The Lost Narrative:

The Connection Between Legal Narrative and Legal Ethics

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Narrative plays a key role in common law legal reasoning and legal practice. When competently inserted into legal argument, narrative is compelling because it appears to be the truth—regardless of what events might have actually occurred. The practice of legal narrative has an unavoidable ethical component, one which should be explored in scholarship and education. However, the ethical dimension of legal narrative is largely unacknowledged in legal education. For example, opinion is divided in some jurisdictions about whether coursework in legal ethics should be required to earn a law degree. The failure to address elements of deception in legal practice leaves students and young lawyers ill equipped to deal with precarious situations, and this severed connection is what I am calling the "lost narrative." The lost narrative contributes significantly to student cynicism and subsequent failure of judgment. First, we must recover the lost narrative. Second, we must incorporate reflection on the ethical dimension of how lawyers communicate by examining the role that narrative plays in legal argument and legal education. If we teach law students narrative skill without any training in related ethical obligations, we do not prepare them optimally for the expectations of the world they will enter upon graduation.

I. Introduction

The phrase "lost narrative" refers to a situation in which events have occurred that some would like to discuss but which cannot, for some reason, be addressed.[1] Political censorship is one cause of a lost narrative, as well as when a story is not directly forbidden but is considered, say, to

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1 The phrase "lost narrative" is generally attributed to Jean-Francois Lyotard, *The Post Modern Condition: A Report on Knowledge* 41 (Geoff Bennington & Brian Massumi trans., U. Minn. Press 1984) and associated with Roger Bromley's *Lost*

be in "poor taste." Some consider it poor taste or impractical to point out to a budding lawyer that he or she must learn to create versions of the truth that further a client's interest. It is generally acknowledged that lawyers are entitled to represent a client's interest as opposed to a larger truth, but there is a danger that students will lose sight of the limits of this entitlement if they do not carefully study the ethical implications of their professional speech. A good first step would be to identify and challenge the problem of the lost narrative. If it is agreed that such a condition exists, then educational opportunities to reflect on the ethical component of legal narrative can be exploited.

I first became aware of the lost narrative when teaching in a first-year legal skills program at the National University of Singapore Law School,[2] a law school in an Asian common law jurisdiction.[3] The course taught basic objective and persuasive writing techniques, and in particular the persuasive skill of presenting a case in the manner most favorable to the client's interests. Students were required to present case facts in a manner that explained a client's behavior and supported the student's legal theory of the case. Students understood what they being asked to do, but many hesitated. They did not feel comfortable refashioning the facts they had been given, primarily because they were making up a story that seemed real. Should they imply that the client had an altruistic motive, when perhaps the client did not? Other students felt that their classmates' hesitation was unnecessary, that this is what lawyers do, and that the matter did not require a whole lot of thought. Observing these students, I was struck by two questions. First, what was it that disturbed the concerned students?[4] Second, did it matter that some students were not at all concerned?

Narratives: Popular Fictions, Politics, and Recent History (Routledge 1988), in which Bromley reviews the ways in which forms of media such as popular fiction shape collective consciousness.

2 The author supervised and taught Legal Analysis, Writing & Research ("LAWR"), a compulsory year-long course in legal skills for first-year students at the National University of Singapore Law School Faculty of Law. For a description of the first semester of LAWR, see Natl. U. Sing., *Legal Analysis, Writing and Research I*, http://law.nus.edu.sg/current/course/courses_desc.asp?MC=LC1006&Sem=1 (last updated Jan. 28, 2010), and for a description of the second semester, see Natl. U. Sing., *Legal Analysis, Writing and Research II*, http://law.nus.edu.sg/current/course/courses_desc.asp?MC=LC1007&Sem=2 (last updated Jan. 28, 2010).

3 This article focuses on the connection between legal narrative and legal ethics, primarily in the context of Asian law schools in the Commonwealth. These jurisdictions have common law legal systems and provide a useful basis for comparison to other jurisdictions with common law legal systems, to which reference will occasionally be made. As used in this article, "Commonwealth" refers to the Commonwealth of Nations, a voluntary association of 54 countries that "support each other and work together towards shared goals in democracy and development." *See* Commonwealth Secretariat, *The Commonwealth*, http://www.thecommonwealth.org/Internal/191086/191247/the_commonwealth/ (last accessed Feb. 26, 2010). Member countries in the Commonwealth of Nations were formerly colonies in the British empire, also referred to as the British Commonwealth. *See id.* at http://www.thecommonwealth.org/Internal/191086/34493/history.

4 Margaret Johns arguably noted a similar phenomenon in 1990 when she wrote, "[a]fter teaching legal writing for several years, I finally grasped what my students were teaching me through their questions: a legal writing course should cover the

To answer these questions, I had to consider the implications of what we were teaching students to do—construct a narrative.[5] Law students in a number of common law jurisdictions are routinely taught narrative skills, here defined as the ability to present a series of facts or events in an interesting and compelling fashion. As lawyers, they will need to understand how to present their clients' perspective on the facts and the law, and narrative figures prominently in this type of persuasive argument.[6]

The students who were not troubled when learning narrative skills felt that the students who hesitated were naïve and simply unaware of the rules of the game. Some legal scholars would agree, so this article considers the distinction between scholarly and practical approaches to the ethics of narrative. There is a disconnect between the two approaches, but this article identifies a common thread in the concern for representations of the "truth." To borrow from Catherine MacKinnon's phraseology, scholars and practitioners alike are fascinated with narrative's peculiar capacity to appropriate reality.[7] This is the key characteristic of narrative which prompts consideration of legal ethics. The article surveys training in narrative skills and legal ethics in several common law systems of legal education in Asia and other jurisdictions, and it suggests some ways in which programs of legal education can uncover the lost narrative.

