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## Thinking Like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance

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THINKING LIKE NON-LAWYERS: WHY EMPATHY IS A  
CORE LAWYERING SKILL AND WHY LEGAL EDUCATION  
SHOULD CHANGE TO REFLECT ITS IMPORTANCE

Ian Gallacher\*

We are all familiar with the famous dictum that law school should train its students to “think like lawyers.”<sup>1</sup> In fact, we are likely so familiar with the words, and the concept behind them, that we rarely stop to consider the fact that a substantial amount of lawyer communication occurs with non-lawyers; people who have not received the same systematic training as lawyers and who, according to the implicit message of the dictum, think very differently from the lawyers who are trying to communicate with them. And because all lawyers have participated in fundamentally the same educational process, and have been trained to emphasize the importance of logic at the expense of all other responses to facts and law, we likely have given little thought to the important role empathy plays in real-life lawyering.

This article seeks to explore the nature of empathy in lawyer-to-non-lawyer communication and to describe why empathy – just as much as knowledge of applicable laws and rules and an ability to synthesize and distinguish precedent – is a core lawyering skill. It also discusses how current legal education practices are designed systematically to eliminate empathy from law students and why this is a mistake that can affect a lawyer’s ability to communicate with juries, clients, and the other non-lawyers with whom a lawyer comes into contact, And it will conclude that law schools should make core changes in the way they teach their students and that attention to empathy as a critical lawyering skill should begin before law school begins, should continue throughout all three years of formal legal education, and should continue after law students graduate from law school.

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\* Associate Professor of Law, Syracuse University College of Law. An early version of portions of this article was presented at “Once Upon A Legal Time,” the second biennial international applied legal storytelling conference at the Lewis and Clark Law School, Portland, Oregon. Thanks to Dean Hannah Arterian for her support, both personal and professional, in making this article possible, to Dean Philip McConnaughay, the faculty, and staff at the Lewis Katz building of Penn State’s Dickinson School of Law for giving an itinerant faculty member a home during the summer of 2009, and to Professor Penny Pether, who planted the seed of this article many years ago. Thanks also to the indefatigable Katharine Laubach who handled all my research requests with grace and skill, to Bailey McKinstry for her company during the writing process, and to Charles Goodell, who taught me many years ago about the importance of empathy for trial lawyers and the power of “standing tall.” This is for Jean McKinstry, a person whose life embodied empathy, and, as always, for her daughter Julie.

<sup>1</sup> KARL LLEWELLYN, *THE BRAMBLE BUSH*, 116 (Oceana, 1996).

The problem is not one of the legal writing curriculum's making, although legal writing, which focuses on training law students to communicate with other lawyers, and which stresses a "lawyer-like" approach to analysis, tends to affirm rather than contradict the lessons students learn in their doctrinal classes. But while legal writing training might not have caused legal education to seek the elimination of empathy from its students, it holds the key to restoring empathy to its appropriate role as a crucial skill for all lawyers. Writing is an empathetic act, and the goal of persuasive writers is to place themselves in their audience's minds in order to understand how best to influence them while they make their decisions. The lessons legal writing faculty teach about writing and reading could easily be adapted so that empathy could take its place besides the more traditional law school emphasis on logical analysis and could be emphasized before and after students come to law school, as well as during their time as law students..

The notion that empathy is so important to lawyers that it warrants a rethinking of the law school curriculum is doubtless controversial to some. Indeed, it is easy these days to walk into the legal empathy minefield but less easy to emerge unscathed.<sup>2</sup> And as some have noted, "empathy" is not a word that carries much

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<sup>2</sup> I am not alone in discussing this controversial issue. A brief and incomplete summary of recent scholarly work on empathy in the law shows that it has been a popular subject for study: Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 Neb. L. Rev. 1 (2008); William D. Casebeer, *Identity, Culture and Stories: Empathy and the War on Terrorism*, 9 Minn. L. L. Sci. & Tech. 653 (2008); Claire A. Hill, *Introduction to the Symposium: Self and Other: Cognitive Perspectives on Trust, Empathy and the Self*, 9 Minn. J. L. Sci. & Tech. 637 (2008); Richard Warner, *Empathy and Compassion*, 9 Minn. J. L. Sci. & Tech. 813 (2008); Jim Golden, H. Abigail Moy, & Adam Lyons, *The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases*, 13 Harv. Negot. L. Rev. 21 (2008); Marc D. Falkoff, *Conspiracy to Commit Poetry: Empathetic Lawyering at Guantanamo Bay*, 6 Seattle J. Soc. Just. 3 (2007); Sharisse O'Carroll, *Empathy, Courage and Diligence: Three Things I Wish I'd Learned in my Law School Ethics Course*, 17 Prof. Lawyer 24 (No. 1 2006); Amnon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 J. Legal Educ. 296 (2006); Jody Lynne Madeira, *Recognizing Odysseus' Scar: Reconceptualizing Pain and its Empathic Role in Civil Adjudication*, 34 Fla. St. U. L. Rev. 41 (2006); Jody Lynne Madeira, *Regarding Pained Sympathy and Sympathy Pains: Reason, Morality, and Empathy in the Civil Adjudication of Pain*, 58 S. C. L. Rev. 415 (2006); Craig Haney, *Condemning The Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DePaul L. Rev. 1557 (2004); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life And Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. Davis L. Rev. 1203 (2004); Susan Nauss Exon, *The Best Interest of the Child: Going Beyond Legalize to Empathize with a Client's Leap of Faith*, 24 J. Juv. L. 1 (2003-04); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 Clinical L. Rev. 135 (2002-03); V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 Clinical L. Rev. 83 (2002-03); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 Cornell L. Rev. 343 (2002-03); Rachel D. Godsil, *Expressivism, Empathy And Equality*, 36 U. Mich. J. L. Reform 247 (2002-03); Michael J. Zimmer, *Systemic Empathy*, 34 Colum. Hum. Rts. L. Rev. 575 (2002-03); Jeanne L. Schroeder,

authority.<sup>3</sup> Lynne Henderson has observed that “[e]mpathy has become a favorite word in critical and feminist scholarship. Unfortunately, it is never defined or described – it is seemingly tossed in as a ‘nice’ word in opposition to something bad or undesirable. . . .”<sup>4</sup> More recently, the word has become a political plaything, with President Obama declaring, in his search to replace Justice Souter on the Supreme Court bench, that empathy is “an essential ingredient for arriving at just decisions and outcomes”<sup>5</sup> and Senator Jeff Sessions replying that he was “troubled” by President Obama’s use of the “empathy standard” when selecting federal judges:<sup>6</sup>

[T]his view – that a judge should use his or her personal feelings about a particular group or issues to decide a case -- . . . stands in stark contrast to the impartiality that we expect in the American courtroom. If a judge is allowed to let his or her feelings for one party in the case sway his decision, hasn’t that judge then demonstrated a bias against the other party? And, if a judge is allowed to inject his personal views into the interpretation of the law, does he not then have a license to rewrite the laws to fit his own preferences?

I fear that this ‘empathy standard’ is another step down the path to a cynical, relativistic, results-oriented world:

- Where words and laws have no fixed meaning;
- Where unelected judges set policy;
- And where Constitutional limits on government power are ignored when they are inconvenient to the powerful.

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*Economic Rationality, Empathy, and Corporate Responsibility*, 70 Geo. Wash. L. Rev. 875 (2002); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U. S. F. L. Rev. 621 (2001-02); Justin D’Arms, *Empathy and Evaluative Enquiry*, 74 Chi-Kent L. Rev. 1467 (1998-2000); Lynda Olsen-Fulero & Solomon M. Fulero, *An Empathy-Complexity Theory of Rape Juror Story Making*, 3 Psychol. Pub. Pol’y & L. 402 (1997); Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 Chi-Kent L. Rev. 819 (1996-97); Teresa Bruce, *The Empathy Principle*, 6 Law & Sexuality 109 (1996); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. Ill. L. Rev. 769 (1994); Stephen Ellman, *Empathy and Approval*, 43 Hastings L. J. 991 (1991-92); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 Mich. L. Rev. 2099 (1988-89); Lynne N. Henderson, *Legality and Empathy* 85 Mich. L. Rev. 1574 (1986-87).

<sup>3</sup> Massaro, *supra* n. 2, at 2106.

<sup>4</sup> Lynne N. Henderson, *Legality and Empathy* 85 MICH. L. REV. 1574, 1578 (1986-87).

<sup>5</sup> Peter Slevin, *Obama Makes Empathy a Requirement for Court*, Washington Post (May 19, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515.html>.

<sup>6</sup> Senator Jefferson Sessions, *Weekly Republican Address* (June 6, 2009), available at <http://www.gop.com/News/NewsRead.aspx?Guid=ebbe52d7-8d7b-4f2c-9c87-924b2e06e806>.

This standard is deeply troubling because it is contradictory to our country's long heritage of a faithful and impartial adherence to the rule of law.<sup>7</sup>

In light of this controversy, my description of “empathy” as a core lawyering skill might surprise some. But once the baggage commonly freighted with the word is unpacked, its relevance to lawyers can readily be appreciated. In the context of this article, I use the word in its simple, dictionary, meaning -- “[t]he power of projecting one’s personality into (and so fully comprehending) the object of contemplation.”<sup>8</sup>

Indeed, as Martha Nussbaum observes, empathy is neither a good nor a bad thing.

Empathy by itself . . . is ethically neutral. A good sadist or torturer has to be highly empathetic to understand what would cause his or her victim maximal pain. Nor, I believe, is empathy always necessary for compassion: we can have compassion for the sufferings of non-human animals without being able to put ourselves inside their minds.<sup>9</sup>

And viewed in the context of this narrow interpretation, empathy can be seen to be of extraordinary value to lawyers. 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. Conversely, a lawyer who fails to make this empathetic connection with others will find it much more difficult – perhaps even impossible – to communicate effectively and persuasively, especially with non-lawyers.

Before we consider how lawyers might become more empathetically attuned, we must first step back and consider why and how the legal education process causes lawyers, especially younger lawyers, to overemphasize a more logical approach at the expense of empathy. That discussion forms part one of this article.<sup>10</sup> Part two will discuss the commonplace notion of a lawyer’s case theory as narrative, but will

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<sup>7</sup> *Id.* Senator Sessions was, of course, reprising the familiar trope that judges should respond logically, and only logically, to the facts of cases brought before them. This is an extension of the idea that lawyers should ‘think like lawyers’ at all times.

<sup>8</sup> Oxford English Dictionary (2d ed. 1989), available at <http://dictionary.oed.com>. Apparently, the word came into the language in the early twentieth century through the aesthetic literature as a translation of the German “Einfühlung.” *Id.* It is worth noting, in passing, that there is no entry for “empathy” in Black’s Law Dictionary. If any special meaning is asserted on the word’s behalf, then, it appears that such meaning has not become universally accepted as a legal term by the legal community.

<sup>9</sup> Martha Nussbaum, *Reply to Amnon Reichman*, 56 J. Legal Educ. 320, 325 (2006).

<sup>10</sup> Footnotes 16-53, *infra*, and accompanying text.

also explore the communicative nature of the multiple narratives that interact during trial and the intertextual,<sup>11</sup> or internarrative relationship between them.<sup>12</sup>

The idea of dueling internarrative relationships sets up the question of what happens when a lawyer's narrative theory conflicts with the jury's collective narrative expectations because of the lawyer's empathetic failure to understand those expectations, and, by contrast, what can happen when a lawyer is empathetically well-attuned to both the witness and the jury's reception of the witness' testimony. That discussion forms part three of this article, which examines in detail three cases that stand as proxies for familiar lawyering tropes: the unsuccessful prosecution theory in the O. J. Simpson case, which represents a failure to appreciate the jury's cultural perspective on the facts of the case; a case from the Vioxx litigation that displays the sometimes unsuccessful corporate defense approach that relies heavily on scientific data and objective fact; and the Triangle Shirtwaist case which presents a successful example of tactical empathy, showing how effective a skillful lawyer who listens to what a witness actually says, and who understands how to communicate with juries, can be. The article will seek to explain the potential impact on juries of these various approaches.<sup>13</sup>

Finally, part four will look suggest ways in which lawyer training, including pre and post-law school training as well as the education that happens during the three years of formal legal training, might change to make junior lawyers more effective communicators.<sup>14</sup> Especially at a time when American college students are measurably, and dramatically, less empathetic than they used to be,<sup>15</sup> law schools do law students, lawyers, and society, a disservice by systematically eliminating the empathetic response of law students and that they should reverse course and start emphasizing the value of empathy together with the more traditional, logic-based, approach to legal analysis.

This article will conclude that legal education should train law students to react both logically and empathetically to factual situations, and that this training – which could begin even before students come to law school – should continue all the way through law school and even after students have graduated.

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<sup>11</sup> “Intertextuality” is a term given to the phenomenon whereby one text operates on another to create new meanings. “Intertextuality is the current and comprehensive literary term for the concept that each text exists in relation to others and is framed by other texts in many ways.” Jeffrey Fischer, *Killing at Close Range: A Study in Intertextuality* 95 *The English Journal* 27, 28 (2006).

<sup>12</sup> Footnotes 54-70, *infra*, and accompanying text.

<sup>13</sup> Footnotes 75-166, *infra*, and accompanying text.

<sup>14</sup> Footnotes 167-178, *infra*, and accompanying text.

<sup>15</sup> Footnotes 201-02, *infra*, and accompanying text.

## A. Thinking And Communicating Like A Lawyer

The origins of the American law school curriculum in the work of Christopher Columbus Langdell, dean of Harvard law school during the formative years of legal education in this country, are well known.<sup>16</sup> The process by which law was taught under Langdell, and by which it is mostly taught today as well, relies on the analysis of judicial opinions “in a scientific spirit as specimens from which general principles and doctrines could be abstracted. Once formulated, these doctrines would be used to classify the fast-expanding mass of American legal decisions, forming the body of law into fields such as contract law, tort law, and criminal law.”<sup>17</sup> Law school’s “signature”<sup>18</sup> pedagogical approach – the so-called “Socratic”<sup>19</sup> method,<sup>20</sup> used especially in the first year of legal education, is intended to help students develop a different set of analytical skills from those they have previously employed.

Karl Llewellyn observed that “[the first year of law school] aims, in the old phrase, to get you ‘thinking like a lawyer,’”<sup>21</sup> and few would disagree that this is what law schools attempt to do.<sup>22</sup> The question implicit in this notion, though, is how should lawyers, or at least law students, think? Llewellyn was in no doubt that lawyers should be trained as cool, unemotional, thinkers and that is was the job of law school to impose this analytical style onto law students who might initially be uncomfortable with it: “The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy,

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<sup>16</sup> For a discussion of Langdell’s importance in the development of the law school curriculum, see, Catherine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L.REV. 551 (2010).

<sup>17</sup> WILLIAM M. SULLIVAN ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (the “Carnegie Report”), 5-6 (2007).

<sup>18</sup> *Id.* at 24.

<sup>19</sup> I say “so-called” because, as Martha Nussbaum notes, the process is not, in fact, very Socratic. “Emphasis is placed on the ability to give quick answers, and to admit to being puzzled – a key Socratic virtue – will not get the student very far. Silence and introspective searching, often the hallmarks of good Socratic inquiry, are not much in evidence in the law school classroom. The classroom culture usually values assertiveness, quickness, and confidence – qualities we associate more with Socrates’s interlocutors, such as Euthyphro and Critias, rather than with Socrates himself. In examinations, it is often more of the same: the ability cleverly to amass and organize a lot of material in a short time is the road to success, rather than the patient searching characteristic of Socratic inquiry.” Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 272-73 (2003).

