NOTE

(RE)COUNTING FACTS AND BUILDING EQUITY: FIVE ARGUMENTS FOR AN INCREASED EMPHASIS ON STORYTELLING IN THE LEGAL CURRICULUM

K. JANE CHILDS*

"The life of the law has not been logic: it has been experience."
- Oliver Wendell Holmes, Jr.[1]

*J.D. Candidate, 2020, Boston University School of Law; B.A., 2007, College of Charleston; M.F.A., 2017, University of Alabama. I am grateful to Laura D'Amato for her tireless support and incisive questions about the direction of this note and its rhetorical framing. The background section owes a great deal to the legal history classes of David Seipp, which inspired much of my research. The coherence of the note as a whole is indebted to generous suggestions made by readers and interested parties, notably from my partner Ryan, Kyle Macy, and Sanjana Dubey. Finally, I want to thank the editorial staff of the *Public Interest Law Journal* at Boston University for their attention to detail and their insistence on clarity, particularly Brittany Hacker and Christina Paek. Any errors contained herein are my own.

[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

INTRODUCTION

Arguments about what should be included in the mandatory curriculum of law school date back to its inception as an institution.[2] Over time, the majority of

[2] *See* Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 349 (2010) ("It should be understood that law-office apprenticeship as the primary means of legal education died slowly. In 1900, it was still the only legal education that the majority of American lawyers received; but the elite lawyers—those who were becoming leaders of the bar and powerful servants of the corporate giants—were increasingly being trained in university-based law schools that employed Langdell's case method."); *see also* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 132–47, 168 (1994) (describing the conflict over the institution of the case method of legal education and the positivist critiques of that approach to the law: "Leaders of the legal profession had once regarded the case method school as an incubator of dangerous ideas about the nature of law.

American law schools (in dialogue with each other at first, and eventually with the American Bar Association ("ABA") and other professional organizations)[3] have established an institutional curricular norm that nevertheless varies in its details from school to school.[4] It is my contention that intensive training in legal storytelling, whether through a mandatory one or zero credit hour course or through additional instruction on storytelling in first year legal writing courses, would address several current critiques of legal education while also ameliorating the documented negative mental health effects of law school.[5]

The argument of this article consists rhetorically of a diachronic narrative as to legal storytelling's value to the mandatory curriculum of contemporary law schools.[6] In other words, I am going to tell you a story about why storytelling

---

It trained not competent leaders of society but mindless case lawyers whose understanding of their profession 'was limited to piling up citations'").

[3] *See generally* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335–53 (2006) (describing the origins of American lawyers and their training, from colonial times until the nineteenth century); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 35–42 (1983) (describing the arduous process of curriculum establishment early in the history of formal university-situated legal education, particularly during the period from 1870 to 1920).

[4] *See* Katcher, *supra* note 3, at 370–72 (noting that today "significant similarities exist among American law schools, especially those that meet the accreditation standards set by the American Bar Association" resulting in an "apparent uniformity in the basic subjects offered[,]" while conceding that "each law school has its own distinguishing characteristics, including varying course offerings and teaching styles" such that there remains "almost continual ongoing debate and discussion in the United States, through established legal organizations such as the American Bar Association, the American Association of Law Schools, as well as local bar associations, concerning changes in the system of legal education, such as modifying course design and content and changing the time frame of the current three-year program").

[5] *See* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 361, 365 (2009) (claiming that "[t]he challenge law schools face is to come up with innovative approaches to the problem of law student distress that do not require a complete overhaul of the law school curriculum" given the fact that "[a] growing body of research shows that law students have an unusually high level of distress, even when compared to students in other stressful professional programs. In 1957, the first of these studies showed that first-year law students experienced higher levels of anxiety than first-year medical students. Moreover, the greater levels of anxiety continued throughout law school to the time of graduation"); *see also* G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225, 247 (1986) (cited by Peterson & Peterson at 367, finding that the "pattern of results suggests that certain aspects of legal education produce uncommonly elevated psychological distress levels among significant numbers of law students and recently graduated alumni").

[6] Ferdinand De Saussure first distinguished the diachronic (spanning time, literally "across time") from the synchronic (isolated in a current moment or non-sequential, simultaneous) in his work, COURSE IN GENERAL LINGUISTICS (1916). Philosopher Galen Strawson later re-

should be a mandatory part of legal education. Beginning at the beginning, this article first looks back at the origins of the legal profession, and traditions associated with teaching legal reasoning that stretch back much further than Christopher Langdell's institution of the case law method at Harvard in the late nineteenth century, in order to show that lawyers have always told stories.[7] Moving into the present, I present a description of certain contemporary critiques of legal education and writing, as expressed by both academics and judges and juries in recent case law. Finally, looking forward, I make a normative statement about what the study of law ought to be, given the relationship that legal writing has to ethics, technological innovation, and cultural diversity, so that it might best serve society, the profession, and the law students seeking support and mentorship during their time at law school. The first two elements are legal background, an arrangement of the facts in a manner that persuades. The final element actively argues from these facts, envisioning a narrative resolution through an invitation to further curricular innovation. Mastery of the principles that undergird inventive storytelling structures should be built into the legal curriculum because storytelling in the law is—and always has been—composed of both formulaic and individualized structures. It is only by studying the process of creating such structures themselves that practitioners will become the ethically and culturally competent *narratores*[8] needed in our current moment.

I. BACKGROUND

A. Form v. Function: What is a Story?

"'Begin at the beginning,' the King said gravely, 'and go on till you come to the end: then stop.'"
-Alice's Adventures in Wonderland[9]

In *The Story and Its Writer*, an introductory textbook on the short story for creative writers, the glossary of literary terms defines "story" as "[a]n account of an incident or a series of events, either factual or invented," highlighting the

---

labeled the distinction as diachronic versus episodic. *See* Galen Strawson, *Against Narrativity*, 17 RATIO 428, 430 (2004) (describing "Diachronic self-experience" as "something that has relatively long-term diachronic continuity, something that persists over a long stretch of time, perhaps for life" as opposed to the Episodic, perceiving the self as existing primarily in the present).

[7] *See* Alton, *supra* note 2, at 340 ("Introduced by Dean Christopher Columbus Langdell at Harvard Law School, the case method has dominated American legal education for more than a century, though not without some controversy and a good deal of change in the method itself"); LAPIANA, *supra* note 2, at 3 ("The appointment of Christopher Columbus Langdell as Dane Professor at Harvard Law School on January 6, 1870, is widely acknowledged to mark the beginning of the modem American law school"); PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 94 (1992).

[8] The term *narratores* was an early name for lawyers in England. For details, *see infra* Section II.B.1.

[9] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 98 (1865).

functional content of the story.[10] The 1971 anthology of experimental fiction *Anti-Story* offers a negative definition of story through the elements it claims its collected works are rebelling against: mimesis, "reality," event, subject, the middle range of experience, analysis, meaning, and scale.[11] Another popularly available contemporary guidebook for creative writers, *Story Structure Architect* by Victoria Lynn Schmidt contains a catalogue of "5 Dramatic Throughlines, 6 Conflict Types, 21 Genres, 11 Master Plot Structures, [and] 55 Master Dramatic Situations," accentuating both the limits and the multiple variants available for the formal structure of a story.[12] Schmidt even includes "sections on anti-structure stories such as Metafiction and Slice of Life," cautioning prospective writers: "When you grow up in a westernized culture, the traditional plot structure becomes so embedded in your subconscious that you may have to work hard to create a plot structure that deviates from . . . the traditional westernized Aristotelian structure."[13] In a similar vein, Verlyn Klinkenborg, author and member of the editorial board of *The New York Times*, cautions new writers that "most of the received wisdom about how writing works is not only wrong but harmful . . . . [W]hat people think they know about writing works in subtle, subterranean ways."[14] Even this brief glimpse into the definitional terrain of creative storytelling points to differing views on the relative value of content and form to the creation of story.[15] The definition of legal storytelling,[16] and occasionally even the attendant doctrine,[17] is equally fraught with value judgments and historical conflict, some relevant portions of which are described below.

---

[10] THE STORY AND ITS WRITER 1744 (Ann Charters ed., 9th ed. 2015).

[11] Philip Stevick, *Introduction* to ANTI-STORY ix,xiv-xxii (1971) ("One hesitates to call most of the works in the collection that follows stories at all . . . since that word, the word that most easily and naturally names the classic genre of short fiction, inevitably carries connotations of narrative ease, facility, the arched shape, the climactic form, all of these being qualities generally avoided in new experimental fiction").

[12] VICTORIA LYNN SCHMIDT, PH.D., STORY STRUCTURE ARCHITECT 4 (2005).

[13] *Id.*

[14] VERLYN KLINKENBORG, SEVERAL SHORT SENTENCES ABOUT WRITING 1 (2012).

[15] *Compare* THE STORY AND ITS WRITER, *supra* note 10, *with* Stevick, *supra* note 11, *and* SCHMIDT, *supra* note 12.

[16] *See generally* Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JAWLD 247, 249–50 (2015) [hereinafter Rideout, *ALS: A Bibliography*]; J. Christopher Rideout, *Storytelling, Narrative, Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 54 (2008) [hereinafter Rideout, *Storytelling*].

[17] *See, e.g.*, Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990) (arguing that contemporary conceptions of property regimes arise out of diachronic narratives about the acquisition and protection of property rights).

B. Form v. Function: Historical Tensions in Legal Storytelling Practice

"If law schools ignore everything but the here and now they will fail in their purpose."
-J.H. Baker[18]

At most law schools, details about the common law system itself and how it evolved are relegated to discretionary digressions by doctrinal professors, elective legal history classes (if they are offered), or independent study.[19] As a consequence, American law students do not, as a rule, receive much of an origin story for their profession.[20] What follows may thus be unfamiliar history, even among an audience comprised almost entirely of those who attended law school.

1. Of Narratores and Novae Narrationes

Conspiracy

C 335. Adam Pye lays before you this: that Nicholas Fox and Robert Cat, who (258v) are there, wrongfully by their false alliance previously made between them the Thursday next etc. at Colp, falsely and maliciously caused this same Adam to be indicted of divers robberies, thefts, and other trespasses done against the peace of our lord the king, namely that he was alleged to havebroken into the house of Adam Fort' and carried off from there two tanned hides, price so much each, and that he was alleged to have robbed one William Foet and G. Cat of ten pence, and that he was alleged to have come with force and arms and broken into the house of Simon Kat and there killed eight sheep; [this indictment was made] such a day, such a year at the leet of the earl of Warenne held the same day in Estretford before such a one, bailiff; *or:* steward; of the said earl; *or:* before such justices of our lord the king in eyre in the county of Northumberland; by which

---

[18] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY v (4th ed. 2007).

[19] *See* Harold P. Southerland, *The Case for American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661, 669 (2007) (pointing out that "[a]ny good school offers a variety of seminars and other intriguing small-enrollment courses that deal with such provocative subjects; but these courses may be difficult to fit in"); *see also* ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL: A COMPLETE GUIDE TO THE LAW SCHOOL EXPERIENCE: BY STUDENTS, FOR STUDENTS 99 (1st ed., 2000) (telling its audience that an elective in Legal History "may be offered" in the first year at some schools). *But see* Christian G. Fritz, *Teaching Legal History in the First Year Curriculum*, 53 AM. J. LEGAL HIST. 379, 383 (2013) (stating that "[l]egal history has been a required first-year class at the University of New Mexico School of Law since 1987").

[20] *See* Southerland, *supra* note 19, at 669 (stating that "What the idealistic students wind up with is mostly the law that is – a legal system already suspect in their view because it has either created injustice or else failed to remedy it. In these heavily subscribed, supposedly indispensable courses – corporations, bankruptcy, real estate transactions, wills and trusts, evidence, family law, taxation, administrative law, intellectual property, estate and gift taxation, and the like – the underlying values that might profit most from critical reexamination are largely taken for granted. The bar examiners and the profession itself are concerned with the law that is, not the law that ought to be").