II. What Is Legal Narrative?

A. Scholar: This is outrageous

In the diverse body of literature that discusses legal narrative, it can be said that there are two main types of texts: materials geared toward professional practice,[8] and books and articles written from an academic

professional responsibility issues that arise in the writing assignments." Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. Leg. Educ. 501, 501 (1990).

5 The definition of narrative, not to mention its place in larger developments in jurisprudence such as the Law and Literature movement, is admittedly "one of the most slippery areas of legal scholarship." Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 Leg. Writing 3, 8 (2008). It is also a highly controversial area. *See* H. Porter Abbott, *The Cambridge Introduction to Narrative* 13–15 (2d ed., Cambridge U. Press 2008). To address the conscious skill creation at work in teaching law students how to present facts persuasively, I am adopting Baron & Epstein's definition of narrative as "a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories," as contrasted with a "story," which is "an account of an event . . . that unfolds over time and whose beginning, middle, and end are intended to resolve . . . the problem set in motion at the start." Jane B. Baron & Julia Epstein, *Is Law Narrative?* 45 Buff. L. Rev. 141, 147 (1997) (cited in Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Legal Ethics 1, 1 n. 4 (2000)).

6 The centrality of storytelling in the practice of law and litigation in particular has been noted by many. *See e.g.* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008).

7 Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in *Law's Stories: Narrative and Rhetoric in the Law* 237 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

8 For instructional purposes, LAWR has utilized Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing* (6th ed., Aspen Publishers 2009), which includes entries on "storytelling" and telling the client's story persuasively at 357–68. There are

perspective. The different texts normally do not intersect, let alone talk to each other,[9] perhaps because of the relative lack of professional practice experience in academic circles,[10] but comparing the concerns reflected in the two areas arguably provides some insight into the connection between narrative and ethics. As most commonly used, the phrase "legal narrative" is primarily a subject of academic enquiry, and in academic discourse it appears to have two main manifestations. Some scholars characterize legal materials such as case reports as "texts," which can be evaluated as one might read a novel.[11] Another group of scholars have inserted the use of narrative into scholarship, either by incorporating the author's own true story or experience[12] or that of another when interacting with a law, or by creating fictional accounts of people's experiences with a law.[13]

This second use of narrative in the primarily analytical world of legal scholarship has created a considerable schism. According to Benjamin Apt, a proponent of narrative, legal narratives typically concern legal injustices, and they are important because they offer an alternative to the generally accepted form of legal history.[14] Legal narratives are significant because they take the reader to an experience where the law is familiar but the impact is not.[15] Binny Miller asserts that "[s]tories are better than traditional methods of legal analysis for understanding legal issues in context," that "stories demonstrate that standards that seem neutral in the abstract are rarely so in practice," and that "[s]tories are lively and engaging in ways that doctrine often is not."[16]

However, the use of narrative in legal scholarship has been criticized, in particular by Daniel Farber and Suzanna Sherry. In *Beyond All Reason*,[17]

numerous other texts on the subject, including Steven D. Stark, *Writing to Win: The Legal Writer* (Main Street Books 1999), which includes a chapter on the role of narrative in argument. Practice-oriented materials tend to characterize what they do as storytelling rather than narrative.

9 An exception to the relative isolation of texts on legal narrative would arguably be found in the academic literature on narrative in law school clinical programs. *See* Miller, *supra* n. 5, at 7–30 (and articles cited therein).

10 *See* Philip N. Meyer, *Will You Please Be Quiet, Please? Lawyers Listening To The Call Of Stories*, 18 Vt. L. Rev. 567, 568 (1994) (noting that "creative practitioners are often more sophisticated about legal storytelling than many legal scholars").

11 *See e.g. Legal Hermeneutics: History, Theory, and Practice* (Gregory Leyh ed., U. Cal. Press 1992) (collection of essays on interpretation of legal texts).

12 The example most cited here is Susan Estrich, *Rape,* 95 Yale L.J. 1087 (1986), which includes a lengthy analysis of the ineffectiveness of rape laws but which begins with the following passage describing the author's own rape: "Eleven years ago, a man held an ice pick to my throat and said: 'Push over, shut up, or I'll kill you.' " *Id.* at 1087.

13 For a frequently cited example in this vein, see Derrick Bell, *The Space Traders*, in *Faces at the Bottom of the Well: The Permanence of Racism* 158 (Basic Books 1992), which describes an offer by aliens who promise the U.S. wealth if it will in return trade the nation's blacks.

14 Benjamin L. Apt, *Aggadah, Legal Narrative, and the Laws*, 73 Or. L. Rev. 943, 956 (1994).

15 *Id.* at 957.

16 *Miller*, *supra* n. 5, at 20.

17 Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford U. Press 1997).

Farber and Sherry argue that the primary goal of legal scholarship is to identify points of improvement in the law, and that proposals for legal change should be based on reasoned argument and empirical data, not stories.[18] Farber and Sherry assert that stories are suspect because of the risk that they are atypical, inaccurate, or incomplete.[19] In response, proponents of narrative in legal scholarship argue that the use of narrative is necessary when confronting well-established but flawed understandings of the law.[20] In attempting to resolve the debate about whether narrative has value, at least one author has argued that the value of narrative lies in its literary trait of upsetting traditional norms, and that narrative should not be evaluated on the basis of more traditional methods of legal analysis.[21]

B. Lawyer: What's all the fuss?

Trial lawyers are intimately familiar with the power of stories to persuade.[22] If a trial lawyer could be persuaded to read academic articles, the controversy represented there might elicit a yawn. However, comparing academic and practical perspectives on legal narrative can provide assistance in understanding the full power of narrative and its potential for insight as well as harm.