<sup>20</sup> Carnegie Report, *supra* n. 17, at 3.

<sup>21</sup> *Supra*, n. 1.

<sup>22</sup> The phrase is difficult to separate from its most famous reading, that by John Houseman in his role as Professor Kingsfield. *The Paper Chase; Pilot* (CBS television broadcast September 7, 1978).

your sense of justice – to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges.”<sup>23</sup>

As things were in Llewellyn’s time, so they are today. The authors of the recent Carnegie Report on legal education noted that

a concentrated focus on the details of particular cases, disconnected from consideration of the larger purposes of the law, begins very early in law school. In 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 the law, especially moral concerns or compassion for clients and concerns for substantive justice, either tacitly or explicitly pushed to the sidelines.<sup>24</sup>

The Carnegie Report’s authors continued that “[t]his focus is justified on pedagogical grounds, with an implied assumption that law school can flip off the of ethical and human concern, teach legal analysis, and later, when students have mastered the central intellectual skill of thinking like a lawyer, flip the switch back on.”<sup>25</sup>

In fact, data suggest that the majority of those drawn to the law are likely to be comfortable with this approach. In a 1997 article, Susan Daicoff summarized the research on incoming law students and concluded that they

appear to have various distinguishing characteristics as children and college students. They are highly focused on academics, have greater needs for dominance, leadership, and attention, and prefer initiating activity. . . . They may have experienced a greater emphasis on scholastic achievement, reading, self-discipline, and the channeling of impulses into expression in their families. . . . Their fathers were

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<sup>23</sup> Llewellyn, *supra* n. 1, at 116. Llewellyn goes on to note that the process is not without its dangers, since the “legal machine” created out of the incoming law student “is not even a good lawyer. It lacks insight and judgment.” *Id.* Nonetheless, Llewellyn concludes, it is vital for the nascent lawyer to experience this dehumanization first, trusting that at some undefined point in their post-law school experience, “the *sapiens* we shall then duly endeavor to develop will, we hope, regain the *homo*.” *Id.* at 101. This disclaimer sounds a somewhat discordant note, since if lawyers must add humanity back into their personalities at some point after the first year of law school, the “lawyers” first year students are being trained to think like, in fact, do not think that way.

<sup>24</sup> Carnegie Report, *supra* n. 17, at 141.

<sup>25</sup> *Id.*



likely dominant and strong. . . . They may have had good social skills, but a low interest in emotion or others' feelings.<sup>26</sup>

Significantly, a study conducted in the 1990s concluded that most law students can be classified as “thinkers” than as “feelers.”<sup>27</sup> Summarizing the study's results, Daicoff noted that:

Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner. They can readily discern inaccuracies and are often critical. They can easily hurt others feelings without knowing it. They are excellent problem solvers. They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice.

Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. They need, and are adept at giving, praise. They are interested in the person behind the idea or the job. They seek to do what is right for themselves and other people and are interested in mercy.<sup>28</sup>

The Bell and Richard study showed that “76.5% of lawyers sampled preferred “Thinking” over “Feeling”, while only 47.5% of the population preferred the same.<sup>29</sup> And a 1967 study found that the personality type most prevalent in law school is “dependable and practical with a realistic respect for facts, who absorbs and remembers great numbers of facts and is able to cite cases to support his evaluations and who emphasizes analysis, logic and decisiveness.”<sup>30</sup> Students with these characteristics dropped out of law school 6.7% of the time, whereas students

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<sup>26</sup> Susan Daicoff, *Lawyer Know Thyself: A Review Of Empirical Research On Attorney Attributes Bearing On Professionalism*, 46 Am. U. L. Rev. 1337, 1349-50 (1996-97)(citations omitted).

<sup>27</sup> The “thinking/feeling” dichotomy is one of the four continua evaluated by the Myers-Briggs Type indicator. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, The Feeling Decisionmaking Preference, And Lawyer Wellbeing*, 16 Va. J. Soc. Pol'y & L. 87, 112 (2008). The “[t]hinking/[f]eeling decision-making preference refers not so much to emotions or to what one ultimately decides to do, in a dilemmas, as it does to the justifications, bases, or reasons one articulates for one's decisions.” *Id.* at 113.

<sup>28</sup> Daicoff, *supra* n. 26, at 1366, quoting Susan J. Bell and Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER?, 149, 152 (Susan J. Bell ed., 2d ed. 1992).

<sup>29</sup> Daicoff, *supra* n. 26, at 1365, citing Bell & Richard, *supra* n. 29, at 229-30.

<sup>30</sup> Daicoff, *supra* n. 26, at 1367, citing Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. Legal Educ. 460, 466 (1967).

who were “concerned chiefly with people, who value[] harmonious human contacts, [are] friendly, tactful, sympathetic, and loyal, who [are] warmed by approval and bothered by indifference and who tend[] to idealize what [they] admire[],” dropped out of law school at the higher rate of 28.1%.<sup>31</sup>

In a study that appears to support these conclusions, Norman Solkoff showed that “the lowest-ranked law students tended to obtain higher humanitarian scores,”<sup>32</sup> a result that, as Daicoff noted, was “consistent with later studies’ findings’ that individuals who are more people-oriented . . . are more likely to either drop out of law school . . . or be dissatisfied as attorneys.”<sup>33</sup> Although these studies were conducted some time ago, their results were replicated in 1994, “suggesting that this preference has remained relatively consistent over time and independent of gender influence.”<sup>34</sup>

Many law students, then, come to law school with a predisposition in favor of the prevalent pedagogical style to be found there. For those who do not, the empathetic response is systematically trained out of them in a first-year curriculum in which most, if not all, their doctrinal classes share the common attribute of changing the way they think, from intelligent laypeople to “lawyers.” And while the process of teaching students to “think like lawyers” defines law school, it is not without its costs. The disambiguation of life used by legal educators to compel students to ‘think like lawyers’ desaturates the landscape presented by the cases the students study. Perhaps this brings some of the scene’s elements into sharper focus, but the process renders the entire picture monochromatic, flat, and sterile.

In considering the law school approach, the Carnegie Report observes that

such a critical transition point in professional development needs to be approached with great care. It is not surprising that students can be quite confused when the professor turns [the ethical] switch off. Many in our focus groups expressed this sort of confusion about what they feared were the implications of this dispassionate perspective for the

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<sup>31</sup> *Id.* Thomas Mauet offers a pithy summary of the behavioral science research in this area, noting that “[t]hey,’ the jurors, do not think and decide like ‘us,’ the lawyers.” THOMAS A, MAUET, TRIAL TECHNIQUES, 13 (8th ed. 2010).

<sup>32</sup> Daicoff, Lawyer Know Thyself, *supra* n. 26, at 1364, citing Norman Solkoff, *The Use of Personality and Attitude Tests in Predicting the Academic Success of Medical and Law Students*, 43 J. Med. Educ. 1250, 1252 (1968).

<sup>33</sup> Daicoff, *supra* n. 26, at 1364-65, citing Miller, *supra* n. 31, at 460-67.

<sup>34</sup> Daicoff, *supra* n. 26, at 1365-66, citing Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States* at 229-30 (unpublished Ph.D. dissertation on file with Temple University).

nature of their role as lawyers, diminishing their hopes that they might serve substantive goods in their careers.<sup>35</sup>

Others have speculated that this approach to legal education, combined with the stresses of studying and practicing the law, is harmful to law students.<sup>36</sup> While the evidence is strongly supportive of this conclusion, however, my concerns with the legal education process here are more limited and more obvious: to the extent we succeed in making our students only think as lawyers, we make it difficult, if not impossible, for them to think like non-lawyers. And that, in turn, makes it more difficult for them to communicate with non-lawyers, as they must do much of the time.

A recent study of the power of story in legal writing lends support to the notion that new lawyers are strongly influenced by logic, and less so by pathos, or emotional reasoning.<sup>37</sup> In the study, Professor Kenneth Chestek drafted a series of briefs around a hypothetical case.<sup>38</sup> Two of these briefs were “information-based narratives”<sup>39</sup> or based on logical reasoning and two were “story briefs”<sup>40</sup> or based on emotional reasoning. Chestek then submitted the briefs to appellate judges, law clerks, appellate court staff attorneys, appellate lawyers, and law professors and asked them to rate the briefs for their ability to persuade.<sup>41</sup>

Once the results were tabulated, the story, or emotional reasoning, briefs were considered to be more persuasive.<sup>42</sup> Significantly though, for our purposes at any rate, Chestek found that “participants with less job experience (especially including law clerks) tended to rate the logos brief more highly than more experienced participants did.”<sup>43</sup> One of the explanations for this result, Chestek believed, might be that “law schools tend to teach that ‘thinking like a lawyer’ means breaking a fact pattern<sup>44</sup> into small, abstract pieces, applying logical rules to those fragments,

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<sup>35</sup> Carnegie Report, *supra* n. 17, at 141.

<sup>36</sup> See, e.g., Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. Legal Educ. 112, 117 (2002) (“Thinking ‘like a lawyer’ is fundamentally negative; it is critical, pessimistic, and depersonalizing. It is a damaging paradigm in law schools because it is usually conveyed, and understood, as a new and superior way of thinking, rather than an important but limited legal tool.”)

<sup>37</sup> Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story* 7 J ALWD 1 (2010). Another way of putting this, although in less strictly rhetorical terms, would be to say that these lawyers are less empathetic than more experienced lawyers and judges.

<sup>38</sup> *Id.*, at 8.

<sup>39</sup> *Id.*, at 10.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, at 8.

<sup>42</sup> *Id.*, at 29.

<sup>43</sup> *Id.*

<sup>44</sup> Chestek does not note this in his article, but lawyers are likely the only group who use the term “fact pattern” to describe what almost anyone else would consider simply as “facts.” The phrase

and then reasoning your way to a conclusion through syllogisms, analogies, or other logical processes.”<sup>45</sup>

Chestek’s survey suggests that law schools do their job well, and that they produce graduates who are persuaded by writing that emphasizes logic over emotion.<sup>46</sup> This should come as no surprise, since they are the product of a training scheme designed to convince them that lawyers think differently from non-lawyers: “[T]here are idiosyncratic aspects to legal logic not necessarily found in other disciplines. Unlike reflective reasoning in everyday life, the statement of belief in our major proposition in law must come from some authority. We cannot start with a proposition simply because we have always believed it.”<sup>47</sup> The legal writing programs in law schools, for the most part, reinforce this message by training first year law students how best to communicate with other lawyers, using the structures and symbols familiar to generations of lawyers trained in fundamentally the same way.

Lawyers have, to be sure, changed the way they write in recent years. The days of dense, opaque language as a desirable medium of legal communication appear to be over and clear, plain English is now generally preferred.<sup>48</sup> And there is increased

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is strongly evocative of the first year of law school, and the addition of the word “pattern” suggests a distancing effect, as if we are no longer looking at facts that happened to real people or entities, but rather are looking clinically at connected packets of information. In fact, Chestek’s use of this phrase acts as a perfect rhetorical model of the process he describes.

<sup>45</sup> *Id.* The other reason Chestek proposes for this result lies in the nature of a law clerk’s job as, in essence, a judge’s lawyer. “Law clerks may tend to view their job as helping their judge find the relevant rules of law; thus briefs that focus more on the law (rather than the story) are more useful for that purpose.” *Id.*, at 30. While this is a plausible explanation, it undercuts, to an extent, the instructions Chestek gave to the survey participants, which asked them to rate the briefs they read for persuasiveness (*id.*, at 18) rather than utility.

<sup>46</sup> *Id.*, at 31 (“All of this suggests that lawyers who have most recently graduated from law school are likely to be persuaded by logical argumentation, since they think that’s what ‘thinking like a lawyer’ means.”) The overall results of the study also suggest that lawyers, in time, become increasingly less persuaded by logic and are more persuaded by emotional reasoning. *Id.* (“[the study’s results suggested that] the more job experience one has, the less likely one was to find the logos brief more persuasive”). Perhaps, then, Chestek’s survey is empirical support for Llewellyn’s hope that the law-school created *sapiens* gradually regains its amputated *homo*. See, n. 23.

<sup>47</sup> RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING, 36 (3d. ed. 1997). While this is the message legal education sends to its students, it is unclear whether the message is correct or not. “Legal writing teachers ‘fervently believe that learning legal reading and writing involved the acquisition of unique cognitive processes and skills,’ but they ‘cannot point to formal empirical evidence verifying the uniqueness.’” Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Legal Educ. 155, 166 (1999), quoting, James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Res. 153, 210 (1990).

<sup>48</sup> See, e.g., BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005). There are still some critics of the plain English

sensitivity to the language lawyers use when writing documents that will be read by the general public.<sup>49</sup> Moreover, there is an increased interest in the power of narrative, and especially to the role of rhetoric<sup>50</sup> and storytelling<sup>51</sup> in legal communication.

Nonetheless, the 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<sup>52</sup> or in the formal and stylized language of oral argument before a judge or group of judges.<sup>53</sup> And this can prove to be a problem when the logical, “thinking” lawyers that law school has selected and constructed come into contact with members of the general public, who might not reach their decisions in the same way as those with legal training.

## B. Dueling Narratives and Close Encounters With Narratives of the Third Kind

The conflict between lawyers trained to think in only one way about a problem and the general public, which can be more willing to entertain other ways of viewing a set of facts, is most dramatically presented by trials.<sup>54</sup> In these contemporary

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movement in the law. See, e.g., David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 Rutgers L.J. 713 (2002).

<sup>49</sup> See, e.g., U.S. SEC. & EXCH. COMM’N, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS (1998), available at <http://www.sec.gov/pdf/handbook.pdf>.

<sup>50</sup> Two examples of the increasing interest in rhetoric and the law are Volume three of the Journal of the Association of Legal Writing Directors, dedicated to “rhetoric and argumentation,” and Mercer University School of Law’s Law and Rhetoric Workshop, held in January, 2009, as an adjunct to that year’s American Association of Law Schools Conference in San Diego.

<sup>51</sup> The Chestek survey was discussed at the second storytelling conference as was an early version of this article. A third storytelling conference will be held in 2011 in Denver. The first swelling of interest in legal storytelling appears to have occurred in the late 1980s. See, e.g., Kim Lane Scheppele, *Forward: Telling Stories*, 87 Mich. L. Rev. 2073 (1989)(foreword to legal storytelling symposium issue of the Michigan Law Review, asking “Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days?”)(citations omitted).

<sup>52</sup> See, e.g., RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE, 48 (6th. ed. 2009)( observing that the “typical” reader of a law student’s future work will be a “judge or [attorney] supervisor.”

<sup>53</sup> See, e.g., *id.*, at 415-36. Later in law school, students usually have the option of taking trial advocacy classes that help to prepare them to present evidence at trial. Although I have no empirical evidence to support this, experience suggests that these classes – although dealing somewhat with how to communicate directly to a jury of non-lawyers – are more concerned with the formalities of conducting direct and cross-examinations and of the mechanics of introducing evidence and preventing evidence from being introduced.

<sup>54</sup> While this article focuses on trials as the medium for this discussion of the role of empathy in the practice of law, the underlying themes this article seeks to explore are applicable to all aspects of law practice.

manifestations of the medieval trial-by-combat, lawyers for all sides in a conflict<sup>55</sup> construct narratives from the testimony and other introduced evidence that are designed to persuade the fact-finders to decide in their clients' favor.

The idea that a trial is a highly formalized forum for story-telling appears to be generally accepted.<sup>56</sup> Although lawyers have their own term for the story they intend to tell – the “theory of the case” – the essential elements of the process should be recognizable to any storyteller:

A theory is worth arguing if it stands a significant chance of being adopted by the judge or jury who must adjudicate the dispute. The more a theory satisfies the following criteria, the greater its chances of adoption.

