

## A TALE OF ELECTION DAY 2008: TEACHING STORYTELLING THROUGH REPEATED EXPERIENCES

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Storytelling has always been a part of law and lawyering, but it is only relatively recently that narrative and storytelling have assumed an important place in legal scholarship. In the past two decades, scholars from throughout the legal academy have turned their attention to the role of narrative and storytelling in law and advocacy. In addition to a thorough examination of storytelling at trial,<sup>1</sup> recent academic literature has used narrative as a lens to understand and describe a vast diversity of areas of law, including, among many others, intellectual property,<sup>2</sup> family law,<sup>3</sup> and

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1. See Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 Clin. L. Rev. 1 (2005); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 Cardozo L. Rev. 559 (1991); Steven Lubet, *Persuasion at Trial*, 21 Am. J. Tr. Advoc. 325 (1997); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991).

2. See Colleen V. Chien, *Of Trolls, Davids, Goliaths and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. Rev. 1571 (2009); Michael J. Madison, *The Narratives of Cyberspace Law (Or, Learning from Casablanca)*, 27 Colum. J.L. & Arts 249 (2004); Viktor Mayer-Schönberger, *In Search of the Story: Narratives of Intellectual Property*, 10 Va. J.L. & Tech. 11 (2005).

3. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992); Timothy E. Lin, Student Author, *Social Norms and Judicial Decisionmaking: Ex-*

corporate law.<sup>4</sup> Storytelling in law has been the subject of several symposia.<sup>5</sup> Major textbooks on advocacy all devote space to the importance of narrative.<sup>6</sup> And the authors of the recent influential report by the Carnegie Foundation, *Educating Lawyers*, determined that “[a]ctual legal practice is heavily dependent on expertise in narrative modes of reasoning.”<sup>7</sup> It is easy to understand why narrative scholars Anthony Amsterdam and Jerome Bruner have confidently declared that “[l]aw lives on narrative.”<sup>8</sup> The proliferation of scholarship on storytelling has been accompanied by a considerable body of literature on the pedagogy of storytelling skills,<sup>9</sup> focusing primarily on teaching students to use this skill effectively by extensive study of storytelling and narrative theory and technique.

We became particularly interested in the pedagogy of storytelling after supervising a number of clinic students in a one-day project on November 4, 2008 as they assisted individuals to en-

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*aming the Role of Narratives in Same-Sex Adoption Cases*, 99 Colum. L. Rev. 739 (1999); Christine Metteer Lorillard, *Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children under the Indian Child Welfare Act*, 8 Whittier J. Child & Fam. Advoc. 191 (2009).

4. See Jeffery Nesteruk, *A New Narrative for Corporate Law*, 23 Legal Stud. F. 281 (1999); Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. Cal. Interdisc. L.J. 181 (2003); William Noble, *The Role of Storytelling in the Merger Approval Process*, 13 DePaul Bus. L.J. 35 (2000); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?* 44 UCLA L. Rev. 1009 (1997).

5. See e.g. Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989); Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 Vt. L. Rev. 565 (1994); Symposium, *The Power of Stories: Intersections of Law, Literature, and Culture* 12 Tex. Wesleyan L. Rev. 1 (2005); Symposium, *Applied Legal Storytelling*, 14 Leg. Writing 3 (2008); Symposium, *Death Penalty Stories*, 77 UMKC L. Rev. 831 (2009).

6. See e.g. Stefan H. Krieger & Richard K. Neumann, Jr., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* 159–175 (3d ed., Aspen Publishers 2007) (“The Story Model of Organizing Facts”); Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 1–8 (3d ed., Natl. Inst. Tr. Advoc. 2004) (“Case Analysis and Storytelling”); Thomas A. Mauet, *Trial Techniques* 494–495 (7th ed., Aspen Publishers 2007) (“Dramatize, Humanize, Visualize Using People’s Stories”).

7. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 97 (Jossey-Bass 2007).

8. Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 110 (Harv. U. Press 2000).

9. See e.g. Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 Cardozo J. L. & Gender 61 (2007); Philip N. Meyer, *Law Students Go to the Movies*, 24 Conn. L. Rev. 893 (1992); Binny Miller, *Teaching Case Theory*, 9 Clin. L. Rev. 293 (2002); Elyse Pepper, *The Case for “Thinking like a Filmmaker”: Using Lars von Trier’s Dogville as a Model for Writing a Statement of Facts*, 14 Leg. Writing 171 (2008).

force their right to vote, when we noticed significant improvement in the students' storytelling skills in a very short period. Our experiences and observations forced us to reconsider existing legal scholarship on the subject, and we turned to cognitive science research to explain the progress of our students in a single day. As a result of our research and our experiences, in this Article we propose a new way of teaching storytelling skills by focusing not on storytelling theory but by creating a learning environment that gives students repeated opportunities to tell stories in a short period of time while providing motivation, feedback, and support.

In Part I, we describe our experience supervising our clinic students on Election Day 2008 and our observations of their learning through the repetitive experiences they had representing several clients in rapid succession. In Part II, we discuss cognitive science research into skills learning, including several necessary elements for optimal learning. In Part III, we review existing legal scholarship on teaching storytelling to lawyers and compare it with cognitive science findings. Finally, in Part IV, we apply cognitive science principles to teaching storytelling through experiential learning and describe the necessary elements for creating effective learning situations. We also suggest some ways that our Election Day experiences might be replicated by teachers in more conventional areas of practice.

### *I. ELECTION DAY 2008*

On Election Day, 2008, we<sup>10</sup> supervised a group of eighteen volunteer students, from each of the seven clinical courses offered at Hofstra Law School, as they participated in a project to give emergency representation to individuals who were seeking to vote after being turned away at the polls. Because New York law gives judges broad power to direct that a petitioner who has been rejected at the polls be permitted to vote,<sup>11</sup> many of these would-

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10. We were also joined on Election Day by Steven Schlesinger, a local election law expert, and Professor Theo Liebmann, a colleague at Hofstra.

11. N.Y. Elec. Law § 5-100 (McKinney's 2007). In addition, because New York has an interest in making sure that "voters be afforded the fullest opportunity to exercise their franchise," *Jones v. Gallo*, 324 N.Y.S.2d 850, 852 (N.Y. App. Div. 4th Dept. 1971), judges are required to construe the Election Law "liberally." N.Y. Election Law § 16-100 (McKinney's 2009).

be voters eventually end up at the courthouse. In Nassau County, over 600 of these frustrated voters flocked to the courts to be able to vote in the historic election of 2008; our students represented approximately 25 percent of them.

We prepared our students for Election Day with a brief training session held a few days before the election. With the help of a local expert and practitioner who was intimately familiar with New York election law as well as custom and practice in Nassau County, we taught a two-hour orientation class that included essential elements of New York election law, the ethical considerations most likely to be relevant, a brief description of what the students could expect, and a few simulation exercises focusing on interviewing and courtroom advocacy.

On Election Day, we were at the courthouse representing clients who had been denied the chance to vote. A typical client came to court after trying to vote at the assigned local polling place and being turned away by poll workers, who informed rejected voters that they could look to the courts for assistance and directed them to the courthouse. Although most of the court system was closed for Election Day, several judges were sitting throughout the day exclusively to hear petitions from rejected voters.

Once inside the court, voters were directed to a crowded and noisy conference room, where they were assigned to one of the several volunteer attorneys working that day, including our students. Lawyers interviewed each client briefly and crafted a short petition, and together they would appear before a judge to present the case. A brief hearing was then held before the judge, with an appearance by a lawyer from the office of the County Attorney, a statutory party to the proceedings whose lawyers were quick to draw the judge's attention to any questionable facts or circumstances. The hearings typically lasted only a few minutes, with little in the way of procedural or evidentiary formality. The judges made their rulings on the spot, and then the lawyers would rush back to the conference room to meet the next client on the list. The whole process rarely lasted longer than thirty minutes from the initial interview to the judicial decision.

There were some obvious differences among the several judges on Election Day. Some were surprisingly quick to allow people to vote; one in particular, however, was much stricter than all of the others. Most were willing to allow our clients to vote as

long as we told a convincing story about why they should be permitted to do so. As a result, the decision to grant or deny a petition tended to turn on whether the story that the lawyer told could convince the judge that the client should be permitted to vote. For our students, this meant that their lack of subject matter expertise was essentially a non-issue, and the most important skill of the day was their ability to translate the facts obtained in their client interviews into compelling stories about the injustice that would result if their clients were denied the right to vote.

All of the students were able to represent several clients, and some represented ten or more individuals. A few stayed for several hours longer than scheduled to help meet the intense demand for counsel. For each of their clients, the students conducted an interview in the chaotic lawyers' room, translated the relevant facts into a compelling narrative, presented the story to the judge, and got a ruling before racing to meet the next client.

Without any conscious effort on our part, on Election Day, we were surprised to discover that as students progressed from their first case to their sixth or seventh case, their storytelling skills improved within a very short period of time, sometimes markedly. Because of the sheer pressure of the scores of cases, we had no opportunity to provide students with formal critiques and primarily debriefed them on the fly as we walked (or ran) back to the conference room for the students' interviews of new clients. But, after only three or four hours of interviewing clients, preparing papers, and presenting multiple cases to judges, most students seemed more adept at telling their clients' stories than at the beginning of their stints.

In this Article, we use "storytelling" to mean the organization and presentation of facts in a way that resonates with the hearer of the story; the skill of storytelling includes analysis of facts to find possible themes and images, selection of an appropriate theme (and, equally importantly, rejecting inappropriate themes), and crafting and presenting that story to convince a particular decision maker in a particular situation. On Election Day, we saw our students progress rapidly in their abilities to assess the facts they learned from each client, to filter out irrelevant information, to focus on the most relevant facts, to develop persuasive themes and images, to present those stories to the judges, and to adapt their techniques to individual judges.

Our assessment of our students is, of course, necessarily impressionistic and difficult to quantify, but we perceived their improvement in at least three interrelated ways. First, in their interactions with us, they displayed increased independence. Our interactions with each student started in typical professor/student fashion: they were unsure, for example, about what questions to ask the clients, how to tell the story to the judge, and such mundane but clearly jitter-inducing matters as where to stand and how to identify themselves to the court. With each successive wave of student arrivals we initially assumed the role of experienced practitioners guiding novice lawyers through the process. We noticed, however, that for most of the students, the interactions quickly became more collegial as we discussed strategies and pros and cons of various approaches to representation of particular clients. No doubt some of this feeling that we were on level footing can be attributed to our own inexperience in this area of law, but we believe that most of it was due to the rapid improvement in our students' abilities. We have frequently seen this transformation from the professor/student relationship in our regular clinical courses, but it takes place over the course of weeks or months, not mere hours.

