

“JUST TRYING TO BE HUMAN IN THIS PLACE”: STORYTELLING AND FILM IN THE FIRST- YEAR LAW SCHOOL CLASSROOM*

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INTRODUCTION

*Law school reform is in the air.*¹

—Susan Sturm & Lani Guinier

The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter

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*** Professor of Law, Suffolk University Law School, and Author of Part I. Classroom teaching has always been the center of his professional and professorial work. Part I of this Article is dedicated to his students, who have made three decades of teaching a great joy, and to his wife, Professor Kate Nace Day.

1. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 Vand. L. Rev. 515, 515 (2007) (emphasis added).

*ago. Invented, that is, not just before the Internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole; not just before Foucault, but before Freud; not just before Brown v. Board of Education, but before Plessy v. Ferguson.*²

—Todd D. Rakoff & Martha Minow

*Many law professors are conscientious and devoted teachers, and quite a few are inspired ones, but their efforts are constrained and hobbled by an educational model that treats the entire twentieth century as little more than a passing annoyance.*³

—Edward Rubin

Law school reform may well be in the air. Such reform, however, requires a social, political, and legal process that challenges the existing division of power in legal education. Absent a national accreditation process that compels broad change, the work of law school reform becomes the difficult work of institutional reform. Reform at this level requires the vision of forward-looking deans and faculty pressing reform initiatives—addressing curricular reform and pedagogical innovation,⁴ clinical education,⁵

2. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 Vand. L. Rev. 597, 597 (2007) (emphasis added).

3. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do about It*, 60 Vand. L. Rev. 609, 610 (2007) (emphasis added).

4. The enduring legacy of Christopher Columbus Langdell is his substantive innovation linking his formalist vision of law—as foundational principles that can be discerned through analysis of appellate cases—to the Socratic teaching method. Contemporary critics argue that this traditional curriculum and its pedagogy fail to teach students “how to think like a lawyer” in their world and time; emphasize adjudication as the dominant, if not singular, narrative of resolving conflict stories and thereby discount the importance of other dimensions of legal practice; and create a cramped and diminished vision of the practice of law, which, in turn, produces lawyers impaired by cramped capabilities, skills, and imagination. Sturm & Guinier, *supra* n. 1, at 515–516; Rubin, *supra* n. 3, at 610–615. Other critics of the underlying substantive vision and its pedagogy use the Socratic method quite differently, “some pointing to the political underpinnings of the rules, others to the efficiencies of the rules, others to the competing arguments that can be made ‘on either side’ of the rule, anticipating its change in other factual circumstances.” See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science, and Being a Human Being*, 69 Wash. L. Rev. 593, 600 (1994).

5. ABA, Sec. of Leg. Educ. and Admis. to the B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and*

and student life⁶—that are matched by a profound institutional commitment of political and financial resources.⁷ Even before the recent financial crises, not all law schools were prepared for such efforts or commitments. New law school buildings were built and filled with art, carpets, and ceremonial gestures; housing spacious up-to-date libraries and electronic and media support centers; wired with Internet access throughout; and offering clinical programs and courses that reflect new developments in law. But, the traditional curriculum remained sacrosanct, and the traditional pedagogy remained largely unchanged.⁸

the Profession: Narrowing the Gap (1992) (available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>) [hereinafter MacCrate Report]. The report is popularly known as the MacCrate Report after Robert MacCrate, former president of the American Bar Association and chairperson of the task force that prepared the report. *Id.*

6. For more than thirty years, outsider students have documented their experiences as an embodied critique of traditional legal education, not only on how the vision is created, but on how it is received. Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law"*, 60 Vand. L. Rev. 555, 575–576 (2007). See Part II for a discussion of Elizabeth Mertz's contribution to this vast body of studies.

7. Reforms at one law school are illustrative. *Id.* at 586. Almost twenty years ago, Georgetown Law Center developed an "opt-in" first-year section called Curriculum B, which created an alternative first-year curriculum and program. *Id.* at 589. To develop this new program, Georgetown required a Fund for the Improvement of Postsecondary Education grant from the Department of Education and an institutional commitment to release six faculty members from teaching for one entire year. *Id.* These faculty members re-crafted first-year courses to include new and interdisciplinary materials and, for the first few years, taught the program. *Id.*

More recently, Georgetown created a new program called Week One: Law in a Global Context. *Id.* at 586. "In the first week of their second semester of law school, the entire first-year class," including students in the evening division, "engaged in a week-long problem set." *Id.* at 586–587. Piloted in Spring 2006, Week One introduced students to modern "out-of-the-legal-category" problem solving within layers of legal pluralism—international, transnational, treaty law, national law, conflicts of law, and enforcement outside of particular jurisdictions—as well as cultural legal differences. *Id.* at 586, 588. Carrie Menkel-Meadow has written of the institutional commitment involved, stating the following:

Week One represented an enormous effort on the part of participating faculty. Ten of us, led by then-Associate Dean and comparative constitutionalist Professor Vicki Jackson, were the principal teachers and problem drafters. Another forty-plus faculty participated in leading small group discussions, along with about fifty Global Teaching Fellows. The Registrar's Office administered the structuring of the exercises, production of readings, and management of class schedules and rooms. This enormous effort presents a relatively small, incremental change in the first-year curriculum with a great deal of impact.

Id. at 588; see also Dean Edward Rubin, Dean W.H. Knight & Dean Katherine Bartlett, Conference Speech, *A Conversation Among Deans from "Results: Legal Education, Institutional Change, and a Decade of Gender Studies"*, (Harv. L. Sch., Boston, Mass., Mar. 10, 2006), in 29 Harv. J.L. & Gender 465 (2006).

8. See *supra* nn. 1–4 and accompanying text (noting that the traditional law school

To describe this situation is not to explain it. The few active defenders of the traditional model⁹ offer less by way of explanation than its critics. For example, Dean Edward Rubin, one of legal education's new reformers, points first to a justification he terms, "If it ain't broke, don't fix it."¹⁰ In Rubin's view, this justification—often spoken, but rarely written—is circular and self-serving. Law schools maintain their position as gatekeepers to a lucrative profession, teach what they want, and measure their success by their ability to "maintain their economic viability."¹¹ As Rubin observes:

Law schools make enough money that they often subsidize their parent institutions, and they rarely make demands on their resources. They do so while paying their faculty members salaries that are positively bountiful by academic standards. Why mess with an institution that corresponds so closely to the average university administrator's definition of success? And if institutional incentives for the university discourage educational change, the personal incentives for the faculty discourage education in general. All of the earthly rewards that a faculty member can obtain—salary raises, summer grants, chaired professorships, competing offers, speaking engagements, and conference invitations—depend on scholarly production, not on teaching. The superheated competition that U.S. News & World Report has engendered among law schools only exacerbates this trend. Under these circumstances, why should a faculty member

curriculum and educational experience has changed very little over time).

9. See e.g. Lawrence M. Friedman, *A History of American Law*, at 468 (3d ed., Touchstone Publishers 2005) (explaining that the case method of teaching was developed in 1872).

10. Rubin, *supra* n. 3, at 611.

11. *Id.* Rubin offers several other explanations, including the following:

One explanation, ironically, is its very obsolescence. If the standard law school curriculum were merely out-of-date, if it had been created forty or sixty years ago, for example, its age would count against it. In fact, the Langdellian model weathered a sustained attack that the Legal Realists and others mounted between forty and sixty years after its creation. . . . [I]t has ceased to be viewed as a particular approach to legal education—as last generation's innovation—and has become a venerable institution that gains gravity and prestige from its antiquity. . . . Langdell's approach is so old, and has been so immutable, that it seems less a tradition than a fact of nature.

Id. at 613–614.

devote time or mental energy to changing a familiar and expected approach to teaching?¹²

This Article is the collaboration of two law professors—Kate Nace Day and Russell G. Murphy—with decades of experience teaching first-year courses within traditional American law schools.¹³ Over the last decade, the Authors have been engaged in pedagogical experiments designed to bring law school reform into the law school classroom. The purpose here is to engage other law professors in this modest but concrete project using storytelling and film to change first-year classrooms into settings where students learn lessons of justice, fairness, and self-worth. This project is given greater coherence and creativity by two recent studies of legal education: *The Carnegie Foundation Report, Educating Lawyers: Preparation for the Profession of Law (The Carnegie Report or The Report)*¹⁴ and the empirical research of linguistic anthropologist Elizabeth Mertz (Mertz)¹⁵—one of the primary researchers of the New Realist Project.¹⁶

12. *Id.* at 614–615. Dean Rubin goes on to ask the following: “And why should a law school dean encourage any faculty member to do so?” *Id.* at 615. This Article leaves the answer to this question to others.

13. Russell G. Murphy, the Author of Part I of this Article, has been teaching first-year courses since 1973, including Legal Writing, Civil Procedure, and Criminal Law. Kate Nace Day, the Author of Part II, has almost twenty-five years of experience teaching first-year courses, including Legal Writing, Civil Procedure, and Constitutional Law.

14. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass Publishers 2007) [hereinafter *The Carnegie Report* or *Educating Lawyers*]. The Carnegie researchers studied law school education under the aegis of their “Preparation for the Professions Program,” which also sponsored studies of clergy, engineering, medical, and nursing training. See The Carnegie Foundation for the Advancement of Teaching, Program Areas, <http://www.carnegiefoundation.org/programs/sub.asp?key=30> (accessed Apr. 14, 2009).

A team of typically four researchers from the Carnegie Foundation visited sixteen law schools in the United States and Canada. See *The Carnegie Report*, *supra* n. 14, at 15. The schools were diverse along a number of dimensions, including the following: public versus private, geographical region, selectivity or status ranking, freestanding versus part of a university, historically devoted to black or Native American people, or noted for educational innovation. *Id.* at 15–16. The research team spoke with personnel and visited classes of every type; they also examined assessment methods and interviewed students in each school. *Id.* at 16. In addition, they consulted with well-known scholars of law and of legal education. *Id.*

15. Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* (Oxford U. Press 2007) [hereinafter Mertz, *The Language of Law School*]. Mertz is a Senior Research Fellow at the American Bar Foundation and Professor of Law at the University of Wisconsin-Madison Law School. *Id.* at x–xi. She began her research in 1990 and began

In Part I of the Article, Murphy describes his subtly subversive yet profoundly rewarding experiences using storytelling and film in first-year Criminal Law classes in light of *The Carnegie Report*.¹⁷ Part I continues to examine *The Carnegie Report* in terms of its identification of specific shortcomings in the education of American law students under what it calls the “case-dialogue” method.¹⁸ Part I considers *The Report’s* recommendations for correcting these problems as opportunities for classroom teachers to make subtle changes in teaching and learning processes at a sub-institutional level. *The Carnegie Report* is the latest in a long line of studies and research projects that critically examines American legal education.¹⁹ The intensity and comprehensiveness of *The Carnegie Report*—focusing on educational practices during two academic semesters at sixteen vastly different public and private law schools—requires legal educators to give the most serious consideration to its findings.²⁰ However,

reporting her findings in 1998. See Elizabeth Mertz, Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. Leg. Educ. 1, 3 (1998). Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 Vand. L. Rev. 483 (2007) [hereinafter Mertz, *Inside the Law School Classroom*]. Professor Mertz’s empirical research presents an extensive, finely detailed account of the law school classroom that offers a crucial, more visual image of the force of language. *Id.* 494–504. Mertz herself has written of *The Carnegie Report*. *Id.* at 504–508.