1. Does the theory “[a]ccount for or explain all of . . . the undeniable facts?” . . .
2. Does the theory “explain away in a plausible manner as many unfavorable facts as it can”? . . .
3. Does the theory “[e]xplain why people acted in the way they did”? . . .
4. Is the theory “supported by the details”? . . .
5. Does the theory have a solid basis in law? . . .
6. Is the theory “consistent with common sense and . . . plausible”?<sup>57</sup>

The limits of a trial’s storytelling universe are defined by ethics, on the one hand,<sup>58</sup> and the applicable rules of evidence, and the court’s rulings on evidence and testimony, on the other. Within the boundaries of that universe, though, lawyers

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<sup>55</sup> Most evocations of trials presuppose the simple X v. Y model, and this article will largely do so as well. But we should not ignore the increasingly common complex civil case in which there can be multiple parties on either side of the “v.”.

<sup>56</sup> See, e.g. Mauet, *supra* n. 31, at 27 (Effective storytelling is the basis for much of what occurs during a trial, including the opening statement, direct examinations, and closing arguments.” Small wonder, then, that good lawyers are invariably good storytellers.”)

<sup>57</sup> Neumann, *supra* n. 52, at 296-97 (citations omitted).

<sup>58</sup> For a stimulating discussion of the ethical boundaries of what has been termed “applied legal storytelling,” see Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling* 7 J ALWD 63 (2010).

are free to use all narrative and rhetorical devices available to them to present their case theory to the jury in the best possible light for their client.<sup>59</sup>

Often overlooked in descriptions of the trial process, however, is the fact that a lawyer's case theory is not presented in a vacuum. Instead, it is presented as one of at least two theories, each of which is constructed on the same criteria as those outlined above.<sup>60</sup> And one of the ways a trial can be viewed is as a tournament at which champions – in the form of opposing case theories, or narratives, created by the attorneys – duel for the jury's approval and acceptance.<sup>61</sup> The jury is told about the characteristics each champion will possess during preliminary statements, observes the construction of these champions during the evidentiary stage of trial, and is introduced to the fully-formed champion during closing arguments, but the duel itself does not (or should not) begin until the jury has had the rules of this particular tournament explained to them, in the form of the court's instructions on the law, and retires to the jury room to deliberate.<sup>62</sup> As it turns out, though, the two champions are not the only competitors in the tournament, just the two that the lawyers get to see.

The process by which a jury reaches its verdict has been modeled by Reid Hastie and Nancy Pennington, who have coined the term "Explanation-based Decision Making" to describe their conclusions.<sup>63</sup> According to this model, the duel between

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<sup>59</sup> Two recent articles discuss the unease some feel about the use of narrative and rhetoric in the legal process. See, Johansen, *supra* n. 58, at 63-4 (" . . . I have been struck by a recurring sense of unease when the conversation turns to Applied Legal Storytelling. We all recognize, perhaps intuitively, that stories are powerful. But the unease comes from a concern that they may be *too* powerful, or perhaps *inappropriately* powerful."); J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J ALWD 155, 156 (2010)(noting that Judge Cardozo "warned that although metaphors in the law can 'liberate thought, they end often by enslaving it.'"), quoting, *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). Both writers conclude, however, that these techniques are and should be available for legal argumentation: "[C]loser inspection of [legal] ethical concerns shows that storytelling is consistent with our existing norms about the ethical practice of law." Johansen, 7 J ALWD at 64; "Metaphors are central to legal thinking, and, by adding flexibility, they help law accommodate complexity and change in human social experience." Rideout, 7 J ALWD at 190.

<sup>60</sup> As Mauet notes, this is usually true in civil trials and is often true in criminal cases. Mauet, *supra* n. 31, at 24. In criminal cases, however, the defense might offer a theory based on "the existence of reasonable doubt and . . . not [on] a competing version of reality." *Id.*

<sup>61</sup> Clients, whose assets, liberty, or – in the case of criminal prosecutions – desire for punishment, are at stake during trial, are likely to hold a more prosaic view of the nature of a trial.

<sup>62</sup> Juries are constantly warned during trial to not deliberate on the evidence or to start weighing their verdicts until all the evidence has been presented and until they are instructed on the law by the judge. See, e.g., Pennsylvania Suggested Standard Criminal Jury Instructions, § 2.05 (1997)("Each of you must keep an open mind throughout the trial. In the oath you just took you swore to do so. You should avoid forming opinions about the guilt or innocence of the defendant or about any other disputed question until the trial is ended and you begin your deliberations.")

<sup>63</sup> Reid Hastie and Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. Col. L. Rev.

the competing trial narratives is an intertextual, or internarrative one,<sup>64</sup> in which meaning is generated by the relationship of one case narrative to the other and – crucially – by additional inferences transported into the jury room by the jurors themselves.

The juror’s “explanation” of legal evidence takes the form of a “story” in which causal and intentional relations among events are prominent. . . . The story is constructed both from information presented at trial and from the juror’s background knowledge. Two kinds of background knowledge are critical: (1) expectations about what makes a complete story and (2) knowledge about events similar to those that are central in the case. . . . The story constructed by the juror will consist of some subset of the events and causal relationships referred to in the presentation of evidence, *as well as* additional events and causal relationships inferred by the juror. Some of these inferences may be suggested by the attorneys and some may be constructed solely by the juror. Whatever their source, the inferences will serve to fill out the episode structure of the story. This constructive mental activity results in one or more *interpretations* of the evidence that have a narrative story form.<sup>65</sup>

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957, 957 (1996). Hastie and Pennington’s theories are more fully explained in Nancy Pennington & Reid Hastie, *A Theory of Explanation-Based Decision Making*, in *DECISION MAKING IN ACTION: MODELS AND METHODS* 188 (Gary A. Klein et al. eds., 1993).

<sup>64</sup> I have stolen “intertextuality” from the world of postmodernist literary theory and have shamelessly modified it to create the concept of “internarrativity” because trials, as opposed to motions and appellate practice, contain no formal, written, texts. I merely intend to import the concept of intertextuality, not any of the additional postmodernist baggage it might attempt to bring with it. For a discussion of the role of intertextuality in the construction of knowledge during the reading of legal texts, see James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection* 34 *Discourse Processes* 57 (2002).

<sup>65</sup> Hastie and Pennington, *supra* n. 63, at 960. See also, Marianne Wesson, *That’s My Story And I’m Stickin’ To It . . . : The Jury As Fifth Business In The Trial Of O.J. Simpson And Other Matters*, 67 *U. Colo. L. Rev.* 949, 954 (1996) (“I am suggesting that the juror is more storyteller than historian. He seeks narrative truth, rather than historical truth . . . . Juries that behave like storytellers’ collectives, as opposed to historians’ collectives, may be more prevalent now than at times in the past, but I believe that it is not identity politics but other aspects of our culture that create in jurors this view of what is expected of them. Late-twentieth-century cultural productions often place creative demands on the reader or viewer, requiring her to impose an order on a chaotic stream of images and information.”) Mauet, surprisingly, appears to miss the inevitability of the jury’s story creation. He believes that lawyers can prevent the jury from engaging in this activity, observing that “[i]f lawyers do not organize the evidence into a clear, simple story, jurors will do so on their own.” Mauet, *supra* n. 31, at 26.



Difficult as it might be for lawyers to hear that the results of the jury room narrative tournament are, in part, out of their control, we should not be too surprised at Hastie and Pennington's conclusions. We know from the list of criteria for a viable case theory that "common sense" is a crucial part of the narrative's armament and trial attorneys are familiar with the standard court instruction that requires jurors to use their common sense when considering the evidence.<sup>66</sup> Hastie and Pennington's model of jury decision making merely confirms that juries take this instruction seriously.

The jury-constructed narrative is defined, or "framed,"<sup>67</sup> by the jury's cultural experience and is, perhaps, best thought of as the jury's cultural narrative, the third narrative – after the two constructed by the lawyers – to influence the trial's outcome. Accordingly, in addition to constructing the narrative that explains the trial evidence in the best light for their clients, trial lawyers must equip their narratives with the ability to engage and co-opt the jury's cultural narrative. The trial narrative that can best ally itself to the jury's narrative will doubtless be the one to win the duel and return victorious from the jury's deliberations.

It is in this part of the trial attorney's work that storytelling techniques can be particularly helpful. As Ruth Anne Robbins has observed,

[b]ecause people respond – instinctively and intuitively – to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately integrate into their storytelling the larger picture of their clients' goals by subtly portraying their individual clients as heroes on a particular life path. This strategy is not merely a device to make the story more interesting, but provides a scaffold to influence the judge at the unconscious level by providing a metaphor for universal theories of struggle and growth.<sup>68</sup>

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<sup>66</sup> See, e.g. NEW YORK PATTERN JURY INSTRUCTIONS 2:320 (Action for Wrongful Death and Conscious Pain – Actions Commenced on or after July 26, 2003) ("Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by [the claimant].")

<sup>67</sup> Literary theorists use the term "frame" to mean "the cognitive model that is selected and used (and sometimes discarded) in the process of reading a narrative text." Manfred Jahn, *Frames, Preferences, and the Reading of Third-Person Narratives: Towards a Cognitive Narratology*, 18 *Poetics Today* 441, 442 (1997). For a discussion of framing theory applied to the law, see Judith Fisher, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U. S.F. L. Rev. 473 (2009). Quoting Erving Goffman, Fisher defines frames as "schemata of interpretation through which users locate, perceive, identify, and label experience," and goes on to explain that frames are "mental structures, similar to picture frames, which define the perimeters of each individual's unique focus." *Id.* at 484, quoting ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON ORGANIZATION OF EXPERIENCE* 21 (1974).

<sup>68</sup> Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey* 29 *Seattle L. Rev.* 767, 768-9

The concept of metaphor is crucial here, because it is metaphor – and the other rhetorical devices available to practitioners – that allow lawyers to relocate the facts of a specific case into the realm of the jury’s cultural narrative. And the selection of metaphors, and the other rhetorical devices lawyers use to persuade juries, is an act that must be undertaken with a great deal of empathetic sensitivity. Metaphors act as a translation matrix, allowing square-shaped facts to connect to the round hole of cultural narrative, thereby ensuring a snug fit between the two worlds.<sup>69</sup> In this sense, a lawyer’s challenge is much like that of the ground crew during the Apollo 13 flight, devising a way for the command module’s square air-scrubbing cartridges to fit into the lunar module’s round air purification system in order to process the toxic gasses out of the system, leaving only breathable air.<sup>70</sup>

### C. Interlude

Well, that didn’t work at all. I know that as writer and reader, we are engaged in an asynchronous dialog,<sup>71</sup> but I am confident that whenever in the future you read this, your reaction to the end of the previous section was, at its most benign, surprise at the analogy I attempted to draw.

The Apollo 13 analogy is intentionally dreadful. It wrenches the article from a discussion of cultural narratives and their role in deciding trials and relocates it somewhere in outer space, and it makes reference to an event that, aside from those few of you who are devotees of America’s manned space program in the 1960s and ‘70s (or have a memory of the movie, starring Tom Hanks<sup>72</sup>), has no context or meaning for readers of this piece.

And there lies the lawyering problem at the heart of this article, because the Apollo 13 analogy is an entirely logical way of describing the role metaphor and rhetoric play in the construction of knowledge that happens during jury deliberation, yet it was apparently selected with such a disregard of empathy towards my audience that it likely failed utterly to persuade you of the point I was apparently trying to

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(2006). Robbins is writing here of written storytelling techniques used to influence a court, but the principal applies at least as well to the oral narrative of the courtroom.

<sup>69</sup> This gross oversimplification of metaphor’s nature and function will doubtless set many rhetoricians’ teeth on edge. For a helpful and substantially more nuanced discussion of the nature of metaphor, see Rideout, *supra* n. 59, at 160-71.

<sup>70</sup> For a description of this remarkable feat of engineering, see, ANDREW CHAIKIN, A MAN ON THE MOON, 315-6 (1994).

<sup>71</sup> See, e.g., JOHN R. TRIMBLE, WRITING WITH STYLE: CONVERSATIONS ON THE ART OF WRITING, 5 (2d ed. 2000) (“Far from writing in a vacuum, [the writer] is conversing, in a very real sense, even though that person – like you – may be hours, or days, or even years away in time.”)

<sup>72</sup> Apollo 13 (Universal Pictures 1995) (motion picture).

make.<sup>73</sup> We know that metaphor and other rhetorical devices must be appropriate to their audience in order to be effective,<sup>74</sup> but if lawyers have difficulty empathizing with their audiences the results could be disastrous for their clients. If logical metaphors can backfire so horribly under the controlled conditions of an article, the consequences can be even more severe in the courtroom. The problems such a failure of empathy can cause, and the benefits of a well-developed empathetic sense, are what we will consider next.

D. O. J. Simpson, Vioxx, and Max Steur: Two Failed Trial Strategies and One Success in Trial Tactics

Enough has been written about the O. J. Simpson trial, in both the popular press and the scholarly world of law review articles, to contribute, in a modest way, to deforestation and global warming.<sup>75</sup> Without wishing to make the problem worse, the Simpson trial gives us an excellent example of what can happen when non-empathetic litigators fail to calibrate their trial strategy to the jury's cultural narrative.

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<sup>73</sup> For those who do not know the story, here, in a nutshell, is the context that was so woefully lacking in the body of the article. The Apollo 13 mission of April, 1970 came near to disaster after an explosion in the spacecraft's service module caused a loss of power and oxygen to the command module, in which the three astronauts were intended to travel during the flight to the moon. Chaikin, *supra* n. 70, at 285-94. Because of the lack of power in the command module, the crew was forced to move to the lunar module, the craft intended to carry two astronauts to the moon's surface and back to the command module. *Id.* at 299. Unfortunately, the presence of three people, instead of two, for a substantially longer period than had been planned, threatened to cause the lunar module's carbon dioxide filtering system to overload, which would cause a fatal buildup of carbon dioxide before the astronauts could return to earth. *Id.* at 315. The command module had sufficient canisters of lithium hydroxide, the substance used to filter carbon dioxide from the air, but these canisters were square-shaped, and the lunar module's environmental control system could only accept round-shaped canisters. *Id.* NASA engineers in Houston devised a connecting device that would allow the square canisters to fit snugly into the round environmental control system by using material available to the astronauts, including tape, socks, and cardboard notebook covers. *Id.* at 320. The device worked, and the astronauts returned safely to earth.

<sup>74</sup> See, e.g., MICHAEL SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING*, 210 (2002) ("Legal writers should also avoid using arcane or esoteric metaphoric references. For a metaphor to be effective, it must be based on well-known concepts easily evoked in the mind of the reader.") My Apollo 13 reference certainly fails this test. See also, Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons while Avoiding Unintended Effects*, 7 J ALWD 313, 315-317 (2010) (discussing appropriately effective use of biblical imagery in the southeastern United States during the trial of Elvis Presley's doctor).

<sup>75</sup> This would traditionally be the place to include a list of at least some of the articles and books written about the Simpson trial. To do a creditable job of this, however, would be to clog-up this article with a multiple page footnote that would add nothing to its purpose. In that footnote's place, let me suggest that anyone interested in literature on the trial go to LexisNexis or Westlaw and search the legal journals databases for articles with the words "O.J. Simpson" in the title. They will not be disappointed in the volume of reading material.

