

Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom

Carolyn Grose*

Narrative theory and storytelling¹ have emerged as threads in legal scholarship steadily over the past 20 years. Beginning in the late 1980s and early 1990s, the Legal Storytelling movement sought to acknowledge and include the voices of “outsiders” in legal scholarship and dialogue.² More

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¹ As I will explain more fully below, I use “narrative theory” to describe the theory of stories—what they are and how they are made. By contrast, I use “storytelling” to describe the practice of telling stories. Throughout the piece, I use the nouns “narrative” and “story” interchangeably. For another set of definitions of the two concepts, see e.g. Ruth Anne Robbins & Steve Johansen, Presentation, *This is your Brain on Stories* (Applied Legal Storytelling Conference, Chapter Two: Once Upon a Legal Story, Portland, Or., July 23, 2009) (video available at <http://lawmedia.lclark.edu/LawMedia/SilverlightPlayer/Default.aspx?peid=a07a027332ee44f2b2109cc3c2eece1c>).

² See e.g. Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255 (1994); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 Clin. L. Rev. 41 (1994); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683 (1992); Peggy C. Davis, *Law and Lawyering: Legal Studies with an Interactive Focus*, 37 N.Y. L. Sch. L. Rev. 185 (1992) [hereinafter Davis, *Law and Lawyering*]; Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and “Feminine” Style*, 66 N.Y.U. L. Rev. 1635 (1991) [hereinafter Davis, *A Demonstration*]; William N. Eskridge, *Gaylegal Narratives*, 46 Stan. L. Rev. 607 (1994); 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); David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 Ind. L.J. 797 (1998); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984); Mary Ellen Maatman, *Justice Formation From Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 Leg. Writing 207 (2008); Elizabeth L. MacDowell, *Law on the Street: Legal Narrative and the Street Law Classroom*, 9 Rutgers Race & L. Rev. 285 (2008); George A. Martinez, *Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon: Philosophical Considerations and the Use of Narrative in Law*, 30 Rutgers L. J. 683 (1999); Philip N. Meyer, *Vignettes From a Narrative Primer*, 12 Leg. Writing 229 (2006) [hereinafter Meyer, *Vignettes*]; Philip N. Meyer, *Convicts, Criminals, Prisoners, and Outlaws: A Course in Popular Storytelling*, 42 J. Leg. Educ. 129 (1992) [hereinafter Meyer, *Popular Storytelling*]; 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 (1999); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073 (1989); Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ALWD 209 (2004); Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 Wake Forest L. Rev. 323 (1995); Arthur M. Wolfson, Book Review, *The Lessons of Narrative*, 11 Roger Williams U. L. Rev. 431 (2006) (reviewing Jean Stephancic & Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails its Creative Minds* (Duke U. Press 2005)).

recently, the Applied Legal Storytelling movement³ encourages scholars to use storytelling to enhance their understanding of what skills lawyers practice and how to improve those skills.⁴ Scholars in the Law and Literature movement explore the uses of literature to help lawyers stay connected to their imaginations,⁵ to their creativity,⁶ and to their humanity.⁷ Each of these scholarly movements has led to, or grown out of, professors' experiments with using narrative theory and storytelling in the classroom. Thus, the scholarship that results tends to focus on one or both of the following ideas: (1) what narrative theory tells us about how to read and construct opinions and briefs; and (2) how to use narrative theory and storytelling in teaching.⁸

³ See e.g. Stacy Caplow, *Putting the "I" in Writing: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 Leg. Writing 249 (2008); Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. Cin. L. Rev. 405 (2002); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127 (2008); Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. Ill. U. L. Rev. 1 (2001); Dena S. Davis, *Tell Me a Story: Using Short Fiction in Teaching Law and Bioethics*, 47 J. Leg. Educ. 240 (1997); Stephen D. Easton, *'Toto, I Have a Feeling We're Not in Kansas Anymore': Using the Wizard of Oz to Introduce Students to the Skills of Witness Examination*, 12 Clin. L. Rev. 283 (2006); 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 (2001); Gail Hammer, *A Conversation Between Friends: Adventures in Collaborative Planning and Teaching Ethical Issues in Representation of Children*, 75 UMKC L. Rev. 1025 (2007); Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 B.Y.U. Educ. & L.J. 299 (2003); 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); Kathleen Magone & Steven I. Friedland, *The Paradox of Creative Legal Analysis: Venturing into the Wilderness*, 79 U. Det. Mercy L. Rev. 571 (2002); Karin Mika, *Innovative Teaching Methods and Practical Uses of Literature in Legal Education*, 18 Whittier L. Rev. 815 (1997); Stacey A. Tovino, *Incorporating Literature into a Health Law Curriculum*, 9 Mich. St. U. J. Med. & L. 213 (2005).

