

APPLIED LEGAL STORYTELLING, POLITICS, AND FACTUAL REALISM

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I. INTRODUCTION

The first Applied Legal Storytelling conference, *Once upon a Legal Time: Developing the Skills of Storytelling in Law*, was held in London on July 18–20, 2007. The almost ninety attendees hailed from eleven different countries. Our Programme asked “Why This Conference?” and answered,

The Applied Legal Storytelling conference was imagined and realized because the conference organizers wished to create a sustainable dialogue about the application of storytelling elements to the practice and pedagogy of law. This conference traces its roots directly from the 2005 *Power of Stories* conference sponsored by University of Gloucester and Texas Wesleyan School of Law. We are committed to spotlighting the concept of “story” in ways that will directly and tangibly benefit law students (i.e. “future lawyers”) and legal practitioners (i.e. “former law students”).¹

However, a person reading the Programme might have been struck, as was I, one of the organizers, that the conference and Applied Legal Storytelling (ALS) seemed political. Presentations addressed infanticide, women in polyamorous relationships, criminal defense strategies, immigration law, and American racial seg-

* © 2008, Brian J. Foley. All rights reserved. Visiting Associate Professor of Law, Drexel University Earl Mack School of Law (2007–2008); Associate Professor, Florida Coastal School of Law. This Article began as a late-added presentation at the *Once upon a Legal Time: Developing the Skills of Storytelling in Law* conference, City Law School, Gray’s Inn, London, United Kingdom, July 18–20, 2007. I was a co-organizer of the conference. I thank the other organizers. I thank all those who attended the talk, and my co-presenter, Melinda H. Butler, who helped spark the ideas in this Article. I thank M.G. Piety for reviewing a draft, and for all her support, Peter Egler, Faculty Services Librarian at Drexel Law, for great research help, Ruth Anne Robbins for her encouragement, and Steve Johansen for strengthening the piece through his editing. I thank Dean Peter Goplerud for the research grant that helped me write and Dean Roger Dennis for supporting my travel to London.

¹ Programme, *Once upon a Legal Time: Developing the Skills of Storytelling in Law* (London, U.K., July 18–20, 2007) [hereinafter Programme]. The Programme and further information about the conference are available at http://www.city.ac.uk/law/vocational/storytelling_in_law_.html, under the link “Speakers and Abstracts.”

regationist lawyers. Inherent in other papers was a critique of United States and United Kingdom legal education, as a premise of the conference was that storytelling needs to be taught as a skill in law schools. Storytelling itself has been branded as left wing and “controversial”²; storytelling has been the subject, and stories themselves have been the mode of discourse, in some scholarship, most notably in Critical Legal Studies and related left-wing movements.³ I want to say up front that I do not regard “political” as pejorative. Nor, for that matter, do I regard “storytelling” or “creative” as pejorative, although some jurists might. In fact, I have published on this topic myself.

My musing was also sparked by a conversation earlier in the summer with my research assistant, Melinda Butler, about whether storytelling in law is unnecessarily politicized. I was able to add a presentation to ask this question of politics and storytelling, on the final day in the final time slot, and Melinda agreed to co-present. It was entitled “What’s Going on Here? Is ALS Political?” and in a later version of the Programme was shortened simply to “Is Applied Legal Storytelling Political?” In preparation, I talked with many attendees, and most agreed that there is at least a *prima facie* case that ALS is inherently political. The presentation brought out similar views as well as competing views, including Melinda’s that ALS should not be political, or at least not merely political, because that could limit what she sees as a broader movement. I did not draw a conclusion during or immediately after the presentation about this question.

In this brief Article, I conclude that ALS is not political or politically motivated in the sense of being inherently Left or Right.⁴

² Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 Neb. L. Rev. 479, 481 (1995) (“Types of nontraditional composition [of scholarship] include doggerel, photography, ramblings on pop culture, haiku, Death-Row Articles and the most popular—and controversial—storytelling.” (Footnotes omitted)); Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes*, 5 S. Cal. Interdisc. L.J. 1, 3 (2005) (“The art of storytelling—the cornerstone of fables, folklores, mythologies, and fiction—is making its way into the ‘narrative’ form of legal scholarships as this form emerges under great scrutiny, suspicion, and controversial debates.”).

³ Austin, *supra* n. 2, at 480–481, 482 (“Typically in narrative form, stories have become the fashion of feminists and minorities who use them to describe experiences of oppression.” (Footnote omitted)). Also, Critical Legal Studies itself has been the subject of academic and political controversy, creating “rifts” among faculties and among students at many law schools, most notably at Harvard in the 1980–1990s. *See id.* at 486 n. 46. For some of the Critical Legal Studies proponents’ justifications and battle cries, see David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 Hastings L.J. 777, 804 (1990).

⁴ If any readers saw my presentation in London, they will recall that I said at the time that I was truly asking this question and had no answer. Trying to answer it has been part of the fun of writing this Article.

Instead, I think the question I had lopped off the title, “What’s Going On Here?” is the better question and leads to some fruitful answers about what we’re trying to accomplish with ALS. I suggest that, on the whole, ALS reflects a focus on fact and particularly on the indeterminacy of fact, as opposed to the indeterminacy of law that characterizes the focus of much traditional law teaching.⁵ When I use “fact” in this Article, I mean not the facts themselves, but the facts in a lawsuit, in the sense of what we think happened. The facts themselves are determinate in an ontological sense, but the “facts” of a lawsuit as argued by lawyers and found by juries are indeterminate in an epistemological sense. To illustrate this contrast between legal indeterminacy and factual indeterminacy, I call this larger view of factual indeterminacy *Factual Realism*.

It has long been known that facts are slippery things, but Factual Realism has entered the law schools only recently, as a result of the widespread increase in teaching lawyering skills. In skills classes “the facts” are no longer simply an immutable part of an appellate opinion in a casebook, to be recited by a student and then essentially forgotten in the subsequent discussion of law, theory, and policy. Rather, in clinics and to some extent in legal methods courses, students face the challenge of ferreting out the facts themselves, taking this raw information and making sense of it for themselves and for the decision maker (real or hypothetical). Under the traditional law school model, students rarely needed to grapple with factual indeterminacy and would learn to do so only later, as apprentice attorneys, atomized in different practice settings, without the benefit of an overarching pedagogy. Storytelling is one way of addressing this indeterminacy.⁶

The ALS view of storytelling leans toward “applied,” and therein lies the difference with much of what has gone before under the names “storytelling” and “narrative.” These previous efforts include such things as scholars’ criticizing legal doctrine,⁷ or

⁵ This idea can be traced to Legal Realism. Brian Leiter, *American Legal Realism*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 21–23 (Martin P. Golding & William A. Edmundson eds., Blackwell 2005) (available at http://ssrn.Com/abstract_id=339562). It is now considered a cliché to use the cliché “[W]e are all realists now.” Michael Steven Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1917 (2005) (footnote omitted).

⁶ There are other ways, and some of them have been tried in the law school curriculum. In writing this Article, I “discovered” a small body of literature among Evidence scholars about teaching “Evidence, Proof, and Facts” (EPF). These scholars themselves acknowledge that their movement has not caught on. I will address EPF below. *See infra* sec. IV(A).

⁷ *See e.g.* Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 Cal. L. Rev. 377, 425 (1996).

scholars' digging up history to bring cases alive,⁸ and more mundanely, hypotheticals, and "war stories."⁹ These uses of stories are within the scope of ALS, because ALS constantly seeks to improve understanding of this important tool. However, ALS goes beyond these efforts to explore how the skills of storytelling are incorporated into the practice of law.

I should add that I stumbled into ALS before we had ALS. After two years teaching legal writing, I was already tired of telling students to "tell a story" in their facts sections, but not really knowing what that meant. That's when my shelf of books on *How to Write the Great American Novel* came in handy. The result was an article I co-wrote with Ruth Anne Robbins that explored what it meant to "tell a story" in a legal context, and how to teach students and lawyers to do so in legal briefs.¹⁰ Organizing the facts of a case as a story gives some control over factual indeterminacy. It makes for more effective lawyering. Legal storytelling can cut through doctrine that might at times seem to stray from issues of fairness and justice. Proponents of legal storytelling may find themselves in the position of criticizing traditional legal education as sometimes failing to get at the human element of the conflicts that become lawsuits.¹¹ The experience of seeing that article used by professors and practitioners has informed my views that legal storytelling is a welcome development.

This Article proceeds as follows. Part II focuses on the conference presentations to show that ALS is not in the main politically motivated, though it does deal with political issues. Part III discusses how the interest in storytelling stems from a larger phenomenon, which is that skills teaching has taken law schools across the Great Fact-Law Divide. Factual Realism is now part of legal education. Part IV discusses implications of this evolution.

II. ALS IS MORE THAN POLITICS

Many of the conference presentations were political in their subject matter, but a closer examination of them, and of the people who made them, reveals that politics was not the main concern of the conference.

⁸ See e.g. Richard Delgado, *Rodrigo's Chronicle*, 101 Yale L.J. 1357 (1992).

⁹ Austin, *supra* n. 2, at 488.

¹⁰ See Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001).

¹¹ See *id.* at 469–471.

A. *The Presentations*

All of the organizers (Steve Johansen, Robert MacPeake, Ericka Rackley, Ruth Anne Robbins, and I) had a hand in choosing the presentations, and each of us read all of the abstracts and proposals. We did not deny any proposals categorically. We were open to most anything dealing with storytelling—and even papers that seemed to deal with it only tangentially. I have grouped the accepted proposals into the following four categories.

