Lawyers For The Talent

by

Richard Dooling

Introduction

Many great storytellers miss their callings. Instead of being filmmakers or novelists or journalists, they succeed in many other walks of life, including law and medicine and lives of crime. Why? Because storytelling is a useful art, useful to Supreme Court lawyers and justices, con artists, sellers of insurance and oncologists alike.

Law and Storytelling

Law and storytelling are twins raised around the same campfire. In villages all over the more remote portions of the planet, "the law" consists of the village elders who gather in the communal clearings and listen to the grievances of villagers. Each affected villager gets a chance to tell her side of the story, and the "palaver" (as it is called in Sierra Leone, West Africa, where I stayed for some months in the early 1980s) often becomes a village drama, with actors, witnesses, and affected parties and their relatives, each "take the floor" and do their best to move and persuade the crowd.

Afterwards, the village elders "hang heads" or deliberate together, consider the stories of the "parties," and then issue a decision, or judgment.

Storytelling Lawyers

The famous Wyoming "frontier justice" lawyer Gerry Spence used to give a nice talk about how, beginning even before *voir dire,* the jury is searching the courtroom for the "teller of truths" or the one with the best, most-likely story.

And this state of affairs, according to Spence, hasn't changed much since tribes of humans gathered around the fire in the evening for what might be called proto-dispute-resolution, which (you guessed it) consisted mainly of stories competing for first prize. Who is telling the truest story?

Nowadays we have courtrooms, which (no surprise) often feel more like theaters, and the trials often feel like staged performances, where judges rule on which witnesses will be allowed to tell their stories under the watchful eyes of the lawyers, who sometimes almost seem to be directors of a theater production called a trial.

Beyond Trials

Good lawyers tell the best possible version of their client's story, and not just in courtrooms. Lawyers often must describe how the client wants to do business with another party, or tell a story about how the client should NOT be investigated by the FBI, or how the client may have killed the victim, but only in self-defense. It's not a stretch to say that lawyers are often biographers of their clients and chroniclers of their client's triumphs and misfortunes.

When lawyers tell the stories of their clients, said stories must comply with the rules of ethical conduct of the state where the attorney practices law. Whether told on behalf of an angry plaintiff or an insulted defendant, there must be a "basis in law and fact" for the story "that is not frivolous." All of which means stories told by lawyers on behalf of their clients must be "true," an adjective of uncertain dimensions even before Pilot asked Christ: "What is truth?"

A lawyer must stick to the facts and the law, but that doesn't mean that the story can't be polished and well told, that it can't be interesting and employ literary devices, like rhyme, rhythm, plot, character, theme, conflict, and allusions to other timeless stories, legends and myths.

Go to Google Scholar and search the case law for "Scylla and Charybdis" and sample the over 1,000 cases, most federal, which contain the expression. "between Scylla and Charybdis." This is a fancy, literary way of saying "between a rock and a hard place," or "between the Devil and the deep blue sea," or "the horns of a dilemma," or even a Catch-22, after Joseph Heller's satirical novel about fighter bombers in World War II.

Scylla and Charybdis were mythical sea monsters in Homer's epic Odyssey. Scylla was a rock shoal (described as a six-headed sea monster) on the Italian side of the strait, and Charybdis was a whirlpool off the coast of Sicily. They were dangerous threats to sailors who had to navigate between them. Avoiding Scylla meant passing too close to Charybdis. Just one example of judicial storytelling employing literary allusion.

Of course, any good storyteller must be sensitive to his audience and to context. Alluding to Scylla and Charybdis would be well-received at oral arguments before the United States Supreme Court, maybe not so much before the Custer County Court in Broken Bow, Nebraska.

Trial lawyers are perhaps the ultimate storytellers, but appellate lawyers also must write and tell compelling tales, or they tell abstract, formal boring stories written in the passive voice, and the whole exercise puts everyone to sleep.

At oral argument, the best appellate lawyers strive for the tone of an erudite after dinner conversation, a story, if you will, about the law as applied to their client, and why their client's version of the story should prevail.

Lawyer/authors, like John Grisham, Lisa Scottoline, Scott Turow, and Linda Fairstein, to name only a few, are so common that I used to joke that it should be a separate occupation on Schedule C of our Income Tax return. Why? Storytelling comes naturally to good lawyers, and many of them try to turn their lawyerly storytelling skills to writing fiction or great essays (see, e.g., Jeffrey Toobin).

Lawyers aren't the only tale-telling profession. Doctors also use narrative, and just a glimpse at how they do so might shed light on our own profession and its storytelling ways.