⁴ See e.g. Caplow, *supra* n. 3; Chestek, *supra* n. 3; Cole, *supra* n. 3; Easton, *supra* n. 3; Foley & Robbins, *supra* n. 3; Hanrahan, *supra* n. 3; Magone & Friedland, *supra* n. 3.

⁵ Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. Chi. L. Rev. 265, 277–79 (2003).

⁶ Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 Am. U. L. Rev. 453 (1992); James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 Willamette L. Rev. 45 (1993); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17 (2008); Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, (Suffolk U. Law Sch. Legal Studies Research Paper No. 08–14, 2008) (available at <http://ssrn.com/abstract=1126400>); Angela P. Harris & Marjorie M. Schultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 Stan. L. Rev. 1773 (1993); Lenora Ledwon, *Storytelling and Contracts*, Book Review, 13 Yale J.L. & Feminism 117, 129 (2001) (reviewing Amy Hilsman Kastely, Deborah Waire Post, & Sharon Kang Hom, *Contracting Law* (2d ed., Carolina Academic Press 2000)); Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of the First-Year Torts*, 74 Or. L. Rev. 823 (1995); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. Kan. L. Rev. 251, 269 (1992); Carrie Menkel-Meadow, *Foreword: Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 Fordham L. Rev. 787 (2000); Michael A. Mogill, *Our Students, Our Selves: The Mirror Reflects Back*, 32 Cap. U. L. Rev. 317 (2003); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 Yale J.L. & Humanities 37 (1990); Sarah E. Thiemann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. Rev. L. & Soc. Change 17 (1998); Robin West, *Literature, Culture, and Law at Duke University* (Georgetown Law, Working Paper No. 75, 2008) (available at <http://lsr.nellco.org/georgetown/fwps/papers/75/>).

⁷ Caplow, *supra* n. 3; Hanrahan, *supra* n. 3; Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Nussbaum, *supra* n. 5.

⁸ See e.g. Blaustone, *supra* n. 6; Caplow, *supra* n. 3; Caron, *supra* n. 3; Chestek, *supra* n. 3; Cole, *supra* n. 3; Davis, *Law and Lawyering*, *supra* n. 2; Davis, *A Demonstration*, *supra* n. 2; Davis, *supra* n. 3; Easton, *supra* n. 3; Elkins, *supra* n. 6; Foley & Robbins, *supra* n. 3; Graham & McJohn, *supra* n. 6; Greenberg & Ward, *supra* n. 2; Hammer, *supra* n. 3; Hanrahan, *supra* n. 3; Jackson, *supra* n. 3; Ledwon, *supra* n. 6; Maatman, *supra* n. 2; MacDowell, *supra* n. 2; Magone & Friedland, *supra* n. 3; McClurg, *supra* n. 6; Meyer, *Vignettes*, *supra* n. 2; Meyer, *Popular Storytelling*, *supra* n. 2; Mika, *supra* n. 3; Mogill, *supra* n. 6; Rose, *supra* n. 6; Spencer, *supra* n. 2; Thiemann, *supra* n. 6; Tovino, *supra* n. 3; West, *supra* n. 6.

In clinical teaching and scholarship, storytelling has assumed pride of place as a tool to help students hear and incorporate the voices of “outsiders” as they engage in and practice various lawyering skills, and to challenge them to think creatively and compassionately about their case strategy and practice. Lucie White’s “Sunday Shoes” piece⁹ and Binny Miller’s “Give Them Back Their Lives”¹⁰ are just two examples of narrative theory and storytelling practice that many clinical teachers use either explicitly or behind the scenes in their supervision of clinical students or their seminar teaching.¹¹

I believe narrative theory and storytelling can be used even more fundamentally in the law school curriculum, cutting across types of courses and types of lawyering. I teach skills, doctrinal, and clinical courses, and I use narrative theory and storytelling in all three, always with the same goal: to help students recognize that as lawyers, they are not only hearers and tellers of stories, but also, and perhaps most important, constructors of stories.

