how passiveness can lead (‘to lead’ is the fossilized metaphor in the word ‘education’) one further than ‘book learning’ (traditional education):

Up! up! my Friend, and quit your books;
Or surely you’ll grow double;
Up! up! my Friend, and clear your looks;
Why all this toil and trouble.

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Books! ’tis a dull and endless strife:
Come, hear the woodland linnet,
How sweet his music! on my life,
There’s more of wisdom in it.

Not only is nature a superior teacher, but cultural wisdom is actually perverted once it is ossified in texts and cut off from experiential modes of learning (and thereby substitutes cold intellect for imagination):

One impulse from a vernal wood
May teach you more of man
Of moral evil and of good,
Than all the sages can.

Sweet is the lore which Nature brings;
Our meddling intellect
Mis-shapes the beauteous forms of things: —
We murder to dissect.
Enough of Science and of Art;  
Close up those barren leaves;  
Come forth, and bring with you a heart  
That watches and receives.

To show how this debate might inform what we do in a modern law-school classroom, I want to sketch out the facts and holdings of a pair of so-called ‘battered spouse’ cases and then suggest a non-textual way of getting behind those cases to show why they arose when they did. In the first case, State v. Hundley (1985), the Kansas Supreme Court was presented with a homicide conviction involving a defendant who had failed in her effort to mount a defence based on proof that she suffered from what is now generally referred to as ‘battered person syndrome.’ There was no factual dispute that the Carl and Betty Hundley had a hellish marriage or that Carl physically and psychologically abused Betty. In the course of their ten-year marriage, ‘He had knocked out several of her teeth, broken her nose at least five times, and threatened to cut her eyeballs out and her head off. Carl had kicked Betty down the stairs on numerous occasions and had repeatedly broken her ribs (1985: 475).’

Betty finally ran and moved into a motel in Topeka, Kansas. Carl found her, though, and tried to pick up where he had left off:

On January 13, 1983, the day of the shooting, Betty had seen Carl early in the day, at which time Carl told Betty he was going to come over and kill her. That night she heard a thumping on her motel door while she was in the bathroom. By the time Betty got out of the bathroom Carl had broken the door lock and entered the room. His entry was followed by violence [, which the Court recounts in graphic detail]. . . Even after that, Carl continued to threaten Betty. She was sobbing and afraid. He pounded a beer bottle on the night stand and threw a dollar bill toward the window, demanding she get him some cigarettes. Betty testified Carl had hit her with beer bottles many times in the past. Therefore, feeling threatened by the beer
bottle, she went to her purse, pulled out the gun and demanded Carl leave. When he saw the
gun, Carl laughed tauntingly and said, ‘You are dead, bitch, now!’ As he reached for the beer
bottle, Betty shut her eyes and fired her gun. She fired it again and again. There were five
spent shells in the gun when it was seized. At the time of the shooting the deceased had his
back to Betty and was paying attention to the beer bottle. She was not physically blocked from
going to the door (1985: 476).

None of this was disputed: the only issue on appeal was whether the trial court improperly
instructed the jury as to the elements of self-defence.

In Betty’s case, the trial court had used the then-standard instruction on self-
defence, which read:

The defendant has claimed his conduct was justified as (self-defense) (the defense of another
person).

A person is justified in the use of force against an aggressor when and to the extent it appears
to him and he reasonably believes that such conduct is necessary to defend himself or another
against such aggressor’s immediate use of unlawful force. Such justification requires both a
belief on the part of defendant and the existence of facts that would persuade a reasonable
person to that belief (1985: 477).

On appeal, Betty’s counsel argued that the use of the word ‘immediate’ in the jury
instruction (rather than ‘imminent’, as stated in the statute) prevented the jury from
considering (even though it had been copiously presented at trial) the evidence concerning
the long-term violence that Betty suffered at the hands of Carl. For the Court, then, the
question became ‘what instruction should accompany this evidence in order to charge the
jury with the proper manner in which such evidence should be considered?’ (1985: 477) In
other words, the Court wanted to insure that Betty’s status as a battered woman figured into
the self-defence equation. And to do so, it undertook a somewhat strained, dictionary-based analysis of the difference between ‘immediate’ and ‘imminent.’ Despite the appeal to semantics, the Court was up to something different. It wanted to make room in its jurisprudence for an issue that had remained hidden (in plain sight) for centuries:

The issue is dramatized by the nature of this case. This is a textbook case of the battered wife, which is psychologically similar to hostage and prisoner of war cases. Betty Hundley had survived her husband’s brutal beatings for ten years. Her bones had been broken, her teeth knocked out and repeated bruises inflicted, but she did not leave him. She called the police occasionally but would continue to stay with Carl Hundley. The mystery, as in all battered wife cases, is why she remained after the beatings. The answer to that question can only be gleaned from the compiled case histories of this malady. It is not a new phenomenon, having been recognized and justified since Old Testament times. It goes largely unreported, but is well documented. It is extremely widespread, estimated to affect between four and forty million women (1985: 477).

From this, the Court concluded that ‘Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. . . . They become disturbed persons from the torture (1985: 477).’ It’s unnecessary for us to spend much time with how the Court technically tied Betty’s situation to the law of provocation, but it made room for the situation in which there has been a ‘buildup of terror and fear . . . systematically created over a long period of time (1985: 477).’

In the wake of Hundley, courts began to give broad, ‘battered-woman’ self-defence instructions and juries began to acquit defendants on that basis. The limits of this line of defence were tested when the first ‘burning-bed’ case (i.e., a case in which an abused
spouse kills her husband while he is sleeping) arrived at the Kansas Supreme Court. That case, *State v. Stewart* (1988), arose from a context much like *Hundley*: a marriage troubled from the outset, a cruel, unpredictable, and physically abusive husband, attempted flights by the battered wife . . . and a gun. At trial, the court gave the jury a standard self-defence instruction (duly modified to reflect the *Hundley* holding that imminence rather than immediacy was the proper standard for judging temporal proximity), but he also added what we might call a *Hundley* tag: ‘You must determine, from the viewpoint of the defendant’s mental state, whether the defendant’s belief in the need to defend herself was reasonable in light of her subjective impressions and the facts and circumstances known to her.’ So, once again, the Court undertook to make a broad policy determination using jury-instruction language as the vehicle.

The Court did this by asking two related questions: first, whether a person in Stewart’s shoes should be entitled to a self-defence instruction *at all* and second, whether the *Hundley* tag was an appropriate statement of the law of self-defence. It answered these questions by turn, holding first that

In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse and the victim is the abuser. In such cases, the issue is not whether the defendant believes homicide is the solution to past or future problems with the batterer, but rather whether circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary (1988: 577 & Syl. § 4).

Given this holding, it was probably superfluous to consider the form and content of the jury instruction given, but the Court did so anyway, apparently to emphasize two key points:
viz., that ‘battered woman’s syndrome’ is not in itself a defence to murder (rather, evidence of the syndrome may be introduced in support of a defence of self-defence) and that the defence of self-defence has both objective and subjective elements (1988: 579). This turn to objectivity is troublesome, especially because notions of objective reasonableness depend on notions of common sense. But as Hundley, Stewart, and a host of other cases make clear, there is no ‘common sense’ when it comes to battered women—they exist in a condition outside the ordinary juror’s ability to know. Justice Herd (the author of the Hundley opinion) explicitly makes that point in dissenting from the Stewart majority (1988: 582).

_Hundley_ and _Stewart_ thus stand in support of the proposition that legal standards are recalibrated on a case-by-case basis. But why is this so? And how do we explain this process to students, especially the question of ‘Why _this_ rule at _this_ time?’ I have found it useful to turn to an iconic work of early modern feminism, Susan Glaspell’s one-act play _Trifles_ (1996) (also published as a short story, ‘A Jury of Her Peers’). The play opens in the gloomy and disordered kitchen of Nebraska farmhouse of a century ago. The owner of the farm, John Wright, has been murdered—strangled—and his wife has been taken into custody. Five characters occupy the stage as the curtain rises: County Attorney Henderson, Sheriff Peters and his wife, and two neighbours, Mr and Mrs Hale. Mr Hale had stopped by the farmhouse the day before and found Mrs Wright sitting in the kitchen looking ‘queer.’ She told him that Mr Wright had ‘died of a rope around his neck’ and that she didn’t know who did it because—although she slept in the same bed—she ‘sleep[s] sound.’ Because of that story’s incredibility, Mrs Wright was arrested and held for murder. From the opening lines, though, we sense that this will be a story less about murder than
about gender. Glaspell first puts this in spatial terms, showing how the men set about to discover clues upon which they can construct a story of Mrs Wright’s guilt: ‘what was needed for the case was a motive; something to show anger, or—sudden feeling.’ But they take up this task from a decidedly masculine point-of-view, looking only at the immediate crime scene and masculine spaces like the barn:

COUNTY ATTORNEY: [Looking around] I guess we’ll go upstairs first—and then out to the barn and around there. [To the Sheriff] You’re convinced that there was nothing important here—nothing that would point to any motive.

SHERIFF: Nothing here but kitchen things (Glaspell 1996: 154).

The men denigrate everything feminine, unable to see feminine artefacts as anything other ‘trifles.’ But these ‘trifles’ hold the key to the mystery, to the narrative:

MRS PETERS: She was piecing a quilt.

MRS HALE: . . . I wonder if she was goin’ to quilt it or just knot it?

SHERIFF: They wonder if she was going to quilt it or just knot it!

[The men laugh, the women look abashed.]

MRS HALE: [resentfully] I don’t know as there’s anything so strange, our takin’ up our time with little things while we’re waiting for them to get the evidence. I don’t see as it’s anything to laugh about. . . . Mrs Peters, look at this one. Here, this is the one she was working on, and look at the sewing! All the rest of it has been so nice and even. And look at this! It’s all over the place! Why, it looks as if she didn’t know what she was about!

[After she has said this, they look at each other, then start to glance back at the door. After an instant Mrs Hale has pulled at a knot and ripped the sewing.]

MRS PETERS: Oh, what are you doing, Mrs Hale?

MRS HALE: Just pulling out a stitch or two that’s not sewed very good. [Threading a needle]. Bad sewing always made me fidgety.

* * *

MRS PETERS: Why, here’s a birdcage. Did she have a bird, Mrs Hale?

MRS HALE: Why, I don’t know whether she did or not—I’ve not been here for so long. There was a man around last year selling canaries cheap, but I don’t know as she took one; maybe she did. She used to sing real pretty herself.

MRS PETERS: Seems funny to think of a bird here. But she must have had one, or why should she have a cage? I wonder what happened to it?
MRS HALE: I s’pose maybe the cat got it.

MRS PETERS: No, she didn’t have a cat. She’s got that feeling some people have about cats—being afraid of them. My cat got in her room, and she was real upset and asked me to take it out. . . . Why, look at this door. It’s broke. One hinge is pulled apart.

MRS HALE: Looks as if someone must have been rough with it.

The women next discuss Mr Wright’s character. Mrs Hale describes him as honest, but ‘hard’ and just passing time with him was like ‘a raw wind that gets to the bone.’ They then decide to take the quilt to Minnie to help her pass the time in jail, and they set about to find her sewing materials.

[They look in the sewing basket.]

MRS HALE: Here’s some red. I expect this has got sewing things in it (Brings out a fancy box.) What a pretty box. Looks like something somebody would give you. Maybe her scissors are in here. (Opens box. Suddenly puts her hand to her nose.) Why— (MRS PETERS bends nearer, then turns her face away.) There’s something wrapped up in this piece of silk. . . . Oh, Mrs Peters—it’s—

MRS PETERS: It’s the bird.

MRS HALE: But, Mrs Peters—look at it. Its neck! Look at its neck! It’s all—other side to.

MRS PETERS: Somebody—wrung—its neck.

[Their eyes meet. A look of growing comprehension of horror. Steps are heard outside. Mrs Hale slips box under quilt pieces, and sinks into her chair. . . .]

MRS HALE: She liked the bird. She was going to bury it in that pretty box.

MRS PETERS: When I was a girl—my kitten—there was a boy took a hatchet, and before my eyes—and before I could get there—If they hadn’t held me back, I would have—(Catches herself, looks upstairs, where steps are heard, falters weakly.)—hurt him.