Less has been written about the 2005 Vioxx trial, *Ernst v. Merck*, in which a plaintiff's verdict for \$253 million was vacated by the Texas Court of Appeals.<sup>76</sup> This trial, though, offers another object lesson in a familiar logical, non-empathetic, and failed, strategy – that a dry emphasis on the failure of the plaintiffs' case to establish causation, a necessary but technical element in tort liability, would be a sufficient defense to a highly emotional case.

Max Steur is mostly forgotten today, although Irving Younger notes that “[m]any who knew him and saw him work say that he may have been the greatest [trial] lawyer of his generation.”<sup>77</sup> Retained by the defendants in the prosecution that arose from the Triangle Shirtwaist Fire, Steur's cross-examination of Kate Alterman, a young woman who worked at the Triangle Shirtwaist Company's factory and who was one of the few survivors of that horrific event, is a textbook example of tactical empathy employed by a lawyer. Steur listened to not just the logical implications of Alterman's testimony, but also to how she delivered her testimony. Realizing that her testimony had likely been coached, and needing to discredit her without appearing to bully an intensely sympathetic witness, Steur conducted what Younger described as “[p]robably his most celebrated cross-examination”<sup>78</sup> and perhaps one of the finest examples of cross-examination in the trial canon.

Taken together, the Simpson and Vioxx cases suggest some fundamental flaws in the logical approach to case theory that should cause concern who believe that “thinking like a lawyer” is an adequate goal for lawyers who seek to communicate with non-lawyers, while the Steur cross-examination points out the importance of a less logical, more empathetic, style of practical lawyering.

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<sup>76</sup> One article that focuses, in part, on this particular Vioxx case is Johansen, *supra* n. 58, at 77-81. That article, in turn, owes much to Roger Parloff, *Stark Choices at the First Vioxx Trial*, *Fortune* (July 15, 2005)(available at [http://www.sociablemedia.com/PDF/fortune\\_jul\\_15\\_05.pdf](http://www.sociablemedia.com/PDF/fortune_jul_15_05.pdf)). Much of the discussion here will be drawn from the Johansen article. For a discussion of the broader Vioxx litigation, see, Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 *DePaul L.Rev.* 509 (2008). See also, Michael E. Tigar, *The Vioxx Litigation: Two Case Studies in*, *Trial Stories* (Michael E. Tigar & Angela J. Davis, editors) (2008).

<sup>77</sup> Irving Younger, Foreword to *Max Steur's Cross Examination of Kate Alterman in People v. Harris & Blank*, 1 (1987).

<sup>78</sup> *Id.*

## 1. O. J. Simpson and Domestic Violence

The facts of the Simpson trial<sup>79</sup> are sufficiently well-known to only require sketching here. On June 12, 1994, Nicole Brown Simpson and Ronald Goldman were found, stabbed to death, in Brentwood, California.<sup>80</sup> Ms. Simpson's former husband, Orenthal James ("O. J.") Simpson was arrested for the murders on June 17 and subsequently tried.<sup>81</sup> The first day of trial was January 24, 1995,<sup>82</sup> the prosecution rested its case on July 6,<sup>83</sup> and Simpson was found not guilty on October 3, 1995.<sup>84</sup>

The prosecution's theory rested, in part, on a history of domestic violence between Simpson and Ms. Simpson.<sup>85</sup> Simpson's tendency to violence towards Ms. Simpson was exacerbated by a series of incidents on June 12, ran the prosecution theory, and led directly to her murder and the murder of the man she was with at the time Simpson encountered her.<sup>86</sup> This was, the prosecution argued, a case in which domestic violence had reached its terrible, but logical, conclusion.

The defense offered several alternative theories throughout the trial.<sup>87</sup> It floated a theory that Ms. Simpson and Goldman were murdered by drug-dealers or their associates, either because of mistaken identity or because one or both of the victims was involved in "drug-related activities."<sup>88</sup> The defense also proposed a theory to explain the prosecution's extensive scientific evidence that, in essence, relied on the Los Angeles Police Department's incompetence in gathering evidence.<sup>89</sup> Most

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<sup>79</sup> There have been enough Simpson trials by this point that I should probably clarify that by "the Simpson trial" I mean the criminal trial for the murders of Nicole Brown Simpson and Ronald Goldman.

<sup>80</sup> ROBERT L. SHAPIRO, *THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE O.J. SIMPSON CASE*, vii (1996).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, at viii Determining when the trial began is more difficult than it might appear. Pre-trial motions took several months, jury selection began on September 26 and took five weeks to complete, and the jury itself was sequestered on January 11. *Id.*

<sup>83</sup> *Id.*, at ix.

<sup>84</sup> *Id.*, at x.

<sup>85</sup> Hastie and Pennington, *supra* n. 63, at 964.

<sup>86</sup> *Id.*

<sup>87</sup> The defense strategy here was in flagrant violation of one of the central principles of case theory development; that the case theory should be firmly in place well before trial begins. *See, e.g.*, Mauet, *supra* n. 31, at 491 ("When discovery is completed, you should have a good grasp of the undisputed evidence, where the evidence is in dispute, and what the key factual disputes are. By this time, and *before* you begin other trial preparation, you must decide on what your theory of the case will be, because your trial preparation needs to focus on proving your theory and discrediting your opponent's theory.") The "dream team" assembled in Simpson's defense strayed far from this classic, structured, formula, more closely resembling a group of improvising jazz musicians.

<sup>88</sup> Hastie and Pennington, *supra* n. 63, at 966

<sup>89</sup> *Id.*, at 967.

memorably, the defense also attacked the credibility and motivation of a Los Angeles Police Department detective – Mark Fuhrman – who was, asserted the defense, a racist officer who reached the decision that Simpson had committed the murders and who manufactured evidence to ensure his conviction.

The prosecution’s theory failed utterly with the jury. The jury only deliberated for approximately three hours – after more than eight months of trial – before returning with its verdict of not guilty on both murder counts.<sup>90</sup> And comments made by some jury members after the trial made clear that the prosecution’s “domestic abuse” theory was spectacularly unsuccessful. One juror noted that “[t]his was a murder trial, not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get tried for that.”<sup>91</sup> A second juror stated “I could not lay a heavy consideration [on it] as far as that being a motive. I feel that if a person is capable of extreme rage, then those types of things happen a bit more often than maybe once every four or five years.”<sup>92</sup> A third juror commented that “the information [the prosecution] gave us about that period of spousal abuse was really not enough information to indicate that this man had built up all this rage over all this time.”<sup>93</sup> And a fourth juror said “What they presented to me [about the previous domestic violence], well, I related it all to they had been drinking. . . . But I didn’t think it was necessarily a motive for murder.”<sup>94</sup>

The jury’s verdict was heavily criticized in the aftermath of the Simpson trial. In one survey conducted less than six months after the Simpson verdict, 70% of respondents rated Judge Ito’s performance as good or excellent, 79% rated Marcia Clark’s performance the same way, 58% rated Johnny Cochran’s performance as

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<sup>90</sup> *Id.*, at 976.

<sup>91</sup> *Id.*, at 971, quoting, Bob Pool & Amy Pyle, *Case was Weak, Race Not a Factor, Two Jurors Say*, L.A. Times, Oct. 5, 1995, at A6.

<sup>92</sup> *Id.*, quoting, ARMANDA COOLEY ET AL., *MADAM FOREMAN: A RUSH TO JUDGMENT?*, 127 (1996).

<sup>93</sup> *Id.*, quoting Cooley, *supra*, n. 92, at 198.

<sup>94</sup> *Id.*, quoting Cooley, *supra* n. 92, at 127-8.

good or excellent, while only 30% rated the jury's performance that way.<sup>95</sup> Others have classified the Simpson verdict as an example of jury nullification.<sup>96</sup>

Jury nullification is, of course, the ultimate triumph of "feeling" over "thinking,"<sup>97</sup> which is perhaps why it so anathematic to many lawyers.<sup>98</sup> Certainly the notion of jury nullification – of a jury ignoring the hermetic world of admissible evidence and controlled discourse in a trial and instead allowing themselves to be influenced by

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<sup>95</sup> Gerald F. Uelman, *Jury-Bashing and the O.J. Simpson Verdict* 20 Harv. J. L. & Pub. Pol'y 475, 475 (1997), quoting *A Survey of the Citrus Municipal Court District* ("Citrus Court Survey") (Nat'l Demographics Corp., Claremont, California), January 18-19, 1996, at tbls. 2–4, 6. The judgment of a group, 79% of whom felt the losing prosecutor did a good job and only 58% of whom felt the prevailing defense attorney did a good job, might legitimately be called into question. And the inherent conservatism of the group was revealed by other answers in the survey: 55% identified themselves as Republican, 59% described themselves as "conservative," and 15% as "very conservative," and when asked whether California "should make convicted criminals do manual labor in chain-gangs, 74% expressed agreement." *Id.*, at 475, quoting Citrus Court Survey, at tbls. 53-54, 34.

<sup>96</sup> See, e.g.: Andrew G.T. Moore II, *The O.J. Simpson Trial – Triumph of Justice or Debacle?*, 41 St. Louis U. L.J. 9, 20 (1996) ("By insinuating a racist police plot to frame O.J. Simpson, the defense had all the ammunition it needed for an act of nullification)(citation omitted); Bryan Morgan, *The Jury's View*, 67 U. Colo. L. Rev. 983, 983 (1996) ("... I am drawn to the unpleasant conclusion that racial bias – the controlling influence of race on one's actions – was the principal, and probably the dispositive, reason for the Simpson acquittal); W. William Hodes, *Lord Brougham, The Dram Team, and Jury Nullification of the Third Kind*, 67 U. Colo. L. Rev. 1075, 1079 (1996) (In the Simpson trial, "the defense lawyers were able to induce even the jurors who harbored no doubts – and certainly no reasonable doubts – about whether O.J. Simpson actually 'did it,' to vote for acquittal anyway, as a matter of long-term justice"). Others disagree. See, e.g.: Hastie and Pennington, *supra* n. 63, at 976 ("We see on clear indication that the jury deliberately nullified the law and disregarded its fact-finding task to send a message to majority white America or to the LAPD.")(citation omitted); Uelman, *supra* n. 95, at 478 ("... the verdict... was not jury nullification." Uelman was a member of the Simpson defense team, and his opinion should be read in that context); Justice Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. Colo. L. Rev. 1109, 1117 (1996) ("Because Cochran's main arguments were based on assessing the credibility and reliability of the evidence, I do not believe Cochran stepped over the bounds of ethics to argue jury nullification.")

<sup>97</sup> To reprise, the difference between those identified as "thinkers" and as "feelers" is not based on the ultimate decision the individual might take, but rather on "the justifications, bases, or reasons one articulates for one's decisions." Daicoff, *supra*, n. 27, at 113. As an example of the distinction between the two states, Daicoff quotes two questions designed to locate a responder on the thinking/feeling continuum: "[One] sample question is: 'Is it better to be (a) just; or (b) merciful?' . . . Another is: 'In a heated discussion, do you: (a) stick to your guns; or (b) look for common ground?' . . . In each of these, (a) is a [t]hinking response, while (b) is a [f]eeling response.'" *Id.* at 114. With this distinction in mind, one can see that nullifiers will tend to the "feeling" end of this continuum and those inclined to follow the evidence and instructions will tend to the "thinking" end.

<sup>98</sup> See, e.g., Kourlis, *supra* n. 96, at 1109 ("... I find jury nullification akin to anarchy. Under its auspices, twelve people become self-appointed legislators, changing the law to fit the circumstances of a particular crime or a particular political climate. It is intolerable in an ordered society.")

their general sense of what the “proper” result should be<sup>99</sup> – would be almost inconceivable to a law student, who has spent the first year of legal study being told to shut out all outside influences and make evaluations and decisions solely on the basis of legal doctrine. Yet the existence of such a concept stands as a powerful symbol for the proposition that lawyers and non-lawyers can, and frequently do, think very differently about the same set of facts.

The Simpson trial was so extensive and excessive that it can stand as an example of almost anything anyone wants to prove. For our purposes, it serves as an example of a fundamental misjudgment of a jury by a group of prosecutors; a failure of empathy by prosecutors who did not understand the jury to whom they were arguing. As Hastie and Pennington note in their brief review of the trial, the prosecution “sought to present a single, linear story.”<sup>100</sup> The prosecution’s fatal error was in selecting when to begin that story. By delving back into Simpson’s relationship with his ex-wife, and by attempting to define the nature of that relationship, between an African-American man and a White woman, as one of domestic violence – with the murders as the logical conclusion of that violence – the prosecution tied itself to a complicated narrative that was replete with cultural, gender, and racial overtones.<sup>101</sup>

At least one report of the prosecution’s reasons for selecting the story they told to the jury describes the lead prosecutor, Marcia Clark, as saying

she preferred to have black women over black men on the jury, because culturally it is known that domestic abuse is more prevalent in black households than in white families. Her thinking was that black women were becoming more liberated, were fed up with being beaten,

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<sup>99</sup> An example of a juror’s unwillingness to act as an unthinking balancer of carefully selected evidence can be found in Marianne Wesson’s description of the Public Broadcasting System’s documentary, *Inside the Jury*, in which “one juror suggests that really the evidence and the court’s instructions leave no room for an outcome other than guilty [and] another actually growls ‘I am not a computer.’” Wesson, *supra* n. 65, at 952, quoting, *Inside the Jury Room* (PBS television broadcast, 1986).

<sup>100</sup> Hastie and Pennington, *supra* n. 63, at 964.

<sup>101</sup> An abbreviated list of articles that center on the issues flowing from the prosecution’s domestic violence story includes: Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 Harv. C.R.-C.L. L. Rev. 49 (1997); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. Colo. L. Rev. 789 (1996); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: . . . Simpson and Beyond*, 69 S. Cal. L. Rev. 1463 (1996); Nancy S. Ehrenreich, *O.J. Simpson & the Myth of Gender/Race Conflict*, 67 U. Colo. L. Rev. 931 (1996); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith – Spectacles of Our Times*, 35 Washburn L.J. 225 (1996); Leonard M. Baynes, *A Time to Kill, The O.J. Simpson Trials, and Storytelling to Juries*, 17 Loy. L.A. Ent. L.J. 549, 563 (1997); Sheri L. Burr, *O.J. As a Tale of 2 Operas*, 68 UMKC L. Rev. 705 (2000).



would identify with Nicole, and would be angry with Simpson for having brutalized her.<sup>102</sup>

These opinions, reportedly expressed in conversations between Ms. Clark and Dr. Donald Vinson of DecisionQuest, a jury consulting firm that advised the Simpson prosecution team briefly during jury selection,<sup>103</sup> were contradicted by polls conducted by DecisionQuest, which indicated that “while 23 percent of black males thought Simpson was guilty, only 7 percent of black women thought so.<sup>104</sup> In additional research conducted by DecisionQuest, African-American women indicated that the reports of Simpson’s domestic violence were “simply not a big deal.”<sup>105</sup> These results were apparently consistent with the research conducted by the defense’s jury consultant.<sup>106</sup>

It is always easy, of course, to criticize a decision after its results are known. And there were enough other moments in the trial that might have led any jury to conclude that the prosecution had failed to prove Simpson’s guilt beyond a reasonable doubt that it is impossible to say, with certainty, that Clark’s misreading of the jury’s response to the domestic abuse evidence on which the prosecution relied, or her unwillingness to consider the jury consultant’s suggestions that a jury composed as was the Simpson jury would be unlikely to convict based on a domestic violence theory, was the cause of Simpson’s acquittal.<sup>107</sup> What seems certain, though, is that Clark made what other lawyers might consider to be a logical rather than an empathetic assumption – that women, who are likely to be the victims of domestic violence,<sup>108</sup> would be offended by the evidence showing Simpson to be an abuser and would draw from that evidence the logical conclusion that Simpson had progressed from abuser to murderer – and that this assumption

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<sup>102</sup> VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER*, 94 (1996).

