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# OK, Google, Will Artificial Intelligence Replace Human Lawyering?

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# OK, GOOGLE, WILL ARTIFICIAL INTELLIGENCE REPLACE HUMAN LAWYERING?

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> [O]nly humans can argue.
> Argument is the affirmation of our being . . .
> As a reasoned dialogue, it resolves disputes . . .
> As a plea, it generates mercy.
> As charismatic oration, it moves multitudes and changes history.
> We must argue—to help, to warn, to lead, to love, to create, to learn, to enjoy justice—to be.
>
> Gerry Spence, American Trial Lawyer[1]

*Will Artificial Intelligence (AI) replace human lawyering? The answer is no. Despite worries that AI is getting so sophisticated that it could take over the profession, there is little cause for concern. Indeed, the surge of AI in the legal field has crystalized the real essence of effective lawyering. The lawyer's craft goes beyond what AI can do because we listen with empathy to clients' stories, strategize to find the story that might not be obvious, thoughtfully use our imagination and judgment to decide which story will appeal to an audience, and creatively tell those winning stories.*

*This Article reviews the current state of AI in legal practice and contrasts that with the essence of exclusively human lawyering skills—empathy, imagination, and creativity. As examples, we use three Supreme Court cases to illustrate these skills.*

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1. GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 5 (David Stanford Burr eds., 1995).

## I. INTRODUCTION

"Ok, Google, Will artificial intelligence replace human lawyering?" The answer is no. Despite worries that artificial intelligence—or "AI" as it's commonly referred to—is getting so sophisticated that it could take over the profession, there is little cause for concern.

Right now, computers are assisting lawyers with document discovery review,[2] and computer review is often more accurate than human review.[3] But AI isn't stopping there. AI technology can research a particular legal issue by reviewing thousands of cases and then delivering a ranked list of the most relevant cases.[4] It can also allow a person to pose a legal question and receive a responsive two-page explanatory memo.[5] But how far can AI go? Is it possible that AI could actually research, formulate, AND advocate a particular legal position?

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2. Julia Voss & David J. Simmons, *Technology-Assisted Review Makes Main Street*, A.B.A. LITIG. NEWS, Summer 2018, at 2 (technology-assisted review uses coding on a subset of documents to "predict how an attorney would code the entire data set"). For a comprehensive discussion of the technical and computational aspects of forging artificial intelligence onto legal research and reasoning, see generally KEVIN D. ASHLEY, ARTIFICIAL INTELLIGENCE AND LEGAL ANALYTICS: NEW TOOLS FOR LAW PRACTICE IN THE DIGITAL AGE (2017).

3. *Id.* at 3 (it is a mistake to assume human review is "the gold standard" because humans are often inconsistent).

4. Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html [https://perma.cc/5RVJ-ZN8C]; *see also* Jill Lepore, *Are Robots Competing For Your Job?*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/are-robots-competing-for-your-job [https://perma.cc/9WQ5-L36E].

5. Lohr, *supra* note 4.

Probably not. Indeed, the surge of AI in the legal field has crystalized the real essence of effective lawyering. As lawyers, our future depends on those very human qualities that, as of now, cannot be replaced with AI. The lawyer's "craft" goes beyond what AI can do because we listen with empathy to clients' stories, strategize to find the story that might not be obvious, thoughtfully use our imagination and judgment to decide which story will appeal to an audience, and creatively tell those winning stories.[6] We call this craft "artisanal" because it evokes the hands-on, traditional skill of lawyering.

This Article reviews the current state of AI in legal practice and contrasts that with what we believe defines the essence of lawyering—empathy, storytelling, and creativity. As examples, we use three Supreme Court cases to illustrate these exclusively human skills. Admittedly, our information will likely be out-of-date as soon as we finalize this Article.[7] Still, we think it is

6. This Article focuses on the lawyer's role in persuasion. Others have pointed out that sophisticated processes, like blockchain, "'couldn't possibly render legal professionals irrelevant' and certainly will not eliminate the valued counseling services that [lawyers] typically render." Daniel S. Wittenberg, *Blockchain: Technology Rockin' the Legal Industry*, A.B.A. LITIG. NEWS, Summer 2018, at 27 (quoting David Fisher, founder and chief executive officer of Integra Leger).

7. Even as we finish the draft of this Article, the most recent edition of the ABA's Litigation News magazine has two articles on the use of artificial intelligence. *See* Voss & Simmons, *supra* note 2; Wittenberg, *supra* note 6. The *Wall Street Journal* ran a series on artificial intelligence on April 2, 2019, discussing AI's emergence and uses in various job markets and in the home. Some of the articles described concerns humans have about interacting with AI or being replaced by AI. *E.g.,* John McCormick, *What AI Can Tell From Listening to You*, WALL STREET J., Apr. 2, 2109, at R1–R2 (stating that current surveys indicate people are uncomfortable with "emotion AI"); Carl Benedikt Frey, *Will AI Destroy More Jobs Than It Creates Over the Next Decade? YES*, WALL STREET J., Apr. 2, 2019, at R4 (referring to his research with Michael Osborne that indicates "47% of U.S. jobs could be automated due to AI"). A common theme among these articles, however, was that in handling routine and mundane functions, AI has the potential to free humans to handle more complicated or nuanced decisions and collaborations. *E.g.,* Robert D. Atkinson, *Will AI Destroy More Jobs Than It Creates Over the Next Decade? NO*, WALL STREET J., Apr. 2, 2019, at R4 (arguing that it would be "incredibly difficult" to automate certain jobs—such as a doctor's role—and emphasizing that AI complements what humans can do); Asa Fitch, *The Next Big Hurdle for AI: A Card Game*, WALL STREET J., Apr. 2, 2019, at R5 (noting that currently "where AI stumbles is in cracking some of the seemingly simple games, the ones that require an ability to communicate and collaborate"); Alexandra Samuel, *Meet Echo, My New Co-Parent*, WALL STREET J., Apr. 2, 2019, at R7 (describing the ways the Amazon Echo helps the author to be a better parent by remedying forgetfulness in parenting tasks); Jim Carlton, *As the Threat of Wildfires Grows, AI can Help Battle the Blazes*, WALL STREET J., Apr. 2, 2019, at R7 (quoting Edward Smith, a Nature Conservancy forest ecology and fire manager, as saying, "'Nothing is going to completely replace the human brain to make decisions, but AI can help us make better decisions across a much larger area,'"); Thomas W. Malone, *What AI Will Do to Corporate Hierarchies*, WALL STREET J., Apr. 2, 2019, at R6 (arguing that AI will produce less-rigid hierarchies in corporations because "when AI does the routine tasks, much of the remaining nonroutine work is likely to be done in loose 'adhocracies,' ever-shifting groups of people with the combinations of skills needed for whatever problems arise"); Aili McConnon, *Virtual Simulations Offer a Cure for Doctors' Poor Bedside Manner*, WALL STREET J., Apr. 2, 2019, at R6 (describing AI simulations that teach those in the medical profession to improve the way they respond to patients).

important to take stock of AI's current role in the law even as we acknowledge that it will continue to change, improve, and perhaps one day be capable of the empathy that we posit is a uniquely human capacity. As long as human beings, especially judges, are making the ultimate decisions in law, there will be a role for the human lawyer.

To argue, as we do here, that AI does not have feelings (and therefore will not overtake lawyering) is a pretty self-evident proposition. Instead, we focus on describing what it actually means to have and use feelings as a lawyer. Empathy and storytelling—both core human characteristics—are essential to lawyering and advocacy and, at least for the foreseeable future, cannot be mastered by AI.

## II. ARTIFICIAL INTELLIGENCE AND THE PRACTICE OF LAW

While AI in the context of lawyers might bring to mind images of R2D2 dressed like *The Good Wife*'s Alicia Florrick, delivering a perfectly executed closing argument, the truth is that AI's usefulness in legal advocacy is limited, at least for now. AI refers to computerized language processing or machine learning that allows a computer system to perform human-like tasks.[8] Currently, AI's usefulness in law exists in content management (creating and storing documents) and practice management (operations that run a legal services organization or business).[9] The technology promises to reduce redundancies and inefficiencies.[10]

Examples of companies offering AI legal platforms include Neota Logic—a company advertising a platform that "connects complex content and expert analysis to provide precise, immediate answers and automate repetitive knowledge work."[11] ThinkSmart is a workflow automation platform that offers to "quickly and easily automate any mundane business process."[12]

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8. JOANNA GOODMAN, ROBOTS ON LAW: HOW ARTIFICIAL INTELLIGENCE IS TRANSFORMING LEGAL SERVICES 4–5 (2016).

9. *Id.* at 9.

10. *Legal Project Management*, SEYFARTH SHAW LLP, https://www.seyfarth.com/legal-project-management [https://perma.cc/S869-CRYF] (last visited Jan. 26, 2019) (stating that the company's services include "legal project management" that "create efficient and cost effective solutions via project planning, client management, process improvement and unique client and legal service delivery solutions").

11. *Expertise Automation for Law Firms*, NEOTA LOGIC, https://www.neotalogic.com/industry/law-firms/ [https://perma.cc/484H-5XXB] (last visited Jan. 26, 2019).

12. *MEET TAP: ThinkSmart's Workflow Automation Platform*, THINKSMART, https://thinksmart.com/workflow-automation-platform/ [https://perma.cc/WF6X-2WEH] (last visited Jan. 26, 2019).

LegalZoom and Rocketlawyer, both marketed as companies that can simplify your legal needs, offer platforms for filling out legal documents and self-guided solutions to everyday legal issues like uncontested divorce, immigration status, and landlord–tenant issues.[13] Some of the technology actually replaces real lawyers with robots. DoNotPay, a chatbot program created by a non-lawyer university student, uses robot lawyers to help users successfully challenge parking tickets.[14] The company is expanding to provide robot lawyers or "bots" that can help homeless people get public housing or help asylum seekers apply for refugee status in the UK.[15] Elexirr, a similar program, can "calculate[] a user's chance of success in winning a legal claim with 71% accuracy and refers them to a network of law firms best suited to deal with their claim."[16]

Ross Intelligence, a legal research platform powered by IBM's Watson technology, is being advertised as "the world's first artificially intelligent attorney."[17] The Ross robot lawyer can take a legal issue and pump out an answer and explanation the next day.[18] Thus far, the Ross program can sift through thousands of cases and find and rank those cases most relevant to the new situation.[19] One lawyer reported that he tested Ross only to discover that its search/rank feature found the most relevant case almost instantly while it took him ten hours to find it on his own.[20]

Dive into any of the websites of these companies and you won't find anything about how these systems can strategize, craft, and draft legal

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13. LEGALZOOM, https://www.legalzoom.com/ [https://perma.cc/A2QH-TGT2] (last visited Jan. 26, 2019); ROCKETLAWYER, https://www.rocketlawyer.com/ [https://perma.cc/9TR8-B27A] (last visited Jan. 26, 2019).