> conspiracy and false alliance the said Adam was taken such a day and year in Nottingham (259r) and imprisoned in the king's prison there and kept in prison from such a day until such a day when this same Adam was acquitted thereof according to the law and custom of the realm before Adam [Crokedayk], justice of our lord the king assigned to deliver the gaol of Nottingham castle; to the heavy damage of the said Adam of ten pounds and against the form of the provision in like case provided by our lord the king and his council. And if etc., good suit.[21]

Paul Brand, tracking the evolution of the English lawyer from Anglo-Norman times through the early 1300s in *The Origins of the English Legal Profession*, notes that "[t]he term normally used during the first half of the thirteenth century to refer to persons speaking on behalf of litigants in the king's courts is *narratore*, meaning 'one who makes a count.'"[22] Later, in his chapter on "The Edwardian Legal Profession at Work," Brand points out that "[t]he term normally used for serjeant on the plea-rolls of the king's courts during Edward I's reign is *narratore* ('one who tells a story'), the same term as was most commonly used for them on the plea-rolls in Henry III's reign."[23] Reading Brand's work, it becomes clear that in the beginning, lawyers were storytellers.[24] In the words of renowned legal historian S.F.C. Milsom:

> Counting, telling the tale, putting the plaintiff's case in formal terms, seems to have been the central activity in litigation long before royal courts or royal writs had much to do with it; and our earliest professional lawyers were called *narratores* in token of this. They were men skilled in the use of customary formulae, whose words could be adopted by the client if they were right and disavowed if they were wrong; whereas a mistake by the client himself would perhaps be irremediable.[25]

It makes sense, then, that one of the earliest collections of English legal work product was called *Narrationes*, a title expanded in later editions to *Novae Narrationes*.[26] In her general introduction to the Selden Society's published edition of *Novae Narrationes* in 1963, Elsie Shanks described the manuscript in the following terms:

---

[21] NOVAE NARRATIONES 328–329 (80 SELDEN SOC'Y, Elsie Shanks & S.F.C. Milsom eds., 1963).

[22] BRAND, *supra* note 7, at 48.

[23] *Id.* at 94.

[24] *Id.*

[25] S.F.C. Milsom, *Legal Introduction* to NOVAE NARRATIONES, 80 SELDEN SOC'Y XXV, XXV (1963); *see also* BAKER, *supra* note 18, at 76–77, 157 (noting these origins and later outlining the organization of the "'forespeakers of the Bench, whom we vulgarly call *narratores*'" into a "fraternity or guild known as the order of serjeants at law").

[26] *See* Elsie Shanks, *General Introduction* to NOVAE NARRATIONES, 80 SELDEN SOC'Y ix, ix (1963).

> *Narrationes* is a series of counts written in Anglo-Norman illustrating the forms for presenting in court typical cases of various sorts, right, dower, replevin, wardship, etc. Each count (Latin *narratio*, Anglo-Norman *conte* or *counte*) is an exact and detailed statement of the plaintiff's case against the defendant, given in the form which the pleader (called *countour*) must use in opening the action before the justices.[27]

Shanks went on to speculate as to the occasion or purpose for compiling a collection of such legal forms at that time without landing on any one particular explanation as satisfactory.[28]

S.F.C. Milsom, Shanks's co-editor, diverged from her speculations, stating that it was "not unlikely" that the authors of *Narrationes* compiled the collection "as part of some training routine."[29] In fulsome style, Milsom described *Narrationes* and its function as follows:

> The collections of model counts known to us as *Novae Narrationes*, which date from Edward I, were made for persons still called *narratores*, and concerned what was still the centre of their learning. For the professional lawyer, or those aspiring to be such, they must then have been of the first importance; but they did not remain so. As the emphasis of litigation shifted from counting to pleading, the contents of these books ceased to represent the principal skill of the bar, and became instead necessary background knowledge. In the curriculum of a law school it would not have been done in the first year—that would have been taken up by the Register of Writs—and no longer in the final year either, but sometime in between. The principal skill came to lie in pleading, and the central position once occupied by *Novae Narrationes* was filled, since the material defied more systematic treatment, by the year books.
>
> So long as oral pleading lasted, however, *Novae Narrationes* served an obvious purpose.[30]

Later in his introduction, Milsom elaborated regarding the practical purpose of *Narrationes*, stating that "even if the collections were first made for a basically educational purpose, they would become more rather than less useful to practitioners . . . . As Miss Shanks observed, the dozen or so very small manuscript volumes look as though they were made to have handy in court."[31]

Examination of these sources paints a picture of early legal education as a process that, of necessity, valued oral argument and storytelling.[32] Early law

---

[27] *Id.*

[28] *Id.* at xvi.

[29] Milsom, *supra* note 25, at xxviii.

[30] *Id.* at xxvi.

[31] *Id.* at xxix.

[32] *See id.* at xxvi.

students learned to be legal storytellers by studying the forms that successful counts were made in, copying them out by hand.[33]

2. From Formulaic Rights to Individual Wrongs: Writs, Equity, and Actions on the Case

> 23 To his most honoured and most gracious Lord, the Chancellor of England,
>
> 1397 Showeth your poor servant, William Lonesdale of Scarborough, merchant, that whereas the said William hath divers times by sea and by land brought divers merchandise, to wit, herring, kippered and salted,[4] and other fish and victuals from the port of Scarborough in the County of York to the town of Yaxley in the County of Huntingdon, to sell them there, as well he might, to the great relief of all the country round the said town of Yaxley; and because he sold his merchandise at a less price than other merchants of the said town of Yaxley did there, Richard Suffyn, Thomas Clement and William Childe of Yarwell, and many other evil-doers, of their covin, lay in wait with force and arms to kill the said William Lonesdale, and they assaulted him, beat him and ill-treated him, and left him there for dead, so that he despaired of his life: May it please your most gracious Lordship to send for the said parties by writs of our Lord the King, to answer in his Chancery, as well for the said misdeeds as for other things which then shall be alleged against them; For God and in way of charity.[34]

If early lawyers were storytellers, what kind of stories did they tell? In the words of Sir John Baker, "between the thirteenth century and reforms of the nineteenth, procedural formalities dominated common-law thinking. As far as the courts were concerned, rights were only significant, and remedies were only available, to the extent that appropriate procedures existed to give them form."[35] Writs were issued out of the Chancellor's office, by virtue of his holding of the king's seal.[36] Baker notes that during a "formative period" of the original writ system it was possible for the chancellor and his senior clerks to invent new

---

[33] *See* Shanks, *supra* note 26, at xvi ("The first collector may have been an apprentice whose notebook proved useful to his comrades until some one older and more experienced in the legal profession saw the value of such a book and compiled another more expertly. Or the idea of making a set of model counts for lawyers and apprentices may have arisen when a group of professional men, at Westminster or upon some eyre, discussed their work after a day in court").

[34] SELECT CASES IN CHANCERY 1364–1471 28 (10 SELDEN SOC'Y, W.P. Baildon ed., 1896) (described by Baildon in his *Introduction* at xlv: "Another interesting case that deserves special mention is that of the poor herring hawker from Scarborough, travelling up into Huntingdonshire, and there assaulted by his local rivals," though a footnote following the text seems skeptical, stating, "This seems hardly a Chancery matter").

[35] BAKER, *supra* note 18, at 53.

[36] *Id.* at 53–54, 99.

forms, though eventually the menu of available writs to bring actions into court became limited:

> Once a writ had been issued, it became a precedent for the future, and there was a reluctance to change the formula if it was found serviceable. A plaintiff did not, therefore, concoct his own writ . . . . He had either to find a known formula to fit his case, or apply for a new one to be invented.[37]

Some early categories of writ included *praecipe* writs, which asserted rights, and plaints of wrong, including the writ of trespass.[38]

Under this evolving medieval system of common law, early law students would study the available forms of action, learning writs "by rote" and attending court, first as mere "apprentices at law" and later as students in the common-law schools known as inns of court.[39] The law school curriculum at the inns of court included "oral pleading exercises (moots) and other exercises based on writs."[40] This early form of legal education lasted until the English Civil War "fatally disrupted" it in 1642, producing "skilful and quick-witted advocates" through its emphasis on practical skills.[41]

When there was no writ available that fit the individual circumstances of the plaintiff, options were limited: try to fit the facts to an ill-fitted writ, make use of an honored legal fiction, or apply to the Chancellor for relief in equity.[42] Early Chancellors were officers of the Church, like bishops,[43] who by virtue of their possession of the king's seal were seen as embodying the king's authority to dispense justice—an authority that included issuing writs.[44] Consequently, when the King's Bench and Common Pleas enforced "strict rules of evidence

---

[37] *Id.* at 55; *see also* A.H. MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY 20–21 (Fred B. Rothman & Co. 1985) (1890) ("The natural tendency of lawyers to establish and follow precedents brought about the result that in the course of time special forms of Original Writ were established for all the ordinary causes of action and the Common Law judges refused to allow these forms to be in any way altered or modified, and finally they refused to sanction any new forms of writ for the purpose of assisting any new or novel causes of action, and they refused to entertain any causes of action which were not covered by the known and approved forms of writ").

[38] *See* BAKER, *supra* note 18, at 57–61.

[39] *See id.* at 56, 159.

[40] *Id.* at 161.

[41] *See id.* at 162, 170 (placing this tradition in context by showing that the law taught at universities of the time, even in England, was all civil law derived from Roman origins—a more abstract or academic study of law for an English lawyer).

[42] *See id.* at 103–04.

[43] This could occasionally lead to some colorful judgments, as in the following excerpt: "I know well that every law is, or ought to be, according to the law of God, and that the law of God is, that an executor who is of evil disposition shall not spend all the goods; and I also know that if he does not make restitution when he is able, he shall be damned in hell . . . ." JOHN REEVES, REEVES' HISTORY OF ENGLISH LAW, FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 184 (London, Reeves & Turner 1869).

[44] *See* BAKER, *supra* note 18, at 99, 102–03; *see also* MARSH, *supra* note 37, at 32.

. . . which might exclude the merits of the case from consideration but which could not be relaxed without destroying certainty and condoning carelessness," the Chancery became the "court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case."[45] The stories told in Chancery were not done by original writ, but by informal complaint via bill or even "word of mouth," and the chancellor was "less concerned with general rules than with individual cases."[46] According to Baildon:

> There are four essentials to the Chancery Proceeding: (a) a petition addressed to the Chancellor or Keeper by a petitioner or plaintiff complaining of (b) an alleged wrong done by some specified person or persons, and asking (c) that the person complained of may be sent for to answer the complaint, and (d) that a remedy may be provided.[47]

As a result of this freedom to examine the circumstances and merits of individual cases, and the attending flexibility in pleading, applications for relief to Chancery's equitable jurisdiction became more popular.[48]

During this same period, a widespread legal fiction arose to circumvent the "inelasticity of [the] principles and practice"[49] of the common law: the application of trespass *vi et armis* to situations where there had been no actual

---

[45] BAKER, *supra* note 18, at 103; *see also* MARSH, *supra* note 37, at 14 ("In the course of time the Chancellor acting as delegate of the King came to exercise a very considerable portion of the royal prerogative authority pertaining to the administration of justice, and more especially that portion of the royal prerogative which warranted the King in ameliorating the rigor of the common law, in all cases in which natural justice, equity and good conscience required his intervention, and thus the Chancellor came to be called the keeper of the King's conscience").

[46] *See* BAKER, *supra* note 18, at 105–06.

[47] W.P. Baildon, *Introduction* to SELECT CASES IN CHANCERY 1364-1471 xii (10 SELDEN SOC'Y, W.P. Baildon ed., 1896).