1. *Improving Law*

Generally, improving the law through storytelling often encompasses the idea of locating the stories of “outsiders,” people whose stories are otherwise not included in lawmaking and adjudication. I agree with the idea and have a work-in-progress that falls into this category.¹² I specifically made this point about outsiders’ stories in October 2006, speaking inside a maximum-security prison to a roomful of men convicted of murder and sentenced to life-without-possibility-of-parole sentences as juveniles—they must get their stories of rehabilitation, of the unfairness, the waste, the excessiveness, the inaptness, of their sentences, out before a general public and legislators. Ultimately, when the public sees that the punishment does not fit the *criminal*, it might move to change the punishment. So far, the public has seen only *the crime*. It must meet the criminal. Stories can accomplish that.¹³

The papers that I categorize as “improving the law” seem “political” in the sense that they discussed outsiders who are excluded because of a lack of political power, a term I use broadly. For example, by lack of political power, I mean people who are excluded or marginalized because they fall outside of the mainstream and could not hope to receive anything like considered understanding from many judges or juries—or the mainstream legal academy. Notable in this regard was a presentation that addressed rape victims who are involved in multi-partner sexual relationships.¹⁴ One

¹² *Indicted Men Tell No Tales: When Criminal Laws and Evidence Rules Don't Let Defendants Tell Their Story* (unpublished ms.) (on file with Author).

¹³ A good use of storytelling advocacy can be seen in Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (Oct. 2005) (available at <http://www.hrw.org/reports/2005/us1005/>) (presenting, inter alia, stories of child offenders serving these sentences).

¹⁴ Michele Alexandre, Presentation, *Girls Gone Wild and Rape Law: Ensuring an Unbiased Appreciation of “Reasonable Doubt” When the Victim Is Non-Traditional* (London, U.K., July 19, 2007).

assumes that such victims run the risk of becoming victims, at least in less tolerant jurisdictions, of societal prejudices such as those modern rape shield laws work to eliminate by preventing criminal defense lawyers from inquiring into the victim's sexual past.¹⁵ (Of course, canny lawyers do their best to work around these restrictions.) During the same session was a presentation concerning mothers who kill their own infant children that sought to understand, not merely condemn, these women.¹⁶ There were also presentations on women victims of sexual harassment,¹⁷ battered women's syndrome,¹⁸ women involved in custody battles,¹⁹ and the forgotten history of three African-American women slaves who were forced into being subjects for experimental gynecology, a presentation that was self-described as applying a Critical Race Feminist perspective.²⁰ There was a presentation on advocating for children using storytelling, specifically focusing on point of view and voice.²¹

Other presentations addressed: criminal defenses, and how in general the best defense is a good alternative narrative;²² storytelling in immigration cases;²³ and a documentary-in-progress telling the story of the 9/11 Victims Compensation Fund (victims of a mass-casualty terrorist attack who are not being adequately compensated or compensated in a timely fashion by the government that had undertaken the duty to defend them from such vio-

¹⁵ See e.g. Fed. R. Evid. 412.

¹⁶ See Julie Kalish, Presentation, *Crime & Punishment, The Use of Narrative and Storytelling in Cases of Maternal Infanticide* (London, U.K., July 19, 2007).

¹⁷ See Margaret Moore Jackson, Presentation, *Confronting "Unwelcome": Teaching Conscious Decision-Making about Case Theory to Tell the Stories of Sexually-Harassed Women* (London, U.K., July 19, 2007).

¹⁸ See Sara R. Benson, Presentation, *Beyond Protective Orders: Clinics and Social Workers Facilitate Battered Women's Stories* (London, U.K., July 19, 2007).

¹⁹ See Linda L. Berger, Presentation, *Metaphor and Narrative in Family Law Disputes* (London, U.K., July 19, 2007).

²⁰ See Deleso Alford Washington, Presentation, *In Search of the "Narrative Behind the Narrative": Critical Race Feminism and the Pursuit of "Cultural Competency" in Medical School* (London, U.K., July 20, 2007).

²¹ See Lisa Kelly, Presentation, *Telling Children's Stories* (London, U.K., July 19, 2007).

²² See Kevin Jon Heller, Presentation, *The Cognitive Psychology of Innocence* (London, U.K., July 19, 2007) [hereinafter *Presentation*]; see also Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 Mich. L. Rev. 241 (2006).

²³ See Stacy Caplow, Presentation, *The Believable Refugee: Convincing the Non-Believer That the Truth Is True* (London, U.K., July 19, 2007); Gloria Valencia-Weber & Antoinette Sedillo Lopez, Presentation, *Immigration Stories in the United States and Mexico: The Rhetoric and the Realities* (London, U.K., July 19, 2007) (discussing (and dispelling) broader narratives about immigrants from Mexico); see also Stacy Caplow, *Putting the "I" in Writing: Drafting an A/Effective Personal Statement to Tell a Winning Story*, 14 Leg. Writing 249 (2008).

lence).²⁴ One panel included a presentation about the stories of segregationist lawyers, who were not, as commonly believed, merely “pushing back” against racial integration but whose actions were informed by white supremacist beliefs,²⁵ and a presentation on a relatively recent desegregation case.²⁶ There was a panel discussion from participants in Australian Aboriginal Sentencing Courts.²⁷

A detailed look at one presentation illustrates how ALS can change the law: Marianne Wesson’s paper on the famous 1892 United States Supreme Court case *Mutual Life Insurance Co. of New York v. Hillmon*.²⁸ The dispute arose when life insurance companies refused to pay the proceeds of an insurance policy to Sallie Hillmon, the widow of John Hillmon, who had reportedly been killed when a gun discharged accidentally at Crooked Creek, Kansas, in 1879.²⁹ The insurance company defendants argued that they were not liable on the policy, because they believed that Hillmon was not dead, and that he and others were attempting to defraud the insurers.³⁰ The body they claimed was Hillmon’s was, according to the insurers, that of another man, Frederick Adolph Walters.³¹ To prove this, the companies offered into evidence a letter from Walters to his fiancée.³² In the letter, Walters said he had met a man named Hillmon and was going with him to work in starting a sheep ranch.³³ Walters was never heard from again.³⁴ The insurers also offered the testimony from Walters’s sister, who had received a similar letter but could not find it.³⁵ The insurers

²⁴ See Marilyn J. Berger, Presentation, *Once upon a Time: The Power of Film as Legal Storytelling* (London, U.K., July 20, 2007). The editorializing is my own.

²⁵ See Mary Ellen Maatman, Presentation, *Justice Formation From Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children* (London, U.K., July 20, 2007); see also Mary Ellen Maatman, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 Leg. Writing 207 (2008); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 How. L.J. 1 (2006).

²⁶ See Kathleen Mangold Spoto, Presentation, *Storytelling in Litigation: A Case Study (Desegregation Lawyers)* (London, U.K., July 20, 2007).

²⁷ See Kate Auty et al., Presentation, *Panel on Aboriginal Sentencing Courts from Australia* (London, U.K., July 20, 2007). This presentation will be discussed further *infra* in section II(A)(4).

²⁸ 145 U.S. 285 (1892); see Marianne Wesson, Presentation, *The Hillmon Case* (London, U.K., July 19, 2007).

²⁹ *Mut. Life Ins. Co. of N.Y.*, 145 U.S. at 286–287.

³⁰ *Id.*

³¹ *Id.* at 287.

³² *Id.* at 288–289.

³³ *Id.*

³⁴ *Id.* at 287–288.

³⁵ *Id.*

offered the letter and the testimony to prove that Walters had actually acted in accordance with his stated intention and had accompanied Hillmon.³⁶ The inference was that Hillmon had killed Walters, and that it was actually Walters's body in the grave. Hillmon at some point would swoop in and share in the proceeds from the life insurance policy with his wife.

The letter and the sister's testimony, however, were pure hearsay. There was no exception that would allow them to be entered into evidence, and the trial court had excluded the letter and the sister's testimony. However, the Supreme Court held that the letter was admissible.³⁷ In doing so, the Court created a new exception to the hearsay rule for "future intentions" in admitting the letter and stated that it was up to the jury to decide whether the letter was credible.³⁸ The Court must have believed that the case was one of insurance fraud to go to such lengths, according to Professor Wesson. The Court's logic, as Wesson pointed out, was flawed: people's expressions of intentions to do future actions are inherently *unreliable*, and hearsay exceptions are supposed to reflect inherent reliability. Consider New Year's resolutions. Consider promises such as "I'll send you my draft tomorrow" (or indeed, anything anyone says they will do "tomorrow").³⁹

If the Court had guessed that the body was indeed Walters's, as Professor Wesson believes it did, then it was wrong. Professor Wesson's presentation was about how she exhumed the remains from the grave. Unfortunately, the remains were insufficient for DNA testing. Professor Wesson had to rely on photographic analy-

³⁶ *Id.* at 294–295.

³⁷ *Id.* at 296–300.

³⁸ *Id.* This rule is now formalized as part of Federal Rule of Evidence 803(3). Justice Cardozo stated that *Hillmon* "marks the high water line beyond which courts have been unwilling to go," and that "[d]eclarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored." *Shepard v. U.S.*, 290 U.S. 96, 105–106 (1933). Courts differ as to whether they distinguish between admitting statements of future intention as evidence that the declarant later acted in accord with that intent versus admitting them to prove that another person (non-declarant) acted in accord with the declarant's stated intention. See *Coy v. Renico*, 414 F. Supp. 2d 744, 763–774 (E.D. Mich. 2006) (discussing *Hillmon* and collecting cases in holding on habeas review that murder victim's statements of intention to meet with defendant at time of murder were properly admitted against defendant under Michigan Rule of Evidence 803(3)). Some courts will admit a statement of future intention against a non-declarant only with corroborating evidence. See e.g. *U.S. v. Best*, 219 F.3d 192 (2d Cir. 2000).