<sup>103</sup> DecisionQuest prepared graphics and courtroom displays for the prosecution throughout the trial, but only participated in two days of the jury selection process. *Id.*, at 93-4.

<sup>104</sup> *Id.*, at 95.

<sup>105</sup> *Id.* Respondents apparently also indicated that “[i]n every relationship, there’s a little trouble;” “[p]eople get slapped around. That just happens;” and “[i]t doesn’t mean he killed her.” JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O. J. SIMPSON*, at 191 (1997).

<sup>106</sup> Stephanie Leonard Yarbrough, *The Jury Consultant – Friend or Foe of Justice*, 54 SMU L. Rev. 1885, 1892 (2001)(noting that the expert, Jo-Ellen Dimitrius, concluded that ‘African-American women over thirty years old ‘would not necessarily believe spousal abuse leads to murder’”), quoting Adrienne Drell, *Complex Decisions*, Chi. Sun-Times, May 24, 2000, at 6.

<sup>107</sup> To make such an assertion would also be to ignore or to downplay the sometimes excellent work done by Simpson’s defense attorneys, particularly the work of Barry Sheck and Peter Neufeld.

<sup>108</sup> Clark’s more specific belief that African-American women are more likely to be the victims of domestic violence than white women appears to have been based on prejudice, not empirical evidence.

was entirely incorrect. Clark thought like a lawyer, and as a result, failed accurately to gauge the jury's response to the evidence.<sup>109</sup>

## 2. Vioxx and a Failure to Show Causation

The lawyers representing Merck Pharmaceuticals ("Merck") made a similar error during the *Ernst* trial.<sup>110</sup> At issue in the case was whether Vioxx, a pain reliever produced by Merck, had caused Bob Ernst to suffer a fatal heart attack.<sup>111</sup> Vioxx was approved for marketing in 2000 and quickly developed a significant share of the painkiller market.<sup>112</sup> Concerns over Vioxx's possible connection to heart illness grew over the time it was on the market, prompting one law firm to have filed over 300 lawsuits even before the drug was withdrawn after studies demonstrated a link between it and a significant increase in the risk of heart attacks.<sup>113</sup> The specific danger posed by Vioxx was an increased risk of blood clots which could lead to sudden heart attacks.<sup>114</sup>

Bob Ernst was an apparently healthy and active 59 year old man who took Vioxx for arthritis pain in his hands.<sup>115</sup> Some months after beginning a Vioxx regimen, Mr. Ernst died after suffering a heart attack.<sup>116</sup> Mr. Ernst's autopsy revealed that he had suffered from hardening of the arteries, and that his heart attack had been caused by arrhythmia.<sup>117</sup>

The strategies for both sides in the litigation were easy to predict. W. Mark Lanier, the plaintiff's lawyer

developed characters: the innocent Ernst, struck down in the prime of life; and the money-grubbing Merck, more concerned with profit than safety. On the other hand, [Merck's lawyer, David C. Kiernan,] presented scientific evidence showing the link between Vioxx was no greater than similar links between heart attacks and other drugs, including ibuprofen. He showed that Ernst died from arrhythmia –

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<sup>109</sup> For a more detailed analysis of the Simpson litigation by an experienced criminal defense attorney, see Angela J. Davis, *The People v. Orenthal James Simpson: Race and Trial Advocacy in Trial Stories*, *supra* n. 76, at 283-352.

<sup>110</sup> *Ernst v. Merck*, 2008 WL 2201769 (2008), *rev'd* 296 S.W. 3d 81 (Tex. App. 2009).

<sup>111</sup> Johansen, *supra* n. 58, at 77-8.

<sup>112</sup> McClellan, *supra* n. 76, at 514. Vioxx accomplished sales of \$2.5 billion in the four years – from 2000 until September, 2004 – in which it was marketed worldwide. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Johansen, *supra* n. 58, at 78.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

and that taking Vioxx presented no known increased risk of arrhythmia.<sup>118</sup>

In short, the plaintiff's lawyer put the drug on trial for causing "heart attacks," and Merck on trial for being a "profit-driven giant corporation whose pursuit of profits ultimately killed [Mr. Ernst]," who had died of a heart attack after taking Vioxx.<sup>119</sup> Merck defended by seeking to prove that while Vioxx might have caused "heart attacks," it didn't cause Mr. Ernst's heart attack, relying on technical terms like "NSAIDS' and 'coxibs' and 'cardiothromboembolic' events [and] on corporate documents full of similar medical jargon."<sup>120</sup>

Viewed logically, and based on the law, Merck appeared to have by far the stronger case. Causation, as any first year law student knows after studying torts, is a crucial element in any personal injury claim.<sup>121</sup> Yet in the *Ernst* case, the only evidence the plaintiff could offer to support causation was the testimony of Dr. Maria Araneta the medical examiner who had conducted the autopsy.<sup>122</sup> Dr. Araneta testified that while she had found no blood clot (a crucial finding because, as both parties agreed, blood clots that led to myocardial infarctions were the only risk posed by Vioxx) during her autopsy, "it was possible that Ernst died of a blood clot that was dissipated during CPR."<sup>123</sup> With this as the only evidence offered to establish causation, it seems likely that a substantial majority of law students confronted with the facts of the *Ernst* litigation would conclude that it was an easy hypothetical: the defendant would prevail.

In fact, however, the jury awarded the plaintiff \$253 million, "including \$229 million in punitive damages."<sup>124</sup> When the case was later considered by a panel of judges, however, the court vacated the jury's award and entered a defense verdict.<sup>125</sup> The court dismissed the 'dissipated blood clot' possibility offered by Dr. Araneta as "mere 'speculation'" and concluded, as we might expect from a group of lawyers, that there was no evidence of causation, and therefore no liability.<sup>126</sup>

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<sup>118</sup> *Id.*, at 78-9. For portions of Lanier's opening statement to the jury, see Michel E. Tigar, *The Vioxx Litigation*, *supra* n. 76, at 404-407.

<sup>119</sup> Johansen, *supra* n. 58, at 78.

<sup>120</sup> *Id.*, at 79. For portions of Kiernan's opening statement to the jury, see, Tigar, *supra* n. 88, at 408-09.

<sup>121</sup> For a discussion of the role of causation in fact in a torts case see, e.g., PROSSER, WADE, & SCHWARTZ, *TORTS: CASES AND MATERIALS*, 268-303 (Victor E. Schwartz, Kathryn Kelly, & David F. Partlett, editors) (2010).

<sup>122</sup> Johansen, *supra* n. 58, at 79.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Texas's cap on non-economic damages operated to reduce the punitive damages award and the trial court ultimately awarded Mr. Ernst's survivor \$26.1 million. *Id.*, citing *Merck*, 296 S.W.3d at 81.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

In his analysis of the conflicting trial strategies, Johansen concluded that while the plaintiff's attorney was "weaving a compelling story," the defense attorney "failed to develop the story of his client."<sup>127</sup> Johansen dismissed the possibility that the plaintiff's "two-pronged emotional appeal – an innocent person died, and a greedy drug company ignored potential safety concerns to make greater profits"<sup>128</sup> had caused the jury to overlook the problems with the evidence establishing causation, noting that the adversarial system allowed the defense to counter the plaintiff's narrative, and concluded that the *Ernst* jury verdict was a triumph of more effective storytelling.<sup>129</sup>

As in the *Simpson* case, one cannot know for certain to what extent the defense strategy caused Merck to lose the *Ernst* trial.<sup>130</sup> Certainly, the Vioxx litigation was not a guaranteed loser for the defense; Merck finally settled the Vioxx litigation after contesting fourteen trials, resulting in five plaintiff verdicts and nine verdicts in favor of the defense.<sup>131</sup> Whether those defense verdicts were obtained as a result of different geographical or other, non-evidentiary, reasons, or were the result of different facts, or of different strategies, is not, and cannot be, known.<sup>132</sup>

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<sup>127</sup> Johansen, *supra* n. 58, at 79.

<sup>128</sup> *Id.* at 80.

<sup>129</sup> *Id.* at 80-81. Johansen also observed that "the existing ethical limits of litigation provide significant safeguards against the potentially overreaching power of story." *Id.* at 81.

<sup>130</sup> Nor is it possible to tell whether or not the *Ernst* jury's verdict was caused by nullification or not. Some scholars argue that there is no such thing as civil jury nullification. See, e.g., Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. Cin. L.Rev. 1377, 1386 (1994)("[N]ullification is not an aspect of civil litigation"). Others, though, believe that civil juries have nullificatory powers. See, e.g., Lars Noah, *Civil Jury Nullification*, 86 Iowa L.Rev. 1601, 1603 (2001)(the concept that civil juries cannot nullify "is unduly narrow"). Noah notes that in litigation involving the drug Bendectin, and also in the silicone-gel breast implant litigation, "juries returned verdicts for the plaintiffs even after deciding that the evidence failed to demonstrate that these products could have caused the plaintiffs' afflictions." *Id.*, at 1605. Certainly the fact that the jury found Merck liable for Mr. Ernst's death when the only evidence regarding causation was speculative at best seems to suggest that it placed less emphasis on the law's causation requirement than might have been expected.

<sup>131</sup> McClellan, *supra* n. 76, at 510.

<sup>132</sup> That alternative strategies were available to Merck, however, is certain. See, e.g., Johansen, *supra* n. 58, at 80 (discussing a suggested alternative narrative that could have been developed in defense of Merck and its actions in regards to Vioxx, proposed by a member of the Vioxx defense team). See also, Tigar, *supra* n. 76, at 410 (providing excerpts of the opening statement by a lawyer representing Merck in a different case showing that alternative explanations for plaintiff's death existed: "Thank you, your honor. [Plaintiff's counsel] talked for about 60 minutes. While he was talking, about 60 people across the United States died from exactly the same thing that caused Mr. Irvin's death and not a single one of them was taking Vioxx. I'm going to talk for about 60 minutes and while I'm talking another 60 people across the United States will die of the same thing that caused Mr. Irvin's death, and not a single one of them is taking Vioxx. The reason is that the thing that caused Mr. Irvin's death is the leading cause of death in the United States of America. That

We can, though, acknowledge that the defense strategy in *Ernst*, like Clark's domestic violence strategy in the Simpson case, was a logical, rational strategy, based on the facts of the case and that both represent a failure of empathy, in that neither strategy spoke to the jury's cultural narrative of Merck as a representative of "big pharma," whereas the strategies employed by opposing counsel in both *Simpson* and *Ernst* were directed specifically at the jury's narrative. And while two cases, plucked from the millions of civil and criminal trials tried over the years, cannot stand definitively for anything, the failure of the "logical" strategy in both cases at least suggests the possibility that the rational, logical approach characterized by the concept of "thinking like a lawyer" might not always be the most effective way to communicate with those who have not been trained to think the same way. Perhaps what is needed from lawyers is a more empathetic response to both the facts and those being asked to consider and rule on them.

### 3. The Triangle Shirtwaist Trial and The Tactical Use of Empathy

Although trial lawyers must develop strong strategic skills that allow them to map out case narratives that will engage and persuade juries, they must also develop a strong tactical sense that will allow them to understand the nuances of testimony as it comes in during a trial, and must be able to understand how to exploit any possible advantages to their clients offered by such nuances. An empathetic response is just as important in this tactical stage as it is when developing the strategy for the overall trial.

Max Steuer, counsel for the defendants in the Triangle Shirtwaist fire prosecution, gives us a flawless example of situational, or tactical, empathy, both in his immediate understanding of the possible advantages offered to his case by the prosecution's star witness and in his sensitive handling of the witness to achieve the best result for his clients.

The facts of the tragic Triangle Shirtwaist fire case are easily given. The Triangle Waist Company was the largest manufacturer of women's blouses in New York City.<sup>133</sup> The company occupied three floors of the Asch Building, located near Washington Place.<sup>134</sup> On Saturday, March 25, 1911, at the end of the workday,<sup>135</sup> a

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was true before Vioxx ever came on the market, and that's true today after Vioxx is no longer being sold.")

<sup>133</sup> David von Drehle, *Triangle: The Fire that Changed America* (2003).

<sup>134</sup> *Id.* at 46-7.

<sup>135</sup> Saturday was the short day in the six-day work week at the Triangle Waist Company. *Id.* at 105. Work began at 9 am and ended at 4:45 pm. *Id.*

fire broke out on the cutting room floor.<sup>136</sup> The fire spread quickly, and one hundred forty-six people were killed, many of whom – in a scene familiar to anyone who witnessed the September 11, 2001 destruction of the World Trade Center buildings – died while jumping from the building to escape the flames.<sup>137</sup>

The furor that resulted from the tragedy led to criminal prosecutions of the owners of the Triangle Waist Company, Isaac Harris and Max Blank, for misdemeanor manslaughter.<sup>138</sup> The prosecution's theory was that the defendants had caused one of the loft exit doors to be locked, thereby preventing at least some of the victims from escaping the fire.<sup>139</sup> Accordingly, it was crucial for the prosecution to be able to establish that at least one victim of the fire had died as a direct result of the door being locked.<sup>140</sup> The prosecutor's found one such victim – Margaret Schwartz – and found a witness – Kate Alterman – who could testify that Schwartz had died because the door was locked.<sup>141</sup>

Little is known of Kate Alterman with certainty. She appears to have been the daughter of Morris Alterman who emigrated from Russia to Philadelphia in 1903,<sup>142</sup> and testified in strongly-accented English.<sup>143</sup> How she found herself to be working at the Triangle Waist Company on March 25, 1911 is unknown, but that she was there was beyond doubt to anyone who heard her testimony.

The simplest way to understand what the jurors, and Max Steuer, heard from Kate Alterman is to reproduce verbatim a portion of her direct examination.

Q. Margaret Swartz [sic.] was with you at this time?

A. At this time, yes sir.

Q. Then where did you go?

A. Then I went to the toilet room, Margaret disappeared from me, and I wanted to go up Greene Street side, but the whole door was in flames, so I went and hide myself in the toilet rooms, and then I went out right away from the toilet rooms and bent my face over the sink, and then I ran to the Washington side elevator, but there was a big

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<sup>136</sup> *Id.*, at 117.

<sup>137</sup> *Id.*, at 167.

<sup>138</sup> Younger, *supra* n. 77, at 1.

<sup>139</sup> *Id.* In fact, as Younger notes, “most of the victims would have died whether or not the exit door was locked.” *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Von Drehle, *supra* n. 133, at 242.

<sup>143</sup> *Id.*

crowd and I couldn't pass through there. Then I noticed some one [sic.], a whole crowd, around the door, and I saw Bernstein, the manager's brother trying to open the door, and there was Margaret near him. Bernstein tried the door, he couldn't open it, and then Margaret began to open that door. I take her on one side – I pushed her on the side and I said, "Wait, I will open that door." I tried, I pulled the handle in and out, all ways, and I couldn't open it. She pushed me on the other side, got hold of the handle and then she tried. And then I saw her bending down on her knees, and her hair was loose, and the trail of her dress was a little far from her, and then a big smoke came, and I couldn't see, I just know it was Margaret, and I said "Margaret," and she didn't reply. I left Margaret, I turned my head on the side, and I noticed the trail of her dress and the ends of her hair begin to burn. Then I ran in, in a small dressing room that was on the Washington side, there was a big crowd and I went out from there, stood in the center of the room between the machines and between the examining tables. I noticed afterwards on the other side, near the Washington side windows, Bernstein, the manager's brother throwing around like a wild cat on the windows, and he was chasing his head out of the window, and pull himself back – he wanted to jump, I suppose, but he was afraid. And then I saw the flames cover him. I noticed on the Greene Street side some one else fall down on the floor and the flames cover him. And then I stood in the center of the room, and I just turned my coat on the left side with the fur to my face, the lining on the outside, got hold of a bunch of dresses that was lying on the examining table not burned yet, covered up my head and I tried to run through the flames to the Greene Street side. The whole door was a red curtain of flame, but a young lady came and she began to pull me in the back of my dress and she wouldn't let me in. I kicked her with my foot and I don't know what became of her, and I ran out through the Greene Street side door, right through the flames, on to the roof.