The second general improvement concerned the reduced number of interactions with us. With each group of students arriving throughout the day, we initially spent significant time sending them back several times to ask clients for more information and working closely with them to craft compelling stories to tell the judges. We repeatedly had to focus them by asking, "What is the story that you want to tell the court?" Very quickly, however, we experienced significantly less back and forth between the students and us, and less need for us to help them prepare their clients' stories, with no reduction in the quality of representation. In fact, we believe that the representation improved despite the diminished role we played with respect to each successive client.

Finally, as the students handled more cases, they were better able to filter out irrelevant facts and focus on relevant facts in telling their clients' stories. Most of the students approached representation of their first client in the same way: once they had conducted an appropriate intake interview, they prepared a story that was a recitation of everything the client had told them, even if, as in some cases, it was actually detrimental to their cases. By

consulting with us and by observing how the court responded to the various elements of their stories, the students quickly learned to filter out not only the negative facts but also the non-essential facts they had learned in their interviews. In short order, they were semi-automatically crafting concise, compelling stories on behalf of their clients.

This experience raised the question for us whether in contexts other than a special one-day project, students might improve their storytelling skills simply through multiple opportunities to tell stories in a particular subject-matter area. In the clinical courses that we both teach, we assign readings on narrative theory and storytelling skills and devote a seminar class to the craft of creating persuasive narratives for clients. Applying the methods we discuss in class, students in their actual cases draft—and redraft—their clients’ stories and eventually present them either orally or in writing to adversaries, courts, agencies, or legislatures. Usually students only have one or two opportunities to make these presentations, and quite candidly, by the end of the semester we often feel unsatisfied about most of our students’ development of storytelling skills. Witnessing the progress of students in honing these skills in just one day, we wondered whether from the perspective of cognitive science there might be more of a benefit to providing students with repeated experiences in storytelling than simply teaching them narrative theory and giving them one or two intensive experiences in the skill.

## II. *TEACHING STORYTELLING THROUGH THE LENS OF COGNITIVE SCIENCE RESEARCH*

Reflecting on our Election Day experience, we turned to the extensive cognitive science literature on the development of expertise to explore the role of repeated experiences in the learning process. Before we review this scholarship, however, we need to make several caveats. First, we in no way intend to suggest that our project on Election Day was a rigorous empirical study. We initiated this program for the sole purpose of providing students with an exciting opportunity to engage in pro bono work on Election Day. In our planning, we had few pedagogical goals and certainly did not intend to test any hypotheses about the effect of multiple experiences on student learning nor did we develop any methodology for measuring student improvement in any lawyer-

ing skills. This Article is based solely on our students' and our own impressions from our experiences that day.

Second, and relatedly, we cannot ignore the fact that November 4, 2008 was a very special day for the students and for us. As one of our colleagues observed, that day was the "perfect storm." Many of the student volunteers had been active in the campaigns for one of the candidates; the clients were highly motivated to assert their rights to vote and tell their stories; and all of the participants, including the judges and court personnel, knew that this day would go down as an important moment in American history. In this context, it is hard to draw any definitive conclusions about the learning that took place. We are the first to admit that our experiences that day may very well have been anomalous.

Finally, in the context of our project, the literature on expertise has its own limited relevance to our experiences on Election Day. Most recent cognitive science studies show that it takes people at least ten years of intense involvement with a skill or profession to acquire expertise.<sup>12</sup> It is inconceivable, then, that our students could miraculously acquire any expertise in any skill in the course of a mere four or five hours.

Even with these limitations, however, consideration of our experiences on November 4 through the lens of expertise literature can be useful in developing improved pedagogies for the teaching of storytelling, and perhaps other lawyering skills. While our inquiry is not a scientific study, by comparing our experiences with the findings reflected in the numerous empirical studies on development of expertise, we can gain a sense of what particular factors might have impacted the perceived improvement in our students' storytelling skills. Obviously, further research on this issue will be required, but this particular experience, we believe, is a good starting point. And while the unique nature of the Election Day project may limit its application to more humdrum contexts, a close examination of what occurred that day can help us identify some possible ways of replicating the experience in everyday skills teaching. Finally, while we recog-

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12. K. Anders Ericsson, *Deliberate Practice and the Acquisition and Maintenance of Expert Performance in Medicine and Related Domains*, 79 *Academic Med.* S70, S72 (Supp. Oct. 2004) [hereinafter Ericsson, *Deliberate Practice*]; K. Anders Ericsson et al., *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 *Psychol. Rev.* 363, 366 (1993) [hereinafter Ericsson, *Acquisition of Expert Performance*].



nize that no students can acquire expertise in any lawyering skills in one day, one semester, or even in the three years of law school, one of the aims of skills education is to teach students the means to learn from experience.<sup>13</sup> Examination of the scholarship on expertise acquisition can provide some guidance in assessing whether a pedagogy that gives students multiple experiences with a skill can provide a means for students to develop expertise as they practice.

#### A. Cognitive Science Research on the Acquisition of Expertise

Traditionally, theorists considered expertise to be an innate quality that was genetically transmitted and could not be altered by training. Practice could improve performance, but the maximum level of achievement was determined by heredity.<sup>14</sup> More recently, theorists have expanded on this view asserting that expertise can be acquired through extensive experience in a particular domain or with a specific skill.<sup>15</sup> They asserted that “extended experience led experts to acquire a gradually increasing number of more complex patterns. With experience, experts were thought to be able to use these new patterns as cues to retrieve stored knowledge about what actions should be taken in similar situations.”<sup>16</sup> But subsequent studies in different areas have demonstrated that even experts with extensive experience in a domain do not necessarily perform better than “less-skilled peers or even .

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13. See generally Sullivan et al., *supra* n. 7, at 22; *Report of the Committee on the Future of the In-House Clinic*, 42 J. Leg. Educ. 508, 514 (1992).

14. Ericsson, *Deliberate Practice*, *supra* n. 12, at S70. Likewise, some theorists, based on self-reporting and myths, asserted that creative contributions of geniuses spring almost spontaneously from their minds. Most scientists now reject this view arguing that geniuses, like the rest of us, develop their insights from experience within their domains. See generally Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 Clin. L. Rev. 149, 174 n. 124 (2004).

15. K. Anders Ericsson et al., *Expert Performance in Nursing: Reviewing Research on Expertise in Nursing within the Framework of the Expert-Performance Approach*, 30 *Advances in Nursing Sci.* E58, E59 (2007) [hereinafter Ericsson et al., *Expert Performance in Nursing*].

16. *Id.*; see generally Hubert L. Dreyfus & Stuart E. Dreyfus, *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer* 30–31 (Free Press 1986). This theory, which, as discussed in the text, has recently been called into question, is proffered as the established model of expertise development by the Carnegie Report on Educating Lawyers. Sullivan et al., *supra* n. 7, at 117 (“[T]he novice must learn to recognize certain well-defined elements of a situation and apply precise and formal rules to these elements, regardless of what else is happening.”).

. . . their secretaries.”<sup>17</sup> Most individuals entering a new domain improve with experience over a period of time until they reach an acceptable degree of performance. But after they achieve that level, more experience does not by itself result in improved performance. Indeed, some studies even suggest that professional performance decreases in accuracy and consistency with length of experience.<sup>18</sup>

Since the evidence suggests that length of experience by itself is not sufficient to improve performance, cognitive scientists have begun to explore what particular factors impact the acquisition of expertise. They have found that those performers who become experts after extensive experience have acquired cognitive skills that “support [their] continued learning and improvement.”<sup>19</sup> These skills are not attained simply by repeated experiences in the domain; rather, they develop from engagement in specific kinds of activities in particular types of learning environments.<sup>20</sup> To fully understand the nature of those activities and environments, it is helpful to consider three different but interrelated cognitive science theories on the development of expertise: schemas, deliberate practice, and flow.

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17. K. Anders Ericsson, *Deliberate Practice and Acquisition of Expert Performance: A General Overview*, 15 *Academic Emergency Med.* 988, 989 (2008); Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E59; see generally Dennis J. Devine & Steve W.J. Kozlowski, *Domain-Specific Knowledge and Task Characteristics in Decision Making*, 64 *Organizational Behavior & Hum. Decision Processes* 294, 295 (1995).

18. K. Anders Ericsson, *The Influence of Experience and Deliberate Practice on the Development of Superior Expert Performance*, in *The Cambridge Handbook of Expertise and Expert Performance* 685, 688 (K. Anders Ericsson et al. eds., Cambridge U. Press 2006); see e.g. Jean Bedard et al., *Expertise in Auditing*, 12 *Auditing* 21, 29 (Supp. 1993) (suggesting that performance of auditors decreased in accuracy and consistency with length of experience).

19. Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E61; Ericsson, *Deliberate Practice*, *supra* n. 12, at S73; Vimla L. Patel et al., *A Primer on Aspects of Cognition for Medical Informatics*, 8 *J. Am. Med. Assn.* 324, 327 (2001); Vimla L. Patel et al., *Diagnostic Reasoning and Medical Expertise*, 31 *Psychol. Learning & Motivation* 187 (1994); Vimla L. Patel et al., *Cognitive Aspects of Clinical Performance During Patient Workup: The Role of Medical Expertise*, 2 *Advances in Health Sci. Educ.* 95 (1993).

20. See Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E61; Larry S. Farmer & Gerald R. Williams, Address, *The Rigorous Application of Deliberate Practice Methods in Skills Courses 6–7* (UCLA/IALS Sixth International Clinic Conference: Enriching Clinical Education 2005) (draft on file with Author).

### 1. *Schemas*

Based on empirical studies, several in the domain of medical expertise, most cognitive scientists now reject the notion that expert performance is merely “a process of pattern recognition” based on prior experiences with similar problems.<sup>21</sup> They also discard as inadequate the view that expert problem-solving merely involves the application of expert “production rules” learned from experience that are applied deductively to the problem at hand.<sup>22</sup> Instead, a number of cognitive scientists hypothesize that expert reasoning involves accessing certain scripts or schemas for solving the problem.

Schemas are “ordered patterns of mental representations that encapsulate all our knowledge regarding specific objects, concepts, or events.”<sup>23</sup> Developed from repeated encounters with similar experiences, “[a] schema can be viewed as a coded expectation about any aspect of an individual’s life, which dictates which characteristics of a given event are attended to, which are stored for the future, and which are rejected as irrelevant.”<sup>24</sup> In regard to the acquisition of expertise, researchers theorize that as a result of greater experience in a particular domain, experts use their well-developed schemas to reflexively filter out irrelevant data and focus on relevant information to come to a solution.<sup>25</sup> Experts automatically use their schemas to identify the deep structure of a situation (its systematic properties) and seek to reformulate it to reach a decision based on previous experience.<sup>26</sup>

Schemas, however, are not acquired simply by repeated experiences in a domain. Cognitive science theory suggests that certain types of experiences nurture the development of schemas while others interfere with it. Scientists have found that because humans have limited attention and processing capabilities, there are significant constraints on the cognitive resources that can be

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21. Vimla L. Patel & Guy J. Groen, *The General and Specific Nature of Medical Expertise: A Critical Look*, in *Toward A General Theory of Expertise: Prospects and Limits* 93, 115 (K. Anders Ericsson & Jacqui Smith eds., Cambridge U. Press 1991).