In her 1998 article, *The Value of Narrative in Legal Scholarship and Teaching*,[23] Jean Love suggests in a manner similar to Farber and Sherry that there are three main concerns with narrative: (1) whether it is valid or truthful; (2) whether it is typical of real world experiences; and (3) whether it discourages debate and reply because it is emotive.[24] If we compare academic and professional concerns about narrative, we can quickly note that a trial lawyer would not be bothered in the least by the second or third concerns. A client's experience need not be typical to merit consideration or assistance from the court, and the lawyer's job (as opposed to that of the larger system of dispute resolution) is primarily to persuade the audience and not elicit debate. An ethical trial lawyer, though, might

18 *Id.* at 38.

19 *Id.* at 39.

20 *See* Apt, *supra* n. 14, at 956–61.

21 *See generally* George H. Taylor, *Transcending the Debate on Legal Narrative* (U. Pitt. Sch. L. Working Paper 11, 2005) (available at http://law.bepress.com/pittlwps/papers/art11/).

22 *See e.g.* Jeremiah Donovan, *Some Off-The-Cuff Remarks About Lawyers as Storytellers*, 18 Vt. L. Rev. 751 (1994); Steven Lubet, *Nothing But the Truth: Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Truth* (N.Y.U. Press 2001).

23 Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. Gender, Race & Just. 87 (1998).

24 *Id.* at 89.

hesitate about the first concern. But why would the issue of truth be a common concern to both scholars and practitioners?

The answer lies in the authoritative power of narrative. When an academic author shares an experience of rape,[25] we are unable to challenge her assertions because the experience relayed appears to be true. When a lawyer relates a client's story in court that pulls together disparate facts in a way that explains and justifies the client's behavior, the story is persuasive because it presents a version of events that rings true—regardless of what "actually" happened according to another perspective. When a beginning law student organizes and shapes a fictionalized set of facts to tell a story, the student is creating a truth—albeit one that did not actually happen. The vehicle of narrative, once mastered, creates a compelling version of the truth.

Why narrative persuades in such a compelling manner, a considerable inquiry in its own right which this article only touches upon, may be explained by the centrality of narrative to any sort of understanding, not just legal reasoning. In his *Introduction to Narrative*, H. Porter Abbott asserts that narrative is present in almost all human discourse and notes Fredric Jameson's description of narrative as "the central function or instance of the human mind."[26] Abbott states that whether such assertions stand up to scrutiny, people "engage in narrative so often and with such unconscious ease that the gift for it would seem to be everyone's birthright."[27]

As described by Gerald Lopez, lawyerly problem solving, which involves persuading others to change the world in ways that are closer to what we desire, is "simply [one] instance of human problem-solving."[28] Lopez asserts that human beings think about social interaction in story form because it helps us interpret the everyday world and "carry out the routine activities of life without having to constantly analyze or question what we are doing."[29] Persuading people to help solve a problem requires familiarity with the "stock stories"[30] that people subscribe to and an ability to manipulate the stories to tell a plausible and compelling story that moves the person to assist us.[31] As noted earlier, Catherine MacKinnon states that narrative is compelling because of its peculiar capacity to

25 *See* Estrich, *supra* n. 12, at 1087.

26 Abbott, *supra* n. 5, at 1.

27 *Id.*; *see also* Rideout, *supra* n. 6, at 57–59.

28 Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 2 (1984).

29 *Id.* at 3.

30 *Id.*

31 *See id.* The legitimacy of this approach is arguably demonstrated by typical teaching approaches to narrative skills, where instructors rely on student perceptions of which stories are believable and which are not—occasionally with reference to what students knew "before they started law school."

appropriate reality.[32] These authors suggest that by tapping into this fundamental method of understanding and manipulating social interactions, lawyers rally an audience to their side with a powerful persuasive tool. Unfortunately, in addition to assisting an audience to understand that one version of events is more accurate than another, narrative can also validate a version of events that does not exist.

In one sense, of course, all stories are constructed and no story is true,[33] but this article adopts the position as articulated by Abbott that if a narrative identifies itself as nonfiction, we expect it "to convey as best it can the truth of actual events."[34] As Catharine MacKinnon puts it, "[t]his may be embarrassingly non-postmodern, but reality exists."[35] This article assumes that reality exists and that law students and lawyers have an ethical obligation not to stray too far from it, particularly when engaging in narrative representations. This article also assumes that while stories are normally told from a certain perspective and are therefore all deceptive to a degree,[36] there are ethical limits on narrative that can be articulated and coherently applied.

III. The Necessary and Multi-Faceted Connection Between Legal Narrative and Legal Ethics

A. Narrative and Ethics in Professional Regulation

Because narrative has the peculiar capacity to appropriate reality, its potential for abuse is troubling. In addition to the scholarly objections already noted, concern about the misuse of narrative has been implicitly acknowledged in many common law systems of professional regulation. In the context of litigation, professional regulations normally impose duties of candor.

The American Bar Association Model Rules of Professional Conduct Rule 3.3, "Candor Toward The Tribunal," prohibits among other things making a false statement of fact or law to a tribunal.[37] In Singapore, rule 56 of the Legal Profession (Professional Conduct) Rules, "Not to mislead or deceive Court," states that an "advocate and solicitor shall not knowingly deceive or mislead the Court, any other advocate and solicitor, witness, Court officer, or other person or body involved in or associated with Court

32 *See* MacKinnon, *supra* n. 7, at 237.

33 *See* Abbott, *supra* n. 5, at 22.

34 *Id.* at 153.