Q. When you were standing toward the middle of the floor had you your pocketbook with you?

A. Yes sir, my pocketbook began to burn already, but I pressed it to my heart to extinguish the fire.<sup>144</sup>

This is extraordinarily powerful testimony, even when printed on paper and read almost one hundred years after the event. Alterman's vivid description of the Triangle Shirtwaist fire, told by someone so close to death herself as she literally

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<sup>144</sup> *Max Steuer's Cross Examination of Kate Alterman in People v. Harris & Blank* ("Cross Examination"), 2-3 (1987).

kicked and fought her way to safety, certainly had a dramatic impact on the jury of twelve men who were trying the case. Max Steuer is reported as saying

I cannot describe to you . . . the pathetic picture made by that little girl. I cannot reproduce the tears that were running down her cheeks, nor can I tell you how the eyes of the twelve jurors were riveted on her and how they sat craning forward, thrilled by the girl's story and how they wept when she told it.<sup>145</sup>

Alterman's testimony had conveyed in the most compelling way possible some crucial aspects of the prosecution's case: Schwartz had attempted to escape through the ninth floor Washington Place door; the door was locked;<sup>146</sup> and Schwartz had died. In short, Kate Alterman's testimony was devastating to the defense.

And yet there were aspects to Alterman's testimony that sounded strange, to Steuer at least. She used turns of phrase – “throwing around like a wild cat,” and “red curtain of fire” – that sounded at odds with her normal mode of speech, the detail of pressing her pocketbook to her “heart to extinguish the fire” sounded more melodramatic than necessary, and the word “extinguish” sounded more like a lawyer than a teenage immigrant.<sup>147</sup>

Steuer began his cross examination by a series of questions that established with whom Alterman had been in contact since the fire and then – breaking all the logical rules against having a witness repeat damaging testimony – he said: “Now, I want you to tell me your story over again, just as you told it before.”<sup>148</sup> And Alterman went back through her description of the fire, using again phrases like “Bernstein, the manager's brother,”<sup>149</sup> “he wanted to jump, I suppose, but he was afraid,”<sup>150</sup> “I pressed it to my heart to extinguish the fire,”<sup>151</sup> and “a red curtain of fire.”<sup>152</sup> Steuer pointed out that she had left out the description of Bernstein jumping around “like a wildcat,” and Alterman reaffirmed that he was “[l]ike a wildcat.”<sup>153</sup>

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<sup>145</sup> Von Drehle, *supra* n. 133, at 245.

<sup>146</sup> To put an exclamation point around that point, the prosecutor later asked Kate Alterman what Ms. Schwartz did as she tried to open the door. “She screamed at the top of her voice, “My God, I am lost! The door is locked! Open the door!” Cross Examination, *supra* n. 144, at 3.

<sup>147</sup> Von Drehle, *supra* n. 133, at 245.

<sup>148</sup> Cross Examination, *supra* n. 144, at 7.

<sup>149</sup> *Id.* at 7, 8

<sup>150</sup> *Id.*, at 8.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*



Then, after a few more questions that helped to locate where Alterman had been when the fire started, Steuer asked her to tell her story yet again.<sup>154</sup> And again, she used phrases like “Bernstein, the manager’s brother,”<sup>155</sup> “he wanted to jump, I suppose, but he was afraid,”<sup>156</sup> “I pressed it to my heart to extinguish the fire,”<sup>157</sup> “a red curtain of fire,”<sup>158</sup> and that Bernstein “jumped like a wildcat on the walls.”<sup>159</sup>

The trial then broke for lunch, and when Steuer’s cross examination resumed, he got Alterman to deny that she had discussed her testimony with anyone before she gave it, and then asked her to tell her story for a fourth time. And again, she used phrases like “Bernstein’s brother,”<sup>160</sup> “he wanted to jump out from the window, I suppose, but he was afraid,”<sup>161</sup> and “a red curtain of fire,”<sup>162</sup> and indicated again that Bernstein was “throwing around like a wildcat.”<sup>163</sup>

On re-cross, Steuer got Alterman to affirm that she had not prepared her testimony and asked her if she could tell her story in any words or in the words she used when she gave her written statement.<sup>164</sup> Although she testified that she could, she left the witness stand without offering a differently-phrased account of the fire. During his closing argument, Steuer “quietly pointed out to the jury that Kate Alterman’s high flown language could not have been her own. She was not testifying to an honest recollection, but to a doctored version of the events of March 25, 1911, a version which had been prepared by another and committed by Kate to memory.”<sup>165</sup> The jury acquitted both defendants.

Steuer’s genius is evident in his two key responses to Alterman’s testimony. First, Steuer recognized that the testimony was probably coached, because of the predominance of vocabulary and phraseology inconstant with who Alterman was. And second, Steuer recognized the power and likely factual accuracy of the testimony<sup>166</sup> and that he could not undertake a destructive, bullying, cross-

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<sup>154</sup> *Id.*, at 10.

<sup>155</sup> *Id.*, at 10, 11.

<sup>156</sup> *Id.*, at 11.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*, at 12. This time through her description of events, Alterman omitted that Bernstein was the manager’s brother.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*, at 13-15.

<sup>165</sup> Younger, *supra* n. 77, at 2.

<sup>166</sup> Ms. Schwartz’s body was found within feet of where Alterman testified she had last seen her and Bernstein, the manager’s brother, died in the fire as well. As von Drehle notes, it is “entirely believable” that he should have behaved in the manner Alterman described, and that he was, indeed, afraid of jumping from the window to his certain death below. Von Drehle, *supra* n. 133, at 250.

examination of such a sympathetic witness. Instead, he realized – apparently as the direct examination was proceeding – that his only hope of deflecting the harm from Alterman’s testimony was to show the jury how coached it was.

Neither of these responses was “logical:” in all material, evidentiary terms, the testimony was both truthful and devastating, and in presenting it, the prosecution had every reason to believe that it would bring about a conviction of both defendants. Instead, Steuer’s responses to Alterman’s testimony were quintessentially empathetic, in that they set logic aside and dealt, instead, with a deep personal understanding of what Alterman’s words meant and how to counter their effect on the jury.

It is this empathetic response, and its importance for lawyers at both the strategic and tactical level, that we will next consider.

#### E. The Need For Empathetic Lawyering

The examples outlined above show the failures that can occur when empathy is lacking, and suggest that a more empathetic response to both witness and jury can produce more effective lawyering strategy and tactics, and ultimately a more satisfactory result for the client. In the narrow context of the dictionary’s definition of the term, then, empathy forms, or should form, a crucial part of a lawyer’s arsenal although, as Nussbaum cautions, empathy alone can be dangerous, and should be used “only in combination with a directive ethical intelligence that animates the whole of the text, and allows us to see the world in a way that permits human understanding, and the understanding of the people as human.”<sup>167</sup>

Nussbaum’s caveat is significant because legal education – at least the education provided to most students in the first year of law school – can be viewed as a systematic attempt to eliminate that directive ethical and empathetic intelligence and replace it with an ethical, but entirely logical, intelligence that prohibits human understanding. It is this elimination of ethical intelligence that so concerned the authors of the Carnegie Report when they wrote that law schools seek to “flip off the switch of ethical and human concern, teach legal analysis, and later, when students have mastered the central intellectual skill of thinking like a lawyer, flip the switch back on.”<sup>168</sup>

Anecdotal evidence, at least, suggests that the students understand that the legal education process changes them. Responding to a survey conducted by Lani Guinier at the University of Pennsylvania, one student noted that “I changed so much. I used to be a much more compassionate person, much more tolerant of

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<sup>167</sup> Nussbaum, *supra* n. 9, at 329.

<sup>168</sup> Carnegie Report, *supra* n. 17, at 141.

different choices, in terms of lifestyle, in terms of personality. I just feel like law school has put huge blinders on my eyes.”<sup>169</sup> And another student participating in the Guinier study responded that

I feel that [compassion] is something that is eradicated in law school. This notion that we can present things as though, like the law, it’s a self-contained unit, it’s a sphere that we can look down upon as though we were astronauts that can look down upon the earth. The whole idea that these things are neutral and that a neutral outcome results just eliminates any notion of compassion because professors sort of play on that. ‘Oh you feel sorry for those people. Oh well that’s too bad. Oh, well the law says X.’ We really are taught that compassion is a bad thing.<sup>170</sup>

Guinier argues that because law schools are institutions whose role is, in large part, to produce students who are ready to participate in a competitive legal employment market,<sup>171</sup> they are places that “valorize[] sorting, [and that] reward[] people who think fast but not always those who think deeply.”<sup>172</sup> She continues that

the way things are done in law school (the Socratic method, timed issue-spotting exams, large classrooms, unpatrolled and informal networks) devalues and distorts those characteristics associated with women, such as empathy, relational logic, and nonaggressive behavior. In this understanding, law school unintentionally uses a male-oriented baseline to measure male/female differences, rendering women as less than competent.<sup>173</sup>

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<sup>169</sup> Anonymous third year woman law student at the University of Pennsylvania Law School, quoted in LANI GUINIER, ET AL, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (“Guinier”), 35 (1997).

<sup>170</sup> *Id.*, at 52 (quoting an anonymous third year woman law student at the University of Pennsylvania Law School).

<sup>171</sup> Guinier is not alone in this belief. *See, e.g.*, Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. Cal. L. Rev. 1231, 1246 (1990-91)(“[F]irms prize law students not for what they have learned about law but rather for the intelligence and potential that law schools rewarded by admitting them. We at elite law schools serve as gatekeepers to the legal profession through our decisions regarding whom to admit. Because a law school admitted ‘Recruit X,’ who went to an undergraduate school without a national reputation and who took courses about which a law firm knows little and cares even less, the law school has put to rest the firm’s anxieties about ‘Recruit X’'s intelligence and adaptability.”)

<sup>172</sup> Guinier, *supra* n. 169, at 2.

<sup>173</sup> *Id.*, at 66-67.

In order to succeed, Guinier concludes, at least some women become bi-cultural by “learn[ing] to function as ‘social males’ and on some level they . . . become ‘gentlemen.’”<sup>174</sup>

Whether or not one accepts Guinier’s feminist critique of the law school process, or her perception that empathy is a characteristic uniquely associated with women, there can be little argument that law school is a particularly transformative experience for those who come with well-developed senses of empathy. Aside from the personal harm such a transformation can cause,<sup>175</sup> it can also cause professional harm, particularly where, as in the *Simpson* and *Vioxx* cases, lawyers make poor decisions as a result of their failure to calibrate their trial strategies to the actual, as opposed to logical, responses of the non-lawyer juries who evaluate and decide on those strategies during their deliberations.

The lawyers in these cases had alternatives. In his review of Merck’s litigation strategy in the *Ernst* case, for example, Professor Johansen describes a potential alternative trial narrative proposed by another member of the *Vioxx* defense team:

This verdict is bad news for all of us, and some of us will die prematurely because the lawsuit deterred the research and development of life-saving drugs.

And *Vioxx* was one such life-saving drug. The painkillers that it replaced (and is now replaced by) cause their own health problems, and current medical thinking is that, at least for some people, *Vioxx* would be a safer as well as a more effective pain-killer than aspirin, despite what we now know to be the latter’s better cardioprotective profile. But Merck can’t collect \$26 million from each person whose life they save, even it were possible to point to a particular Alvy Singer of

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<sup>174</sup> *Id.*, at 68.

<sup>175</sup> There is little question that the law school experience causes many students to suffer psychological harm. See, e.g., Daicoff, *Lawyer, Be Thyself*, *supra* n. 27, at 96; Nancy Soonpa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 U. Conn. L. Rev. 355 (2003-04); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?* 8 J. Legal Writing Inst. 229 (2002); Suzanne C. Segerstrom, *Perceptions of Stress and Control in the First Semester of Law School*, 32 Willamette L. Rev. 593 (1996); B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 Conn. L. Rev. 627, 650-53 (1991); Andrew H. Benjamin et al, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 Int’l J. L. & Psychiatry 233 (1990); Andrew H. Benjamin et al, *The Role of Legal Education in Producing Psychological Distresses Among Law Students and Lawyers*, 1986 Am. B. Found. Res. J. 225 (1986). No one will argue that the suppression of empathetic responses is the sole, or even the principal, cause of this harm. Nonetheless, it cannot be discounted as a contributing factor.

Hypothetical City, Iowa, who didn't die of aspirin-related complications because he was taking Vioxx.<sup>176</sup>

Professor Johansen notes that if Merck had told this story “— that Merck was the hero in this story [and] that the world is a more dangerous place without Vioxx and other drugs that may never make it to market – it might have resonated more effectively with the jury [than the more fact-based approach Merck adopted].”<sup>177</sup>

In the *Simpson* case, the prosecution's inability to consider the possibility that a jury might be unwilling to convict Simpson based on an extended domestic violence theory, and might be willing to set aside the logical inconsistencies of the police conspiracy theory offered by the defense, led to a failed prosecution. By contrast, a more empathetic evaluation of the likely jury reaction to the prosecution's domestic violence case theory might have led to a shorter, more focused, trial in which the evidence against Simpson could have been presented more directly and compellingly.

Nussbaum sums up the value of empathy to lawyers, and the danger of suppressing the empathetic instinct, as follows:

[T]he imagination of human predicaments is like a muscle: It atrophies unless it is continually used. And the imagination of human distress, fear, anger, and overwhelming grief is an important attribute in the law. Lawyers need it to understand and depict effectively the plight of their clients. Lawyers advising corporations need it in order to develop a complete picture of the likely consequences of various policy choices for the lives of consumers, workers, and the public at large, including the public in distant countries where corporations do business. Factual knowledge is crucial, and in its absence the imagination can often steer us wrong. But knowledge is inert without the ability to make situations real inside oneself, to understand their human meaning.<sup>178</sup>

It is empathy's ability to act as a moral compass which allows lawyers to steer an often difficult professional and personal course in a complicated world.

Yet while the value of empathy as a professional tool for lawyers is readily apparent, the legal education world still behaves as if its primary, if not only, task is to eliminate empathy and to train its students to “think like lawyers.” Perhaps

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<sup>176</sup> Johansen, *supra* n. 58, at 80, quoting, Ted Frank, *Ernst v. Merck – One More View*, (Sept. 1, 2005), available at <http://www.aei.org/article/23166>.

<sup>177</sup> Johansen, *supra* n. 58, at 80.

<sup>178</sup> Nussbaum, *supra* n. 19, at 277-78.

the time has come to change that approach and to consider a multi-pronged approach to helping law students develop their empathetic skills. This is not to suggest that law students should not also be taught to think logically and clinically about the legal problems they are asked to confront, but it is to suggest that this education can be accomplished in addition to, and not at the expense of, an ability to think empathetically about the responses of clients and, in the case of litigation, juries to the facts and law of a case.