22. *Id.*

23. Mark P. Higgins & Mary P. Tully, *Hospital Doctors and Their Schemas about Appropriate Prescribing*, 39 *Med. Educ.* 184, 185 (2005) (citations omitted).

24. *Id.*

25. *Id.*

26. Krieger, *supra* n. 14, at 168.

used during learning.<sup>27</sup> Under this “cognitive load” theory, if the instructional format requires students to engage in cognitive activities that are irrelevant to the pedagogical goals, knowledge acquisition can be impeded.<sup>28</sup> They simply become overwhelmed, turn off, and cannot develop effective schemas.<sup>29</sup> Accordingly, this theory suggests that educational experiences should be fashioned in ways that do not impose a heavy extraneous cognitive load but instead help the student develop sound schemas for tackling similar situations in the future.<sup>30</sup>

## 2. *Deliberate Practice*

While schema acquisition is essential to expert performance, cognitive scientists caution that schemas, by themselves, do not assure that individuals will achieve true expertise.<sup>31</sup> Although schemas can make performance more efficient by proceduralizing (even routinizing) the cognitive process, they can limit the knowledge selected for use and the number of variables considered.<sup>32</sup> While in many everyday situations, schemas can be advantageous, in non-routine or difficult situations, they can be harmful.<sup>33</sup> In these latter circumstances, experts need to engage in more complex reasoning and consider alternatives to the scripted process.<sup>34</sup>

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27. See Paul Chandler & John Sweller, *Cognitive Load and Format of Instruction*, 8 *Cognition & Instr.* 293, 294 (1991); John Sweller et al., *Cognitive Architecture and Instructional Design*, 10 *Educ. Psychol. Rev.* 251, 254–255 (1998).

28. Chandler & Sweller, *supra* n. 27, at 294–295.

29. Jeroen J G Merriënboer & John Sweller, *Cognitive Load Theory in Health Professional Education: Design Principles and Strategies*, 44 *Med. Educ.* 85, 87–88 (2010).

30. *Id.* at 295.

31. Krieger, *supra* n. 14, at 175–176.

32. See Douglas A. Hershey et al., *The Effects of Expertise on Financial Problem Solving: Evidence for Goal-Directed, Problem-Solving Scripts*, 46 *Organizational Behavior & Human Dec. Processes* 77, 98 (1990); G. Marchant et al., *Analogical Transfer & Expertise in Legal Reasoning*, 48 *Organizational Behavior & Human Dec. Processes* 272, 282 (1991).

33. See Ericsson, *Deliberate Practice*, *supra* n. 12, at S77 (“When medical conditions are frequently encountered in clinical practice, then experienced physicians will acquire patterns that will allow them to recognize each condition and access mental models or prototypes for the corresponding disease. When the disease or problem is unfamiliar, however, physicians cannot draw directly on their accumulated experience and knowledge and must, therefore, rely on reasoning and systematic generation of alternatives.”); Krieger, *supra* n. 14, at 175–176.

34. See Ericsson, *Deliberate Practice*, *supra* n. 12, at S77; Krieger, *supra* n. 14, at 175–176.

Expertise, then, requires the ability “to distinguish between those situations in which schemas should be used and those in which routine procedures should be modified to adapt to difficult or unusual problems.”<sup>35</sup> As cognitive psychologist K. Anders Ericsson posits, “[E]xpertise is not merely a matter of the amount and complexity of the accumulated knowledge or the ability to recognize patterns and schemas, it also reflects acquired cognitive mechanisms that allow the expert performer to keep refining and modifying representations even after extensive experience in a domain.”<sup>36</sup> “The key challenge for aspiring expert performers is to avoid the arrested development associated with automaticity and to acquire cognitive skills to support their continued learning and improvement.”<sup>37</sup>

To learn these cognitive skills, Ericsson contends that future experts must engage in particular kinds of experiences, which he calls “deliberate practice.”<sup>38</sup> Specifically, he asserts, this practice requires repetitive experiences with incrementally increasing complexity, immediate feedback, and the opportunity to fine-tune their performance.<sup>39</sup> The combination of repetitive experiences and feedback prods students to reflect on the results of their performance.<sup>40</sup> This process, Ericsson claims, encourages students to acquire the cognitive mechanisms to handle both routine and unique problems.<sup>41</sup>

### 3. *Flow*

A third, related theory of cognitive science that is relevant to consideration of the activities that encourage learning from experience is the concept of “flow.” Cognitive psychologist Mihaly Csikszentmihalyi and his colleagues interviewed a large number

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35. See Krieger, *supra* n. 14, at 205.

36. Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E60–E61.

37. *Id.* at E73. While Ericsson’s research initially focused on domains very different from the practice of law, such as musical and athletic performance, Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, he has expanded his analysis to the field of medicine which, like legal practice, often requires professionals to confront ill-structured problems. See generally Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15; Ericsson, *Deliberate Practice*, *supra* n. 12.

38. See Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E61.

39. *Id.*; Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 367.

40. Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 368.

41. See Ericsson, *Deliberate Practice*, *supra* n. 12, at S77.

of individuals who were considered “creative” in a variety of fields and found a common thread:

Artists, athletes, composers, dancers, scientists, and people from all walks of life, when they describe how it feels when they are doing something that is worth doing for its own sake, use terms that are interchangeable in their minutest details. This unanimity suggests that order in consciousness produces a very specific experiential state, so desirable that one wishes to replicate it as often as possible. To this state, we have given the name of “flow,” using a term that many respondents used in their interviews to explain what the optimal experience felt like.<sup>42</sup>

To experience flow, an individual must become totally immersed in an activity.<sup>43</sup> She must pay close attention to her actions, concentrate on achieving her goals, and monitor feedback.<sup>44</sup> And her activities must stay close to the “boundary between boredom and anxiety.”<sup>45</sup>

The Csikszentmihalyi studies demonstrate that certain surroundings foster these elements of the flow process: those that provide easy access to information, stimulation of colleagues engaged in similar activities, and a supportive environment.<sup>46</sup> In these settings, repetitive experiences can become more than humdrum routines and can lead to the development of creative practice and expert performance.

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42. Mihaly Csikszentmihalyi, *The Flow Experience & Its Significance for Human Psychology*, in *Optimal Experience: Psychological Studies of Flow in Consciousness* 15, 29 (Mihaly Csikszentmihalyi & Isabella Selega Csikszentmihalyi eds., Cambridge U. Press 1988).

43. Mihaly Csikszentmihalyi, *Flow: The Psychology of Optimal Experience* 72, 74 (Harper & Row Publishers Inc. 1990).

44. *Id.* at 210–212. While Ericsson asserts that the concept of “deliberate practice” is inconsistent with flow, Csikszentmihalyi’s studies suggest that many of the subjects were able to attain flow precisely because they were engaged in activities similar to deliberate practice. Compare Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 368, with Csikszentmihalyi, *supra* n. 42, at 46; Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery & Invention* 107–108, 114–116 (Harper Collins Publishers 1996) [hereinafter Csikszentmihalyi, *Creativity*].

45. Csikszentmihalyi, *supra* n. 42, at 228 (“When there are too many demands, options, and challenges, we become anxious; when too few, we get bored.”).

46. Csikszentmihalyi, *Creativity*, *supra* n. 44, at 127–147.

## B. Optimal Learning Environment

The research on schemas, deliberate practice, and flow demonstrates the significance of particular kinds of activities and environments to the learning process.

### 1. *Repeated Experiences with Clear Goals*

All three of these theories suggest that repeated performances of an activity by students have limited value unless the experiences are designed to focus on clear tasks. Faced with performing an act with multiple, ambiguous, or open-ended goals, students are often likely to experience cognitive overload. Without clear goals, they will have difficulty becoming attuned to the deep structure of situations and will be unable to identify the relevant and irrelevant information in a particular situation. Consequently, they will be handicapped in developing the necessary schemas for handling similar tasks in the future. And with such multitasking, they will have little opportunity to repeat their performances with enough precision to correct their errors and improve their skills.<sup>47</sup> Finally, it is impossible for students to achieve complete involvement in a flow experience if they are preoccupied with figuring out the nature of the goals rather than attempting to achieve them.

Accordingly, these theories show that teachers need to structure their exercises with clear goals to allow students to pay close attention to the task at hand. Then, with similar repeat experiences, students can focus with precision on areas for improvement, monitor their performance, and work to correct their errors. And then when these goals are met, a new set of precise goals can be developed so that they can achieve increased levels of performance.

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47. Farmer & Williams, *supra* n. 20, at 8. Comparing their previous approach to skills teaching in their courses on interviewing, counseling, and negotiations with their present use of deliberate practice in these courses, Professors Farmer and Williams observed that under their prior method,

each exercise call[ed] upon students to carry out a number of different tasks, [and] students tend[ed] to focus their preparation not on skills but on the substantive aspects of the problem. . . . Our students had almost no opportunity to repeat their performances with enough precision to correct their errors. The exercises did not provide a basis for accurately monitoring . . . progress of our students.

*Id.*

## 2. *Gradual Increases in Complexity*

Even if the goals are clear and unambiguous, effective learning may not take place unless the experiences are designed with attention to the boundary between boredom and anxiety. On the one hand, as cognitive overload and flow theory posit, if the challenges of a particular exercise greatly exceed students' skills sets, they feel anxious and are unable to learn from the experience. They have difficulty processing all the information required for tackling the situation. Accordingly, optimal learning cannot occur if students do not feel they have a chance of completing a task. Teachers, therefore, should design tasks that take into account the students' preexisting knowledge so that the task can be understood after a brief period of instruction.<sup>48</sup>

On the other hand, if the repeated experiences consistently demand the same level of complexity, students become bored and have little incentive to improve their performance. Moreover, without the feeling that the stakes are being raised, students do not acquire the cognitive skills that can assist them in learning from experience. With repeated tasks of gradually increased complexity, when students overcome challenges, they feel more capable and skilled.<sup>49</sup> Accordingly, by designing exercises for students that require them both to build on their prior experiences and also overcome challenges of new ones, teachers can give students a learning environment conducive to the development of deliberate practice and flow.<sup>50</sup>

## 3. *Feedback*

These cognitive science theories also demonstrate the importance of feedback during the process of repeated experiences. As discussed previously, teachers need to design exercises with clear goals so that students have the opportunity to develop schemas for handling similar situations. But for optimal learning to take place, students also need to receive feedback so that they can measure their progress in achieving their goals.<sup>51</sup> Indeed, studies

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48. Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 367.