Storytelling Doctors

When a doctor examines a patient for the first time, the doctor "takes" or records the patient's history, the story of her life, certainly the story of her medical life. Older, wiser doctors try to teach younger ones to LISTEN to the patient tell her story. To hear the patient's words and examine the patient's body for corroborating evidence and clues to diagnosis.

Like legal storytelling, medical storytelling is an art, not a prescriptive science. The patient's story is that she lost weight because she is training for a marathon, but she has no muscle tone. Is she hiding an eating disorder? Is the Johnny really just a clumsy kid who keeps falling down the stairs, as Mom says, or is Mom protecting an abusive spouse and parent. The doctor asks Dad, "Do you drink alcohol?" When Dad says, "Only with meals," is that good enough, or does the doctor pursue the story to learn that drinking with meals means breakfast, lunch, and dinner, and usually entails a bottle or two of wine.

After taking a careful history and physical exam, the physician writes the patient's story or history, proposes tests to rule out diagnoses, and then diagnoses the patient's disorder, if possible, and prescribes a course of treatment. Now the patient's "story" is easy to share with another specialist, who must be called in to consult about the patient's case.

Storytelling doctors are as interesting as their legal counterparts.

The great Russian playwright and author, Anton Checkhov was a working country doctor and wrote stunning short stories about ordinary patients and their struggles to live. We can read some of them if you'd like.

Atul Gawande who writes for the *New Yorker* tells stories galore about patients and doctors in bestsellers like *Complications: A Surgeon's Notes on an Imperfect Science* and *Being Mortal: Medicine and What Matters in the End*.

You may have seen the great Oliver Sacks writing in the *New York Times* recently, an essay entitled *Sabbath*. Sacks, recently diagnosed with terminal cancer, has been called "the poet laureate of medicine" because of his neurological tales including *Awakenings*(made into a major motion picture starring the late Robin Williams), or the *New York Times* bestseller *The Man Who Mistook His Wife For A Hat* and many other great medical tales. Sacks describes his early attraction to medical stories:

> Almost unconsciously, I became a storyteller at a time when medical narrative was almost extinct. This did not dissuade me, for I felt my roots lay in the great neurological case histories of the 19th century (and I was encouraged here by the great Russian neuropsychologist A.R. Luria).

- Oliver Sacks, *Sabbath*.

The list of storytelling lawyers and doctors goes on, and we'll consider them as candidates for our reading list.

Law & Literature

I began teaching at UNL after Professor Lawson invited me to come speak about my novel *Brain Storm*, which was assigned reading at the time in his version of the Law and Literature course; we may read if you so desire. I have another novel which could work: *White Man's Grave*. It was nominated for the National Book Award long ago. Google it and ponder some reviews. I'll make a case for it, namely, I have plenty of free copies.

The only other book I'd really like to bring into the course is Thomas Healy's *The Great Dissent: How Oliver Wendell Holmes Changed His Mind–and Changed the History of Free Speech in America*, to use as our foremost example of nonfiction legal storytelling.

Since 2008, Prof. Lawson and I have taken turns teaching Law and Literature. Indeed, last spring when I taught Law and Literature, the students took over the course early and made it something much grander than I could imagine. Their ultimate verdict was that I should make a seminar version of the course, and that's how Law and Storytelling was born.

But we'll begin with some of the Law and Literature basics, just so you know what that course usually entails. Many law schools offer a Law and Literature course. Most of them contain a collection of the predictable works that Judge Richard A. Posner complained about in his famous book *Law and Literature*. Even our own Roscoe Pound edited a well-regarded anthology called *Law in Action: An Anthology of the Law in Literature* (New York:Crown, 1947)

What might be called a cliché Law and Literature reading list would include works like Shakespeare's *The Merchant of Venice*, Camus' *The Stranger* or *The Fall*, Frank Kafka's *The Trial*, excerpts from Dostoevsky's *Crime and Punishment*, a rereading of *To Kill A Mockingbird*, Truman Capote's *In Cold Blood* and so on.

Law IN Literature

Traditionally Law and Literature comes in two flavors: Law IN Literature and Law AS Literature, Law IN Literature being the more obvious of the two. Meaning, for instance, we read Franz Kafka's *The Trial* and discuss how most non-lawyers feel upon being confronted by a system where everybody speaks a foreign language and the rules all seem arbitrary or rigged in favor of the authorities, or in favor of people with lots of cash. Most of the books listed above fall into the Law IN Literature category.

