

Contracting for Social Change

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Contracting for Social Change

Adam N. Eckart*

Throughout history, social change has often been shaped by high-profile legislation and through high-stakes litigation. But social change can also be spurred on through private contract, including through the agreements businesses and individuals make with each other every day. Transactional attorneys can promote social change through drafting techniques and choices, including narrative and storytelling techniques, and can use such drafting techniques in order to 1) write better and more complete agreements that are more consistent with business-led social activism already taking place, and 2) influence society by forcing counterparties to evolve on social issues, change industry practice, or foster a narrative for social change in society in general.

This article begins with establishing a background overview on business-led social activism, describing recent efforts by large businesses to influence social policy, and provides a scholarship overview regarding how transactional drafters can use narrative theory and storytelling techniques in transactional documents. Combining these two elements, this article analyzes how transactional attorneys can employ narrative and storytelling techniques to promote social change in transactional documents. The article argues that by integrating narrative and storytelling techniques into transactional documents, transactional attorneys can increase the persuasiveness of transactional documents, align

* Associate Professor of Legal Writing, Suffolk University Law School, Boston, Massachusetts. Thank you to my colleagues Professors Sarah Burstein and Dyane O’Leary for their helpful feedback on this article. Thank you to research assistants Erin Michaud, Catherine Nicolson, and Emily Sullivan for their important and diligent assistance. Thank you to Suffolk University Law School for their support of this article in the form of a summer research stipend.

corporate statements with existing business-led social activism, and positively influence social change.

INTRODUCTION 256

I. BUSINESS-LED SOCIAL ACTIVISM 259

 A. *Speaking Out*..... 261

 B. *Acting Out*..... 266

 C. *Something More*..... 269

II. THE STORY OF STORYTELLING..... 270

 A. *Narrative and Storytelling in Legal Disciplines* 271

 B. *Narrative and Storytelling in Transactional Legal Work*..... 274

 1. Why narrative and storytelling should be used 274

 2. How narrative and storytelling can be used 278

 3. Examples of narrative and storytelling 281

III. UTILIZING CONTRACTUAL LANGUAGE TO PROMOTE SOCIAL CHANGE 283

 A. *Contracts of Today*..... 283

 B. *Utilizing Contractual Language to Promote Social Change*... 284

 C. *Drafting with Narrative and Storytelling for Social Change*... 286

CONCLUSION..... 292

INTRODUCTION

Social change has long been advanced through high-stakes litigation¹ and legislative work.² Yet, social change can also be advanced through

¹ See, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (establishing that racial segregation in public education is unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a woman’s right to choose); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (establishing the right of same-sex couples to marry); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overturning *Roe* and finding that there is no right to an abortion under the U.S. Constitution).

² A number of landmark legislative achievements come to mind, including those passed to promote voting rights, civil rights, and other rights. See, e.g., Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1964) (drafted to outlaw discriminatory voting practices); Patient Protection and Affordable Care Act, Pub. L. No.111-148, 124 Stat. 119 (2010) (designed to bring health insurance to the vast majority of uninsured Americans); Title VII of the Civil Rights Act (1964), 42 U.S.C. § 2000e (prohibiting discrimination on the basis of race, color, religion, sex, and national origin); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (denying discrimination on the basis of sex in education programs); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (requiring employers to provide reasonable accommodations to individuals with qualifying disabilities); Respect for Marriage Act, Pub. L. No. 117-228, § 7, 136 Stat. 2305, 2305 (2022) (requiring all states to recognize same-sex and interracial marriages); Clean Water

transactional work and private contract.³ Transactional attorneys and their private clients have long sought to influence society and shape social policy in private agreements between parties through business-led social activism. Business-led social activism—the act of businesses working to shape public policy and social policy⁴—is not new. First, large businesses advocated for their own rights and recognitions,⁵ and more recently, large businesses have used their voice to speak on social issues, including those effecting the LGBTQ+ community, the black community, women, and others.⁶

As far back as the 1960s, big corporations and organizations mobilized to speak out against segregation and to promote social justice with The Sullivan Principles.⁷ In recent years, big companies like Dick’s Sporting Goods has spoken out on gun safety; Hobby Lobby has supported religious freedoms; Amazon and AirBnB have provided support for woman seeking abortions; and Disney has voiced their support for LGBTQ+ rights.⁸ As recently as 2023, corporations like Microsoft have spoken out on the U.S.

Act, 33 U.S.C. §§ 1251-1388 (1972) (regulating pollutants and quality standards of waters of United States); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1970) (regulating air emissions).

³ See *infra* Section I (describing the role of corporations and businesses, and their attorneys, in advancing social issues).

⁴ Sometimes, this is referred to as corporate activism. See Aileen Noonan et al, *Corporate Activism When the Stakes Are High*, CAL. R. MGMT. (Apr. 17, 2023), <https://cmr.berkeley.edu/2023/04/corporate-activism-when-the-stakes-are-high/> [<https://perma.cc/K4LB-46M5>] (pressuring businesses to engage in corporate activism to address social, environmental, and economic issues).

⁵ See, e.g., ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018) (describing historic advocacy by corporations for their own benefit); Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U.L. REV. 1535, 1540 (2018) (describing more recent business-led social activism); Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 443 (2019) (describing recent business-led social activism); Adam Eckart, *In Business We Trust*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 227, 233 (2023) (describing recent business-led social activism, including as recently as actions in 2022); see also Andrew Jennings, *Adam Eckart’s In Business We Trust*, BUS. SCHOLARSHIP PODCAST (Feb. 8, 2024), <https://andrewkjennings.com/2024/02/08/adam-eckart-on-corporate-activism/>.

⁶ See *infra* Section I.

⁷ See, e.g., Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?* 23 SUFFOLK TRANSNAT’L L. REV. 191 (1999). The Sullivan principles, introduced in 1977, was comprised of seven requirements of corporations in connection with equal treatment of employees, regardless of their race. The Sullivan principles, developed to apply economic pressure on South Africa in protest of apartheid, were adopted by more than 125 U.S. companies, including brand name companies like General Motors. Even the 1965 performance agreement of The Beatles stated that the group would “not be required to perform in front of a segregated audience.” Jonathan C. Lipson, *Promising Justice: Contract (as) Social Responsibility*, 2019 WISC. L. REV. 1109, 1111 (2019).

⁸ See *infra* Section I.

Supreme Court decision in *Students for Fair Admissions v. Harvard*, which found that “affirmative action” in undergraduate admission practices violated the Civil Rights Act of 1964.⁹ Through these efforts, and others, large businesses have used their voice to influence change.

While much scholarship has been devoted to creating change through business-led social activism,¹⁰ this article focuses on how transactional lawyers representing those organizations can promote social change through transactional drafting, using the skills and techniques of narrative and storytelling to do so. When used in legal drafting, narrative refers to the writer’s attempt to persuade the audience to take an action, experience a change in attitude or belief, or consider a story to amplify a legal or factual point.¹¹ Scholarship addressing narrative and storytelling in the transactional world has often focused on how transactional lawyers can incorporate storytelling and narrative into their documents to 1) better capture the intent of the parties, 2) ensure better compliance between the parties, and 3) ensure more fair interpretation of the agreement by third party decision makers (such as judges, arbitrators or mediators).¹² This article takes that construct one step further and argues that transactional lawyers can use similar elements of narrative and storytelling to influence social change through negotiated transactions and transactional documents governing relationships between parties.

Section I of this article analyzes how large businesses have used their power and position in industry to effectuate change in social policy over the last one hundred years, including and particularly focusing on how

⁹ *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023). Many corporations had sided with the Universities in the related litigation by submitting amicus briefs. Rahem D. Hamid and Nia L. Orakwue, *Top Corporations, Universities Ask Supreme Court to Uphold Affirmative Action in Harvard Case*, THE HARVARD CRIMSON (Aug. 4, 2022), <https://www.thecrimson.com/article/2022/8/4/affirmative-action-amicus-briefs/> [<https://perma.cc/3FXA-JP7C>]. After the decision was announced in 2023, several companies reacted in opposition. Paige McFlaflin and Trey Williams, *Microsoft, Salesforce, and other Fortune 500 companies react to Supreme Court striking down affirmative action: ‘Our commitment to equality doesn’t waiver’*, FORTUNE (June 30, 2023), <https://fortune.com/2023/06/30/major-companies-ceos-react-supreme-court-affirmative-action-decision-microsoft-salesforce-gm-hp/> [<https://perma.cc/G9E7-M94K>].

¹⁰ See, e.g., Fan, *supra* note 4; Eckart, *supra* note 4.

¹¹ See generally Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN’S L. REV. 845 (2017) (describing components and the aspects of narrative theory).

¹² See, e.g., *id.*; Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263, 266-68 (2016); Susan M. Chesler, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. REV. 247 (2019); Susan M. Chesler & Karen J. Sneddon, *Humanizing Transactional Documents: Why and How Transactional Drafters Should Use Narrative Techniques*, 23 TENN. J. BUS. L. 222 (2021).

businesses have become increasingly socially conscious and advocacy-driven in the last two decades. This section analyzes how large businesses have historically weighed in on social issues, including speaking out on topics and offering solutions, and discusses the pitfalls and disadvantages of each. This section also introduces a new way businesses may advocate for social change, including through using narrative and storytelling techniques in agreements.

Section II of this article analyzes the background and history of narrative and storytelling both in the legal field but also regarding using narrative and storytelling in transactional agreements. This section identifies why drafters employ narrative and storytelling in transactional agreements and how drafters can effectively use narrative and storytelling in those agreements.

Finally, section III of this article identifies how businesses and transactional lawyers can introduce narrative and storytelling into transactional agreements to influence and advance social change. This section presents different examples that transactional attorneys can use to advance social change and argues that such drafting choices can improve the persuasiveness of such documents, better align corporate statements with existing business-led social activism, and positively influence social change.

I. BUSINESS-LED SOCIAL ACTIVISM

Private law has long been used to influence social policy, and businesses and companies have used private law to shape social policy and social issues for some time.¹³ Promoting social change through transactional work or transactional attorneys is not new. Over a century

¹³ This article does not discuss considerations related to fiduciary duties and whether companies should be engaging in such activism, but instead takes the fact that companies are engaging in such activities as facts. For more detailed discussion of fiduciary duties, shareholder theory, stakeholder theory, and consideration of such concepts, see my previous article on the topic. Eckart, *supra* note 4. Other scholarship also discusses a variety of these considerations. See, e.g., Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951 (2018) (describing the “shareholder primacy” model); Tiffany M. Burba, *To “B” or not to “B”: Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. 329, 344 (2017); Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/> [<https://perma.cc/VMH6-ATAB>]; GRANT HAYDEN & MATT BODI, *RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE* (2021).

ago, large businesses¹⁴ first entered the advocacy space to advocate for their own rights: the freedom of speech, association, and others.¹⁵ In recent decades, large businesses have similarly used their voice to speak out on social issues related to gun safety, the LGBTQ+ community, race, religion, and women's rights, among others.¹⁶

For decades, companies have advocated for social change; first to gain recognition of rights for businesses, and in more recent history for the advancement of social change. In just the last decade, businesses have increasingly been speaking out on social topics: from gun safety to marriage equality, access to abortion, free expression of religion, and more.¹⁷ During this time, businesses and associations have largely spoken out or advanced causes in one of two ways: either by making public pronouncements supporting or in opposition to statewide or national politics, pending legislation, or passed legislation, or in connection with making policy changes within their own organizations to solve a perceived problem or shortcoming of government.¹⁸

Undeniably, many examples of business-led social activism have been more liberal or progressive, including on topics such as marriage equality, gun safety, access to abortion, or other issues identified in this article. But companies have likewise promoted conservative causes, including free

¹⁴ While the term "business" could comprise a variety of corporate formations, partnerships and other companies, this article focuses on the work of larger businesses, such as Fortune 500 companies, and associations, such as professional sports associations. While other businesses, including small businesses, can employ the same narrative and storytelling techniques in their agreements and in their transactional work, examples of business-led social activism by local or small businesses is less readily available. Accordingly, this article focuses more on the work and future of large businesses in this area. Future scholarship of the author may address the different reactions to social issues from small businesses in their communities.