[48] *See* GEORGE SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY; COMPRISING ITS RISE, PROGRESS, AND FINAL ESTABLISHMENT: TO WHICH IS PREFIXED, WITH A VIEW TO THE ELUCIDATION OF THE MAIN SUBJECT, A CONCISE ACCOUNT OF THE LEADING DOCTRINES OF THE COMMON LAW AND OF THE COURSE OF PROCEDURE IN THE COURTS OF COMMON LAW IN REGARD TO CIVIL RIGHTS; WITH AN ATTEMPT TO TRACE THEM TO THEIR SOURCES; AND IN WHICH THE VARIOUS ALTERATIONS MADE BY THE LEGISLATURE DOWN TO THE PRESENT DAY ARE NOTICED 389 (1846) ("The judgments of the Common Law, following the writ on which the action was founded (*d*), were uniform, simple, and invariable, according to the nature of the action . . . . In the Court of Chancery no writ or formula of action imposed any fetter of form (*e*); and the court not being tied to forms, was able to modify the relief given by its decrees to answer all the particular exigencies of the case fully and circumstantially . . . . [I]t is this pliability . . . [among other powers and abilities] that has brought to the Court of Chancery a vast proportion of the business over which it entertains a jurisdiction . . . .").

[49] Baildon, *supra* note 47, at xxi.

"force of arms" deployed.[50] This roundabout method of procuring justice was eventually eliminated by the invention of trespass on the case.[51] Formulaic stories in legal pleadings offered a streamlined process and a degree of certainty regarding the outcome, but failed to account for all circumstances.[52] Actions "on the case" were a natural evolution of legal storytelling.[53]

C. The Current Legal Curriculum[54]

The current curriculum at Boston University School of Law ("BUSL") is in some ways representative of the standard law school curriculum, both in what it shares with other law schools as well as in its drive to innovate with other elements of its mandatory curriculum.[55] The first year ("1L") is composed of the traditional doctrinal classes (Civil Procedure, Contracts, Torts, Criminal Law, Constitutional Law, and Property) combined with an introductory course in Legal Research and Writing that incorporates a Moot Court experience ("Lawyering").[56] Upper level requirements currently include an extensive piece

---

[50] *See* BAKER, *supra* note 18, at 61 ("A series of actions for injuring horses with force and arms, brought against defendants identifiable as smiths, suggests irresistibly that the complaints were really for shoeing accidents; and actions for forcibly chopping up timber, brought against men described as carpenters, strongly suggest the negligent performance of building contracts").

[51] *See id.* at 61–63.

[52] *Id.* at 61.

[53] *Id.*

[54] In the tradition of Duncan Kennedy's *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 1 (1971), written when that eminent scholar was still a law student at Yale, much of my argument here is framed in reference to the curriculum at Boston University School of Law, which I currently attend.

[55] *See* Katcher, *supra* note 3, at 370–72 (stating that today "significant similarities exist among American law schools, especially those that meet the accreditation standards set by the American Bar Association," and that the consequence is "an apparent uniformity in the basic subjects offered," though "each law school has its own distinguishing characteristics, including varying course offerings and teaching styles"); *see also* American Bar Association, Accreditation Information, https://www.americanbar.org/groups/legal_education/accreditation/ (last visited Jan. 18, 2019). Historians cite as one of the causes of BUSL's founding a critique of the abstract and impractical new case method of legal study being propounded by Christopher Langdell at Harvard. *See* LAPIANA, *supra* note 2, at 132 ("The belief that 'instruction at [Harvard Law School] was particularly technical and historical, and when completed, necessitated an apprenticeship in some good attorney's office,' found expression in the founding of Boston University Law School. There teachers familiar with the practice of law offered not only an introduction to the science of law but also training designed to enable students to enter active practice on graduation").

[56] *See* FIRST-YEAR CURRICULUM AT BU LAW | SCHOOL OF LAW, https://www.bu.edu/law/academics/jd-degree/first-year-curriculum/ (last visited Nov. 22, 2018); LAWYERING PROGRAM | SCHOOL OF LAW, https://www.bu.edu/law/academics/jd-degree/first-year-curriculum/lawyering-program/ (last visited Nov. 22, 2018); *see also* ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL: A COMPLETE GUIDE TO THE LAW SCHOOL EXPERIENCE: BY

of written work, a single class in Professional Responsibility, and six credit hours of experiential education.[57] All of these requirements are limned by certain restrictions as to minimum hours overall and stipulations as to how many of those credits must be graded.[58] One of BUSL's innovations is the Lawyering Lab, a week of experiential education for 1Ls that occurs over the winter break and represents one credit hour.[59] Another is the requirement that students complete an online course in Business Fundamentals, carrying no credit hours.[60] Both of these additions to the curriculum are graded pass/fail.[61]

D. What's Missing?

"We as lawyers have been trained to desire abstract, universal, objective solutions to social ills, in the form of legal rules or doctrine."
-Ann C. Scales[62]

How law schools educate potential lawyers, particularly that part of their education that is deemed mandatory for all, is dependent on what they view as the essential characteristics of all lawyers and their role in society.[63] Legal

---

STUDENTS, FOR STUDENTS 138 (3rd ed., 2011) ("Most American law schools offer a standard first-year curriculum that includes courses in Contracts, Real Property, Civil Procedure, Torts, Criminal Law and/or Criminal Procedure, Constitutional Law, and a full-year course in legal writing. In some schools, one or more of these classes might be offered as a full-year course, pushing one of the others, often Criminal Law or Constitutional Law, to the second year. Further, one or more of a limited list of elective courses, often including Administrative Law, Labor Law, Legal Theory, Economic Theory, or Legal History, may be offered during the second semester to provide a bit of variety").

[57] *See* EXPERIENTIAL LEARNING REQUIREMENT | SCHOOL OF LAW, https://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/experiential-learning-requirement/ (last visited Nov. 22, 2018); JURIS DOCTOR DEGREE REQUIREMENTS | SCHOOL OF LAW, https://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/jd-degree-requirements/ (last visited Nov. 22, 2018); PROFESSIONAL RESPONSIBILITY REQUIREMENT | SCHOOL OF LAW, https://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/professional-responsibility-requirement/ (last visited Nov. 22, 2018); UPPER-CLASS WRITING REQUIREMENT | SCHOOL OF LAW, https://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/upper-class-writing-requirement/ (last visited Nov. 22, 2018).

[58] *See* JURIS DOCTOR DEGREE REQUIREMENTS | SCHOOL OF LAW, *supra* note 57.

[59] *See* LAW JD 607 » ACADEMICS | BOSTON UNIVERSITY, https://www.bu.edu/academics/law/courses/law-jd-607/ (last visited Nov. 22, 2018).

[60] *See* LAW JD 605 » ACADEMICS | BOSTON UNIVERSITY, https://www.bu.edu/academics/law/courses/law-jd-605/ (last visited Nov. 22, 2018).

[61] *See* LAW JD 607 » ACADEMICS | BOSTON UNIVERSITY, *supra* note 59; LAW JD 605 » ACADEMICS | BOSTON UNIVERSITY, *supra* note 60.

[62] Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1373 (1986).

[63] *See* Katcher, *supra* note 3, at 335, 372 (asking first "What is the role of the lawyer in society, and by what means should the lawyer be trained to achieve this role? The changing answers to these questions underlie the varying models of legal training that America has used

storytelling,[64] for example, already exists in several places in the curriculum: it is most present, of necessity, in the context of optional advanced classes in trial advocacy and criminal law,[65] though it shows up to a limited extent in the mandatory curriculum as part of the general instruction in legal writing.[66] Because the only mandatory instruction on legal storytelling occurs in the first year, it is linked to very particular functions and subject to abbreviated treatment for two reasons: (1) time constraints and (2) traditional tendencies to emphasize the rational and doctrinal in legal education rather than the "soft" skills of persuasion and advocacy.[67] Given the prevalence of findings that the current legal curriculum contributes to mental health issues for current law students and recent graduates, this article joins the "many discussions of the law school environment and its relation to law student well-being [that] are parts of larger critiques of how law is taught and how the substance of what is taught should be changed" identified by Todd and Elizabeth Peterson in their article, "Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology."[68]

---

since its colonial period" and later stating that "Since the end of the twentieth century, the trend in American legal education has been to focus on what lawyers really do").

[64] For an overview of the scholarship and subareas in the field of Applied Legal Storytelling, *see* Rideout, *ALS: A Bibliography*, *supra* note 16.

[65] *See* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); *see also* Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, From Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRECTORS 37, 49-53 (2010) (describing the author's use of storytelling in an advocacy course).

[66] *See* Rideout, *Storytelling*, *supra* note 16, at 54; *see also* Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229, 237 (2010) (noting that the Legal Writing Institute's yearly surveys of legal writing programs show that "the most commonly used writing assignments include persuasive written assignments such as appellate and pretrial briefs, and the most common oral exercises are appellate court arguments, all of which incorporate narrative").

[67] *See* William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 3 (Jossey-Bass 2007) [hereinafter *Carnegie Report*] (stating that "[i]n their all-consuming first year, students are told repeatedly to focus on the procedural and formal aspects of legal reasoning, its 'hard' edge, with the 'soft' sides of law, especially moral concerns or compassion for clients and concerns for substantive justice, either tacitly or explicitly pushed to the sidelines"); *see also* Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC 109, 119 (2011) ("[T]he emphasis in legal education, at least in the most formative first year, is on training law students to communicate with other lawyers, either in writing or in the formal and stylized language of oral argument before a judge or a group of judges"). *But see* Rideout, *Storytelling supra* note 16, at 68–76, 84–85 (describing the persuasive component of legal storytelling that the author calls "narrative fidelity," and its quality of "reach[ing] beyond the formal features of the story, and beyond simple plausibility, to the center of how we allow narratives to define who we are").

[68] Peterson & Peterson, *supra* note 5, at 376.

Chief among these current criticisms identified by the Petersons, and originating from within the legal education system, is that made by Jean Stefancic and Richard Delgado.[69] Framing Stefancic and Delgado's arguments as "anecdotal commentary and polemical advocacy," the Petersons summarize them as finding the origins of lawyers' discontent in law school, caused by legal formalism.[70] Stefancic and Delgado reference not only the original formalism of Langdell, but specifically the re-entrenched "latter-day formalism" they characterize as emphasizing judicial restraint, rationality, and precedent.[71] For context, Arthur Allen Leff, reviewing Richard Posner's influential *Economic Analysis of Law* in 1974, believed that the Legal Realists' iconoclastic shake-up of the Formalist system of "unquestionable premises leading to ineluctable conclusions," ultimately left the legal profession bereft of dogmatic certainty: "If you no longer are allowed to believe in a deductive system, if criticism is no longer solely logical, you no longer can avoid the question of *premises* . . . those things you don't talk about."[72] Leff believed that Posner's law and economics school of thought was stepping into that existential gap in order to reassert empirical certainty in the legal universe by measuring all human activity vis-à-vis the utilitarian principle of efficiency as the highest good.[73] Over the course of his review, Leff noted the usefulness of Posner's economic analysis as used in law school,[74] but questioned the costs, concluding that while it is "so very

---

[69] *See id.* at 377; *see also* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005).

[70] Peterson & Peterson, *supra* note 5, at 377 (quoting STEFANCIC & DELGADO, *supra* note 69) ("[L]awyer discontent begins in law school and has two elements: 'A conceptual dimension, concerned with how they understand what they do, and a phenomenological one that embraces the felt experience of law and lawyering.' These problems are caused by legal formalism, which is 'associated with a form of education that emphasizes doctrines and cases and minimizes external factors, such as justice, social policy, and politics. It imagines law as an autonomous discipline existing apart from others; it is not at all interdisciplinary.' Stefancic and Delgado find the source of lawyers' unhappiness in law school and the hyper-competitive environment that students face there").

[71] STEFANCIC & DELGADO, *supra* note 69, at 38–39 ("While many in the legal academy pay lip service to notions such as indeterminacy, formalism is as entrenched as it has been at any time since Christopher Columbus Langdell").