14. DONOTPAY, https://www.donotpay.com/ [https://perma.cc/68YJ-NQSL] (type in a query about fighting a New York City Parking ticket related to signage and you get this: "Welcome. I am a bot to help you appeal a ticket in New York when there was no clear signage. Firstly, what is your ticket number?").

15. GOODMAN, *supra* note 8, at 48.

16. *Elexirr*, LEGAL GEEK, https://www.legalgeek.co/startup-map-v1/elexirr/ [https://perma.cc/NBP3-FZ8S] (last visited Jan. 26, 2019).

17. Karen Turner, *Meet 'Ross,' The Newly Hired Legal Robot*, WASH. POST (May 16, 2016), https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/?noredirect=on&utm_term=.6158a62aad9c [https://perma.cc/6P7Q-65LG].

18. Lohr, *supra* note 4. Judicata also advertises a system called Clerk, described as "moneyball for motions." Jean O'Grady, *Forget the Robots You Might Just Need A Clerk. Judicata's Clerk: Algorithms and Analytics That "Grade" and Recommends Edits to Briefs*, DEWY B STRATEGIC (Nov. 10, 2017), https://www.deweybstrategic.com/2017/11/judicata-clerk.html [https://perma.cc/Q5RC-BT8N]. The system allows lawyers to input briefs and get back a grade that evaluates argument, drafting, context, and more. *Id.*

19. Lohr, *supra* note 4.

20. *Id.*

arguments. That is because the technology is not capable of doing the creative, flexible analysis that legal argument requires.[21] At least for now, automated lawyering skills are limited to those tasks that have an underlying pattern or structure susceptible to being turned into instructions that a computer can process.[22] As a recent *New York Times* headline proclaimed, "A.I. is Doing Legal Work. But It Won't Replace Lawyers, Yet."[23]

The reason for this is obvious. Empathy is at the root of the uniquely powerful human ability to hear a story or observe an incident and react appropriately—to immediately assess the incident's essential elements, categorize it as a member of a particular class of legal problems, compare the elements to analogous cases we remember, and decide on how best to proceed. Lawyers go through this process without a second thought, and it's only when one stops and thinks how to get a machine to duplicate such a cascade of understanding, analysis, distillation, and analogizing that the complexity of human cognition stands out. While parts of this process may eventually get broken down into tasks AI can assist with, developing the ability to understand the relationships, emotions, facts, precedents, contingencies, and necessary decisions present in even the simplest client interview or legal strategy meeting is beyond AI's current horizon. In short, the nuanced and critical lawyering skills needed to form persuasive arguments are not likely to be susceptible to computerization.

## III. THE LAWYER AS ARTISAN: STORY FINDING AND STORYTELLING

An artisan is "a person skilled in an applied art; a craftsperson"[24] who provides high-quality products.[25] Lawyers are artisans, too. And one of our

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21. Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501, 519 (2017). *But see* Meredith Somers, *Emotion AI, Explained*, MIT SLOAN SCH. MGMT. (Mar. 8, 2019), https://mitsloan.mit.edu/ideas-made-to-matter/emotion-ai-explained [https://perma.cc/4FKH-BAHY].

22. Remus & Levy, *supra* note 21, at 508–09.

23. Lohr, *supra* note 4.

24. *Artisan*, WEBSTER'S AMERICAN DICTIONARY (2d College ed. 2000).

25. Artisan products "reflect high-quality craftsmanship and care." Lisa Goller, *Artisan Sales Soar as Consumers Invest in Quality*, RANGEME (Aug. 8, 2017), https://www.rangeme.com/blog/artisan-sales-soar-as-consumers-invest-in-quality [https://perma.cc/X3ZN-EWUL] ("From beer to beauty, artisan products—goods made in small batches to reflect high-quality craftsmanship and care—are extremely popular among consumers right now. Unlike mainstream and mass-produced products, artisan products represent unique, affordable luxuries made with mastery."). An artisan explosion has swept through the United States in the last decade. *See* Janet Helm, *Food Trend Alert: Artisan is the New Quality*, NUTRITION UNPLUGGED (Oct. 23, 2010), https://www.nutritionunplugged.com/2010/10/food-trend-alert-artisan-is-the-new-quality/ [https://perma.cc/DL65-Z5FX]. Travel guides help visitors locate the best artisan food places. *See, e.g.*, Katie Sweeney, *5 Places to Sample San Francisco's Artisan Explosion*, FORBES TRAVEL GUIDE

essential lawyering crafts is storytelling, which fuses empathy and creative flexible analysis. After all, "Legal stories, though nonfiction, are still stories."[26] This—the space where human experience is critical—is where lawyers can still outperform AI.[27] AI draws only on what it has been trained to do—sort through huge databases and even "incrementally solv[e] problems"[28]—but "the human condition is expansive and broad and brings a lot more depth of perspective . . . ."[29] Storytelling is an artisanal activity because each legal story is handcrafted and tailored to persuade a judge, jury, or even the opposing party.

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(Mar. 26, 2015), http://stories.forbestravelguide.com/5-places-to-sample-san-franciscos-artisan-explosion [https://perma.cc/A743-AA7G] ("These [small street stores] are stocking shelves with high-end local cheeses, baked goods, charcuterie, unique wines from all over the world, and housemade lamb salads and braised chicken legs with white wine, apples and onions."). Artisan fabric is a popular style in fashion. Olivia Fleming, *The Artisan Fabric Is Revolutionizing the Fashion Industry*, HARPER'S BAZAAR (Aug. 12, 2016), https://www.harpersbazaar.com/culture/features/a17111/piece-and-co-handmade-artisan-fabric-revolutionizing-fashion-industry/ [https://perma.cc/G63B-ERXS]. Artisan aesthetic was HGTV's top home design trend for 2018. Irma Zandl, *Artisan Aesthetic: HGTV's Top Home Design Trend for 2018*, OPINIONATOR (Nov. 4, 2017), http://theopinionator.com/artisan-aesthetic-top-home-design-trend-for-2018/ [https://perma.cc/X587-2EXC].

26. RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 44 (2013).

27. Research into training computers to replicate story arcs has already begun. Adrienne Lafrance, *The Six Main Arcs in Storytelling, As Identified by an A.I.*, POCKET (July 12, 2016), https://getpocket.com/explore/item/the-six-main-arcs-in-storytelling-as-identified-by-an-a-i [https://perma.cc/SK5L-ETXU]. But identifying a story arc, while useful, is a far less complex skill than analyzing how a law applies to a set of facts (a human story) to determine a strategy and argument, then packaging that argument into a compelling narrative. Researchers have also been developing ways to create storylines that appear as fake news, with results so disturbingly realistic that the researchers did not launch the program with its full potential. Sean Gallagher, *Researchers Scared by Their Own Work, Hold Back "Deepfakes for Text" AI*, ARS TECHNICA (Feb. 15, 2019, 2:10 PM), https://arstechnica.com/information-technology/2019/02/researchers-scared-by-their-own-work-hold-back-deepfakes-for-text-ai/ [https://perma.cc/2GQ5-QQK3]; *see also* Alex Hern, *New AI Fake Text Generator may Be too Dangerous to Release, Says Creators*, THE GUARDIAN (Feb. 14, 2019, 12:00 PM), https://www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction [https://perma.cc/3FGZ-YDHL] (discussing "'deepfakes for text,'" in research that has been backed by Elon Musk and others). Again, however, the ability to create a storyline is not the same as the ability to see what is compelling in a story and to harness that narrative into a legal argument.

28. Tim Wallace, *Robot, Waiter, Artisan Baker: Three New Classes of Worker for the Digital Age*, TELEGRAPH (June 12, 2018, 9:12 PM), https://www.telegraph.co.uk/business/2018/06/12/robot-waiter-artisan-baker-three-new-classes-worker-digital/ [https://perma.cc/C3JQ-KYCD].

29. Tierney Bonini & Paul Donoughue, *Artificial Intelligence and Creativity: If Robots Can Make Art, What's Left for Us?*, ABC NEWS (Aug. 10, 2017, 8:50 PM), http://www.abc.net.au/news/2017-08-11/artificial-intelligence-can-ai-be-creative/8793906 [https://perma.cc/P6HK-YAUX] (quoting Dave King, founder of Move 37, a creative AI company).

Lawyers make "great logical leaps of imagination"[30] when they listen closely to a client's story, reflect on both the obvious and hidden stories, and then persuasively tell those stories. Storytelling is, of course, not only a lawyer's ability, but also a human ability. The human practice of storytelling is ancient[31] and universal.[32] Michelle Scalise Sugiyama paints a vivid picture of the robust power of story:

> Literate or not, all known cultures, past and present, practice storytelling. Moreover, all normally developing humans acquire the ability to process and generate stories . . . . [N]o special education is required for narrative competence to develop[;] . . . the practice of storytelling itself arises independently among even the most isolated people[].[33]

Storytelling takes the same basic form in all cultures;[34] "stories describe problems and [a] character['s] plans [to] solv[e them.]"[35]

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30. Wallace, *supra* note 28. Andy Haldane, the Bank of England's chief economist, emphasized that human creativity and intuition is needed for "tasks or problems whose solutions require great logical leaps of imagination rather than step-by-step hill climbing." *Id.* The great storyteller Ian McEwan recently published *Machines Like Me*, a novel in which the main character, Charlie, purchases an artificial human. Elizabeth Winkler, *Ian McEwan: A Novelist Ponders Our AI Future*, WALL STREET J., Apr. 13, 2019, at C17 (describing the novel). In his interview with the *Wall Street Journal* about the novel, McEwan cautioned about the "irresistible" desire to "'anthropomorphiz[e] a halfway-intelligent machine, as long as it gestures and looks like us.'" *Id.*; *see also* Timothy Lau, Presentation at Duquense University School of Law: Artificial Intelligence: Thinking About Law, Law Practice, and Legal Education (Apr. 26, 2019) (stating that "excessive anthropomorphism of AI is risky"). To the extent that humans fear AI, and specifically fear that AI will eliminate jobs, we think humans are anthropomorphizing AI's capabilities, and from there, leaping to the not-necessarily-true inference that AI will therefore replace human capability.