16. See generally Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *New Legal Realism Symposium: Is It Time for a New Legal Realism?* 2005 Wis. L. Rev. 335 (2005).

17. *The Carnegie Report*, *supra* n. 14.

18. *Id.* at 76–77.

19. See generally John O. Sonsteng, Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 Wm. Mitchell. L. Rev. 303 (2007) (describing major research studies on American legal education).

20. The Report has generated scholarly and professional responses. See e.g. Larry Catá Backer, *Parallel Tracks? Internationalizing the American Law School Curriculum in Light of the Principles in the Carnegie Foundation’s ‘Educating Lawyers’* (Comp. Perspect. L. & Just., Vol. 3, Accepted Paper Series 2007) (available at <http://ssrn.com/abstract=1104098>); David F. Chavkin, *Experience Is the Only Teacher: Meeting the Challenge of the Carnegie Foundation Report* (N.Y. L. Sch. Clinical Research Inst. Paper No. 07/08-3 2007) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008960); Francis J. Mootz III, *Recalling Vico’s Lament: The Role of Prudence and Rhetoric in Law and Legal Education*, 83 Chi.-Kent L. Rev. 1261 (2008); see also Roy Stuckey et al., *Best Practices for Legal Education A Vision and a Road Map* (Clin. Leg. Educ. Assn. 2007) (available at http://cleaweb.org/documents/bestpractices/best_practices-full.pdf); Dennis R. Honabach, *Responding to “Educating Lawyers”: An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. Toledo L. Rev. 311 (2008); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 Mercer L. Rev. 909 (2008);

Part I examines only a limited number of its conclusions—those that lend themselves to the use of storytelling and film in the classroom to enrich the learning and professional-growth experiences of law students in general and in a first-year Criminal Law course specifically.

In Part II of the Article, Nace Day details her uses of storytelling and film in first-year Constitutional Law classes in light of Mertz’s empirical study of law school teaching, *The Language of Law School: Learning to “Think Like a Lawyer.”*²¹ Mertz studied the first-year law school classroom experience—“the first days of an initiation rite”—at eight very different law schools.²² Through the lens of language,²³ Mertz found the same closed epistemology documented in *The Carnegie Report*.²⁴ Mertz, however, also studied the differences in language patterns of students’ participation in class discussion.²⁵ There, Mertz found another kind of premature closure—the silencing of students from different social groups.²⁶ Part II describes Nace Day’s pedagogical experiments in first-year Constitutional Law using storytelling and film to alter the vision of law created and received.

James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 *Intl. J. Leg. Info.* 1 (2007); Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, 87 *Mich. B.J.* 20 (2008).

21. Mertz, *The Language of Law School*, *supra* n. 15; see also Mertz, *Inside the Law School Classroom*, *supra* n. 15.

22. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 487, 491.

23. Mertz approached language in the law school classroom (written, read, and spoken, and all involved in first-year students learning “to think like a lawyer”) with an understanding of the crucial role played by “pragmatic,” or contextually dependent, aspects of language structure. *Id.* at 489–490.

24. According to Mertz,

This is an empirical way of approaching a question with which legal scholars and philosophers have struggled mightily: Just what is “law”? How is it defined, how does it work? . . . Legal professionals are likely to view law differently than do laypeople, and there are also frequent divergences in vision among professionals and among laypeople. In this book, my focus is on one version of the “expert” vision, the understanding of law imparted to students—initiates into the legal profession in the United States.

Mertz, *The Language of Law School*, *supra* n. 15, at 13.

25. See generally *id.* at 174–203.

26. *Id.*

I. THE CARNEGIE REPORT: *LEARNING TO THINK
LIKE A (HUMANE) LAWYER?*

—Russell G. Murphy

In 1996, the American Bar Association reported that American law schools were required “to elevate the twin concepts of the practice of law as a public service calling and the development of the capacity for reflective moral judgment to the same level as legal knowledge and traditional legal skills.”²⁷ *The Carnegie Report* refined that recommendation based on certain observations it made with respect to the intended and unintended consequences of teaching under the Socratic case method, otherwise known as the “case-dialogue” method.²⁸

The starting (and really ending) point of the *Carnegie* critique is the overwhelming emphasis of law school’s teaching on doctrine—“case-dialogue teaching as a cognitive apprenticeship”²⁹—at the expense of practical skills, professional judgment, and social responsibility.³⁰ *The Carnegie Report* detailed some of the problems caused by typical classroom instruction, which focuses on analysis of appellate court cases.³¹

First, the Socratic case method of instruction teaches students “to think like lawyers” in the most restricted sense of the term.³² While successful in developing analytical thinking skills and combative (neutral) argumentation, the method overemphasizes “the procedural and systematic,”³³ resulting in students un-

27. *The Carnegie Report*, *supra* n. 14, at 190 (citing ABA Sec. of Legal Educ. & Admis. to the B., *Teaching and Learning Professionalism: Report of the Professionalism Committee* (ABA 1996)).

28. *Id.* at 50. *The Carnegie Report* observes that “the case-dialogue method constitutes the legal academy’s standardized form of . . . cognitive apprenticeship” and is the “signature pedagogy” of legal education. *Id.*

29. *Id.* at 60. The authors of *The Carnegie Report* also note that “[i]n its quest for academic respectability, legal education would come to emphasize legal knowledge and reasoning at the expense of attention to practice skills, while the relations of legal activity to morality and public responsibility received even less direct attention in the curriculum.” *Id.* at 7.

30. *See e.g.* Maxeiner, *supra* n. 20, at 3. “[T]he . . . Report gives legal education high marks for its cognitive component, but low marks for its practice and ethical-social components.” *Id.*

31. *The Carnegie Report*, *supra* n. 14, at 59–60.

32. *Id.* at 186.

33. *Id.*

critically coming to understand “the law as a formal and rational system, however much its doctrines and rules may diverge from the commonsense understandings of the layperson.”³⁴ *The Report* noted that first-year students learn the substance of the law and the formal systems in which that substance is applied without any understanding of how the law actually works—on the ground, with real people, and concrete consequences—in the operating political, economic, and social systems of the United States.³⁵

Next, the Carnegie researchers found that American legal education conveys “both an accurate representation of central aspects of legal competence and a deliberate simplification” of them.³⁶ A crucial observation of *The Report*, for this Article, leads to the conclusion that this “simplification consists in the abstraction [by students] of the legally relevant aspects of situations and persons from their everyday contexts [in such a way as to] . . . dissect every situation they meet from a [purely] legal point of view.”³⁷ According to *The Report*, this oversimplification causes students to see lawyers “more like competitive scholars than attorneys engaged with the problems of clients.”³⁸ Law schools “rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice”³⁹ pursued by American lawyers.⁴⁰ This results in the failure to “engage the moral imagination of students as they move toward professional practice.”⁴¹

In their most biting criticism, the Carnegie researchers offered a broad condemnation of the consequences of the case-dialogue method.⁴²

34. *Id.*

35. *Id.* at 187.

36. *Id.*

37. *Id.*

38. The Carnegie Foundation, *Summary of the Findings and Recommendations from Educating Lawyers: Preparation for the Profession of Law* 6, http://www.carnegiefoundation.org/dynamic/publications/elibrary_pdf_632.pdf (accessed Apr. 21, 2009) [hereinafter *Summary*].

39. *Id.* at 6.

40. *Id.*

41. *The Carnegie Report*, *supra* n. 14, at 188.

42. *Id.* at 187–188.

By questioning and having argumentative exchanges with faculty, students are led to analyze situations by looking for points of dispute or conflict and considering as “facts” only those details that contribute to someone’s staking a legal claim on the basis of precedent. . . . [T]he . . . method drills students, over and over, in first abstracting from natural contexts, then operating on the facts so abstracted, according to specified rules and procedures; then they draw [legal] conclusions based on that reasoning. Students discover that thinking like a lawyer means redefining messy situations of actual or potential conflict as opportunities for advancing a client’s cause through legal argument before a judge or through negotiation.

[T]he task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the [case-dialogue] method. Issues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda. Being told repeatedly that such matters fall, as they do, outside the precise and orderly “legal landscape” [created by the case method], students often conclude that they are secondary to what really counts for success in law school—and in legal practice. In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.

[S]tudents have no way of learning when and how their moral concerns may be relevant to their work as lawyers and when these concerns could throw them off track. Students often find this confusing and disillusioning. The fact that moral concerns are reintroduced only haphazardly conveys a cynical impression of the law that is rarely intended.⁴³

It is not surprising that the researchers concluded that “[l]aw schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills.”⁴⁴

43. *Id.*

44. *Summary, supra* n. 38, at 6. Elizabeth Mertz reached similar conclusions throughout her research. *See generally* Mertz, *The Language of Law School, supra* n. 15.

By way of reform, *The Carnegie Report* made extensive recommendations for law school faculty, deans, and accrediting agencies based on the adoption of an integrated curriculum constructed with equal parts of "the teaching of legal doctrine and analysis, . . . introduction to the several facets of practice[,] . . . [and] exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession."⁴⁵ Implementation of *The Report's* extensive recommendations is a matter of institutional and structural reform in American legal education that is beyond the scope of this Article. Rather, this Article's focus is on the very small but important steps that law professors can take to counteract some of the negative effects of the case-dialogue method so powerfully described by the Carnegie researchers.

First-year faculty can use storytelling and film to provide context in the analysis of appellate case law in order to foster moral sensitivity and professional responsibility in the problem-solving approaches of law students. This approach can open up law students' thinking to "the identity, values and dispositions"⁴⁶ of lawyering in a democratic society, which, according to *The Carnegie Report*, is now missing from contemporary American legal education.⁴⁷

My experience with using film and storytelling in a first-year Criminal Law course provides an illustration of what can be done in the classroom by an individual faculty member. My approach addresses the following question: can the existing disconnect between a law student's substantive analytical work and matters of justice, morality, human experience, and social good be remedied, in part, by the use of documentaries, movies, non-legal narratives,

45. *Summary, supra* n. 38, at 8. The full recommendation is for a curriculum consisting of "(1) the teaching of legal doctrine and analysis, which provides the basis for professional growth; (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession." *Id.* The conclusion of *The Carnegie Report* refers to an integrative approach in which "each aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social—takes on part of its character from the kind of relationship it has with the others." *The Carnegie Report, supra* n. 14, at 191.

