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Exhuming Human Remains from Case Law: the Role of Narrative Research in Legal Education

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Summary

This essay proposes narrative inquiry as a means to encouraging a human-centred approach to legal education. It seeks to emphasise the significant role of narrative as a universal tool for both conveying and receiving knowledge and understanding. Since narrative permeates human society its presence is to be expected and has been identified in legal proceedings and discourse. Yet its significance has not been acknowledged widely by legal educators. This essay seeks to endorse and to encourage the use of narrative research in the field of legal education. It introduces a research project that will be carried out in order to assess the practical outcome of its aims.

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Introduction

Imagine a vast round pit, dug into the ground, clods of brown earth piled around its perimeter. Picture now a large crowd of people, just coming into sight but drawing closer as they walk in unison towards this huge hollow in the ground. As they come into view some details are recognisable. There are men and women – dressed smartly and carrying large, white sheets of paper with arms outstretched. Others are pointing at the paper and shouting at other men and women around them "You are on our land, you are on our land. You must move that fence!" These are you come to realise, the boundary-disputers. Behind them come funeral directors, carrying a coffin on their shoulders. Walking behind are people in black, some weeping, some arm in arm, others behind them whispering "We did everything for that man; we're entitled to that house". These are the probate disputers and the estoppel claimers. And so it goes on. More and more people, some crying, some shouting, some whispering. All walking on and on towards the freshly dug pit.

Another group appear. Again both men and women, smartly dressed and carrying large, black briefcases. Some are chatting to each other and smiling, others are speaking into mobile telephones and the younger members are running ahead to catch up with the first group, handing out business cards to them as they all continue on towards the pit. These are the legal representatives. As the younger members rejoin the group they walk on but all stop momentarily and turn to look behind them. There are men and women in fine, black robes walking towards them. More legal representatives are yet of another breed. They wave and shout greetings to one another before all marching steadily on. Finally a smaller group emerges, again in fine robes but of varying colours and styles. The judges; solemn, silent and sombre as they too walk on and on towards the vast, freshly dug hole. You watch in amazement as these groups of people walk calmly and unknowingly down into the bottom of the pit. They are soon all gathered there, some conversing, some weeping, some shouting accusations. The funeral directors place the coffin down.

Suddenly, all around the pit and from every angle appear a multitude of bright yellow JCB diggers. They are driven by men and by women. They are wearing hard hats and yellow 'high-vis' jackets, and in black writing across their backs they bear the title 'ACADEMICS'. They move swiftly and smoothly, each catching the pile of earth before them and sweeping it down into the pit. In a matter of seconds the pit is full of earth and the ground is perfectly smooth. There is silence.

Next a host of white vans appear. Chairs are unloaded from their flung-open doors. Soon rows upon rows of seats are placed on the site where the pit once stood. Thousands of textbooks and law reports are placed in a pile on the fresh soil. Beside them a mound of laptops is placed and streams of young men and women now appear, first walking but now running, each intent on grabbing the books and computer equipment before them. The ACADEMICS step down from their diggers and the crowd is hushed. Through megaphones they utter in harmony "Please be seated". The students stumble to their seats. "We shall now find the ratio". Books are opened, laptop lids are released and the students begin to read, unaware of the bodies that lay buried beneath them, as the ACADEMICS continue to shout through their megaphones "find the ratio! find the ratio!".

This article argues that by training law students to seek out only the ratio of a case and by emphasising the disparity between 'the facts' and 'the point of law' during the course of their

studies, we have removed from legal education the significance of human nature, human emotion and human imagination. Indeed we have buried them. In order to cultivate humanity in legal education it is vital that we make our students aware of the human actors that lay beneath the words of the textbooks and case reports that they read. Narrative inquiry is proposed as a means to exhuming and rediscovering these hidden human remains.

Narrative

Narrative is a term that is used in a variety of contexts when referring to story-telling, or synonymously with story (Riessman 2008, p.3). The word derives from both the Latin *narrare* which means "to tell" and from *gnarus*, meaning "knowing". These two aspects of the word encapsulate its function as "a universal tool for knowing as well as telling, for absorbing information as well as expressing it" (Porter Abbott 2002, p.11). And so intrinsic in any narrative is the conveyance and reception of knowledge or information. However, narrative means more than this. A train timetable conveys information but it is not a narrative; since "[w]hat distinguishes narrative from other forms is that it presents information as a connected sequence of events" (Lacey 2000, p.13). It is this organisation of events and the relationship that one has with another that are crucial aspects of any narrative.