31. Michelle Scalise Sugiyama, *Narrative Theory and Function: Why Evolution Matters*, 25 PHIL. & LITERATURE 233, 233 (2001). The practice of storytelling "pre-dat[es] not only the advent of writing, but of agriculture and permanent settlement as well." *Id.* Language likely developed approximately 100,000 years ago. *Id.*; *see also* GEOFFREY MILLER, THE MATING MIND 260 (2000) (adding that this is the time when *Homo sapiens* began migrating out of Africa). The earliest known written narrative is about 5,000 years old, but oral narratives likely emerged between 30,000 and 100,000 years ago. Sugiyama, *supra* note 31, at 233–34.

32. Story is partly universal because language is uniquely able to capture both simple and complex information: "All human languages are thought to possess the same general structure and permit an almost limitless production of information for communication. This limitlessness has been described as 'making infinite use of finite means.'" Martin A. Nowak & David C. Krakauer, *The Evolution of Language*, 96 PROC. NAT'L ACAD. SCI. USA 8028, 8028 (1999).

33. Sugiyama, *supra* note 31, at 234.

34. *Id.* at 234. Stories include "character, . . . goal-oriented action, and resolution." *Id.*; *see also* ROBBINS, JOHANSEN & CHESTEK, *supra* note 26, at 38 (stating a story is "[a] character-based and descriptive telling of a character's efforts, over time, to overcome obstacles and achieve a goal").

35. John B. Black & Gordon H. Bower, *Story Understanding as Problem-Solving*, 9 POETICS 223, 231 (1980); *see also* Ruth Ann 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 U. L. REV. 767, 768–69 (2006) [hereinafter, Robbins, *Harry Potter*].

Legal storytelling evolved from the foundational principles of classical rhetoric—"the use of language for persuasive purposes."[36] Classical rhetoricians emphasized the importance of three types of arguments: ethos (argument based on the author or speaker's credibility), pathos (arguments based on emotion), and logos (arguments based on logic) in persuasion.[37] All three types of argument are important and intertwined.[38] And a story is the best way to make all three types of arguments.

At first glance, it may seem like AI would be more successful and efficient than a human lawyer at all three rhetoric components. Won't AI be best able to find all the applicable logical arguments? Won't AI avoid all emotion and instead present only logical arguments? Won't AI have ethos because judges will see it as incapable of misrepresentation and thus inherently reliable? A closer look reveals that lawyers, not AI, have the edge in making all three types of arguments.

In law, logical arguments require much more than an application of legal rules to a set of uncontested facts. The reality is that "there may not be a right answer to every legal question."[39] This is why two different Circuit Courts of Appeals can reach two different conclusions about how the same law should be interpreted and why many United States Supreme Court cases have a majority opinion and a dissent—and often several concurring opinions. Frankly, this is why lawyers have jobs.

There is much uncertainty in the law, and judges must decide "knotty questions . . . in a context in which there's usually profound disagreement about both what has happened and what ought to be done about it."[40] "Malleability," or "the latitude a lawyer has in articulating legal principles," is at the heart of

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36. EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 15 (4th ed. 1999). Corbett and Connors further explain:

> Classical rhetoric was associated primarily with persuasive discourse. Its end was to convince or persuade an audience to think in a certain way or to act in a certain way. Later, the principles of rhetoric were extended to apply to informative or expository modes of discourse, but in the beginning, they were applied almost exclusively to the persuasive modes of discourse.

*Id.* at 16.

37. MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 5 (2005).

38. Michael H. Frost, *With* Amici *Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ASS'N LEGAL WRITING DIRECTORS 5, 9 (2006).

39. Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1468 (1996).

40. Maksymilian Del Mar, *The Legal Imagination*, AEON (Mar. 28, 2017), https://aeon.co/essays/why-judges-and-lawyers-need-imagination-as-much-as-rationality [https://perma.cc/3TGC-YWR9] (Del Mar is a reader in legal theory at the School of Law at Queen Mary University of London).

legal practice.[41] It is the malleability of the law, within reason, that allows a lawyer to argue different interpretations of legal principles, point out that a precedent case should be interpreted narrowly or broadly, emphasize that a policy argument controls, or suggest that a judge should not follow an outdated precedent. And every single one of these tasks requires a human lawyer to use his or her imagination, which is why an argument is a hand-crafted, individualized art form.

Legal reasoning is impossible without human imagination.[42] We imagine hypotheticals because we know that judges will test how our proposed legal interpretation will apply to new situations. We imagine metaphors to help us understand and make sense of difficult legal concepts.[43] We imagine relationships when none technically exists. We imagine how considerations outside of the law impact the law itself.

Most importantly, we imagine what it would be like to be in another person's shoes. It is the uniquely human quality of empathy that allows one person to identify with, or vicariously experience the feelings and thoughts of, another person.[44] From the time stories developed, "[t]he storyteller takes what he tells from experience—his own or that reported by others. And he in turn makes it the experience of those who are listening to his tale."[45] Because the logic in the law is tied not just to legal principles, but also to facts, a human lawyer has the edge on logos. Pure deductive reasoning relies on syllogisms based on absolute facts. But legal cases do not present absolute facts. The facts of a case are necessarily complex, tangled, unknown. An analogy, where a lawyer compares the story of one case to another, allows an advocate to address the complexities of messy human facts.

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41. Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. LEGAL EDUC. 689, 710–11 (2014) (arguing that malleability is thus the threshold concept that law students must understand to become professionals).

42. Del Mar, *supra* note 40 ("Legal reasoning has at least four imaginative abilities at its disposal"—supposing, relations, image-making, and "the ability to take on the perspectives of other people.").

43. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 889 (2010); Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church and State*," 7 J. ASS'N LEGAL WRITING DIRECTORS 123, 123 (2010); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 923 (2007).

44. *Empathy*, WEBSTER'S AMERICAN DICTIONARY (2d College ed. 2000). A similar point has been made in *Deep Medicine*, in which author and physician Eric Topol argues that bringing AI into medicine allows medical practitioners to focus on the "essential human element of medical practice." ERIC TOPOL, DEEP MEDICINE 15 (2019). To that end, Topol identifies the importance of empathy in medicine and argues that AI can facilitate a medical practitioner's ability to empathize and connect with patients. *See id.* at 17.

45. WALTER BENJAMIN, ILLUMINATIONS 31 (Hannah Arendt ed., 1st Mariner Books ed. 2019).

Ethos, too, is more effective in human lawyering than in AI.[46] An advocate's credibility "is an aura formed by an advocate's entire professional life—before he or she ever sets foot in the Court—by the tone and context of the briefs, by what happens in Court that day, and by the residual impact of previous presentations."[47] No lawyer ever wants to lose that credibility.[48] A persuasive advocate is the lawyer the Court knows it can rely on. A lawyer who has honed that reputation during years of service will have more ethos than AI.

Humans are the clear winners in the pathos category because AI is not yet capable of human emotion. One expert on AI recently noted:

> AI technologies are developing fast and so are their attendant risks. AI applied to warfare and policing is certainly a concern. Autonomous armed robots, which can track and target people using facial recognition software, are just around the corner. Let loose, such machines would keep on killing until they ran out of targets or ammunition. This reminds us that AI has no social awareness, conscience, mercy, or remorse. It simply does what it's been trained to do.[49]

Human lawyers have those listed intangibles of conscience, experience, flexibility, and mercy. In finding and telling their client's stories, lawyers outshine AI.

## IV. EMPATHY AND STORYTELLING IN THREE SUPREME COURT CASES

Three cases illustrate these human talents. The lawyers—all who went on to become United States Supreme Court Justices—used creativity, empathy, and judgment to persuade. Only a human being with curiosity and imagination could find and develop these stories. Thurgood Marshall redefined the segregation issue in *Brown v. Board of Education* as a story of personal, fundamental injustice by successfully arguing that it wasn't just bad schools,

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46. The quality of being intelligent, prepared, and thorough is an important part of the author's credibility and character. Quintilian believed "the perfect orator is a good man speaking well." FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC, *supra* note 37, at 69 (citing 2 Quintilian, INSTITUTIO ORATORIA 9).

47. Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy*, A.B.A. LITIG. NEWS, Winter 2018, at 12, 14. Olson continued, "The advocate's integrity, veracity, credibility, and character are foundational elements of every argument." *Id.* at 14.

48. Theodore B. Olson, a veteran Supreme Court advocate, recalls that Supreme Court Justice Clarence Thomas's words about ethos are etched in his memory, "[n]ever lose your credibility with this Court." *Id.* at 12.

49. Steven Finlay, *We Should Be as Scared of Artificial Intelligence as Elon Musk Is*, FORTUNE (Aug. 18, 2017), http://fortune.com/2017/08/18/elon-musk-artificial-intelligence-risk/ [https://perma.cc/7HP3-NNBM] (stating that Elon Musk commented on Twitter that "artificial intelligence . . . is more dangerous than North Korea").

but a much bigger claim of inherent human damage. In *Frontiero v. Richardson*, Ruth Bader Ginsburg tapped into her own experience with gender discrimination to impart a convincing story of unfair struggle that persuaded the Court to see working women in a new way. Ginsburg had the ingenuity to know that one way to win her argument was to show that both women *and* men would suffer without a change in the law. John Roberts used curiosity and creativity to form a story where one was not obvious in *Alaska v. EPA*. These three examples show the limits of AI and, perhaps more importantly, offer hope for the future of human lawyering.

### A. Brown v. Board of Education*: Thurgood Marshall Tells A Story that Ended a Fifty-Year Precedent*

The 1954 *Brown v. Board of Education* school desegregation decision is perhaps the best-known Supreme Court case. It has been studied, written about, included in school curricula, and made into movies. Coming as it did at the dawn of the television age, the resulting desegregation, with its footage of black school children being ushered to school by police while angry mobs screamed insults, has become a visual icon of the early civil rights movement.