46. *Summary, supra* n. 38, at 8.

47. *Id.*

and “real world” stories of the people involved in appellate cases? I believe it can.

“Just trying to be human”⁴⁸ in the Criminal Law classroom is not a difficult thing. A human face can be put on assigned cases and materials at the very beginning of the course.⁴⁹ My course begins with readings on theories and justifications for criminal punishment. The first assigned case, *Roper v. Simmons*,⁵⁰ provides a basic Eighth Amendment “cruel and unusual punishments” analysis of death penalty issues in the United States.⁵¹ In declaring such punishment unconstitutional as applied to juvenile offenders, the United States Supreme Court opinion and accompanying casebook notes describe the horrible crimes committed by Roper and his young colleagues and note the mental and physical suffering of the victim.⁵² But, in describing these horrible crimes, the materials offer little genuine context for discussion of the human dimension of the death penalty or similar harsh criminal sanctions.⁵³ Therefore, this case is supplemented with several non-textual materials.

First, the students’ understanding of crimes, victims, criminals, and punishments is significantly broadened by hearing the story of a case that occupied my professional attention for many years—*People v. Cahill*.⁵⁴ A quick reading of my law review article on the case⁵⁵ gives the students the facts and legal framework behind the brutal slaying of Jill Russell Cahill and the subsequent imposition, and reversal, of the death penalty on her killer, James “Jeff” Cahill.⁵⁶ In April of 1998, Cahill beat his wife with

48. Paula Gaber, “Just Trying to Be Human in This Place”: *The Legal Education of Twenty Women*, 10 *Yale J.L. & Feminism* 165 (1998).

49. An interesting example of non-traditional expansion of traditional textual approaches to classroom material can be found in University of Edinburgh Professor Maksymilian Del Mar’s draft article *Beyond Text in Legal Education: Art, Ethics and the Carnegie Report* (unpublished ms. March 2008) (available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=mdelmar>).

50. 543 U.S. 551 (2005).

51. *Id.* at 555–556.

52. *Id.* at 556–557.

53. *See generally Roper*, 543 U.S. 551.

54. 809 N.E.2d 561 (N.Y. 2003). I have served as pro bono advisor to the victims, the Russell and Jaeger families, since this case was decided.

55. Russell G. Murphy, *People v. Cahill: Domestic Violence and the Death Penalty Debate in New York*, 68 *Alb. L. Rev.* 1029 (2005).

56. *Id.* at 1029–1030.

an aluminum baseball bat during an early morning domestic dispute.⁵⁷ Between April and October of the same year, Cahill plotted the assassination of his wife as she struggled to recover from the attack in a New York hospital room.⁵⁸ His plan included forging documents to obtain the poison potassium cyanide, gaining access to the hospital disguised as a maintenance worker (with glasses, a fake ID, and a wig), and “scoping out” Jill’s room a week prior to her killing.⁵⁹ Jeff Cahill inflicted an agonizing death on Jill Russell when he forced the potassium cyanide down her throat or through her feeding tube.⁶⁰ The jury easily convicted him of capital murder, but his death sentence was lifted.⁶¹ At his resentencing hearing, a term-of-years imprisonment was imposed when the New York Court of Appeals found technical legal errors in the prosecution’s use of the New York aggravated murder death penalty statute.⁶²

After reading the article, I refer the students to a book written about the case—*While She Slept* by Marion Collins.⁶³ Then, I show the video of the live television broadcast of Jeff Cahill’s resentencing hearing.⁶⁴ The students see the true faces of crime and punishment. They see Mr. Cahill, a white, Ivy League educated, previously successful business man; the seasoned prosecutor, outraged and frustrated by the appellate court’s action; a weathered public defender, working to limit his client’s sentence; Jill’s sister and mother, grieving and distraught; the judge, staring at Cahill with the words “when I look at you I see an evil man”;⁶⁵ and the dozens of police officers cordoning off Cahill to protect him from possible lethal attack by spectators in the courtroom.⁶⁶

57. *Cahill*, 809 N.E.2d at 567.

58. *Id.* at 568.

59. *Id.* at 568, n. 1.

60. *Id.* at 568.

61. *Id.* at 569.

62. *Id.* at 569, 594. The Court held that the killing was not for the purpose of eliminating Jill as a witness in the prosecution of Cahill for assault with the baseball bat and that a provision making it capital murder to intentionally kill during the commission of burglary did not apply to the facts of Cahill’s case. *Id.* at 583.

63. See generally Marion Collins, *While She Slept* (Macmillan 2005).

64. A tape of the resentencing hearing was shown on Syracuse News 10 Now on the day of the sentencing. Syracuse News 10, *Cahill Resentenced* (Jan. 14, 2004, posted 5:00 p.m.) (TV broad., video available at <http://news10now.com/Default.aspx?ArID=1676>).

65. *Id.*

66. *Id.*

This one visual experience sets the foundation for the rest of my course. The crimes committed by Cahill involve many categories of criminal law and theory that I cover. Some of these categories include: basic purposes of criminal punishment; statutory/Model Penal Code versus common law crimes; mental capacity, insanity, and voluntary conduct; self defense; theft and property crimes; burglary; attempt, conspiracy, and accomplice liability; homicide offenses; and legislative reform. The Cahill case provides a common, human, and contextualized reference point for class discussion of casebook readings. The case integrates several categories of criminal law analysis and provides a constant reminder of the law's impact on real people, allowing the students to feel and react. Many criminal law faculty have similar personal stories to tell.

The Cahill component is complemented by other film and storytelling experiences. After the Cahill case is covered, several additional films can be shown. One, *The Exonerated*,⁶⁷ is the DVD version of the widely acclaimed theatrical production. *The Exonerated* tells the stories of six death-row inmates who were eventually found innocent and released from prison.⁶⁸ The star appeal of the actors—Susan Sarandon, Danny Glover, Aidan Quinn, Brian Dennehy, and Delroy Lindo—and the critical role played by a law school “innocence project” engage the students. The viewing leads the students to a more focused awareness of the morality and justice of capital punishment, especially in terms of race and class. Also, the movie offers models of professional responsibility in the work of the prisoners’ lawyers and law school “innocence projects.” *The Exonerated* fosters class discussions about reflective moral judgments and the social obligations of attorneys.

A second recommended film, the documentary *At the Death House Door*,⁶⁹ presents the IFC award-winning story of Reverend Carroll Pickett’s thirteen years as death-house chaplain at the infamous “Walls” prison in Huntsville, Texas.⁷⁰ Unlike *The Exon-*

67. *The Exonerated* (Court TV, Radical Media 2005) (DVD).

68. *Id.*

69. *At the Death House Door* (The Chicago Tribune, Kartemquin Films 2008) (DVD).

70. *Id.* A short list of other films that dramatize issues of innocence, police misconduct, prejudice in the criminal justice system, and the critical role played by lawyers and investigators include the following: *In the Blink of an Eye* (Grossbart Barnett Productions 1996) (DVD); *Call Northside 777* (20th Century Fox Film Corp. 1948) (DVD); *The Hurricane*

erated, there are no fairy-tale happy endings in the ninety-five executions Reverend Pickett attended.⁷¹ The documentary allows me to ask the students to compare their feelings concerning Jeff Cahill—whom many feel deserved to die—with their feelings towards Carlos De Luna, the main death row prisoner in *At the Death House Door*—who many feel, including investigators for the *Chicago Tribune*, was an established case of executing an innocent man.⁷² If my points are not well made, a short showing of the hanging of Saddam Hussein typically generates significant controversy and debate while providing a basis for discussing capital punishment as an international human rights issue.⁷³

Later in the semester, I show the original 1962 version of the film *The Manchurian Candidate*⁷⁴ to illustrate the criminal defenses of brainwashing, involuntary non-punishable acts, and lack of culpable mental state. In the film, an American prisoner of the Korean War is chemically and psychologically conditioned to respond to the commands of a handler after he returns to the United States.⁷⁵ The goal is the political assassination of a presidential candidate in order to install a puppet United States government controlled by the Communist Party.⁷⁶ If the movie’s stars, Frank Sinatra, Angela Lansbury, Janet Leigh, and Law-

(Azoff Entertainment 1999) (DVD); *Dangerous Evidence: The Lori Jackson Story* (Brayton-Carlucci Prods. 1999) (DVD); *The Thin Blue Lie* (Helfgott-Turner Productions 2000) (DVD); *In the Name of the Father* (Hell’s Kitchen Films 1993) (DVD); *A Cry in the Dark* (Cannon Entertainment 1988) (DVD) (Australian title of motion picture is *Evil Angels*); *10 Rillington Place* (Filmways Pictures 1971) (DVD); *The Wrong Man* (Warner Bros. Pictures 1956) (DVD). Films dealing directly with the death penalty include the following: *Dead Man Walking* (Havoc 1995) (DVD); *Dancer in the Dark* (Zentropa Entertainments 2000) (DVD); *Death by Hanging* (Art Theatre Guild, Sozoshia 1968) (motion picture) (original Japanese title of motion picture is *Koshikei*); *Death of a Princess* (Associated Television 1980) (DVD); *The Idiot* (Shochiku Kinema Kenkyū-jo 1951) (DVD) (original Japanese title of motion picture is *Hakuchi*); *Sacco and Vanzetti* (Jolly Film 1971) (VHS).

71. *At the Death House Door*, *supra* n. 69.

72. Steve Mills & Maurice Possley, ‘I Didn’t Do It. But I Know Who Did’, <http://www.chicagotribune.com/services/newspaper/edition/chi-tx-1-story,0,7844122.htmlstory> (June 25, 2006) (First of a three part investigation series discussing the conviction and allegedly wrongful execution of Carlos De Luna.)

73. NBC News & News Servs., *Saddam Hussein Executed, Ending Era in Iraq*, <http://www.msnbc.msn.com/id/16389128/> (updated Dec. 30, 2006, 10:05 p.m.) (containing a video depicting the moments leading up to the hanging).

74. *The Manchurian Candidate* (M.C. Productions 1962) (DVD).