## F. Developing a Sense of Empathy in Lawyers

Explaining the professional benefits of empathetic lawyering is easier than describing what can be done about developing, or enhancing, a sense of empathy in current and future lawyers. In fact, it is likely that there is no single solution to the conundrum of how to make lawyers more empathetic, and the best solution is to seek to permeate empathetic development before, during, and after law school. And while much of what follows is raised in the context of the law school curriculum, because it is in law school that much of this non-empathetic response is learned, the principles underpinning the courses described here could, and perhaps should, be readily adopted by law firms or even by individual lawyers for their own use.

### 1. Empathetic Education Before Law School

One of the strengths of the current legal education model is that a student can come to law school with no prior training or educational prerequisites. Unlike medical school, with its extensive list of preliminary coursework,<sup>179</sup> or other graduate programs, which typically require a strong preliminary grounding in their subject matter, law school imposes no formal prerequisites on its students and accepts them from any academic background as long as their GPA and LSAT scores indicate an ability to cope with the rigors of a law school education.

Whether or not it is desirable that law schools maintain this tradition of accepting students without formal prerequisites is a question for another time. Law schools could, though, initiate at least an informal, and voluntary, plan of study for those who have already applied and been accepted into law school in order to help with the transition to the study of law. In particular, while most law schools send their prospective students suggested reading lists for the summer before the students

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<sup>179</sup> Harvard Medical School, for example, tells its prospective students that “[a] study . . . has shown that students are successful in their medical studies regardless of their undergraduate concentration, providing that they have had adequate science preparation.” <http://hms.harvard.edu/admissions/default.asp?page=requirements>. “Adequate” preparation includes: one year of biology, with laboratory experience, two years of chemistry, with laboratory experience, one year of physics, one year of calculus, and one year of expository writing. *Id.* Students must also be “comfortable” with upper-level mathematics (through differential equations and linear algebra), biochemistry, and molecular biology. *Id.*

come to law school, a more formalized and intensive course of study could help incoming students to practice their study skills and – more importantly, for our purposes – help to develop the students’ empathetic responses.

There are many possible models for a pre-law school summer course. One possible approach is outlined by Charles Cox and Maury Landsman.<sup>180</sup> While Cox and Landsman describe their course as one taught during law school, it would be relatively easy to modify it to fit the looser requirements of a summer pre-law school course, with distance learning technology taking the place of in-class discussions.

In the class they describe, students are given a one-page summary of the facts of a case, but are not given any law from the case, and are asked to discuss “[w]hat *should* the law be [and] [w]hy?”<sup>181</sup> The authors note that they aim to “help the students learn that they can resolve what the law should be, and usually is, just by ‘thinking it through.’ The technique is simple: focus on the facts of the case and remember that the law is only answers to human problems. . . .”<sup>182</sup> Cox and Landsman require the students to read two chapters of John Noonan’s *Persons and Masks of the Law*<sup>183</sup> and note that through the reading of “the extensive unreported facts of the widely known *Palsgraf* case,” the students “get a look at the many factors outside the law that may, and arguable do *or should*, affect a decision. . . .”<sup>184</sup>

Cox and Landsman’s course, which they have apparently taught to general acclaim at the University of Minnesota Law School for several years,<sup>185</sup> points out a way in which students can be introduced to key aspects of the legal process without losing sight of the importance of the facts – both disclosed and undisclosed and related and unrelated to the specific circumstances of the case<sup>186</sup> – to the actual, as opposed to aspirational, outcome of the case. This approach is fundamentally empathetic, and yet does not impede the development of the students’ ability to think like lawyers. If anything, it enhances that ability by allowing the students to explore a deeper, more nuanced approach to decision-making than that typically offered in the traditional first-year torts class. If the students had taken this class before entering

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<sup>180</sup> Charles A. Cox, Sr. & Maury S. Landsman, *Learning the Law by Avoiding It in the Process: And Learning From the Students What They Don’t Get in Law School*, 58 J. Legal Educ. 341 (2008).

<sup>181</sup> *Id.* at 342.

<sup>182</sup> *Id.* at 341.

<sup>183</sup> JOHN T. NOONAN, JR. *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AN MAKERS OF THE MASKS* (2002); Cox & Landsman, *supra* n. 180, at 343.

<sup>184</sup> Cox & Landsman, *supra* n. 180, at 344 (emphasis in original).

<sup>185</sup> *Id.* at 341.

<sup>186</sup> Cox and Landsman point out specifically Noonan’s observation that, at the time of the *Palsgraf* decision, Justice Cardozo harbored “ambitions to influence the content of the First Restatement of Torts.” Cox & Landsman, *supra* n. 180, at 344, citing Noonan, *supra* n. 183, at 149-50.

into the formal study of torts, their Socratic discussions with their professors would likely have been more complex and more interesting for both students and teacher.

Another course studying the way we make decisions, and one that could also be adapted to fit into a summer pre-law school schedule, is described by Martha Nussbaum.<sup>187</sup> The course, called, descriptively enough, “Decisionmaking,” is taught jointly by Nussbaum and Professor Douglas Baird, “an expert in the application of game theory to the law.”<sup>188</sup>

Addressing both the analytical and the normative ethical aspects of good decision-making in public life, we acquaint the students with expected utility theory, game theory, and the new behavioral law and economics. We have many students who basically think ethics is a “soft” subject. But we then get them reading Kant, Mill, and Aristotle, and odder authors still, such as Henry James, and Mahasweta Devi. I am optimistic about the ability of courses such as this to expose a wide range of law students to good normative reasoning.<sup>189</sup>

A course like this, in which students read and discuss – both with each other and with a teacher – a carefully selected group of texts that allow them to explore the nature of decision-making, would serve the traditional law school goal of helping the students develop their critical, logical skills, but could also help the students understand that logical decisions are made in an ethical, and empathetic, context.

A third approach to a summer course might take one or more pieces of extended litigations – the *Simpson*, *Ernst*, and Triangle Waist Company cases discussed here are three possible examples, but there are many more – and have the students study and discuss both the facts and the various strategies adopted by the attorneys and why they were, or were not, successful. This type of course would allow the students to begin the careful reading they will need to employ in their law school classes, but would also encourage their empathetic responses to the material and might challenge their expectations that logical trial strategies and tactics are always the best ones.

This type of course runs close to a law and literature approach – in this case, with the law *as* literature – and that model is another that might successfully be used in a pre-law school summer course. This type of course – described in Professor Reichman’s evaluation of the influence of Martha Nussbaum’s *Poetic Justice*<sup>190</sup> –

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<sup>187</sup> Nussbaum, *supra*, n. 19, at 274-75.

<sup>188</sup> *Id.*, at 274.

<sup>189</sup> *Id.*, at 274-75.

<sup>190</sup> MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); Reichman, *supra* n. 2, at 296-97.



would deal with decision making or, perhaps more accurately, the deferral of decision making, and would involve the study of literature and the lessons it can teach lawyers.<sup>191</sup> This type of course is well-suited to students who are still novices in the current legal education model, and as Reichman observes, “[p]erhaps it is time to recognize the need for teaching literature and the literary approach to law as part of the introductory classes in law, in a separate and mandatory course where literary methods will be taught systematically and with a critical approach.”<sup>192</sup>

A course of this type would involve the reading of literature specifically as a means of stimulating the students’ empathetic responses.

The main thesis [of Nussbaum’s *Poetic Justice*] is that the reading of literature – an ethical reading – arouses empathy, and that this empathy allows for better judgment. . . . Developing the capacity to exercise empathetic judgment in literature will also serve legal judgment. It will allow for judgment is neutral but not aloof, sensitive but uncompromising on moral principles, personal but not capricious (or idiosyncratic), but not overbearing or diffident. Focusing on works by Dickens, Whitman, and Wright, Nussbaum provides guidelines for properly reading literature as an exercise of developing empathetic judgment. . . .<sup>193</sup>

Such a course would be particularly valuable to students before they develop fully-formed legal-logical reflexes, because it would encourage them to withhold judgment rather than to exercise the immediate judgment often called for in law school classes. As Reichman notes,

[o]ne of the basic components of human culture is the constantly exercised capacity for making judgments. We are quick to judge: we easily determine the reality presented before us, often without pausing

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<sup>191</sup> I would have explicitly acknowledged this as a “law and literature” class but for Professor Nussbaum’s reservations about that label. “I used to teach [a Law and Literature] course, and I now no longer do. The name ‘Law and Literature’ denotes no clearly demarcated subject matter. My course did have a definite subject matter: It was the role played by compassion and empathy in the law, and I pursued that theme through literary . . . and legal texts of many kinds. But, not surprisingly (despite the fact that I thought I had described the course clearly enough) students came to the course not expecting a sustained philosophical examination of the emotions, and expecting instead a lighter, more entertaining kind of course about literary representations of legal situations. Perhaps that sort of problem can be solved, but I think one cannot rely for the training I would like to promote, on elective courses of this nature, however well designed.” Nussbaum, *supra* n. 19, at 278.

<sup>192</sup> Reichman, *supra* n. 2, at 302.

<sup>193</sup> *Id.*, at 303.

to reflect whether what appears (or is presented) as real is indeed real. We swiftly identify the good and the bad, often resorting to simplistic labels and categories, and frequently do so based on a number of assumptions and shortcuts – rules of thumb – the validity of which we generally do not bother to check.”<sup>194</sup>

But while it is easy for students to reach judgments about what is and is not a logically correct decision, such immediate responses tend to ignore the more empathetic question of what the “correct” decision, viewed in a broader context, might be. By contrast, literature forces us to slow down our decision-making facility and to assimilate more information before we reach our conclusions about appropriate outcomes.

Good literature, unlike superficial or programmatic literature, exposes the reader to the complexity of the human condition even by telling a simple story. The novel, especially because it is a figment of the imagination, calls first for withholding factual judgment. The readers are aware that the story they have before them is not a true story, but they are prepared to treat it as plausible – as long as it intertwines the kind of events that seem conceivable, based on the cultural horizon and human nature with which they are familiar. The suspension of disbelief is not expressed merely in accepting the fictional story as possible, but also by the various sources from which we are willing to receive information within the story.<sup>195</sup>

Moreover, literature allows us – uniquely – the chance to insert ourselves into another (albeit fictional) person’s mind and hear their thoughts:

[T]he vast majority of novels directly present to readers their main characters’ thoughts, and we have learned to accept that as perfectly natural. One of the pleasures of reading novels is the enjoyment of being told what a variety of fictional people are thinking. It is a relief from the business of real life, much of which requires the ability to decode accurately the behavior of others.<sup>196</sup>

One of the benefits of literature to law students is the opportunities it offers to practice this empathetic decoding of real-life behavior by providing fictional examples for study, reflection, and discussion.

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<sup>194</sup> *Id.*, at 304.

<sup>195</sup> *Id.*, at 305.

<sup>196</sup> Alan Palmer, *The Construction of Fictional Minds* 10 Narrative 28, 29 (2002).

It might be imagined that law students have already experienced the benefits of literature well before they come to law school. But this is not a safe assumption. A recent study suggests that “[l]ess than half of the adult American population now reads literature”<sup>197</sup> and that literary reading had declined by 10% between 1982 and 2002.<sup>198</sup> A snapshot picture of some of the incoming law school class of 2006<sup>199</sup> suggests that the situation with law students is a little better than the national average, with 5% responding that they had read for pleasure more than one book a week, 20.4% responding that they read one book a week, 31.8% responding that they had read one book a month, 26.2% responding that they had read more than one book a year, although fewer than one book a month, 3.5% responding that they had read one book a year, and 1.6% responding that they had read fewer than one book a year.<sup>200</sup>

Although these data suggest that law students’ literary reading is higher than the national average, though, they are still not cause for celebration. Based on this survey’s results, fully 60% of responding incoming law students indicated that they read for pleasure one book or fewer each month. For those who celebrate the ability of literature to deliver important information about empathy and decision-making, such a reading rate would appear to be depressingly low.

These results mirror a decline in empathy found in American college students. In a meta-analysis of American college students announced at the annual meeting of the Association for Psychological Science, researchers concluded that college students today score “40% lower than their counterparts of 20 or 30 years ago, as measured by standard tests of this personality trait.”<sup>201</sup> The authors of the study suggest several possible reasons for this decline, including exposure to violent media and the advent of social media.<sup>202</sup>

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<sup>197</sup> NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., NATIONAL ASSESSMENT OF ADULT LITERACY: A FIRST LOOK AT THE LITERACY OF AMERICA’S ADULTS IN THE 21ST CENTURY, ix (2005) available at <http://nces.ed.gov/NAAL/PDF/2006470.PDF>.

<sup>198</sup> *Id.* Only 56.6% of American adults had read any book in the year the survey was conducted and only 46.6% had read a work of literature, broadly defined as any novel, short story, poem, or play. *Id.* at ix, 1-2.

<sup>199</sup> The survey polled students coming to seven law schools: Syracuse University College of Law, Washington College of Law, Marquette University Law School, Rutgers School of Law, Camden, Thomas Jefferson School of Law, John Marshall Law School, and the University of Baltimore School of Law. Ian Gallacher, “Who Are These Guys?": *The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 151 155, n. 12 (2007).

<sup>200</sup> *Id.* at 169.

<sup>201</sup> Rick Nauert, *Compassion on the Decline Among College Students*, Psych Central (June 4, 2010), available at <http://psychcentral.com/news/2010/06/01/compassion-on-the-decline-among-college-students/14210.html>; Edward H. O’Brien, Courtney Hsing, & Sara Konrath, *Changes in Dispositional Empathy over Time in American College Students: A Meta-Analysis*, available at, [http://sitemaker.umich.edu/skonrath/files/empathy\\_decline.pdf](http://sitemaker.umich.edu/skonrath/files/empathy_decline.pdf).

<sup>202</sup> Nauert, *Compassion on the Decline*, *supra* n. 201.

Whatever the reasons for this apparently dramatic drop in empathetic response, we are confronted by the reality that law students are likely significantly less empathetic coming in to law school than were their predecessors, and that they also appear to be reading less. Developing pre-law school law and literature courses in which students could participate before coming to law school would go some way to remedying the literature gap, and might help improve student empathetic responses as well.

Allowing law students to confront the complexity inherent in the decision-making process, and equipping them with the tools to make more nuanced, informed decisions about the cases they begin to read on the first day of law school, would encourage them to remember that logic need not be divorced from empathy, and that the two types of decision making can coexist. In essence, this approach to legal education gives the students access to the “switch of ethical and human concern” the Carnegie Report’s authors write of,<sup>203</sup> and would allow them to control when the switch is flipped on or off.

## 2. Empathetic Education in Law School

Useful though such pre-law school courses might be, they would have more impact if they were followed up by some law school curricular reforms that allowed the messages the pre-law students had learned to be enhanced and developed by courses in law school as well. These changes might include not just a greater appreciation for the importance of empathy in the traditional doctrinal courses where, researchers have noted, it is generally ignored, but also additional programming devoted to the restoration of the balance between empathy and logic.

The pre-law school summer courses discussed above could be adapted for inclusion in the regular law school curriculum. Indeed, both the Cox and Landsman<sup>204</sup> and Nussbaum<sup>205</sup> courses were designed as elective courses in law school curricula and would require adaptation to be taught as pre-law school courses. The location of these, and other non-doctrinal, courses in the traditional upper-class law school curriculum is less than desirable, though, while better than nothing, would be more effective and beneficial to students if they could be part of the first year curriculum.

There already is at least one course that helps students develop their empathetic senses in the typical law school first year curriculum, although it is usually thought to have a different function. The legal research and writing course required by most

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<sup>203</sup> Carnegie Report, *supra* n. 17, at 141.

<sup>204</sup> *Supra* nn. 180-86 and accompanying text.

