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WHERE HAVE ALL THE (LEGAL) STORIES GONE?[1]

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I wanted to be an English major in college because I loved to read.[3] I loved reading the classics, and I loved thinking about plots and narratives. Thanks to my dad,[4] 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?"[5] 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[6] 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.[7]

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.[8]

FOOTNOTES

1. © Nancy B. Rapoport 2009. All rights reserved.

2. Gordon Silver Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas; proud member of AMEC. Her books include NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009) and NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, LAW SCHOOL SURVIVAL MANUAL (Aspen Publishers, forthcoming).

3. 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.)

4. See n. 3, *supra*.

5. See Hawkins v. McGee, 146 A. 641 (N.H. 1929).

6. "Odd" in that I doubt that every trial advocacy course has time to talk about crafting the theory of the case.

7. Law school presents the opportunity to miss other lessons as well, including the lesson that students can use the expertise that they brought into law school to augment the skills that they learn while in law school. But that's the subject of another essay, for another time.

8. *Shark*, Pilot (CBS 2006). For a discussion of how Sebastian Stark ruins his protégés' ethical principles, see Nancy B. Rapoport, *Swimming with Shark*, in LAWYERS IN YOUR LIVING ROOM: LAW ON THE SMALL SCREEN 163 (Michael Asimow, ed., 2008).

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 a lawyering skills point of view, 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'd 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.[9] Litigation is also over-represented in movies and television, in part because trials have a beginning, a middle, and an end,[10] much like stories. (Of course, litigation in movies and television is not the mind-numbing, watching-grass-grow, drawn-out process that it is in real life. Thank goodness.)

But what should we do about budding transactional lawyers? Law students who want to be "deal lawyers" shouldn't be cheated out of the understanding of the link between storytelling and lawyering. There are precious few examples of fictional lawyers slaving over the "story" behind the creation of contracts,[11] so how can we convey the art of storytelling to law students who don't want to become litigators?

For deal lawyers, I think that the storytelling comes down to the interpretation of provisions, whether those provisions are part of transactions themselves or whether they're part of statutes or regulations. There's still a need for storytelling, to fit a client's situation within (or outside) the scope of a provision.

Every lawyer who wants to explain to the IRS why a particular tax reduction strategy is legitimate is engaging in storytelling.[12] Every lawyer who is trying to respond to an "event of default" notice by claiming that the alleged triggering event does not match what the provision in the contract lists as an event of default is, in effect, telling a story as to why his client's facts differ from what the parties meant when they (or their lawyers) drafted the contract.

To take an example that has piqued my curiosity, I'm wondering what storytelling the producers of *The Hangover* (Warner Bros. 2009)[13] used to get an R rating, given some of the photos that accompany the credits at the end of the movie. There *has* to be some pretty creative lawyering going on there.

It seems as if it would be easy to fix the disconnect between the art of storytelling that we know goes on in real-life lawyering and the lack of storytelling-instruction that takes place in law schools. But I'm not sure that the fix is so easy. Here's why.

To change anything in a law school curriculum requires either a micro-change (a single professor decides to incorporate the change into her course) or a macro-change (the faculty as a whole decides to change the curriculum). Micro-changes are easy, because law professors don't micro-manage each other's courses. If I want to teach, say, my Professional Responsibility course by using film clips to illustrate various ethics violations,[14] I have *carte blanche* to do that. My colleagues who teach other courses have similar freedom to teach their courses the way that they see fit. We don't vote as a faculty on each other's syllabi; at best, we'll review the syllabi of our "pre-tenured" colleagues as they move towards promotion and tenure. Academic freedom—to teach our courses as we deem appropriate and to research what interests us without fear of retribution if we write about unpopular topics—protects our choices.

Macro-changes, on the other hand, are exceptionally difficult to achieve. Contrary to popular belief, deans have very little power in law schools when it comes to curricular decisions, faculty hiring, and admissions.[15] Because these three areas are considered "core" faculty decisions, the faculty must take the laboring oar. To get a curricular change approved, then, a proposal must go first through a curriculum committee, then through the faculty, and then, if the law school is affiliated with a university, through the university's curriculum structure, all the way to the university's governing board. Such a process takes time, and that's only the procedural part of the equation.

More serious, still, is the trade-off problem. Let's say that I propose to the curriculum committee that we add a course—or even a segment of a course—on storytelling and the law. Maybe the proposal would be for a first-year, 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[16] 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'd have bypassed that possibility completely.) Moreover, the next objection to this curricular change would be that few, if any, of 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 only the J.D. degree,[17] 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 required revisions before it will accept the piece, or has rejected the piece (in which case, the professor may then submit the piece to a different journal).[18] 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.[19] Law professors teach and do research,[20] 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

9. Yes, yes, I know. Having the facts and the law on your side helps, too.

10. Settlements make the ending more abrupt.

11. Offhand, I can't think of any.

12. And I'm using "storytelling" here, as in the rest of this essay, in its literal sense—as telling a story, not as "lying." That second meaning is not something that I'd encourage a lawyer to do.