75. *Id.*

76. *Id.*

rence Harvey, are unknown to the students,⁷⁷ clips from the 2004 version of the film—set in the post-Desert Storm world and starring Denzel Washington, Meryl Streep, and Liev Schreiber—connect the students and generate a similar discussion on capital punishment.⁷⁸ In the 2004 version of the film, the main character is a vice-presidential candidate who is brainwashed to advance the interests of an international weapons manufacturer.⁷⁹ The main character kills his chief rival, a United States Senator, but to defeat a plot to make him president, he is assassinated as well.⁸⁰

The world of movies and television is full of dramatizations that can be used to stimulate classroom teaching of criminal law materials. In the future, I hope to offer a full state substantive criminal law course built around the television series *CSI*,⁸¹ *The Wire*,⁸² or *The Shield*.⁸³ The point is, film and storytelling easily eliminate the abstraction, lack of human context, and blurred focus on values, leadership, and responsibility that *The Carnegie Report* found to exist in the American law school classroom.⁸⁴ What does this achieve?

In a general sense, these types of experiences re-legitimize what *The Carnegie Report* finds is the dismissal of students' desires for justice, their moral concerns, and their compassion for people.⁸⁵ To the extent such matters are not part of the students' approach to the study of law, these film and storytelling experiences may force the desire for justice and moral concern into their consciousness. A film and storytelling class component complements the mastery of abstract doctrine that is essential to cognitive law school learning. Movies introduce into the classroom messy situations involving human experiences, complex competing values, and ambiguous claims of "right and wrong" under the

77. *Id.*

78. *The Manchurian Candidate* (Paramount Pictures 2004) (DVD).

79. *Id.*

80. *Id.*

81. *CSI: Crime Scene Investigation* (CBS 2000–present) (TV series); *CSI: Miami* (CBS 2002–present) (TV series); *CSI: New York* (CBS 2004–present) (TV series).

82. *The Wire* (HBO 2002–2008) (TV series).

83. *The Shield* (FX Networks 2002–2008) (TV series).

84. See generally *The Carnegie Report*, *supra* n. 14 (discussing the existence of lack of human context and other problems within American law schools).

85. *Id.*

law. Additionally, movies facilitate class discussions beyond pure legal analysis of cases, force role-playing in combative legal argument, and subtly challenge moral and ethical neutrality. Importantly, visual and artistic law-related materials require students to explore the social effects of law and to recognize the human suffering and vulnerability that lie behind formal legal doctrine.

This method of teaching and experimentation has produced positive results. For example, focused discussion of *People v. Cahill*, *The Exonerated*, and other stories forces the students to reach personal judgments on critical matters of public policy, such as capital punishment, and encourages them to make reflective moral decisions about the results of the legal process. This academic exercise legitimizes personal values and subjective feelings in a nondestructive manner.

The materials allow students to communicate with each other and not just back at the professor, which creates trust, community, and a softening of classroom hierarchy. The introduction of film and storytelling early in the course builds a foundation for a full semester of linking legal doctrine with everyday life. In a course like Criminal Law, the media (newspapers, magazines, the Internet, and television) provide constant material for contextual discussion of substantive principles. Discussion of current events, through film and documentaries, also puts the humanity of the faculty member on display, requiring as it does (or should) the expression of a teacher's values, beliefs, and conclusions about course material, therefore, humanizing both students and faculty. This teaching method also makes students aware of lawyers' reform work, providing them with role models and concrete examples of social responsibility.⁸⁶

86. *The Carnegie Report* recommends that law schools provide "educational experiences directly concerned with the values and situation of the law and the legal profession. . . . [T]hese concerns 'come alive' most effectively when the ideas are introduced in relationship to students' experience of taking on the responsibilities incumbent on the profession's various roles." *Id.* at 196–197. Storytelling and film visualize those roles very effectively. One commentator read *The Report* as requiring law students to "be provided with opportunities to encounter and be inspired by appealing examples [of principled lawyers], [e.g.] of those who are known to have upheld the high values of the profession, or of law and the legal system being used as a force for justice." Gary Davis, *Intl. Conf. on the Future of Leg. Educ. Address, Rpt. to Council of Australian L. Deans* (Ga. St. U. College of L. Feb. 20–23, 2008). The films described in this portion of the Article are highly successful

Ultimately, careful use of film and storytelling may make students ask, from the beginning of their legal apprenticeships, what is the story behind the case I am reading? Do the legal analyses presented lead to a just and fair result? Also, how does the resolution of conflicts studied in the course contribute to the advancement of personal, professional, and social values? This intrapersonal communication is a small step in the direction of reform urged by *The Carnegie Report*.⁸⁷

II. ELIZABETH MERTZ: LANGUAGE AND SILENCES IN THE LAW SCHOOL CLASSROOM

—Kate Nace Day

Elizabeth Mertz proceeds from “a novel standpoint.”⁸⁸ Drawing on the methods and theory of anthropological linguistics, she begins with crucial and detailed observations of the use of language in context, including in-class observations of classroom exchanges and tape-recorded verbatim linguistic data.⁸⁹ Mertz tracked language patterns in the first full semester of Contracts classes at eight different law schools.⁹⁰ Across the diversity of classrooms in her study, Mertz found the commonalities of lan-

at this.

87. See *supra* pt. I (discussing the implementation of *The Carnegie Report's* recommendations).

88. Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. Marshall L. Rev. 91, 93 (2000–2001) [hereinafter Mertz, *Teaching Lawyers the Language of Law*].

89. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 487–488, 491. Mertz and her research team tape-recorded the entire first semester of classes in each of eight schools, while in-class observers also coded aspects of the classroom interactions. *Id.* at 487–488. The tapes were then transcribed. *Id.* at 488. Mertz explains:

Transcripts, tapes, and in-class coding sheets formed the basis for a new coding process, tracking aspects of each in-class turn (such as length of turn, gender/race of speakers, and whether the turn was volunteered or called-on). Coders also generated an ethnographic account of each class meeting, noting aspects of the developing classroom culture, such as the use of humor and how social context was discussed. These were used to create overall ethnographic summaries for each classroom in the study.

Id.

90. *Id.* at 490. For the study, Mertz selected “schools from across the ‘indigenous’ U.S. status hierarchy of law schools, with three from the ‘elite/prestige’ category, two from the ‘regional’ category, and three from the ‘local’ category.” *Id.* at 488. She also “varied the gender and race of the professors studied.” *Id.* The result was, in Mertz’s view, “a comparative set of in-depth case studies.” *Id.*

guage that create the shared vision of law documented by the Carnegie researchers.⁹¹ Furthermore, in an area of research beyond the scope of *The Carnegie Report*, Mertz tracked the differences in the language patterns of students’ in-class participation. Mertz found the same disturbing silences that have been documented for decades in observational studies, surveys, self-reporting studies, and the personal narratives of “outsider” law students.⁹² Mertz links these disturbing silences to how law teachers function as storytellers. Mertz’s research suggests that, even in the most traditional law schools, law teachers have the power to use language in the classroom to alter the vision of law we impart and the silences we create.⁹³

Beginning with the experiences of outsider students,⁹⁴ Mertz found “learning the apparently neutral language of the law appears to have different effects on students of different races, genders, and class backgrounds.”⁹⁵ As to women law students, Mertz found that those in her study participated at lower rates than men in all classes with male professors and generally spoke less

91. *Id.* at 504–508. Both Mertz and the Carnegie researchers recognized that “there is something of value that can be found alongside the tacit problems involved in law’s ‘signal pedagogy.’” *Id.* at 506. Mertz argues,

Like pedagogical practices in other professional schools, the ‘case-dialogue method’ captures some key aspects of the profession’s culture, and conveys them using a powerful mirroring (the form of the pedagogy in some way echoing the message it seeks to convey). Arguably there is a tension, at least in the Anglo-American system of justice, between a push toward abstraction (an attempt to limit discretion, and to provide a metric for consistent decisions that in their best moments rise above local prejudice) and the need to contextualize (so that the equities of individual cases can be considered, and justice achieved).

Id. Mertz looked for “commonalities that might exist in the way classroom discourse was structured.” *Id.* at 490. “Linguistic anthropologists have found that subtle cultural messages can be encoded in discourse structure, so that any shared features of law school classroom language are potential keys to a commonly-held distinctive worldview.” *Id.* at 490–491.

92. *Id.* at 508, 510.

93. Furthermore, we can use storytelling and film in upper division seminars to encourage students to explore their own silences and rediscover themselves as storytellers.

94. When Mertz first reported her findings, she addressed the question of outsider students’ classroom experiences. *See supra* n. 15 and accompanying text.

95. Mertz, *The Language of Law School*, *supra* n. 15, at 6. Although Mertz found a shared underlying epistemology imparted in diverse classrooms, she also found significant differences among law schools and law teachers and urged “more fine-grained and contextual attention to the ways that school status and culture, as well as aspects of professorial style and classroom dynamics, may affect equality of opportunity in law training and subsequent practice.” *Id.* Mertz is currently engaged in research on equalities in law practice.

in the more Socratic classrooms.⁹⁶ Mertz's empirical documentation of the silencing of women in the law school classroom lends crucial support to what we know from earlier studies.⁹⁷ For more than three decades, studies⁹⁸ have documented what has been termed the "chilly climate"⁹⁹ for female law students.¹⁰⁰

96. Mertz, *Teaching Lawyers the Language of the Law*, *supra* n. 88, at 115.

97. *Id.* at 110.

98. Many of the efforts to track gender dynamics have been conducted by students. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 489 (citations omitted). As Mertz has written,

As an anthropologist who is also participating in the research in this area, I have watched with great interest a process by which student-run observational work appears to have built on itself over the years, with each new study incorporating and improving on innovations from prior efforts (as well as from other sources). At a time when there is a great deal of discussion of how best to encourage empirical work in the legal academy, I think we should take note of this kind of process; it is tempting for trained social scientists to express only skepticism about efforts by legal professionals in this regard, but absent formal graduate social science training for everyone involved, it might be important to view the public discussion itself as a forum for genuine interdisciplinary communication and advancement.

In this regard, some of the students may be ahead of their professors in coming to understand some of the real difficulties and intricacies of using empirical research to address policy issues.

Id. A recent study at Harvard Law School not only replicated the findings of the previous three decades of gender studies but also suggested that outsider students are not alone in their negative experiences of legal education. The Harvard Working Group on Student Experiences, *Study on Women's Experiences at Harvard Law School* at 16, 47–49. (Feb. 2004) (available at <http://www.law.harvard.edu/students/experiences/FullReport.pdf>) (accessed Mar. 16, 2009) [hereinafter *Women's Harvard Experiences*]; see also Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 *Am. U. J. Gender Soc. Policy & L.* 511 (2005) (discussing multiple kinds of data on gender found at Harvard, including grades data in required first-year courses from 1996–2000, and an accompanying survey of students conducted from 2002–2003). As one male third-year student commented,

The school manages to take 500 of the brightest and most motivated students in any field in the country and systematically pacify and alienate large proportions of them, so that by the time they are in their third year, many if not most students rarely attend class, do the reading, or care a fig about the law.