Perhaps less commonly known is the extent to which this pivotal, history-changing case relied on an imaginative and novel legal strategy. In each of the five consolidated cases that led to *Brown*, the records, the arguments, and ultimately the Court's decision referenced black children's *feelings* of insecurity and inferiority caused by segregation as a justification for overturning a practice that had been ingrained in the country's socio-economic fiber for fifty years.[50] By fashioning a narrative that interwove emotion and logic, Thurgood Marshall and his team of NAACP lawyers pioneered a groundbreaking, and ultimately successful, approach to advocacy.

Marshall's personal experience in Baltimore provided the foundation for the narrative he ultimately used to challenge the status quo. He went to a segregated elementary school in Baltimore and experienced the profound differences between the newer school the white children attended and his own, with its lack of a playground and hand-me-down books.[51] When Marshall began high school in 1921, his school was the only one in Baltimore City and was so overcrowded that the students attended in shifts.[52] After attending

50. Brief for Appellants at 8–9, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 47265 at 5.

51. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 37 (1994).

52. LARRY S. GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE 62–63 (2012).

Lincoln University in Pennsylvania, Marshall wanted to go to the University of Maryland Law School, which would have been ideal—it was close to home, had a good reputation, and had low in-state tuition.[53] But the school did not accept black students.[54] Instead, Marshall enrolled at Howard Law School, a predominantly black school that Marshall believed was for students who couldn't get in anywhere else.[55]

During his final year of law school, Marshall developed an association with the NAACP when the civil rights organization enlisted Howard students and faculty to help defend a black man accused of murdering two white women in Virginia.[56] The young lawyer continued doing part-time work for the NAACP after graduation, including work on a suit against the University of Maryland Law School for its refusal to admit black students—a case with special resonance for Marshall given his experience.[57] Ultimately, Marshall joined the NAACP's national office in 1936 with the express assignment of working on educational equality.[58]

Marshall's call to advocate for educational equality coincided with other forces at work that helped pave the road to *Brown*. Having witnessed the horror of Hitler's genocide and Japanese imperialism, post-WWII Americans were more aware and troubled about injustices based on race.[59] The new post-war focus on humanitarianism created an impetus for litigation aimed at civil rights.[60] At the same time, psychology and sociology as a means of understanding human behavior were playing a growing role in economic and government policy.[61]

In 1954, elementary schools throughout the South were racially segregated, based on the 1896 ruling in *Plessy v. Ferguson* that solidified the legality of "separate but equal" institutions.[62] Initially, Marshall and his colleagues refrained from challenging the "separate" part of *Plessy v. Ferguson*'s "separate but equal" rule when it came to elementary schools, considering it a difficult-

53. JUAN WILLIAMS, AMERICAN REVOLUTIONARY 52 (1998).

54. *Id.*

55. *Id.* at 53.

56. *Id.* at 58.

57. *See* Pearson v. Murray, 182 A. 590, 590 (Md. 1936).

58. WILLIAMS, AMERICAN REVOLUTIONARY, *supra* note 53, at 84–85; GIBSON, *supra* note 52, at 307–08.

59. DAVIS & CLARK, *supra* note 51, at 136; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 268 (2000).

60. RANDALL WALTON BLAND, JUSTICE THURGOOD MARSHALL: CRUSADER FOR LIBERALISM—HIS JUDICIAL BIOGRAPHY (1908–1993) 55 (2001).

61. DAVIS & CLARK, *supra* note 51, at 137.

62. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

to-win "bombshell."[63] Instead, the strategy had been to argue for equal treatment—better schools and equal funding.[64] In other words, they argued that maintaining segregation was acceptable, but only if the treatment was sufficiently similar.[65] After all, challenging segregation directly would require not just overturning *Plessy's* long-standing precedent but also confronting a deeply-established cultural norm. If Marshall's team was going to challenge such a foundational aspect of American life, it was going to need an "airtight," persuasive argument.[66]

In the years leading up to the *Brown* case, Marshall and his team had made incremental progress, successfully persuading courts to allow integration in higher education to some extent, such as with the University of Maryland Law School case.[67] While those successes resulted in greater opportunity for black graduate students, the team realized that such gains would have minimal impact if disparities in early education persisted.[68] If students could not be adequately prepared for college, few black students would be able to attend, and little progress would result. Although Marshall feared that going after segregation at the grade school level could backfire,[69] he began to consider it after a federal court in California held that it was unconstitutional to segregate Mexican-American school children.[70]

The team knew that taking on *Plessy* could not be based on just one lower court's analysis or the Supreme Court precedent that applied to college and graduate students.[71]

Marshall needed a way to change the entire scope of the argument and persuade the Court that segregation itself was fundamentally unfair and damaging to students. Showing that segregation per se caused damage was a

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63. *See* DAVIS & CLARK, *supra* note 51, at 138; WILLIAMS, AMERICAN REVOLUTIONARY, *supra* note 53, at 196.

64. DAVIS & CLARK, *supra* note 51, at 138.

65. *See id.*

66. Pauli Murray, *"Members of Your Race Are Not Admitted…," in* SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE (1987).

67. WILLIAMS, AMERICAN REVOLUTIONARY, *supra* note 53, at 195; Sweatt v. Painter, 339 U.S. 629, 636 (1950); Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 337 (1938).

68. LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP 137 (1962).

69. WILLIAMS, AMERICAN REVOLUTIONARY, *supra* note 53, at 195.

70. *Id.* at 196; Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 549 (S.D. Cal. 1946) ("The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry.") (internal quotations omitted), *aff'd*, 161 F.2d 774, 781 (9th Cir. 1947).

71. WILLIAMS, AMERICAN REVOLUTIONARY, *supra* note 53, at 96–97.

particular challenge because the *Plessy* Court had found just the opposite.[72] Although not a school case—the case involved separate railcar accommodations—the Court held that segregation was not only permissible under the Fourteenth Amendment, but that laws requiring segregation "do not necessarily imply the inferiority of either race to the other."[73] Thus, the team needed to establish that segregation had an inherently negative psychological impact to directly contradict what the *Plessy* Court had found.

The segregation cases that preceded *Brown*, like the one against the University of Maryland Law School, did provide a possible opening.[74] In these cases, the states had argued that they complied with *Plessy* if they offered graduate students the same legal education while requiring the black students to sit separately in the classroom and in the cafeteria.[75] The Supreme Court rejected this solution.[76] It held that such an arrangement had only the appearance of equality and that separating black students had an intangible but significant detrimental impact on their learning, thus causing a fundamental inequality.[77] The Court's focus on "intangible[s]" emboldened Marshall and his team to raise the issue of the psychological effect separate schools had on black children.[78] But how could he get that idea across to nine middle-aged (or elderly) white men, most of whom had likely never been in a black neighborhood or school?

Marshall's idea was that, although the physical differences between white and black schools were fundamentally unfair, it was the "undeniable personality damage and serious injury to the human personality" that made segregation inherently unequal and unconstitutional.[79] This line of argument led Marshall to the work of Kenneth and Mamie Clark, psychologists from New York who had studied the impact of segregation on black children's sense of inferiority.[80] Marshall enlisted the Clarks to conduct studies of black children in the Southern school districts where Marshall was bringing lawsuits.[81]

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72. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

73. *Id.*

74. Sweatt v. Painter, 339 U.S. 629, 636 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637, 637 (1950).

75. *Sweatt*, 339 U.S. at 633.

76. *Id.* at 634.

77. *Id.* at 634–35.

78. Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

79. HUGHES, *supra* note 68, at 138.

80. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 315–16 (1975).

81. *Id.* at 315.

In May 1951, Marshall and Kenneth Clark traveled to the small farming town of Summerton, South Carolina.[82] Clark brought with him an unusual box:

> The box contained the tools of Clark's particular trade: dolls. There were four of them, each about a foot high and sexually neuter. Dressed only in diapers, they were identical except for one thing: two of them were pink and two of them were brown. They had cost fifty cents each at a five-and-ten [cent store] on 125th Street [in New York] . . . .[83]

Dr. Clark and his wife had used the dolls in experiments to show segregation's effect on children.[84] The Clarks presented black children with the four dolls and asked a series of questions such as: "Give me the doll you like to play with" and "Give me the doll that is the nice doll."[85] They discovered that the majority of the children preferred the white doll, because it was the "nice" doll.[86] These findings and other observations led Dr. Clark to conclude that the children carried a "tremendous burden of feelings of inadequacy and inferiority which seem to become integrated into the very structure of personality as it's developing."[87]

Marshall was known for his direct, common-sense approach to arguments, so it's not a surprise that his brief was all of thirteen pages.[88] The brief argued that segregation "interferes with [a black child's] motivation for learning and instills in him a feeling of inferiority resulting in a personal insecurity, confusion, and frustration that condemns him to an ineffective role as a citizen and member of society."[89]

By zeroing in on the effect of segregation on a "[black] child," Marshall used classic storytelling tools. He emphasized the central sympathetic character in the child's story, painting a picture of how the child's sense of self is harmed now and will continue to be harmed unless the Court protects him by ending

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82. *Bitter Resistance: Clarendon County, South Carolina*, NAT'L MUSEUM AM. HIST., https://americanhistory.si.edu/brown/history/4-five/clarendon-county-3.html [https://perma.cc/BU6B-GFHC] (last visited Jan. 26, 2019).

83. KLUGER, *supra* note 80, at 315.

84. *Id.*

85. *Id.* at 316.

86. *Id.*

87. *Id.* at 138. In more recent years, the Doll Test has been met with criticism. *See, e.g.*, Gwen Bergner, *Black Children, White Preference:* Brown v. Board*, the Doll Tests, and the Politics of Self-Esteem,* 61 AM. Q. 299, 301 (2009).