MRS HALE: I wonder how it would seem never to have had any children around. No, Wright wouldn’t like the bird—a thing that sang. She used to sing. He killed that, too.

MRS PETERS: We don’t know who killed the bird.

MRS HALE: I knew John Wright. . . .

MRS PETERS: We don’t know who killed him. We don’t know.
MRS HALE: If there’d been years and years of nothing, then a bird to sing to you, it would be awful—still, after the bird was still. . . .

MRS PETERS: My, it’s a good thing the men couldn’t hear us. Wouldn’t they just laugh! Getting all stirred up over a little thing like a—dead canary. As if that could have anything to do with—with—wouldn’t they laugh!

MRS HALE: Maybe they would—maybe they wouldn’t. [Mrs Hale soon hides the canary and its box.] (Glaspell 1996: 157-63)

The men end the play as they began it: literally and figuratively clueless. They are so trapped within their masculinity that they cannot read the signs that are so obvious to the women. In other words, they cannot construct a text—a coherent narrative—that will make sense of the crime. As a result, the murderer will likely go free, as the County Attorney predicts: ‘No, Peters, it’s all perfectly clear except a reason for doing it. But you know juries when it comes to women. If there was some definite thing. Something to show—something to make a story about—a thing that would connect up with this strange way of doing it— (Glaspell 1996: 163).’ The women, on the other hand have not only solved the murder but justified it to their own satisfaction as well. In other words, as the play’s final line ironically suggests, they have tied up all the loose ends:

COUNTY ATTORNEY: [Facetiously] Well, Henry, at least we found out that she was not going to quilt it. She was going to—what is it you call it, ladies!

MRS HALE: [Her hand against her pocket] We call it—knot it, Mr Henderson (Glaspell 1996: 164).

At this point, one may ask what it is that students can learn from the play that they couldn’t get straight from the cases. My answer comes in two parts, one having to do with how reading cases can have a stultifying effect on the imagination, the other having to do with how the play is used in the classroom setting.
A recurring theme in much recent criticism of legal pedagogy is the heavy reliance placed (especially in first-year courses) on the case method. There are a variety of ways to frame this issue, but one that has particular resonance for me is the notion that the case method exalts a text-bound ‘analytical’ mode of thinking over a context-sensitive ‘narrative’ mode. As the Carnegie Report puts it:

In the narrative mode of thought, things and events are given significance through being placed within a story, an ongoing context of meaningful interaction. The narrative is a mode of thinking that integrates experience through metaphor and analogy. It is employed in the arts and also in practical situations, including professional work. Meaning and value have their origins here (Sullivan 2007: 83).

Thus conceived, the narrative mode of thinking is essential to moral reasoning, deliberation and conduct. Steven Fesmire (2003: 4), following on Dewey’s heels, helpfully suggests that there are three interrelated ideas at work here: ‘(1) Moral character, belief, and reasoning are inherently social, embodied and historically situated; (2) Moral deliberation is fundamentally imaginative and takes the form of a dramatic rehearsal; (3) Moral conduct is helpfully conceived on the model of aesthetic perception and artistic creation.’ All this squares with Percy Shelley’s conception of Reason and Imagination:

Reason is the enumeration of quantities already known; imagination is the perception of the value of those quantities, both separately and as a whole. Reason respects the differences, and imagination the similitudes of things. Reason is to Imagination as the instrument is to the agent, as the body to the spirit, as the shadow to the substance. (Shelley 1977: 480)

Imagination thus ties to morality in a fundamental, empathetical way:

The great secret of morals is Love; or a going out of our own nature, and an identification of ourselves with the beautiful which exists in thought, action, or person, not our own. A man, to
be greatly good, must imagine intensely and comprehensively; he must put himself in the place of another and of many others; the pains and pleasures of his species must become his own.