[72] Arthur Allen Leff, *Commentary:* Economic Analysis of Law*: Some Realism About Nominalism*, 60 VA. L. REV. 451, 453–54 (1974) (reviewing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1st ed., 1973)).

[73] *Id.* at 457–59 (conceding that "[t]he economic analysis of law . . . continually manages to provide rich and varied insights into legal problems," but arguing that "lovely as all of this is, it is still unsatisfactory as anything approaching an adequate picture of human activity").

[74] *Id.* at 459–61 (noting that economic legal analysis has achieved a "growing popularity among legal scholars," and describing the difficulty law students have with cases that are "awful" and how economic analysis provides a simple tool to approach such morally daunting cases).

hard to be a thinking lawyer . . . substituting definitions for both facts and values is not notably likely to fill the echoing void."[75]

Despite the Petersons' misgivings, Stefancic and Delgado are certainly not outliers in their suggestion that the place for reforms touching the underlying philosophical bedrock of the legal profession is in the law school curriculum.[76] As one example, twenty years prior to the publication of Stefancic's and Delgado's *How Lawyers Lose Their Way*, Harvard Professor Duncan Kennedy published his article, "Legal Education and the Reproduction of Hierarchy."[77] Among the "three kinds of projects that are likely to be useful" in resisting the reproduction of hierarchies in legal education, Kennedy naturally proposed "curriculum change" given his contention that "[w]hat is needed is to think about the law in a way that will allow students to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to an alien system of thinking and doing."[78] I will return to this argument later,[79] simply noting here the resemblance Kennedy's suggested change from 1982 bears to my current proposed integration of legal storytelling into the mandatory curriculum at law school. For now, it is important to briefly ground this article in the more contemporary critiques and concerns of the legal profession, particularly those related to technology, diversity, and legal ethics in the 21st century.

1. An exclusively formulaic storytelling praxis raises concerns among practitioners and scholars about technological obsolescence.

To hear some people tell it, *LegalZoom, Inc.* is the fifth horseman of the coming legal job market apocalypse.[80] In "*LegalZoom* and Death from Below,"

---

[75] *Id.* at 482.

[76] Even simply looking at the examples cited by Stefancic and Delgado in their endnotes produces an extensive list, a few of which I include here for those interested: David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61 (1994); Bridget A. Maloney, *Distress Among the Legal Profession: What Law Schools Can Do About It*, 15 NOTRE DAME J. L., ETHICS, & PUB. POL'Y 307 (2001); Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999); Jamison Wilcox, *Borrowing Experience: Using Reflective Lawyer Narratives in Teaching*, 50 J. LEGAL EDUC. 213 (2000).

[77] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

[78] *Id.* at 599–600, 612.

[79] *See infra* Section III.F.

[80] *See* Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63.4 CASE WESTERN L. REV. 1419, 1420 (2013) (examining "how recent state court opinions addressing LegalZoom demonstrate the difficulty of balancing the importance of providing access to justice for a greater number of people with the prohibition against the unauthorized practice of law"). Mr. Figueras was a JD Candidate at Case Western in 2013 when he wrote this comment on the question of looming technological challenges to the current lawyering paradigm.

the fifth chapter of his book *Glass Half Full: The Decline and Rebirth of the Legal Profession*, Benjamin Barton claims that "[c]omputerization has come to the legal services market and solo practitioners and small-firm lawyers are on the front lines."[81] Barton points out that although the industrial revolution left knowledge jobs intact, the current information revolution combined with globalization are now bringing "knowledge occupations to heel."[82] He goes on to track the rise of internet legal services, from "chat boards offering very general advice" to the current battleground use of "interactive forms, where the customers answer questions and *LegalZoom* builds out the forms."[83] It is this more current iteration of online legal forms that begins to look like artificial intelligence ("AI") lawyering, potentially bordering on the unauthorized practice of law ("UPL"), forbidden in all states by either rule or statute.[84]

Barton's primary contention is that although Big Law might not be worried about *LegalZoom*'s encroachment on the lower end of the market (such as people without much money who want to create wills and small businesses); it may not be "unimaginable that *LegalZoom* could use its experience drafting LLC and incorporation documents to begin stealing IPO [Initial Public Offering] or bond contracts [that] largely consist of unexamined boilerplate."[85] For all the *Sturm und Drang*[86] of his initial rhetoric, Barton's final analysis of the potential impact of such technology on the legal profession over time is somewhat more balanced.[87] He claims that in-court litigation is unlikely to be completely co-opted by technology, after all, even though "the number of trials is in a free fall, and every year there is less in-court work to be done" and "[o]nline dispute resolution has been gaining traction."[88]

Kent A. Higgins, former President of the Idaho State Bar Board of Commissioners, in "The Spinning Jenny and a Tale of Fear," takes a more staid

---

[81] BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 85 (2015).

[82] *Id.*

[83] *Id.* at 89–90.

[84] *Id.* (discussing states' different approaches to LegalZoom, including Washington, which investigated and fined LegalZoom for UPL, and South Carolina, where the state supreme court found no UPL because LegalZoom's online forms were "substantially similar" to forms offered by the court).

[85] *Id.* at 91, 93, 101–02.

[86] *Sturm und Drang*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/Sturm_und_Drang (last visited Jan. 18, 2019) ("Sturm und Drang comes from German, where it literally means 'storm and stress.' Although it's now a generic synonym of 'turmoil,' the term was originally used in English to identify a late 18th-century German literary movement whose works were filled with rousing action and high emotionalism, and often dealt with an individual rebelling against the injustices of society. The movement took its name from the 1776 play *Sturm und Drang*, a work by one of its proponents, dramatist and novelist Friedrich von Klinger.").

[87] *See* BARTON, *supra* note 81, at 100, 103.

[88] *Id.*

approach to the same phenomenon.[89] Higgins blithely compares the "recurring concern . . . that advancements in internet law will take away our jobs" to the panic that beset the cottage textile industry in England when the spinning jenny was invented in 1768.[90] The short article features several gems of reassurance offered by Higgins, such as: "[P]erhaps the technology of the future will free me from the less enjoyable tasks, so I might focus on the more rewarding ones," and "[i]f technology will reduce time I spend drafting documents, sorting them for relevance, eliminating duplicate medical records, and tracking my web site statistics, I say bring it on."[91] However, his final attempt to defuse neo-Luddite concern over online legal services makes a relevant argument, *sub silentio*, about the quintessential character of lawyers:

> As for my own prediction, I think that those of us who went to law school to acquire the rudimentary skills of a lifelong trade may have reason to fear for our futures. On the other hand, I believe that those of us who sought a doctoral education, who longed to enter the ranks of great intellectual minds, like those who conceived, established and preserved this nation, will always find a need, even a demand, for our services.[92]

With this, Higgins ends on a note in tune with Barton's final take-away: the essential quality of an attorney is less his ability to draft documents from templates than it is complex cognitive processes, cultural awareness, and perhaps even human empathy.[93] To the extent this is true, *LegalZoom* and other purveyors of internet legal services[94] are less of a threat to coming generations of American attorneys.[95]

---

[89] *See* Kent A. Higgins, *The Spinning Jenny and a Tale of Fear*, ADVOCATE, Jan. 2018, at 12–13.

[90] *Id.* (noting that the invention of the spinning jenny, "a revolutionary machine that could produce cotton yarn at least eight times faster than the spinning wheel," caused great fear in communities where "[s]pinning wheels were foundational to the local cottage textile industry").

[91] *Id.* at 13.

[92] Higgins, *supra* note 89, at 13.

[93] *Id.*

[94] *See, e.g.*, Lyle Moran, *Casetext Launches Automated Brief-Writing Product*, ABA J.: PRAC. TECH. (Feb. 25, 2020, 8:00 AM), https://www.abajournal.com/news/article/casetext-launches-automated-brief-writing-product ("Casetext has developed an automated legal-writing product that purports to create an entire document with just a few simple clicks of the mouse.").

[95] *See* Higgins, *supra* note 89, at 13. *But see* Sarah Jaffe, *Automatic for the People: Are Robots Coming to Take Our Jobs?*, 26 BOOKFORUM (Feb./Mar. 2020) (reviewing DANIEL SUSSKIND, A WORLD WITHOUT WORK: TECHNOLOGY, AUTOMATION, AND HOW WE SHOULD RESPOND (2020)), https://www.bookforum.com/print/2605/are-robots-coming-to-take-our-jobs-23849 ("[T]he 'robots are coming for your jobs' argument[is] often offered as a comeback to the 'immigrants are coming for your jobs' nationalism so prevalent these days, missing the fact that the real threat comes from neither machines nor migrants but management.").

2. An exclusively monocultural storytelling praxis raises concerns among practitioners and scholars about cultural insularity.

In the courtroom, normative cultural stories that have become associated with "rationality" and disassociated from empathy and creativity, will likely be found more acceptable because they "ring true with the stories [the judge or jury] know[s] to be true in their lives."[96] This leaves courtroom stories told by individuals from marginalized populations in a tough spot, as that very important audience might not read them as believable.[97] James Boyd White considered the implications of this tension for legal storytelling in his book *The Legal Imagination*, asking "what kinds of justice can there be in a world in which some people are reduced to objects of manipulation by others, or where their stories are erased?"[98] Richard Delgado argues that these "outgroups" must be encouraged to incorporate their "counter-storytelling" into our common law tradition if we intend to construct a truly shared and equitable social reality.[99] Outgroups mentioned in Delgado's 1989 "Plea for Narrative" include "the tradition of storytelling in black culture," as well as "the Spanish tradition of the picaresque."[100]

Robert A. Williams, Jr., Faculty Co-Chair of the University of Arizona Indigenous Peoples Law and Policy Program,[101] once wrote that while "Indian people love their storytellers[,]" the American legal education system is filled

---

[96] *See* Rideout, *Storytelling, supra* note 16, at 61, 63, 66, 69; *see also* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440–41 (1989) ("Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry").

[97] *See* Delgado, *supra* note 96, at 2412 ("An outgroup creates its own stories, which circulate within the group as a kind of counter-reality. The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural").

[98] JAMES BOYD WHITE, THE LEGAL IMAGINATION xiv (abr. ed., Univ. Chicago Press 1985) (1973) (noting also that "the law can be regarded as an institution that is founded on the principle of recognizing others, in large part by giving them a chance to tell their stories and have them heard").

[99] Delgado, *supra* note 96, at 2414–15 (defining outgroups as "groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized.").

[100] *Id.* at 2414.

[101] *See* ROBERT A. WILLIAMS, JR. | UNIVERSITY OF ARIZONA LAW, https://law.arizona.edu/robert-williams-jr/ (last visited Mar. 22, 2020).

with "Storyhaters."[102] Today there are inspiring developments in Canada that American lawyers and law schools might take under consideration when it comes to "Creating Space for Indigenous Storytelling in Courts," the title of Kirsten Manley-Casimir's 2012 article.[103] Manley-Casimir is optimistic regarding potential opportunities for addressing the stories of marginalized populations in Canadian courts, despite "competing conceptions of law" that arose under the common law (that developed first in England and then in its colonies) and Aboriginal practices surrounding oral-history evidence.[104] She makes a strong case that "it is important to interrogate the assumptions underlying the Canadian legal system and to consider how to change the structure of courtrooms to facilitate Indigenous storytelling."[105] She suggests judges might "work[] with Indigenous representatives to come up with creative ideas for adapting the rules of evidence to facilitate Indigenous storytelling," pointing out that this would "allow Indigenous Elders to share their knowledge on their own terms [and] might eliminate further disrespectful treatment in Canadian courts."[106] The Truth and Reconciliation Commission of Canada, in its 2015 final report, called on the government "to recognize and implement 'Aboriginal justice systems'" and encouraged law schools to "create mandatory courses that include Indigenous laws."[107] Similarly, the Canadian Bar Association's 2013 resolution "to recognize and advance Indigenous legal traditions in Canada" establishes a promising groundwork for reshaping normative stories in that country's legal system.[108]

3. An exclusively normative storytelling praxis raises concerns about ethical competency.

The ethical implications of legal storytelling are vast, touching as it does on the attorney's duties as a zealous advocate,[109] the duty of candor to the court,[110]

---

[102] Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 742 (1997).