35 MacKinnon, *supra* n. 7, at 235.

36 *See* Lubet, *supra* n. 22, at 6; Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961, 978–84 (2006).

37 *See* Model R. Prof. Conduct 3.3 (ABA 2009).

proceedings."[38] Rule 59 of the Legal Profession (Professional Conduct) Rules, "Facts, arguments and allegations," more specifically states that an

> advocate and solicitor shall not contrive facts which will assist his client's case or draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing—(a) any statement of fact or contention (as the case may be) which is not supported by his client or instructions; (b) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonable credible material which as it stands establishes a prima facie case of fraud; or (c) in the case of an affidavit or witness statement, any statement of fact other than the evidence which in substance according to his instructions the advocate and solicitor reasonably believes the witness would give if the evidence contained in the affidavit or witness statement were being given orally.[39]

In Malaysia, the ethical rules are similar. There, the Bar Council, with the approval of the Attorney General's Chambers, issues the rules of professional conduct and etiquette pursuant to the Legal Profession Act of 1976.[40] The Legal Profession (Practice And Etiquette) Rules of 1978 state in relevant part that an advocate and solicitor shall not "practice any deception on the Court"[41] or "refer to any facts in the case which he is not in a position to prove."[42]

In Hong Kong, every barrister, whether practicing or otherwise, must comply with the provisions of the Code of Conduct of the Bar for the Hong Kong Special Administrative Region.[43] In the section on Conduct in Court, paragraph 130 of the Code of Conduct provides that a barrister "must not knowingly deceive or mislead the Court,"[44] and paragraph 146 provides that when defending a client on a charge of crime, a barrister must not "provide or devise facts which will assist in advancing his client's case."[45]

The fact that lawyers are advocates who pursue outcomes favorable to their clients, and not necessarily to society at large, is commonly

38 Legal Profession Act, Legal Profession (Professional Conduct) Rules, Rule 56 (Cap. 161, 2009 Rev. Ed. Sing.), s. 71(56).

39 *Id.* at Rule 59.

40 Legal Profession Act 1976 s. 77 (Malay. Act 166, reprint 2001).

41 Legal Profession (Practice and Etiquette) Rules 1978, Rule 17 (Malay. P.U.(A) 369/78) (available at http://www.malaysianbar.org.my/news_notices.html).

42 *Id*. at Rule 19.

43 *See* Hong Kong Bar Assn., *The Code of Conduct of the Bar for the Hong Kong Special Administrative Region* ¶ 4, http://www.hkba.org/the-bar/code-of-conduct/code-of-conduct.html (2009).

44 *Id.* at ¶ 130.

45 *Id.* at ¶ 146.

understood if not always valued. But when the partiality of advocacy is combined with the ability of narrative to portray a "true" state of affairs, the full potential for misuse of persuasive argument becomes clearer. It is arguably the presence of narrative and its impressive potential to deceive, combined with the type of advocacy at work in common law legal systems, which has produced ethical restrictions on lawyers' communications with the court in many common law jurisdictions around the world.[46]

In addition to arising in professional regulation and academic research, the ethical dimension of narrative has received limited attention in legal education, primarily in clinical scholarship regarding what role clients should play in deciding whether and what story should be told about them.[47] There has also been limited discussion of the ethical limits on a lawyer's use of narrative when advising a client,[48] in legal argument,[49] or even in law blogs.[50] It would seem as though awareness of ethics in legal narrative has been just below the surface. The connection warrants considerably more attention, particularly in legal education.

B. Narrative Training in Legal Education

Training in persuasive argument and the attendant development of skills in legal narrative begins at some law schools in the first year. Practices in U.S. legal writing programs have been surveyed through the combined efforts of the Legal Writing Institute and the Association of Legal Writing Directors since 1999.[51] The surveys indicate that, in addition to assignments utilizing objective analysis, the most commonly used writing assignments include persuasive written assignments such as appellate and pretrial briefs, and the most common oral exercises are appellate court arguments, all of which incorporate narrative.[52] Legal writing texts in

46 Steven Johansen has noted in his work on legal narrative and legal ethics that narrative inherently includes partiality, and that court systems in fact tolerate some deception in storytelling and other matters in the context of client advocacy, although lawyers are not allowed to engage in "carte blanche deception." Johansen, *supra* n. 36, at 961.

47 *See* Miller, *supra* n. 5, at 5 n. 24.

48 *See* Johansen, *supra* n. 36, at 961.

49 *See* Muneer I. Ahmad, *The Ethics of Narrative*, 11 Am. U. J. Gender Soc. Policy & L. 117 (2002) (exploring the ethical basis for refusing to incorporate racist or gender-based arguments that are in the client's interest but against the public interest). Gerald Lopez touches upon "responsible storytelling" in the lay context by noting that while threats and lies do not violate any rules of storytelling form, they "normally are considered objectionable." Lopez, *supra* n. 28, at 14.

50 *See* Anna P. Hemingway, *The Ethical Obligations of Lawyers, Law Students and Law Professors Telling Stories on Web Logs*, 41 The Law Teacher 287 (2007).

51 *See ALWD/LWI Survey*, http://www.lwionline.org/surveys.html (accessed May 4, 2010).