¹⁵ See WINKLER, *supra* note 5 (describing the path that businesses have embarked upon over the last century in order to gain recognition of their rights).

¹⁶ See *infra* Sections I(A) and I(B) for further discussion of such rights.

¹⁷ *Id.* Scholarship has detailed recent actions of corporations in these spaces. See, e.g., Fan, *supra* note 4; Eckart, *supra* note 4.

¹⁸ Some scholars suggest that expressive speech by companies can be broken down in other ways, such as in 1) Marketing Activities, and 2) Corporate Contributions. See, e.g., W.C. Bunting, *Against Corporate Activism: Examining the Use of Corporate Speech to Promote Corporate Social Responsibility*, 74 OKLA. L. REV. 245 (2021). Within Marketing Activities, these can include Cause Marketing (companies trying to broadcast a particular message or promote a particular cause for the purpose of increasing profits), Advocacy Marketing (designed to promote personal convictions of the company's managers or other stakeholders), and Philanthropic Contributions (either charitable or political). *Id.* at 257-261. While different scholarship breaks down this speech in different ways, the classification are less important than the fact that corporations are speaking out and acting out on social issues.

expression of religion, “traditional” family values, and the right to bear arms, among others.

While businesses may take positions on both sides of the political aisle, a vast majority of the social issues at stake are those within the political mainstream and are not on the fringe. Both private and public companies are often motivated by profits¹⁹ and are unlikely to adopt fringe or radical positions unpopular with wide swaths of society.²⁰ Accordingly, while business will continue to stake out social positions on both sides of the aisle, few are likely to promote baseless or unpopular positions, even if closely held, for risk of financial peril. This section analyzes these examples of business-led social activism and suggests a new way of speaking out may be appropriate.

A. *Speaking Out*

While many businesses have historically been reticent to weigh in on hot button social issues of the day, large companies and corporations have increasingly done so since *Citizens United*, the landmark case which permitted increased corporate and union-based financial contributions in politics.²¹ By unlocking the potential for businesses to engage in the political forum more broadly, *Citizens United* marked a turning point for businesses to speak out on social issues of the day. In just five short years after *Citizens United*, Fortune 500 companies now speak out regularly on a variety of the most pressing and hotly debated social issues of the time, including: marriage equality, contraception, religious freedom, gun safety, transgender rights, Black Lives Matter, and more.²²

¹⁹ In fact, public companies have fiduciary duties to shareholders, as discussed in Note 12.

²⁰ See Michael Nalick, et al, *Corporate Sociopolitical Involvement: A Reflection of Whose Preferences?*, 30:4 ACAD. MGMT. PERSPS. 384, 385 (Nov. 2016) (explaining alienation risks companies take when they engage in issues that affect people’s emotions and morals). When companies do adopt positions that are unpopular with the majority of the population, companies risk “cancel culture” attack on their profits. For example, when Mike Lindell, the CEO of My Pillow, adopted some of the more outlandish claims of voter fraud in the 2020 election, My Pillow’s sales and distribution tanked. See Sapna Maheshwari & Tiffany Hsu, *MyPillow C.E.O. ’s Trump Conspiracy Theories Put Company on the Spot*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/business/mike-lindell-mypillow.html>.

²¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). After *Citizens United*, the idea that businesses could participate in the political discourse of the day was furthered through *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which established that there was no requirement for companies to focus their business efforts solely on the generation or profit and that businesses could sacrifice, at least to some extent, the maximization of shareholder value in the name of social advocacy on topics important to the corporation. See Fan, *supra* note 4, at 441.

²² See, e.g., Fan, *supra* note 4; Eckart, *supra* note 4; Lin, *supra* note 5, at 1549-50.

Whether it connects with Pride Month, in the wake of gun massacres, or when the U.S. Supreme Court takes cases on controversial social issues, businesses have seen fit to mark their territory—without significant downside.²³ Companies reason that by doing so, they might lose supporters and customers, but from a business standpoint, the net was likely positive: either garnering greater devotion by its existing customer base or perhaps by appealing to other customers. While business may argue that another reason they take such steps is because it is the “right thing to do,” businesses have ensured that such decisions are consistent with ensuring long term profitability for shareholders.²⁴

Examples of such business-led social activism since *Citizen United* have abounded, including on the following issues, among others:²⁵

- LGBTQ+ Rights: Hundreds of companies have expressed their support for both marriage equality and transgender rights. First, in

²³ Recent review of business practices in terms of speaking out and the impact that such advocacy has done to their bottom line indicates that such advocacy has little to no effect. See Eckart, *supra* note 4, at 227. While “cancel culture” has led to some recent examples of public “boycotts” of businesses or brands, including in one instance related to public boycott of Bud Light after the company seemingly endorsed a transgender individual, overall financial damage to the company was minimal, if any, and not significantly long lasting. See Jenni Reid, *Beer giant AB InBev beats forecasts but Bud Light boycott continues to drag U.S. revenues*, CNBC, <https://www.cnn.com/2023/10/31/beer-giant-ab-inbev-beats-forecasts-but-bud-light-continues-to-drag.html> (Oct. 31, 2023, 8:23 AM) [<https://perma.cc/VHV4-9QN6>].

²⁴ One study by Dick’s Sporting Goods supports the idea that some such changes are good for long term financial health of the business. Under a 2018 pilot program, Dick’s took all guns out of ten stores and filled the empty space with products targeted for those markets, such as sports team merchandise. According to the company, those ten stores outperformed the rest of the chain on the product swap and have continued to deliver. See Rachel Siegel, *Dick’s Sporting Goods reports strong earnings as it experiments with reducing gun sales*, WASH. POST (Aug. 22, 2013, 11:30 AM), <https://www.washingtonpost.com/business/2013/08/22/dicks-sporting-goods-stock-surges-strong-nd-quarter-earnings/> [<https://perma.cc/US94-BLL3>]. Although not discussed in this article, some argue that profit maximization is no longer the only way in which corporations can govern themselves. While the theory of shareholder primacy asserts that decisions by the Board of Directors and management should maximize wealth for shareholders, see generally Rhee, *supra* note 13, the stakeholder theory asserts that decisions of the Board of Directors and management need not revolve around only the shareholder but can instead be more broad to cover the interests of interested “stakeholders,” such as employees and community members, see, e.g., Burba, *supra* note 13, at 344, Lenore Palladino & Kristina Karlsson, *supra* note 13. Some may argue that advocating for business-led social activism may encourage businesses to cater to fringe groups or conspiracy theories, but in an effort to preserve profits, which is one of the premier goals of any business organization, adoption of such radical views would risk alienating great majorities of customers and the public as a whole, which likely serves as appropriate deterrence.

²⁵ See Fan, *supra* note 4, at 441; Eckart, *supra* note 4, at 227 (2023); Lin, *supra* note 5, at 1549-50.

the time before *Obergefell* (questioning whether marriage equality should be guaranteed to same-sex couples under the Constitution),²⁶ hundreds of corporations and employer organizations filed amicus briefs in both *United States v. Windsor*²⁷ and in *Obergefell*²⁸ in voicing support for marriage equality.²⁹ In more recent history, professional sports associations, including the National Basketball Association (the “NBA”), have been vocal opposing anti-transgender legislation, including most notably in North Carolina, when the NBA withdrew its award of the 2016 NBA All-Star Game and related festivities from Charlotte in protest of the then-recently-passed HB2 (known as the “Bathroom Bill,” which required that North Carolina students use the bathroom that corresponded with the gender assigned to them at birth), at an estimate economic cost to the state of approximately \$3 billion.³⁰ More recently, in 2022, Disney advocated against passing Florida’s “Parental Rights in Education” bill, which limited discussions of sexual orientation and gender identity in schools, dubbed by opponents as the “Don’t Say Gay” bill.³¹ On the other side of the aisle, companies such as Chick-Fil-A have voiced support for the “traditional family,”³² including when the company’s president, Dan Cathy, tweeted that

²⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (ruling that the same-sex couples have the right to marry under the Constitution).

²⁷ *United States v. Windsor*, 570 U.S. 744 (2013) (ruling that the Defense of Marriage Act, which denied federal recognition of same-sex marriages, was unconstitutional).

²⁸ See Zach Wener-Fligner, *Every U.S. company arguing for the Supreme Court to legalize same-sex marriage*, QUARTZ (Mar. 10, 2015), <https://qz.com/359424/every-us-company-arguing-for-the-supreme-court-to-legalize-same-sex-marriage> [<https://perma.cc/ZLV2-GQ56>].

²⁹ Fan, *supra* note 4, at 478 (describing the role of corporations in filing amicus briefs and weighing in on the legal issue of marriage equality).

³⁰ Daniella Silva, *HB2 Repeal: North Carolina Overturns Controversial ‘Bathroom Bill’*, NBC NEWS (Mar. 30, 2017), <https://www.nbcnews.com/news/us-news/hb2-repeal-north-carolina-legislature-votes-overturn-controversial-bathroom-bill-n740546> [<https://perma.cc/35PQ-Z3B3>].

³¹ See Adam B. Vary, *Disney CEO Bob Chapek Apologizes to LGBTQ Employees, Announces Pause for Political Donations in Florida*, VARIETY (Mar. 11, 2022), <https://variety.com/2022/film/news/disney-ceo-bob-chapek-support-lgbtq-1235197938/> [<https://perma.cc/PJ5X-XDS2>]; Breck Dumas, *Disney Employees Are Walking Out to Demand More LGBTQ Support*, FOX BUSINESS (Mar. 22, 2022), <https://www.foxbusiness.com/politics/disney-employees-are-walking-out-to-demand-more-lgbtq-support> [<https://perma.cc/699S-5GM5>].

³² One might characterize this position as anti-LGBTQ+ rights.

it was a “sad day” after the U.S. Supreme Court held that the Defense of Marriage Act was unconstitutional.³³

- **Race and Religion:** Several corporations have spoken out over time on issues effecting race or religion.³⁴ In one example, in the wake of the “Muslim ban” first proposed and instituted in 2017 by then-President Trump, a national outpouring of companies, including Apple, Microsoft, Netflix, Airbnb and Google, signed on to amicus briefs protesting the ban in court and/or issued statements of belonging in opposition to the ban.³⁵ More recently, in the wake of the U.S. Supreme Court’s affirmative action ruling in 2023, Microsoft, Salesforce, and other Fortune 500 companies spoke out in opposition to the ruling.³⁶ On the other side of the aisle, many companies have been outspoken regarding preserving religious freedoms, including most prominently Hobby Lobby,³⁷ and have gained protections from the U.S. Supreme Court for such religious freedom exemptions.³⁸
- **Gun Safety:** Dick’s Sporting Goods, a one-time national leader in gun sales, has led with action on the heels of multiple school shootings, including those in Sandy Hook, Connecticut where 26 teachers and elementary students were killed,³⁹ and in Parkland Florida, where 17 teachers and high school students were killed, by first announcing that it would stop selling AR-15 firearms in its stores,⁴⁰ and later discontinuing the sale of all assault rifles and bump stocks and destroying over \$5 million in military-style,

³³ See Charles Passy, *Deleted Tweet From Chick-fil-A Head Calls Gay Ruling ‘Sad Day’*, WALL ST. J. (June 26, 2013), <https://www.wsj.com/articles/BL-SEB-75441>. Chick-Fil-A has a long history of making such statements and has a history of being shut out of some markets because of its stances, despite its rise to the 3rd largest fast food chain in the country. See Janelle Griffith, *Rider University in N.J. nixes idea for campus Chick-fil-A over its record on LGBTQ issues*, NBC NEWS (Nov. 26, 2018), <https://www.nbcnews.com/news/us-news/rider-university-n-j-nixes-idea-campus-chick-fil-over-n940321> [<https://perma.cc/4AN7-PTS7>].