³⁹ For Professor Wesson's argument—and more on this fascinating story—see www.thehillmoncase.com. I believe I am indebted to Professor Wesson for the example of New Year's resolutions.

sis instead, which she said showed to a reasonable certainty that the body in the grave was indeed that of John Hillmon.⁴⁰

My sense is that although for 116 years this exception has stood, albeit based on shoddy reasoning, there is a chance it can be toppled decisively by Professor Wesson's work. This will prove the persuasive power of storytelling: by showing that the high court got it wrong, and by showing it in such a dramatic way, the law might be changed, a law that has stood despite being so *unsupported* and *unsupportable* by logic or experience. At the end of the day, it doesn't really matter whose body decomposed in the grave.⁴¹

Wesson's thesis seems apolitical: the Supreme Court became sufficiently convinced of the possible story that Hillmon was perpetrating a fraud. Of course, a next step could make the thesis more political: the powerful insurance companies perpetuated the idea of widespread fraud, using their increased power to speak; the widow making the claim was treated dismissively by the Court; there were prejudices by established "East Coast" types against the sort of ruffian or outcast who would Go West to start a sheep farm. Wesson touched on this idea, but there was not time for it in the presentation.⁴²

In any event, the political nature of most of the presentations I have described as "improving the law" is evident. Some reflect the Critical Legal Studies (CLS) tradition (many CLS scholars would, I am sure, chafe at my use of "tradition"),⁴³ especially outsider jurisprudence (Critical Race Theory, Feminist Legal Theory).⁴⁴ They show that lawmaking reflects dominant ideologies. As part of this, they argue that adjudication and legislation must not exclude those without power, and that the law must in many in-

⁴⁰ *Id.*

⁴¹ For further discussion of Professor Wesson's work, see Melinda H. Butler, *The Hillmon Case: A Reply to Professor Wesson* (unpublished ms.) (on file with Author).

⁴² The trial court expressed concern to the jury that it might be prejudiced in favor of Sallie Hillmon, a "poor woman . . . [versus] wealthy corporations" that were foreign whereas Sallie Hillmon was "a citizen of your own State." George Fisher, *Evidence* 468 (Found. Press 2002) (quoting transcript quoted in John Henry Wigmore, *The Principles of Judicial Proof* 891 (Little, Brown & Co. 1913)). I am sure the "wealthy corporations" were pleased with the judge's statement. Nevertheless, Hillmon won a third trial after two earlier trials ended with sharply divided juries; the first two juries saw Walters's letters, but the third did not. *Id.* at 468-469.

⁴³ For more on Critical Legal Studies, see Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton U. Press 1990); Mark Kelman, *A Guide to Critical Legal Studies* (Harv. U. Press 1987); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991).

⁴⁴ See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683, 685 (1992); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. Rev. 18, 75-76 (1999).

stances be changed to reflect the wants, the needs, the *existence* of these less powerful groups and individuals. They are also political in the sense that they reveal that the legal academy has not yet found fit to include many of these stories in traditional law courses. But these presentations are also practical for anybody representing outsiders of any stripe: the presentations remind lawyers to search for the broader context of their client's particular conflict.

2. Improving Lawyering

Another category that many presentations fell into is how to better persuade judges and juries by using storytelling. There were papers that explained how storytelling was located within legal reasoning and argumentation;⁴⁵ how lawyers can improve their storytelling in cases;⁴⁶ how to use storytelling in cross-examination, through reinterpreting a classic how-to legal text on cross-examination as conveying storytelling techniques;⁴⁷ how storytelling carried from the facts section of briefs into the argument section;⁴⁸ how to use parentheticals about cases to carry forth a narrative in an argument;⁴⁹ how to persuade juries;⁵⁰ and how to use storytelling in negotiations.⁵¹ There was some overlap between

⁴⁵ See Stefan H. Krieger, Presentation, *The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel's Torah Min-Hashamayim* (London, U.K., July 20, 2007); J. Christopher Rideout, Presentation, *Storytelling, Narrative Rationality, and Legal Persuasion* (London, U.K., July 19, 2007); see also J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008).

⁴⁶ See Jason Eyster, Presentation, *Attorney as Artist: Challenging Lawyers' Assumptions About the Primacy of Action in Telling the Client's Story* (London, U.K., July 19, 2007); Mark Osbeck, Presentation, *Use of Storytelling in the Presentation of Damage Theories* (London, U.K., July 20, 2007); Elyse Pepper, Presentation, *Legal Storytelling Through Film: Finding the "Statement of Facts" in Dogville* (London, U.K., July 19, 2007); Jean Rosenbluth, Presentation, *The Persuasive Power of Reverse-Image Storytelling* (London, U.K., July 20, 2007); see also James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 Leg. Writing 87 (2008); Elyse Pepper, *The Case for "Thinking Like a Filmmaker": Using Lars von Trier's Dogville as a Model for Writing a Statement of Facts*, 14 Leg. Writing 171 (2008).

⁴⁷ See Eileen A. Scallen, Presentation, *The Art of Storytelling in Wellman's The Art of Cross-Examination* (London, U.K., July 20, 2007).

⁴⁸ See Kenneth D. Chestek, Presentation, *The Plot Thickens: The Appellate Brief as Story* (London, U.K., July 20, 2007); see also Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008).

⁴⁹ See Michael R. Smith, Presentation, *Stock Stories and the Power of the Parenthetical: Exploring the Cognitive Dimensions of Illustrative Parentheticals in Legal Writing* (London, U.K., July 20, 2007).

⁵⁰ See Rachel Croskery-Roberts & Grace Tonner, Presentation, *Telling Stories to a Jury: Using Our Understanding of Jury Decision-Making to Enhance the Ability to Persuade at the Moments When Arguments Are More Memorable* (London, U.K., July 19, 2007).

⁵¹ See James R. Holbrook, Presentation, *Transforming Conflict Narrative into Dialogue in Performative Negotiation* (London, U.K., July 20, 2007).

the “outsider” papers discussed above and these, such as the presentations about children,⁵² criminal defendants⁵³ and immigrants.⁵⁴ These presentations, at least when considered in the category of “improving lawyering,” seem the least political in that they are about technique, which would be available to either side of a dispute on either end of the political spectrum.⁵⁵

3. *Improving Legal Pedagogy*

Another topic was improving legal education—by teaching students how to tell stories, and by using storytelling in teaching. In a way, all of the papers can be interpreted as making this claim in one way or another, explicitly or implicitly. But some stand out more than others in this sense. There were presentations on using storytelling in teaching casebook courses⁵⁶—including three on using *Harry Potter* in particular;⁵⁷ using storytelling in teaching clinical courses;⁵⁸ using storytelling to teach ethics;⁵⁹ using judicial humor (and attempts at humor) in opinions to teach storytelling;⁶⁰ and using storytelling to teach international students.⁶¹

⁵² See Kelly, *supra* n. 21.

⁵³ See Heller, *Presentation*, *supra* n. 22.

⁵⁴ See Caplow, *supra* n. 23.

⁵⁵ See Foley & Robbins, *supra* n. 10, at 473–475, 483 (providing examples of storytelling technique for corporate clients and criminal defendants); see also Anthony Kronman, *Leontius’ Tale*, in *Law’s Stories: Narrative and Rhetoric in the Law* 54, 54 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996) (“Some stories have good effects and others bad ones. Some stories strengthen good practices and good institutions, and others do the opposite. Moreover, stories do not contain within themselves the criteria for distinguishing the good ones from the bad.”).

⁵⁶ See Paula Abrams, *Presentation*, *The Constitutional Case Unbound—The Importance of Narrative in Teaching Constitutional Law* (London, U.K. July 19, 2007); Michael Blissenden, *Presentation*, *Storytelling in an Australian Tax Law Degree: The Experience in the Field of Taxation Law* (London, U.K., July 19, 2007).

⁵⁷ See Heidi Mandanis Schooner, *Presentation*, *The Fantasy of Money and Banking* (London, U.K., July 20, 2007); Eric Gouvin, *Presentation*, *Telling Business Stories* (London, U.K., July 20, 2007); Laura Spitz, *Presentation*, *Wands Away: Preaching to Infidels Who Wear Earplugs* (London, U.K., July 20, 2007).

⁵⁸ See Kelly, *supra* n. 21; Laurie Shanks, *Presentation*, *Using Students’ Stories in the Clinical Setting* (London, U.K., July 20, 2007); Jo Tyler & Faith Mullen, *Presentation*, *Work Stories, Stories Work: Storytelling for Meaning Making and Pedagogical Improvement in Clinical Education* (London, U.K., July 20, 2007).

⁵⁹ See Julie A. Oseid, *Presentation*, *It Happened To Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics* (London, U.K., July 20, 2007); see also Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 *Ariz. St. L.J.* 961 (2006); Anna P. Hemingway, *Presentation*, *The Ethical Obligations of Lawyers, Law Professors, and Law Students Telling Stories on Blogs* (London, U.K., July 20, 2007).

⁶⁰ David Thomson, *Presentation*, *The Use of Humor in Judicial Opinions: How It Can Advance the Narrative and Help You Teach Storytelling* (London, U.K., July 19, 2007).

⁶¹ See Katerina Lewinbuck, *Presentation*, *Using Storytelling in Teaching Legal Skills to International Students* (London, U.K., July 20, 2007).

These presentations could be seen as saying to students and lawyers, “What you may have learned in your other classes is good, but here are a few more things you need to know.” That sort of statement can place us in the political position of critics, gadflies, reformers. What makes these papers political is not their content so much as their context: skills professors on the whole have less power within the legal academy than the casebook professors they criticize for using traditional teaching techniques. I will address this idea more fully in Part III, when I talk about the political struggles that result from Factual Realism’s entry into the legal academy.

4. *Disparate Treatment: Australian Aboriginal Sentencing Courts*

An intriguing presentation was given by the participants in an Australian sentencing court for Aboriginals.⁶² These courts are a recent phenomenon in Australia. They are designed to give Aboriginal defendants, tribal Elders, family members, police, victims, and other stakeholders a voice in the sentencing process.⁶³ The defendant can tell his story. Elders can advise the Magistrate about cultural matters. Various options besides traditional punishment are explored.⁶⁴ In short, the special sentencing court endeavors to tailor problem-solving punishments that take into account the perpetrator, victim, crime, and broader community interests.⁶⁵ For example, if drugs were the root cause of the offense, drug treatment would be part of the sentence. If the offense reflected past transgressions or character traits of the offender that the court was not aware of but that Elders and family are, the court is able to take those into account in determining how to treat the offender. As the abstract of one presenter explained, “Historically defendant’s stories have been told through a combination of state prosecutors and legal counsel producing a tidy dialogue which is carefully scripted and recognisable to those insiders in control of the process. Such storytelling often serves to exclude the

⁶² See Kate Auty et al., *supra* n. 27.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Dept. of Just. & Atty. Gen., *Queensland Government, Queensland’s Courts System: The Murri Court*, Fact Sheet C11 (May 2006) (available at <http://www.courts.qld.gov.au/Factsheets/M-FS-MurriCrt.pdf>) (discussing one of these sentencing courts and stating that punishments may be “tailored to the issues relating to the offending behaviour in the best interests of the community”).

defendant, his or her cultural norms and forms and it is sanitised.”⁶⁶

Such individual tailoring of sentences—and with an eye cast directly upon all purposes of punishment except retribution⁶⁷—seems promising as a means of crime control. The offender himself is probably less likely to offend again. What is learned from him can be brought back to the community and used to make changes that could prevent future transgressions by similarly situated people. Indeed, the number of Aboriginals sent to prison has declined under the program.⁶⁸ As for retribution, it may be that the victims and the community coming to understand the reasons for the crime—the unmet needs, unresolved anger, and shame from repression, for example—temper the feelings for revenge that inform the putative need for retribution. Such sentencing seems more effective than the mandatory minimum, three-strikes-and-you’re-out sentencing that is emblematic of United States criminal punishment. Much American sentencing is “story-less”: the offender’s story will likely never be uttered in court, or will fall on deaf ears—he did the crime, he will do the time, no matter what.⁶⁹

These Australian courts appear to reflect the resolution of a political struggle. The stories of outsiders were heard.