<sup>205</sup> *Supra* nn. 187-95 and accompanying text.

law schools<sup>206</sup> typically involve a combination of classroom instruction and written assignments using simulations to recreate client problems that must be analyzed by the students. Although these assignments are developed to reinforce lessons of structure and analysis that are taught in the legal writing classroom, they can be designed to stimulate a student's empathetic response by contextualizing legal analysis more realistically than can be achieved in the typical doctrinal class laboratory setting.

Writing, after all, is – or should be – an exercise in applied empathy. In order to persuade a reader of something, whether it be the accuracy of a set of facts, a legal interpretation, or the believability of a fictional account, a writer must attempt to place him or herself in the mind of the reader and try to imagine the reader's response to the written material.<sup>207</sup> It is precisely this skill which lawyers must develop in order to communicate effectively, and this collateral benefit to legal writing courses in law school should be recognized and emphasized in law school curricula by expanding the number of legal writing courses offered to students.

Valuable though this pre-clinical engagement with a more empathetic approach to legal analysis is, though, it alone is likely not enough to counter the force of the more purely logical approach employed in most doctrinal courses. And while those courses can, and should, be taught in a way that incorporates both the doctrinal lessons to be distilled from case law and the more human lessons to be drawn from the facts surrounding those cases,<sup>208</sup> an additional, required, course in the first year

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<sup>206</sup> The American Bar Association (“ABA”) Standards for legal education require that law schools provide substantial instruction in “writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.” ABA Standards for Approval of Law Schools, Standard 302(2)(3), available at Council Standards, Chapter 3, available at <http://www.abanet.org/legaled/standards/20082009.StandardsWebContent/Chapter%203.pdf>. This standard is satisfied, in most law schools, by a course in legal research and writing. See, Association of Legal Writing Directors & Legal Writing Institute. Report of the Annual Legal Writing Survey, 2010, at 7 (2010), available at

[http://www.alwd.org/surveys/survey\\_results/2010\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2010_Survey_Results.pdf) (indicating that 181 law schools teach legal writing in the fall semester and 184 schools teach legal writing in the spring

<sup>207</sup> See, e.g., Trimble, *supra*, n. 71, at 5-6 (“The writer . . . after realizing that a world – the reader – exists out there beyond himself, slowly comes to develop, first, an awareness of himself from the reader’s vantage point (*objectivity*); next, a capacity to put himself imaginatively in the mind of the reader (*empathy*); and finally, an appreciation of the reader’s rights and feelings (*courtesy*).”)

<sup>208</sup> The recent publication of a series of books that go into more depth about the facts of cases than do the often terse factual summary offered by the courts is an encouraging sign. These books, published by Foundation Press, include the Trial Stories volume discussed at n. 76, *supra*, and also have volumes covering, for example, Administrative Law, Antitrust, Business Tax, Civil Procedure, Constitutional Law, Evidence, Labor Law, and Torts. These books, used in conjunction with more typical casebooks, offer at least one model by which the human implications implicit in all court decisions could be discussed in doctrinal classes.

of law school that focuses on the empathetic, and, perhaps, ethical<sup>209</sup> aspects of law practice would be of tremendous benefit to the students.

Locating such a course in the first year, and ideally in the first semester, would allow it to serve as a valuable counterweight to the more dispassionate lessons typically taught in doctrinal courses. Although students often have access to courses that engage some or all of this material in the upper-class curriculum,<sup>210</sup> the damage is, by then, likely done and the students will likely have difficulty reintegrating a more empathetic approach to analysis into their newly-created lawyer personas.

I use “damage” intentionally here. Some have speculated that the analytical approach employed by law schools in the first year contributes to the well-documented psychological harm<sup>211</sup> suffered by many first year law students.<sup>212</sup> And while it would be fanciful to assert that a course requiring a more balanced approach to analysis would cancel-out the potentially negative effects of the more traditional law school pedagogical style, it would at least alert the students that empathy is not forbidden to lawyers and that an empathetic approach to legal and factual analysis can be an important aspect of a lawyer’s work.

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<sup>209</sup> By using “ethical” to describe this possible course, I intend to make a conscious distinction between such a course and the more circumscribed “professional responsibility” courses that form a typical part of the second year law student’s experience.

<sup>210</sup> Even if a law school has a “law and literature” elective course in its curriculum, such a course is often not available to all students in that school. *See, e.g.*, Reichman, *supra* n. 2, at 301. Reichmann notes that Harvard University, New York University, and the University of Pennsylvania “only provide one elective law and literature class to the juris doctorate candidates, each being limited to fifteen and eighteen students.” *Id.*, n. 16. In addition, in the academic year 2004-05, several schools did not offer a law and literature class at all, including “Stanford University, Yale University, the University of Chicago, Cornell University, the University of California at Berkeley, and Vanderbilt University.” *Id.* Of course, Nussbaum’s retreat from the “law and literature” term (*see* n. 191) might why there was no such named class at the University of Chicago.

<sup>211</sup> For a discussion of some of the psychological harm suffered by first year law students, and the possible causes for such harm, *see, e.g.*: Nancy Soonpa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 U. Conn. L. Rev. 355 (2003-04); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?* 8 J. Legal Writing Inst. 229 (2002); Krieger, *supra* n. 36, Suzanne C. Segerstrom, *Perceptions of Stress and Control in the First Semester of Law School*, 32 Willamette L. Rev. 593 (1996); Peter Kutulakis, *Stress and Competence: From Law Student to Professional*, 21 Cap. U. L. Rev. 835 (1992); B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 Conn. L. Rev. 627 (1991); Andrew H. Benjamin et al, *The Role of Legal Education in Producing Psychological Distresses Among Law Students and Lawyers*, 1986 Am. B. Found. Res. J. 225 (1986); Lawrence Silver, *Anxiety and the First Semester of Law School*, 4 Wis. L. Rev. 1201 (1968).

<sup>212</sup> *See, e.g.*, Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. Legal Educ. 75, 75-6 (2002) (“Causes of student distress include the overwhelming workload, intimidating classroom dynamics, excessive competition, astronomical debt, personal isolation, lack of feedback, and the nearly exclusive emphasis on linear, logical, doctrinal analysis.”)

### 3. Empathetic Education After Law School

Some might question the notion that law schools have a role to play in legal education after their students graduate. There is enough to do, they might argue, in the three years the students are in school. Once law students walk across the stage with their degrees in hand and are transformed before the faculty's eyes into alumni, the law school's responsibility for their active education has ceased.

Certainly it is true that a law school's formal educational role, as with any academic institution, ends with the graduation of its students. But law schools could, and perhaps should, continue to offer opportunities for their former students to continue their legal education after graduation. Many schools already offer continuing legal educational opportunities as part of their alumni reunions or other law school events, and adding training in empathy as one of the programs offered, or as part of other programs, should pose little challenge. Law schools might also consider introducing on-line programs, based on courses, such as law and literature courses already taught at the school, that would help alumni, wherever they might be physically located, to improve or perhaps develop their empathetic skills. Such courses are not difficult to set-up, would not fall foul of the American Bar Association's limitations on on-line courses offered as part of a J.D. program,<sup>213</sup> and would offer alumni not only a chance to stay in touch with their law schools but also a chance to engage in a discussion – with faculty and with each other – about how to communicate better with non-lawyers. Programs like this could serve both an educational and a broader, humanizing, role and would benefit the alumni who participated in them and the law schools that offered them.<sup>214</sup>

### CONCLUSION

The ubiquity of the Langdellian approach in contemporary legal education has made it difficult, if not impossible, for law schools to contemplate alternatives to it. Robert Berring has traced this effect – what might be called the ontological power of classification – from Blackstone, through Langdell, and down to today.<sup>215</sup> Berring notes that in Blackstone's time, the common law “was a hodge-podge of local

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<sup>213</sup> ABA Standard 306 (c) provides that students in accredited law school programs may not take more than four credit hours in any one semester, or more than twelve credit hours total. <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>, at 28-29.

<sup>214</sup> The obvious benefits to law schools would include continued contact with a group of alumni interested in participating in, and benefiting from, law school activities, as well as the general sense of good-will generated by a school that is sufficiently interested in its alumni to create special programming for them.

<sup>215</sup> Robert Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000).

practice and custom.<sup>216</sup> Blackstone’s achievement, according to Berring, was to take “a messy smorgasbord of common law doctrines and practice and organize it into a comprehensible series of propositions. He supplied a structure of categories and concepts that fit the existing data.”<sup>217</sup>

It was this framework of common law doctrines, an artificial construct for Blackstone’s pedagogical purposes, that Langdell seized on and expanded in his development of Harvard’s law school curriculum. “A close examination of Langdell’s work in shaping the law school curriculum – a curriculum that persists today – shows that it is a descendant of Blackstone’s universe. Langdell’s belief that law was at heart scientific, and subject to discovery through the reading of common law cases, flowed smoothly from Blackstone.”<sup>218</sup>

And, indeed, it is a testament to both Blackstone and Langdell’s conception, and the power of the classification structure they helped to create, that it survives virtually intact over one hundred years after its introduction at Harvard. But therein lies the problem, because one of the side-effects of powerful classification systems is their ability to blind us to other possibilities. “Good, useable systems disappear almost by definition. The easier they are to use, the harder they are to see.”<sup>219</sup>

Eventually classification decisions that were once based on the banal realities of constructing a workable sorting process transform that very process. Now this early decision becomes the only possible outcome; the result appears to be natural. Indeed, those using the system see no decision at all. Because those who use the system tend to conceptualize in terms of the system and, as a system matures, it becomes authoritative, the classification system simply describes the universe.<sup>220</sup>

The gradual reification of Langdell’s approach to American legal education presents significant challenges for those seeking to propose changes. Put simply, it is difficult to imagine an alternative approach, let alone persuade that such an alternative is feasible. As Berring observes, we live in a legal world which is, in effect “a conceptual universe of thinkable thoughts that has enormous power. Indicative of its real strength is the fact that those using it do not appear to perceive

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<sup>216</sup> *Id.*, at 308.

<sup>217</sup> *Id.* As Berring observes, some have argued that Blackstone took much of his methodology from others. *Id.*, n. 7. Berring concludes, though, that this is “not worth bothering about. It was Blackstone’s version that changed the way the law was conceptualized and that is what matters.” *Id.*

<sup>218</sup> *Id.*, at 309.

<sup>219</sup> *Id.*, at 310, quoting GEOFFREY C. BOWKER & SUSAN LEIGH STARR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES, 33 (1999).

<sup>220</sup> Berring, *supra* n. 215, at 310.



it; the classification of legal concepts appears inevitable.”<sup>221</sup> To consider changes in this universe is, almost literally, unthinkable.

Yet that should nonetheless be the task of legal educators and the broader community of lawyers. As Martha Nussbaum reminds us, one of the necessary qualities for a citizen in a pluralistic democracy is that we lead “the ‘examined life,’”<sup>222</sup> and while Nussbaum was writing about law students, her observation surely applies to law school faculties and lawyers as well. Difficult though it is for faculty members, who have gained so much by working within the Langdellian construct of what a law school curriculum should be, and for lawyers, who were trained, and succeeded, in that Langdellian model, they should examine the value, or lack of value, in its continued vitality in a contemporary world and should be willing to modify or abandon it if they can come up with a better approach.

No one will argue with Nussbaum that “[l]egal education is specialized professional training, not a general preparation for citizenship and life,”<sup>223</sup> nor with Professor Johnson when he notes that “a law degree is not supposed to be a substitute for a good advanced liberal arts degree.”<sup>224</sup> The problem is that even assuming law students all came to law school with well-developed liberal arts backgrounds that would allow them to consider the issues and concerns of the law on an empathetic basis,<sup>225</sup> law schools intentionally and systematically prevents students from responding emotionally during their first year of law school, making empathy difficult or even distasteful for them. The upper-level curricula at most law schools might take some steps to transfuse some sense of empathy back into the students during their second and third year of law school, but the harm, by and large, has already been done.

This approach generally succeeds in teaching students to “think like lawyers,” and it provides them with a grounding in doctrinal knowledge that will allow them to function as lawyers upon graduation. But this approach also costs students, both personally and professionally, by making it difficult, if not impossible, for them to

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<sup>221</sup> *Id.*, at 311.

<sup>222</sup> Nussbaum, *supra* n. 9, at, 320.

<sup>223</sup> *Id.*, at 323.

<sup>224</sup> Johnson, *supra* n. 171, at 1251. Professor Johnson goes on to note that “[a]s a colleague pointed out to me, if a law degree were merely a broad liberal arts degree, we would have difficulty defending the fact that we pay law professors approximately double what we pay liberal arts professors. Law school is not liberal-arts graduate school; we pay law professors high salaries because teaching law is different from teaching other disciplines.” *Id.* at 1251-52.

<sup>225</sup> This is by no means a reasonable assumption. It ignores, for example, the plethora of law students with backgrounds other than in the liberal arts, and the emphasis on “well-developed” ignores the variable quality of liberal arts education in this country. *See, e.g.*, Richard P. Vance & Robert W. Pritchard, *Measuring Cultural Knowledge of Law Students*, 42 J. Legal Educ. 233, 235 (1992)(students performed “poorly” in a test of their cultural knowledge.)

think like anyone else. The process makes it difficult, at least for junior lawyers, to communicate with, or think like, the non-lawyers who are their clients, their witnesses, and their juries. Ironically, the process of training law students to “think like lawyers” might make it more difficult for them to do a lawyer’s work.

Left to their own devices, it is unlikely that law school faculties will embrace change enthusiastically. And while the Carnegie Report presages a more determined assault on law school pedagogy than has been seen in a while, it seems likely that any changes that result will be grudging and incremental, rather than whole-hearted and extensive. But another, significant, pressure group exists, and its mobilization could persuade law schools to make faster, comprehensive, and willing changes to the way they teach.

Alumni are a crucial constituency who have tremendous influence, both as donors to their law schools and as employers of their more recent graduates, in the way legal education is delivered. If alumni were to recognize the professional value that would accrue if newly-minted lawyers came out of law schools with a more nuanced, empathetic, sense of decision-making and analysis, and were to ask legal educators and law school administrators to take more note of empathy in law school classes, it is difficult to imagine law schools not taking close notice of their opinions.

Changing a pedagogical approach so generally accepted as law school’s “signature” pedagogical approach<sup>226</sup> will not be easy, but change is possible, and, once law schools concede the need for it, could come relatively quickly: models exist, in the form of the law and literature and legal skills curricula, that can help point the way towards the necessary changes. Such changes could go some way to plugging the evident gaps in cultural literacy displayed by law students<sup>227</sup> and could help provide them with the tools necessary to make better decisions on behalf of their clients. We all – lawyers and non-lawyers alike – would benefit from a recognition that empathy is just as important to a lawyer’s work as is logical analysis.

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<sup>226</sup> Carnegie Report *supra* n. 17, at 24.

<sup>227</sup> As Professors Vance and Pritchard note, “[l]aw schools alone cannot make up the deficits in cultural literacy that we are finding [in law students]. Courses in legal ethics and legal history can help. Continual exposure to interdisciplinary perspectives appears to be more crucial than ever, given the apparent lack of such exposure in students’ earlier experiences. But professional education cannot replace adequate preparation in high schools and colleges.” Vance & Pritchard, *supra*, n. 225, at 239. But their solution – that law schools “ought to demand that the educational process yield a more culturally literate product.” (*id.*) – is too facile and lets us off the hook too easily. Certainly the apparent rapid decline in cultural education is deeply disturbing, and certainly American high schools and colleges should be mobilizing to address it. But even if such changes are addressed in the school system, law schools cannot wait the ten to fifteen years it will take for any changes made today to show up in their incoming class. They, too, have an obligation to address the problem.