Women's Harvard Experiences, *supra* n. 98, at 21 (emphasis removed). The Harvard Study also prompted "a new perspective" for Morrison Torrey, an insistent commentator on the failures of legal education. Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 *Wm. & Mary J. Women L.* 795, 797 (2007) [hereinafter Torrey, *Gender Study*]. "After writing several articles addressing gender and legal education, I have come to the realization that even though female students were subjected to a greater quantity (and sometimes different quality) of negative law school experiences, substantial numbers of men are also being deprived of a quality legal education." *Id.* "Apparently law school is a positive learning experience for hardly anyone!" *Id.*

99. Morrison Torrey, Jennifer Ries & Elaine Spilopoulos, *What Every First-Year Female Law Student Should Know*, 7 *Colum. J. Gender & L.* 267, 269 n. 7 (1998) [hereinafter Torrey, *First-Year Female Law Student*]. This "chilly climate" has been documented in five

In the most famous gender study, one woman law student at the University of Pennsylvania Law School commented that, "Law school is the most bizarre place I have ever been. . . . [First year] was like a frightening out-of-body experience. Lots of women agree with me. I have no words to say what I feel. My voice from that year is gone."¹⁰¹ "Another young woman added, 'For me the damage is done; *it's in me*. I will never be the same."¹⁰²

There are far fewer empirical studies examining the effects of legal pedagogy on the experiences of students of color.¹⁰³ Mertz offers the first systematic observational data on race in the law school classroom, finding that students of color participated at high levels in classes taught by professors of color, and these were the only classrooms in which students of color were dominant speakers.¹⁰⁴ Numerous personal accounts and several survey studies document a sense of exclusion,¹⁰⁵ particularly among

general areas, including the following: sexual harassment, classroom environment, academic performance, perceptions of self, and interaction with faculty. *Id.* at 270. These five organizational categories were first used in *What Every First-Year Female Law Student Should Know. Id.*

100. Torrey, *Gender Study*, *supra* n. 98, at 796. They "speak less in class than white men; perform worse, both by internal and external standards, than white men; experience more negative physical, psychological and emotional reactions than white men; and, in general, have a less satisfactory legal education than white men." *Id.* Torrey has written extensively on this subject, dating back more than a decade. See Torrey, *First-Year Female Law Student*, *supra* n. 99; Morrison Torrey, *You Call That Education?* 19 *Wis. Women's L.J.* 93 (2004) [hereinafter Torrey, *You Call That Education*].

101. Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* 28 (Beacon Press 1997) [hereinafter Guinier, *Becoming Gentlemen*].

102. *Id.* As Michelle Fine observed,

If law school is "boot camp" to train recruits for equally ruthless law firms, then the success of this institution is brilliant. Silence makes sense, difference has no place, and domination and alienation are the point. Alternatively, if law school is an attempt to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people, then the failure of the institution is alarming. In the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss.

Id. at 76.

103. Mertz, *The Language of Law School*, *supra* n. 15, at 174.

104. Mertz, *Teaching Lawyers the Language of the Law*, *supra* n. 88, at 112.

105. See e.g. Taunya Lovell Banks, *Gender Bias in the Classroom* 2, 14 *S. Ill. U. L.J.* 527 (1990) [hereinafter Banks, *Gender Bias* 2]; Taunya Lovell Banks, *Gender Bias in the Classroom* 38 *J. Leg. Educ.* 137 (1988) (reporting on 1986 study of five schools based on self-reports) [hereinafter Banks, *Gender Bias*]. In her later study, Banks surveyed students from fourteen private and public law schools during the 1987–1988 and 1988–1989

women of color.¹⁰⁶ For example, Patricia Williams described her experiences as a student.

My abiding recollection of being a student at Harvard Law School is the sense of being invisible. I spent three years wandering in a murk of unreality. I observed large, mostly male bodies assert themselves against one another like football players caught in the gauzy mist of intellectual slow motion. I stood my ground amid them, watching them deflect from me, unconsciously, politely, as if I were a pillar in a crowded corridor. Law school was for me like being on another planet, full of alienated creatures with whom I could make little connection. The school created a dense atmosphere that muted my voice to inaudibility.¹⁰⁷

Less is known about gay, lesbian, and bisexual (GLB) law students. There are only three survey studies.¹⁰⁸ All three studies

academic years. Banks, *Gender Bias 2*, *supra* n. 105, at 528. In addition to findings on gender, this study compared the perception and experiences of students of color with those of white male students. *Id.* at 535. It found that students of color were more likely to report that “very few of their professors respect their questions and comments” and that African-American students were more likely to “perceive that professors embarrass or put-down students, and use offensive humor in class.” *Id.* at 536. A 1988 study at University of California—Boalt Hall found that white male students reported volunteering in class more frequently than all other students. Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women’s L.J. 1, 12 (1990). They also reported more positive feelings of self-esteem and more positive reactions to the traditional pedagogy. *Id.* at 43. Lani Guinier’s study at University of Pennsylvania found that race constitutes a significant independent factor in predicting academic performance in law school. See Guinier et al., *Becoming Gentlemen*, *supra* n. 101. See also Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender in Nine Law Schools*, 44 J. Leg. Educ. 311 (1994) (reporting on the 1994 study of Ohio’s nine law schools ordered by the Ohio Supreme Court and the Ohio Bar Association).

106. Homer & Schwartz, *supra* n. 105. Women of color consistently showed up with the most negative reports regarding participation, self-esteem, and satisfaction with law school teaching. *Id.*

107. Patricia J. Williams, *The Alchemy of Race and Rights* 55 (Harv. U. Press 1991).

108. The Committee on Lesbians and Gay Men in the Legal Profession, *Report on the Experience of Lesbian and Gay Law Students in New York Metropolitan Area Law Schools*, 51 The Record 145 (Mar. 1996). The Report of the Committee on Lesbians and Gay Men in the Legal Profession of the Association of the Bar of the City of New York, in conjunction with a previous study of the Committee on the barriers facing lesbians and gay men in the practice of law in the New York metropolitan area, documents the law school experiences of sixty-nine gay students in New York metropolitan area law schools and a “continuing need for education and action to address inequality and discrimination against lesbian and gay individuals in the legal environment.” *Id.* at 1–2. See also Scott H. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 L. & Inequal. 555, 559 (1996) (discussing narratives of gay, lesbian, and bisexual (GLB) stu-

document the negative impact of attitudes toward sexual orientation on these students’ law school experiences.¹⁰⁹ In one survey study, a gay student described a first-year Constitutional Law classroom discussion of *Bowers v. Hardwick*.¹¹⁰ When he questioned his professor’s agreement with the majority’s holding and reasoning,¹¹¹ the professor advised him, “you need to divorce your personal politics from your constitutional law.”¹¹²

It seems beyond dispute that many outsider students are silenced in the first-year classroom—a silence whose effects go beyond the students to the content of the course itself.¹¹³ As Mertz noted, when outsider students are silenced,

dents at University of Minnesota Law School Class of 1997 and responses to surveys mailed to GLB law student groups across the country). See generally Janice L. Austin, Patricia A. Cain, Anton Mack, J. Kelly Strader & James Vaseleck, *Results from a Survey: Gay, Lesbian, and Bisexual Students’ Attitudes about Law School*, 48 J. Leg. Educ. 157 (1998) (reporting on the 2003 Law School Admissions Council (LSAC) survey of Canadian and American law schools) (available at <http://lsacnet.lsac.org/publications/GLBT-Climate-Survey.pdf>). The survey consisted of two questionnaires—one for GLB students and one for GLB student organizations—covering coming out in the application process and in law school, coverage of GLB issues in the classroom, the law school environment, institutional support for student organizations, and students’ overall satisfaction with law school. *Id.* “In response to the question, ‘Have you ever experienced homophobia in your law school?’ 66 percent of the students responding reported that they had (52 percent ‘occasionally’ and 14 percent ‘frequently’).” *Id.* at 166.

109. See generally *supra* n. 108 (describing surveys conducted on GLBT experiences in law school).

110. 478 U.S. 186 (1986).

111. Ihrig, *supra* n. 108, at 557–558.

112. *Id.* See also Kevin S. Reuther, *Dorothy’s Friend Goes to Law School*, 1 Natl. J. Sexual Orientation L. 253, 253 (1995) (available at <http://www.ibiblio.org/gaylaw/issue2/reuther.html>). Reuther, an openly gay Harvard law student, wrote that all the gay men and lesbians he encountered in the assigned readings in his first year as a law student at Harvard—including Michael Hardwick—were “criminals of one sort or another.” *Id.* Other than that, he wrote “[w]e are invisible.” *Id.*

Another gay student at Harvard Law School tells a story of emerging utterly demoralized from a contracts exam and going to a gay bar, where he danced all night instead of studying for his next exam. Brad Sears, *Queer L*, 1 Natl. J. Sexual Orientation L. 234, 246 (1995) (available at <http://www.ibiblio.org/gaylaw/issue2/sears.html>).

[T]hat night, the seedy gay bar I walked into took on new meaning. All of those gay men dancing, just dancing, in the face of the world outside seemed like a courageous act of rebellion, showed an incredible endurance and vitality. . . . As I danced in the center of that dingy basement throbbing with shirtless men and colored lights, I started to regain some sense of who I was and why I had come to law school.

Id.; see also Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 Harv. Women’s L.J. 89 (2004) [hereinafter Brooks, *Queering Legal Education*] (explaining the development of a “queer” legal pedagogy in law schools).

113. Beyond questioning ourselves on the issues of social context and moral footing that have been lost in the translation of human stories into law’s language, there remains the

then any differences these students bring with them in experience or background are not given voice in classroom discourse. To the extent that these differences in experience reflect race, gender, class, or other aspects of social identity, we again see aspects of social structure and difference pushed to the margins of legal discourse.¹¹⁴

Mertz documented this tendency to marginalize in the actual structure of voices heard in law school classrooms. She also found a similar tendency in the content of law school teaching, the same tendency documented by the Carnegie researchers.

Mertz's central conclusions regarding the commonalities of language involved in creating this shared legal vision can be stated simply:

There is a core approach to the world and to human conflict that is perpetuated through U.S. legal language. This core legal vision of the world and of human conflict tends to focus on form, authority, and legal-linguistic contexts rather than on content, morality, and social contexts.

* * *

This legal worldview and the language that expresses it are imparted in all of the classrooms studied, in large part through reorienting the way students approach written legal texts. This reorientation relies in important ways on a subtle shift in linguistic ideology.¹¹⁵

disturbing question of what outsider students have lost in their silences. As Catharine MacKinnon wrote more than twenty years ago, "What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience." Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 205 (Harv. U. Press 1987).

It is possible to create space in upper division seminars for law students to determine the form and content of their own excavations of their own language and silences. We can construct courses that cast a bright, critical light on the experiences of outsider students in legal education and the profession, including how they are portrayed. Students can then create and present their own subversive projects—working sometimes with words, sometimes with photography, film, and video. They can begin to complete their own stories.