³⁴ See, e.g., Fan, *supra* note 4, at 459.

³⁵ *Id.* at 460-63 (describing efforts by Corporate America to respond to the ban).

³⁶ McFlaun & Trey Williams, *supra* note 9.

³⁷ *Burwell vs. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (finding that privately held for-profit corporations are exempt from regulations to which its owners religiously object).

³⁸ See *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (ruling that Colorado could not compel the web designer Plaintiff to create work that violates her values).

³⁹ See *Sandy Hook School Shootings Fast Facts*, CNN (May 26, 2022), <https://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts> [<https://perma.cc/4SPP-BMVD>].

⁴⁰ See *id.*

semiautomatic rifles held in its inventory.⁴¹ Despite this, other players in the industry have associated themselves closely with the National Rifle Association (the “NRA”), the premier advocacy group in favor of preserving Second Amendment rights, including Bass Pro Shops and Cabelas, each gaining a place on the NRA’s list of “Industry Allies.”⁴²

Despite businesses’ demonstrated involvement in social policy during the last several decades, recent efforts to penalize or confront businesses about their activism has increased. In one recent example, the State of Florida retaliated against Disney after it opposed Florida’s “Parental Rights in Education” bill,⁴³ by revoking Disney’s Reedy Creek self-governing status, which allowed Disney authority to build its own roads and infrastructure without local municipality approval.⁴⁴ After ensuing

⁴¹ Laura M. Holson, *Dick’s Sporting Goods Destroyed \$5 Million Worth of Guns*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/business/dicks-sporting-goods-destroying-guns-rifles.html> [<https://perma.cc/J6V8-85JB>]. In light of these actions, Dick’s faced little backlash or investor revolt. For instance, a mere 60 Dick’s employees (of approximately 50,000) quit in the immediate timeframe after the announcement of inventory destruction. See Siegel, *supra* note 24. In addition, in March 2019, Dick’s announced that it lost \$150 million in sales, or 1.7% of annual revenue, after stopping the sale of assault rifles and high-capacity magazines, arguably a small price to pay for what Dick’s leadership saw as being the right thing to do. See Eben Novy-Williams, *Restricting Gun Sales Cost Dick’s \$150 Million Last Year*, BLOOMBERG (Mar. 29, 2019), <https://www.bloomberg.com/news/articles/2019-03-29/dick-s-dks-ceo-ed-stack-says-gun-shift-cut-sales-by-150m#xj4y7vzkg> [<https://perma.cc/JER6-VVWD>]. In addition to Dick’s, other companies have announced rules regarding gun safety, including, in response to a shooting in a 2019 shooting in a Walmart store in Texas, many national chains—including Starbucks, Walmart, Kroger, CVS, Walgreens, and Wegmans—have requested that customers not openly carry firearms into their stores. In 2013, Starbucks became one of the first national chains to adopt such a policy. See Michael Corkery, *Retailers Walk Thin Line by Asking, Not Telling, Shoppers Not to Carry Guns*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/business/walmart-guns-open-carry.html?smid=fb-nytimes&smtyp=cu> [<https://perma.cc/ZH9S-P95H>]. In 2019, many other national chains followed, including those mentioned above. In its press release on the topic, Wegman’s noted that the policy was adopted to promote the safety of customers and employees and because the “sight of someone with a gun can be alarming.” See Mahita Gajanan, *U.S. Stores Are Asking Customers To Stop Openly Carrying Weapons—But Can They Actually Enforce a Restriction on Guns?*, TIME (Sept. 6, 2019), <https://time.com/5670809/walmart-kroger-cvs-open-carry-gun-ban/> [<https://perma.cc/FE3P-WS2U>].

⁴² See *Become An Ally*, NAT’L RIFLE ASSOC., <https://nraindustryally.nra.org/become-an-ally/amazing-brands/> (last accessed Feb. 5, 2024) [<https://perma.cc/JE32-GFVC>].

⁴³ Elizabeth Blair, *After protests, Disney CEO speaks out against Florida’s ‘Don’t Say Gay’ Bill*, NAT’L PUB. RADIO, Mar. 10, 2022, <https://www.npr.org/2022/03/08/1085130633/disney-response-florida-bill-dont-say-gay> [<https://perma.cc/YK5R-3PLC>].

⁴⁴ Andrew Atterbury, *DeSantis revokes Disney’s special status after ‘Don’t Say Gay’ opposition*, POLITICO, (Apr. 22, 2022), <https://www.politico.com/news/2022/04/22/desantis-disney-special-status-dont-say-gay-00027302> [<https://perma.cc/LL85-GDJ4>].

lawsuits and maneuvering by both sides, the legal dispute is still ongoing as of the publication of this article, despite Governor Ron DeSantis stating in late 2023 that the feud was over.⁴⁵ Whether the dispute is over or not, the feud increased tensions between the state and one of its largest stakeholders, demonstrating the risks of speaking out and the potential for both public and governmental retaliation.

B. *Acting Out*

Besides speaking out on social topics through press releases or other media, businesses during this time increasingly offered internal policy changes aimed to back up such public pronouncements, including by offering gay employees a gay gross-up,⁴⁶ working to support racial equality, and offering women financial support to retain access to abortion. In this sense, businesses put their money where their mouth was: showing support for employees and stakeholders in order to demonstrate ways in which companies and private law could account for (and resolve) issues with public law.⁴⁷

⁴⁵ In 2023, when campaigning for President, Governor DeSantis noted that Florida had “moved on” from the controversy and had asked a judge to dismiss a suit brought by Disney against the state. See Kelly Garrity, *DeSantis: ‘We’ve basically moved on’ from Disney lawsuit*, POLITICO (Aug. 14, 2023), <https://www.politico.com/news/2023/08/14/desantis-disney-lawsuit-end-00111199>; [<https://perma.cc/Z8VH-C5WM>].

⁴⁶ A “gay gross-up” was a tax benefit that businesses, including large law firms, offered to homosexual employees married under state law who were not afforded tax savings advantages of being able to file jointly with their married spouse because the then-enforced Defense of Marriage Act prohibited the federal tax code from recognizing same-sex unions. See, e.g., David Lat, *Biglaw Perk Watch: The Gay Gross-Up Is All The Rage*, ABOVEHELAW (Aug. 23, 2011), <https://abovethelaw.com/2011/08/biglaw-perk-watch-the-gay-gross-up-is-all-the-rage/>. Under this benefit, same-sex couples were put on equal footing as heterosexual couples as their employer covered the additional monies the employee owed to the Internal Revenue Service on their taxes in the form of a “gross-up,” effectively putting the homosexual married employees in the same position as their heterosexual married counterparts.

⁴⁷ I explore the effectiveness of private law solutions, as compared to public law solutions, in my recent article. See Eckart, *supra* note 4, at 227. In some recent examples, efforts to solve social and other issues through public law has shown its limitations. For example, efforts to mandate Board diversity, including through legislation in California, have been ruled unconstitutional. Sarah Fort et. al., *California Gender Board Diversity Law is Held Unconstitutional*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (June 12, 2022), <https://corpgov.law.harvard.edu/2022/06/12/california-gender-board-diversity-law-is-held-unconstitutional/> [<https://perma.cc/T8A4-VCEV>]. In other examples, severe gridlock and hyper partisanship in Washington, D.C. has prevented much from being accomplished in terms of public law. See generally Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 993–95 (1996) (describing the privatization of functions, traditionally performed by governments, including those related to employee benefits or environmental protection).

Examples of such business-led social activism in the last several years are innumerable, including on the following issues, among others:

- **LGBTQ+ Rights:** Before marriage equality became the law of the land under *Obergefell v. Hodges*,⁴⁸ businesses stepped in where the federal government had a perceived shortcoming. For example, hundreds of companies offered same-sex couples, wed under state law, benefits that were unavailable to them (but available to opposite-sex couples wed under the same state laws) because their marriage was not recognized on a federal level. In 2011, approximately 58% of Fortune 500 companies provided such benefits.⁴⁹
- **Race:** In the wake of #BlackLivesMatter, which gained significant traction after Breonna Taylor and George Floyd were killed in 2020, a variety of companies both spoke out and enacted specific measures regarding race.⁵⁰ For example, Amazon shared an essay on racial trauma with employees and asked them to read it; Walmart, Walgreens and CVS removed Black beauty products from special theft prevention cases; Sephora promised to dedicate 15% of its shelf space to products coming from Black-owned companies; Netflix debuted a new genre dedicated to Black creators and Black history; and several corporations, like Amazon, donated to organizations such as the National Association for the Advancement of Colored People (known more commonly as the NAACP).⁵¹
- **Religion:** Hobby Lobby and other organizations, including Masterpiece Cakeshop and 303 Creative, among others, have helped to bring litigation to preserve religious freedoms based on closely held religious positions of the company founders or

⁴⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (ruling that the same-sex couples have the right to marry under the Constitution).

⁴⁹ Tara Siegel Bernard, *Google to Add Pay to Cover a Tax for Same-Sex Benefits*, N.Y. TIMES (June 30, 2010), <https://www.nytimes.com/2010/07/01/your-money/01benefits.html> [<https://perma.cc/P6DS-RUKV>]. These benefits included a tax-gross up, health care benefits, and similar other benefits, even though the marriage was not recognized under federal law at the time. These benefits were provided in order to “do the right thing” and fill a gap through private law when public law failed to do so.

⁵⁰ See Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 GEO. J. GENDER & L. 449, 462 (2021) (discussing corporate responses to race-related murders in America, including most notably two murders in 2020).

⁵¹ See *id.* at 462-63. In addition, other companies called for plans to hire Black and Latinx workers. See *id.* at 465 (2021).

management. In the decade since the Hobby Lobby decision, proponents of religious freedoms have succeeded in many U.S. Supreme Court cases.⁵²

- **Reproductive Issues:** As recently as 2022, the decision of the U.S. Supreme Court in *Dobbs*⁵³ has galvanized the question of access to abortion and companies have offered a range of supports to women seeking to access such care. Companies like Amazon offered to pay up to \$4,000 in travel expenses annually for non-life-threatening medical treatments, such as abortions;⁵⁴ Airbnb offered to reimburse employees for travel for out-of-state abortions;⁵⁵ Salesforce offered to relocate employees and their families out of states prohibiting abortion;⁵⁶ and Google allowed employees to apply for relocation, without justification, out of states that prohibited abortion.⁵⁷
- **Veteran's Rights:** Black Rifle Coffee, which has marketed itself as a conservative alternative to Starbucks, pledged to hire 10,000 veterans in response to Starbucks pledging to hire 10,000 refugees in 2017.⁵⁸ From 2015 to 2020, Black Rifle Coffee's revenue increased from \$1 million to \$163 million by catering to veterans

⁵² See, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (ruling that Colorado could not compel the web designer Plaintiff to create work that violates her values); Masterpiece Cakeshop, LTD. v. Co. Civil Rights Comm'n, 584 U.S. 617 (2018) (holding that the Colorado Civil Rights Commission violated Cakeshop's free exercise of religion).

⁵³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (finding that a woman's right to an abortion, first recognized in *Roe v. Wade*, was unconstitutional).

