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Where Have All the (Legal) Stories Gone?

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I wanted to be an English major in college because I loved to read. I loved reading the classics, and I loved thinking about plots and narratives. Thanks to my dad, I majored in psychology and legal studies, and because I hated the sight of blood (which ruled out medical school), I ended up in law school after college.

Law school is notorious for beating the love of reading right out of people. Who would want to read anything that begins with the word “Assumpsit”? Legal prose is frequently verbose, plodding, and downright boring, and law school casebooks rarely spend time teaching students the difference between good legal writing and awful legal writing. No wonder that law students graduate with the impression that they have to continue the tradition of impenetrable prose. What other examples do they see?

What’s worse is that, with the exception of a few scattered “law and literature” courses, and maybe the odd trial advocacy course, we fail to teach students that not only does writing matter, but the “story” matters, too. Really good lawyers—especially litigators—know that the “story” shapes everything: from the way that the lawyer goes about developing the case to the way that the lawyer drafts the pleadings and even all the way to trial or settlement of the case. Somewhere in law school, though, that lesson has been lost.

It’s not too late to fix the problem, though. By interweaving some real-life examples of lawyers who talk about crafting the stories of their clients with the use of Hollywood’s images of lawyers doing the same thing, we can teach law students that great lawyering begins with understanding that facts and law don’t make a case; stories do.

Let’s take an easy example: one of my favorite TV shows (cancelled, sadly, after only two seasons) was Shark (CBS 2006-2008). In that show, James Woods played Sebastian Stark, a former criminal defense lawyer who left defense work behind to become an assistant district attorney. Put in charge of a group of young, unseasoned lawyers, he indoctrinates them in his way of thinking about trials:

“My cutthroat manifesto. These rules guide every decision I make on every single case. Rule No. 1: Trial is war; second place is death. Rule No. 2: Truth is relative. Pick one that works. Rule No. 3: In a jury trial, there are only twelve opinions that matter, and, Miss Troy, yours most decidedly, is not one of them.”

My dad wanted me to major in something else—well, actually, anything else—for two reasons: one, because he knew that being an English major would come fairly easily to me, and he wanted college to challenge me, and two, because he wasn’t exactly sure what English majors did for jobs after college. (My fantasy, of course, is that they went to Hollywood, but we’ll never know.)
I love this movie! The meaning is not something that I’d encourage a lawyer to do. Litigation itself involves the story of a claim often the most important step in winning the case. Litigation is also over-represented, in part because one credit course linking the art of storytelling to lawyering skills. The first legitimate question will be what the faculty would have to remove from the curriculum in order to make room for the storytelling unit. Professors who teach first-year courses, already feeling pressed for time in their own courses, won’t want to give up a credit-hour of their already compressed course coverage. So a mandatory first-year storytelling unit is probably a no-go from the beginning.

As an experienced law professor, I’d then shift to the recommendation of making the storytelling unit an upper-class elective. Now I’ve gained the support of professors who aren’t losing any credit-hours from their first-year courses, but I’d have weakened the argument that the art of storytelling is a crucial element of lawyering. (Because so few upper-level courses are mandatory in most law schools, I’ve bypassed that possibility completely.) Moreover, the next objection to this curricular change would be that if any, the current faculty could staff such a course, and the law school wouldn’t have the resources to go out and hire new faculty who could teach such a unit.

And there’s the crux of the problem. Although individual law professors might be able to teach such a unit, or to add the discussion of storytelling to their own courses (the micro-change), the real problem is the age-old debate about the purpose of law school.

Law schools are strange animals in the university setting. Many law professors have the J.D. degree, whereas their peers in the university have real (“earned”) doctorates. Law professors publish primarily in law reviews, which are run by law students, and law professors are allowed to submit their articles to multiple law reviews simultaneously. Other professors in other disciplines submit an article to one peer-reviewed journal at a time, wait for the review to come back, and then find out whether the journal has accepted the piece, has rejected the piece (in whole or in part), or has required revisions before it will accept the piece. In other words, the professor may then submit the piece to a different journal. Like the other professional schools, law schools are supposed to graduate lawyers, just as engineering schools are supposed to graduate engineers, and architecture schools are supposed to graduate architects. Other academic units on campus have graduate students, who may well go on to become professors themselves. (Aside from students at Yale Law School, few law students go to law school with the idea of becoming law professors.) Professors teach, research, and do other work, but what we teach is often quite different from the research that we do, and that leads to intermittent clashes about why law schools exist.

FOOTNOTES
8. Yes, yes, I know: leaving the facts and the law on your side helps. 13. Settlements make the ending more palatable. 14. Difficult, I don’t think of any. 15. And I’m “storytelling” here, as in the title of this essay. In its literal sense—i.e., telling a story no “telling” that sounding meaning is not something that I’ll encourage in a lawyer to do.

Think about how much fun it would be to show this clip to a group of first-year law students, many of whom come in with rose-colored glasses about how trials determine “truth.” It’s a wonderful opportunity to talk about whose truth—the defendant’s? The “people of the state of X”? It’s also a wonderful opportunity to talk about the adversary system and how judges and juries never really know the facts of the case. What they know is what the lawyers choose to let them see about the case.