114. Mertz, *Teaching Lawyers the Language of the Law*, *supra* n. 88, at 112–113.

115. Mertz, *The Language of Law School*, *supra* n. 15, at 4–5 (emphasis in original).

Mertz found that the key function of law school is training students through a common language to rupture their way of reading the “conflict stories” contained in legal cases.¹¹⁶

When first-year students first describe their assigned readings, they typically try to “tell the story” in a more usual, non-legal narrative framework.¹¹⁷ Law teachers move them away from their old way of reading guided by a new ideology about language.¹¹⁸ Mertz compared this to medical students being introduced through gross anatomy classes to “a new, more dispassionate way” of dealing with human bodies, dead and alive.¹¹⁹ We law teachers accomplish a similar shift—to a more dispassionate way of reading and storytelling—through a range of linguistic structures.

For example, Mertz tracked language to see whether, once a student has responded to a teacher, the teacher then incorporates some aspect of what that student said in his or her next question.¹²⁰ In this “uptake structure,”¹²¹ if a law teacher takes up some part of the student’s answer in a comment or a subsequent question, then the student has an impact on the classroom exchange and vice versa. Professors often ignore students’ attempts at narrative storytelling, which is termed “non uptake,”¹²² or ridicule the response, which is termed “negative uptake.”¹²³ Either structure sends the message that the emotional, social, and moral dimensions of narrative and story are not important.¹²⁴

116. *Id.* What Mertz adds to *The Carnegie Report’s* broad condemnation of the case-dialogue method (see *supra* n. 45 and accompanying text) is of unique value to law teachers. She parses the linguistic structures of the method and shows us in detail how our uses of language in the classroom lead to “unintended” negative consequences. *Id.* If we think of the classroom as a linguistic landscape—with language literally flowing back and forth—we may see what we are excluding in a new light.

117. Mertz, *The Language of Law School*, *supra* n. 15, at 8.

118. *Id.* at 5.

119. *Id.* at 5, 9.

120. *Id.* at 54.

121. *Id.* at 56.

122. *Id.* at 54.

123. *Id.* at 56.

124. *Id.* at 69. In the following, Mertz explains a typical transcript excerpt where the professor interrupts a student who is responding to a request that she state the facts of a case.

In the first-year classroom, “uptake” controls the content of class discussion.¹²⁵ Professors push students away from storytelling’s typical narrative regime to the law’s regime of contexts of legal authority.¹²⁶ We ask about the procedural stance of the case, the authority of the authoring courts, and the legal categories of written law or precedent discussed.

By redirecting students’ attention to hierarchies of authority, professors shift their attention away from the drama of the human conflict and the moral dilemmas inherently involved. As students are socialized to this new reading of legal texts, their increasingly expert gaze moves ever more fluidly through the most wrenching of conflict stories. The “re-oriented” students search for those key “facts” and pragmatic cues that allow them to link this story to previous cases and situate it within its current legal context.¹²⁷

Prof.: Hi. Um, can you start developing for us the arguments for the plaintiff and the defendant. (.) Um, Ms. N.?
 Ms. N.: Um, that the plaintiff was a young, youthful man // with //
 Prof.: // great // the plaintiff
 was a beautiful man (.) [[class laughter]] Is that what you said?

Id. (Use of //parallel lines// signals overlapping speech.) It is quite usual to begin a story by introducing the characters, in part by describing details of their physical appearance. The professor, however, interrupts and then directs the student to skip this type of narrative introduction and move straight into a discussion of the legal issues:

[Prof.:] Okay, all right, so there’s a lot at stake in the choice of which branch of this rule to apply in this particular fact situation. And all I’m interested in, Ms. N., is what the arguments are, um, for cost of completion, which is what the plaintiff wants in both cases, and what the arguments are for diminution in value, which is what the defendant wants in both cases, all right? I want the argument, okay?

Id.

125. *Id.* at 56.

126. *Id.*

127. Mertz, *Teaching Lawyers the Language of Law*, *supra* n. 88, at 104.

Indeed, a common approach to law school examinations on the part of professors is to compose their own conflict stories, known as “issue-spotters,” through which students must sift in order to select the most legally salient features. Frequently, composing “issue spotters” involves throwing emotionally compelling—but legally irrelevant—cues into the fact pattern. This tests students on their ability to read texts for legal pragmatics rather than for social, emotional, moral, or narrative contexts.

Id.

Language in the classroom is used to restructure the very language law students use in discussing what they have read, pushing them into a new way of speaking, reading, and thinking.¹²⁸

As we shift attention away from social to legal context, we engage students in a back and forth linguistic exchange that mirrors the form and structure of general legal reasoning and the internal dialogue seen throughout appellate cases. We reinforce the form and structure of this exchange in class through "role-play." As Mertz observes,

[P]rofessors invite students to play the roles of legal personae—of parties, lawyers, and judges—and make legally relevant arguments. When asked to play the roles of litigants or other legal actors, students "become" abstracted individuals within a removed and "acontextual" context. The most salient aspect of identity in these scenarios is students' location within a legal landscape, situated in geography of strategies and argument.¹²⁹

Human beings become disembodied abstractions, stripped of the social, emotional, and moral detail that makes for good non-legal storytelling. Students learn to conceptualize people in terms of legally salient categories that define them in terms of argumentative positions.¹³⁰ In Mertz's words,

128. Mertz, *The Language of Law School*, *supra* n. 15, at 94.

129. Mertz, *Teaching Lawyers the Language of Law*, *supra* n. 88, at 108. An excerpt of Mertz's classroom transcripts is illustrative.

Prof.: Well, if I say I intend to give you \$5,000 if you climb to the top of the Sears tower, is that an offer?

* * *

So, in other words, if I give you \$5,000 this year for your tuition, is part tuition, and \$5,000 next year, your tuition . . . All right? And, depending on how you do in school for the next two or three years, \$5,000. I'm wondering whether or not if I renege you can sue me for breach of contract.

* * *

Okay. What do you think, Mr. B? You are the lawyer for the company that's seeking to fire her. What are you going to say to argue that she should have accepted the position as appliance clerk?

Id.

130. *Id.* at 107. One of Mertz's excerpted transcripts is illustrative.

Student: The defendant has—uh—requested information.

Prof.: Is he a purchaser or seller?

Student: Purchaser.

The human characters in the conflict story become strategizing skeletons, defined by legally delimited contexts, shaped by their places in ongoing dialogic arguments. While role-playing in the classroom attempts to bring students to the level of actual people, the particular roles played omit many of the social particulars that shape not only social interactions, but also moral assessments of those interactions.¹³¹

Obscuring real, social differences presents law as a system that ensures justice in the form of the same treatment for everyone, regardless of specific situations or human lives.¹³² This appearance of neutrality, however, conceals the law's role in enacting and perpetuating social, political, and legal inequalities and injustices.¹³³ "Although apparently neutral in form, in fact the filtering structure of legal language taught to students is not neutral. . . . There is a 'double edge' to the approach found in U.S. legal language; it offers benefits but also creates problems."¹³⁴ Mertz termed this process the "simultaneous problem of 'cultural invisibility and dominance.'"¹³⁵ Some aspects of social context and differences are rendered invisible while others dominate.¹³⁶

For example, we law teachers demand precision from our students regarding issues of legal-textual authority¹³⁷ while simultaneously allowing students to engage in wide-ranging, imprecise, almost fictional discussions of the cases' social contexts.¹³⁸ When

* * *

Prof.: All right, what happened in this case?

Student: Uh—the defendant, Oliver, was selling some land—

Prof.: All right, let's talk in terms of buyer, seller, vendor, vendee, so we can follow the case, all right. All right, go ahead.

Id. at 107–108.

131. *Id.* at 109.

132. *Id.*

133. Mertz, *The Language of Law School*, *supra* n. 15, at 6.

134. *Id.* (emphasis omitted).

135. *Id.*

136. *Id.*

137. *Id.* at 65–66. Regardless of the status of the school or the philosophy of the professor, law students were called on to demonstrate increasing precision about the texts, their institutional histories, and their relationships with other texts, that is, precedent or statutes. *Id.* at 65. Students were pressed until they reproduced the precise words of a legal text. *Id.*

138. *Id.* at 76.

looked at in light of the silence of outsider students, Mertz found that this kind of classroom “storytelling” likely mirrors and perpetuates existing social power divisions. Such storytelling also makes it difficult to introduce “epistemological humility” into legal thinking.¹³⁹

This creates a vivid contrast between the law and the social sciences, which often demand that researchers remain open to revising core assumptions. If the data are in conflict with your pet theory, unfortunately, in the long run, it is probably your theory and not the data that will have to go. By contrast, an attorney is required to hold onto his or her client’s interests and to contest any data that might get in the way. . . . The ubiquitous hedging and modesty with which well-regarded social scientists present their conclusions fre-

Prof.: Organs, all right, organ transplants and stuff. Now, you might or might not agree with it and it might or might not happen, all right. But there are—there’s at least some concept that there (is) some things that are beyond the pale to be allocated through private resources. (0.3 pause) Well, is *Batzakis* that—or isn’t it, and should it—(0.3 pause) and what should the court do with it? Yeah?

Student #1: See, I don’t see organ, like donating an organ for money as the same thing as *Batzakis*—like they’re in a war-torn country and the only way for them to get the money is to give up an organ, in that sense I could see them being similar. But if you’re a rational person living in America and just one day decide you want to give up your organ, I think that should be allowed more so than a situation where you have no choice.

Student #2: But the only reason people give up their organs is when they’re under extreme duress, they’re so poverty-stricken that they say, “All right, I’ll sacrifice one of my two kidneys to this person who’s much richer and can afford to buy it because I need the money in order to feed my kids.”

Prof.: That’s the supply side of it, and what’s the problem with the demand side of it, and by the way if you would say this is somewhat hypocritical because I don’t see the difference between this and milk, on the demand side I’d say, “Yeah, I think we are drawing lines and some of it does look very hypocritical, but we are drawing lines and have to”—what?

Id.

139. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 504. See also Mertz, *Teaching Lawyers the Language of Law*, *supra* n. 88, at 115. Mertz observed:

[T]his distinctive linguistic approach fits within broader legal epistemology in the United States. It notes a tension that emerges between abstract categories and conceptions of justice, on the one hand, and, on the other hand, the democratic ideals of inclusion that require more social, contextual, and grounded moral reasoning. When considered in this framework, the problem of “cultural invisibility/dominance” in legal training emerges as a profound challenge. There is a certain genius about a system of legal reasoning that treats all individuals the “same,” within safely abstract layers of legal categories and authorities, regardless of social identity or context.