⁵⁴ Jeffrey Dastin, *Amazon To Reimburse U.S. Employees Who Travel For Abortions, Other Treatments*, REUTERS (May 2, 2022), <https://www.reuters.com/business/retail-consumer/amazon-reimburse-us-employees-who-travel-treatments-including-abortions-2022-05-02/> [https://perma.cc/66AP-4T94].

⁵⁵ Maggie McGrath & Jena McGregor, *These Are The U.S. Companies Offering Abortion-Related Benefits*, FORBES (May 7, 2022), <https://www.forbes.com/sites/maggiemcgrath/2022/05/07/these-are-the-us-companies-offering-abortion-related-benefits/?sh=4d4d371d76ea> [https://perma.cc/Z4A9-CNRE].

⁵⁶ Jordan Novet, *Salesforce Tells Employees Worried About Abortion Access That It Will Help Them Relocate*, CNBC (May 12, 2022), <https://www.cnbc.com/2022/05/12/salesforce-will-help-employees-relocate-for-abortion-access.html> [https://perma.cc/J24L-CKZE].

⁵⁷ *Id.*

⁵⁸ See Jason Zengerle, *Can the Black Rifle Coffee Company Become the Starbucks of the Right?*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/magazine/black-rifle-coffee-company.html> [https://perma.cc/B6JB-VHKK] (explaining Starbucks pledged this in response to President Trump's executive order banning visas from seven majority Muslim countries).

and Americans “who viewed the military as an aspirational lifestyle.”⁵⁹

Such actions demonstrate the ability of private businesses to step in where public law fails, or is inactive, to address important social issues of the time. For instance, if the benefits offered above were offered more broadly, like health insurance is for many large employers, private law could help transform the way social benefits are offered.⁶⁰ Transactional attorneys are important pieces of making these actions actionable for stakeholders.⁶¹

C. *Something More*

While companies have typically used speaking and acting out to advocate and effectuate social change, this article argues that a third path is an available option. By utilizing narrative and storytelling techniques in private contracts to advocate for social change, parties can make their documents more persuasive, can match public pronouncements with

⁵⁹ See *id.* (showing Black Rifle Coffee’s commitment to veterans). In 2021, Black Rifle Coffee said “more than half of its 550 current employees are veterans, reservists or military spouses.” *Id.*

⁶⁰ Compare, for example, with the rate in which other private benefits are offered to employees, such as health insurance. By way of example, approximately 89% of people work at companies that offer health insurance benefits, which is often considered a “standard” benefit, especially in Corporate America, even before the passage of the Affordable Care Act. GARY CLAXTON ET AL., KAISER FAM. FOUND., EMPLOYER HEALTH BENEFITS: 2022 ANNUAL SURVEY 12 (2022), <https://files.kff.org/attachment/Report-Employer-Health-Benefits-2022-Annual-Survey.pdf>; [https://perma.cc/4RRP-KC5S]. Although no reliable data is generally available regarding what percentage of the workforce has access to benefits like payments for travel to gain abortion access, one could assume it is low and by no means reaches 89%. If such benefits were to become offered more widely, private law could step in and provide such benefits to a large portion of society, even if public law takes no such action to support or mandate such of an expansion of benefits.

⁶¹ Much has been written and discussed about how litigators impact society, including through high-stakes litigation at the Supreme Court of the United States shaping policy on topics like marriage equality, but transactional lawyers can have a positive impact on society as well. Scholars are increasingly writing about how transactional attorneys can also have a positive impact on society, including but not limited to pro bono work, clinical work, and work with historically underrepresented communities. See, e.g., Alina Ball, *Transactional Community Lawyer*, 94 TEMP. L. REV. 397 (2021) (discussing how transactional representation in low income communities can help support small businesses owned by underrepresented entrepreneurs); Laurie Haber, *Promoting Economic Justice through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3 (2007) (describing how transactional community-centered lawyering promotes economic justice); Adam Eckart, *Litigation Bias*, 101 OR. L. REV. 51 (2021) (discussing ways in which transactional attorneys can have a positive effect on society, but which are often unsupported by law schools in the same manner litigation-oriented opportunities are).

action, and can ensure that company ideals are reflected in company agreements.

For various reasons, such a third way can both complement and improve how companies speak out and act out in connection with business-led social activism, even resolving claims of disingenuousness, such as those related to greenwashing,⁶² rainbow-washing,⁶³ or other placation without real change for such constituencies. Doing something more, such as integrating and embedding such advocacy into transactional drafting choices can help make more meaningful changes both inside the corporation but also with other stakeholders that companies seek to engage with through their speaking out.⁶⁴ Second, embedding such advocacy into transactional drafting choices supports an overall consistency in policy and practice—a narrative coherence⁶⁵ which helps make documents more effective.

II. THE STORY OF STORYTELLING

For many, when they think of persuasive legal writing, they think of litigation-specific documents, such as briefs and motions.⁶⁶ Although

⁶² See generally, Cara Beth Musciano, *Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing*, 57 GA. L. REV. 427 (2022) (describing the concept of greenwashing as the practice of misrepresenting a company's sustainability efforts, and how it can be prevented); *FTC Green Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited Jan. 19, 2024) [<https://perma.cc/977Y-R6N3>].

⁶³ See generally, John Rice, *Rainbow-Washing*, 15 NORTHEASTERN U. L. REV. 285 (2023) (describing the concept of rainbow-washing, where companies appear to advocate or placate the LGBTQ+ community). Here, in the case of "rainbow washing," the LGBTQ+ community, often during June's Pride Month, yet companies do not have institutional policies that support the hiring, retention, or provide other supports for LGBTQ+ people. In effect, the talk is cheap. See also Andrew Jennings, *John Rice on Rainbow Washing*, BUS. SCHOLARSHIP PODCAST, August 25, 2022, <https://andrewkjennings.com/2022/08/25/john-rice-on-rainbow-washing/> [<https://perma.cc/BFR5-LEGF>].

⁶⁴ See generally Bunting, *supra* note 18, 245 (arguing that other changes within a corporation can also help create meaningful internal change within a corporation). Narrative and storytelling in agreements could be one additional way to effectuate such meaningful internal change within a corporation such that values and advocacy would be baked into agreements of all kinds between the company and its stakeholders (e.g., employees, vendors, customers).

⁶⁵ See *infra*, Section II(A), describing narrative coherence.

⁶⁶ Some legal scholarship has addressed the question of why litigation work often gets more attention than transactional work. See, e.g., Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills In the First Year Curriculum*, 41 OHIO N. U. L. REV. 61, 72-73 (2014) (describing litigation-focused popular culture references to lawyers); Tina Stark, *My Fantasy Curriculum and Other Almost Random Points* (Emory L. and Econ.

these documents can be persuasive, and are typically the focus of legal pedagogy related to teaching persuasive writing, other types of legal documents can be persuasive as well. Transactional legal documents and negotiated agreements—contracts, wills, prenuptial agreements, merger agreements, and supply agreements, to name just a few—can be persuasive too.⁶⁷

A. *Narrative and Storytelling in Legal Disciplines*

Narrative theory emerged in various aspects of legal writing and thought in the late 1980s, gaining momentum in the 1990s, as a means of creating meaning in human communication, often with a focus on storytelling.⁶⁸ In the legal sphere,⁶⁹ narrative theory was first applied

Research Paper, No. 08-29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158506 (describing how few popular culture references, including few television shows, movies, or other depictions of lawyers, are transactional-focused); Nancy L. Schultz, *What Do Lawyers Really Do?*, 50 CAP. U. L. REV. 1, 23 (2022) (explaining importance of negotiating within context of clients' stories).

⁶⁷ Some critics argue that narrative and storytelling plays no significant role in corporate law or transactions. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007). Kuykendall argues that 1) companies have been uninterested in narrative, 2) materials in corporate law do not use narrative technique, 3) legal scholarship on corporate law focuses more on underlying facts about business and has little attempt to address narrative, and 4) corporations have their own "alien" narrative that renders "human narrative" irrelevant. *Id.* at 540-41. I find these arguments far from compelling. Although Kuykendall's first, second and third points may be historically true, this article and other scholarship cited herein prove that the assertion in the third point is no longer true. Furthermore, this article and other scholarship cited herein demonstrate that the second point should change. Finally, with respect to the fourth point, corporations are not "alien," in fact, they are conduits for human actions, are led by humans, and are judged by third-party humans (when a contract is at dispute). Accordingly, human narratives are entirely appropriate.

⁶⁸ Johnson, *supra* note 11, at 845 (describing narrative theory and its origins and growing acceptance in recent years in the legal context). See WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD PHILOSOPHY OF REASON, VALUE AND ACTION 85 (1987). Narrative theory is drawn from a number of other fields, such as literature, cognitive psychology, and neuroscience. Chesler & Sneddon, *supra* note 12, at 265. Cognitive psychologists have determined that storytelling helps human beings understand other people and make sense of the world. See Kenneth D. Chestek, *The Life of the Law Has Not Been Logic: It Has Been Story*, 1 SAVANNAH L. REV. 21, 26 (2014); see also Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L. J. 573, 579 (2018) (explaining how humans use "schema" functions—"events or series of events that we've seen, heard, or experienced before"—to help process information and predict what should happen next).

⁶⁹ Outside the legal sphere, narrative theory is a powerful method for conveying information and is used in popular culture, media, and a variety of other disciplines. Chesler & Sneddon, *supra* note 12, at 264-65; see also George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L. J. 683, 683 (1999) (explaining narrative in the law has been used primarily by "critical theorists, including critical race theorists, Latino legal theorists, Asian-American legal theorists, feminist

practically in litigation contexts in a range of legal communications and used for over three decades in a variety of litigation-based legal work, including in pleadings, briefs, fact sections of legal memoranda, oral arguments, victim impact statements, and judicial opinions.⁷⁰ In these documents, and others, narrative seeks to persuade the audience to take an action, experience a change in attitude or belief, or consider how such belief or attitude will have legal significance.⁷¹

Legal narrative in these litigation (and other) contexts often revolves around three aspects of narrative theory, including narrative coherence, narrative correspondence, and narrative fidelity.⁷² First, narrative coherence, essential in legal storytelling, is the concept of ensuring a complete and coherent legal story or the degree to which the narrative “makes sense” to the audience: ensuring a connection of facts to law and ensuring a cohesive view of the legal problem, increasing the likelihood

theorists, and gay/lesbian legal theorists . . . as a way to introduce a perspective that is not represented in mainstream legal discourse”).

⁷⁰ See Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 LEGAL COMM. & RHETORIC 151, 161 (2019) (explaining how using narrative techniques can influence emotions of others and influence decisions and opinions); Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC 99, 134 (2012) (addressing how different people, i.e. judges, respond differently to different stimuli, so narrative decision-making needs to be done carefully); Kenneth Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 130-131 (2008) (arguing persuasive appellate briefs should weave narrative reasoning and logical argument); see, e.g., Johnson, *supra* note 11, at 845; Chesler & Sneddon, *supra* note 12, at 266-68; Although this paper touches briefly on the some important aspects of narrative theory, this paper does not attempt to trace the history or importance of narrative theory or storytelling techniques in legal communication throughout history since other scholarship has clearly articulated such information over time. For more information on the history of the legal narrative movement, of narrative theory or of storytelling techniques, other articles are available. See Johnson, *supra* note 11, at 845; Chesler & Sneddon, *supra* note 12, at 266-68; Chesler, *supra* note 12, at 247; Chesler & Sneddon, *supra* note 12, at 222.

⁷¹ Susan M. Chesler & Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, NEVADA L.J. 652, 658 (2021) (describing the goals of narrative theory, including for both transactional and litigation contexts). One study showed “that narratively written briefs persuade judges more than those written with a purely logical organization.” See Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMM. & RHETORIC 27, 30 (2021); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study on the Power of Story*, 7 J. ALWD 1, 32 (2008).