Amsterdam and Bruner (2000 p.113) explain in more detail this organisation of events and their expected sequence. They stress that from the outset a cast of human, or human-like, characters must be present. Thereafter the narrative requires a plot, whereby particular characters become involved in particular events. The plot will commence with an initial state of affairs; the status quo. This state of affairs is interrupted by an unexpected event; that which Amsterdam and Bruner call 'Trouble' but that which is akin to Aristotle's *peripeteia*, a "breach in the expected state of things... a rupture from the expected" (Riesman 2008, p.4). It is this that interrupts the ordinariness of existence and which transforms the sequence of events from a script (that which embodies 'normality') into a narrative. Efforts are then made to remedy or redress the situation and as a result of these efforts, the status quo is restored or "a new (transformed) steady state is created" (Amsterdam and Bruner 2000, pp.113-4).

Of course, this simplistic definition itself conceals the broad complexity and diversity of narrative structure. Herman (2009 p.7) recognises that breaking down a story into its essential elements can be challenging since

"...narrative can be viewed under several profiles, as a cognitive structure or a way of making sense of experience; as a type of text, produced and interpreted as such by those who generate or navigate stories in any number of semiotic media...and as a resource for communicative interaction".

Yet it serves to provide a suitable framework within which we can place the case reports that we encourage students to read. Case reports, of course, ensue from legal proceedings and in terms of narrative structure, a court hearing represents the time at which efforts are made to redress a situation, with the intention that the parties will progress from Court with the status quo restored or, with a new, steady state created. Since those reports that our students read are from the higher courts, we can surmise that the process of redressing the situation has been a protracted one. We can also see that the recorded judgments represent only one element of a diverse story that started months or (more likely) years before.

Reasons for Using Narrative in Legal Education

The reasons for arguing for the use of narrative are three-fold. Firstly it is argued that by introducing the concept of narrative into our teaching, we will create a means by which the human actors or characters involved in a given case may be restored to their rightful status 'above ground'. Furthermore, by giving close consideration to the part that each has played in the story of the case, we breathe back life into these human remains. Through this process of not only exhuming the human remains from case law but also reviving them, and by encouraging our students to do so, we will take an important intermediary step towards cultivating humanity in the realm of legal education.

Secondly, it is broadly accepted that narrative is and has been since ancient times an essential feature of human experience. As Barthes (1966, cited in Reissman 2008, p.4) states:

"narrative is present in every age, in every place, in every society; it begins with the very history of mankind...and there nowhere is nor has been a people without narrative...it is simply there, like life itself."

By encouraging students to consider the 'whole story' of the legal proceedings that lie beneath a case report, we allow them to gain an understanding of the case in a format that is familiar to them. This will serve to engage students more fully in the subject and encourage active student learning.

Lastly, it has been stated that the "law is awash in story-telling"; clients tell stories to lawyers, lawyers rewrite and present those stories in an appropriate form (Amsterdam and Bruner 2002, p.110). Then judges and juries retell those stories in the form of findings, verdicts and opinions and hand them over to critics, journalists and commentators, who participate in this "endless telling and retelling, casting and recasting [that is] is essential to the conduct of the law" (Amsterdam and Bruner, 2002 p.110). Simply put, law and narrative are natural partners and as Papke (1991, p.1) states "[w]hen we reflect on the things and activities that we consider "legal", we find narrative present at every turn". He goes on to question how it is then that, given the pervasiveness of narrative in legal discourse, legal educators have seemed oblivious or even disdainful of it. As one who until recently fell into the 'oblivious' category, the writer seeks to redress the situation by embarking on a research project that both alerts students to the role of narrative in the law and gives them an opportunity to use narrative as a means to participating actively in their learning.

Proposed Research Project - 'Examining the Role of Narrative Inquiry in the field of Legal Education'

A small-scale research and evaluation project will commence in October 2009, based in the School of Law at the University of Leicester. The project will seek to assess the advantages and disadvantages of incorporating within the existing curriculum for undergraduate law students a form of narrative inquiry. It is aimed particularly at final year students who are studying the Law of Equity and Trusts; a subject that students are required to study in order to gain a qualifying law degree.

A general invitation to participate in the study has been given to students within this cohort (of approximately 320) and 35 students have volunteered to take part. Basic information on the project is set out at <http://legalnarratives.wetpaint.com/>. Students were directed firstly to

this site and asked to respond via email. The participants have been asked to attend two seminars. Each runs for three hours. These seminars will be hosted by the writer and by Alison Davies, a professional story-teller and poet. Participants will be required to take part in a number of imaginative story-telling exercises, the aim of which is to familiarise them with the concept of narrative and story-telling. They will take place at the Richard Attenborough Arts Centre. This is a venue that is familiar to students and situated close to the main campus but it is not a normal teaching venue. There will be no requirement for writing as the focus of these sessions is on the use of pencil drawings, oral communication and visual imagery. The intention is that the participants themselves identify the basic features of narrative accounts by being involved in the active creation of them.