[103] *See* Kirsten Manley-Casimir, *Creating Space for Indigenous Storytelling in Courts*, 27 CAN. J.L. & SOC. 231, 234 (2012) ("[A] storytelling approach is central to the struggle for decolonization"); *see also* Val Napoleon & Hadley Friedland, *An Inside Job: Engaging with Indigenous Legal Traditions Through Stories*, 61 MCGILL L.J. 725, 729–31 (2016) (describing fruitful use of legal methods of analysis in combination with Indigenous oral traditions).

[104] Manley-Casimir, *supra* note 103, at 236–37 (noting the "strong emphasis on neutrality, objectivity, and impartial adjudication in a formal legal system, as well as a privileging of written over oral sources of evidence" that predominates under the common law).

[105] *Id.* at 237.

[106] *Id.* at 243.

[107] *See* Napoleon & Friedland, *supra* note 103, at 729.

[108] *Id.* at 730.

[109] *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983).

[110] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983).

and duties related to client counseling.[111] As a result, any critique of the current praxis or recommendations for the future are limned by a minefield of potential ethical dilemmas.[112] As one strong example of the kind of ethical issues raised by relying on an exclusively normative storytelling praxis, Muneer Ahmad describes a common dilemma for certain lawyers: "the tension that arises between the progressive lawyer's political commitment to anti-subordination on the one hand, and the particular demands of an individual client's case on the other."[113] Ahmad asks if there is "anything wrong with advancing arguments that, while advantageous to our clients, may reinforce subordinating racist, sexist, or homophobic stereotypes" that will be recognizable to an average jury or judge and thus read as truth.[114] In his most provocative example, Ahmad asks if a defense attorney can ethically raise "the 'crack whore' defense"[115] to elicit sympathy for a client accused of rape by implying or expressly claiming that the complaining witness is lying about events due to her own criminal conduct.[116] The dictates of the professional rules regarding zealous advocacy can thus put an idealistic new attorney in a moral conundrum: "Because narratives are constructed and do not merely exist in the ether, there for us to discover, the choices we make as to what narratives to construct are subject to moral and ethical scrutiny."[117] Ahmad is certainly not alone in believing that new attorneys face ethical choices related to their underlying philosophies of law,[118] some

---

[111] *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).

[112] *See, e.g.*, Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 1–2 (2003); Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 984–92 (2006); Binny Miller, *Telling Stories about Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 1 (2000); Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 427 (2005).

[113] Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 117 (2002).

[114] *Id.* at 120–21.

[115] *Id.* at 118 (defining the "crack whore defense" as an alternate explanation that what happened was "trading sex for drugs" and not rape).

[116] *Id.*

[117] *Id.* at 122, 124.

[118] *See* Beth D. Cohen, *Helping Students Develop a More Humanistic Philosophy of Lawyering*, 12 LEGAL WRITING 141, 147, 148 (2006) (arguing that law students should "consider their professional development and identity through an examination of professionalism issues such as the moral implications of lawyering," among other issues).

explicitly related to legal storytelling,[119] which may often go unaddressed in the current mandatory legal curriculum.[120]

E. Judges and Juries: Critiques of Contemporary Legal Storytelling

Even a cursory tour through the virtual stacks on Westlaw or Lexis will turn up countless contemporary cases in which judges or juries (or both) are dissatisfied by the quality of the legal storytelling presented to them—often to the detriment of the hapless attorney's case or contended point of law, not to mention their client.[121] To give a brief but broad overview, I have compiled a selection of various kinds of cases in which such critiques appear, including criminal cases, negligence actions, review of asylum petitions, and divorce proceedings. Following these, there are three recent cases that illustrate the all-important intersection between legal storytelling and civil procedure vis-à-vis the pleading standards of Federal Rules 8 and 12(b)(6).

1. Criminal cases reference storytelling.

Legal scholars and lecturing practitioners speak most frequently about the utility of storytelling for legal argument in the context of trial practice.[122] Whether on the prosecution, plaintiff, or defense side, trial and appellate attorneys learn in study and practice that their client's story—their theory of the case or theory of defense—plays a pivotal role in whether or not a jury or judge will find in their favor.[123]

One issue on appeal in the case of *State v. Rafay* was whether the deputy prosecutor committed reversible misconduct by essentially telling the jury in a

---

[119] *See, e.g.*, Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63, 64 (2010) (exploring "three characteristics of story that give rise to the concerns that storytelling is unfairly manipulative").

[120] *See* Cohen, *supra* note 118, at 147, 150.

[121] *E.g.*, State v. Anderson, No. 39227, 2013 Ida. App. Unpub. LEXIS 513, at *19–21 (Idaho Ct. App. Dec. 30, 2013); People v. Collins, 784 N.Y.S.2d 489, 492–93 (N.Y. App. Div. 2004); State v. Rafay, 285 P.3d 83, 133–35 (Wash. Ct. App. 2012).

[122] *See, e.g.*, THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 25 (10th ed. 2017) ("If lawyers do not organize the evidence into a clear, simple story, jurors will do so on their own."); Rideout, *ALS: A Bibliography*, *supra* note 16, at 249; Rideout, *Storytelling*, *supra* note 16, at 54 n. 10; *see also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 3–5 (1981).

[123] *See, e.g.*, Stephen P. Lindsay, Senior Partner, Cloninger, Lindsay, Hensley & Searson, P.L.L.C, If You Build It, They Will Come. . .. Creating and Utilizing a Meaningful Theory of Defense, Presentation at the National Defender Training Project, 2008 Public Defender Trial Advocacy Program 16 (May 30–June 4, 2008) (on file with author); MAUET, *supra* note 122, at 23 ("A theory of the case is a clear, simple story of 'what really happened' from your point of view."); *see also* Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399 (2011).

murder case that it had to believe either the defense's story or the prosecution's.[124] During his closing, the prosecutor stated, "You must either believe everything [the defendant] told you in order for this unbelievable story of his to be true, or it seems to me you have to believe" the evidence presented by the prosecution's witnesses.[125] On appeal, the defense argued that this impermissibly shifted the burden of proof and misled the jury.[126] The court in *Rafay* was not convinced, holding that:

> [W]hen viewed in context, the comment merely highlighted the obvious fact that the two accounts were fundamentally and obviously different. The remarks were therefore analogous to those approved in *State v. Wright*, where the court concluded that when the parties present the jury "with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." The challenged comments were not misconduct.[127]

People v. Collins is an example of a case where a court held for the defense in similar circumstances.[128] In *Collins*, the Appellate Division of the New York Supreme Court was appalled as it outlined the statements made by the prosecutor, who "repeatedly referred to defendant as a liar. She began by characterizing his story as 'unbelievable,' . . . . Throughout her summation, the prosecutor referred to defendant's testimony, by turns, as 'unbelievable,' 'ridiculous,' 'absurd' and 'fantastical.' She stated . . . that defendant 'made up' that 'unbelievable' story."[129] What seemed to bother the court in *Collins* most was that:

> Here, the prosecutor repeatedly told the jury that it could not believe defendant's testimony that he was merely doing the undercover a favor by helping him buy drugs unless it believed that all the undercovers were lying . . . . Moreover, instructing the jury that in order to find a defendant not guilty it must find that the prosecution witnesses lied is an impermissible attempt to shift the burden of proof from the People to the defendant . . . .[130]

In its decision to reverse and remand *Collins*, the court stated, "We cannot assume that, absent all the prosecutor's improprieties in summation, defendant's version of events would not have carried the day."[131]

By contrast, the Idaho Court of Appeals in *State v. Anderson* held that the prosecutor's statements during rebuttal, that the defense presented "a terrible

---

[124] *Rafay*, 285 P.3d 83 at 134.

[125] *Id.*

[126] State v. Rafay, 285 P.3d 83, 135 (Wash. Ct. App. 2012).

[127] *Id.*

[128] People v. Collins, 784 N.Y.S.2d 489, 490 (N.Y. App. Div. 1st Dept. 2004).

[129] *Id.* at 492.

[130] *Id.* at 492–93.

[131] *Id.* at 495.

story" and a "ridiculous argument," did not rise to the level of misconduct.[132] The prosecutor in that case stated that "when they have a defendant that comes up with an unbelievable story they've got to use smoke and mirrors," that defense "never . . . talked to you about his client's version of the events except one or two times. Why? Because it's an unbelievable story," and that "he knows it's not a good story."[133] Defense claimed these statements disparaged them, suggesting that "defense counsel knowingly elicited false testimony."[134] However, the court did not agree, holding that, "[a]s opposed to personally disparaging defense counsel, this statement addresses the believability of [the defendant]'s version of what occurred. Any inference that defense counsel knowingly elicited false testimony was obscured by the prosecutor's true intent of attacking [the defendant]'s 'story.'"[135]

There are countless other examples of recent criminal decisions that reference the stories told on behalf of criminal defendants[136] or by prosecutorial

---

[132] State v. Anderson, No. 39227, 2013 Ida. App. Unpub. LEXIS 513, at *19 (Idaho Ct. App. Dec. 30, 2013).

[133] *Id.* at *19–20.

[134] *Id.* at *20.

[135] *Id.* at *21.

[136] *See, e.g.*, People v. Castro, No. B264800, 2016 Cal. App. Unpub. LEXIS 6756, at *39–40 (Sep. 15, 2016)

> (affirming the conviction, stating, "As we have already said, it is clear the jury did not believe the story told by Castro and Patricia that he never threatened her with the gun. It is also clear that, given the fact Revilla called police to report the theft of Brown's gun, it was highly unlikely the jury would believe Castro's story that he was really just borrowing the gun and he intended to return it as soon as he could get Revilla to come pick it up from him");

In re Anthony J., 11 Cal. Rptr. 3d 865, 869 (Cal. Dist. Ct. App. 2004) (upholding the lower court's "reject[ion of] Anthony J.'s version of events: 'The court finds that [Anthony J.'s] story . . . is totally unbelievable and incredible. And therefore the court will not make its decision based on that absolutely unbelievable story'");

State v. Robinson, No. 105,281, 2012 Kan. App. Unpub. LEXIS 847, at *12 (Kan. Ct. App. Oct. 5, 2012)

> ("There is nothing inherently impermissible or objectionable about a storytelling approach to jury selection, so long as the analogies or narratives do not misstate legal concepts or otherwise confuse jurors. No such problems appear to have infected what Robinson's lawyer was doing. By the same token, however, a district court need not prolong jury selection because one or the other lawyer or both wish to paint numerous colorful and time consuming word pictures in figuring out which potential jurors to strike. The trial record reflects that Robinson's counsel actually got to do most of the painting he wished. And he did not proffer sketches of any masterpieces left undone. The district court did not limit the particular question put to the jurors during voir dire or the overall time Robinson's lawyer could spend. Rather, the district court merely reined in the lawyer's use of several narrative set pieces").

witnesses[137] or even by judges,[138] and whether or not judges or juries found those stories believable. Yet, as the cases cited in the following two sections will show, legal storytelling is not the exclusive province of the criminal law: references to effective legal storytelling appear in other contexts as well.[139]

2. Cases regarding other substantive law reference storytelling.

Effective legal storytelling is not only necessary in the criminal context, but also in areas as diverse as immigration and divorce. In *Bocher v. Glass*, a Florida appellate court reversed an award of three million dollars in damages due to inappropriate storytelling by the plaintiff's attorney.[140] The court held that counsel "injected a continuous stream of personal commentary from voir dire through to closing arguments rather than focusing on the discrete issues and the evidence" when the "issues for the jury's consideration should have been limited to the respective degrees of negligence."[141] In 2007, the Eighth Circuit upheld a decision to deny asylum to a petitioner because "[t]he [immigration judge]'s stated reasons for disbelieving the petitioner were sufficiently specific and cogent to preclude reversal .... She told an unbelievable story regarding the timing of how she obtained her visa for Mexico and how she entered the United States."[142] In a contentious divorce case in 2013, a California Court of Appeal

---

[137] *See, e.g.*, Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000) ("All storytelling involves an element of selectivity. We cannot demand that police officers relate the entire history of events leading up to a warrant application with every potentially evocative detail that would interest a novelist or gossip ('. . . the witness blushed when I mentioned the gun, and blinked six times while studying the photographic array. I noticed his hand crept up to his lips (which were chapped) . . .')").