⁷² Johnson, *supra* note 11, at 845 (describing components and the aspects of narrative theory); J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM. & RHETORIC 67, 71 (2013) (explaining narrative coherence increases likelihood acceptance of story, and make it more persuasive, independent of underlying facts).

of reaching the desired result.⁷³ Second, narrative correspondence involves aligning the reader's existing expectations with the narrative presented or the plausibility of the narrative, which is essential in persuasion and in making the legal analysis more compelling—for the reader or audience is only persuaded when they agree with or sympathize with the narrative presented.⁷⁴ Finally, narrative fidelity, vital in legal advocacy, involves the truthfulness of the narrative, ensuring it aligns with the audiences' social reality and, similarity, to what the audience knows about the outside world, relying heavily on the audience's personal experiences and not just their understanding of what could happen.⁷⁵

Despite nearly four decades of recognizing the benefits of narrative theory and storytelling techniques in litigation and other contexts,⁷⁶ use of narrative and storytelling techniques in transactional documents has long been limited and overlooked due to a perceived inapplicability, largely because transactional work was perceived to be more “objective” or because the power of such techniques were considered inapplicable to transactional work.⁷⁷ Recent scholarship, however, has acknowledged the benefit of using narrative and storytelling techniques in transactional practice, including the benefits it brings to negotiation, drafting, and enforceability of transactional documents.⁷⁸

⁷³ Johnson, *supra* note 11, at 863-64; Chesler & Sneddon, *supra* note 71, at 664; see Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. KAN. L. REV. 251, 259 (explaining legal storytelling “goes beyond the identification and application of legal rules . . . [and] plac[es] legal rules in a narrative framework to solve problems”).

⁷⁴ Johnson, *supra* note 11, at 864-65; Chesler & Sneddon, *supra* note 71, at 664.

⁷⁵ Johnson, *supra* note 11, at 866-67; Chesler & Sneddon, *supra* note 71, at 664.

⁷⁶ In contexts including but not limited to family law, for example, storytelling techniques around developing “social stories” have been used in order to develop clarity in writing and reader comprehension. Yeal Cannon et. al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L. J. 403 (2013). Although there are a variety of ways to incorporate social stories into legal documents, some in the family law context have used social stories in support agreements to help individuals understand the context of the decisions they are making and the examples through which legal provisions bind. *Id.*

⁷⁷ Johnson, *supra* note 11, at 866-67. There are a variety of different theories as to why narrative theory and storytelling techniques have been dismissed in transactional work, including because transactional work has traditionally been considered objective and narrative and storytelling have historically been considered persuasive. *Id.*

⁷⁸ Johnson, *supra* note 11, at 866-67; Chesler & Sneddon, *supra* note 12, at 264; Susan M. Chesler & Karen J. Sneddon, *Telling Tales: The Transactional Lawyer as Storyteller*, 15 LEGAL COMM. & Rhetoric 119 (2018); Susan Chesler and Karen Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, NEV. L.J. 652 (2021); Chesler, *supra* note 12, at 247; Chesler & Sneddon, *supra* note 12, at 222; see Susan M. Chesler & Karen J. Sneddon, *Happily Ever After: Fostering the Role of the Transactional Lawyer as Storyteller*, 20 TENN. J. BUS. L. 491, 494

B. Narrative and Storytelling in Transactional Legal Work

Narrative and storytelling have long been used in litigation to paint pictures of clients and adversaries.⁷⁹ In criminal cases, for example, defense attorneys focus on their clients' redeeming qualities rather than their repugnant qualities and stories of relationships, motives, and ambitions dictate the direction of the court and the jury, often with a theme, story, or personal narrative of a defendant.⁸⁰

In the transactional context, however, use of narrative and storytelling has long been underutilized, at least until recent history.⁸¹ Why? It may simply be that fear of using narrative and storytelling depart from the transactional attorney's role as "scribe" and wade into the realm of fiction,⁸² as transactional attorneys seek to avoid cluttering transactional documents with inaccurate or superfluous information.⁸³ Or, maybe transactional attorneys just were not aware of the benefits of these tools.⁸⁴ In either respect, not until recent history have transactional attorneys considered the use of narrative and storytelling techniques in agreements.

1. Why narrative and storytelling should be used

Like litigated cases, which take place in a swirl of human emotions, differing priorities, and decisions that shape the remainder of individuals'

(2018) (explaining how transactional documents trend towards using narrative techniques to make them cohesive like a storyteller telling a story).

⁷⁹ See, e.g., Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3 (2009); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001).

⁸⁰ A variety of examples from popular culture and litigation folklore help support this position. After all, an entire series on Netflix has been dedicated to how narratives, including those playing out in the media, influenced high-profile crimes of recent history. TRIAL BY MEDIA: THE TRUTH BEHIND THE CRIMES (Netflix 2020).

⁸¹ Johnson, *supra* note 11, at 866-67.

⁸² Although the role of the transactional attorney may have originally been to serve as the "scribe" or the person simply memorializing the business agreements between parties, scholars have been thinking about ways in which transactional attorneys can draft with narrative—even if they didn't call it that at the time—for nearly 30 years. See, e.g., Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RIGHTS L. REP. 147 (1996) (describing how transactional attorneys representing women in premarital agreements can making drafting choices in prenuptial agreements that are woman-centered and are likely to be more equitable to both parties); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L. J. 355 (2012) (describing how wills can be considered personal narratives that reflect an individuals' values and self-perception).

⁸³ Chesler & Sneddon, *supra* note 12, at 266-68 (describing reasons why transactional attorneys have historically been hesitant to use narrative and storytelling techniques in transactional documents).

⁸⁴ *Id.*

lives, transactions likewise have complex human emotions at play and do not take place in a vacuum.⁸⁵ Just like the litigated case that plays out at trial, employing techniques related to narrative and storytelling help place a transaction in the context of the story of the individuals and businesses around it; a context that can benefit aspects of that same transaction, including the purpose, strength, and enforceability of the agreement itself.⁸⁶

How and why are narrative and storytelling techniques used in transactional practice? Scholars suggest a variety of reasons and benefits related to integrating storytelling and narrative techniques into transactional documents. These reasons and benefits are many.⁸⁷

First, transactional drafters using narrative and storytelling techniques in drafting a transactional document often have a better understanding of their client's goals, motivations, and desires when compared to those that do not.⁸⁸ For example, when drafting a section of an agreement with narrative and storytelling techniques, such as the recitals, an attorney may

⁸⁵ *Id.* at 264. After all, transactions are led not by businesses themselves, but by the individuals who operate these businesses. Accordingly, such individuals have their own beliefs, convictions, and predispositions to a social issues. These beliefs, convictions, and predispositions, therefore, affect the priorities of the businesses that these individuals operate. *See* Susan M. Chesler & Karen J. Sneddon, *supra* note 78, at 134. Not only are transactional documents outlining the terms of the agreement, but they inherently create a personal relationship between the parties that will have an impact on each.

⁸⁶ Chesler & Sneddon, *supra* note 12, at 263. As discussed later in this section, there are a variety of benefits to including narrative and storytelling techniques in the drafting of a transactional document, including that the parties may be more invested in the agreement when narrative and storytelling techniques are included. *See* Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH. L. REV. 1287, 1287-88 (2013) (outlining important of context). Contextualizing the facts of a case within contract law helps to understand the “particular cultural, economic, and social era” that may have an influence on parties’ conduct. *See id.* at 1288.

⁸⁷ Scholarship is varied and somewhat diverse in the way in which it describes the benefits of narrative and storytelling in transactional drafting. This section tries to harmonize and summarize the variety of benefits, but may use some different language than the scholarship cited here.

⁸⁸ Johnson, *supra* note 11, at 845 (describing the benefits of understanding the client’s goals when drafting a transactional agreement); *see also* Foley & Robbins, *supra* note 79, at 470 (explaining how focusing on client’s goals and needs helps make clients more likable in an interaction between parties or to a judge). Using the recitals section of an agreement, parties can describe the background or history of their organization (including founding principles, initial foci, or humble beginnings), core beliefs, or other key information that provides context about the business and its goals that may help other parties better understand the organizations party to the agreement and the motivations they may have in executing the agreement. Parties can also use narrative and storytelling techniques in substantive provisions of an agreement to help facilitate conveyance of core beliefs and context that help promote social positions. *See infra* Section III.

learn of its client's desires to pay a living wage⁸⁹ to employees (which could affect portions of an employment agreement, such as the compensation section), or to ensure stability in the organization (which could affect endgame provisions of an employment agreement, including the predetermined choice of a successor to a high-level executive).

Second, transactional drafters can use narrative and storytelling techniques in a persuasive way to facilitate the transacting parties' performance, ultimately helping to achieve the client's goals.⁹⁰ To do this, transactional drafters use persuasive techniques throughout the agreement to convince the counterparty to perform according to the agreement⁹¹ (e.g., describing why the agreement was entered into by the parties, or describing the harm that would result to one party if the other breached). And transactional drafters can use narrative and storytelling techniques in a persuasive way to increase rapport between the parties and establish buy-in from both parties when negotiating and executing the agreement⁹² (e.g., describing important contributions of the selling party, identifying important and key personnel from the selling party critical to the company's ongoing success, or describing important elements of the selling party or their business as "critical" or "essential" to the resulting enterprise).

⁸⁹ A living wage is different than the minimum wage, set by each state, and is a wage that supports the real cost of living. Various organizations are trying to advocate for a living wage, including Living Wage for US, Inc. See Living Wage for Us2024; <https://livingwageforum.org/>; [<https://perma.cc/JW2M-HU3V>].

⁹⁰ Chesler & Sneddon, *supra* note 71, at 652. By helping the counterparty understand 1) why the parties may have initially requested a provision or why that provision is important to them, and 2) the negative impacts that might occur should one party breach the agreement, both parties are more likely to perform their obligations under the agreement, making the likelihood of performance greater. See Carl Briggs, *Ask Less, Get More: Research Shows Simpler Contracts Fuel Employee Motivation*, UNIV OF V.A. (July 17, 2017), <https://batten.virginia.edu/ask-less-get-more-research-shows-simpler-contracts-fuel-employee-motivation> [<https://perma.cc/66X2-V822>] (looking at how less constraining contracts led to more cooperation, autonomy, and trust between parties). Understanding the personalities of the parties involved can help in coming to an agreement that will make the parties feel more satisfied in the transaction and ideally lead to more profitable outcomes. See *id.*

⁹¹ Chesler & Sneddon, *supra* note 71, at 652; see also Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor & Narrative*, 50 WASHBURN L. J. 275, 281 (2011) (considering the interplay of stories within culture that help construct social norms).