The great instrument of moral good is the imagination . . . (Shelley 1977: 487-88)

In yoking empathetic imagining to morality, Shelley stands in a line of thinkers as diverse as Adam Smith, Dewey and—more recently—Neil MacCormick, who have posited that one must step outside oneself (via imagination) to assess the morality of a proposed act. Dewey, for instance, proposes that imaginative empathy is ‘the animating mold of moral judgment.’ Fesmire takes this to mean that ‘[t]aking the attitudes of others stirs us beyond numbness so we pause to sort through others’ aspirations, interests, and worries as our own’ (2003: 65). Smith offers, as MacCormick (2008: 64) describes it, ‘the model of an ideal and impartial spectator. Right and wrong are matters of which we judge, by filtering immediate responses of the sentiments by reference to the sentiments we think imputable to somebody situated as we are but possessed of perfect impartiality and complete knowledge.’ MacCormick (2008:64) states his own version of empathy-through-imagination by grafting Kant’s categorical imperative onto Smith’s ‘impartial spectator’:

Enter as fully as you can into the feelings of everyone directly involved in or affected by an incident or relationship, and impartially form a maxim of judgement about what is right that all could accept if they were committed to maintaining mutual beliefs setting a common standard of approval and disapproval among themselves.

Inherent in these conceptions of moral deliberation is a sense of drama, a coupling of imagination and observation. It is not surprising, then, that some have made the linkage express: Dewey, for example, goes so far as to call moral deliberation ‘dramatic rehearsal’, a metaphor that Alasdair MacIntyre (2007: 213) extends into a conceit:
we are never more (and sometimes less) than the co-authors of our own narratives. Only in fantasy do we live what story we please. In life, as both Aristotle and Engels noted, we are always under certain constraints. We enter upon a stage which we did not design and we find ourselves part of an action that was not of our making. Each of us being a main character in his own drama plays subordinate parts in the dramas of others, and each drama constrains the others.

From this—in agreement with Martha Nussbaum—Fesmire (2003:112) concludes that ‘[t]o discover how others’ life-dramas can develop coordinately with one’s own requires attention to the constraints imposed and possibilities made available by other dramas enacted on the same stage.’

All this suggests links among drama, imagination and moral growth. Shelley (1977: 490-91) draws attention to these links with the suggestion that great drama offers a sure spur to imaginative growth and moral strength:

The tragedies of the Athenian poets are as mirrors in which the spectator beholds himself, under a thin disguise of circumstance, stript of all but that ideal perfection and energy which every one feels to be the internal type of all that he loves, admires, and would become. The imagination is enlarged by a sympathy with pains and passions so mighty, that they distend in their conception the capacity of that by which they are conceived; the good affections are strengthened by pity, indignation, terror and sorrow; and an exalted calm is prolonged from the satiety of this high exercise of them into the tumult of familiar life; even crime is disarmed of half its horror and all its contagion by being represented as the fatal consequence of the unfathomable agencies of nature; error is thus divested of its willfulness; men can no longer cherish it as the creation of their choice. In a drama of the highest order there is little food for censure or hatred; it teaches rather self-knowledge and self-respect. Neither the eye nor the mind can see itself, unless reflected upon that which it resembles. The drama, so long as it continues to express poetry, is as a prismatic and many-sided mirror, which collects the
brightest rays of human nature and divides and reproduces them from the simplicity of these elementary forms, and touches them with majesty and beauty, and multiplies all that it reflects, and endows it with the power of propagating its like wherever it may fall.

Is there a teaching angle here? I think so, for at least two related reasons. First, as Fesmire (2003: 114) argues, Aristotelian ‘flexible practical wisdom, not unthinking subjugation to law, is the ideal for citizens, legislators, and judges’ and—more important—practical wisdom can be taught, as Nussbaum explains:

Aristotelian education is aimed at producing citizens who are perceivers. It begins with the confident belief that each member of the heterogeneous citizenry is a potential person of practical wisdom, with the basic (that is, as yet undeveloped) ability to cultivate practical perception and use it on behalf of the entire group. It aims at bringing these basic abilities to full actuality.