B. Presenters and Participants: Point of View

We know from storytelling that character and point of view matter and cannot be overlooked here. Participants at the conference shared several traits.

1. Skills Teachers

Many Conference participants were legal skills teachers (clinical and legal methods). Skills teachers sometimes find themselves at odds with “casebook” faculty. The gist of the critique from skill professors is that casebook faculty need to do more skills training

⁶⁶ Auty et al., *supra* n. 27 (specifically, the abstract for Sarah Gebert’s portion of the presentation).

⁶⁷ Though retribution might be accomplished if the court, victim, police, prosecutor, and others become convinced that the offender suffers from remorse or shame; this suffering could be argued to be productive suffering, a corrective suffering that spurs the offender onward toward a law-abiding, productive life.

⁶⁸ Auty et al., *supra* n. 27 (specifically, the abstract for Daniel Briggs’s portion of the presentation).

⁶⁹ See e.g. *Ewing v. Cal.*, 583 U.S. 11 (2003) (upholding California’s three-strikes, twenty-five-years-to-life imprisonment law for man with long criminal history who was convicted of for stealing three golf clubs worth \$399 each).

(including storytelling). There is good support for this critique in the famous 1992 MacCrate Report⁷⁰ and, more recently, the Carnegie Foundation for the Advancement of Teaching's report.⁷¹ This focus on skills versus doctrine, doing over knowing (I admit to oversimplification *arguendo*) can place skills professors in the role of outsiders—and critics—in the academy. That is a political position. At its extreme, this can be seen as a war over the hearts and minds of law students, waged between casebook and skills professors, though, happily, the Carnegie Report and probably most skill professors propose more of a mixture of traditional and newer pedagogies, not razing the Ivory Tower. Notably, this battle for balance between doctrine and skills is not new. According to the Carnegie Report, Judge Jerome Frank, a prominent legal realist,

famously advocated a clinical “lawyer-school,” rather than a “law school” that would focus on preparation for practice as an alternative to the exclusive emphasis on the case method invented by [Christopher Columbus] Langdell. A variety of experiments with different models of such curricula—models involving clinical teaching and close student-faculty interaction—marked the interwar years in a number of leading law schools.⁷²

But for the most part, “legal education struggled to escape the ‘trade school’ stigma.”⁷³

In addition there is often the lower salary, less job security, and lower status that distinguish skills professors from casebook faculty.⁷⁴ These distinctions can end up politicizing skills professors, with lasting effects. I attribute many of my political views to having spent six years in the “pink ghetto” of legal writing. Those years were enlightening to say the least; this was the first time I had been discriminated against, treated as a member of a subordinate class. A friend teaching legal writing as part of a prestigious law school's program recently confided in me that as a result of his experiences, he now shares my political leanings.

There were several casebook professors at the conference, but it is fair to say that they were somewhat untraditional. Some, in-

⁷⁰ ABA Sec. Leg. Educ. & Admis. to the B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992).

⁷¹ William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

⁷² *Id.* at 91 (citation omitted).

⁷³ *Id.* at 93.

⁷⁴ Status in the legal academy was recently addressed in a law review symposium. See *Symposium: Dismantling Hierarchies in Legal Education*, 73 UMKC L. Rev. 231 (2004).

cluding me, teach or have taught skills.⁷⁵ Others have transcended traditional teaching and scholarship. For example, Garret Epps teaches a law school course in fiction writing. Marilyn Berger creates documentaries as scholarship and teaching tools. Mimi Wesson practices what could be called legal archeology. Epps and Wesson have published novels.

2. *Clinicians: Applied Outsider Jurisprudence?*

Many participants hailed from legal clinics, where much of law school skills training occurs (though only for a relatively small number of students). Almost by definition, clinics are political, inside and outside the academy. Clinics focus on skills, and they generally serve people who otherwise could not retain counsel to resolve their disputes: the poor and the marginalized. (Case in point: There are no clinics set up to help IBM or Pepsi or General Electric.) There are different types of clinical professors. Some see themselves primarily as teachers, with the client base of the clinic being of secondary importance, while others see themselves primarily as practitioners of the particular area of law, teaching students to practice in that area, and to further the policies and ideals of that area of law, with imparting general lawyering skills a matter of secondary importance. (The same of course can be said for casebook professors: for example, am I more interested in Criminal Law, Criminal Procedure, and Evidence, or in teaching law?) Either way, the clinician is to some extent an outsider in the academy and even in the larger lawyer population. Most lawyers do not serve such clients fulltime—even if the spirit is willing, the profits are too weak. It is also more likely that such outsiders will use stories as a way of teaching courts and colleagues about themselves.

There is of course a cart-horse question. Many law students take their particular initial career paths because of deeply held values, beliefs, and politics. Nevertheless, the fact is that skills in law schools are mostly taught through representing the poor and oppressed, supervised by people who often have lived lives committed to serving their particular clientele.⁷⁶

The inherent nature of clinics leads to cultural differences among clinicians and casebook faculty. Oversimplifying *arguendo*,

⁷⁵ Since I last taught Legal Methods in 2003, I have taught Business Organizations I and II, Civil Procedure I and II, Criminal Law, Criminal Procedure I and II, Evidence, Federal Courts, and Property II.

⁷⁶ I am sure there are clinicians who are on the right-hand side of the political spectrum.

the lawyers opposing the clinician in the clinic's cases are often lawyers for government or business—the powerful. Many casebook law professors are drawn from that milieu: the traditional law professor career path is top student from top law school; federal appellate clerkship; “high-powered” job such as a prestigious (albeit often lower level) federal government position or as an associate at a major corporate law firm.⁷⁷ Clinical professors may come from such backgrounds and often do. But on the whole their career paths are broader, more varied.

Another difference is that clinical law professors generally have spent more time in actual practice than casebook professors, and clinicians still practice. They have fresh war stories, which help their teaching and also help them find meaning in what they do. Many casebook professors have not practiced in several years. Another difference is that clinical professors play supervisory roles where they strategize and make final decisions in real time and real life. Many if not most casebook professors practiced in subordinate positions where they did not make strategy decisions or interact with clients. Yet the message the academy sends is that what clinicians do is less important, or perhaps less pure.⁷⁸ Clinicians are in the minority on faculties, and they are often marginalized, given less-private offices, limited or no voting rights, limited or no tenure. (They are often treated better than legal methods professors, however.)

3. *Outsiders in General?*

Last but not least, some participants are outsiders in general. Those of us who are may be attracted in whole or part to ALS for the aspects of it that are political, or as a tool of persuasion in political discourse. Some are political activists, if only part-time, and some of these and others write political commentary. At least one participant has run for Congress on a third-party ticket. Some people might be attracted to ALS simply because it is different and innovative.⁷⁹

⁷⁷ Sullivan et al., *supra* n. 71, at 89.

⁷⁸ Less pure law. Below I discuss the fact-law distinction as a pecking order phenomenon.

⁷⁹ Which can make one an academic outsider, perhaps. See Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971, 977 (1991) (“Not every law school numbers among its faculty either scholars who use or scholars who read narratives, so there may be no one present who can explain the objects or innovations of the form. Even those who can offer such explanations may find it difficult to do so ab initio, because of the time pressures and the contentiousness that often surface in this context. Here, as in other areas of academic life, the absence of full public discussion of innovation tends to favor those forms of scholar-

4. *Conclusion: The Dangers of Politics*

ALS could end up identified as a political movement, or at least aligned with left-wing politics, when it is not inherently political or left wing. That identity could limit its growth, which would limit law school pedagogy.⁸⁰ But until skills are taught more widely in law schools, the ALS flag will be carried largely by skills professors, and some of the work in ALS will undoubtedly acquire a political character. It therefore will be important for those of us who believe in the value of teaching storytelling to law students, and using storytelling in our teaching, to articulate that storytelling is a tool that can be used by anybody.

The next Part examines how ALS may be explained not by political motivations but as a natural result of the recent increase in skills teaching in law schools, an advance that has taken the academy and the students across the Great Fact-Law Divide.

III. CROSSING THE GREAT FACT-LAW DIVIDE: FACTUAL REALISM

In this Part, I argue that ALS results not from the political leanings of many of its proponents, but from an increase in skills teaching in law schools. This focus takes professors out of the world of “pure” law, the appellate opinions that have long been the fare of casebook courses, and deep into the world of fact—investigation, negotiation, and trial. Traditionally, students did not cross the fact-law divide until after graduation.⁸¹ Skills professors, especially clinics, do not give students the facts of a case neatly packaged as “The Facts,” but must teach the students how

ship that are already established, with palpable consequences for the professional lives of innovators.”).

⁸⁰ Melinda Butler urged this in her portion of the presentation.