[138] *See, e.g.*, Fisher v. Beard, No. 03-788, 2018 U.S. Dist. LEXIS 125279, at *87–89 (E.D. Pa. July 25, 2018)

(holding that a judge's instructions to the jury that contained multiple stories violated the defendant's Constitutional rights, because "the flawed parts of the instructions were stories, but the non-flawed parts of the instruction were simple statements about what a reasonable doubt is. People more readily absorb information through stories, and there is ample research proving that individuals retain information better and engage with the material more fully when it is conveyed through a story as compared to the lecture format. . . . This data means that the jurors, in divining what a reasonable doubt is, likely retained the two incorrect stories by the judge, rather than his correct conclusory statements").

[139] *See infra* Sections II.E.2 & II.E.3.

[140] Bocher v. Glass, 874 So. 2d 701, 703-04 (Fla. Dist. Ct. App. 2004) ("Finally, during rebuttal, plaintiffs' counsel attempted to relate a story about him and his grandfather walking in the Florida woods when he was a child. Appellants objected and the trial court sustained the objection .... Counsel then began telling a story about a hypothetical young boy and his grandfather walking through the woods. Appellants once again objected, and once again the trial court sustained the objection. Finally, plaintiffs' counsel got to the point and advised the jury not to be distracted by 'rabbit trails' and to focus on the facts of the case").

[141] *Id.* at 702.

[142] Yakovenko v. Gonzales, 477 F.3d 631, 636 (8th Cir. 2007).

noted that "[t]he trial court stated that it did not believe either party, castigated both sides for 'storytelling' instead of testifying, and effectively concluded that everything was community property."[143]

3. Cases decided on Rule 8 & Rule 12(b)(6) reference storytelling.

At a functional level, certain rules of legal procedure ask threshold questions about the sufficiency of legal storytelling. Rule 8 of the Federal Rules of Civil Procedure dictates the standards for claims in the following terms: "[a] pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[144] One pertinent case example touching on the Rule 8 pleading standard is *Winston v. Martinez*, a civil rights action filed by a pro se prisoner plaintiff.[145] In *Winston*, the court stated that it was "currently unable to conduct the screening required by 28 U.S.C. § 1915A, because Plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2) and (d)(1). Accordingly, the amended complaint will be dismissed with leave to file a second amended complaint."[146] Explaining its decision, the court noted, "Plaintiff's amended complaint consists of lengthy, winding narratives and storytelling. Figuring out from this complaint what specific allegations Plaintiff is making and how those allegations support the single claim would be excessively time-consuming for Defendant."[147] The court then gave instructions for the pro se plaintiff regarding the drafting of his amended complaint, stating that:

> Plaintiff must avoid excessive repetition of the same allegations. Plaintiff must avoid narrative and storytelling. That is, the complaint should not include every detail of what happened, nor recount the details of conversations. Rather, the second amended complaint should contain only those facts needed to show how a specific, named defendant legally wronged the plaintiff.[148]

It is apparent here that courts will not be swayed by storytelling or empathy, even where a party is appearing pro se, if ineffective pleading is present.[149]

The second case is also a Rule 8 dismissal of a pro se plaintiff's complaint, though it may be less likely to elicit sympathy, as the party appearing pro se is an attorney.[150] As in *Winston*, the court in *Gottschalk v. City and County of San*

---

[143] De Los Cobos v. De Los Cobos (*In re* De Los Cobos), No. B237332, 2013 Cal. App. Unpub. LEXIS 5706, at *16 (Cal. Ct. App. Aug. 14, 2013).

[144] FED. R. CIV. P. 8(a).

[145] Winston v. Martinez, No. 1:17-cv-00774-MJS (PC), 2017 U.S. Dist. LEXIS 183776, at *1 (E.D. Cal. Nov. 5, 2017).

[146] *Id.* at *7.

[147] *Id.*

[148] *Id.* at *8.

[149] *See, e.g.*, *id.*

[150] *See* Gottschalk v. City & Cty. of S.F., No. C-12-4531 EMC, 2013 U.S. Dist. LEXIS 18825, at *1 (N.D. Cal. Feb. 12, 2013).

Francisco was unsympathetic to a complaint that did not meet the clarity and brevity requirements of Rule 8.[151] The California court gave some detail about the complainant's unclear story:

> In some places, she seems to suggest that she is being retaliated against for disclosing her sex, sexual orientation, religion, and other protected statuses. FAC at 52 ("The retaliation and/or bad faith of defendants as a result of the revealed knowledge and in the light of a scheme by all named defendants group A to preferentially favor" LGBT people over non-LGBT people). . . . In other places, she seems to claim that she was retaliated against for challenging the SFHRC's decision not to hire her . . . . In still other places, it appears that Plaintiff is alleging that Defendants retaliated against her in anticipation of the fact that she would reveal widespread corruption and illegal activity of various officials and city departments . . . . This level of confusion make[s] it difficult for Defendants to adequately respond to Plaintiff's allegations of retaliation.[152]

Gottschalk makes clear that practicing attorneys are no less likely to err in their storytelling than pro se plaintiffs without law degrees, at least under some circumstances.[153]

The final example of a failure to properly tailor a complaint to established pleading requirements involves a pair of decisions in the same matter.[154] *FootBalance System, Inc. v. Zero Gravity Inside, Inc.* involved a patent dispute related to the production of "custom orthotic insoles."[155] In its ruling on a motion to dismiss under Rule 12(b)(6) in 2016,[156] a federal district court in California explained that:

> In some sense, a complaint tells a story of liability. As in other storytelling, showing is often more important than simply telling. FootBalance has told the Court that the Moving Defendants are liable under an alter ego theory, but it has not shown they are liable. The Moving Defendants' MTD is

---

[151] *Id.* at *29.

[152] *Id.* at *15–17.

[153] *Cf.* Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 527 (2002) ("Lawyers have faced many consequences for poor writing, including court sanctions and fines, bar discipline, civil liability, and public humiliation.").

[154] *See* FootBalance Sys. v. Zero Gravity Inside, Inc., (*Footbalance II*), No. 15-CV-1058 JLS (DHB), 2017 U.S. Dist. LEXIS 50668, at *2 (S.D. Cal. Apr. 3, 2017); FootBalance Sys. v. Zero Gravity Inside, Inc., (*Footbalance I*), No. 15-CV-1058 JLS (DHB), 2016 U.S. Dist. LEXIS 137978, at *2 (S.D. Cal. Oct. 4, 2016).

[155] *FootBalance I*, 2016 U.S. Dist. LEXIS 137978, at *2.

[156] "(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

> therefore GRANTED with respect to FootBalance's claims for direct infringement.[157]

One year later, the same court found itself dismissing similarly framed claims in the same case.[158] Once again, the court explained the deficiency in the pleading and the standard under 12(b)(6):

> The Court previously explained to FootBalance that a complaint tells a story of liability. (See id. at 15 ("As in other storytelling, showing is often more important than simply telling.")). But, as before, FootBalance has simply told the Court that the Individual Defendants are liable under an alter ego theory, but it has not shown they are liable. The Individual Defendants' MTD is therefore GRANTED with respect to FootBalance's claims for direct infringement under an alter ego theory of liability.[159]

This case is particularly important for later arguments in this article because here the court referred not only to precedent on pleading standards relative to Rule 12(b)(6) dismissal, such as *Twombly* and *Iqbal*,[160] but also to common maxims of storytelling generally.[161]

II. ARGUMENT

"Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest[s] served by equity and fairness or other elements of social welfare."
-Benjamin Cardozo[162]

A. Historical Origins: Lawyers Have Always Told Stories

The first argument offered here as to why legal storytelling should be part of the mandatory curriculum for law students is based on the actual origins of the profession. The fact that the first legal advocates in the English common law system were defined by the stories they told in court, *narratores* who made counts on behalf of litigants, is strong evidence that storytelling was a central skillset of the profession.[163] The stories that these early attorneys told evolved from oral counts to written pleadings or writs, both of which were rigidly

---

[157] *FootBalance I*, 2016 U.S. Dist. LEXIS 137978, at *18–19.

[158] *FootBalance II*, 2017 U.S. Dist. LEXIS 50668.

[159] *Id.* at *20–21.

[160] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[161] *See FootBalance II*, 2017 U.S. Dist. LEXIS 50668 at *20–21; *see also* Sonya Huber, *The Three Words That Almost Ruined Me as a Writer: "Show, Don't Tell"*, LITHUB.COM (Sept. 27, 2019), https://lithub.com/the-three-words-that-almost-ruined-me-as-a-writer-show-dont-tell/ (addressing the ubiquity of "show, don't tell" as a maxim of writing practice).

[162] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113–114 (1921).

[163] *See* BRAND, *supra* note 7, at 94; *see also* Milsom, *supra* note 25, at xxv.

proscribed in form and often in content.[164] The arguments that legal functionaries would have made to justify this rigidity are arguments familiar to every first-year law student: a strict adherence to a limited menu of available forms was easier to administer, offering fewer delays, lowered court costs, and more certainty and predictability. Yet the resulting surge in petitions to the Chancellor in equity and the eventual ascendency of actions sounding in tort, particularly trespass on the case, show that there was a previously untapped market for more individualized legal storytelling.[165]

An appeal to origins might seem unduly conservative or antiquated, but it is mustered here to combat the prevailing narrative in legal education that the formalist approach (pioneered by the Langdellian caselaw method[166] and re-entrenched by the ascendency of law and economics[167]) is sacrosanct. Despite documented negative effects on law students' mental health, which likely contribute to the ongoing issues with mental health in the legal profession at large, law schools and law professors still find Langdell's moldering justifications that his method makes the study of law "rational" and "scientific" compelling.[168] To the extent that legal educators and institutions are thus driven to seek authority from past precedents, then, I offer an older and stronger one: when common law attorneys came into existence, it was to tell clients' stories.[169]

B. Technologically Vulnerable: New Lawyers Must Be More Valuable Than Algorithms

In addition to being one of the earliest skills attributed to common law lawyers, storytelling is also one of the most human skills—and that matters.[170] In light of the rising tide of AI lawyering, currently embodied by the *LegalZoom* phenomenon, it can no longer be considered an acceptable minimum standard for law schools to teach students to be merely competent drafters of forms. Both Benjamin Barton and Kent Higgins, addressing the potential threat to attorneys from this new technology, made a critical distinction.[171] To the extent that new attorneys simply learn "rudimentary skills" in law school, they will inevitably end up ceding some share of the market for legal expertise to inexpensive,

---

[164] *See* Shanks, *supra* note 26, at ix; *see also* BAKER, *supra* note 18, at 53–55.

[165] *See* BAKER, *supra* note 18, at 61–63, 103–04; *see also* Baildon, *supra* note 47, at xxi; MARSH, *supra* note 37, at 14; SPENCE, *supra* note 48, at 389.

[166] *See, e.g.*, Alton, *supra* note 2, at 340.

[167] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (9th ed., 2014) (1973). *But see* Leff, *supra* note 72, at 482 (critiquing this re-entrenchment of neo-formalism as "substituting definitions for both facts and values" and thus "not notably likely to fill the echoing void").

[168] *See* Peterson & Peterson, *supra* note 5, at 361, 365.