52 *See id.*

North America routinely include segments on persuasive writing and factual renderings.[53]

Although legal writing programs are not typically included in the curriculum of law degrees outside of North America,[54] selected law schools in the common law jurisdictions of Singapore, Hong Kong, Malaysia, and India do include similar courses. In Singapore, first-year law students at the National University of Singapore are taught persuasive narrative writing skills, including the creation of a case theory and attendant factual narrative, in the second semester of a year-long course in legal skills.[55] At Singapore Management University, which began offering an LL.B. focused on corporate and commercial law in Singapore in 2007,[56] students study advocacy skills in the second semester of their first year.[57] At Hong Kong University, LL.B. students take courses in Legal Research and Writing that are staggered through the first two years of the curriculum and study argumentative techniques at the end of the first year.[58] At the University of Malaysia, LL.B. students take a final year course in Professional Practice,[59] in which they practice drafting,

53 North American texts, though, are more likely to include this element of instruction than texts in other common law jurisdictions. Some representative American texts are Neumann, *supra* n. 8, which includes chapters on the shift from objective to persuasive writing and the development of a case theory, appellate briefs, motion memorandum and oral argument, and Linda H. Edwards, *Legal Writing and Analysis* (2d ed., Aspen Publishers 2007), which includes material on writing a fact statement, writing a trial-level brief, writing an appellate brief, and oral advocacy. In Canada, Michael J. Iosipescu & Philip W. Whitehead's *Legal Writing and Research Manual* (6th ed., LexisNexis 2004), includes chapters on writing a brief (Chapter 6) and writing a factum (Chapter 7). In the U.K., Sharon Hanson, *Legal Method, Skills and Reasoning* (2d ed., Routledge-Cavendish 2003) includes chapters on the power of legal language and the construction of argument but does not address the construction of factual narratives.

54 *See* Tan Cheng Han et al., *Legal Education in Asia*, 1 Asian J. Comp. L., Art. 9 n. 35 (2006) (available at http://www.bepress.com/asjcl/vol1/iss1/art9).

55 The course description for Legal Analysis, Writing and Research ("LAWR") states in part that in the second semester, students will

> focus on developing persuasive communication skills. Students will learn to: (i) formulate cogent arguments for their clients' positions; and (ii) convincingly present legal support for such positions. They will be expected to exercise these persuasive skills in multiple media (written, oral) and contexts (in simulated negotiations and courtroom presentations). These exercises will culminate in a hypothetical case or "moot" problem.

Legal Analysis, Writing and Research II, *supra* n. 2.

56 For an overview and history of the Singapore Management University School of Law, see Sing. Mgt. U., *Overview*, http://www.law.smu.edu.sg/about_school/index.asp (last updated July 13, 2009). For a description of the LL.B. focus on corporate and commercial law at the Singapore Management University, see Sing. Mgt. U., *LL.B. Programme Overview*, http://www.law.smu.edu.sg/blaw/index.asp (last updated Mar. 22, 2010).

57 For a detailed description of the LL.B courses included in Singapore Management University's LL.B. degree, see Sing. Mgt. U., *Core Courses' Description*, http://www.law.smu.edu.sg/blaw/corecourses_description.asp#writing (last updated Oct. 23, 2009).

58 For a description of the Program Structure of the Bachelor of Laws degree (LLB) at the University of Hong Kong, see Faculty of Law, U. Hong Kong, *Undergraduate Degrees; LLB*, http://www.hku.hk/law/programmes/llb_structure.html (accessed Feb. 26, 2010). The course content of Legal Research and Writing III is described in Faculty of Law, U. Hong Kong, *Regulations for the Degree of Bachelor of Laws*, http://www.hku.hk/law/Files/Programme/LLB_2007–08.pdf (May 28, 2007).

59 For a program overview and list of courses in the LL.B. offered by the University of Malaysia, see U. Malay., *List of Programmes*, http://www.um.edu.my/mainpage.php?module=Maklumat&kategori=82&id=546&papar=1 (accessed May 2, 2010).

advocacy, and related skills. At the National Law School of India University, Bangalore, students take various courses in argumentative technique throughout the LL.B. degree, including Drafting, Pleading and Conveyancing, and Litigation Advocacy.[60]

However, while the skills of legal narrative and the ability to approximate reality are being taught with increasing regularity in Commonwealth jurisdictions, accompanying ethical constraints are not necessarily included in the picture.

C. Legal Ethics Instruction in Selected Common Law Jurisdictions

Few common law jurisdictions require law students to study legal ethics as a compulsory part of their law degree, and when the subject is included in the curriculum there is considerable diversity in how it is taught. U.S. law schools, if they wish to be accredited by the American Bar Association, are required to give students substantial instruction in "the history, goals, structure, values, rules, and responsibilities of the legal profession and its members."[61] In Canada, legal ethics is not a state-mandated requirement of a common law degree,[62] but the majority of law schools have decided to require students to take a course in legal ethics.[63]

In Australia, legal ethics is a recent addition to the curriculum.[64] All Australian law schools now teach legal ethics,[65] although Puig asserts that most follow a "discrete" model where legal ethics is taught as a system of rules rather than a mode of judgment.[66] A 2003 "stocktake" of practices in legal education organized by the Australian Universities Teaching Committee concluded that of the twenty-eight then-existing law schools, all but two taught legal ethics in the undergraduate degree, mostly as a

60 For a description of courses in the B.A., LL.B. (Hons.) program offered by the National Law School of India University, Bangalore, arranged by trimester, see Natl. Law School India U., *Academic Programmes*, http://www.nls.ac.in/academic_programmes_undergraduate_courses.html (accessed Fed. 26, 2010).

61 *See* American Bar Association, *Program of Legal Education*, Standard 302(a)(5) (available at http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf).

62 The lack of a required course in legal ethics in Canada may change, as the Federation of Law Societies of Canada established a Task Force in June 2007 to review the criteria for an approved common law degree and characterized professional responsibility as a fundamental area a national standard should incorporate. *See* Fedn. L. Socys. Can., *Task Force on the Canadian Common Law Degree Consultation Paper* 3, 4 (2008) (available at http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf).