⁹² Chesler & Sneddon, *supra* note 71, at 652. Authors have also addressed this point as a form of "audience engagement." Chesler & Sneddon, *supra* note 12, at 225. Narrative techniques can help ensure that audiences engage with the drafting and comprehension of the document, ensuring that the audience will read the document, recall the terms included in the document, and act in accordance with the commitments made by the parties in the agreement. *Id.*

Third, transactional drafters can use narrative and storytelling techniques to influence parties outside the transaction.⁹³ For example, drafters may wish to use narrative and storytelling techniques in drafting documents that may eventually be subject to a dispute before a third-party decision-maker, such as a judge or an arbitrator.⁹⁴ There, the parties typically want the third-party decision-maker to interpret the agreement as intended. In planning for such a scenario, transactional drafters may wish to use narrative or storytelling in the recitals or agreement introduction to gain sympathy, appreciation, or respect from the third-party decision-maker⁹⁵ (e.g., describing the companies not as “Company A” and “Company B” but akin to “a global conglomerate manufacturing company” or as a “fourth generation family-owned company” to set the stage of the parties’ bargaining power and position in the transaction) or use narrative or storytelling in operative sections of an agreement to help the third-party decision-maker understand the implications of operative decisions (e.g., using representations and warranties to describe an impact that a breached provision might have on the other party). And transactional drafters can employ narrative techniques in the agreement’s recitals or agreement introduction to describe the intent of the parties when they signed the agreement, helpfully assisting a third party decision-maker in understanding the intent and rationales behind the transaction and interpreting the legal issue in dispute, given the original intent of the

⁹³ Chesler & Sneddon, *supra* note 71, at 655. When agreements are disputed, courts or arbitrators often decide which interpretation of a provision will prevail. As a result, when narrative and storytelling are included in the agreement, a third party arbiter typically has a better understanding of the initial intentions of the parties and therefore can better understand the context of the events surrounding the signing of the agreement. Accordingly, the third party arbiter is likely able to make better decisions and understandings about which interpretation of a provision should prevail when they have a better understanding of the context. See Jeanne M. Kaiser, *When Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 J. LEGAL WRITING INST. 163, 177 (2010) (suggesting lawyers look for middle ground between straight logic and facts and forcing client’s goals into an established archetype, and figuring out how to mesh these two techniques to reach goals of client).

⁹⁴ By considering the court or a third-party arbiter as a possible audience during the drafting phase of a contract, drafters may make different decisions about word choice and may consider how the terms of an agreement may be interpreted by such a decision-maker.

⁹⁵ Chesler & Sneddon, *supra* note 71, at 655. By helping third-party decision-makers better understand the context and goals of the parties at the time of signing the agreement, the decision-makers can better understand the motivations of the parties, the rationale behind the words chosen in the agreement, and if the dispute is with respect to a question not addressed in the agreement, the context in which the unwritten provision should be decided.

agreement⁹⁶ (e.g., in a will context, this may be accomplished by explaining that a will is not a document used to divide specific property but instead a recognition of the testator's wishes for fairness and equity among family members, guiding an executor beyond the specific provisions in a will).⁹⁷

Finally, using narrative and storytelling techniques in a transactional agreement can assist in creating a more complete and holistic transactional document that governs the deal.⁹⁸ Simply put, when the transactional drafter considers the motivations and desires of a client and incorporates such motivations and desires into both the narrative within an agreement and in the substantive provisions of the agreement, the agreement itself is better—it is more consistent, complete, and true to the parties' desires.⁹⁹

2. How narrative and storytelling can be used¹⁰⁰

While narrative and storytelling techniques are often placed into one large bucket,¹⁰¹ the techniques related to narrative and storytelling that

⁹⁶ *Id.*; see Ken Broda-Bahm, *Tell a Story with Your Transactional Documents*, JDSUPRA (Apr. 27, 2021), <https://www.jdsupra.com/legalnews/tell-a-story-with-your-transactional-4463833/> [<https://perma.cc/F9VK-6FN8>] (looking at a contract as a “time capsule of captured intention”).

⁹⁷ Scholars have written about how narrative in corporate law, including in Biblical contexts, could be used to inform the interpretation of a corporate law issue by a judge. See, e.g., Lyman P.Q. Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847 (2009).

⁹⁸ See Johnson, *supra* note 11, at 845 (2017); After all, a complete and consistent document, tied together through narrative and storytelling techniques, produces a better transactional agreement; but see Tal Kastner, *How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67,74 (2014) (addressing issues with narrative techniques when one party is more sophisticated than other). There is an importance in ensuring that when narrative techniques are used, that those becoming bound by law understand what they are agreeing to. See *id.*

⁹⁹ This concept aligns with the concept of narrative coherence. This is important in aligning a company's documents and policies with the outward-facing statements and actions a corporation makes on social issues in the public sphere.

¹⁰⁰ Although this article focuses on how narrative and storytelling techniques should be used in practice, it does not discuss how or why these techniques should be taught in law school. While other scholars have addressed such topics, see K. Jane Childs, *(Re)Counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum Note*, 29 B.U. PUB. INT. L. J. 315 (2019), and I agree with such calls, this article focuses instead on the practical application of narrative and storytelling techniques in transactional documents.

¹⁰¹ And for the purposes of this article, I discuss all of the different techniques of narrative and storytelling collectively rather than in their individual parts.

transactional drafters may employ can vary.¹⁰² These techniques can include, but are not limited to using stock stories;¹⁰³ plot and narrative;¹⁰⁴

¹⁰² Different scholars have emphasized different aspects, theories, and techniques related to narrative and storytelling, techniques proposed by Walter Fisher in 1987, *see* WALTER FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION* (1987), to the present Applied Legal Storytelling movement, *see* Johnson, *supra* note 11, at 851. Fisher's generation theory, which identified how narrative theory could be used in transactional work, includes three specific elements: narrative coherence (whether a story is complete, and coherence informs its persuasiveness and credibility); narrative correspondence (how well the story matches up with what the listener knows about the world); and narrative fidelity (whether the story is truthful, as viewed through the lens of the community of the listener). *Id.* at 863-869. Others have drawn Biblical analogies, relying on the Bible's influence as a piece of literature, to identify it as a source of stock stories that could inform the interpretation of a judge, including in the discussion of fiduciary duties in the corporate law context. *See generally* Lyman P.Q. Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847 (2009). Although these theories are not the focus of this paper, they are worth recognizing here as foundational elements in the use of narrative and storytelling techniques in transactional documents. That said, not all scholars have recognized the importance of utilizing narrative and storytelling in transactional documents; some scholars have argued that narrative has only a marginal role in corporate law because companies have little experience in using narrative themes, that legal materials in corporate law do not use narrative techniques, that legal scholarship on corporate items tends to focus more on underlying cultural facts about business rather than narrative theory, and that corporations have their own "alien" narratives rather than irrelevant human narratives. *See* Kuykendall, *supra* note 67, at 537. I find these arguments both untrue and unpersuasive.

¹⁰³ Stock stories include prototype or template stories that can be used to create more personalized stories that associate players or circumstances related to an agreement to preconceived notions or attitudes related to stock stories that may be known in common society and can be used to reflect a more positive narrative in order to counteract stereotypes, neutralize negative connotations, make documents more readable and accessible to the reader, and humanize the documents in order to promote engagement, comprehension and enforceability. Chesler & Sneddon, *supra* note 12, at 269-77; *see also* Susan M. Chesler & Karen J. Sneddon, *Tales From a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237, 238-39 (2017) (defining stock stories as regularly understood cultural templates with predictable outcomes).

¹⁰⁴ Plot and narrative techniques can be employed to form a storyline of events that helps develop "alternative plotlines" to holistically foresee potential future events and to contract for such events to address those possible storylines. Chesler & Sneddon, *supra* note 12, at 276.

character development;¹⁰⁵ point of view perspective;¹⁰⁶ setting and narrative time;¹⁰⁷ and themes and motifs.¹⁰⁸

Scholars have addressed several ways that storytelling and narrative can be employed in negotiated agreements.¹⁰⁹ Although a wide range of techniques can be used in transactional documents, a variety of these techniques may lend themselves to greater adoption than others.¹¹⁰ First, plot and narrative can help shape the storyline of how a transaction came to be, whether it solves issues or concerns that a party may have been grappling with. Second, character development can tell the stories of the characters in the agreement—from the large corporation with advanced therapies that cure a disease to a century-old family-owned business built on the back of a great-grandfather—or to help demonstrate the intentions and motivations the parties have for entering the agreement. Third, setting and narrative time can demonstrate why the agreement took place in the context of the timeframe around it—perhaps a dictated necessity or marked with opportunity based on external forces such as a public health crisis, the political environment, good (or bad) economic conditions, or a groundswell of public interest. Finally, themes and motifs can also be

¹⁰⁵ Character development can be employed to strengthen descriptive information about the people, entities and ideas that participate in the agreement and can be developed by discussing motive, intent or other information that may humanize the parties or their decision-making. Chesler & Sneddon, *supra* note 12, at 280.

¹⁰⁶ Point of view perspective is “the perspective from which the audience experiences the narrative,” shaping how the audience understands the story and influences what they will remember. *Id.* at 284. See also Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV 833, 914-15 (2010) (addressing how stories may not always be complete and lawyers and judges must have narrative awareness to consider any omissions).

¹⁰⁷ Setting and narrative time refers to the environment of the story, the temporal sequence of events, and the “cultural, history, and chronological factors surrounding events of the narrative” designed to show context and detail and help ground the transaction “in a realistic series of events.” Chesler & Sneddon, *supra* note 12, at 287-90.

¹⁰⁸ Themes, the central meaning of a narrative, and motifs, recurring phrases, ideas or images that help explain a theme, deepen the meaning of the story being told, which helps in interpretation of the document. *Id.* at 290. Themes could be used in order to portray goals or visions of a company, and motifs, including use of repeated words or phrases, can be used to help bring that vision to life through examples or common language.

¹⁰⁹ See, e.g., Deborah Gordon, *Mor(t)ality & Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J. L. & HUMAN. 265 (2016) (describing how inheritance texts can use narratives); Guggenheimer, *supra* note 82, 147 (describing drafting choices in prenuptial agreements can be more woman-centered); Sneddon, *supra* note 82, at 355 (describing the use of personal narratives in wills).

¹¹⁰ Not to suggest that other types of techniques cannot or should not be used in transactional documents, but I take the view that some are more likely to be used than others. This article argues that some of these techniques are more likely to be used than others. Future scholarship may address other ways in which narrative and storytelling techniques can be utilized in transactional drafting.

helpful techniques for transactional drafters in creating an underlying principle or central meaning to a narrative, which can demonstrate reasons for a particular decision, reinforce goals or values of the organization, or provide rationales for provisions placed in the agreement, such as the phrasing of a company as “environmentally friendly” in describing a company’s efforts to advance ecological preservation ideals.¹¹¹

While using narrative and storytelling techniques in agreements has several benefits, one must ensure that each piece of the agreement is ethically sound and that aspects of the narrative and story in the agreement contribute to the overall goal of building mutually beneficial and ethically sound transactions.¹¹² In this sense, transactional attorneys should ensure that developing their client’s narrative and the storytelling included in the agreement align with the document’s overall narrative and that the techniques “ring true” to both parties involved in the transaction.¹¹³ Attorneys must ensure that they do not engage in overzealous advocacy, risking misusing narrative and storytelling techniques, and that they carefully navigate ethical boundaries in using these techniques, while maintaining ethical standards in transactional lawyering.¹¹⁴

3. Examples of narrative and storytelling

Narrative and storytelling can be employed in transactional documents both in background portions of a negotiated agreement, such as in the recitals section that introduces the reader to the parties and memorializes important information about the parties, and in operative sections of an agreement that contain binding agreed-upon language between the parties reflecting their agreement.¹¹⁵

¹¹¹ With respect to family law agreements, such as wills, trusts, employment contracts, and premarital contracts, narrative and storytelling techniques such as character development, plot and narrative, stock stories and themes and motifs can be utilized, among others. *See* Chesler & Sneddon, *supra* note 12, at 284 (describing how a variety of agreements, such as wills, trust agreements, employment contracts, premarital agreements and advance directors use techniques such as stock characters, stock plots, stock situations and stock inevitable outcomes to employ narrative and storytelling techniques in such documents).

¹¹² Johnson, *supra* note 11, at 870-71 (describing the applicability of narrative approach to improving transactional outcomes and the ethical considerations and boundaries inherent in this portion of the practice).

¹¹³ *Id.* at 871.