Whatever one thinks about Vincent Bugliosi, it’s safe to say that he wrote a marvelous book called AND THE SEA WILL TELL (1991), about his prosecution of a gruesome double homicide. From what makes this book so good is that Bugliosi talks about how early in a case he prepares his closing argument—before he goes to trial. He develops his theory of his case (i.e., the story), and his closing argument, at the same time. He’s not alone in doing that. I bet that virtually everyone who’s reading this essay does much the same thing, whether consciously or subconsciously.

Litigation lends itself to storytelling, which is one of the reasons why litigators tend to understand that framing the story is often the most important step in winning the case. Litigation is also over-represented, in part because one credit course linking the art of storytelling to lawyering skills. The first legitimate question will be what the faculty would have to remove from the curriculum in order to make room for the storytelling unit. Professors who teach first-year courses, already feeling pressed for time in their own courses, won’t want to give up a credit-hour of their already compressed course coverage. So a mandatory first-year storytelling unit is probably a no-go from the beginning.

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And there’s the crux of the problem. Although individual law professors might be able to teach such a unit, or to add the discussion of storytelling to their own courses (the micro-change), the real problem is the age-old debate about the purpose of law school.

Law schools are strange animals in the university setting. Many law professors have the J.D. degree, whereas their peers in the university have real (“earned”) doctorates. Law professors publish primarily in law reviews, which are run by law students, and law professors are allowed to submit their articles to multiple law reviews simultaneously. Other professors in other disciplines submit an article to one peer-reviewed journal at a time, wait for the review to come back, and then find out whether the journal has accepted the piece, has rejected the piece (in whole or in part), or has required revisions before it will accept the piece. In other words, the professor may then submit the piece to a different journal. Like the other professional schools, law schools are supposed to graduate lawyers, just as engineering schools are supposed to graduate engineers, and architecture schools are supposed to graduate architects. Other academic units on campus have graduate students, who may well go on to become professors themselves. (Aside from students at Yale Law School, few law students go to law school with the idea of becoming law professors.) Professors teach, research, and do other work, but what we teach is often quite different from the research that we do, and that leads to intermittent clashes about why law schools exist.
Do law schools exist only to turn out lawyers? If they do, then much of the research that law professors do has no bearing on the day-to-day work of lawyers, and many of the courses may, in fact, be too theoretical to help novice lawyers hit the ground running. If, on the other hand, law schools exist to turn out people who—with proper coaching—can eventually become lawyers and to help lawyers and judges understand the law (via the professors’ research), then law schools are more than mere trade schools. And if law schools are more than mere trade schools, then asking them to add a unit on storytelling is adding more to an already overburdened curriculum.

A counterargument to the “overburdened curriculum” argument is that, once we teach students how to learn the law, we need them to teach the law in a substantive way. Our current curriculum has us do. At some point, students can learn the law on their own. Instead, we could take the remainder of their time in law school (maybe the last year) to teach them other skills that will help them develop into good lawyers. We could, for example, teach them interviewing skills, or negotiating skills, or catch them up on any missed courses in accounting, economics, or psychology—all necessary for the problem-solving that good lawyers must do. And yes, we could teach them how important the art of storytelling is to their clients’ needs.

But there’s the third, and final, problem. Few law professors stay in touch with the practice of law. Of course, some of us stay in touch by being expert witnesses from time to time, and our clinical colleagues are lawyers and professors simultaneously. But many of the rest of us haven’t been lawyers for years, and the practice of law has changed dramatically. We just don’t have much credibility when it comes to telling students how lawyers work, or what good lawyers need to know, because few of us ever stayed long enough in the practice of law to have been considered good lawyers.

What’s the profession to do? If law schools don’t want to adapt to turn out better lawyers—those with skills beyond learning how to learn the law—then either legal employers have to act as “lawyer finishing schools” (not likely these days, based on the economy) or the profession has to pressure law schools into changing what and how we teach. Law professors don’t tend to feel pressure readily, but remember: just as legal employers are suffering in this economy, so are most law schools. If ever there were a time that the profession might be able to get the professors’ attention in the first place.

My second-favorite mixie of all time has a wonderful scene explaining how the space program really got off the ground:

Gordon Cooper: You boys know what makes this bird go up?
Gus Grissom: He’s right. No bucks, no Buck Rogers.

Funding—that is, budget allocations, donations, and the like—is one way to drive the engine of change. If we want law schools to recapture the art of storytelling, we need to teach law students how important that art is, and the way to do that is to integrate storytelling into the law school curriculum. But to change the curriculum, the profession needs to get the faculty’s attention in the first place.

You could do it with funding, if you have the discretionary income. (But I’m guessing that few of us ever stayed long enough in the practice of law to have been considered good lawyers.)

You could do it by telling us some stories—stories about how much better lawyers are when they understand that the bare linking of facts and law has never persuaded anyone.

Or you could do it by telling us some stories—about how much better lawyers are when they understand that the bare linking of facts and law has never persuaded anyone. Why don’t you start there?