49. Csikszentmihalyi, *supra* n. 42, at 41.

50. See Krieger, *supra* n. 14, at 203–204.

51. Csikszentmihalyi, *supra* n. 42, at 54–55, 97.



have shown that, “[i]n the absence of adequate feedback, efficient learning is impossible, and improvement minimal even for highly motivated subjects. . . . [M]ere repetition of an activity will not automatically lead to improvement in . . . accuracy of performance.”<sup>52</sup>

The effectiveness of feedback depends considerably on the nature of the activity.<sup>53</sup> Most cognitive scientists contend that *immediate* feedback is essential so that students, with the memory of the activity fresh in their minds, can assess their performance.<sup>54</sup> Also, the feedback must be informative so that students can identify specific performance goals for the future so they can work on addressing their performance errors.<sup>55</sup>

Some studies also suggest that the most effective feedback may come from an individual’s own insights from witnessing the results of her performance. Ericsson, for example, claims that physicians are most motivated to improve their practice when they see immediate results from their actual diagnoses and treatment.<sup>56</sup> Apparently, the opportunity to assess one’s own performance provides unique motivation to improve performance. Some of the best feedback, therefore, may not come from the traditional critiques by teachers or coaches, but rather from the results of the activity itself.

#### 4. *Motivating Environment*

Ericsson observes that “a number of conditions for optimal learning and improvement of performance have been uncovered. The most cited condition concerns the subjects’ motivation to attend to the task and exert effort to improve their performance.”<sup>57</sup> Obviously, teachers can motivate students in their repeated experiences through the identification of precise goals, the design of

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52. Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 367.

53. Csikszentmihalyi, *supra* n. 42, at 56–58.

54. See Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 367.

55. See *id.*; Ericsson et al., *Expert Performance in Nursing*, *supra* n. 15, at E61.

56. Ericsson et al., *Deliberate Practice*, *supra* n. 12, at S77; see also Csikszentmihalyi, *supra* n. 42, at 56 (relating Csikszentmihalyi’s interviews with expert surgeons: “[S]urgeons who love doing operations claim that they wouldn’t switch to internal medicine even if they were paid ten times as much as they are for doing surgery, because an internist never knows exactly how he is doing. In an operation, on the other hand, the status of the patient is almost always clear.”).

57. Ericsson et al., *Acquisition of Expert Performance*, *supra* n. 12, at 367.

exercises that take into account their existing skill sets but offer challenges, and the opportunity for immediate, informative, feedback. But the cognitive science literature suggests that more is needed for optimal learning than the use of particular teaching or coaching techniques.<sup>58</sup> Individuals must feel motivated to engage in the activity.

Flow theory provides some guidance in identifying those circumstances that can motivate students to attend to their tasks and improve performance. As described above, individuals experience flow in an activity when they experience an “order in consciousness . . . so desirable that one wishes to replicate it as often as possible.”<sup>59</sup> A key component of this experience is the opportunity to become deeply involved with the activity.<sup>60</sup> To achieve such involvement, an individual needs to “find a relatively close mesh between the demands of the environment and one’s capacity to act” and to have the capacity to concentrate without distractions from the task at hand.<sup>61</sup>

To motivate students to optimal learning in their repeated experiences, therefore, teachers need to design learning environments that give their students the opportunity to become deeply involved in their activities. In structuring these surroundings, teachers should consider how to provide easy access to the information that will help students engage in the particular activity without distraction, ways of providing stimulation from others engaged in similar activities, and surroundings that provide support, the necessary feedback, and the opportunity for fine-tuning performances. The insights from flow theory indicate that students need the opportunity to become immersed in their experiences, not just obedient performers of tasks.

### C. Election Day Storytelling and Cognitive Science Theories

Soon after November 4, 2008, we met with most of the students to debrief them in regard to their learning experiences that

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58. As Professors Farmer and Williams observe in regard to their use of deliberate practice methods in their skills courses, “We concluded that in order to effectively employ deliberate practice methods, we had to find ways to motivate our students to strive toward the acquisition of target skills rather than to dutifully, but mindlessly, perform deliberate practice exercises.” Farmer & Williams, *supra* n. 20, at 15.

59. Csikszentmihalyi, *supra* n. 42, at 29.

60. Csikszentmihalyi, *supra* n. 43, at 210.

61. *Id.* at 210–211.

day. We then conducted in-depth interviews with four of them to probe their impressions of Election Day and to ask them to compare their experiences that day with those in their regular clinic courses. Based on these discussions, it became clear that many of the findings in the cognitive science research on repetitive practice were borne out in our students' experiences on November 4. The student insights confirmed our impressions that the project we supervised that day could perhaps be an effective alternative model for teaching storytelling.

To provide context for the excerpts from our in-depth interviews with four selected students,<sup>62</sup> here are summaries of their clients' stories:<sup>63</sup>

**Diana.** Her client was a pilot for US Airways and a federal air marshal who had just flown in earlier that evening and raced to the polls, only to be turned away. He came directly to the courthouse to vote, and he was adamant that Diana had to win his case because he "wanted to keep Obama out of office." He had not voted in a presidential election since at least 1980, although he told us he had voted in a local election of some sort in 2000. He offered no evidence that he was registered to vote, so Diana decided to emphasize his service to his country, his patriotism, the faith that the government had placed in him as a federal marshal, and his role in the war on terror.

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62. Video footage of the interviews is available at <http://videos.studentlegalreasoning.info/>.

63. In describing these clients' stories and the students' experiences preparing and presenting the cases, we have protected the confidentiality of the clients. New York Rule of Professional Conduct 1.6 provides that "A lawyer shall not knowingly reveal confidential information." We are not revealing the names of the clients, and therefore not directly revealing confidential information. Furthermore, in New York, "[a] lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client." N.Y. R. Prof. Conduct 1.6 cmt. 4. Reading the Rule and the Comment together, we conclude that in this Article there is no revelation of confidential information because there is not a reasonable likelihood that a reader will be able to ascertain the identities of any of our clients. In light of the large numbers of clients represented by each student (and the even higher number represented by each of us), the number of different judges students appeared before, and the abbreviated record-keeping procedures in place on Election Day, we believe that it would require a heroic effort by any reader to determine the identity of any of the clients discussed in this Article. The daunting nature of the difficulty of mounting this effort and the low likelihood of success in any case make it unlikely that an investigation will be undertaken, much less successful. Because identification of our clients is not reasonably likely, we conclude that we are protecting our clients' confidences.

**Emily.** Her client was one of the final clients of the day, a middle-aged woman who had moved to Nassau County from Georgia in September 2008. She told Emily that she had lived at one address for a month and then, a week before the election, had moved to a new address. After some prodding, she confided to Emily that she initially had lived in County shelter housing, and had recently been placed in more permanent housing within the County. When she went to the polling place for her new residence, she was turned away and sent to the courthouse.

Emily decided to focus on the sympathetic aspect of her client's experience in the shelter system, frequently moving from place-to-place with no fixed residence during the pre-election period. She intentionally avoided mentioning that her client had not registered to vote because she hoped that the judge would feel that the shelter system should have made more effort to help the client register to vote during multiple and frequent contacts with her.

**David.** His clients were a married couple who were registered to vote in one village in Nassau County but approximately four or five months prior to Election Day had moved temporarily to another village in the County. They had gone to vote in the village in which they had registered and were rejected, even though they had certificates from the Nassau County Board of Elections saying that they were actively on rolls and that their registration was valid. All of their documentation, including their drivers' licenses and the voting certificates, had their original address, not the new address.

The clients did not want to talk about the reason they had moved; when David sensed that they were embarrassed about discussing their move, he did not ask them any other questions to determine whether the reasons might have added to the persuasiveness of their story.

Because he believed it might prejudice their case, David initially chose not to bring to the judge's attention that the source of the clients' problem was their failure to update their registration when they moved. Once the judge realized the nature of the problem, however, David and a supervising attorney successfully argued that it was a simple procedural oversight and not a fatal defect in their case. The story they ended up telling was a simple one about the clients overlooking a mere technicality.

**Dan.** His client had been convicted of a felony several years prior to the election, and went through a 90-day “shock program” to complete his sentence. He had left work, during his lunch break, to vote, but was not on the registered voter rolls. After being denied the opportunity to vote, he went to the courthouse, still on his lunch break, with his two little girls. He was especially hopeful that Dan could help him get the right to vote because he wanted to tell his daughters he voted in the historic 2008 election.

By the time he was assigned to this particular client, Dan had started to apply what he described as a “standard form” of questions that allowed him to tease out the facts he needed to tell a client’s story and to determine which facts to include and which to omit to show the judge why the client was sympathetic or why denying the client the right to vote would be an injustice. Dan’s storytelling choices are described more fully in the interview excerpts transcribed below.<sup>64</sup>

In these interviews, the students’ descriptions of their learning echoed in large part the findings of cognitive science.

### 1. *Precise Goals*

In their interviews, several students mentioned the importance of clear goals to their experiences that day. One student, for example, observed how the single goal of the day resulted in her ignoring her own political disposition:

*Diana: In that moment, on that particular day, my role as an attorney was to advocate for people who had been denied a right, and that right was to vote. I had staunch beliefs as to who I thought should win the election but in that moment—and I’ll just tell you guys I was an Obama supporter—so in that moment that I had a client who did not like Obama, wanted nothing to do with Obama, and wanted to vote just to take Obama down. I had to separate my personal beliefs; I had to separate my personal sentiments; and in that moment I had to recognize that my client had been denied one of his fundamental rights that are guaranteed to him. So my sole job was not necessarily Obama or was it Bush? I can’t even remember. McCain, sorry. It wasn’t Obama or McCain, but rather it was becoming an advocate to get this man*

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64. See *infra* pt. II(c)(1).

*his right to vote. I think that was a very important lesson for me to realize that when it comes to the law, your job is to advocate not on your personal beliefs, not on your sentiments, but advocating on behalf of rights being taken away from this person.*

With this precise goal, from their repeat experiences students appeared to acquire schemas for developing stories for their clients:

David: *Well the two or three things that I had mentioned earlier about making your client feel comfortable enough, and kind of developing a relationship with a client in a way that allows them to give you all of the information that you're going to need in order to advocate on their behalf and then once you have that information, if you're able to do that well, then you can craft an argument that will give all of the information that the judge needs in order to make a decision and will present the equities in a way that really makes it seem that if there's any question, this should certainly be decided in your client's favor.*

And consistent with the cognitive studies, and much to our pleasure, at least one student, on his own, began to develop his own methods for becoming attuned to the deep structure of a client's case, to focus on the relevant facts, and to filter out the irrelevant facts:

Dan: *We basically had one sheet of paper to put all of the information that he gave us and all of our reasons for what we were going to bring up for the judge—the laws that we might use—on one sheet of paper. I used the top half—usually put down his information—and the bottom half I would use to pick out the facts. I would underline the facts on the top; on the bottom part, I would put what I was going to say, if anything; so I was just looking at the things I was going to say, and I was trying to connect it to the facts that I wanted to use. So just having that immediately available for me so I wouldn't have to refer back and forth, and then I don't know I try to tell a story with it. I always feel like I don't know a rule, it's just kind of . . . I don't know it's a tool but it can also be used as almost like a bridge to bring the facts to why he should do it. And I kind of use the same template every single one of the whenever I went up in front of the judge. I try and say all these factors lead up to this person being here today so that you would grant him the right to vote. That these factors . . . there wasn't anything preventing him from voting or why he shouldn't vote but that all these things were just things that had happened*

*leading to the moment where the judge, you, say that he should be allowed to vote or she should be allowed to vote. It kind of just makes sense to me because there's these laws and there's these stories but not all of this information is important or relevant, and there's only a limited amount of time that we can ask questions. I think that everyone during the examples [at the training session] that some people asked a lot of questions or delved into things that I didn't think were very important so I wanted to make sure I asked for a limited amount of facts so that I could go straight to the law or the things that would be applicable to the law. Things that would appeal to a judge and make him say yes or no and not want to say no.*

## *2. Repetition and Increased Complexity*

In their debriefings, several students mentioned the benefits of having repeat experiences crafting different stories in a particular subject-matter area. Reflecting the boredom/anxiety dichotomy described in the flow scholarship, several students described the increased comfort level they felt as the day progressed.