63 *See* Adam M. Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, 46 Osgoode Hall L.J. 1, 33–34 (2008).

64 *See* Gonzalo Villalta Puig, *Legal Ethics in Australian Law Schools*, 42 The Law Teacher 29, 33 n. 17 (2008) (citing Marlene J Le Brun, *Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching,* 12 Leg. Educ. Rev. 269, 277 (2001)).

65 *See* Puig, *supra* n. 64, at 33 n. 18.

66 *Id.* at 40–43.

compulsory subject.[67] However, there was no clear pattern regarding approaches to instruction.[68] There have been calls for the adoption of a pervasive approach to legal ethics that is more integrated into the curriculum,[69] but these suggestions do not appear to have been widely adopted.

In New Zealand, in addition to completing the LL.B. degree and the Professional Legal Studies Course, all students applying for admission to the roll of barristers and solicitors are required to pass a course in legal ethics, although this is a requirement for practice and not a compulsory degree subject.[70]

In Malaysia, graduates with law degrees from foreign universities must secure the Certificate in Legal Practice ("CLP") in order to practice, which includes an examination in ethics within the Professional Practice course.[71] Graduates from selected Malaysian universities (and the National University of Singapore), however, are exempt from the Malaysian CLP. The University of Malaysia now requires its students to have some training in legal ethics in that students are required to take a course in "Professional Practice" in the Final Level of the LL.B., which includes training in drafting and advocacy as well as in professional ethics.[72]

In Singapore, the National University of Singapore teaches legal ethics at the LL.B. level via the pervasive method,[73] including classes on legal ethics within the first-year legal skills course Legal Analysis, Writing, and Research, and offers an upper-class elective in legal ethics.[74] Professional legal ethics has historically also been taught at the post-graduate stage,

67 Richard Johnstone & Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* 118 (2003) (available at http://cald.anu.edu.au/docs/AUTC_2003_Johnstone-Vignaendra.pdf).

68 *Id.* at 122.

69 *See e.g.* Puig, *supra* n. 64. *See also* Diana Henriss-Anderssen, *Teaching Legal Ethics to First Year Law Students*, 13 Leg. Educ. Rev. 45 (2002).

70 *See* Auckland Dist. L. Socy., *Requirements for Admission as a Barrister and Solicitor of the High Court of New Zealand* 5 (2008) (available at www.adls.org.nz/filedownload?id=3f16d84c-21cc-45d3-a8e8-cbec2d71f693).

71 *See* The Malaysian Bar, *Certificate in Legal Practice*, http://www.malaysianbar.org.my/c.l.p.html (accessed Feb. 26, 2010).

72 *See List of Programmes*, *supra* n. 59.

73 *See* Patrick Nathan, *Legal Ethics in Asean Legal Education Systems: A Singapore Perspective* 1, www.aseanlawassociation.org/Patrick_Nathan.pdf (2006) (summarized in *Report on ALA Workshop I: Legal Ethics in ASEAN Legal Education* 4–5 (January A. Sanchez rptr., 2005) (available at www.aseanlawassociation.org/REPORTONALA-WORKSHOPI.pdf).

74 For a description of the National University of Singapore Faculty of Law's elective course in legal ethics, Conflicts and Obligations in Legal Ethics, see Natl. U. Sing., *Conflicts and Obligations in Legal Ethics*, http://law.nus.edu.sg/current/course/courses_desc.asp?MC=LL4149&Sem=2 (last updated Jan. 14, 2010). *See also* Seow Hon Tan, *Law School and the Making of the Student into a Lawyer: Transformation of First Year Law Students in the National University of Singapore*, 12 Leg. Ethics 125 (2009).

and continues to be required as part of the post-graduate Practice Law Course (PLC) conducted by the Board of Legal Education.[75]

The pedagogical practices reviewed above suggest that most law students are exposed to some degree of training in legal ethics before they enter into practice. However, this training can be quite removed from students' initial training in argument and narrative, so even in jurisdictions that instruct in legal ethics, it is questionable whether the connection between legal narrative and legal ethics is being made at all. By the time students are instructed in legal ethics, they may have already concluded that narrative has no important ethical constraints. If legal training gives students advanced abilities to create compelling narratives, then teaching students narrative alone borders on the irresponsible.

D. Possibilities for Uncovering the Connection Between Narrative and Legal Ethics

In view of the uneven practices regarding ethical training in legal education, the best hope for recovering the connection between narrative and legal ethics may reside at the point in the legal curriculum where students are first taught narrative skills. For most U.S. students, this occurs when they are taught the skills of persuasive argument in introductory legal skills courses.[76] Melissa Weresh, Margaret Johns, and others have suggested a number of creative and practical ways to incorporate ethical training in ways that are feasible in the context of legal writing courses, where narrative skills would frequently be part of the curriculum.[77]

Evidence concerning the degree to which narrative skills are taught together with ethical principles is somewhat anecdotal at this point.[78] Regarding practices in the U.S., Gerald Lebovits asserts that few law

75 Applicants for admission to the Singapore Bar must complete the Postgraduate Practical Course in Law or Part B of the Singapore Bar Examination as well as a practice training period. Requirements for Admission, http://www.lawsociety.org.sg/ble/Requirementsfor Admission.htm. Professional Responsibility is examined on the Bar Examination and the PLC. Professional Responsibility, http://www.lawsociety.org.sg/ble/c1_plc.htm.

76 *See* Johns, *supra* n. 4, at 503–07; *see also* Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 897–98 (1999).