I use the term “narrative theory” to describe the study of story *construction*, which is different from—though clearly related to—story *telling*. Construction is the act of building: putting together the elements that comprise the story and then writing it down. Performance of the story—reading it, telling it, enacting it—comes later. So narrative theory studies that process of construction by asking: What are the elements of this story? What choices must the author make about those elements? What process does the author go through to make those choices? By choosing what goes into the story, what has the author left out? How is the story different as a result of those choices? Have those choices been made

⁹ Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hiring of Ms. G.*, 38 Buff. L. Rev. 1 (1990); McKenzie, *supra* n. 6. In “Sunday Shoes,” Lucie White tells a story about herself as a young legal aid lawyer representing a client in a welfare overpayment case. The piece explores the complexity of the lawyer-client relationship and introduces the important “critical lawyering theory” idea that the client is the expert about her own life and that the lawyer must collaborate with her to construct and tell a story that adequately and authentically represents her. White, *supra*.

¹⁰ Binny Miller, *Give Them Back Their Lives: Client Narrative and Case Theory*, 93 Mich. L. Rev. 485 (1994). In this piece, Miller describes the multi-layered process of constructing case theories and the need for awareness of the ways in which the lawyer and client bring different pieces of themselves to the process of constructing those stories. *Id.*

¹¹ See also Caplow, *supra* n. 3; Caron, *supra* n. 3; Chestek, *supra* n. 3; Cole, *supra* n. 3; Davis, *Law and Lawyering*, *supra* n. 2; Davis, *A Demonstration*, *supra* n. 2; Davis, *supra* n. 3; Easton, *supra* n. 3; Elkins, *supra* n. 6; Alfredo Mirande Gonzalez, *Rotating Centers, Expanding Frontiers: Latcrit and Marginal Intersection*, 33 U.C. Davis L. Rev. 1347 (2000); Graham & McJohn, *supra* n. 6; Greenberg & Ward, *supra* n. 2; Hammer, *supra* n. 3; Hanrahan, *supra* n. 3; Jackson, *supra* n. 3; Nancy Levit, *Legal Storytelling: The Theory and the Practice—Reflective Writing Across the Curriculum*, 15 Leg. Writing 259 (2009); Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73 (2004); Maatman, *supra* n. 2; MacDowell, *supra* n. 2; Magone, *supra* n. 3; McKenzie, *supra* n. 6; Meyer, *Vignettes*, *supra* n. 2; Meyer, *Popular Storytelling*, *supra* n. 2; Mika, *supra* n. 3; J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 Clin. L. Rev. 55 (1996); Spencer, *supra* n. 2; Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 Baylor L. Rev. 893 (2006); Tovino, *supra* n. 3.

intentionally or reflexively? What factors influence the author in making those choices?¹²

Other branches of narrative theory explore the essential nature of stories and why they are so elemental to human interaction by asking how and why and when narrative works.¹³ My understanding and use of narrative theory relies and builds on these works in an effort to make it a more active theory: in other words, “yes, we get it that stories are essential; now how can we use them to make us better lawyers?” That theory in action is the practice of storytelling: the actual craft of constructing stories, based on choices made with intention and reflection by the lawyer and her client.

My particular teaching philosophy and approach rely on an exploration of both narrative theory and the practice of storytelling. Most, if not all, of my classes—regardless of their official content—involve discussions about what stories are and what makes them “good” (persuasive, compelling), both substantively (the “what” of the story) and technically (the “how” of the story). That’s the narrative theory. In addition, my students spend a lot of time constructing and deconstructing stories, focusing on their elements—both the “what” and the “how”—and on the choices that resulted in the story’s substance and structure. That’s the storytelling practice.

So I have complementary teaching and learning goals in my courses: in my Family Law or Trusts and Estates courses, I hope that my students learn the doctrine of custody or *intervivos* transfers; in my Advocacy course, I hope that my students begin to understand the goals of direct and cross examination; and in my Legal Planning Clinic, I hope that my students gain confidence in the practice of filing Articles of Incorporation or drafting a Health Care Directive. At the same time, the storytelling exercises I use in all three kinds of courses are aimed more broadly than the particular skills or doctrine that are the focus of each course. The exercises are designed to challenge students to deconstruct the story they are hearing or telling, to gain understanding of that story’s substantive and technical elements, and to recognize the choices that they, as lawyers, must make to construct a story that is persuasive and compelling and likely to further their client’s goals.

A pedagogy that relies on this kind of narrative theory and storytelling practice both starts from the premise and leads to the realization that The

¹² I use the term “author” here to refer to the person who puts the story together and writes it down—the story constructor. The storyteller might continue the process of construction, but many of the choices have already been made by the time the story gets told or read or enacted.