88. Brief for Appellants, *supra* note 50, at 13.

89. *Id.* at 9.

segregation.[90] The child became the story's protagonist, and segregation the evil to be overcome. The Court was invited to become the hero.[91]

Marshall spends only a few paragraphs creating this narrative in his brief.[92] The real power of his message was achieved in an appendix—a novel strategy in the 1950s.[93] Perhaps even more novel was the nature of the appendix. Written as a report by thirty-two social scientists, the appendix was titled, "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement."[94] Taking a readable, narrative approach, the report made the child of the "minority group" central to its focus. First, referring to the affected children as a collective, the report cited that many of these children:

> [B]ecome confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others.[95]

From this collective, the narrative singled out "the child":

> Under these conditions, the minority group child is thrown into a conflict with regard to his feelings about himself and his group. He wonders whether his group and he himself are worthy of no more respect than they receive. This conflict and confusion leads to self-hatred and rejection of his own group.[96]

Marshall used these findings to illustrate to the Supreme Court justices how it *felt* to be in the shoes of the segregated black child. By making that emotional connection, Marshall gave the Justices a sense of the underlying injustice and unfairness of segregation—a powerful rationale that the Court relied upon in their decision to overturn *Plessy*.[97]

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90. *Id.*

91. *See* Robbins, *Harry Potter, supra* note 35, at 782.

92. Brief for Appellants, *supra* note 50, at 9.

93. Appendix to Appellants' Brief, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1); *see* Jeremy Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CA. INTERDISC. L.J. 1, 14 (2002).

94. Appendix to Appellants' Brief, *supra* note 93, at 1.

95. *Id.* at 4.

96. Appendix to Appellants' Brief, *supra* note 93, at 4.

97. Raymond Wolters, *Constitutional History, Social Science, and* Brown v. Board of Education *1954–1964*, 5 THE OCCIDENTAL Q., Spring 2005, at 19–20 ("Clark had the satisfaction of knowing that his doll test and social science statement made a crucial contribution to the NAACP's victory in *Brown*. The Supreme Court had found the NAACP's historical argument inconclusive, but it pricked up its ears when the NAACP's social scientists said that segregation fostered feelings of inferiority that hampered the education of blacks. Historian Alfred Kelly conceded, '[Clark's] black and white dolls won the case, not the historians.' In tribute to the NAACP's premier psychologist and most influential witness, some social scientists referred to *Brown* as the 'Ken Clark law.'").

Using data-based social science research was a new idea at the time, but its incorporation of "real life" experience allowed Marshall to create a narrative that tapped into the Court's sense of empathy and allowed the Justices to see the harm through the eyes of the affected children. Although the social science research was not the only factor that led to the Court's decision to overturn *Plessy*, the Justices felt its impact. To separate black children from their white peers solely because of their race, the Court said, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[98] Marshall successfully engaged the Justices with a story that they could empathize and identify with. The power of that story created the conditions whereby nine white men could look past centuries of tradition and begin a new chapter in American history.

### B. Frontiero v. Richardson*: Ruth Bader Ginsburg Stands Up for the "Long Silenced Majority"*[99]

Before Ruth Bader Ginsburg was the "Notorious RBG"[100] and a Supreme Court justice, she was an activist, a "trailblaz[er],"[101] and the "Thurgood Marshall of the women's movement"[102] for her legal work to create gender equality in United States law.[103] Ginsburg herself was no stranger to sex discrimination—she had faced it explicitly as a student in law school where the dean asked her and the eight other women in her class why they were taking up seats that could be filled by men, and as a professor, where she fought to even the pay inequity between male and female professors.[104] These experiences spurred her into the activism that led her to co-found the ACLU Women's Rights Project in 1972.[105] *Frontiero*, a case that Ginsburg brought on behalf of

98. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

99. Ruth Bader Ginsburg, *Comment:* Frontiero v. Richardson, WOMEN'S RTS. L. REP., Summer 1973, at 4.

100. IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG 7 (2015); *see also* Lauren Kelley, *How Ruth Bader Ginsburg Became the 'Notorious RBG*,' ROLLING STONE (Oct. 27, 2015, 3:36 PM), https://www.rollingstone.com/culture/culture-features/how-ruth-bader-ginsburg-became-the-notorious-rbg-50388/ [https://perma.cc/9W2D-887B].

101. Kelley, *supra* note 100.

102. Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 41 (2013).

103. *Id.*

104. Toni J. Ellington, Sylvia K. Higashi, Jayna K. Kim & Mark M. Murakami, Comment, *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 705–06, 708 (1998).

105. Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff [https://perma.cc/4XNX-Z67F] (last visited Jan. 26, 2019).

the ACLU, broke new ground for women's rights and paved the way for a legal shift when it came to gender discrimination and the law.[106]

What makes a trailblazer in championing the rights of others in law? For one, a trailblazer needs to have the courage to tell a story. Ginsburg became the voice of women who did not have the voice to tell their own story, when legal authorities for generations had been perpetuating a different story. For another, a person must be able to see when the right strategic moment is to tell the story. Ginsburg saw that moment happening in the 1970s with the emergence of the ERA and other legislative reforms. And finally, a trailblazer must have the wisdom to infuse both concrete facts and intangibles into that story in a way that creates empathy and passion. Ginsburg created both empathy and a strong legal argument by using an analogy to the African-American experience in U.S. law to create a successful bridge to the women's movement.[107]

Appellate courts must consider not only an individual's case, but the broader implications of a decision on a group. In *Frontiero* and other Supreme Court cases Ginsburg vocalized—she literally brought a voice to—women who otherwise had not been historically heard in the legal power centers in the U.S. Lieutenant Frontiero's situation became, instead of an isolated story of a female soldier in Alabama being denied housing and medical benefits, the story of all women's injuries at being slighted under U.S. laws. Her briefs and oral argument necessarily were inserted in the Supreme Court's lexicon and dialogue with the public instead of being confined to closeted and silenced conversations among women. She carried the message to the nation's highest tribunal where the message could not be ignored.

*Frontiero* was part of a broader narrative in Ginsburg's work to push gender equality at the Supreme Court between 1970 and 1980, when she left for the judiciary.[108] Ginsburg's goal was to eliminate "'sex-role pigeon-holing.'"[109]

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106. For a thorough discussion of the history of *Frontiero v. Richardson*, see Serena Mayeri, *"When the Trouble Started": The Story of* Frontiero v. Richardson, *in* WOMEN AND THE LAW STORIES 57 (Elizabeth M. Schneider and Stephanie M. Wildman eds., 2011); *see also* Iselin M. Gambert, *Commentary on* Frontiero v. Richardson, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 168, 168 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

107. Gambert, *supra* note 106, at 170 (explaining that Ginsburg also drew an analogy between women and African Americans in her brief in *Reed v. Reed*).

108. *See* Berta Esperanza Hernandez-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 42 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

109. Williams, *Ruth Bader Ginsburg's Equal Protection Clause*, *supra* note 102, at 45.

Men and women both benefited from women's equality, as neither sex benefits from being boxed into a particular stereotype.[110] Harm to one sex was really a harm to both men and women, as exemplified by the *Frontiero* case, where both husband and wife were denied access to benefits.[111] Ginsburg had already participated in the briefing in *Reed v. Reed*, the first Supreme Court decision to apply the Equal Protection clause to women.[112]

In *Frontiero*, the Supreme Court in 1973 considered whether the unequal treatment of military servicemen and women under statutes providing for medical and dental benefits for dependents violated due process.[113] Male servicemen were allowed to claim their wives as dependents without needing to show whether their wives were, in fact, depending on the servicemen for support.[114] The servicewomen, in contrast, had to show, by producing an affidavit, how their husbands depended on over one-half of their support to claim those benefits.[115]

Sharon Frontiero was an army soldier who sought the increased quarter's allowances and housing and medical benefits for her husband as a dependent.[116] Frontiero failed to demonstrate that her husband depended on her for more than one-half of his support, and the military denied her request for benefits.[117]

The Frontieros, who at the time were represented by the Southern Poverty Law Center, sued the government.[118] Both wife and husband were parties in the case.[119] In examining the whole statutory scheme, the district court's majority opinion (a 2–1 decision in a three-judge district court decision) found the legislation did not invidiously differentiate between service members and, viewed more narrowly, the statutes were constitutional because they satisfied the requirements of rational basis review.[120]

However, the majority opinion also addressed "a subtler injury" the court perceived was "lurking behind the scenes," which was "the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having

110. *Id.* at 46.

111. *Id.*

112. 404 U.S. 71, 76–77 (1971); *see* Ruth Bader Ginsburg, *Comment on* Reed v. Reed, WOMEN'S RTS. L. REP., 1972, at 7, 8 (calling the decision a "small step forward").

113. Frontiero v. Richardson, 411 U.S. 677, 678 (1973) (citing 37 U.S.C. §§ 401, 403; 10 U.S.C. §§ 1072, 1076).

114. *Id.* (citing 37 U.S.C. §§ 401(1); 10 U.S.C. §§ 1072(2)(A)).

115. *Id.* (citing 37 U.S.C. §401; 10 U.S.C. §§ 1072(2)(C)).

116. *Frontiero*, 411 U.S. at 680.

117. *Id.*

118. Frontiero v. Laird, 341 F. Supp. 201, 203 (M.D. Ala. 1972).

119. *Id.* at 203–04.

120. *Id.* at 206.

to traverse the added red tape of proving her husband's dependency, and, most significantly, of being treated differently."[121] The court explained it was "not insensitive," but that these grievances misunderstood the legislation's purpose.[122] The statutory scheme, the court concluded, was not "merely a child of Congress' 'romantic paternalism' and 'Victorianism,'" but rather, an administrative and economic aid based partly on sex.[123]

On a direct appeal to the Supreme Court, Ginsburg argued as amicus for strict scrutiny review.[124] Eight justices determined that the statutes were unconstitutional.[125] While the members of the Court disagreed about what standard of review to apply to sex discrimination cases, four of the justices agreed with Ginsburg's argument for strict scrutiny.[126]

Several themes run through Ginsburg's amicus brief: "woman's place,"[127] "benign classifications,"[128] and "enlightened courts."[129] These themes convey a narrative of women's rights and sex discrimination in the U.S. Ginsburg used two analogies to show that sex is an inherently suspect class.[130] First, she compared the treatment of women to the treatment of African Americans in U.S. history: just as the Court had applied strict scrutiny to cases involving race, so should it apply strict scrutiny to sex.[131] Second, she highlighted a narrative spun by men in American public forums, which portrayed women as weak and requiring benign legislation.[132] She showed that, in fact, such legislation is not

121. *Id.* at 209.

122. *Id.*

123. *Id.* The dissent, however, concluded the statutes were unconstitutional because they failed rational basis. *Id.* at 210 (Johnson, J., dissenting).