¹¹⁴ *Id.* at 878. Although ethical considerations are important when employing narrative and storytelling techniques, this article does not attempt to address these questions or considerations. Other articles are better sources for considerations related to ethical issues in this area. *See, e.g., id.* (describing ethical duties with respect to drafting transactional documents with narrative and storytelling techniques).

¹¹⁵ Chesler & Sneddon, *supra* note 71, at 658. The above-cited article has a variety of examples of how narrative and storytelling can be used in transactional documents. Some

In the recitals section, provisions drafted with narrative and storytelling techniques allow the parties to better understand why the agreement was entered into, why the specific terms of the agreement were included (as opposed to others), and what motivations were behind the overall purpose of the agreement.¹¹⁶ This information also helps third-party decision-makers ensure that any decisions or interpretations made after the signing of the agreement follow the parties' overall intent.¹¹⁷

In a premarital agreement, use of narrative and storytelling in the recitals section can explain the parties' specific intentions that the parties are equal partners in the marriage and are both invested in its success.¹¹⁸ In an employment agreement, use of narrative and storytelling in the recitals section can use descriptive recitals to help explain the origin story of an employer or provide background on the nature of a business, such as how the business may be specialized and significant training and resources are invested in each employee, explaining the background and need to have restrictive covenants on the employee after their departure from the business.¹¹⁹

In the operative sections of an agreement, provisions drafted with narrative and storytelling techniques can make the document more humanizing and increase the sense of ownership and duty to uphold provisions in the agreement.¹²⁰ This information helps parties understand the ramifications of decisions to disobey portions of the agreement and may help facilitate performance of the agreement by the parties.¹²¹ Examples could include, but are not limited to, having a seller provide a representation regarding why time is of the essence in an agreement, which

examples are provided in this article, but for more information and examples, readers should review the above-cited article.

¹¹⁶ *Id.* After all, ambiguity and vagueness are often reasons for disputing or litigation an agreement. This suggestion leads to a more specific definition.

¹¹⁷ *Id.* After all, understanding the parties' initial intentions behind the agreement can be important to interpreting the agreement's words. Additionally, including the parties' intent in the document can lead to more efficient adjudication, since an in-depth examination of the parties' intent with outside information would be unnecessary because the intent of the parties is instead clearly identified within the four corners of the executed agreement.

¹¹⁸ *Id.* at 673. The specific language proposed in the aforementioned article says "In anticipation of the upcoming marriage between the two parties, the parties wish to clarify their interests in property acquired before the marriage and their interests in property acquired during the marriage. This clarification is a reflection of each party's family relationships and the accumulation of significant retirement benefits. This clarification is not in anticipation of a potential dissolution of the marriage. The parties intend to be life-long partners and appreciate the benefit to plan for their shared life." *Id.*

¹¹⁹ *Id.* at 673. Such a provision can help support the need for a restrictive covenant, and if then litigated later, the judge will be able to understand the modifications for such a covenant (and, at least potentially, more likely to uphold the covenant).

¹²⁰ *Id.* at 677-78.

¹²¹ *Id.* at 678.

might make the buyer better understand why deadlines should not be missed. Such narrative and storytelling techniques do not only demonstrate to the parties why the agreement's provisions should be followed, in a case of a breach of an agreement, such provisions can also help support claims that one party may have against another, including for the breach or reliance on the terms of the agreement.

In a trust agreement, use of narrative techniques, including in defining terms such as “descendants,” can be customized to reflect a more specific definition, including whether adopted or posthumously conceived descendants are to be included as beneficiaries, and can ensure that the parties have a better understanding of the intent of the grantor.¹²² In a real estate purchase and sale agreement, drafters can use narrative and storytelling techniques to help ensure that parties perform their obligations with close attention to deadlines in line with a typical “time is of the essence” clause, by also including a representation that the seller is an elderly couple on a fixed income and delays to closing would cause them to incur additional expenses, which would be personally devastating.¹²³

III. UTILIZING CONTRACTUAL LANGUAGE TO PROMOTE SOCIAL CHANGE

Combining two recent movements in the transactional legal realm, transactional attorneys and businesses must think about how the ideas of narrative and storytelling and business-led social activism can converge. For one, can recent ideas of employing narrative and storytelling techniques in transactional documents inform and advance goals of business-led social activism? And can social activists use narrative and storytelling techniques to advance their goals? The answer to each question is a simple “yes.”

A. *Contracts of Today*

Although scholarship regarding utilizing contractual language to promote social change may be relatively new, provisions in agreements sought to inform private law regarding such provisions is not new.¹²⁴ In

¹²² *Id.* at 658.

¹²³ *Id.* The example in the text relates to a “time is of the essence” clause and the inclusion of a representation, but instead of in a house purchase agreement from an elderly couple it discusses a purchase agreement from a small family-owned business. I revised the facts slightly to provide a different context for the reader, but the idea is the same.

¹²⁴ The concept of Contract Social Responsible (“KSR”) describes the attempt to harness the ability to use enforceable contract terms to address social, economic and environmental problems. See Lipson, *supra* note 7, at 1116. This area differs from what is described in this article, as KSR does not seem to place any importance on narrative or storytelling

fact, nearly sixty years ago the Beatles 1965 performance agreement provided that the “Fab Four” would “not be required to perform in front of a segregated audience.”¹²⁵ In more contemporary examples, General Motors’ template supply agreement forbids “child, slave, prisoner[,] or any other form of forced or involuntary labor,” which is commonplace in international manufacturing agreements, and Hewlett Packard’s supplier terms and conditions include “elaborate environmental compliance standards.”¹²⁶

By combining such practices with narrative and storytelling techniques, transactional drafters can draft a more cohesive and effective agreement. By employing narrative and storytelling techniques throughout the agreement, combined with substantive contractual provisions, parties can shape the narrative around important topics by framing the agreement as a way to advance social issues, by demonstrating the commitment of the parties, and by influencing counterparties and potential third-party arbiters to devote resources to commitments outside those agreed upon in the contract.¹²⁷

B. Utilizing Contractual Language to Promote Social Change

Scholars have detailed how individual choices in private law drafting in the aggregate can shape social change.¹²⁸ For example, when many drafters of individual agreements—which are typically unrelated to each other—use similar language, adopt similar concepts, or apply similar standards, such choices can effectively become standards in such

techniques. By combining these areas, drafting transactional documents with narrative, storytelling, and KSR techniques and principles makes for a more well-rounded and complete transactional document. KSR ideas and concepts are not without criticism. For one, because breaching certain terms may not create clear-cut damages, such provisions may be un- or under-enforceable. *Id.* at 1130-31. Likewise, KSR compliance can be difficult, depending on the circumstances of the contracting parties or the relative bargaining power of the parties. *Id.*

¹²⁵ *Id.* at 1111. This serves as just one example, but is a good example of how private law between two parties can have an effect on society overall, especially in circumstances like this where parties to the agreement seek to promote social change through private law when public law is unresponsive to such social change.

¹²⁶ *Id.* Like the Beatles example, above, such actions noted here also seek to promote social change on society in general, expanding beyond the contracting parties.

¹²⁷ See Akshaya Kamalnath, *supra* note 50, at 449 (discussing how businesses have historically been reactionary to social issues and instead can take approaches to be more proactive and think holistically about how to advance social goals).

¹²⁸ See, e.g., Susan Chesler, *Using Private Law as a Vehicle for Social Change: A Feminist Approach*, 15 L. J. FOR SOC. JUST. 138 (2022) (discussing how choices made by individual drafters on agreements that typically only affect the signing parties can have broader effect on industries or the general public). This “Aggregate Effect” is discussed later in Section II(B)(2).

negotiated agreements and can therefore have a positive aggregate effect.¹²⁹ Although efforts at social change are often focused on the legislative and judicial branches of government because private law created by contracting parties does not apply to the public in general, the aggregate effect of choices made in private law can affect the public, especially where the legislature or judiciary do not act, or act in ways unpopular with the majority of citizens.

In this sense, drafting choices can effectuate social change extending beyond the contracting parties and affecting the public at large in three ways.¹³⁰ First, drafting choices can affect the parties to a transaction and can shape how businesses conduct themselves and how businesses interact with the public.¹³¹ For example, by using the aforementioned Inclusion Riders in an actor's employment contracts, actors and studios can change policies within the studio on a particular project in order to address diversity concerns in an industry. With such provisions in place, the parties to the agreement are not only better off, but individuals related to the specific project also benefit, including through increased employment opportunities for diverse talent.

Second, when large-scale movements redefine the standard language used in an industry, like when the #MeToo movement identified the harms in the standard practice of using non-disclosure and mandatory arbitration provisions in employment agreements. Such changes, including removing those provisions from future employment agreements, can become the new accepted standard in the industry.¹³² By implementing such changes and setting off a shift in their industries, the parties to the agreement are not only better off, but employees far and wide are better positioned because of such industry-wide changes.¹³³ By identifying areas for

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* One historic example of this is with respect to the Beatles performance agreement provided above (although such agreement was void of narrative and storytelling techniques). See *supra* Section III(A).

¹³² Chesler, *supra* note 128, at 138. In many respects, the #MeToo movement, which took off in the wake of the Harvey Weinstein sexual harassment scandal, is a good example of this phenomena. See Akshaya Kamalnath, *supra* note 50, at 453. When places of employment silenced accusations of sexual harassment and other malfeasance with mandatory arbitration clauses or non-disclosure agreements, such undesirable activity continued, leaving employees vulnerable (and eventually and unfortunately victims of such harassment and other malfeasance).

¹³³ Although some portion of industry-wide change can come because transactional drafters will learn of changes in "standard" language and provisions in practice, some change will also occur because employment agreements of high-level executives of publicly traded companies are often publicly disclosed and filed with the Securities and Exchange Commission and available on the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") database.

improvement in an industry or in certain documents, provisions, or agreements, parties can create new industry standards or “norms” through private contract that benefits not just those who enter into such private contracts, but also a larger community that may enter into such contracts. In addition, by creating new baseline standards for drafting, adoption of such changes in policy becomes the norm in drafting, leading to a net positive result in connection with the desired social change.

Finally, judicial decisions emanating from drafting choices made in agreements can also affect society at large.¹³⁴ For example, a court ruling that an employee was unlawfully terminated based upon a vague definition of “sexual wrongdoing” could have impacts on how such a term is defined in future contracts and how such contracts are interpreted.¹³⁵

By applying narrative and storytelling techniques to advance business-led social activism, parties can demonstrate to counterparties, related third-parties, and third-party arbiters the priorities important to the contracting parties, and can establish industry standards for terms and provisions related to social issues.

C. *Drafting with Narrative and Storytelling for Social Change*

Drafting agreements with narrative and storytelling techniques helps establish a tone for the document that addresses social issues, including those that may be important to the contracting parties. While narrative and storytelling techniques related to business-led social advocacy can be utilized in a variety of agreements and transactional documents, several are ripe for such adoption, including employment agreements, supply agreements, merger and purchase agreements, and corporate formation documents.¹³⁶

¹³⁴ Susan Chesler, *supra* note 128, at 138 (describing how decisions of judges, after consulting agreements that have been drafted with narrative and storytelling techniques, can have an impact on society at large if, for instance, a judge was persuaded that a type of provision was generally unlawful); *see also* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 449 (2001) (explaining how judicial opinions must interweave oftentimes conflicting stories and voices). Similarly, transactional documents will need to interweave the stories and voices of the parties to the transaction.

¹³⁵ Chesler, *supra* note 128, at 138. This example identifies how one decision by a judge with respect to one case and one agreement can have widespread effect on society as a whole, as lawyers watching the case would change standard practices based on this one decision in an effort to ensure that future agreements they author are enforceable.

¹³⁶ Of course, while a variety of other types of agreements could be good candidates for employing narrative and storytelling techniques, the examples provided here are good introductory examples, which is consistent with the intended introductory tone of this article. Future scholarship may address other types of transactional agreements that would be well-suited for employing narrative and storytelling techniques.