¹³ See e.g. Anthony G. Amsterdam & Jerome S. Bruner, *Minding The Law* 1–165 (Harv. U. Press 2000).

Law is made up of a set of stories that have been adopted by decision makers and that those stories have been constructed by none other than lawyers. When students arrive at this conclusion, they begin to recognize the power and responsibility they hold as story constructors—makers of The Law.¹⁴

In this piece, I develop the idea of using storytelling across the curriculum to teach students this kind of critical thinking and reflection about their role as lawyers. In Part One, I describe the importance of storytelling and stories in the craft of lawyering. Part Two describes my own teaching in the context of narrative theory and practice, and it analyzes how and why this context achieves the goal of developing students' critical thinking skills and reflective practice. The piece concludes with the suggestion that narrative theory and storytelling as a pedagogy used systematically across individual courses and the curriculum has the potential to transform a student's experience of law school, resulting in her development as an empowered, reflective, and socially responsible member of the legal profession, regardless of the kind of law she practices or the kinds of clients she represents.¹⁵

I. Narrative Theory and Storytelling Practice

Narrative theory is an exploration and elaboration of the idea that the law is made up of stories that are constructed by lawyers, clients, and decision makers. Each one of these stories consists of distinct and identifiable elements, both substantive and technical, and each one of these elements is the product of choices made—consciously or not—by the story's constructor.¹⁶ Storytelling itself is the craft that puts this theory into practice: the act of constructing the story's elements, the choices the storyteller makes in the process, and then the actual telling of the story.

Thinking about the practice of law as a practice of storytelling gives us the opportunity to look behind and between and over and under the black letter rules that comprise "the law."¹⁷ In those interstices, we find facts and language and structure and ideas that go well beyond the holding of an opinion or the mandate of a statute.¹⁸ By viewing the law through a

¹⁴ See e.g. Richard Sherwin, *Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 716–19 (1994), reprinted in 6 J. ALWD 88 (2009).

¹⁵ See Laura Little, *Characterization & Legal Discourse*, 46 J. Leg. Educ. 372, 400–06 (1996), reprinted in 6 J. ALWD 121 (2009) for a discussion about how empowering it is for students to understand "framing."

¹⁶ See Carolyn Grose, *Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending*, 2 Northeastern U.L.J. 97 (2010).

¹⁷ See Amsterdam & Bruner, *supra* n. 13, at 1–165.

¹⁸ Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *Law's Stories: Narrative and Rhetoric in the Law* 2–24 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

narrative lens, we discover not only “how law is found but how it is made.”¹⁹

A. Narrative Theory: What is a Story?

Anthony Amsterdam and Jerome Bruner provided a great service to legal scholarship and teaching with their book *Minding the Law*; there, they translated literary theory and rhetoric into terms understandable to the contemporary legal (as opposed to literary) scholar.²⁰ As described in *Minding the Law*, stories are composed of the following elements:

A “steady state”—that is, a state “grounded in the legitimate ordinariness of things.”²¹

The “trouble”—that is, something that happened to disrupt the “legitimate ordinariness of things.”²²

Followed by “efforts” at redress, to cope or come to terms with the disruption.

Leading to an outcome or resolution.

Ending with a coda or moral—a retrospective evaluation of what it all might mean—which returns the audience from the “then-and-there” of the narrative to the “here-and-now of the telling.”²³

Taken together, these five elements make up what we call “the plot” of the story²⁴—the “what happened and why” of the story. Plots usually fit into particular “genres”—“mental models representing possible ways in which events in the human world can go.”²⁵ In other words, the story is recognizable to the reader or listener almost from the outset, causing him or her to register it as a comedy, tragedy, or drama.²⁶ These are established frameworks for narratives or scripts that we recognize and expect to be resolved in certain ways.²⁷

19 *Id.* at 3.

20 See generally Amsterdam & Bruner, *supra* n. 13.

21 Amsterdam & Bruner, *supra* n. 13, at 113.

22 *Id.* at 114.

23 *Id.*; see also Jerome Bruner, *Making Stories: Law, Literature, Life* 20 (Harv. U. Press 2002).

24 See Thomas M. Leitch, *What Stories Are: Narrative Theory and Interpretation* 148 (Penn. St. U. Press 1986). See also generally Peter Brooks, *Reading for the Plot: Design and Intention in Narrative* (Alfred A. Knopf 1984).