⁸¹ At least students who did not take clinical courses or work in law firms. As for legal methods courses, many students gave those short-shrift. For example, many legal methods programs were taught by adjuncts or third-year students and were ungraded. Students often lacked incentive to delve into them. As for working in law firms, students do not necessarily work with facts. I remember how as a summer associate I wrote legal memoranda about legal issues. A supervising partner would give me “the facts” for my short fact section. Indeed, more than one partner would not even give me the name of the client or other parties and witnesses. I remember writing a legal memo about a bankruptcy issue regarding “ABC” and “DEF” Corporations, and a termination of parental rights case where the names of the people involved were kept from me. I had a sense that I was not only not trusted with the facts, but that I was not trusted to *work with* the facts. See Foley & Robbins, *supra* n. 10, at 462 (discussing how law firm partners do not entrust to associates writing fact sections of appellate brief, citing and quoting Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 156 (Rev. 1st ed., Natl. Inst. Tr. Advoc. 1996)).

to go out and get them. One way to understand, manage, and present facts is through storytelling.

A. Teaching Facts

One specific idea that many skills professors share is that students need to be taught that lawyering is often more about the facts than it is about the law. What I would call skills professors' higher attention to the facts of cases makes them more sensitive to the need to focus on facts in the overall task of lawyering. A clinic, for example, has client intake, interviewing, and counseling. Throughout skills teaching persists an awareness that students need to be taught, that, as Richard Neumann points out, "[f]acts have subtleties that can entangle you if you are not careful. Beginners tend to have difficulties with four fact skills: (1) separating facts from other things; (2) separating determinative facts from other kinds of facts; (3) building inferences from facts; and (4) purging analysis of hidden and unsupportable factual assumptions."⁸² This focus on gathering facts for the judge or jury to accept, or not, for the legal reasoning that the court will later undertake focuses us necessarily on storytelling, which is a way of controlling and presenting the facts in a case. That is because in recent years there has been increasing support for the idea that juries decide cases based on the "Story Model" as opposed to logical, probabilistic models of decision-making.⁸³ According to Nancy Pennington and Reid Hastie, who have pioneered this work, jurors, when hearing the facts, are constructing a story from them, using the evidence and their own background knowledge; they ultimately must choose between competing stories and pick the one that makes most sense as representing what happened.⁸⁴ So not only must skills professors be able to tell stories, but they must also be able to teach students and lawyers how to tell them, how to

⁸² Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 207 (5th ed., Aspen Publishers 2005); see also Serenda Stier, *Reframing Legal Skills: Relational Lawyering*, 42 J. Leg. Educ. 303, 317 (1992) (noting that attorney fact finding takes specific skills that must be taught, in reviewing Robert Bastress & Joseph Harbaugh, *Interviewing, Counseling and Negotiating: Skills for Effective Representation* (Little, Brown & Co. 1990), and David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (2d ed., West 2004)).

⁸³ John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069, 1087 (2006); Samuel H. Solomon, *How Jurors Make Decisions* (Am. L. Inst.-ABA CLE, Jan. 19-21, 2005) (available at SK042 ALI-ABA 963) ("Seminal research concludes . . . that a 'story model' emerges so 'that jurors [will] impose a narrative story organization on trial information.'").

⁸⁴ See generally Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991).

recognize them, how to find within them the hidden assumptions, and how to identify those aspects that can be exploited by an advocate.

In legal methods classes and clinics, teaching students how to *construct* a legal argument in a particular situation necessarily includes more attention to the facts than is necessary in casebook classes, where the focus is on reading appellate opinions. In the appellate opinions students read for casebook classes, the facts are already provided, served up painlessly and authoritatively as having been “found” by the jury. Indeed, the facts sections of opinions in many casebooks are often horribly truncated or even outright eliminated.⁸⁵ The material used by the fact-finder is not included. Students never see how the premises for this legal argument were actually *created*, that is, how the facts in the opinion were “found.” Students (and indeed their professors) reading the opinion never see directly the influences from advocates and parties, and the other, external influences of the sorts discussed above (politics, religion, social class, etc.). Indeed, this coloring may have influenced the jury or judge in ways these decision makers do not understand themselves.⁸⁶ But casebook courses are silent as to these matters. As William Twining wrote, “rarely is fact finding as such directly studied in a systematic, comprehensive, and rigorous manner.”⁸⁷ How juries actually find facts is not even taught in most Evidence courses;⁸⁸ if students glimpse this process at all,

⁸⁵ In law school I remember how revelatory it was in my first semester one day to go to the library and pull a case and read its facts—in one instance it made a case from our casebook that a professor had called “very complicated, very complex” seem fairly straightforward. The complication resulted from the fact that many facts were excised.

⁸⁶ Books and articles on judicial opinion writing give limited guidance on how judges find facts. See e.g. Ruggero J. Aldisert, *Opinion Writing* 54–60, 154–160 (West Publ. 1990); Joyce J. George, *Judicial Opinion Writing Handbook* 221–230 (5th ed., W.S. Hein & Co. 2007); Eileen Kavanaugh, *Robert Traver as Justice Voelker—The Novelist as Judge*, 10 *Scribes J. Leg. Writing* 91 (2005–2006); George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 *Ark. L. Rev.* 197, 204, 210 (1967); George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 *Vand. L. Rev.* 1203, 1204–1205 (1973); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 *Me. L. Rev.* 47, 56–58 (2002); Daniel E. Wathen, *When the Court Speaks: Effective Communication as a Part of Judging*, 57 *Me. L. Rev.* 449, 453 (2005) (trial court judge in writing opinion should focus more on factual findings than on legal reasoning).

⁸⁷ William Twining, *Taking Facts Seriously*, 34 *J. Leg. Educ.* 22, 40 (1984) [hereinafter *Seriously*]; see also William Twining, *Taking Facts Seriously—Again*, 55 *J. Leg. Educ.* 360 (2005) [hereinafter *Seriously Again*] (lamenting that the earlier article had not brought about the reforms it proposed).

⁸⁸ As Scott Howe wrote,

The typical evidence course teaches little about the overall process [of fact-finding]. Its narrow focus suggests that facts essentially leap from testimony and exhibits. The misleading message of the typical evidence class also frequently goes uncorrected by other courses. A few students may gain a sense of the complicated nature of fact finding through clinical or simulation classes.

they learn it in clinics. As a result of this failure of pedagogy, students are not able to gain what Walter Otto Weyrauch calls “fact consciousness.”⁸⁹ The unrealistic view obtains that facts are set and immutable (as the judge cannot alter the findings on appeal⁹⁰). Although the indeterminacy of *law* is amply discussed,⁹¹ the indeterminacy of *fact* does not enter the classroom. A law student can easily end up believing that in most mundane cases, the law is indeterminate and the facts are not, when it is of course the other way around.

Of course in casebook classes, professors change the facts to create the hypotheticals that make up so much of traditional teaching. That reveals to students how different facts can change an outcome, which is probably not much of a revelation beyond the first semester of the first year. In any event, merely changing the facts does not capture the construction of the facts that the trial lawyer and jury participate in. There are, of course, approaches that are notable exceptions, such as casebooks that adopt a “case study method” as opposed to “case method,”⁹² which broadens the source material and requires some imaginative interpretation of fact by students, but these exceptions prove the rule.⁹³

However, these courses typically have small enrollments, and in any event, usually cannot focus heavily on the analytical and psychological dimensions of proof. Law schools have sometimes instituted classes focusing on the theoretical analysis of the proof process. The most notable, perhaps, was Wigmore’s course at Northwestern, which was based on his relatively unheralded book on judicial proof. These scattered attempts have not spread widely. The result is that law schools have largely avoided systematically engaging law students in rigorous analysis of the process of proof.

Scott W. Howe, *Untangling Competing Conceptions of “Evidence”*, 30 Loy. L.A. L. Rev. 1199, 1230–1231 (1997). There is a small movement among Evidence scholars, based on Wigmore’s “unheralded” book and course, known as EFP—Evidence, Facts, and Proof. Although I teach Evidence, I learned of EFP in the course of writing this Article. I will discuss it *infra*.

⁸⁹ Walter Otto Weyrauch, *Fact Consciousness*, 46 J. Leg. Educ. 243 (1996) (arguing that as a result of this teaching, law students end up needing to be taught “Fact Consciousness,” a way of observing what is going on around them and, when practicing law, what is going on in their cases, in a manner similar to cultural anthropologists).

⁹⁰ Aldisert, *supra* n. 86, at 54.

⁹¹ Regarding indeterminacy, see Brian Leiter, *supra* n. 5; Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987).

⁹² See e.g. Paul. H. Robinson, *Criminal Law: Case Studies & Controversies* (West Group 2005).

⁹³ I choose casebooks that give students a chance to work with facts. For example, in Criminal Law I use the Robinson book cited above; in Criminal Procedure I use Andrew E. Taslitz et al., *Constitutional Criminal Procedure* (3d ed., Found. Press 2007); in Evidence I use George Fisher, *Evidence* (Found. Press 2002). These books avoid the spectator sport approach found in most casebooks.

B. Factual Indeterminacy and the Jury

The fact-finder's role is arguably the most important, albeit overlooked, event in many lawsuits that travel up to the appellate courts, given that the factual record the jury constructs with its findings and inferred findings has an enormous influence on the appellate judge in making law. The jury's "finding" the facts is ultimately an effort to overcome indeterminacy. Finding facts means choosing among competing, opposite facts—and a multiplicity of competing inferences, some spoken, others not. Jurors must apply "common sense," psychology, logic, their own experience, and they are instructed to try to block out biases and prejudices.⁹⁴ Jurors presumably encounter the "beginner's problems" Richard Neumann describes.⁹⁵ The difficulty is accentuated in that there is no formalized, professional training in how to do it, in contrast to judge's training for overcoming legal indeterminacy. It is also unclear whether the jury ever overcomes the factual indeterminacy; it may be that what comes out of the black box of the jury is as much, or more, *opinion* than fact. Anyway, how can that ever be tested, given that courts are allowed to make only extremely limited review of the jury's factual determinations on reconsideration after trial or on appeal?