Following these sessions, the students will be asked to choose only one case from a selection of cases that they will be required to read in any event as a part of their study of Equity and Trusts. The proposed list of cases is *Paul v Constance* [1977] 1 All ER 195, *Pennington v Waine* [2002] EWCA Civ 227, *Re Endacott* [1960] Ch 232, *Tinsley v Milligan* [1994] 1 AC 340, *Tribe v Tribe* [1996] 4 All ER 236, *Tinker v Tinker* [1970] P 136, *Patel v Ali* [1984] Ch 283, *Burns v Burns* [1984] Ch 317, *Eves v Eves* [1975] 3 All ER 768 and *Lissimore v Downing* [2003] 2 FLR 308. Participants will be asked also to write a fictional story or narrative account of the case (or one aspect of the case) from the perspective of just one of the characters that features in it. They will be free to write from the perspective of one of the parties but will not be required to do so. There will be no word limit and no prescribed format (meaning that the narrative account may be given in the form of a poem, a play or a fairy tale, for example).

The written work will be assessed using the grading scheme that is familiar to students. Gary Watt has kindly agreed to discuss methods of grading for this type of work prior to the project commencing, based on his experience of assessing a Law and Literature course at the University of Warwick. Students will be given the opportunity to publish their work on the website and/or to perform their work to an invited audience should they wish to do so.

Analysis

The extent to which the project has been successful will be measured also by a form of narrative analysis. Initially it was thought that the students' own narrative accounts of the being involved in the project would be recorded via focus group interviews. It has now been decided that throughout the course of the project, students will be asked to discuss their views, feelings and concerns about the project via the discussion board facility in Blackboard. This is a means of communication that students tend to be familiar with and which will be more easily managed than formal interviews.

The students' accounts will be assessed and used as a means to establishing whether the use of narrative inquiry has raised their awareness of the significance of human actors in legal proceedings. More generally it is hoped that this information will demonstrate whether involvement in the project has enhanced the learning experience, whether it has developed the students' understanding of the subject and whether they consider that this active form of learning has helped to develop their intellectual and personal skills and abilities.

Relevant Research

Case law, particularly judicial opinions, and court room discourse provide a rich source of investigation for narrative research and arguably this form of inquiry has tended to dominate legal research based upon narrative; looking within the law for narrative construction and reconstructions. Amsterdam and Bruner (2002 p.144) for example, focus on two specific judicial opinions from the cases of *Prigg v Pennsylvania* 10 L.Ed. 1060 (1842) and *Freeman v Pitts* 118 L.Ed.2d 108 in order to learn what may be discovered by "reading these judicial opinions as stories". My colleague Steven Cammiss (2006) has conducted a study of the production and narratives in the courtroom, arguing that the lawyers produce (and reproduce) narratives in a form that focuses upon legally relevant details. Inherent in this practice is the alteration or translation of the client's story; so that which we might call applying the law to the facts might more readily be described as fitting the facts to the law.

In the field of legal education, Elkins (1988) has conducted a study of students' experience of law school and in his paper he includes numerous 'narrative fragments' or 'narrative vignettes' – statements extracted from student interviews - as a means to explaining and understanding the student learning experience. Webster and Mertova (2007) also adopt a narrative approach as a means to evaluating a teacher development programme introduced by them in the Faculty of Law at Monash University. The personal reflections of participants on the course and of its teachers are analysed in order to identify areas for improvement. A similar approach will be adopted in the latter stages of this research project when the views of the student participants are recorded and considered.

Initially, however, the project requires an 'externalisation' of the story. The construct of a narrative, or the imposition of a narrative structure upon a case, is intended to be a creative act as opposed to an analytical one. Students will be encouraged to adopt an imaginative approach; to go beyond the words that appear before them in the form of a case report and to invent a fictional narrative account based in the factual representations. This will require the students to write in a way that is opposite to their (by now) normal way of working. In short, they will be adding rather than taking away or extracting relevant parts of a judgment. They will be encouraged to make use of secondary materials (such as newspaper reports) as a means to enhancing their understanding of the context in which the case is set.