[169] *See* BRAND, *supra* note 7, at 94; *see also* Milsom, *supra* note 25, at xxv.

[170] *See* BARTON, *supra* note 81, at 100; *see also* Higgins, *supra* note 89, at 12–13.

[171] *See* BARTON, *supra* note 81, at 100; *see also* Higgins, *supra* note 89, at 12–13.

intelligent software that will help laypeople fill out forms and draft legal documents.[172]

Yet in-court litigation, being the most human of legal skillsets, is likely not subject to (much) usurpation by technology.[173] Furthermore, powerful courtroom advocacy is actually composed of a myriad of human-centric legal skills, the most pertinent here being the ability to identify, tell, and stage an effective legal story.[174] To adequately prepare law students for the rigors of the legal job markets of the future, law schools must double down on the human side of lawyering and bring formerly optional upper-level courses in "persuasive legal writing" (often code for legal storytelling) into the mandatory curriculum.[175]

C. *Culturally Ignorant: New Lawyers Must Be Able to Tell the Stories of Diverse Clients*

It is troubling when the cultural models for well-told stories are gleaned only from the cultural and political theories of Aristotle, Kant, or Hegel, and thus enshrine only one particular cultural tradition's definition of "narrative rationality."[176] This is not because there is nothing of value in the work of Aristotle and Kant when it comes to analyzing the power of narrative, but because the tradition those luminaries are a part of has become so centered that we no longer see their models of narrative as simply one of many ways to effectively tell stories.[177] Why does this matter? If "every trial contains competing narratives" then the judge or jury is in a very real way being asked to "choos[e] between competing stories, . . . pass judgment on the competing narratives, [and] in that act, define [them]selves."[178] This necessarily implies that familiar tales (even if somewhat badly told) will have an advantage in the courtroom.

---

[172] *See* Higgins, *supra* note 89, at 13.

[173] BARTON, *supra* note 81, at 100.

[174] *See* Lempert, *supra* note 65; *see also* Grose, *supra* note 65, at 49–53 (describing the author's use of storytelling in an advocacy course).

[175] *See infra* Section III.F.

[176] *See* Rideout, *Storytelling, supra* note 16, at 60–62, 73–74; *see also* Scales, *supra* note 62, at 1374 (claiming that "[i]n this country, the engine of the struggle for equality has been Aristotelian: Equality means to treat like persons alike, and unlike persons unlike").

[177] *See* Delgado, *supra* note 96, at 2413 ("Ideology – the received wisdom – makes current social arrangements seem fair and natural."); *see also* Scales, *supra* note 62, at 1382–83 (describing as male, centered, and thus invisible as ideology, a Hegelian model of "defin[ing] self, and other important concepts, by opposing the concept to a negativized 'other'").

[178] Rideout, *Storytelling, supra* note 16, at 69, 73; *see also* Gallacher, *supra* note 67, at 121 ("[T]he duel between the competing trial narratives is an intertextual, or internarrative, one, in which meaning is generated by the relationship of one case narrative to the other and—crucially—by additional knowledge and inferences transported into the jury room by the jurors themselves").

The examples cited above regarding the Canadian movement to recognize Indigenous storytelling practices in the courtroom are every bit as relevant in the United States.[179] When we represent diverse clients and simply attempt to fit their stories into existing forms and formalities, we fail in both our duty to the clients and our duty to the legal system as officers of the court. The forms of the legal stories and the stock tales we muster on behalf of clients will become as rigid and inelastic as the stifling writ system in England prior to the advent of Chancery's actions in equity if our exposure is limited as law students and professionals to the storytelling practices of the prevailing legal culture. It is only by becoming acquainted with a variety of legal storytelling styles and methods, from the variety of cultures that populate the United States, that new attorneys will be able to make prudent and ethical decisions when it comes to their own briefs, complaints, and memoranda.

D. Ethically Vulnerable: New Lawyers Need More than a Single Professional Responsibility Course

If a new attorney's legal storytelling toolbox consists only of stock stories from mainstream or traditional cultural narratives, and their legal education does not provide space to examine the possible ethical implications of using unexamined stories in practice, it raises a number of concerns.[180] Not least of these is the practical concern raised by potential sanctions for missteps and the attendant harm to a nascent attorney's professional reputation.[181] Perhaps it is arguable that this is less of a concern for those law students who head straight to "Big Law."[182] Yet if the justification for not providing more comprehensive ethical education for nascent attorneys is that we assume those that are successful will be mentored effectively by large law firms, or legal employers generally, the legal academy may be assuming too much. Particularly for non-

---

[179] *See* Napoleon & Friedland, *supra* note 103, at 729–31; Manley-Casimir, *supra* note 103, at 234.

[180] *See supra* Sections II.D.2 & II.D.3. Not reaching here the concern that the attorney may use stories to persuade a client. *See* Johansen, *supra* note 112, at 984–86, 991–92; *see also* Whalen-Bridge, *supra* note 66, at 241 (pointing out that although "most law students are exposed to some degree of training in legal ethics before they enter into practice . . . this training can be quite removed from students' initial training in argument and narrative," and thus, "[b]y the time students are instructed in legal ethics, they may have already concluded that narrative has no important ethical constraints").

[181] *See* Schiess, *supra* note 153, at 527 ("Lawyers have faced many consequences for poor writing, including court sanctions and fines, bar discipline, civil liability, and public humiliation").

[182] The argument is that larger organizations provide associates with more built-in time as apprentices before ever seeing the inside of a courtroom. *But see* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 739–46 (discussing the "increasing materialism of the legal profession" and the resultant erosion of the ethical mentorship available for new attorneys in elite law firms).

traditional, first-generation, and poor law students,[183] as well as those contemplating public interest law or "hanging a shingle" as a solo practitioner,[184] law schools cannot afford to be complacent about their obligations in mentoring and modeling legal ethics when it comes to legal writing.[185]

E. Professional Necessity: Judges and Juries Still Respond to Well-Told Stories and Reject Badly-Told Stories

As the *FootBalance* cases showed, at least in California, the standard for certain pleadings can now be taught to associates fresh out of law school as "Show, don't tell."[186] So it would seem that effective legal storytelling has certain things in common with effective storytelling in other disciplines, but it nevertheless presents unique challenges. In case after case cited above, judges and juries based their determinations in small or large part on the effectiveness of the storytelling being done on behalf of the parties.[187] While seeing the official pleading standard applied scrupulously to pro se plaintiffs often makes

---

[183] In other words, law students who may not have prior exposure to the ethical conundrums of the legal profession. *See* Jessica Tomer, *First-generation Law Students: Struggles, Solutions and Schools That Care*, NAT'L JURIST (Mar. 22, 2019, 8:39 AM), http://www.nationaljurist.com/national-jurist-magazine/first-generation-law-students-struggles-solutions-and-schools-care (quoting first-generation law student Jasmine Richardson of New England Law as saying, "It's really hard to get directions when you're the blueprint.").

[184] Here, the concern is that there is no pre-existing ethical mentorship structure when you are your own boss, and public interest organizations are often underfunded. *See* Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425, 431 (2013) (arguing that "basic competence" right out of law school "may be even more important in a small law firm, in a non-profit such as Legal Aid, or in a government agency (for example, the public defender's office), where there is less time to get acclimated and the pressure of immediate business may put the new lawyer on the firing line even sooner").

[185] *See, e.g.*, Johansen, *supra* note 112, at 64 (exploring "three characteristics of story that give rise to the concerns that storytelling is unfairly manipulative"); Schiltz, *supra* note 182, at 746–47 (arguing that "the academy is an obvious candidate to replace what has been lost by the profession's abandonment of mentoring" if it can refocus on students rather than "the accumulation of academic prestige").

[186] *See* FootBalance Sys. v. Zero Gravity Inside, Inc., (*FootBalance II*), No. 15-CV-1058 JLS (DHB), 2017 U.S. Dist. LEXIS 50668, at *20–21 (S.D. Cal. Apr. 3, 2017); FootBalance Sys. v. Zero Gravity Inside, Inc., (*FootBalance I*), No. 15-CV-1058 JLS (DHB), 2016 U.S. Dist. LEXIS 137978, at *18–19 (S.D. Cal. Oct. 4, 2016). This statement is somewhat tongue-in-cheek. *See* Huber, *supra* note 161 (addressing the ubiquity of "show, don't tell" as a maxim of writing practice). *But see* LAURA E. LITTLE, GUILTY PLEASURES: COMEDY AND LAW IN AMERICA 1 (2018) ("Judges and lawyers sometimes think they are (and indeed sometimes are) just *so* funny.").

[187] For details, see *supra* Section II.E.

for uncomfortable reading,[188] *Gottschalk* illustrates the degree to which bad storytelling and poor writing overlap even for licensed attorneys.[189] The judge's description of the flaws in the complaint related to issues of chronological clarity, i.e., inadequate linking of cause and effect, which are failures of diachronic narrative.[190] Other judges repeatedly raised issues of believability,[191] brevity,[192] and propriety.[193] Therefore, as a final argument, I offer three brief

---

[188] *See, e.g.*, Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 377 (2008) (describing movement to humanize process and allow parties to proceed more informally in light of increases in pro se litigants).

[189] *See* Gottschalk v. City & Cty. of S.F., No. C-12-4531 EMC, 2013 U.S. Dist. LEXIS 18825, at *15–17 (N.D. Cal. Feb. 12, 2013) (discussing difficulty of discerning factual basis for Plaintiff's claim due to disorganization of her complaint).

[190] *Id.*

[191] Regarding the believability of criminal defendants, see People v. Castro, No. B264800, 2016 Cal. App. Unpub. LEXIS 6756, at *39–40 (Sept. 15, 2016) (affirming the conviction, stating, "As we have already said, it is clear the jury did not believe the story told by Castro and Patricia that he never threatened her with the gun. It is also clear that, given the fact Revilla called police to report the theft of Brown's gun, it was highly unlikely the jury would believe Castro's story that he was really just borrowing the gun and he intended to return it as soon as he could get Revilla to come pick it up from him"); *see also In re* Anthony J., 11 Cal. Rptr. 3d 865, 869 (Cal. Dist. Ct. App. 2004) (upholding the lower court's "reject[ion of] Anthony J.'s version of events: 'The court finds that [Anthony J.'s] story . . . is totally unbelievable and incredible. And therefore the court will not make its decision based on that absolutely unbelievable story'").

[192] Regarding brevity, see Winston v. Martinez, No. 1:17-cv-00774-MJS (PC), 2017 U.S. Dist. LEXIS 183776, at *4–7 (E.D. Cal. Nov. 5, 2017) (dismissing amended complaint for being excessively long while failing to clarify original complaint); *see also Gottschalk*, 2013 U.S. Dist. LEXIS 18825, at *13, *15–17 (criticizing complaint for rambling and being confusing, unclear, and redundant).

[193] Finally, regarding propriety, see State v. Robinson, No. 105,281, 2012 Kan. App. Unpub. LEXIS 847, at *12 (Kan. Ct. App. Oct. 5, 2012) ("There is nothing inherently impermissible or objectionable about a storytelling approach to jury selection, so long as the analogies or narratives do not misstate legal concepts or otherwise confuse jurors. No such problems appear to have infected what Robinson's lawyer was doing. By the same token, however, a district court need not prolong jury selection because one or the other lawyer or both wish to paint numerous colorful and time consuming word pictures in figuring out which potential jurors to strike. The trial record reflects that Robinson's counsel actually got to do most of the painting he wished. And he did not proffer sketches of any masterpieces left undone. The district court did not limit the particular question put to the jurors during voir dire or the overall time Robinson's lawyer could spend. Rather, the district court merely reined in the lawyer's use of several narrative set pieces"); *see also* Fisher v. Beard, No. 03-788, 2018 U.S. Dist. LEXIS 125279, at *87–89 (E.D. Pa. July 25, 2018) (holding that a judge's instructions to the jury that contained multiple stories violated the defendant's Constitutional rights, because "the flawed parts of the instructions were stories, but the non-flawed parts of the instruction were simple statements about what a reasonable doubt is. People more readily absorb information through stories, and there is ample research proving

observations. First, new attorneys may not naturally know what legal stories judges and juries will find believable. Second, new attorneys may not be able to gauge the appropriate length of any given legal story, based on lessons from their first year Civil Procedure and Legal Writing courses. And, finally, new attorneys who are only guaranteed exposure during law school to the final opinions of courts, seasoned with a mere moiety of mandatory experiential education, will likely not have seen enough examples of effective legal storytelling *by attorneys* to judge for themselves the propriety of the legal stories they may be contemplating.