Juries may encounter indeterminacy even in a legally "clear" case, because the indeterminacy may come from the indeterminacy of facts or moral, ethical, religious, traditional, or political indeterminacy.⁹⁶ An example of this would be a clear-cut case where the jury nevertheless refuses to apply the law, nullifying the case ("jury nullification"). Or a clear, unambiguous law concerning abortion rights. Jury members might bring as many external influences to bear on their decision as they would in participating in a dinner table discussion about the topic—influences such as biases based on gender, religion, class, or race that judges are on the whole loath to entertain consciously.⁹⁷

⁹⁴ See e.g. N.Y. Mod. Civ. Jury Charge 1.12P (2007) ("No Prejudice, Passion, Bias or Sympathy") (available at <http://www.judiciary.state.nj.us/civil/civindx.htm>); see also Fed. R. Evid. 403, advisory comm. nn. (rule designed to exclude evidence that would, inter alia, "induc[e] decision on a purely emotional basis").

⁹⁵ See *supra* n. 82 and accompanying text (Neumann discussing beginner's problems).

⁹⁶ See Croskery-Roberts & Tonner, *supra* n. 50.

⁹⁷ See Josephine Ross, "He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt, 65 U. Pitt. L. Rev. 227, 231–233, 263–264 (2004) (Jurors use "short-cuts" such as social class, job history, marital status, and racial stereotypes in absence of specific evidence as to criminal defendant's character.).

C. Factual Realism

I suggest that recognizing the condition that judging and especially “jurying” are subject to the vagaries of fact, which includes intellectual and emotional responses to the facts as well as overall political leanings and ideologies, be called “Factual Realism.” Going further, indeterminacy of fact encompasses *opinions* as well—opinions about particular laws and law itself, testimony, documents, parties, witnesses, the judge, other jurors, etc. All of these opinions may arise from the law or facts themselves, or from other, external sources, such as moods, ideologies, religions, cultural influences, television, advertising, art, professional training, etc.⁹⁸ These externalities, these inputs, are hard to control.

Instead of ignoring this indeterminacy, or railing against it as an unfortunate condition, we who are involved in ALS decide *to train lawyers to address it*. We reflect on how the decision makers came to the decisions we are now stuck with in cases we have argued, or helped argue, or studied, or trained and supervised students to argue. Or, more importantly, we must prospectively figure out the various ways in which the decision maker *might* decide, when given the case, and then try to influence the decision. In the world of ALS and of skills professors and most of the practicing bar, the jury is the star, the focal point, not the appellate judge. That’s because only a small percentage of all disputes ever reach appellate courts.⁹⁹ Another related distinction is that ALS is about winning cases, whereas many of the ideas in the academy, including Legal Realism, focus on how law is made.

We also are not privy to the jury’s deliberations, in our cases or really in any others, so it is hard to assemble a working model of how juries actually go about deciding.¹⁰⁰ Questionnaires given out to juries after trials that attempt to capture the decision-making process may suffer from post hoc rationalization as well as jurors’ own inability to understand and articulate how they arrived at, personally and as a group, what may in fact have been an emotional decision. Similarly, we are not necessarily privy to the appellate judge’s thinking. The opinion that the judge writes, if any,

⁹⁸ See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. Cal. L. Rev. 659 (2002).

⁹⁹ For that matter, only a small percentage of cases ever reaches a jury, given that most are resolved through settlement or plea bargain. See *infra* sec. IV(B).

¹⁰⁰ Fed. R. Evid. 606(b) (“[i]nquiry into validity of verdict or indictment”). There is a significant amount of scholarship and studies on jury decision-making. The National Center for State Courts has compiled a list. See NCSC, *Jury Decision Making Resource Guide*, <http://www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=JurDec> (last modified May 15, 2008).

to justify her decision might in some cases be taken with a grain of salt as quite literally self-justifying and perhaps even self-serving or self-deluding—or even simply disingenuous. It characteristically does not describe the drama that might have taken place among the judges on the panel, or even among their squads of law clerks. Indeed many lawyers have probably experienced that sense in cases they have tried—especially in ones they have lost, which goes to show how, after a full airing of the facts and law, people may still disagree over them!

D. Factual Realism and Storytelling

Storytelling is a way of controlling, or at least taming, factual indeterminacy. The main focus in ALS is in helping shape the jury's construction of "the facts" of the case, that is, how to convince the jury to see the facts in a particular way: our and our clients' way, which often requires creating a story. ALS recognizes that the story is a powerful tool of persuasion, a powerful way to *achieve control over and to present facts* (and opinions and other external influences). Indeed, stories can take advantage of these externalities such as by invoking stock stories¹⁰¹ and tapping into myths¹⁰² and stereotypes.¹⁰³ Storytelling can give a skilled advocate some control over the determination of facts and hence of the outcome of a case: If an advocate can organize a client's facts into a compelling story, then she just might have a chance. The jury gains a cognitive frame for looking at the conflict before them.¹⁰⁴

This, of course, is nothing new. Legal storytelling (and law itself) fits well within the broader framework of persuasion and the study of rhetoric.¹⁰⁵ Michael Smith reminds us that the ancient rhetoricians unpacked persuasion into the concepts of logos, pathos, and ethos.¹⁰⁶ Logos "refers to the process of persuading through substance and logical argument," including legal argu-

¹⁰¹ See Smith, *supra* n. 49.

¹⁰² See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006).

¹⁰³ Prosecutors often take advantage of stereotypes, especially given that it is difficult for criminal defendants to have good character evidence admitted. See Ross, *supra* n. 97, at 263–264. Of course, this is an example of the use of storytelling by the powerful.

¹⁰⁴ See generally Pennington & Hastie, *supra* n. 84.

¹⁰⁵ Duong, *supra* n. 2, at 2–3 (noting that these fields share in common the study of rhetoric).

¹⁰⁶ Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 22–23 (Aspen L. & Bus. 2002).

ments based on precedent, statutes, and policy.¹⁰⁷ Pathos “refers to persuasion through emotional argument, which classical rhetoricians recognize as being coequal with logical arguments using logos.”¹⁰⁸ And “[e]thos . . . refers to establishing and maintaining credibility in the eyes of the audience,”¹⁰⁹ by showing “intelligence, character, and good will.”¹¹⁰ Pathos and ethos can be achieved by storytelling; ethos, of course, may temper the appeal to pathos (and, again, the tension between logos, ethos, and pathos offers an avenue for teaching values).¹¹¹ Roughly stated, casebook classes and appellate judges focus on logos, whereas clinics—and actual law practice—focus on all three aspects of persuasion. This is not to downplay the importance of teaching “legal logos”; after all, that is what sets legal argument apart from other forms of argument. The knowledge and training in legal logos is what makes law a distinct profession, what makes law school training unique, but law school has to be about more than logos—much to the chagrin of some casebook professors, perhaps—as long as lawyering is about persuasion, and, more to the point, as long as lawyering often concerns persuading jurors, who are usually not lawyers or otherwise legally trained.

*E. Factual Realism, ALS, and Academic Politics:
The Fact-Law Distinction*

Factual Realism—though not identified as such until this Article—has entered the academy, and skills professors are leading the way in teaching students to address it. Expanding legal pedagogy in this way is long overdue, given that most law school graduates go on to become practicing lawyers at the trial level rather than at the appellate level, or in transactional work¹¹² and counseling; few become law professors or judges.¹¹³ What skills professors do is more “relevant” to what lawyers do, and therefore teaching skills is something that law schools should do a lot more of.¹¹⁴

¹⁰⁷ *Id.* at 22.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 103 (emphasis omitted).

¹¹¹ Something that Judge Ruggero Aldisert stresses, using different terms. See Aldisert, *supra* n. 81, at 167–169, 172–173.

¹¹² For an engaging article describing a simulation-based corporate transactional course, see Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. Leg. Educ. 498 (1995).

¹¹³ See Sullivan et al., *supra* n. 71, at 89–90.

¹¹⁴ *Id.* at 87 (“[T]he primary focus of future lawyers’ education is legal analysis. Learning to think like a lawyer is, accordingly, the main occupation of students’ first phase in law

This shift from the casebook method as the “signature pedagogy” in law school¹¹⁵ is not painless.¹¹⁶ Traditional legal education makes the casebook professor the brightest star in the law school firmament. The pain, and indeed the academic political struggles stemming from the rise in importance of skills professors, is rooted in a longstanding distinction that pervades law and legal culture more than we may have understood: the fact–law distinction. This distinction represents a pecking order with, of course, law on top. For example, judges deal with law, juries deal with fact. Appellate judges deal with law more purely than trial judges, who are involved in the jury’s fact-finding (such as by guiding it through evidentiary rulings). In the academy, casebook professors teach from appellate opinions, while skills professors teach students how to prepare for trial, conduct trials, and write legal briefs and memoranda. In academic hiring, an appellate clerkship is widely seen as more prestigious than a trial-level clerkship. And, of course, law professors outrank practitioners.¹¹⁷ (And given that law professors often critique judges’ work, many professors likely believe that in this pecking order they outrank judges.) The distinction is ultimately a distinction between elites and commoners. Law, i.e., abstract principles, is highbrow. Fact is concrete, lowbrow.

Skills professors bring into the hallowed halls of law schools the trial in all its mess and uncertainty, in all its impossibility of ever looking inside the black box of the jury—fact. Discussions in skills classrooms and clinics often revolve around methods and strategies for convincing juries, a convincing that often entails deeply studying the facts and investigating to get more facts; it also entails considering making appeals to jurors’ emotions rather than their intellects. Treating common people as decision makers

school. But developing lawyers must at some point learn another set of demanding skills, all the while negotiating the complex transition from the stance of student . . . to that of apprentice practitioner.”).

¹¹⁵ *Id.* at 186.

¹¹⁶ For a report on some of these changes, see Jill Schachner Chanen, *Re-engineering the J.D.: Schools across the Country Are Teaching Less about the Law and More about Lawyering*, 93 ABA J. 42 (July 2007).