77 A number of American scholars have discussed the need to connect legal skills with professionalism. *See* Johns, *supra* n. 4, at 503–07; Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (2d ed., LexisNexis 2009). *See also* Ben Bratman, *Toward a Deeper Understanding of Professionalism: Learning to Write and Writing to Learn during the First Two Weeks of Law School*, 32 J. Leg. Prof. 115, 121–22, 122 n. 40 (2008); Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 Leg. Writing 113, 133–36 (2007); Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 Touro L. Rev. 427, 456–62 (2005) [hereinafter Weresh, *Fostering Respect*]. For an overview article that can be given directly to students, see Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527 (2002).

78 For example, at the University of New South Wales Faculty of Law, undergraduate students take a "Foundations of Law" course which addresses legal institutions, legal research, case law and statutes, and contextual approaches to the law as a social phenomenon, but the course does not specifically refer to legal ethics. U. New South Wales Handbook,

schools teach ethics in the context of legal writing for more than a few moments here and there, but all should, while Melissa Weresh suggests that in the context of advocacy, legal writing professors generally address the obligation of zealous representation, tempered by an obligation to advance only those claims and arguments that are meritorious.[79] A yearly survey of U.S. legal writing programs, which has collected data on program design, curriculum, salary, workload, and status issues since 1999, does not inquire about treatment of ethical issues.[80]

A brief look at legal writing textbooks in the U.S. also suggests that there is an uneven focus on ethical concerns arising out of narrative skills. Most U.S. legal skills textbooks with sections on persuasive writing reference the ethical duties of not misleading the court and sharing contrary authority with the court even if not cited by opposing counsel,[81] but this has not always been the case. An example of a seminal textbook on legal writing would be Richard Neumann's *Legal Reasoning and Legal Writing*, now in its 6th edition.[82] Various editions of the text include instruction on persuasive argument and detailed instructions on fact presentation, but the book did not contain an entry regarding ethics in the index until the fifth edition published in 2005.[83]

Less information is available on practices outside the U.S. In Australia, Diana Henriss-Anderssen has reviewed a number of ways to teach legal ethics to first-year law students. She suggests that legal ethics can be integrated into skills courses and mooting programs but makes no particular connection between narrative and legal ethics.[84] At the National University of Singapore Faculty of Law, the first-year legal skills program

http://www.handbook.unsw.edu.au/undergraduate/courses/2010/LAWS1052 html. Graduate students take Legal Systems, Research and Writing, which comprises three modules—Principles of International Law, Australian Legal System and Process, and Research and Writing in a Legal Environment—none of which refers expressly to legal ethics. http://www.handbook.unsw.edu.au/postgraduate/courses/2010/LAWS8110.html. At the University of Hong Kong, L.L.B. students are required to take Legal Research and Writing I, II, and III, and Writing Solutions to Legal Problems (first year), and Legal Research and Writing IV and V (second year), none of which expressly incorporates legal ethics, even though Legal Research and Writing IV includes some persuasive writing. U. Hong Kong Course Descriptions, http://www.hku.hk/student/pubmedia/uregcourse/.

79 *See* Weresh, *Fostering Respect*, *supra* n. 77, at 460. Weresh also notes how in many respects legal writing teachers in the U.S. already teach ethics and professionalism, although they do not yet characterize it as such. *Id.*

80 *See ALWD/LWI Survey*, *supra* n. 51.

81 *See* Charles R. Calleros, *Legal Method and Writing* 323–26 (4th ed., Aspen Publishers 2002); Cathy Glaser et al., *The Lawyer's Craft* 321, 336 (Anderson Publg. Co. 2002); Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 330–31, 460–61 (2d ed., Matthew Bender 2006).

82 Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* §§ 25.4, 29.3 (6th ed., Aspen Publishers 2009).

83 *See* Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (5th ed., Aspen Publishers 2005).

84 Henriss-Anderssen, *supra* n. 69, at 52.

addresses legal ethics at multiple stages throughout the year. The curriculum includes discussion of the professional limitations on persuasive argument both factual and legal, but as yet has not specifically addressed finer ethical issues raised by narrative.

This article's suggestion that training in narrative be paired with legal ethics can be viewed as a variation on the pervasive approach to teaching legal ethics, one that addresses issues of professional responsibility as they arise in particular substantive areas throughout the curriculum.[85] The arguments in favor of teaching ethics via the pervasive method are legion and persuasive. In order to convey the educational goal of becoming a skilled professional who contemplates ethical issues as part and parcel of legal analysis, professors in law school should be ready and willing to discuss ethical issues as they arise.

However, all programs of legal education are subject to competing demands, and legal skills programs are subject to pressure to teach numerous skills beyond analysis, research, and objective and persuasive writing. Complete integration of various skills is the ideal, but courses will likely have to prioritize.[86] This article argues that the deeply embedded human orientation toward narrative and the corresponding potential for highly effective deception means that teaching students narrative skills is one area that arguably requires simultaneous treatment of ethical issues.

When contemplating how to teach ethical issues across the curriculum, scholars have uniformly suggested a discussion of relevant professional rules.[87] Teaching existing ethical rules is a necessary step. Students need to know early on that despite what they might have gathered from popular representations of lawyers in the media,[88] they cannot lie about their case, particularly to the court.

Teaching only rules of professional responsibility, though, could backfire. Rules requiring candor to the court, which for the most part prohibit lawyers from knowingly deceiving the court, may set the wrong example for lawyers in training because they suggest that students need only worry about the lowest common denominator. Students could benefit significantly from a guiding principle. One possibility is Steven Lubet's description of legal storytelling as a noble pursuit that does not encompass misrepresentation.[89] Lubet asserts that lawyering story framing is "truer"

85 *See* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Leg. Educ. 31 (1992). *See also* Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (2d ed., Aspen Publishers 1998).