Id.

quently seem like a dangerous luxury to those engaged in legal pursuits.¹⁴⁰

As Mertz concluded, “[w]hen social context comes in the door, structure, standards, and rigor exit.”¹⁴¹

There are “better ways to teach.”¹⁴² Storytelling in many forms—text, film, and video—remains available to create more inclusive classrooms that may, in turn, alter the substance of law we teach. Storytelling, as a form of narrative legal scholarship,¹⁴³ describes events of legal significance, often from the perspective of “outsider” writers.¹⁴⁴ These are stories “from the bottom”—

140. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 504.

141. Mertz, *The Language of Law School*, *supra* n. 15, at 79.

142. These alternative methods include the following: student reflection papers, storytelling, out of class assignments, contextualized learning experiences, recognition of the importance of a classroom with racial and gender discourse, creating a more relaxed learning environment, increased interim feedback, small group problems, creation of community, and collaborative and cooperative learning exercises. Torrey, *You Call That Education*, *supra* n. 100, at 110–113.

143. Storytelling originally came into legal scholarship through the work of critical race scholars Patricia Williams, Mari Matsuda, and Derrick Bell. *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2411 (1989). As Richard Delgado wrote around that time—now, almost twenty years ago—“[e]veryone has been writing stories these days.” *Id.* at 2411. Feminists were using narrative, as well. *See e.g.* Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, 13 Nova L. Rev. 355, 358 (1989) (discussing the attributes of legal discourse concerning women and mothers); Carol Gilligan, *In a Different Voice* (Harv. U. Press 1993) (arguing that women reason contextually—what we might term in the law school classroom as “fighting the hypothetical”); Robin West, *Love, Rage and Legal Theory*, 1 Yale J.L. & Feminism 101, 101 (1989) (identifying the existence of disciplining and oppressive forces and their marginalization of the feelings behind feminist legal work); *see generally* Catharine MacKinnon, *Sex Equality* (West Group 2007) (arguing that we always need to tell more of the facts, all the facts; we need women’s blood on the page); Catharine MacKinnon, *Are Women Human?* (Harv. U. Press 2006) (same); Catharine MacKinnon, *Women’s Lives, Men’s Laws* (Harv. U. Press 2005) (same); Catharine MacKinnon, *Only Words* (Harv. U. Press 1993) (same); Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harv. U. Press 1989) (same).

There is no more remarkable storyteller among outsider scholars than poet, novelist, short story writer, and award-winning essayist Ruthann Robson. *See e.g.* Ruthann Robson, *The Struggle for Happiness* (Gay & Lesbian Rev., Inc. 2000); Ruthann Robson, *A/K/A* (St. Martin’s Press 1997); Ruthann Robson, *Another Mother* (St. Martin’s Press 1995); Ruthann Robson, *Cecile* (Firebrand Bks. 1991); Ruthann Robson, *Eye of a Hurricane* (Firebrand Bks. 1989); Ruthann Robson, *Sappho Goes to Law School: Fragments in Lesbian Legal Theory* (Colum. U. Press 1998); *see generally* Brooks, *Queering Legal Education*, *supra* n. 112 (explaining the development of a “queer” legal pedagogy in law schools).

144. There is a body of outsider narratives and scholarship directed at law school reform. *See e.g.* Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?* 76 Va. L. Rev. 95 (1990); Elizabeth M. Iglesias, *Foreword: International Law, Human Rights,*

retellings of law from the point of view of women, people of color, lesbians, gay men, bisexuals, and other silenced groups.¹⁴⁵ Stories humanize the relationships between reader and legal subjects, acting as counter-stories to law, teaching our students to challenge and question the underlying system of reasoning.¹⁴⁶ Through storytelling and film we can introduce “epistemological humility”¹⁴⁷ and tell the otherwise untold stories of outsiders.¹⁴⁸

and *LatCrit Theory*, 28 U. Miami Inter-Am. L. Rev. (1997); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (N.Y.U. Press 2004); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L. Rev. 1547 (1993); Daniel G. Solórzano & Tara J. Yosso, *Maintaining Social Justice Hopes within Academic Realities: A Freirean Approach to Critical Race/LatCrit Pedagogy*, 78 Denv. U. L. Rev. 595 (2001); Williams, *The Alchemy of Race and Rights*, *supra* n. 107.

145. Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies to Teach Legal Ethics*, 69 Fordham L. Rev. 787, 792 (2000).

The use of . . . stories [is] intended to give us a closer, more intimate, as well as broader *experience* (even if only vicariously) of situations—others’, so that we might function better in our own. By bringing vividness and inducing “feelings,” stories . . . are meant to make us feel more directly implicated in what we read and understand. “Feeling with” a character in a story . . . allows us both to empathize or sympathize, as well as to criticize and consider what we might do differently in the same situation.

Id.

146. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607 (1994) (discussing gay narratives).

“Outsider” scholarship posits that law’s traditional stories reflect neither neutrality nor consensus. Outsider work generally consists of writings of authors who are female, nonwhite, and/or gay. Outsider scholars usually have a different view of the law than do their traditionalist colleagues: From the outsider’s perspective, the law not only makes errors of deduction or fact (in that it operates from factually erroneous premises or draws erroneous conclusions from uncontested premises), as traditional scholars often argue, but also makes errors arising out of bias and global ignorance. Outsider scholarship seeks to challenge the law’s agenda, its assumptions, and its biases.

Id. at 608 (citations omitted).

147. Mertz, *Inside the Law School Classroom*, *supra* n. 15, at 504.

148. Outsider scholars provide insights into and sources for excavating those untold stories. For example, GLBT students will be well served if faculty read such authors. *See e.g.* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992); Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (Free Press 1988); Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 Neb. L. Rev. 723 (1993); Arthur S. Leonard, *From Law: Homophobia, Heterosexism, and Judicial Decision Making*, 1 J. Gay & Lesbian Psychotherapy 65 (1991); Timothy W. Reinig, *Sin, Stigma, and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 Buff. L. Rev. 859 (1990); Robert Rhoads, *Coming Out in College: The Struggle for Queer Identity* (Greenwood Publg. Group 1994); William B. Rubenstein, ed., *Lesbians, Gay Men, and the Law* (New Press 1993); Jane S. Schacter, *Poised at the Threshold: Sexual Orienta-*

I approach storytelling in first-year Constitutional Law through films that embody and reflect the insights drawn from the work of outsider scholars. Recently, however, in light of the increasing debate regarding the role of international law in constitutional interpretation, I have also looked for films that present issues of international human rights. Arvonne Fraser's essay, *Becoming Human: The Origins and Development of Women's Human Rights*,¹⁴⁹ is an elegant examination of the social, political, and legal process involved in women's human progress, beginning in 1405 with the first extant feminist text, the writings of Christine de Pizan.

De Pizan understood that denying a group its history and suppressing its record of leadership results in disempowerment of the group. She knew that the record of actions by those who challenge existing power structures is often deliberately suppressed and, unless that group is successful and becomes a new political force, that history is lost.¹⁵⁰

The importance of a sense of one's history—and a record of that history—makes a good beginning in selecting films for a traditional first-year Constitutional Law class.¹⁵¹ Most traditional courses begin with the structural power principles of the United States Constitution: the power of judicial review, the principles of federalism, and the nature and scope of executive powers.¹⁵² In my experience, outsider students are often alienated by the early readings and the lofty talk of the Framers or Founders. However, within just a few classes, examination of Article III, the power of judicial review, leads to the question of the judicial exclusivity in constitutional interpretation. In *Cooper v. Aaron*,¹⁵³ the United States Supreme Court responded to the resistance to desegrega-

tion, Law, and the Law School Curriculum in the Nineties, 92 Mich. L. Rev. 1910 (1994); Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity*, 39 Wayne L. Rev. 121 (1992); Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (Doubleday 1995); see also *infra* n. 155.

149. Arvonne Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 Hum. Rights Q. 853 (1999).

150. *Id.* at 859–860.

151. At many law schools, including ours, Constitutional Law is taught in the second semester of the first year.

152. See U.S. Const. art. II, § 1, cl. 1; *id.* at art. III, § 2, cl. 1.

153. 358 U.S. 1 (1958).

tion in Little Rock, Arkansas.¹⁵⁴ To dignify the history of students of color and to ensure the visibility of the social, political, and moral context of the case, I screen one segment of the documentary *Eyes on the Prize: Fighting Back (1957–1962)*.¹⁵⁵ Before screening the film this past year, I called the students’ attention to the schoolchildren’s lawyers—including Thurgood Marshall, then Chief Counsel for the NAACP, responding to questions at a press conference—at work making social, political, and legal history. Then, as a class, we see the images and hear the voices of the African-American teenagers who integrated Little Rock’s Central High School. We also see the ugly face of massive resistance in the Jim Crow south,¹⁵⁶ as one of the angry white mob strikes an African-American male reporter on the head with a brick. The lesson of the enormous power of judicial review is also brought

154. *Id.* at 7.

155. *Eyes on the Prize: Fighting Back (1957–1962)* (PBS Home Video 1986) (video documentary). It is much simpler to use storytelling and film in teaching civil rights. Traditional students easily grasp that becoming fully human in terms of rights is a social, political, and legal process. They resist, however, challenges to the traditional “story” that exercises of governmental power pursuant to ancient structural principles are not neutral. This can be made explicit in teaching famous and infamous cases that were later overturned by the Court. To my teaching of *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Lawrence v. Texas*, 539 U.S. 558 (2003), I add Peter Irons’ storytelling, including the story of Michael Hardwick. Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, *supra* n. 148.

An earlier example is *Buck v. Bell*, 274 U.S. 200 (1927), an early Lochner-era substantive due process case that brings home the lessons of the limitations of a legal language that excludes issues of social context, power, and morality. Another example is *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Court invalidated a state Habitual Criminal Sterilization Act. In *Buck*, the United States Supreme Court validated the sterilization of Carrie Buck under a Virginia law that allowed the sterilization of those who were feeble-minded, retarded, and had an inheritable trait. 274 U.S. at 207. It was the era of eugenics. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. Rev. 30, 32 (1985). That might be all first-year students would read in their casebook or hear in their classroom discussion, and all they may remember might be Justice Oliver Wendell Holmes’ concluding proclamation, “Three generations of imbeciles are enough.” *Buck*, 274 U.S. at 207.

Subsequent scholarship about Carrie Buck, her mother, Emma, and her daughter, Vivian, however, revealed that none of them was provably retarded, a social misfit, or a dangerous person. Furthermore, the Director of the Colony, its doctors and Carrie Buck’s lawyer were friends and in collusion, pressing their own legislative agenda regarding medicine and the state’s power to legitimate private prejudice. Lombardo, *supra* n. 155, at 32–33. In 2002, by Resolution of the General Assembly of Virginia, Virginia honored the memory of Carrie Buck on the occasion of the 75th anniversary of *Buck v. Bell*. Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?*, 30 Fla. St. U. L. Rev. 191, 198–199 (2003).