F. Form v. Function Revisited: Legal Storytelling as Humanistic Legal Pedagogy

Earlier portions of this note set out to establish that legal storytelling has been and remains an important and relevant skillset for attorneys vis-à-vis an appeal to origins and a look at contemporary scholarly critiques and caselaw. Yet several final questions remain regarding the potential impact of a heightened emphasis on legal storytelling on the legal curriculum. First, what would a legal storytelling class look like?[194] Second, how would it help improve student mental health? Finally, what are the arguments against actively incorporating legal storytelling into the law school curriculum, and how compelling are they?

1. A legal storytelling class would incorporate three necessary elements: a philosophy of lawyering statement, exposure to a variety of examples of legal storytelling, and regular in-class writing assignments practicing legal storytelling.

Based on my experiences teaching fiction writing to undergraduates, the ideal elements to foster the critical engagement of an incipient writer with story are threefold. First, each student must craft an aesthetic statement, re-envisioned here as a philosophy of lawyering statement. Second, each student must be exposed to a variety of examples of legal storytelling *by lawyers*, including a variety of styles and mediums. Finally, each student should create a portfolio of legal storytelling created over the course of their study, incorporating work created through regular in-class writing assignments.

Beth D. Cohen, in her article *Helping Students Develop a More Humanistic Philosophy of Lawyering*, describes the value of having students develop a

---

that individuals retain information better and engage with the material more fully when it is conveyed through a story as compared to the lecture format . . . . This data means that the jurors, in divining what a reasonable doubt is, likely retained the two incorrect stories by the judge, rather than his correct conclusory statements").

[194] Throughout this section, the discussion centers on the structure and benefits of a standalone legal storytelling class. However, these structural elements could also be incorporated into the existing first year writing courses, potentially achieving the same benefits posited here as flowing from the standalone course.

philosophy of lawyering.[195] Thoughtfully engaging with a medium like storytelling requires making normative judgments about what that medium should or should not do. In the case of new fiction writers, an aesthetic statement might express the writer's belief that story should involve a mimetic representation of reality—or that it should disturb the reader with a representation of the irreal or the uncanny. Similarly, a new legal writer's philosophy of lawyering statement would make normative claims about what the law and legal storytelling should or should not do. These statements might incorporate consideration of the lawyer's role as an advocate, a fiduciary, an officer of the court, and an individual.[196] A well-drafted and thoughtful philosophy of lawyering, like an aesthetic statement, can serve as a great personal resource for the new writer: when the writer is stuck, reference to their individually articulated first principles may offer inspiration.

The other two elements of a legal storytelling class work together: exposure to examples of legal storytelling and regular in-class writing assignments practicing legal storytelling. Cohen advocates the use of a longer non-fiction work, citing its ability to provide "a basis for substantive legal research and writing assignments," as well as "a framework to discuss different lawyering roles, approaches, strategies, and philosophies."[197] However, these interests might well be served in the context of a legal storytelling class by compiling a variety of examples of such storytelling: real examples of motions to dismiss, closing arguments, briefs, and potentially even short contracts to illustrate transactional storytelling. With a supporting multitude of fact patterns to generate in-class writing, these examples could become templates. Students might also reflect on these writings in light of their philosophy of lawyering, synthesizing and personalizing their approach to legal storytelling over time. The result would be, for each student, a portfolio of legal storytelling and a refined philosophy of lawyering, the creation of which would establish a foundational competency and facility that would serve each of them throughout their legal careers.

2. A legal storytelling class would ameliorate acknowledged issues with student mental health in law school.

As pointed out by the Petersons (and many others before them) law students suffer from much higher rates of depression and anxiety than other students.[198]

---

[195] Cohen, *supra* note 118, at 170 (claiming that "helping students develop a more humanistic and holistic philosophy of lawyering can help to improve the way that students study law and practice law" and "create a more unified view of the study and practice of law and a more unified view of a life in the law").

[196] *See id.* at 159 (describing the consideration of these roles by students).

[197] *See id.* at 153–54 (describing *Damages* as "the compelling story of a medical malpractice case and its impact on the lives of the family, lawyers, medical professionals, and insurance carriers").

[198] *See* Peterson & Peterson, *supra* note 5, at 365–66.

Cohen's argument for a more humanistic approach to legal education situates the problem clearly:

> Students arrive at law school with diverse experiences and backgrounds and are generally excited and energetic about the study of law and becoming lawyers. However, . . . their enthusiasm is often dampened by or replaced by self-doubt and insecurity. Legal education, instead of embracing diversity of thought, opinion, and experience traditionally tends to relegate individual perspective in favor of the notion of "thinking like a lawyer."[199]

Cohen further argues that by integrating more holistic and humanistic methods of education into the legal curriculum, law schools would be "[e]ncouraging law students to reflect on and explore the practice of law in more humane terms, while considering the impact of their work on their own lives and the lives of others."[200] This would "likely . . . ease some of the feelings of isolation and disconnect" they experience.[201]

Storytelling is an inherently humanistic practice. As Ian Gallacher argued in his article, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*:

> A lawyer who can project him or herself into the thoughts of another and understand how that person—juror, witness, judge, or other lawyer, for example—is thinking has the ability to calibrate language, posture, and gesture in a manner calculated to persuade the subject to believe whatever argument the lawyer is making.[202]

Gallacher went on to cite several different articles and studies supporting his contention that the current law school environment causes those who have more humanitarian or people-oriented personalities to drop out at higher rates or potentially be dissatisfied later in life as attorneys.[203] If it is true that the "disambiguation of life used by legal educators to compel students to 'think like lawyer' drains the landscape of . . . color and nuance . . . render[ing] the entire picture monochromatic, flat, and sterile," then it is no wonder that naturally empathetic students suffer in law school.[204] Legal storytelling offers an opportunity for law students to mediate the heightened emphasis on rationality

---

[199] Cohen, *supra* note 118, at 145–46 (stating further that "the lawyer in thinking like a lawyer is conceived and presented as a thoroughly competitive notion of 'advocate or gladiator' rather than as a collaborative, compassionate, and humanistic problem-solver or counselor, advisor, or problem-avoider").

[200] *Id.* at 148.

[201] *Id.*

[202] Gallacher, *supra* note 67, at 112.

[203] *Id.* at 116 (citing Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1367 (1997)).

[204] *Id.*

with an appropriate forum in which to cultivate proper uses of empathy in the practice of law.

3. Arguments against increased emphasis on legal storytelling in the law school curriculum fail to realistically envision the place of such methods within the extant curriculum.

If these arguments in favor of increasing the presence of legal storytelling in the mandatory law school curriculum hold water, it is a wonder that all law schools have not heeded the call to add courses or coursework of this kind to their requirements. In fact, several law schools do have course offerings specifically examining some aspect of legal storytelling, though they are not part of the mandatory curriculum.[205] So, what are the arguments against making classes like these mandatory? Over the course of my research, I ran across two arguments against increasing the emphasis on legal storytelling within the compulsory law school curriculum worth addressing briefly herein. First, there is the argument that amending the mandatory curriculum is a daunting process that legal storytelling courses may not merit. To this first criticism, I would simply reiterate that it is entirely possible to integrate the recommended curriculum described above into a first-year research and writing course, without actively amending the school's mandatory curriculum per se.[206] The second and more substantive argument against classes such as these is that applied legal storytelling as a discipline is itself evidence of a dangerous subjectivity in the

---

[205] *See, e.g.*, *Art of Storytelling* | SOUTHWESTERN LAW SCHOOL, SW. L. SCH., https://www.swlaw.edu/curriculum/courses/art-storytelling [https://web.archive.org/web/20170618003635/https://www.swlaw.edu/curriculum/courses/art-storytelling] (a one credit-hour course with an emphasis on oral storytelling, described as an "intensive course [that] will explore and practice the components necessary in delivering a compelling story. Students will acquire a new self-awareness physically, vocally and behaviorally. Through acting exercises and role play, students will discover their personal communication style, and understand how it can serve rather than distract from their message"); *see Successful Trial Lawyers are Novelists, Not Historians*, UNIV. OF HOUSTON L. CTR., http://www.law.uh.edu/news/spring2009/storytelling.asp (last visited Mar. 31, 2019) (describing a storytelling course still being offered in the current UHLC course catalog); *see also LAW 925 - Heroes and Villains: The Lawyer's Narrative in Fact and Fiction*, UCLA L., https://www.law.ucla.edu/academics/curriculum/course-list/law-925/ (last visited Mar. 31, 2019) (describing a current one credit-hour course at UCLA Law in the following terms: "Storytelling is not a metaphor for legal advocacy. It is legal advocacy itself. This course uses a single book and fictional stories about lawyers in film and television to understand what narrative is, why it is so effective in conveying information and persuading others, and how lawyers can improve their use of narrative in every aspect of their profession. Each class session will screen, analyze, and discuss a law-related fictional work, focusing on the rhetorical elements of the narrative and particular problems of legal ethics, the practice of law, issues of substantive law and public policy. Students will be assessed on class attendance and a short take-home final exam. The course is only offered pass/fail").

[206] *See supra* text accompanying note 194.

law that should not be allowed to flourish.[207] To this second argument, I would simply answer that it is very unlikely that all law school courses would become courses in legal storytelling, and I am certainly not advocating that the JD become simply a legal MFA. Integrating a minor increased emphasis on subjective argument as well as humane and empathetic reasoning will never displace the necessity of logical reasoning in the law; it simply has the potential to ameliorate some of the negative effects of exposure to the process of learning to think like a lawyer while making more able advocates of the participants.

CONCLUSION

There are five strong arguments that an increased presence of legal storytelling instruction in the mandatory curriculum of law school, with an emphasis on recognizing and building the underlying structures of such stories, would address the critiques of legal education cited above. First, the oldest legal precedent in the common law system for what lawyers are and what their essential function should be tells us they are storytellers. Second, perpetuating an exclusively formulaic storytelling praxis leaves new attorneys wide open to technological obsolescence at the binary-coded "hands" of AI lawyering. Third, an exclusively monocultural storytelling praxis—and the cultural insularity that it creates—does not reflect our diverse American society and, when utilized by attorneys, fails to represent clients in both senses of the word "representation." Fourth, teaching an exclusively normative storytelling praxis during law school compromises the ethical competency of nascent attorneys, leaving them open to potential discipline and humiliation. Fifth and finally, when the audience for their storytelling is a judge or a jury, attorneys do not have the luxury of telling those stories badly if they want to competently and successfully represent their clients. Given the relative ease of integrating legal storytelling into the law school curriculum, particularly in light of its potential benefits to students and eventual practitioners, there is little reason not to do so. It is of vital importance that legal educators offer law students sufficient exposure to the principles that undergird inventive storytelling structures because storytelling in the law is—and always has been—composed of both formulaic and individualized structures that can only be mastered through adequate study, which the legal academy must begin to guarantee.

---

[207] *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICA 39 (1997) (arguing that "stories can distort legal debate, particularly if those stories are atypical, inaccurate, or incomplete"). *But see* George H. Taylor, *Transcending the Debate on Legal Narrative* (Univ. of Pittsburgh Sch. of Law Working Paper Series, Paper No. 11, 2005), https://law.bepress.com/pittlwps/art11/.