86 *See* Weresh, *Fostering Respect*, *supra* n. 77, at 429–30. *See also* Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. Leg. Educ. 96, 105 (1994).

87 *See* Schiess, *supra* n. 77, at 529–30.

88 *See* Seow Hon Tan, *supra* n. 74, at 125–26.

89 *See* Lubet, *supra* n. 22, at 2.

than the truth presented by the unadulterated minutiae of testimony and evidence.[90] Students could be guided by the normative position that a conscientious attorney "fashions a story not to hide or distort the truth, but rather to enable a client to come closer to the truth."[91] Teaching professional regulation on its own also fails to address the trickier questions raised by narrative, for example, whether a laywer should imply that a fact is true when the lawyer is not sure. Another issue is how to evaluate whether it is ethical to use racial stereotypes in narrative in order to win an argument.[92] The ethical issues raised by training students in narrative implicate rules of professional responsibility, but the subject can arguably only be fully addressed by helping students to contemplate how they will interpret their roles as lawyers and how they will respond when their professional responsibility requires them to act at odds with personal ethics.[93] The complexity of the task suggests that the approach advocated by Melissa Weresh[94]—which urges legal writing programs to recognize ethical concepts as a pervasive theme in curriculum and pedagogy—does not appear unduly ambitious.

When teaching the ethics of narrative in the context of a legal skills course, instructors could raise the duty of candor in order to open discussion, and then ask students how they would resolve more difficult issues not addressed by applicable professional rules. Students could be asked to formulate their own guidelines in a manner similar to the rule synthesis they perform in standard legal analysis. Lebovits suggests that overstatement is unethical;[95] Steven Stark has proposed that, in certain situations, hedging is a form of dishonesty.[96] Students can challenge these assertions, propose different factual scenarios, and discuss the point where narrative goes from being ineffective to unethical. If students learn that ethical issues are inherent in legal practice, and that they are complex

90 *Id.* at 1.

91 *Id.* at 2.

92 *See* Ahmad, *supra* n. 49. *See also* Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 Seattle U. L. Rev. 1, 23–32 (2003).

93 Many writers have suggested that training in legal ethics requires students to go beyond rules of professional responsibility, but Steven D. Stark states that

> lawyers recognize their role as deceivers and understand that language is the means through which they work their magic. After a while, they begin to lose faith in the honesty of words, and their writing suffers. . . . It's true that part of the purpose of legal training is to enable lawyers to think and write in just this way. But . . . [t]he lifelong struggle of learning to write well is a way to regain your humanity as a lawyer.

Stark, *supra* n. 8, at 265–66.

94 *See generally* Weresh, *Fostering Respect, supra* n. 77.

95 *See* Gerald Lebovits, *Legal-Writing Ethics—Part II*, 77 N. Y. St. B. J. 64 (Nov. 2005).

96 Stark, *supra* n. 8, at 269 (cited in Schiess, *supra* n. 77, at 530).

and likely to require reflection over a period of time, instructors need not worry that they are not providing all the answers.

Diana Henriss-Anderssen has suggested that students create a "Court Report," an assignment in which students observe and report on legal argument in court hearings.[97] This assignment could work well with programs that already include sessions where students observe legal argument in court.[98] This assignment could also require students to evaluate ethical aspects of what they observed in court. In order to effectively address the ethical limits of narrative, students would have to be familiar with the case being argued, but the assignment has the advantage of flexibility in that students are likely to observe some activity in court that raises ethical issues.

The further possibilities presented by coordinating initial ethical training in narrative with upper level instruction in professional responsibility could be startling. Students being trained in persuasive skills and narrative could be asked to develop standards for ethical argument, and then be on the lookout for instances in law school or internships that call for their application. When students enter later courses in legal ethics, instructors can ask, "So what workable standards have you come up with?" These and many other strategies can be used to infuse narrative training with ethics and allow us to rediscover one of legal education's most important lost narratives.

IV. Conclusion

Narrative is a profoundly compelling way to organize information, and training in narrative organization can be an inestimable benefit to those who study law. The study of narrative potentially trains readers to beware not only of deceptive speakers but also of self-deception. But the power of narrative to persuade, regardless of merit, has been recognized by the most accomplished academic scholars and appears in the hesitations of our most neophyte law students. Since the practice of legal narrative has an unavoidable ethical component which should be acknowledged and developed on a broader scale, it would be beneficial for law schools to offer training in the creation and use of narrative, specifically foregrounding difficult choices and relevant ethical restraints.

97 *See* Henriss-Anderssen, *supra* n. 69, at 60–63.

98 In her description of the pervasive method, Deborah Rhode envisions both discrete courses on legal ethics and discussion of legal ethics throughout the curriculum. *See* Rhode, *supra* n. 85, at xxix-xxxi.

One question raised by the inclusion of narrative in common law legal education is the relevance of comparative context. The degree to which narrative is practiced, the types of narratives which are likely to be accepted and rejected, and the existence and manifestations of corresponding ethical obligations will all differ depending on the jurisdiction. The type of story told in the U.S. will not necessarily be understood or acceptable in Asia, and further consideration of the types of narratives used in common law Asian jurisprudence and corresponding issues in legal ethics would be helpful developments.

In another sense, a comparative focus that suggests difference is misleading. Professional socialization—the internalization of ethical norms—is a process in many common law countries that takes place in law schools, the workplace, and professional organizations. Law schools, wherever situated, need to ensure that crucial ethical training is not optional. Telling students who are preparing to enter a sometimes intensely high-pressured workplace that they ought to find out on their own how to incorporate ethics into their calculations is pedagogical malpractice.