It is acknowledged that a project that encouraging law students to step away from a factual representation may cause concern. However, in terms of legal education it is a risk worth taking. Amsterdam and Bruner (2002 p.1) maintain that "familiarity is dulling" and that in adopting a routine approach, we can cease to recognise that we are thinking in a certain way and so become ambivalent about our reasons for doing so. For students in their third year of study, embarking on an Equity and Trusts course, this is especially true. The dulling effect is evident in many faces. By contrast, Bruner (2002. pp.9-10) argues that "fiction creates realities so compelling that they shape our experience not only of the worlds the fiction portrays but of the real world...[fiction] offers alternative worlds that put the actual one in a new light". It is hoped that by freeing students to enter into an alternative (or long-forgotten) way of thinking, their understanding of a given case and of case law in general will be deepened and their minds engaged in a manner that enhances the student learning experience. More particularly, it is hoped that by exercising that which Nussbaum (2003, p.10) terms "the muscles of the imagination", students will at the very least acknowledge the existence of the human characters that lay at the heart of the case reports that they read, and perhaps go some way in developing an ability to empathise with them.

Notably, academics that have already used story-telling and narrative in higher education have done so in relation to those which we might consider to be 'dry' subjects. For example, Crumbley and Smith (2000) have used stories to enhance tax students' critical thinking and communication skills and Blissenden (2007) uses story-telling as a means to developing student-led learning in the teaching of Revenue Law at the University of Western Sydney. Their approaches differ. Crumbley and Smith focus upon short stories and consider that the means by which this is implemented into a course may be based on the views of the particular teacher. Students may be required to read a relevant novel that relates to a particular aspect of the course and then be required to construct their own short story. They point out that for teachers, reading short stories prepared by students can be time-consuming and suggest that his approach is most appropriate for smaller classes. They report that the better stories are placed on the internet for other students to read and that the possibility of being published encourages students to become involved in the project. Happily they conclude that "What may have been wearisome and unexciting information can become meaningful through mystery, intrigue, humour or adventure" (2000, p294).

Blissenden acknowledges that requiring students to write stories is an effective means of engaging students but he makes the valid point that in order for this task to be carried out successfully, definite guidance from the teacher is necessary. His own study required students to voluntarily undertake the close reading of selected case law. Thereafter the emphasis is upon oral as opposed to written communication. One group of students was required to "tell the story" to other members of the class. This group were encouraged to use information that was available outside of the case report as a means to appreciate the significance of certain aspects of the case. They were not expected to discuss the point of law or legal principle that arose from the judgment. However, a second group was required to adopt this approach and then to apply the principle to a tutorial question and a third group was asked to explain how to advise an individual client who was about to embark on a particular course of action, in light of their reading of the case. Students that participated in the study provided written feedback, the majority of which was positive. Blissenden concludes that the practice of "retelling the stories behind the judicial opinions" is "a more interactive and engaging learning experience for all concerned" (2007, p.274).

In the field of professional legal education, McPeake (2007) argues that narrative or story-telling is the "missing ingredient" and in considering a suitable place to incorporate story-telling into the legal education process, McPeake considers that it may be appropriate to include it at LLB level, perhaps as an optional course on case preparation or more widely as part of legal skills training. Given that McPeake teaches on the Bar Vocational Course, his emphasis is upon the use of stories in advocacy. He maintains that whereas "jurors are emotional, impulsive and sympathetic and generally affective (or right brain) decision makers. This is typically contrasted with lawyers who are trained to be cognitive (left brain) decision-makers" who tend to focus on facts, logic and reasoning (2007, pp.306-7) He goes on to make a more general statement which provides a fitting conclusion to this part of essay "if we have taught law students to think differently, maybe we should also take the chance to remind them of how everyone else is thinking" (2007, p.307).

Conclusion

This essay has sought to establish narrative inquiry as a valid pursuit in legal education. It has argued that by encouraging students to focus solely on finding the ratio or the point of law in appellate case reports, we have caused them to become detached from the voices, thoughts

and emotions of the multiple human actors that are involved in the litigation process. They lay buried in a metaphorical pit beneath our feet. The writer has outlined a research project that will take place in the new academic year, the aim of which is to revive our students' imaginations and allow them to look beyond a strict interpretation of a case. They will be encouraged to undertake a close reading of a case but they will then be free to create a story of that case, written from the perspective of any one of the persons involved in it. It is hoped that the students' feedback will demonstrate that this form of student-led learning is beneficial to their understanding of a complex and occasionally dull subject. More generally, the project seeks to establish the role of narrative inquiry as a means to highlighting to students the significance of human actors in legal proceedings.

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