Second, Dewey’s thinking dovetails nicely on this point and emphasizes the central role that imagination plays in meaningful education: ‘[a]n adequate recognition of the play of imagination as the medium of realization of every kind of thing which lies beyond the scope of direct physical response is the sole way of escape from mechanical methods in teaching.’ This is so because ‘imagination is as much a normal and integral part of human activity as is muscular movement.’ But this is not the most interesting part of his theory for our purposes. He goes on to suggest that drama (or acts that approximate drama) is the catalyst for transforming a mere act into representative knowledge:

The educative value of manual activities and of laboratory exercises, as well as of play, depends upon the extent in which they aid in bringing about a sensing of the meaning of what is going on. In effect, if not in name, they are dramatizations. Their utilitarian value in forming habits of skill to be used for tangible results is important, but not when isolated from the appreciative side (Dewey, 1916: 237).
Dewey’s overarching point here is that playacting offers an important mode of learning. This logic can easily be extended to include the observation of playacting. Indeed, J.M. Balkin and Sanford Levinson (1999: 729) have persuasively argued that the performative aspects of the law are more important than the textual ones: ‘Law, like music or drama, is best understood as performance—the acting out of texts rather than the texts themselves.’ Their rationale is that legal texts no more constitute the social practice of law than sheet music or scripts constitute the social practice of music or drama. For them, then, law-as-performance is a more useful analogy than the more familiar law-as-literature comparison because the latter obscures important features of legal practice. Most important for our purposes is their observation that legal practice is built on a triangular relationship among law-creating institutions, law-interpreting institutions, and persons affected by law interpretations. Performing arts share this structure in the form of author, performer and audience. Merely reading a text collapses the roles of interpreter and audience and, thereby, diminishes the public aspect of a social practice. Even more problematically, we can find ourselves—like Kafka’s man from the country—perpetually separated from the law, which, as Derrida (1992: 210-11) describes it, trapped in an infinite loop of textual self-referentiality:

The story Before the Law does not tell or describe anything but itself as text. It does only this or does also this. Not within an assured specular reflection of some self-referential transparency—and I must stress this point—but in the unreadability of the text, if one understands by this the impossibility of acceding to its proper significance and its possibly inconsistent content, which it jealously keeps back. The text guards itself, maintains itself—like the law, speaking only of itself, that is to say, of its non-identity with itself. It neither
arrives nor lets anyone arrive. It is the law, makes the law and leaves the reader before the law.

It is for the reason that texts can become self-isolating, among others, that—to illuminate Hundley, Stewart and their historical context and even deeper background—I have students act out in class the various roles in Trifles, rather than have them just read and discuss Glaspell’s short-story version of the same basic narrative, ‘A Jury of Her Peers.’ As a teaching tool, the play—in ways that the story cannot—emphasizes the performative aspects of the law, invokes different senses (and attendant learning paths), and draws attention to the non-verbal aspects of legal performance. It also, in my experience, generates a richer discussion than does a straight-on comparison of Hundley and Stewart. By this I mean that—without the benefit of Trifles—it’s easy for students to draw a legal rule amounting to this: ‘If you want to claim self-defense, make sure he’s awake when you kill him.’ Trifles shows that the moral issues that surround and penetrate the law of provocation are not so neatly drawn. Or, as Gillian Calder more generally suggests elsewhere in this collection, ‘[i]n being asked to put their bodies into the action of their learning, . . . those who study and practice law gain access to the means of constituting and transforming a basic rethinking of the power of law itself.’ All this is designed to cast off, if even for a few moments, the tyranny of habit and free students to see things anew, to see familiar legal rules bobbing in a sea of moral a complexity, and to re-judge those rules before blindly applying them.

Conclusion
Law school and law practice are, as Philip Kissam (2003) has argued, akin to a Foucauldian discipline. What he means is that law students traditionally learn (and lawyers traditionally come to practice) in a narrowly instrumental way. This is not, all in all, a bad thing. Law students must learn to understand how to read cases and thereby understand how courts articulate rules in the context of factual determinations. And much of what lawyers do in the workaday world is routine. All this is to say that law schools and legal institutions benefit greatly by the efficiencies associated with repetition and habitual practices. Nonetheless, these efficiencies come with a high associated cost: a valorisation of rules and familiar forms of legal narrative that—in some cases—proves insufficient. What the Beyond Text project aims to do is demonstrate how a process of defamiliarizing received legal forms can cultivate in students and practitioners alike a rounder imagination, one that—especially in novel and hard cases—offers new ways out of the legal thicket. Teaching and learning law with contextual-historicist tools is perhaps one such way.
References