124. Frontiero v. Richardson, 411 U.S. 677, 678 (1973).

125. *Id.* at 677–78. Specifically, a plurality of the Court—Justice Brennan joined by Justice Douglas, Justice White, and Justice Marshall—concluded that the statutes were inherently suspect statutory classifications based on sex and subject to strict scrutiny. *Id.* at 687. Justice Stewart concurred on the basis that the statutes worked an invidious discrimination. *Id.* at 692 (Stewart, J., concurring). Justice Powell—joined by Chief Justice Burger and Justice Blackmun—agreed that the statutes violated the Due Process Clause of the Fifth Amendment but argued that it was inappropriate to identify sex as a suspect criterion. *Id.* at 691–92 (Powell, J., Burger, C.J., Blackmun, J., concurring). Justice Rehnquist dissented. *Id.* at 691 (Rehnquist, J., dissenting).

126. *Id.* (Justices Brennan (author), Douglas, White, and Marshall).

127. Brief for the American Civil Liberties Union as *Amici Curiae* Supporting Plaintiffs at 17, Frontiero v. Laird, *sub. nom.* Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) [hereinafter Brief for the ACLU] (co-authored with Melvin L. Wulf, Brenda Feigen Fasteau, and Marc Feigen Fasteau).

128. *E.g.*, *id.* at 34 (internal quotations omitted).

129. *E.g.*, *id.* at 27.

130. *Id.* at 6–7.

131. *E.g.*, *id.* at 14.

132. *Id.* at 34–44.

benign and that it injures women, who otherwise are strong and can stand on their own.[133]

Ginsburg referred to the "myth and custom" underlying sex as a suspect classification.[134] That myth and custom "assumes that the male is the dominant partner in marriage," and it "reinforces restrictive and outdated sex role stereotypes about married women and their participation in the work force."[135] Ginsburg cited examples where women were referred to as inferior, weak, or unable to play a full role in society.[136] She equated these clear, precise, public examples of women's inferior legal status with African Americans' status before the Civil War under the slave codes.[137]

American politicians such as Thomas Jefferson[138] and Grover Cleveland[139] perpetuated the myth of the dominant male and the inferior woman. Ginsburg recounted how Alexis de Tocqueville described these American customs: "'In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different.'"[140] Gender stereotypes in the law, Ginsburg showed, were inherited from British common law.[141] Alfred Lord Tennyson explained how "'[t]he common law heritage, a source of pride for men, marked the wife as her husband's chattel, 'something better than his dog, a little dearer than his horse.'"[142]

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133. *Id.* at 15–17.

134. *Id.* at 7, 11 ("'Man's world' and 'woman's place' have confronted each other since Scylla first faced Charybdis.") (quoting ELIZABETH JANEWAY, MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY 7 (1971)). For a further discussion of myth in legal narrative, see Linda H. Edwards, *Where Do the Prophets Stand?:* Hamdi*, Myth and the Master's Tools*, 13 CONN. PUB. INT. L.J. 43, 45 (2013).

135. Brief for the ACLU, *supra* note 127, at 7.

136. *E.g.*, *id.* at 13 (1866 debate in Congress) (debate quoted in ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 148–49 (1970), from Cong. Globe, 39 Cong., 2d Sess., Part I, p. 66).

137. *Id.* at 14 (stating the legal status of women and children provided a model for slaves' legal status in the slave codes).

138. *Id.* at 11 (Jefferson quoted in MARTIN GRUBERG, WOMEN IN AMERICAN POLITICS: AN ASSESSMENT AND SOURCEBOOK 4 (1968)).

139. *Id.* at 15 (citing Grover Cleveland, *Would Woman Suffrage Be Unwise?*, LADIES HOME J., 1904–05, at 7–8, quoted in UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM 199–203 (Aileen S. Kraditor ed., 1968)).

140. *Id.* at 12 (de Tocqueville quoted in *Democracy in America, pt. 2* (Reeves tr. 1840), in WORLD'S CLASSICS SERIES, Galaxy eel., p. 400 (1947)).

141. *Id.* at 13–14 (citing 1 BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND 442 (3d. ed. 1768).

142. *Id.* at 13 (quoting ALFRED LORD TENNYSON, LOCKSLEY HALL (1842)).

But women protested and struggled against these characterizations, Ginsburg asserted.[143] Women recognized the injustice—the inferior classifications into which they were being cast.[144] For example, a declaration of women's rights at the 1848 Women's Rights Convention in Seneca Falls, New York described how man "'has endeavored, in every way that he could, to destroy [a woman's] confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.'"[145]

The women of the day, despite this treatment, endeavored to identify their strength, independence, and humanity.[146] Sojourner Truth spoke for women's suffrage: "'I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman?'"[147]

Ginsburg reported that at the time the brief was written, in the early 1970's, some progress had been made in federal legislation, and momentum was growing in favor of the ERA.[148] She noted how legislation still put women in a place subordinate to men.[149] This was a time, though, when "[e]nlightened courts" were striking down sex classifications, and "the national conscience ha[d] been awakened to the sometimes subtle injury inflicted on women by these stereotypes."[150]

In the joint reply brief, Ginsburg and counsel for the Frontieros argued that the ERA should be supported by the Court's decisions, because under the Equal Protection Clause, "legislative distinctions should not be made on the basis of characteristics that bear no necessary relationship to ability and over which persons have no control."[151]

The joint reply emphasized how "total political silence was imposed on this numerical majority" with "second-place status" for women in education, jobs,

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143. *Id.* at 15–17.

144. *Id.*

145. *Id.* at 16 (declaration quoted in HISTORY OF WOMAN SUFFRAGE, 1848–1861, at 70–75 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881)).

146. *Id.* at 15–17.

147. *Id.* at 17 (Sojourner Truth quoted in Flexner, *supra* note 136, at 90–91); *see also* Mayeri, *supra* note 106, at 79 (discussing the analogy between race and gender in the amicus brief).

148. Brief for the ACLU, *supra* note 127, at 17–20.

149. *Id.* at 17–18.

150. *Id.* at 7.

151. Joint Reply Brief of Appellants and American Civil Liberties Union *Amici Curiae* at 7, Frontiero v. Laird, *sub. nom.* Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) (co-authored by counsel for amicus and Joseph J. Levin, Jr. and Morris S. Dees, Jr.).

and politics.[152] The reply asserted that classifications to protect women, and which were labelled benign, created a separate but equal position for women in society.[153] They argued that the traits associated with American women are valued less.[154]

The reply ended with a passionate entreaty on behalf of "women who want to exercise options that do not fit within stereotypical notions of what is proper for a female, women who do not want to be 'protected' but do want to develop their individual potential without artificial constraints . . . ."[155] For these women, "classifications reinforcing traditional male-female roles are hardly 'benign.'"[156]

Picking up themes from her briefs, Ginsburg began her oral argument with the analogy to *Reed*, stating that in both cases "[t]he legislative judgment in both derives from the same stereotype. The man is or should be the independent partner in a marital unit. The woman with an occasional exception, is dependent, sheltered from bread winning experience."[157]

Regardless of the lack of evidence in *Frontiero* as to the number of servicemen who had wage-earning wives, she said, "[w]hat is known is that by employing the sex criterion, identically situated persons are treated differently. The married serviceman gets benefits for himself, as well as his spouse regardless of her income[,]" she said, while a married servicewoman like Frontiero, earning two-thirds of the family income, is denied benefits.[158] And, for these reasons, she said, the legislation failed the rationality standard.[159]

Ginsburg then asked the Court to declare sex a suspect criterion. As she had in her briefs, Ginsburg drew a second analogy, this time to race: "Sex like race is a visible, immutable characteristic bearing no necessary relationship to ability. Sex like race has been made the basis for unjustified or at least unproved assumptions, concerning an individual's potential to perform or to contribute to society."[160]

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152. *Id.* at 8.

153. *Id.* at 12.

154. *Id.*

155. *Id.* at 13.

156. *Id.*

157. Transcript of Oral Argument at 15, Frontiero v. Laird, *sub. nom.* Frontiero v. Richard 411 U.S. 677 (1973) (No. 71-1694), https://www.oyez.org/cases/1972/71-1694 [https://perma.cc/HX2E-6W29]. Levin carved out time for Ginsburg from his oral argument. Mayeri, *supra* note 106, at 69.

158. Transcript of Oral Argument, *supra* note 157, at 15.

159. *Id.*

160. *Id.* at 16–17.

Ginsburg addressed the government's position that sex did not deserve the same constitutional protections as race. The Fourteenth Amendment's purpose, she said, was "to eliminate invidious racial discrimination."[161] And, both a person's skin color and their sex "bears no necessary relationship to ability."[162]

Ginsburg knocked down the government's two points against sex as a suspect criterion: (1) that women are a majority population, and (2) that classification by sex does not imply women's inferiority.[163] To combat these points, Ginsburg reminded the Court that women were denied the right to vote until 1920, that women face pervasive and subtle employment discrimination, that women face restrictive quotas, and that women are absent from state and federal government positions.[164]

Ginsburg provided examples of the stigma, exclusion, and "judgment of inferiority" that injure women.[165] She said, "[t]hese distinctions have a common effect. They help keep woman in her place, a place inferior to that occupied by men in our society."[166] Ginsburg said that regardless of the ERA's ratification, "clarification of the application of equal protection to the sex criterion is needed and should come from this Court."[167]

Ginsburg concluded with vigor, urging a position "forcibly stated in 1837 by Sarah Grimk[é], noted abolitionist and advocate of equal rights for men and women. She spoke, not elegantly, but with unmistakable clarity. She said, 'I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.'"[168]

Unusual for that time, no one on the Court asked Ginsburg any questions during her oral argument,[169] but the themes in her briefs and her oral argument play a central role in the Court's decision.

The plurality found Ginsburg's arguments on the standard of review convincing.[170] Central to the plurality opinion is the very language that

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161. *Id.*

162. *Id.*

163. *Id.*; *see also* Mayeri, *supra* note 106, at 69–71 (discussing Ginsburg's oral argument).

164. Transcript of Oral Argument, *supra* note 157, at 17–18.

165. *Id.* at 18.

166. *Id.* at 19.

167. *Id.* at 20.

168. *Id.* ("I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from off our necks, and permit us to stand upright on that ground which God designed us to occupy.") (quoting Sarah Grimke, *Letter II: Women Subject Only To God*, *in* LETTERS ON THE EQUALITY OF THE SEXES (1837), https://en.wikiquote.org/wiki/Sarah_Grimk%C3%A9 [https://perma.cc/WGH6-LZAU]).