*Emily: In general we learn about [case preparation] in clinic in general as far as the theory of the case and storytelling, but like I said before, you're able to do it with so many more clients this time, and you're able to develop a theory and develop a story and themes that are still each very different. And, you know, you have someone who moved and then you have someone who moved from a shelter, so there's you know kind of the same theories but they're all very different stories with each individual client. I was definitely more comfortable speaking in front of the judge for the last case and more comfortable developing the story, developing the theory of the case because there were . . . you know I did four previously so I was more comfortable with knowing what direction to take, but you know the last case was more difficult in the fact that it was kind of an iffy argument that we had to make.*

It struck us as fascinating that Emily contrasted learning the theory of storytelling in her clinic course with her experience on Election Day. Her comments suggest that the clinic course was helpful in learning storytelling theory. But it was the repetitive practice of Election Day that gave her some facility in crafting narratives for her clients.

Another student made a similar point:

Dan: *Yeah I guess the storytelling part of it was nice because this was the first time that we just did it over and over again going in front of the judge. Client to judge; client to judge. Most of the time, or at least in the clinic, we'd get a case, and we'd do the investigation, and then we'd look up the law, prepare motions and we mooted and we'd do all of this stuff. Here, it's just straight from the client to the judge, to a court of law. The system and the citizen. It was a fun experience for the lawyers and also to be able to talk to the clients that directly, to be able to have their problem in front of you and then turn it into a solution that quickly. So it was an ego trip, I guess. But it was also educational because we did get to practice over and over again, and there are some skills that you can read the book and you can prepare for it but when you go in front of a judge, blah. You have nothing. You're looking to do A, B, and C, and I go up there and I did A and X. So there are some things that you just can't learn until you go up there and do it over and over again. And there are mistakes that you can say that I'm going to watch out for that and that but you're going to make them. So having that time to be ready for the shock of being in front of a judge that you can't teach in a class, you can't replace it.*

Given the one-day nature of the Election Day project and the random selection of clients assigned to the students, it is impossible to draw any conclusions about the importance of increased complexity in repetitive practice. But one student mentioned how a particularly difficult case affected his handling of storytelling in subsequent cases. In that difficult case, the student was initially unsuccessful and needed to call upon an experienced attorney, who asked the judge for a rehearing:

David: *There's a learning curve along the way right, so I didn't always want to just take what they had given me. I needed to ask exactly about the information that I would need to present in front of the judge and I . . . you know after this experience, especially with the supervising attorney who did the rehearing, I realized I needed to have all of the information and give it to the judge immediately. So it really couldn't be that I was unsure about certain things, and I wouldn't let the . . . client answer certain questions once they were asked by the judge because that seemed to leave too much open to the judge's discretion, which I found out could not be relied on. I couldn't rely on any assumptions in my favor. I was able to learn from the first experience and*



*give the judges everything that they would need in order to make the decision while raising as few questions as possible. It was actually a very controlled study on how I could have done this differently.*

In a follow-up interview, David described three things that he had learned to consider by the end of the day: (1) procedural problems, (2) emotional or sympathetic elements, and (3) problems clearly not of the client's making.

As an example of this process, David described a later client, a firefighter who was informed by the poll workers that he had a "Code One" noted on his registration. David made sure to focus on the Kafkaesque "Code One" notation—the meaning of which neither David, the client, the County Attorney, nor anyone at the court—understood. David felt that this made the story "even better," because it was a bureaucratic problem not of the client's making. David also focused on the client's occupation even though it had absolutely no bearing on the case, because by that point he "was getting better with the script of [the three] things [he had learned] [and] felt it would be helpful." By crafting a story of a public servant who was the victim of a bureaucratic problem, David was able to convince the judge to allow his client to vote.

### *3. Feedback*

Nearly all the students we interviewed mentioned the importance of the feedback they received after their hearings. Consistent with the cognitive science theories, it appears that the immediacy of the feedback was very important to them. Interestingly, however, the feedback identified by most students as significant was not from us but from their clients and the judges.

In regard to comfort level as the day progressed, several students referred to the significance of positive feedback from their clients. But for some students this client feedback seemed to be more than just a "feel good" moment. It helped them clarify their goals in the storytelling process. For instance, the student who represented the released felon told us that he considered becoming a doctor but instead decided to go to law school. He continued,

Dan: *My goal never shifted, I wanted to help people instead of using a scalpel though, I'm using my voice, talking, and logical*

*law. But things in the law could affect you just as badly as a lost leg or a bad heart. You know, being taken from your job and your family and being put in jail. So I really thought it was important and this kind of reaffirmed that because I actually got to do it and see the effect in person instead of just, you know, document production and sending it out. [The client] told me, "You did a good job." This was something that I actually got to see somebody's face change as the experience went along.*

And another student recounted the effect of witnessing the response of a daughter of an elderly woman whom the student successfully represented:

*[H]er mother just got out of the hospital to vote. . . . In the end [the daughter] started crying because she was so relieved that she got her mother to vote. It was really important for her mother to be able to vote in that election. She thought it was going to be the last election that [her mother] could vote in because she had all this heart failure and, you know, other diseases. So, you know, it really hit me.*

Likewise, the feedback from the judges apparently helped students in fine tuning their approach to their cases. One student, for example, learned from his mistakes when witnessing a more experienced lawyer's telling of the same story on a motion for rehearing:

*David: The judge didn't seem to have any kind of set criteria for determining residence, but he did ask the respondent, the county board of elections, what they thought. They said they took no position but that the statute said that it takes, that you have to live in a place for at least thirty days in order to be considered a resident of that village and that residency is based on intent and that in the end it was up to the judge's discretion. Which is really where the shocking part came in for me because when I heard they took no position and that it was up to the judge's discretion, I felt as though it was in the interest of allowing people to have their voting rights you would easily decide in our favor. And he actually stated he didn't see any basis for allowing them to vote anywhere. And then we had to request that he at least allow them to vote in the presidential election only, which the statute clearly doesn't even give him discretion it mandates that he allow them to do that, and so that was the way at least our first appearance in front of the judge ended with them being denied the right to vote in*

*the general election but the right to vote just in the presidential election.*

*I was kind of shocked at the outcome, and I went and spoke to another supervising attorney. . . . He immediately brought it back in front of the judge. And I was really impressed with how much command he had of the situation and how much confidence. He kind of . . . it wasn't really a request for a rehearing. It was kind of a demand for an immediate rehearing of the issue, and the judge deferred to him and his expression of or interpretation of the law. Although it was questionable to me how accurate that interpretation was, but the supervising attorney presented it with a lot of confidence, and the story that he told was very simple and clear for the judge to understand. You know, ours was a little bit nuanced. There were multiple residences involved; there was a question of the test for residency and what shows someone's intent to live somewhere. So upon hearing this argument from the supervising attorney, the judge said that he would allow them to vote in the general election.*

#### 4. *Motivation*

Finally, the student interviews support the cognitive science findings that motivation to attend to a task is an essential component to acquisition of expertise. In regard to Election Day, a number of students mentioned the significance of their deep involvement in the client representation as a factor in their learning. One student related, for example,

*I was there quite a long time. I was there in the morning, left, and came back, and I was there probably from 3:00 or 4:00 till like 8:30 when I left. Before I can say anything specific, I just want to say that it was so cool—like, I was driving home, and I was talking to my friend, and I just realized that I totally had like the best sort of high—when you're so excited about something. I was like, and I came home and I was like, you know. So I turned on the election and I was so exhausted that I fell asleep before like 11:00 . . . I was like, done.*

And another told a similar story:

*I'm driving home and I call one of my girlfriends, and everything was so politically charged, especially with all my friends. And they're all crazy anyway, and they all want to talk about it*

*and I'm like, "I don't even want to talk about the politics; I don't even want to discuss that. Let me tell you what I did today!"*

Surprisingly, while the historical nature of the election may have inspired the students to participate in this project in the first place, at the end of the day what appeared to motivate them was not the election itself but the repeated experiences of telling their clients' stories of why they had a right to vote.

This deep involvement was also apparently fostered by the learning environment at the courthouse that day. As one student recalled,

*Dan: We were ready to do what was needed from us. And even though Steve [the election law expert] did try to give us an idea of what the experience would be like, actually going into it and going in front of the judge, it was still a little bit of a shock going from the clinic . . . . Here on the election day it was a little more loose, a little more informal so that was still a little bit of a shock even though he had tried to tell us what it would be like.*

*I guess we were all in the same room so we didn't have the time to pay attention but we were having that group support. Like if I had a question I could turn over and say, "Hey what are you doing? Can you tell me?" I guess then having all of you there and the election guy, although he didn't actually help out. I think we actually tried to get him for something else, but he was busy. But yeah, everybody was there for the same reason so it wasn't anything that had to be hidden, you know, I can't show this to you. It was more of a community, a neighborhood, law office type of feel, everybody comes in, it's open to the public, and we'll solve it, and we'll help you.*

Apparently—and without any conscious intent on our part—the surroundings on that date contributed to the experience of flow. There was easy access to information; Steve, an Election Law expert, was present. There was stimulation from other students and attorneys handling similar cases. And there was an overall sense of community of purpose. As Dan implied, it felt like a neighborhood law office, not like a classroom.

### *III. SCHOLARSHIP ON STORYTELLING PEDAGOGY*

Our students' rapid improvement in performance, with virtually no instruction in narrative theory or storytelling technique, was unexpected in light of the current body of scholarship ad-

dressings pedagogy of storytelling skills.<sup>65</sup> The literature largely shares a common focus: to prepare students for storytelling by giving them extensive exposure to narrative and storytelling theories, and models for crafting effective stories. In the words of Ruth Anne Robbins and Brian J. Foley, “So how does one tell a story? The first thing to do is to understand what a story is.”<sup>66</sup> This approach dominates the literature and shapes the regnant pedagogy of storytelling.<sup>67</sup>

### A. Learning About Stories

In this model for storytelling pedagogy, the focus is less on *telling* stories than it is on teaching *about* stories. This process is best described as deconstructionist: stories are broken down for students to gain the requisite “deep understanding of stories”<sup>68</sup> by observing and discussing the various narrative theories, story elements, and techniques that go into story creation.