156. *Eyes on the Prize: Fighting Back (1957–1962)*, *supra* n. 155.

into focus as two presidents, however reluctantly, send in federal troops to enforce the Court's rulings.

Following the subject of judicial review, we examine the principles of federalism. For the last two years, I used the issue of sex trafficking in children as a case study for exploring the legislative powers of Congress, including the Commerce Clause, the foreign Commerce Clause, and treaty power. In developing this case study, I have relied on storytelling through documentary films. These films portray the inability of state, national, and international legal and social systems to address what has come to be called "modern slavery."¹⁵⁷ Two years ago, we viewed the documentary film *The Day My God Died*,¹⁵⁸ which tells the story of young girls who were sex-trafficked from Nepal into the brothels of India.¹⁵⁹ The film documents the rescue work of one Nepali NGO, Maiti Nepal, and its founder Anuradha Koirala.¹⁶⁰

This past year, Alicia Foley Winn, a recent graduate of our school and founder of a Boston-based NGO, The Boston Initiative to Advance Human Rights, spoke to the class about the dynamics of national and international sex trafficking. We then screened a second documentary, *Playground*,¹⁶¹ about sex trafficking in the United States.¹⁶² The young filmmaker¹⁶³ was present for the screening. In the panel discussion that followed, students heard from representatives of several human rights NGOs, lawmakers, law enforcement representatives, and the Executive Director of the Massachusetts Human Trafficking Task Force about the scope, depth, and nature of sex trafficking. Sex trafficking presents a powerful counterpoint to the Court's holding in *United States v. Morrison*¹⁶⁴ that violence against women is local, non-

157. See James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 Va. J. Intl. L. 1, 43–44 (2008) (noting that women and children are used in sexual trafficking, which is a modern form of slavery).

158. *The Day My God Died* (Andrew Levine Prods. 2003) (DVD).

159. *Id.*

160. *Id.*

161. *Playground* (Libby Spears 2009) (DVD).

162. *Id.*

163. *Id.* Libby Spears is one of a growing number of filmmakers addressing this topic. Her mission is to raise the public's awareness of the commercial sexual exploitation of American children. Libby Spears, *The Nest Foundation*, <http://www.nestfoundation.org/> (accessed Apr. 2006).

164. 529 U.S. 598 (2000).

economic activity and therefore beyond the reach of the Commerce Clause.

Finally, the often untold story surrounding *Korematsu v. United States*¹⁶⁵ plays a central role in teaching the structural principles of executive war powers in general and executive detention, in particular.¹⁶⁶ A young man named Fred Korematsu challenged the constitutionality of the 1942 Executive Order.¹⁶⁷ *Of Civil Rights and Wrongs*¹⁶⁸ tells Fred Korematsu’s story, including much of his subsequent legal history.¹⁶⁹ The film is also

165. 323 U.S. 214 (1944). In *Korematsu*, the Court offered the following explanation: [W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. (citation omitted). But hardships are part of war, and war is an aggregation of hardships.

Korematsu was not excluded from the [West Coast] because of hostility to him or his race [but] because the . . . military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id. at 219, 223–224.

166. *Id.* at 216–217. Following the Japanese attack on Pearl Harbor, President Franklin Roosevelt signed Executive Order 9066, which gave military officials the legal authority to exclude any or all persons from designated areas on the West Coast in order to insure against sabotage and espionage. *Id.* Under authority of the Executive Order, the War Relocation Authority subjected all persons of Japanese descent on the West Coast to curfew, excluded them from restricted areas, detained them in assembly centers, and then evacuated them to “relocation centers.” *Id.* at 217–221.

167. *Of Civil Rights and Wrongs: The Fred Korematsu Story* (POV 2000) (DVD) [hereinafter *Of Civil Rights and Wrongs*]. As filmmaker Eric Paul Fournier later wrote,

One of the things that I tried to show in the film was the irony, if you will, of Fred being incarcerated for his actions by one president and 40 years later given the Presidential Medal of Freedom award by another president for the very same actions. I think that says volumes about the growth of America, about the changes in America, the changes in the face of America. That said . . . at the time I made the film it was meant to be a cautionary tale. But obviously I had no idea how prescient, timely and extremely relevant the film and these issues would become by virtue of the attacks of September 11 . . . and the subsequent round-up of people of Arab, Muslim and Middle Eastern descent.

PBS, *Making the Film: An Interview with Eric Paul Fournier*, <http://www.pbs.org/pov/pov2001/ofcivilwrongsandrights/thefilm.html> (accessed Apr. 11, 2009).

168. *Of Civil Rights and Wrongs*, *supra* n. 167.

169. *Id.* Many participants in the Japanese internment later reflected on their roles. Some knew at the time that internment was unconstitutional and immoral. Peter H. Irons, *Justice at War: The Story of the Japanese American Internment Cases* 273–277, 344–345 (U. Cal. Press 1983). Years before he was appointed to the Supreme Court, Tom Clark served as an Assistant Attorney General responsible for criminal prosecutions. John D. Weaver, *Warren: The Man, The Court, The Era* 113 (Little, Brown & Co. 1967). Upon retiring from the Supreme Court in 1966, Justice Clark stated, “I have made a lot of mistakes in my life [.] . . . One is my part in the evacuation of the Japanese from California[.] . . .

the story of idealistic young lawyers.¹⁷⁰ Professor Peter Irons discovered long-forgotten documents proving that the Justice Department misrepresented the facts to the Supreme Court.¹⁷¹ He took this evidence to Fred Korematsu, and they decided to re-open the case.¹⁷² Peter Irons then enlisted a legal team consisting mainly of Asian-American lawyers.¹⁷³

The lawyers' efforts ultimately uncovered documents clearly showing the government had concealed evidence that racism—not military necessity—motivated the internment order in the 1944 case.¹⁷⁴ More than thirty-nine years after the fact, a federal judge reversed Fred Korematsu's conviction, acknowledging the "great wrong" done to him. In 1998, Fred Korematsu was awarded the Presidential Medal of Freedom Award, the nation's highest civilian honor.¹⁷⁵ After viewing the film, students read Fred Kore-

[A]s I look back on it—although at the time I argued the case—I am amazed that the Supreme Court ever approved it." *Id.*

Later presidents also addressed the immorality of the internments. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 Cal. L. Rev. 2203, 2206 (2007). In 1976, as part of the celebration of the American Bicentennial, President Gerald Ford issued Presidential Proclamation No. 4417 that recognized the internments as a "national mistake." *Id.* President Ford concluded by calling "upon the American people to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated." Paul Lyon, *The Presidential Internment Power Established by the 1942 Internment of Americans Suspected of Disloyalty*, 13 San Joaquin Agric. L. Rev. 23, 48 (2003). In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order No. 9066. Stone, *National Security v. Civil Liberties*, *supra* n. 169, at 2206–2207. The Commission was composed of former members of Congress, the Supreme Court, and the Cabinet, as well as distinguished private citizens. *Id.* at 2207. In 1982, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity." *Id.* In 1988, President Reagan signed the Civil Liberties Act of 1988, which officially declared the Japanese internment a "grave injustice" that was "carried out without adequate security reasons," and offered a formal presidential apology and reparations to each Japanese-American who had been interned, along with a formal presidential apology for the discrimination, loss of liberty, loss of property, and personal humiliation they had suffered. Pub. L. No. 100-383, 102 Stat. 903, 903 (1988).

170. See also *The Carnegie Report*, *supra* n. 14; *supra* n. 86 and accompanying text.

171. Irons, *supra* n. 169, at viii–ix.

172. *Id.*

173. *Id.* at viii.

174. *Id.* at viii–ix.

175. Fred Korematsu Br. of Amicus Curiae, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343) [hereinafter *Korematsu Brief*]. *Of Civil Rights and Wrongs* records former President Clinton's praise of Korematsu at the ceremony. "In the long history of our country's constant search for justice, some names of ordinary citizens stand . . . for millions of souls—Plessy, Brown, Parks. To that distinguished list today we

matsu’s Amicus Brief in the Guantanamo Detainees cases.¹⁷⁶ What can be said of this film can be said of many readily available documentaries: The film imparts the lesson that the social, political, and moral dimensions of governmental exercises of power are not merely footnotes to a forgotten history.

CONCLUSION

Law school reform movements offer rather chilling portraits of traditional legal education. In the 1930s, social realist Karl N. Llewellyn gave us the image of traditional legal education as a machine.¹⁷⁷ Law school training, he wrote, when “viewed in critical aloofness, [is] blind, inept, factory-ridden, wasteful, defective, and empty. If you prefer verbs: it blinds, it stumbles, it conveyor-belts, it wastes, it mutilates, and it empties.”¹⁷⁸ In the 1970s and 1980s—from social realism’s modern cousins, socio-legal studies, law and society, and critical legal studies—there was Duncan Kennedy’s image of legal education as hierarchies within hierarchies, perpetuating hierarchy like shadow boxes.¹⁷⁹ Today, reformers like Dean Edward Rubin give us the image of legal education as corporations, marked by competition, product, and brands.¹⁸⁰ Given the recent financial crises, perhaps another image awaits. Yet, within all the images of legal education as machine, box, or monumental architecture dead to reform, the law

add the name of Fred Korematsu.”

176. *Korematsu Brief*, *supra* n. 175, at 1.

177. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651, 652–653, 678 (1935).

178. *Id.* at 652–653, 678 (1935). Llewellyn concluded, “[l]aw school education, even in the best schools, is, then, so inadequate, wasteful, blind and foul that it will take twenty years of unremitting effort to make it half-way equal to its job.” *Id.* at 678.

179. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against The System* 61–68 (N.Y.U. Press 2004); *see also* Kate Nace Day, *Pedagogical Forays: One Art: Being Feminist in Legal Education*, 32 Leg. Stud. Forum 953, 953 (2008).

180. Edward Rubin, *Should Law Schools Support Faculty Research?* 17 J. Contemp. Leg. Issues 139, 145–146 (2008).

school classroom continues to present itself as the place that is alive to reform.¹⁸¹ The Authors hope this Article contributes to a rebirth of creativity and engagement in the law school classroom.

181. Many law teachers know this, perhaps especially those teaching in the first year. It is “difficult knowledge,” however, and may fall upon the individual law teacher as a lonely responsibility. In reply to Edward Rubin’s question—why should a law teacher take up this difficult work?—I offer this: Otherwise confined in the values and power structures of traditional legal education, this work might be the only place where the faculty member is alive to her commitment and purpose. *See generally* Adrienne Rich, *Poetry and Commitment, An Essay* (Norton & Co. 2007) (explaining, through poetry, some of the modern struggles people face).