Employment agreements. Narrative and storytelling techniques can be used in employment agreements to accomplish business-led social advocacy by having employees advocate for social changes in their agreements with employers, not only in the substantive portions of the agreement but also by using storytelling and narrative technique to establish social goals, common interests, and advocacy prevalent in the industry.¹³⁷

In this context, transactional drafters could use storytelling and narrative techniques in order to 1) demonstrate personal narrative of adversity and how important company policies could provide equity to the employee and other employees who are similarly situated; or 2) evoke themes of fairness and employee voice, which could help identify strategic decisions made in drafting the agreement, such as why the agreement limits mandatory arbitration provisions or non-disclosures agreements.

Example:

Typical Recital Provision: “The Company and Executive wish to enter into an agreement (this “Agreement”) to provide for Executive’s service to the Company.”¹³⁸

Revised Recital Provision:¹³⁹ “The Walt Disney Company (the “Company”) and Horacio Gutierrez (the “Executive”), enter into this agreement (this “Agreement”) to provide for Executive’s service to the Company and in a shared commitment to supporting employees, while also advocating for cultural understanding and inclusion.¹⁴⁰ True to these ideals, the Company aims to hire individuals who share similar ideals and is committed, with the

¹³⁷ See Gerald F. Davis & Christopher J. White, *The New Face of Corporate Activism*, 13 STAN. SOC. INNOVATION REV. 40, 40-41 (Fall 2015), https://ssir.org/articles/entry/the_new_face_of_corporate_activism [<https://perma.cc/C4MN-7T43>] (explaining companies can gain an advantage by allowing employee-led movements because employees are more likely to be in touch with social issues than executives). For example, employees with closely-held social convictions could make these known in the employment agreement and could use narrative and storytelling techniques to convey that they joined the company because of such shared ideals.

¹³⁸ See The Walt Disney Co., Exhibit 10.4: Employment Agreement, Horacio Gutierrez (Form 8-K) (2022), https://www.sec.gov/Archives/edgar/data/1744489/000174448922000059/fy2022_q1x10qxex104.htm [<https://perma.cc/H3MK-TLDC>].

¹³⁹ This recital provision example is designed to demonstrate how a company could establish company goals, ideals, or social views in their recitals section of an agreement.

¹⁴⁰ See *Disney Social Responsibility*, THE WALT DISNEY COMPANY, <https://impact.disney.com/diversity-inclusion/culture/> [<https://perma.cc/V7EZ-PYEE>] (using language from Disney’s Social Responsibility section).

assistance of the Executive, to helping support members of such communities through inclusive and supportive practices.”

Supply agreements. Narrative and storytelling techniques can be used in supply agreements to accomplish business-led social advocacy by having the parties advocate for social changes in their agreements, addressing the goals of each company, in a variety of provisions, including regarding sustainable sourcing, climate-related pledges, or the use of involuntary labor.¹⁴¹

In this context, transactional drafters could use storytelling and narrative techniques in order to 1) persuasively detail the negative effects that unsustainable sources or climate-adverse behavior has on society; or 2) appeal to moral beliefs of right and wrong in explaining why use of involuntary labor should not be used and would be unacceptable under the business relationship between the parties.

Example:

Typical Covenant: “At all times during the term of this Agreement, DC will comply with the Federal Organic Foods Production Act and applicable federal, state, and local laws, regulations, rules, and guidelines and will maintain organic certification with respect to the Products by a certification bureau or agency mutually agreed upon by Annie’s and DC.”¹⁴²

Revised Covenant:¹⁴³ “At all times during the term of this Agreement, DC will comply with the Federal Organic Foods Production Act and applicable federal, state, and local laws, regulations, rules, and guidelines and will maintain organic certification with respect to the Products by a certification bureau or agency mutually agreed upon by Annie’s and DC. Annie’s recognizes that in an effort to promote sustainability and combat worldwide issues regarding climate change and concerns regarding

¹⁴¹ By incorporating storytelling and narrative into these agreements, parties are more likely to advance social issues with business partners and within their industry. Additionally, they are more likely to find common ground in addressing sustainability, labor, and other social concerns in an industry.

¹⁴² See Annie’s Homegrown, Inc. and DairiConcepts, L.P., Exhibit 10.20: Product Supply Agreement (Form 8-K) (2012), <https://www.sec.gov/Archives/edgar/data/1431897/000119312512104829/d261388dex1020.htm> [<https://perma.cc/ZY39-T37H>].

¹⁴³ This covenant example is designed to demonstrate how a company could expand upon a typical covenant provision with narrative to explain underlying rationales for company positions and why the other party should care about such positions.

inhumane acts related to animal cruelty, the seller will only use environmentally-friendly ingredients in their manufacturing of the Products, such as using farmers who attempt to minimize synthetic pesticides usage and investing in regenerative agriculture.”¹⁴⁴

Merger and purchase agreements. Narrative and storytelling techniques can be used in merger and purchase agreements to accomplish business-led social advocacy by addressing goals and core beliefs of the participating companies. Such core beliefs could include a wide range of social, economic, or other goals, ranging from upholding certain religious beliefs to second amendment issues.¹⁴⁵

In this context, transactional drafters could use storytelling and narrative techniques in order to 1) pair substantive provisions in a negotiated transaction, such as representations and warranties reflecting a company’s commitment to a social cause or related initiative, with recitals highlighting each party’s commitment to those ideals; or 2) demonstrate the efforts that one party has made regarding a closely-held social policy and establish the need for the company to only work with partners that hold common beliefs.

Example:

Typical Recital Provision: “The Board of Directors of Parent (the “Parent Board”) has determined that the Merger is consistent with and in furtherance of the long-term business strategy of Parent and fair to, and in the best interests of, Parent and its stockholders and has approved and adopted this Agreement, the Merger and the other transactions contemplated by this Agreement.”¹⁴⁶

Revised Recital Provision:¹⁴⁷ “The Board of Directors of Parent (the “Parent Board”) has determined that the Merger is consistent

¹⁴⁴ See *Our Mission*, ANNIE’S, <https://www.annies.com/our-mission> [<https://perma.cc/5PVY-Q2NF>] (using language from Annie’s mission section).

¹⁴⁵ For example, Chick-fil-A and Hobby Lobby, companies well-known for their closely held religious convictions would likely want any surviving company to preserve those ideals should the company ever contemplate a merger, for example. Similarly, Dick’s Sporting Goods has recently become a champion of gun safety and likely would want to preserve that reputation in any contemplated merger.

¹⁴⁶ See Agreement and Plan of Merger among athenahealth, Inc., Echo Merger Sub, Inc. and Epocrates, Inc.: Exhibit 2.1 (Form S-4) (Jan. 7, 2013), <https://www.sec.gov/Archives/edgar/data/1131096/000113109613000008/mergeragreement.htm> [<https://perma.cc/J96H-3T6D>].

¹⁴⁷ This recital provision example is designed to demonstrate how a company could establish company goals, ideals, or social views in their recitals section of an agreement.

with and in furtherance of the long-term business strategy of Parent and fair to, and in the best interests of, Parent and its stockholders and has approved and adopted this Agreement, the Merger and the other transactions contemplated by this Agreement. The Parties are both devoted to promoting fair wages and diversity, equity, and inclusion among employees—to help challenge systemic barriers to accessible healthcare—and that the Parties’ combined entity, organized around these common purposes and committed to these ideals in order to help better society, will lower costs for customers.”¹⁴⁸

Corporate formation documents. Narrative and storytelling techniques can be used in corporate formation documents to accomplish business-led social advocacy by addressing the goals of the organization, including staking out social positions held, important advocacy planned, and ideals that the company should adhere to when operating (including hiring personnel, engaging with counterparties, and engaging on social issues).¹⁴⁹

In this context, transactional drafters could use storytelling and narrative techniques in order to 1) explain the origin story of the company and explain what the company seeks to do not only in terms of business, but on community-related social issues, if any; 2) enumerate any social positions that the company anticipates speaking out on and why those ideals are important to the organization; and 3) explain any criteria that the organization should have for partnering or working with other organizations and whether social policies of such organizations will be considered when contracting with other parties.

Example:

Typical Board Provision: The Board will be comprised of 10 directors.

¹⁴⁸ See *Our Culture*, ATHENAHEALTH, <https://www.athenahealth.com/careers/culture> [<https://perma.cc/6BM9-4SGH>] (incorporating language from athenahealth’s Career page).

¹⁴⁹ Boards may advocate for the inclusion of such narrative and storytelling techniques in the formation documents of a corporation or entity in order to help preserve the intentions and social missions that the organizers envisioned for the company. By incorporating such ideals within the text of the formation documents, such social policies and goals are more likely to be sustained by the company in the long term.

Revised Board Provision:¹⁵⁰ “The diversity of our management team and workforce is key to our success and reflects our mission and values. We strongly encourage people of color, lesbian, gay, bisexual, transgender, queer and non-binary people, veterans, and individuals with disabilities to apply to work with us. We seek to be fully reflective of the communities we serve around the world. As of the date of this Annual Report, 73% of our Board and more than 50% of our management team are women. As of December 31, 2022, we had over 950 full-time employees, of which approximately 770 are located outside of the United States.”¹⁵¹

Drafting with narrative and storytelling techniques is the first step in transforming a private agreement between two parties into something more: an opportunity to advance social movements and social issues. By taking an approach that modifies just specific provisions to account for social change, the drafter is losing an opportunity to frame the document, and its goal of establishing the same social goals or priorities, in relation to the overall agreement. Without drafting an agreement using narrative and storytelling techniques, the drafter loses an opportunity to discuss and address the overall importance of a social issue, the organizations’ values regarding that issue, and the opportunities that the parties have to address that issue. Drafters to an agreement should address individual clauses and provisions in an agreement that advance such a goal, but without narrative to frame the issue, the individual choices in each individual clause are not unified.

This approach also encourages companies to think holistically about the social goals it seeks to advance when drafting agreements and memorialize those goals in negotiated agreements—with narrative and storytelling—instead of simply acting in reactionary ways to address social issues or public relation crises when confronted with criticism or current events.

¹⁵⁰ This Board provision example is designed to demonstrate how a company could incorporate narrative into operative provisions of an agreement to signify the importance of drafting decisions (e.g., requiring certain board representation).

¹⁵¹ See Bumble Inc., Annual Report (Form 10-K) (Feb. 28, 2023), <https://www.sec.gov/Archives/edgar/data/1830043/000095017023005080/bmb1-20221231.htm> [<https://perma.cc/5DZZ-9976>] (outlining example of incorporating storytelling into corporate formation documents).

CONCLUSION

Combining recent trends in business-led social activism and narrative theory related to transactional work, transactional attorneys and businesses can harness the power of the pen to employ narrative and storytelling techniques in transactional documents to better support business-led social activism and promote social change. Large businesses have increasingly sought to engage with social issues and shape the social fabric of the country by speaking out on topics and offering up solutions to stakeholders; but more can be done to effectuate broader change.

By employing narrative and storytelling techniques in transactional drafting, transactional lawyers and businesses can employ such techniques to shape transactional agreements and advocate for social change in private law—creating positive impact for the parties to the contract, to industries related to the parties, and to society as a whole. By combining business-led social activism with narrative and storytelling techniques in transactional documents, transactional attorneys can write better and more complete agreements, ensuring consistency with existing business-led social activism efforts, and help influence society by effectuating change through counterparties, industries, and social acceptance. Through using narrative and storytelling to effectuate change through private contract, transactional attorneys and businesses can bring about positive social change and make transactional documents consistent with business-led social activism advanced by corporations.