Advocates of this pedagogical model suggest using sources such as materials describing elements of an effective story,<sup>69</sup> as

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65. We included in our review scholarship that focuses on teaching law students to use storytelling, narrative, and “case theory” with a storyline focus. In our review, we also included works on “case theory” such as those of Professor Binny Miller, Miller, *supra* n. 9, at 295 (“The concept of narrative in legal advocacy is rooted in the idea of case theory.”), and Professor Margaret Moore Jackson, *supra* n. 9, at 84 (case theory connects facts “through the prism of the client’s story”), because of the intense focus on narrative and storyline in the versions of case theory that they teach.

66. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 465 (2001).

67. See e.g. Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 Leg. Writing 229, 230 (2006) [hereinafter Meyer, *Vignettes*] (asserting, “[I]t behooves legal writing professors teaching persuasion, law students who will become attorneys, and attorneys litigating cases, to better understand how stories work, and to develop a narrative tool kit supplementing the analytical skills emphasized in legal writing programs.”); Meyer, *supra* n. 9, at 913 (observing, “Discussions of plot structure, motive and character are essential to understanding the nature of storytelling.”); Miller, *supra* n. 9 at 302 (observing, “Understanding case theory as storyline presupposes a deep understanding of stories. It requires deconstructing stories to find storylines, and reconstructing stories to support storylines.”); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 Cooley L. Rev. 267, 269 (2008) (observing literature and its elements, “character, setting, plot, theme and tone” should be taught to students to enhance their storytelling).

68. Miller, *supra* n. 9, at 302.

69. See Foley & Robbins, *supra* n. 66; Meyer, *Vignettes*, *supra* n. 67; Pepper *supra* n. 9; Rappaport, *supra* n. 67.

well as movies,<sup>70</sup> literature,<sup>71</sup> and journalism<sup>72</sup> to provide models and texts for deconstruction and class discussion. For example, Professor Elyse Pepper watches a particular movie with her students and then leads them through a discussion of cinematic storytelling and its use of character, narrative structure, and theme.<sup>73</sup> She argues that students can gain a better understanding of effective methods of persuasion by “[d]econstructing the way in which filmmakers tell” stories about legal themes.<sup>74</sup>

The theory seems to be that through the process of experiencing stories, studying them, and taking them apart, students are able to see how storytelling works in practice.<sup>75</sup> They can focus on individual story elements or applications of narrative theory and gain a fuller understanding of the nuances and complexities of persuasive storytelling.

#### B. A “Long, Slow Process” Culminating in Telling Stories

Embedded in the deconstructionist methodology is the corollary that understanding narrative theory well enough to use it effectively requires a lengthy apprenticeship and an immersion in theory. It is only through what Professor Binny Miller describes as the “long, slow process of reading and talking about lawyer and client stories”<sup>76</sup> that students are able to understand how storytelling can be done effectively. As described in the literature, this process requires multiple class discussions and/or supervisory models and repeated exposure to theories and models. For example, Professor Miller describes how she has focused an entire clin-

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70. See e.g. Meyer, *supra* n. 9; Miller, *supra* n. 9, at 309; Pepper, *supra* n. 9.

71. See Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 *Quinnipiac L. Rev.* 1 (2004); Meyer, *Vignettes*, *supra* n. 67; Rappaport, *supra* n. 67.

72. Miller, *supra* n. 9, at 317 (“[J]ournalists, even more than lawyers, appreciate the role of case theory in courtroom advocacy.”).

73. Pepper, *supra* n. 9, at 205.

74. *Id.* Movies are singled out for use as models due to the “similarity between trial and movie storytelling,” Meyer, *supra* n. 9, at 896, and their ability to “do a markedly better job of telling the client’s story than briefs and opinions,” Pepper, *supra* n. 9, at 177. In addition, when movies necessarily “dumb down” the law, story elements become much more powerful. Miller, *supra* n. 9, at 309–314.

75. See e.g. Pepper, *supra* n. 9, at 187 (arguing that “[b]efore, legal writers can effectively use movies as a model for fact writing, they must first understand the particular narrative structure and cinematic methodology filmmakers employ”); Rappaport, *supra* n. 67, at 285 (noting, “the discussion of [a particular novel] is the primary means of using storytelling to teach law students about storytelling”).

76. Miller, *supra* n. 9, at 308.

ic seminar on “translat[ing] the underlying idea of story and storyline to the clinic classroom.”<sup>77</sup> She leads students through progressively more sophisticated uses of storytelling,<sup>78</sup> starting with sequential discussions about movies, fiction, and nonfiction, then moving to simulations, “[a]nd, finally, there is real life lawyering”—representation of actual clients.<sup>79</sup> This is, obviously, a time-consuming and intensive process.

Another clinic professor describes how she introduces narrative and storytelling theory “in case supervision conferences with groups of two or three students well before formally introducing the concept in a larger classroom setting,”<sup>80</sup> and then teaches a 4-class arc on narrative and follows up in supervision sessions.<sup>81</sup> Another professor has taught an entire storytelling course composed exclusively of reading stories and watching movies.<sup>82</sup> As Professors Foley and Robbins argue, if “the people [such as movie screenwriters] whose job or ambition it is to tell stories recognize that they must study extensively in order to tell stories well or even competently,” it makes sense that lawyers similarly need to recognize the importance of extensive study.<sup>83</sup>

Taken as a whole, the scholarship makes it quite clear that in the standard model for teaching storytelling, lawyers must invest significant time formally studying storytelling and narrative theory and technique.

The culmination of this immersion in theory is the constructionist bookend to the pedagogical process, when students assemble the stories that they will be telling;<sup>84</sup> it is only after learning the theories, after identifying the elements of a story, and after examining and borrowing the techniques of accomplished storytellers,<sup>85</sup> that at last an “advocate can build a convincing narrative.”<sup>86</sup>

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77. *Id.* at 301.

78. This gradual increase in degree of difficulty is an element of the optimal learning environment that we describe above. However, while it is likely in this case to help students develop effective schemas for *analyzing* the stories they experience, it is unlikely to develop skill in *telling* stories.

79. Miller, *supra* n. 9, at 309.

80. Jackson, *supra* n. 9, at 87.

81. *Id.* at 87–91.

82. Meyer, *supra* n. 9. This course appears to be unique within the literature because it does not have a practical component.

83. Foley & Robbins, *supra* n. 66, at 464–465

84. Miller, *supra* n. 9, at 309.

85. Pepper, *supra* n. 9, at 190 (“After viewing [*Dogville*], discussing it, identifying the

### C. Theory and Telling Stories

It is true that within the storytelling scholarship there is an acknowledgment of the importance of telling real clients' stories to learn storytelling.<sup>87</sup> However, even those teachers who use live-client cases or simulations often focus on theory. As one clinical professor describes, “[t]he model I employ for my clinical supervision in criminal advocacy rests on narrative theories, and can best be defined as one constantly directing and sensitizing the students towards competing narratives.”<sup>88</sup> Even in this context, the emphasis is squarely on teaching the theory about storytelling and use of narrative, rather than on learning from the experience itself. The same focus can be seen in the explanations that scholars give for the use of simulations and live clients: actually representing clients is useful for giving students “a concrete understanding”<sup>89</sup> of the narrative model, and “[o]nly through working with actual case scenarios, either real or simulated, do students begin to understand both the theory and how it can be used effectively.”<sup>90</sup> In the current scholarship, theory reigns supreme as the most important element of teaching storytelling.

### D. Cause for Re-evaluation

The dominant pedagogy we have described does not have any serious challengers in the academic literature, but our experience on Election Day has caused us to re-evaluate this orthodoxy. Cognitive science findings raise some serious questions about the efficacy of relying almost exclusively on theory and technique as the building blocks of storytelling pedagogy. The extreme focus on theory in the literature is not consistent with the optimal learning environment that we described in Part II, and the domi-

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underlying themes and competing viewpoints, the class will be ready” to do the drafting assignment.).

86. *Id.* at 172.

87. Miller, *supra* n. 9, at 296 (observing that classrooms and simulations “cannot provide the rich lessons of lawyering and client interaction that enhance students’ understanding of case theory in a live-client clinic”).

88. John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?* 6 Clin. L. Rev. 85, 105 (2000).

89. *Id.* at 108.

90. Jackson, *supra* n. 9, at 86.



nant methodology alone is unlikely to produce students who are skilled storytellers.

### 1. *Lack of Clear, Focused Goals*

As we discussed in Part II, cognitive science research shows that a clearly articulated and focused goal is important for learning: a student who is pursuing multiple or uncertain goals is less able to develop schemas, benefit from repeat experiences, or become immersed in a task. However, the literature's preoccupation with giving an extensive foundation in narrative and storytelling theory and technique provides a multiplicity of broad and often murky goals for storytellers, which actually distracts from the learning experience. It is impossible for students to achieve complete involvement in a flow experience if they are preoccupied with figuring out the nature of their goals rather than attempting to achieve them.

Furthermore, cognitive load theory argues that there are limits to the cognitive resources that students can draw on as they learn, and any demand on cognitive resources that does not directly further pedagogical goals reduces the efficiency of learning.<sup>91</sup> The extreme emphasis placed on understanding theory and technique in storytelling and narrative creates significant demands on cognitive resources simply to keep theory in mind when actually telling a story. For example, a student focusing on what Professors Foley and Robbins describe as "only the most important" elements of storytelling would be juggling "character, conflict, resolution, organization and point-of-view."<sup>92</sup> As we discussed above, focusing on so many things at once leads to cognitive overload.<sup>93</sup> Resources are not available for schema creation or otherwise for learning from the storytelling experience because students are preoccupied with theoretical elements of storytelling. As a result, they are not able to learn efficiently from their experiences; instead, they are likely to become overwhelmed by the process and disengage. This effect could be amplified by intensive and lengthy classroom focus on storytelling methods and theories, with attendant increased cognitive load for beginning storytellers.

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91. Chandler & Sweller, *supra* n. 27, at 294–295.

92. Foley & Robbins, *supra* n. 67, at 466.

93. See *supra* nn. 26–28 and accompanying text.

## 2. *Lack of a Motivating Environment*

Optimal learning occurs when a student has the opportunity to become deeply involved with a task and experience total immersion in the activity.<sup>94</sup> Creating an environment that will lead to flow is a crucial part of experiential learning. A focus on theory, however, does not necessarily lend itself to flow. The multiple and complex elements of narrative and storytelling theory present novices with the formidable task of keeping them all in mind when crafting a story; rather than becoming consumed by the experience, the student is likely to be distracted from the actual experience of storytelling by the effort of keeping theoretical considerations in mind, and, therefore, unlikely to achieve a state of flow that could lead to rapid and efficient learning.