169. Mayeri, *supra* note 106, at 70.

170. Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973).

Ginsburg used in her amicus brief.[171] Referring to a "paternalistic attitude," the Court stated that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."[172]

Ginsburg's detailed examples and analogies come through as the Court decried the abuses of the past: "As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . ."[173] Specifically, the Court stated, "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks in pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, . . . or serve as legal guardians of their own children."[174]

In her comments on *Frontiero*, Ginsburg noted the swift progress from *Reed* to *Frontiero*.[175] The decision would notify the legislature and lower courts, which had a responsibility to the "long silenced majority," that sex discrimination in law would be subject to "rigorous" constitutional review in the Supreme Court.[176] Ginsburg further advocated for the ERA's ratification, to ensure that "women and men stand as full and equal individuals before the law."[177] This concern that women and men would both be equals is a human ideal not driven by a cost-benefit analysis, or a data-driven administrative convenience argument. This is a far-sighted argument that speaks to the core of justice.

In our view, in 2019, AI's abilities are still essentially binary, employing input-output driven forms of reasoning, while human reasoning has multi-faceted depth and employs perceptions that humans cultivate through non-linear learning. Ginsburg's argument in *Frontiero* demonstrates a non-binary form of argument. AI uses linear optimization; an argument such as Ginsburg's optimizes both an individual litigant's and societal goals.

### C. Alaska v. EPA*: John Roberts Finds and Then Tells the Less-Obvious Story*

Lawyers know that stories persuade all humans, even judges.[178] But when we think about using stories in the law, we often think of situations when the stories are both compelling and easy to tell. A few examples of such easy

171. *See id.* at 684.

172. *Id.*

173. *Id.* at 685.

174. *Id.*

175. Ginsburg, *supra* note 99, at 3–4 (noting the importance of the decision in light of the pervasive legislative pattern in the case).

176. *Id.* at 2, 4.

177. *Id.* at 4.

178. ROBBINS, JOHANSEN & CHESTEK, *supra* note 26, at 39.

stories include stories about people serving time in jail for crimes they did not commit, poor and uneducated tenants being unfairly evicted from their homes, and victims of blatant discrimination suffering indignities and economic harm. Anyone who hears these stories will immediately identify the injustices.

But what about those stories that aren't so easy to tell? What about a contract dispute between two huge corporations where the conflict is about who gets more money? What about a criminal defendant who is tied by unrefuted DNA evidence to the crime? What about a bankruptcy case where various creditors are vying for priority over other creditors? What about a tax case when a state is trying to collect taxes on purchases its citizens made in another state?

Perhaps AI will one day be able to tell the easy stories. But it will take a real human lawyer to find those stories when they aren't obvious. And it will take a real human lawyer to frame the difficult story to persuade the reader.

John Roberts, now the Chief Justice of the United States Supreme Court, is a fine example of how a real human lawyer found, framed, and told a compelling story in what, at first blush, was a case that did not scream "story." In one of the last briefs he wrote in private practice,[179] Roberts brought a basic federalism case to life through storytelling.

The facts in *Alaska Department of Environmental Conservation v. EPA*[180] were straightforward. Alaska, before it could build a generator near protected land, conducted an extensive review process to identify the best available control technology ("BACT") to comply with the Clean Air Act.[181] The EPA then came in and said Alaska should have selected a more effective solution to control emissions.[182] Alaska's theme was that the EPA could not second-guess their well-informed decision.[183] One commentator noted, "Roberts likely

179. Roberts was working for a private law firm when he wrote the Petitioner's brief, but did not write the Reply brief, presumably because he was named to the D.C. Circuit Court of Appeals. *See John Roberts Fast Facts*, CNN LIBRARY (Jan. 15, 2019, 4:22 PM) https://www.cnn.com/2013/03/25/us/john-g-roberts-fast-facts/index.html [https://perma.cc/JL7S-E2JL]. He also did not argue the case in the United States Supreme Court.

180. Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461, 461 (2004).

181. *Id.* at 475–76.

182. *Id.* at 478.

183. The theme did not change but the lawyers did because Roberts was no longer representing the State of Alaska, so Jonathan S. Franklin argued the case in front of the United States Supreme Court. Transcript of Oral Argument at 1, Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461 (2004) (No. 02-658), https://www.oyez.org/cases/2003/02-658 [https://perma.cc/97CK-NA5S]. Here is Franklin's opening line during the oral argument:

> The question in this case is whether the Federal Environmental Protection Agency has the legal authority to override by fiat a discretionary determination that Congress expressly directed be made instead by the State of Alaska, which

realized [that this theme] would resonate, for we all know how frustrating it can be for a boss, parent, spouse or relative [to] question from afar an informed decision we've made."[184]

The crux of the legal issue was whether the EPA had to challenge Alaska's decision through the available state review process (Alaska's argument) or whether the EPA could (as it did) issue a series of orders prohibiting the construction of the generators.[185] The Ninth Circuit agreed with the EPA; so did the United States Supreme Court.[186]

So, yes, despite Roberts's eloquent storytelling, his client lost the case. The loss doesn't mean that lawyers can't learn from master storytellers and try to emulate their craft.[187] Ruth Bader Ginsburg called Roberts "the 'best' advocate to come before the Supreme Court."[188] Even Senator Chuck Schumer, who voted against Roberts's nomination, called him "one of the best advocates, if not the best advocate in the nation."[189]

Lawyers, like all storytellers, know they should let their facts "show, not tell."[190] Roberts proved that maxim by personalizing his government client and telling the story from his client's point of view. Roberts told the story of how the Red Dog Mine got its name:

> For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs.

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> Congress trusted to exercise its own independent judgment according to local priorities and local conditions.

*Id*. Later in the argument, Franklin refined the theme a bit to emphasize that the statute does not require federal uniformity: "EPA understands . . . and that is the nub of this case . . . that the BACT determination is not supposed to be a uniform Federal standard." *Id.* at 21.

184. Thomas Villecco, *Storytime: How Lawyers Can Use Narrative Techniques in Brief Writing*, LAWYERIST.COM (Apr. 16, 2013), https://lawyerist.com/storytime-how-lawyers-can-use-narrative-techniques-in-brief-writing/ [https://perma.cc/JJ9H-YK4V].

185. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 469.

186. *Id.* at 463, 469.

187. I first became aware of Roberts's work in this case after reading Ross Guberman's excellent article about the Roberts brief. *See generally* Ross Guberman, *Five Ways to Write Like John Roberts*, LEGAL WRITING PRO (2010), https://www.legalwritingpro.com/pdf/john-roberts.pdf [https://perma.cc/93D8-N54U] [hereinafter Guberman, *Five Ways*].

188. ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 60 (2d ed. 2014) (Ginsburg made the comment when "Roberts was nominated to be Chief") [hereinafter GUBERMAN, POINT MADE].

189. Guberman, *Five Ways*, supra note 187 (internal quotations omitted).

190. *Id.*

> Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek.[191]

Years later, Roberts was interviewed about effective advocacy, and he highlighted this slice from his own lawyer days:

> You've got to find some way of trying to bond your reader with the brief. He can pick it up later on and say, "Oh, this is the case about . . . [.]" And it can be something silly. I remember I had a cert petition once with a mine in rural Alaska. It was called the Red Dog Mine. Well, I didn't know why it was called the Red Dog Mine, so you do some research. It's a fascinating story about a guy with his plane and his faithful red dog delivering emergency medicine in a blizzard, and the plane crashes, and the dog dies. You waste a couple of sentences in a brief, but you put that in there, and it's kind of interesting. Then everybody remembers that. Oh, that's the case about the Red Dog Mine. And they're kind of invested in it, and they want to see how the story ends up, and it gives a little texture to the brief.[192]

Quibbling with a Supreme Court Justice is not generally recommended, but Roberts did not "waste a couple of sentences" in that brief. Instead, those few sentences were the essence of how Roberts built empathy for his client when a reader's normal inclination may be to avoid any sympathy for the company accused of polluting the pristine Alaska wilderness.

Notice how Roberts's human creativity and curiosity inspired him to learn about and then include the memorable little tale about the naming of the Red Dog Mine. Even conceding that AI may take over rote legal tasks, it is hard to imagine how AI could ever mimic the inquiring mind of a human. It was the question that Roberts posed, "I didn't know why it was called the Red Dog Mine," that made all the difference.

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191. Brief for Petitioner at 7–8, Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461 (2004) (No. 02-658), https://www.findlawimages.com/efile/supreme/briefs/02-658/02-658.mer.pet.pdf [https://perma.cc/55PE-8ECN].

192. *Interview with Chief Justice John G. Roberts Jr.*, 13 SCRIBES J. LEGAL WRITING 17–18 (2010) (Bryan Garner interviewed Chief Justice Roberts on March 2, 2007) [hereinafter SCRIBES].

Maybe it was the charming history of the Red Dog Mine's naming that inspired Roberts to connect with his client. The theme of the case, that a federal government agency should not second-guess Alaska, was rooted in the reality that the Red Dog Mine provided employment and a livelihood for hundreds of Alaskans—mostly Inupiat Eskimos—who had previously suffered from high unemployment rates.[193] Here Roberts wrote about the impact the Red Dog Mine had on the community:

> Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. The vast majority of the area's residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. The region offers only limited year-round employment opportunities, particularly in the private sector; in the two years preceding Alaska's permit decision, the borough's unemployment rate was the highest in the State.
>
> . . . .
>
> With nearly 600 workers, the mine's payroll represents over a quarter of the borough's wage base. Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State.[194]

Roberts tied Alaska's choice to boost the financial security of the local people to his theme about state control. Look at how effectively Roberts's opening brief reveals that theme. Here are the first sentences of the first three paragraphs in the Introduction:

> Described as an "experiment in federalism," [citation omitted] the Clean Air Act ("CAA") assigns to the States an important—indeed *primary*—role in air pollution prevention and control.
>
> . . . .
>
> The CAA by its terms thus gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination.
>
> . . . .
>
> In this case, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine, located in Northwest Alaska some 100 miles north of the

193. *See* Brief for Petitioner, *supra* note 191, at 9.

194. *Id.* (citations omitted).