This genre of the traditional Law & Literature course looks at legal dramas and themes in literature. The idea behind the course is that those who study the law should also read great literature about the law, because authors offer an "independent" view of the law. Instead of learning only legal doctrine handed down from above, law students should take at least one course where they look at law from the outside in, by reading great novels or works of nonfiction and then ask: How is law portrayed *in* literature?

Wikipedia puts it this way:

> Authors have a lesson to teach legal scholars and lawyers alike about the human condition, and the law's effect on it. Such scholars tend to cite authors like Franz Kafka, Albert Camus, Herman Melville, Fyodor Dostoevsky, and Charles Dickens. The fictional situations presented in literature, these scholars assert, can tell a great deal about political and social situations, and the individual that often find themselves before the court.

Law AS Literature

Less obvious but equally interesting is studying Law AS Literature, which means the class considers what literary techniques WORK when representing clients by

writing and telling stories. I might make the argument that every case is a story, and every story is a case (protagonist, antagonist, being compared to plaintiff and defendant, or vice versa). Or we might ask: how does The Declaration of Independent WORK as a piece of literature? What rhetorical gimmicks does it employ to make its case? What literary techniques does it use to persuade, not just Tories and colonists, but US? Indeed how does it persuade THE AGES and the future generations it was clearly addressing?

Law *as* literature scholars critique and analyze legal writing as a form of literature. They ask, what tools and techniques do legal writers use that are just like the tools and techniques used by literary authors? Certainly imagery, rhyme, and the "sound" of sentences all play a part.

Slow Reading

In Law and Literature and maybe even more so in Law and Storytelling, we make a concerted effort to read slowly and carefully. The Law and Literature course is a more formal and serious version of a book club. Law and Storytelling, I imagine, will be a more formal and serious version of a writing course. Our mission is to SLOW DOWN and spend time with great stories and great literature, and then try to figure out how they work, preferably by imitation.

I read stories and novels at a much slower pace than, say, a Supreme Court opinion. A novel needs to capture me completely, or I've got other things to read. Take a look at Jeanne Whale's article in the *Wall Street Journal: Read Slowly to Benefit Your Brain and Cut Stress At Least 30 Minutes of Uninterrupted Reading With a Book or E-Book HelpsRead Slowly to Benefit Your Brain and Cut Stress At Least 30 Minutes of Uninterrupted Reading With a Book or E-Book Helps*. I took the speed reading test. I came out "average" but I also missed a question. I also learned a new term for what I do when I read GOOD stuff. I sub vocalize.

Justice Roberts and Slow Reading

Last year when Justice Roberts visited us at the Law College, a student asked him, "What do you read when you aren't reading law?" Or, "What should a young lawyer read when she's not practicing law?"

Justice Roberts didn't hesitate a moment: "Literature! **If you don't read great literature you don't even know what a good sentence sounds like.**"

A perfect description of what we are about. I would add that if you don't cultivate and MAINTAIN the habit of reading great literature your whole life, you'll quickly *forget* what a good sentence sounds like.

Storytelling

Most authors will tell you that they write books, not because they know the answers and would like to share them with their readers. No, usually the author has a question or a problem and attempts to *solve* the problem by dramatizing it and writing it out. Fiction and nonfiction both require research and mastery of details. "If you can't explain it simply, you don't understand it well enough," said Einstein, and writing a book or telling as story is your attempt at telling the story.

In this course we are intensely interested in how a story grabs you and moves you.

We don't want to be scholars and kill storytelling by analyzing it. E.B. White, the author of *Charlotte's Web* and many other tales, said:

> Analyzing humor is like dissecting a frog. Few people are interested and the frog dies of it."

> –E.B. White

Instead of trying to reverse engineer or analyze stories, we learn by doing, namely, by reading and writing stories; not by reading academic descriptions of stories to learn lessons better learned by reading the original, twice if necessary, to see how it works.

Selecting Great Stories To Read

Here, I need your help. I'll send you some sample syllabuses, and I'll make my own recommendation, so you can look over some likely candidates for reading, but I encourage you to think outside the box. (Professor Lawson's version of this course includes Jane Austen's *Emma* and Jean Dominque-Bauby's *The Diving Bell And The Butterfly*, anything but obvious choices for a Law & Lit course.)

I am primarily interested in getting a recommendation from each of you for a short story, novella, play, essay, even a comic book or screenplay that grabbed you and MOVED you. We want to know why?

So if you have a candidate you'd love to see in the course, prepare to nominate! Long novels, like *The Brothers Karamazov* or *Bleak House* are prohibitive because it's tough to fit all that reading into a law school education. Better are shorter, compelling, streamlined stories.

RD