In addition, an over-reliance on theory and technique can deter spontaneity and creativity, which are important aspects of experiential learning in general and of storytelling in particular. When a student is concerned with formal structures and elements of persuasive narrative, there is limited room for experimentation of the sort we saw from some of our students on Election Day.

## 3. *Lack of Repetition*

Finally, the approach advocated in the literature is inconsistent with the crucial need for repeated opportunities to practice a skill targeted for learning. Although there is no necessary incompatibility with emphasizing theory and creating opportunities for repetition, in the legal education context there is the practical question of limited resources. The literature is largely restricted to a discussion of teaching storytelling within the confines of traditional legal writing and clinical courses,<sup>95</sup> where students typi-

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94. Csikszentmihalyi, *supra* n. 43, at 210.

95. Professors Jackson, Miller, and Mitchell focus on teaching storytelling in their traditional clinical courses. See Jackson, *supra* n. 9; Miller, *supra* n. 9; Mitchell, *supra* n. 88. Professors Pepper, Canavan, and Rappaport focus on the traditional legal writing class as the primary venue for storytelling training. See Canavan, *supra* n. 71; Pepper, *supra* n. 9; Rappaport, *supra* n. 67. Professors Robbins, Foley, and Meyer are legal writing professors whose articles discuss teaching storytelling in traditional law school writing courses as well as to practitioners. See Foley & Robbins, *supra* n. 66; Meyer, *Vignettes*, *supra* n. 67. Professor Meyer provides the only serious departure from the focus on clinics and legal writing courses when he describes teaching storytelling in a decidedly non-traditional course that is a classroom course using only movies and novels as its texts, but this course did not have any practical element and, therefore, also fails to address our

cally have only a small number of chances to perform any particular skill, including storytelling, and, therefore, have limited opportunities to reflect on their experiences and fine-tune their performances accordingly. This is obviously not consistent with cognitive science findings discussed above on the role of repetition in schema development.

Of course, we are not arguing that there is no value to teaching students theory. Students need a base level of competence in and comprehension of storytelling's purposes and processes if they are to be able to actually do it effectively. But we believe that the current dominant pedagogy may take this notion well beyond the point of necessity or helpfulness. Our experiences on Election Day lent support to the insights from cognitive science literature; a more efficient way to teach storytelling is to provide the bare minimum of a theoretical foundation, and then give students the chance to tell stories. And keep telling them. Rather than wait until they have studied extensively, they should be encouraged at a very early stage in their study of storytelling to start telling stories within a supportive and motivating environment and learn from the process. This is, of course, easier said than done. In Part IV, we discuss ways that these concepts might be implemented in practice.

#### IV. IMPLICATIONS OF ELECTION DAY EXPERIENCE TO TEACHING STORYTELLING

After considering the experiences on November 4, 2008, the obvious question is whether our students' experiences on Election Day could ever be replicated. As we mentioned before, we are the first to acknowledge that the experiences on that date were significantly influenced by the historic nature of the election. Everyone involved—from the clients to the judges to the clerks—approached these cases knowing full well that November 4, 2008 would be an important day in the history books. But, as our interviews with students indicated, as the day progressed, the ultimate outcome of the election became a secondary issue for many of them. Something about their representation of clients on that day—especially their repetitive storytelling—seemed to result in

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concerns about limitations on opportunities to tell stories. See Meyer, *supra* n. 9.

the students' acquisition of new, and perhaps, transferable skills. By the end of just one day, some students showed a marked improvement in their storytelling abilities.

#### A. Design of Election Day Program

In retrospect, the design of the program on Election Day was a perfect venue for such learning. We believe four components of this design were crucial to its success.

##### 1. *Limited Issues and Repetitive Experiences*

The substantive legal issues were very limited. All the cases arose pursuant to one statutory scheme (the New York Election Law), under which the court has very broad discretion. This context gave students the chance to focus on a single goal: crafting the facts elicited in the client interview into a persuasive narrative. And the opportunity for students to engage in the storytelling process for a number of clients helped them develop, in just a few hours, rudimentary schemas for filtering out irrelevant facts and focusing on relevant evidence. Moreover, the different factual situations of each case, as well as the differing degrees of complexity of the cases, prevented these experiences from becoming boring, humdrum exercises.

##### 2. *Minimal Procedural and Evidentiary Distractions.*

These cases also raised few technical procedural or evidentiary issues. As one student, Dan, said in our interview with him, the proceedings were simply, "Client to judge; client to judge." The paperwork was minimal: an affidavit setting forth the grounds in support of the client's petition. There was no formal pleading requirement. The hearing consisted of the student's narration of the story, the County's response, and questions from the judge to the student and, in some cases, the client. Although the court swore in the petitioner, the student was not required to formally examine the witness. And while exhibits were marked for the record, judges did not adhere rigorously to the rules of evidence. Without these procedural and evidentiary distractions and the anxiety of juggling many tasks at the same time, students could focus on the task at hand: telling a persuasive story.

### 3. *Cases Challenging Injustice*

Putting aside the historic nature of November 4, 2008, our experience on that date leads us to believe that not every kind of case will create the same kind of rich context for storytelling as those that the students handled on Election Day. Students became deeply involved in these cases and in the storytelling process for their clients because they felt that their clients had been unjustly denied the right to vote. In this context, Edmond Cahn's observations about our concept of justice seem on point:

Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism . . . organization. . . . Justice, as we shall use the term, means the *active process* of remedying or preventing what would arouse the sense of injustice.<sup>96</sup>

It is that sense of injustice, we believe, that motivated one of our students, a staunch Obama supporter, to ignore her own political beliefs and zealously advocate for her Obama-hating client. To paraphrase Cahn, on Election Day, the courthouse was alive with movement and warmth in our attempts to challenge the injustice of the County's denial of our clients' right to vote.

### 4. *Supportive Environment*

The final component that we believe was essential to the learning experience created on Election Day was the supportive environment at the courthouse. Students had easy access to copies of the relevant provisions of the Election Law,<sup>97</sup> and an expert in the area was available to answer unusually difficult questions. While neither of us has expertise in election law, our mere presence seemed to have a beneficial effect. After students interviewed clients, they met with us, often very briefly. We tried to

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96. Edmond Cahn, *The Sense of Injustice: An Anthropocentric View of Law* 13–14 (Ind. U. Press 1964); see Amsterdam & Bruner, *supra* n. 8, at 46–47 (discussing the importance of “trouble in storytelling”).

97. Surprisingly for students who are often attached at the hip to their laptops during law school classes, these students fended very well for themselves merely using the books.

help them develop follow-up questions for the clients, parse the language of the statute, fine-tune language in the affidavit, or address ethical issues. Although often we gave very little advice, this collaborative process created a sense that we were all in this enterprise together. And the repeated experiences, along with the feedback from judges and clients, and stimulation of other students and attorneys engaged in the same process, appeared to provide an incentive for students to work on addressing errors in their development of stories. What could have been merely some useful *pro bono* exercises morphed into deliberate practice and flow.

### B. Possible Examples for Replication

The issue of replication, then, boils down to the ability to design a course focusing on developing storytelling skills that incorporates all four of these components: repetitive experiences with limited goals; minimal distractions; cases challenging perceived injustice; and supportive environments.

#### 1. *Simulations*

From the outset, it appears that it would be difficult to replicate the Election Day experiences with repeat storytelling exercises in simulated cases. While simulations can easily be designed to limit the substantive issues and minimize procedural and evidentiary distractions, the sense of injustice that pervaded the Election Day program would be hard to duplicate without real clients facing actual deprivations of rights. Moreover, without the feedback from actual clients and judges, the motivation for improving performance is not as intense as that experienced by students on November 4.

Professors Larry Farmer and Gerald Williams tout the use of repetitive simulations in skills courses using deliberate practice pedagogy (well-defined tasks fashioned to the knowledge base of the students and use of immediate feedback) but identify motivation methods that do not appear to be very effective, at least in the context of teaching storytelling.<sup>98</sup> These methods include teaching the students about the benefits of deliberate practice

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98. Farmer & Williams, *supra* n. 20, at 15–16.

theory, giving them a clear sense of direction for the development of their skills, and pervasive video recording and post-performance evaluation.<sup>99</sup> While we have no doubt that students can be motivated somewhat by a clear sense of direction and a desire to improve their performance, the experience of crafting stories to challenge an injustice and receiving feedback in the process from clients and judges is significantly different. Stories in law cases develop from the “troubles” faced by actual clients.<sup>100</sup> In our opinion, the best way to motivate students to give voice to these troubles is through repetitive storytelling experiences in actual cases.<sup>101</sup>

Some of the benefits of our experience, however, can be obtained through well-designed simulation exercises. As is generally recognized,

Good simulations need to be designed with a realistic context which will both involve the students and make what they learn transferable to a wide variety of lawyering circumstances. The closer to reality the problem is, the more likely the student will behave as if she is dealing with an actual problem for actual clients. In turn, the student is more likely to appreciate that both the indeterminacy of facts and the reality of professional and human issues are an integral part of being a lawyers.<sup>102</sup>

This need for verisimilitude is especially important in crafting exercises for repeated storytelling experiences. If the simulations appear too artificial or unrealistic, student performances will become nothing more than “cut and paste” jobs. The exercises need to provide students with the motivation to continue to fine-tune their performances. In this context, several factors should be considered in designing storytelling simulations.

First, like the Election Day Program, the exercises should concern areas of the law that have minimal procedural and evi-

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99. *Id.*

100. Amsterdam & Bruner, *supra* n. 8, at 46–47.

101. “Or, as a friend who flies for a major airline told me recently: ‘You can get everything in a simulation except for the feeling, the real feeling, of the last 200 feet of landing.’” Pauline W. Chen, *Practicing on Patients, Real and Otherwise*, N.Y. Times D6 (Feb. 2, 2010).

102. Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 Clin. L. Rev. 417, 444 (2002).

dentiary distractions, have rich factual contexts, raise few substantive issues, and challenge injustices in the clients' lives. Many small administrative law cases are ideal vehicles for such exercises.<sup>103</sup> In cases in areas such as public housing termination hearings; Medicaid denials; unemployment compensation disputes; public utility terminations; or denials of veterans' disability benefits, students can handle simulations of cases that have significant impact on their "client's" housing or subsistence. These cases are often fact-intensive, and the clients' stories can easily be crafted for different levels of complexity and factual context. In most of these administrative fora, few procedural and evidentiary rules apply, the cases can be designed to involve only one or two substantive legal issues, and the role of the hearing examiner or administrative law judge is to assess credibility and fairness issues. Effective storytelling becomes the primary objective.

To develop exercises of varying complexity for these kinds of issues, we suggest that teachers review files of attorneys who have practiced in the particular area or, if accessible, files from friendly agency staff members. Obviously, the facts of more complex cases can be tweaked to limit the issues for the particular simulation. Such files reflect actual situations, not contrivances by law professors. Based on these files, teachers can craft detailed scripts for the "clients" that describe not only the facts of their cases but also the persona of the clients, adversaries, and other third parties.