Arctic Circle.[195]

Roberts emphasized that there is "no single, objectively 'correct' BACT determination for any particular source."[196] Instead, Roberts said that what is "best" in any situation is a "discretionary judgment based on the case-by-case weighing of . . . factors."[197] Roberts started by giving a few examples of how different states could weigh all factors and yet conclude that two completely different selections are "best":

> For example, one State—experiencing little economic growth in the pertinent area and concerned about the impact of increased costs on a critically important employer—may select as BACT for that employer a less stringent and less costly technology that results in emissions consuming nearly all of (but not more than) the available increment for growth. Another State—experiencing vigorous economic growth and faced with many competing permit applications—may select as BACT for those applications a more stringent and more costly technology that limits the impact of any particular new source on the increment available for development. A third State—in which ecotourism rather than more industrial development is the priority—may select as BACT an even more stringent and more costly technology, effectively blocking *any* industrial expansion.[198]

The reader is easily drawn into these mini stories about how different states might make different decisions. Subtly, these mini stories also further the theme that Congress wanted the states, not the federal government, to decide the particulars of their pollution control measures as long as they met the federal standards. Allowing, and indeed even encouraging, states to experiment in different ways strikes a familiar chord of "cooperative federalism."[199]

But then Roberts kicked it up another notch. His analogy to what the "best" decision would be in another situation—buying a car—is akin to watching a masterful musician during an absolute peak performance:

> Determining the "best" control technology is like asking different people to pick the "best" car. Mario Andretti may select a Ferrari; a college student may choose a Volkswagen Beetle; a family of six a mini-van. A Minnesotan's choice will doubtless have four-wheel drive; a Floridian's might well be a

195. *Id.* at 3.
196. *Id.* at 23.
197. *Id.*
198. *Id.* at 24.
199. *Id.* at 17.

> convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on.[200]

Almost all readers will have had personal experience with buying a car, allowing them to easily relate to the reality of weighing all the factors. Roberts hints that the ultimate decision can be difficult. The family may have preferred a sporty car, but the reality led them to the mini-van. Alaska may have preferred a more restrictive solution, but the reality of the economic situation led them to this BACT for this generator. Roberts logically pointed out that the EPA's suggested BACT was "not economically feasible" for the regional economy, particularly when the end result of all improvements would "result in lower overall . . . emissions" than would occur if the EPA dictated its preferred technology on only one generator.[201]

It is doubtful that Roberts's examples of Minnesotans and Floridians were mere coincidence. Roberts could have made the same point by using examples of drivers from Northern and Southern states. Instead, he included Minnesotans and Floridians to paint a more vivid picture, and to further solidify his theme that federalism encourages state experimentation. When states are named—Alaska, Minnesota, and Florida—the reader can see the people in those states and concede that those people should decide what is best for their state.

Legal writing expert Ross Guberman often uses Roberts's brief as an example of outstanding writing. He said, "When I run into lawyers who have taken one of my brief-writing seminars, they often mention this example [comparing choosing BACT to choosing a car], even years after taking the workshop."[202] Guberman credits this lasting impression to Roberts's imaginative use of a very personal, easy-to-grasp choice.[203] Roberts, as a human writer, is connecting with another human, the reader.

Roberts accurately predicted that the EPA would argue that its preference to substitute SCR (selective catalytic reduction) as BACT would further national consistency. So he ended the brief with a zinger: "When it came to BACT, however, Congress had a different idea, and left that determination—'on a case-by-case basis'—to the States."[204] Roberts's decision to use a short,

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200. *Id.* at 24.

201. *Id.* at 13. Megan Boyd noted, "Roberts lost, but his argument is a wonderful example of the power of logos. Think of the logic: how can Alaska have acted arbitrarily and capriciously if the control technology it selected would result in lower overall emissions?" Megan Boyd, *Logos in Litigation*, LADY (LEGAL) WRITER (Apr. 8, 2014, 5:43 AM), http://ladylegalwriter.blogspot.com/2014/04/ [https://perma.cc/M6XJ-6UB4].

202. GUBERMAN, POINT MADE, *supra* note 188, at 212.

203. *Id.*

204. Brief for Petitioner, *supra* note 191, at 48.

six-word quote—"on a case-by-case basis"—hammered home his theme that the states needed flexibility.[205]

In the grand conflict between human versus AI, we would send Roberts into the arena as the gladiator to represent human creativity, empathy, and judgment. But even in the seemingly small decisions like the use of punctuation it is hard to imagine that AI could ever achieve Roberts's expertise. Take the em dash. Many lawyers avoid the em dash, either because they aren't quite sure how to use it[206] or because they have been warned that some readers might consider it to be too informal.[207] Review how Roberts brilliantly used em dashes in the excerpts above from his brief for the State of Alaska. He sprinkled em dashes throughout the entire brief as a way to emphasize important phrases and legal points.[208] Or consider the semicolon. Again, some lawyers might not remember that semicolons can be used to unite two short, closely connected sentences or main clauses.[209] Roberts used the semicolon to contrast two concepts: "In clean air areas, the federal government determines the maximum allowable increases of certain emissions for certain pollutants; the States decide how to allocate the available increments among competing sources for economic development and growth."[210] Roberts made the same point about federalism, and his use of the semicolon highlighted the stark contrast between the role of the federal government and the role of the state.

Human curiosity, empathy, creativity, and judgment will provide the stories and glimmers that can make the brief sparkle, and in turn persuade the readers and listeners. Roberts, a master storyteller, put it like this:

> It's got to be a good story. Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together—that's a story. And you've got to tell a good story. Believe it or not, no matter how dry it is, something's going on that got you to this point, and you want it to be a little bit of a page-turner, to have some sense of drama, some building up to

205. GUBERMAN, POINT MADE, *supra* note 188, at 304.

206. Bryan Garner suggests three different uses for the em dash: (1) Using a pair of em dashes "to set off an inserted phrase that, because of what it modifies, needs to go in the middle of the sentence"; (2) using a pair of em dashes to "set off a parenthetical phrase that you want to highlight"; and (3) using an em dash "to tack an important afterthought." BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 154 (2001).

207. LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 532 (5th ed. 2010).

208. *See, e.g.*, Brief for Petitioner, *supra* note 191, at 48.

209. *See* OATES & ENQUIST, *supra* note 207, at 672–73. Note that semicolons can also be used "to separate items in a series if the items are long or if one or more of the items has internal commas." *Id.* at 674.

210. Brief for Petitioner, *supra* note 191, at 17.

> the legal arguments. I also think—again, it varies on your forum—but certainly here at the Supreme Court and in the courts of appeals, you're looking for a couple of hooks in the facts that hopefully are going to be repeated in one form or another later on in the legal argument but also are going to catch somebody's interest. It may not have that much to do with the substantive legal arguments, but you want it to catch their eyes. Certainly here in the Supreme Court, in writing cert petitions, for example, if you're going to be looking at 9,000 of them over the course of a year, you've got to stand out from the crowd a little bit. So you want to put something in there to give them the hooks . . . . But give them some hook, and it kind of helps draw them into the brief and carries them along a little bit.[211]

Maybe AI could write a brief outlining the relevant law and facts in *EPA v. Alaska*, but it is hard to imagine that the brief would be anywhere near as readable, persuasive, and compelling as the one written by a masterful storyteller like Roberts.

## V. CONCLUSION

Alf White, the "real" James Herriot, was one of the greatest storytellers of the 20th century. His bestselling stories about the life of an English country veterinarian during the 1930s, 1940s, and 1950s captivated the world. White's son Jim, also a veterinarian, points out, "[Alf White] was an incredibly sensitive man, with a deep interest in people. I think that's what made him a wonderful writer. One of the things that people get most wrong about my father is that he wrote 'nice little stories about animals.'. . . My father didn't write about animals—he wrote about people."[212]

Ironically, many assume that we lawyers write about the law when, instead, we too are writing about people. And we share one more thing with Alf White. He was capturing a way of life that was dramatically changing as a result of mechanical innovation. The horse was an absolute necessity on English farms at the beginning of the 20th century. In 1914 there were 25 million horses in the United Kingdom, but by 1940 that number was reduced to 5 million with

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211. SCRIBES, *supra* note 192, at 16–17.

212. Jenny Johnston, *James Herriot's Private Hell: The Shocking Truth About the Man Behind TV's Most Famous Vet*, DAILY MAIL (Sept. 24, 2010 5:30 PM), http://www.dailymail.co.uk/femail/article-1314863/James-Herriots-private-hell-The-shocking-truth-man-TVs-famous-vet.html#ixzz56ulqwKBm [https://perma.cc/8ZH7-EAT4] (note that the shocking truth is that White had depression).

only 600,000 horses located on farms.[213] One author noted, "The end of the horse was bewilderingly swift."[214] The tractor replaced the horse on the small farms throughout England, but the stories of those Yorkshire Dale farmers did not end with the arrival of the tractor. When the Yorkshire Dales farmers changed from horsepower to mechanical power, increased productivity and larger farms was not the only result. Those farmers became excellent mechanics. Many were tempted to ignore the march of technology, but in the end almost all were forced to adapt to survive.

Lawyers, too, will need to adapt to survive.[215] One current adaptation we are facing is AI. Like the Yorkshire Dale farmers in the 1930s and 1940s, lawyers who learn to work with the emerging technology can be both innovative and traditional.[216] The innovative piece will be the opportunity to see the value and good in AI coupled with a willingness to learn as much as we can about it. The traditional piece will be our continued commitment to the value of creativity and empathy that lawyers, as human beings, bring to our profession.

213. JOHN LEWIS-STEMPEL, YOUNG JAMES HERRIOT: THE MAKING OF THE WORLD'S MOST FAMOUS VET 114 (2011).

214. *Id.*

215. Dennis Garcia and James Dempsey gave a presentation to the Seventh Circuit Bar Association on May 6, 2019 in Milwaukee. In his remarks, Mr. Garcia advised attorneys and judges not to "fear AI or change. Technology can be a lawyer's best friend." Dennis Garcia & James Dempsey, Address at the 68th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit: Artificial Intelligence: Implications for Judges, Lawyers, and the Legal Profession (May 6, 2019). He also noted that "AI gives lawyers more time to do mission critical work." *Id.*

216. Dennis Garcia echoed this sentiment, saying that "we are all still at the early stages of AI, and we should use a growth mindset." *Id.* To that end, Mr. Garcia recommended that law schools develop courses in law and AI.