13. I love this movie!

FOOTNOTES

14. And I do just that in my PR course. Thank you, Hollywood, for giving me so many great examples!

15. *See, e.g.*, Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359 (2006).

16. I've been a law professor since 1991, and I was a dean of two different law schools (for a total of eight years as a dean).

17. Although this statistic is changing: many new professors have Ph.Ds or other advanced degrees.

18. *Cf.* Rick Trebino, *How to Publish a Scientific Comment in 1 2 3 Easy Steps*, available at http://www.scribd.com/doc/18773744/How-to-Publish-a-Scientific-Comment-in-1-2-3-Easy-Steps. As one of my favorite colleagues has said,

> If you have never tried it, imagine what it is like to encounter the mixture of incredulity and greed that you inspire when you, as a law professor, tell a professor of English (say) that we let students make publication decisions. Surely, it is an exquisite form of humiliation to have some infant who can't earn a C in criminal law tell you that you really don't grasp the contours of mens rea. But for anyone who has suffered under the vengefulness and pomposity of a peer review system, the regime of the law review must look like a sinful indulgence.

John D. Ayer, *"Aliens Are Coming! Drain The Pool!,"* 88 MICH. L. REV. 1584, 1587 n.13 (1990). Law professors are also among the highest-paid faculty members on campus, unless the campus has a medical school and a business school, in which case the law school faculty is third in line on the pay scale. No wonder the other units hate us.

19. As Jack Ayer has pointed out, "law is one post-graduate discipline where the students are not training to do the same job as their teachers." John D. Ayer, *So Near to Cleveland, So Far from God: An Essay on the Ethnography of Bankruptcy*, 61 CINN. L. REV. 407, 408 (1992). He goes on to explain, "There is a delicious irony here: 'real' academics like to dismiss the law schools as mere barber colleges whereas from the standpoint of the student/consumer, it is they who operate by apprenticeship and we who operate closer to the plane of 'pure' theory." *Id.* at 408 n.4. These are two of my favorite Ayer quotes of all time. If you've never read any of his articles, you should. They're delightful.

20. And service.

21. *See* Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, available at http://select.nytimes.com/2007/03/19/us/19bar.html?_r=1. If judges are finding our articles irrelevant, then law professors may well be writing only for each other. If you listen carefully, you can hear trees falling in the forest, which is devoid of any witnesses able to hear those trees fall.

22. That coaching is less likely now that more law firms are laying off associates (and some partners) in droves, delaying other associates' start dates by months or years, or paying some hires not to start work at all.

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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,[21] and many of the classes 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[22]—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 needn't teach them as many substantive law courses as 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 here'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 attention of those who control the curriculum in law schools, that time is now.

My second-favorite movie 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?
FUNDING 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 lawyers 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 donations for storytelling professorships are going to be few and far between for a long time.)

Or 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. Why don't you start there?

FOOTNOTES

23. If ever.

24. *The Right Stuff* (Warner Bros. 1983); quote available at http://www.imdb.com/title/tt0086197/quotes.

ATTORNEY PROFILE

NANCY **RAPOPORT**

Nancy B. Rapoport is the Gordon Silver Professor at the William S. Boyd School of Law, University of Nevada, Las Vegas. Before arriving in Las Vegas in 2007, she was a law professor at The Ohio State University College of Law (now the Moritz College of Law), the University of Nebraska College of Law (where she also served as dean), and the University of Houston Law Center (where she, again, served as dean). Before starting her academic career, she was a law clerk for the Hon. Joseph T. Sneed III of the United States Court of Appeals for the Ninth Circuit and was an associate at Morrison & Foerster.

Her specialties are bankruptcy ethics, ethics in governance, and the depiction of lawyers in popular culture. Among her published works is Enron: Corporate Fiascos and Their Implications (Foundation Press 2004) (co-edited with Professor Bala G. Dharan of Rice University). The second edition, Enron and Other Corporate Fiascos: The Corporate Scandal Reader (Nancy B. Rapoport, Jeffrey D. Van Niel & Bala G. Dharan, eds.; Foundation Press 2d ed. 2009), addresses the question of why we never seem to learn from prior scandals. Soon out will be the Law School Survival Manual, co-authored with Jeffrey D. Van Niel (Aspen Publishers 2009). She is admitted to the bars of the states of California, Ohio, Nebraska, Texas, and Nevada and of the United States Supreme Court. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. She is a Fellow of the American Bar Foundation and a Fellow of the American College of Bankruptcy. In 2009, the Association of Media and Entertainment Counsel presented her with the Public Service Counsel Award at the 4th Annual Counsel of the Year Awards.

She has also appeared in the Academy Award®-nominated movie, Enron: The Smartest Guys in the Room (Magnolia Pictures 2005) (as herself). Although the movie garnered her a listing in www.imdb.com, she still hasn't been able to join the Screen Actors Guild. Her hobbies include competing pro-am in ballroom and Latin dance, and her not-so-secret fantasies include serving on the Disney Board of Directors and to working, somehow, as a legal consultant in television or movies, even though she's not uniquely qualified to do so.