Second, to increase the realism of the simulations, actors should be used for the simulated clients, and actual hearing examiners or practicing attorneys should adjudicate the cases. As we discussed previously, feedback from clients and judges was an important part of the learning experience on Election Day.<sup>104</sup> Feedback from other students performing as clients or instructors acting as hearing examiners likely will have much less impact than assessments from unknown third parties. While it has be-

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103. See e.g. James C. May, *Hard Cases from Easy Cases: In Defense of the Fact—and Law-Intensive Administrative Law Case*, 32 John Marshall L. Rev. 87 (1998) (touting the value of administrative law cases for clinical cases for many of the reasons discussed in the text). James May goes further, however, and argues that in addition to these benefits, small cases may "ripen" into hard cases and may provide sufficiently difficult material to challenge both students and faculty. *Id.* at 92–97. In the context of teaching storytelling through repeat experiences, these concerns are not relevant.

104. *Supra* pt. II(C)3.



come fairly common for skills-based courses to use actors for simulations,<sup>105</sup> little empirical data exist as to the particular benefits of such a practice. In one study in the health professions, however, the researchers compared students performing a nursing skill with a mannequin, a real patient, and an actor.<sup>106</sup> They found that students who practiced with a mannequin did not master the skill, but students who practiced with an actor-patient mastered the skill most quickly.<sup>107</sup> The researchers concluded that students who practiced with actors preferred learning in an environment with purpose and authenticity. For storytelling simulations to replicate in any way Election Day, students will need to experience a purpose and authenticity from the exercise aside from the usual requirements of a law school assignment. Incorporating actors who are given carefully drafted scripts and who are trained to portray complex characters, as well as actual hearing examiners or attorneys acting as fact finders, simulated exercises have the potential to provide students with an environment that encourages learning storytelling from experience.

Finally, to reproduce the conditions of the Election Day project, we suggest the use of a “real-time lawyering process.”<sup>108</sup> Instead of teaching students the law and storytelling theory over the course of several weeks, the instructor should have students experience practice in real time. Preferably with a practitioner in the area, the teacher should hold a short training session on the applicable law. At this meeting, students can engage in mini-simulations to get a feel of the process. Then, a few days later, the students should meet their clients and, over the course of only one or two days, prepare their cases and represent their clients at

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105. See e.g. Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training with MBAs Can Improve Transactional Education, Prepare Students for Private Practice, and Enhance University Life*, 13 *Fordham J. Corp. & Fin. L.* 89, 105–106 (2008); Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum through Experimental Learning*, 51 *J. Leg. Educ.* 51, 69 (2001).

106. Ron Kerr, *Professional Actors Really Do Enhance Nursing Skills Development*, <http://www.scu.edu.au/schools/nhcp/aejne/archive/vol3-1/no1.htm> (1997).

107. *Id.* The subjects who practiced with actual patients performed less effectively than those who worked with actors, perhaps, the researchers surmise, because of the stress they felt with real patients.

108. The concept for this approach was developed by Professor Barbara Barron at Hofstra School of Law. She has prepared materials for “real-time lawyering” mini-courses in which students represent clients either in a proceeding to obtain a temporary restraining order or in a negotiation with a creditor before bankruptcy, handling the cases in real time.

hearings. This short time span should motivate them to become deeply engaged with their cases. Ideally, with a cadre of actors, students could then replicate the experience two or three times over a period of several weeks. With exercises of increasing complexity, optimal learning can be achieved through repetitive practice, feedback, and the ability to fine-tune their skills.

## 2. *Traditional Clinics*

Although we strongly believe that storytelling can best be learned by representing real clients in real situations, the traditional model for clinical education is not designed to teach storytelling skills in an optimal way.

We know from experience that students in a clinic are highly motivated by the responsibility of representing live clients and can get caught up in the representation of their clients, and as professors we provide a helpful environment and expert guidance. However, clinics are slow and inefficient by design, with students representing a few clients (in some cases a single client) throughout their time in the clinic. As a result, there is usually very limited opportunity for repeated storytelling experiences. Feedback from courts and administrative bodies—and even from clients—about the stories students tell is generally not immediate. In fact, in many clinics it may not come during the student's tenure in the clinic at all. Goals come from the clients, and are therefore not guaranteed or even likely to be narrow or clearly defined. In addition, where live clients are involved, there are competing concerns that make choices about which goals are pursued messy and imprecise. Even clinics with a very narrow subject-matter focus are not likely to present the kind of controlled environment that is necessary for effective deliberate practice.

We are both clinicians who generally use a fairly standard model for clinical teaching, and it is not our desire here to completely renounce that approach. However, we were made aware of the sharp contrast between “regular” clinical work and the Election Day experience in our discussions with students following Election Day. Students observed that the “slow motion” process that we use in our clinics at Hofstra was starkly different from the high-speed, high-volume practice that emerged on Election Day. By freeing our students from the confines of the pre-

vailing clinical model, we gave them the opportunity to refine their skills in a wholly new and unexpected way.

In fact, on Election Day, we basically threw the clinical model out the window. We could hardly have come up with a less standard clinical model had we tried. We had students with highly condensed training representing multiple clients in a single day, repeating activities in rapid succession, and getting instant feedback. To a certain degree, we simply let the students go and hoped for the best. For many of them, this was the first time they had the chance to appear in court or represent a client in front of a judge. We ended up with an experience that was almost completely controlled by the students' ability to gather facts and then extract relevant elements to present a persuasive story to the judges. By (unintentionally) stripping away all of the other elements of clinic—or, indeed, typical “real world” practice—we gave our students the opportunity to practice one or two skills over and over in a controlled environment. We were frankly a bit worried by the unorthodoxy of our project because the clinical model that we generally use does not contemplate educational methods like those we found ourselves using on Election Day.

This is not to suggest, however, that a clinical setting could not be created to teach storytelling skills more effectively. While the literature on other attempts to teach skills such as storytelling through repetitive practice in actual cases is sparse, it appears that several clinics have had success with this method for many of the same reasons that our Election Day program was effective. Ian Weinstein, for example, writes about the effective learning experience in a clinic in which students represent clients in violation and misdemeanor cases in a high-volume court in New York City.<sup>109</sup> Many of the virtues he identifies about his clinic are very similar to those we found on Election Day: (1) in his clinic, students work on “small, predictable cases . . . that . . . require a relatively small set of simple schema”;<sup>110</sup> (2) the cases “provide . . . manageable legal puzzles whose solutions are usually well understood”;<sup>111</sup> (3) the cases are “complex enough to offer a wonderful learning opportunity, but simple enough so that almost

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109. Ian Weinstein, *Teaching Reflective Lawyering in A Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 Clin. L. Rev. 573 (2006).

110. *Id.* at 584.

111. *Id.* at 577.

all of our students are able to develop useful cognitive models or schema”;<sup>112</sup> and (4) students are motivated by the knowledge that they are making a difference in their client’s lives.<sup>113</sup> Indeed, Weinstein relates storytelling experiences that sound a bit like ours on November 4:

In our cases, bail arguments are good teaching and learning tools because they are small in scope, controlled by a detailed statute, based on rich facts to which we usually have very good access (our clients know a good deal about themselves), well understood by the teachers, and can make a real difference in our cases . . . . The arguments are typically brief, lasting one to three minutes and including roughly three points: strong community ties, weak prosecution case, and minimal prior court history are typical. These arguments can be polished into shining little gems which can motivate, serve as models, and make a real difference to our clients.<sup>114</sup>

In a similar vein, Kimberly Thomas describes her clinic focused on representation of actual clients in sentencing proceedings in misdemeanor cases.<sup>115</sup> She contends that such proceedings are conducive to teaching the skill of crafting case theory in large part because in many lower courts the sentencing law system is not complex; evidentiary rules are relaxed in these proceedings; the factual development of the case will usually have occurred prior to sentencing; these hearings are often good fora for using stock images and stories from popular culture; and the decisions at these hearings are critical to the client and may affect future decisions made at probation and parole hearings.<sup>116</sup> And similar to our experience, she observes that the multiplicity of differing narratives that can be told in these cases furnishes a rich context for teaching students the craft of case theory development.<sup>117</sup>

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112. *Id.* at 585.

113. *See id.* at 576–577.

114. *Id.* at 587.

115. Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 Clin. L. Rev. 187 (2008).

116. *Id.* at 206–209.

117. *Id.* at 199–200.

Besides small criminal cases and sentencing hearings, a number of other clinical caseloads potentially could provide storytelling experiences similar to our Election Day program. As discussed above,<sup>118</sup> small administrative cases could provide excellent opportunities for repetitive practice in the clinical setting. Unemployment compensation hearings, for example, usually raise fairly limited substantive law issues, are informal proceedings, concern issues of perceived injustice, and generally provide the students with feedback from the hearing officer. In regard to storytelling skills, they give students the opportunity for crafting rich stories in repeat cases. Likewise, small claims cases may be conducive to effective repetitive practice, especially if the clinic caseload is focused on a particular type of case, for example, warranty of habitability claims by tenants. By limiting the cases to those with a common substantive legal theory, as well as a claim of injustice, students have the opportunity to craft their stories without the distractions of formal court procedures.

### CONCLUSION

Election Day 2008 was an unforgettable day for all of us, but we are well aware that it was not an empirical study or even consciously designed, and we do not pretend that our observations of rapid student progress can be taken as conclusive evidence that it is the ideal model for teaching storytelling. Nevertheless, our experiences have some important implications for teaching storytelling to law students.

The first implication is the need to reassess the dominant pedagogy in this area. It is an essentially unchallenged article of faith in the scholarship that extensive training in theory is the best—and perhaps the only—path to proficiency as a storyteller. However, our students' rapid progress in storytelling ability despite receiving almost no training in storytelling theory suggested that immersion in theory was not crucial to learning this skill. While we do not discount the importance of some training in narrative theory as part of the curriculum in teaching storytelling, our experiences highlight the need to evaluate and question the dominant pedagogical model.

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118. *Supra* n. 98 and accompanying text.

A second and related implication is that cognitive science research should play a role in the design and implementation of storytelling teaching methods and, for that matter, other areas of skills training. Much of the scholarship on the teaching of storytelling is based on the personal experience and preference of the instructors. Cognitive science research expands our understanding of the learning process and demonstrates the importance of repetition, feedback, motivation and flow when creating optimal learning environments and raises serious questions about the methods now being used to teach skills such as storytelling.

Finally, our experiences on November 4, 2008 invite further research into effective storytelling pedagogy to test our observations and expand on them. Such research might evaluate additional naturally occurring situations like Election Day or other supportive and repetitive learning environments crafted by creative teachers. An intriguing issue is whether students can transfer the skills they learned in contexts such as the Election Day project into other arenas, especially those involving more complex legal and factual issues. While this is not an insignificant challenge, we have highlighted some clinical programs that are having success with the repetitive environment we have discussed, and we believe that it can be replicated in other areas as well.