¹¹⁷ Some law professors even have noticeable disdain for practicing lawyers. Okamoto, *supra* n. 112, at 498 (noting “disdain” that many legal academics hold for practitioners and stating, “I suppose the obvious reason why law teachers generally care so little about private law practice is that most have had little exposure to it and the few who have tried it have rejected it as a career choice. But I want to ignore that sort of realist analysis and focus instead on the epistemological basis for the split. Law professors shun corporate practice because corporate practice is not a ‘serious subject.’”); Harry H. Wellington, *Challenges to Legal Education: The “Two Cultures” Phenomenon*, 37 J. Leg. Educ. 327, 329 (1987) (observing that many law professors “do not venture outside the ivy-covered walls [and] scorn the practicing lawyer and his work”); see also Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 36 (1992).

surely is not what elite law professors (or appellate lawyers and judges) relish. In their view—which is often correct—such people often simply cannot understand the complex legal issues involved in a case; far more preferable is it to argue to a similarly educated and trained judge.¹¹⁸ Consider how even many lawyers apparently try to keep educated people *off* their juries (and it is probably these same lawyers who call juries “stupid” when juries find against their clients!).

The focus of the skills and clinic teachers accurately captures what practicing law is all about. Skills teaching, including crafting a story from the client’s facts, also raises ethical issues in a lively and immediate way, which further increases its value.¹¹⁹ With increasing emphasis on teaching skills, the indeterminacy of facts now must be addressed by law students and their teachers during law school—it can no longer wait until the first jobs after graduation. The messiness and ugliness—witnesses who lie, corporations that conceal, people’s impaired memories, their hobbled senses of sight and sound, the rampant *uncertainty* that can topple a well-wrought syllogism—make the Ivory Tower look a bit less pure.

These things also make the academy, on a traditional view, impure in another sense: the increased focus on skills training is in response to student demand, the *market*. The majority of law students recognize that they will go on not to become judges, especially appellate judges, or appellate lawyers, or law professors, all of whom have the luxury to deal almost exclusively with issues of law, but practicing lawyers, trafficking in down and dirty fact. This recognition of (caving into?) student demand reveals the economic and marketing forces that act on law schools. The student demand is joined by and informed by demands by the practicing bar, which, because of clients’ cracking down on legal fees, no longer can afford to train beginning lawyers. At the salaries being paid new lawyers by top law firms, the firm cannot bill clients when the new associate merely observes a deposition or client intake interview. Nor can the law firm justify having the new associate handle these matters at the high hourly rate when the associate has never done these tasks before! The client would undoubtedly blanch at having a rookie handling its important matters.

Ultimately, however, law schools *should* be training law students to be lawyers. So the shift toward including more skills

¹¹⁸ See Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 727, 733–734 (1991) (describing how judges and legal scholars have increasingly criticized the “ability of laypersons to serve as competent jurors”).

¹¹⁹ See Sullivan et al., *supra* n. 71, at 136 (discussing calls for more professionalism and ethics teaching in law school).

training will be beneficial, and ultimately, students will be grateful. Discussing well known lawyer-author (legal storyteller?) Scott Turow's reflections on the distinction between his Legal Methods course and casebook classes, the Carnegie Report states,

Yet the pedagogies of Legal Methods were largely divorced from the theoretical-analytical training in [Turow's] doctrinal classes. Turow thought this reflected the valuing of certainty in legal education over the uncertainty and situational ambiguity of law revealed in the practice experience. Law school provided no formal place in which to come to grips with his momentous discovery that legal theory and the practice of law require very different habits of mind and modes of engagement.¹²⁰

Factual realism and legal storytelling bridge the distinction that law schools have created between traditional teaching and skills teaching; they bring together these "very different habits of mind and modes of engagement."¹²¹ As one law student told the Carnegie team, finding the "theory of the case" means "legalizing the [client's] story,' meaning by this that serving the client requires turning the client's narrative of difficulty into a viable strategy for obtaining a legal remedy."¹²² Such deep understanding from a law student seems promising.

Making such understanding the norm rather than the exception, however, will require fighting political battles. So far, the changes I have discussed have been incremental, slow. As the Carnegie Report states, "the strong position of academic law has made it difficult for the concerns of the practicing bar and the public to influence law school education, except around the edges."¹²³ Perhaps if casebook professors come to understand Factual Realism and ALS, and understand that the sorts of strategizing and crafting and legal storytelling that skills professor are training law students to do is not only realistic but decidedly *not* lowbrow (and, indeed, fun and rewarding), political opposition will dissolve. As William Twining has stressed, "fact investigation, fact management, and argumentation about disputed questions of fact in legal contexts (not just in court) are as worthy of attention and as intellectually demanding as issues of interpretation and reasoning about questions of law."¹²⁴

¹²⁰ *Id.* at 107.

¹²¹ *Id.*

¹²² *Id.* at 122–123.

¹²³ *Id.* at 90–91.

¹²⁴ Twining, *Seriously Again*, *supra* n. 87, at 360.

Interesting times lie ahead. Whether this is a curse or a blessing remains to be seen.¹²⁵

IV. IMPLICATIONS FOR FURTHER STUDY

I am sure I have merely scratched some complex surfaces in making my main point, which is that crossing the Great Fact-Law Divide, and Factual Realism, will further change legal education and law itself, and that ALS can be at the forefront of this (r)evolution. I offer the following suggestions and provocations, which I hope will spark further inquiry, discussion, and action.

A. Drawing from the EPF (Evidence, Proof, and Facts) Movement

Criticism of law schools for failing to teach students about facts has a distinguished pedigree, harking back to a course taught by Dean John Henry Wigmore at Northwestern.¹²⁶ A “small” literature about his approach has developed and is known as EPF, “evidence, proof, and facts.”¹²⁷ In EPF courses, students learn to ferret out facts, understand the inferences that can be drawn from them, and figure out the best way to present the case to the jury, including the use of stories.¹²⁸ They learn to construct the arguments that will be presented to judge and jury.¹²⁹ The movement, however, has not caught on widely—this according to one of its major proponents, William Twining.¹³⁰ Jethro Lieberman (drawing on Twining) states that the failure can be attributed to objections inside the academy that “boil down to the claim that law schools have no time to teach ‘soft’ skills or notions rooted in common

¹²⁵ “May you live in interesting times” is seen (perhaps incorrectly) as an ancient Chinese curse. See N. of Boston Lib. Exch., Inc., *NOBLE Reference Files*, “May You Live in Interesting Times”, <http://www.noblenet.org/reference/inter.htm> (accessed Feb. 25, 2008).

¹²⁶ Jethro K. Lieberman, *The Art of the Fact*, 5 Leg. Writing 25, 26 (1999).

¹²⁷ *Id.*

¹²⁸ See *id.* at 33–34.

¹²⁹ See Terence Anderson et al., *Analysis of Evidence*, passim (2d ed., Cambridge U. Press 2005) (using EPF approach); see also Peter W. Murphy, *Teaching Evidence, Proof, and Facts: Providing a Background in Factual Analysis and Case Evaluation*, 51 J. Leg. Educ. 568, 573–574 (2001) (providing syllabus for EPF course). Students are taught to use a rigorous chart format created by John Henry Wigmore. See Anderson et al., *supra* n. 129, at xix, ch. 5 (describing “the chart method” as “the heart of the book for those who want to master the most rigorous method of analysis”).

¹³⁰ Twining, *Seriously Again*, *supra* n. 87, at 360. Twining states that this failure caused him to repeat the argument he had made more than twenty years earlier in his 1980 *Taking Facts Seriously* paper and subsequent reprintings. *Id.* (describing the response to Twining, *Seriously*, *supra* n. 87). Lieberman, writing in 1999, discusses the earlier article. See Lieberman, *supra* n. 126.

sense that have been learned elsewhere.”¹³¹ Lieberman wrote that these objections are meritless:

They miss the distinction between a general skill and a particular practical requirement; they underestimate the difficulty inherent in the problem; they radically assume common sense for much that has not yet been investigated; and they assume without evidence that these things have been taught elsewhere. Moreover, the tables can be turned: After all, isn't rule handling a matter, ultimately, of common sense? Yet we spend most of three years on rules handling, of detecting, understanding, distinguishing, and applying rules. Why should we do less about fact handling?¹³²

The criticisms of the law school curriculum made by EPF are dead-on. Even before discovering EPF while writing this Article,¹³³ I found in my Evidence classes that students need extra instruction and practice in learning how to draw inferences from facts at the beginning of the semester. I have found throughout my teaching career spanning legal methods and casebook classes that students need help in critical reasoning and problem solving. And they need help in learning how to tell stories.¹³⁴

Engaging with EPF can help us see that, having crossed the Great Fact-Law Divide, we need to teach students other ways of reasoning besides storytelling, such as inference-building, psychology, rhetoric, informal logic, creative problem-solving,¹³⁵ probabilistic reasoning, and statistics—in short, all the ways we think and argue about facts. EPF also addresses some of the challenges of storytelling. Anderson, Schum, and Twining call stories “necessary

¹³¹ *Id.* at 34.

¹³² *Id.* at 35.

¹³³ My experience was similar to Lieberman's, who wrote how he came to these conclusions on his own before,

Almost as an afterthought, I decided I should make a brief excursion to the library. I'm old enough now to know that most of what I think I have dreamed up has already been voiced by others. So I suppose I should not have been surprised to discover a literature, albeit a small one, about this very problem. It's nearly a century old. It is even denominated by a set of initials, though I think these are perhaps only a few decades old: EPF, evidence, proof, and facts.

Id. at 26.

¹³⁴ I have managed to tackle storytelling and inferences in my classes and scholarship. I'm still trying to teach critical reasoning and creative problem solving. My course proposals at two different schools have not survived the curriculum committees.

¹³⁵ California Western School of Law has pioneered teaching Creative Problem Solving (CPS) to law students and even offers it as an area of concentration. Courses in the CPS program can be accessed at California Western School of Law, *Center for Creative Problem Solving, Curriculum*, http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/curriculum.asp.

but dangerous,” based on stories’ tendency to facilitate abuse by advocates because of stories’ possible appeal to emotion over intellect.¹³⁶ There is also the danger of what I will call “story indeterminacy,” the idea that the story might be misinterpreted.¹³⁷ Part of what makes a story such a powerful tool of persuasion is that it helps convey the experience to the audience through “narrative transportation”¹³⁸ and lets the audience construct and experience the meaning of the story for itself. But to do so, the storyteller must give up some control over that meaning-making, lest the storyteller turn the story into a mere rhetorical argument. The distrust of stories that is part of EPF seems worth exploring further and can help us sharpen our own thinking.

Engaging with EPF *politically* could prove fruitful, too. My sense is that EPF has not gained traction because it is made up of a small subset of a subset of casebook professors (Evidence professors), and it did not address an immediate curricular need—few students were in clinics, and law firms obliged by teaching skills to graduates.¹³⁹ Now the landscape has changed. EPF might end up gaining more adherents, making it less of a small movement. And ALS can trumpet that it has Wigmore on its side.

B. Thinking outside the Jury Box

Although I have called the jury a focal point of ALS, I speak subject to correction—the breadth of topics presented in London gives me pause here. There should be further work taking into account the fact that something like 90% of cases never go before juries. That means that in resolving disputes, no facts are ever found, at least not formally. How much agreement over them is there? How is agreement arrived at (or not)? Do advocates agree to disagree? Although it can be argued that the settlement discussions and plea bargain negotiations that resolve these disputes take place in the shadow of courts, which means that the parties

¹³⁶ Anderson et al., *supra* n. 129, at 280–281, 285.

¹³⁷ *Id.* at 285.

¹³⁸ Heller, *Presentation*, *supra* n. 22, at 287.

¹³⁹ Twining suggests that his 1980 call for EPF

failed to persuade, perhaps because it fell between audiences: Practitioners quite liked it, but it was about legal education; many academic lawyers perceived it as addressed to specialists in evidence and thus no concern of theirs; some evidence teachers perceived it as a radical and undiplomatic critique of traditional courses on the law of evidence; while others saw it as poor salesmanship for improbable Wigmore charts.

Twining, *Seriously Again*, *supra* n. 87, at 360. Skills professors, whose numbers were few in the early 1980s, might be an excellent audience for EPF.

and their attorneys predict what a jury might conclude, at least one scholar has called this view of plea bargaining “far too simplistic.”¹⁴⁰ Instead, these negotiations have a dynamic all their own, a system more akin to administrative law than to traditional law.¹⁴¹ That may make sense. If so, then how are facts used in these transactions? How are they valued? Is storytelling more or less important in these bargaining systems than at trial? What about facts and storytelling in alternative (to the jury trial) dispute resolution methods such as arbitration, mediation, and negotiations?¹⁴² Do these methods provide a better or worse vehicle for storytelling than jury trials? How do these methods compare to each other in this regard? How do these methods address factual disputes?

This is fertile ground for exploration, and the wide-ranging topics presented in London suggest that ALS is up to the task. Asking these questions and others could lead us to a more general theory of ALS, rather than our coming up with a theory *first*. Perhaps, as Ruth Anne Robbins warned me, it is too soon to define ALS! According to Twining,

The role of narrative in legal discourse and questions about the relations between narrative, reasoning, argumentation, and persuasion are distorted if narrative and stories are only considered in relation to disputed questions of fact in adjudication. Stories and story-telling are also important in investigation, mediation, negotiation, appellate advocacy, sentencing, and predictions of dangerousness, for example. A general theory of narrative in law and legal argumentation needs to encompass all such questions. Some of these topics have been canvassed rather eclectically under the heading of “law and literature,” *but a comprehensive framework has yet to be developed within which all these lines of inquiry can be considered in relation to each other*.¹⁴³

Is ALS this comprehensive framework? We might learn in trying to find out, and we might also find out more ways to apply storytelling and deal with factual indeterminacy.

¹⁴⁰ See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2464–2466 (2004) (noting that the “shadow-of trial model . . . dominates the literature on civil settlements” and “looms large in recent plea-bargaining literature” but is “far too simplistic”).

¹⁴¹ *Id.*

¹⁴² One conference presentation may have jumpstarted this effort. See Holbrook, *supra* n. 51.

¹⁴³ Twining, *Seriously Again*, *supra* n. 87, at 362 (footnotes omitted) (emphasis added).

C. Where Are We Going: The End of Law?

The following is offered as provocation. If facts are indeterminate, or at least capable of different interpretations depending on point of view, character, language choice, and the like (all elements of storytelling), then might not law, which seeks to categorize, to treat like instances alike, and often to brazenly limit inquiry into the facts, at times present an *obstacle* to justice? Let me suggest that there is an argument that eliminating law as we know it could result from Applied Legal Storytelling. Let me suggest the possibility of a Problem-Solving/Storytelling Court.

Imagine, for example, a sentencing court like the Aboriginal Sentencing Court discussed above,¹⁴⁴ but a court whose jurisdiction is not limited to a particular race. Or imagine, as we have in the United States, a “drug court.”¹⁴⁵ Our problem-solving sentencing court would take into account an offender’s story, his unique situation that is created or at least informed by a confluence of individual characteristics, neurochemistry, culture, interpersonal relationships, family, history, abilities, goals, and obstacles. This court would regard criminal behavior not as the product of “evil” that needed to be punished (“justice”), but as a product of *discernible causes* that could be corrected for—in short, behaviors to be modified, *problems to be solved*. Such a concept would brush aside laws that require particular punishments as antiquated, regardless of whether those punishments are likely to “work,” as based on a world view that requires ideas of Good and Evil, a religious-based view that seems to be less and less relevant the more we learn about nature, neurology, psychology, the influence of culture, and the like. The court would be based on an understanding that an offender’s story should be paramount in how the law treats him. This view would replace quaint ideas of meting out justice and putting the devil back in his dungeon. Criminal law might no longer serve as a weapon in the fight between Good and Evil. Retribution could be replaced by understanding and restitution, from the offender and from the government itself. After all, the government should help those in need.¹⁴⁶ Does the basic need for help differ because the cause of harm differed—hurricane, flood, airplane crashing into building, criminal attack? This view is not really all that far off from the view that the government should take

¹⁴⁴ See *supra* sec. II(A)(4).

¹⁴⁵ For a discussion of problem-solving courts, see Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 937–954 (2003).

¹⁴⁶ See generally James Gilligan, *Preventing Violence* (Thames & Hudson 2001) (advocating various measures that would treat violence as a public health problem, not as “evil”).

it unto itself to punish a private actor for harming another private actor, is it?

My tongue may be near my cheek, but the sweeping change I suggest might occur in at least a few courtrooms in the not-too-distant future. For example, the 2005 United States Supreme Court decision in *U.S. v. Booker*¹⁴⁷ recently freed federal judges from the strictures of the Federal Sentencing Guidelines; the guidelines are no longer mandatory but are advisory, and sentences are reviewable for unreasonableness.¹⁴⁸ What is to stop a judge from engaging in creative, reasonable sentencing practices? What is to stop a judge from taking a storytelling/problem-solving approach?

Could this approach go beyond criminal law? Imagine a problem-solving court with “Elders” (by this I mean wise people, regardless of age) who treat disputes as problems to be solved. Perhaps we would jettison the idea of equal justice, of precedent, of sedulously treating similar situations alike, and move toward an idea of treating individuals as individuals—based on their characters, their deeds, their “stories.” Would that not be a sort of true justice, even equal justice in terms of substance, if not in form? Taking into account “storytelling” and its focus on character and the goals and needs of the character could lead us to take such questions seriously, and lead us beyond our current conception of a legal system as well as to seriously ask questions such as “What is law?” “Do we need law?” and “Should we start all over?” For example, if law is simply a way to resolve disputes or solve problems or even achieve justice, if we can do these things more directly, more fundamentally, with a storytelling/problem-solving court, then we can at least sometimes disregard law in the traditional sense. After all, law was created to mediate between ideals of justice and actual disputes. To put it another way, if we can see more clearly without the glasses, then why wear them? To promote (or at least investigate) such ideas would certainly place us in a highly political position of reforming a legal system that is older than the London Inn of Court where we held our conference. But it’s a worthy project that could bear fruit. As Michael Dorf has written in discussing problem-solving courts: “Although the basic structures of American government are virtually unamendable, there remains considerable room for creative thinking about how law can serve the people.”¹⁴⁹ Such thinking can come from ALS.

¹⁴⁷ *U.S. v. Booker*, 543 U.S. 220 (2005).

¹⁴⁸ *Id.* at 245, 261.

¹⁴⁹ See Dorf, *supra* n. 145, at 877 (footnote omitted).

D. Prospective Storytelling as Scholarship

The power of storytelling can be tapped as a *way of thinking* that is particularly suitable for critiquing proposed laws. When contemplating a proposed law (or even an existing one), why not write fictional stories of how people are likely to be affected?¹⁵⁰ This might sound farfetched, but it can be less costly than waiting to see the damage that a policy might do if enacted. It also would engage the skills of lawyers who are interested in storytelling. This pursuit is usually seen as separate from legal scholarship. But the law could benefit from the full use of our imaginations that storytelling requires.

V. CONCLUSION

The increased focus on facts that ALS represents comes in large part from expanding law faculties to include skills professors, as well as providing them the resources (and in some cases, the requirement) to write about their interests, to reflect on the knotty questions of law and pedagogy that keep them up at night or wake them early in the morning. Storytelling has long been recognized as a powerful tool for exerting control over facts (real or fictional), or, more accurately, control over the *indeterminacy* of facts. Casebook professors have long had the comfort of canons of construction, rules about identifying and valuing precedent, legal theory, and the freedom to address policy concerns—and the freedom, in treating law as indeterminate, to *dazzle* with these tools. Perhaps storytelling serves this role for skills professors. Our challenge going forward is to continue to examine the uses and implications of storytelling in courts, in alternative dispute resolution, in negotiations and transactions, and in our classrooms.

Perhaps a greater challenge is for us to consider that storytelling may not be the last word or final answer to the questions raised by the broader challenge of factual indeterminacy. For that reason, I suggest that we see storytelling, and ALS, as a subset of a broader idea, Factual Realism. The time has come for the entire legal academy to address realistically the factual indeterminacy that has always been at the heart of law. Law teaching can no longer always be neat, clean, and fact-free. It must be messy, like law and life itself.

¹⁵⁰ But see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 Ind. L.J. 797 (1998) (criticizing the use of storytelling to support proposed legislation because narrative is essentially not testable in the way statistics and what I would call “harder” facts are).