25 Amsterdam & Bruner, *supra* n. 13, at 133 (genres are tools of narrative problem-solving that can shape human encounters and institutional arrangements).

26 *Id.*

27 *Id.*; see also Lopez, *supra* n. 2.

Making the plot move, of course, are the Characters—free agents, with minds of their own,²⁸ rendered by external details, who engage in the “what happened and why” of the story.²⁹ Theodore Leitch describes characters as “trope[s] for human identity”;³⁰ like plots, characters tend to register with readers or listeners as familiar, each one expected to embody one or more general truths.³¹ Thus, we expect to encounter and to recognize heroes, villains, lovers, enemies, good guys, bad guys, clowns, tragic figures, protagonists, and antagonists.³²

Plot and character make up the “what” of the story—something happened to someone and the story is about how to fix it. The arrangement of the substantive components is what I call the “how” of the story. These are the technical pieces that literally make the story go: timing, framing, pace, language, when the story begins, when it ends, what gets described fully, what gets left out, setting, organization, structure.³³ As much as plot or character, these elements make the story what it is, delivering it to the reader or listener in a form that he recognizes and responds to.

This is only the nutshell deconstruction of a story, however. In every story, each one of those elements—character, plot, genre, timing, framing, pace, language, structure, rendering of detail, organization, setting, etc.—represents one, if not more than one, choice about the kind of story to tell and how to tell it. As Martha Minow points out, one of the shortcomings of the storytelling mode is that it “gives no guidance or suggestion about which stories to tell.”³⁴ To know how to tell a story, then, we need to understand the choices we make and why we make them.³⁵

B. Storytelling Practice: How Lawyers Tell Stories

Cultural psychologist Jerome Bruner describes the act of storytelling as so instinctive and intuitive as to render an explanation of how we do it close to impossible: “We stumble when we try to explain, to ourselves or to some dubious other, what makes something a story rather than, say, an argument or a recipe.”³⁶ And yet, if we are to be effective storytellers—the

28 Bruner, *supra* n. 23, at 20; *see also* Leitch, *supra* n. 24, at 148.

29 Leitch, *supra* n. 24, at 148.

30 *Id.*

31 *Id.*

32 Robbins, *supra* n. 6, at 774–90.

33 *See* Amsterdam & Bruner, *supra* n. 13, at 124; *see also* Scheppele, *supra* n. 2.

34 Martha Minow, *Stories in Law*, in *Law's Stories: Narrative and Rhetoric in the Law*, *supra* n. 18, at 31.

35 *See* Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 Clin. L. Rev. 329 (2006).

36 Bruner, *supra* n. 23, at 3–4.

kind who explain not only how law is found, but also how it is made—we must be able to overcome this asymmetry between doing and understanding what we do.³⁷ We must be able to describe—if only to ourselves, so we can do it again—what goes into the making of a story.

Lawyers are particular kinds of storytellers, influenced by variables unique to their role as tellers of their clients' stories. In that role, as makers of legal arguments, we decide what story to tell and how to tell it "guided by some vision of *what matters*."³⁸ Put another way, to figure out what story to tell and how to tell it, the lawyer must weigh three substantive factors, the same factors that make up the theory of the case: the law, the facts, and the client's goals.³⁹ In addition, of course, the lawyer must consider contextual factors, e.g., the audience, the forum, the availability of resources, and the personalities of the client and other potential supporting or detracting characters in the story. The lawyer must also consider particular cultural norms and values in deciding among different stories and ways of telling them. And finally, the lawyer must consider factors personal to himself in determining what story to tell and how to tell it: is he comfortable in a courtroom, can he pull off a humorous narrative, does he do better in a more formal or less formal setting, does the client's situation raise personal moral or ethical concerns?⁴⁰

Storytelling is pervasive. When a lawyer drafts a statement of facts, for example, she does not simply record the known universe of "relevant" facts in an interesting and persuasive way. Indeed, there is no such thing as an absolutely neutral description of the facts.⁴¹ As lawyers, we engage in fact-gathering repeatedly—at initial client interviews, after we've done some legal research, in anticipation of the other side's argument—and then we "pick and choose from available facts to present a picture of what happened"⁴² that most accurately reflects our sense of what matters.⁴³ And the other lawyers involved do exactly the same thing, with exactly the same pool of facts, but emphasizing different details, drawing different inferences, and thus drawing quite a different picture.⁴⁴

37 *Id.*

38 Amsterdam & Bruner, *supra* n. 13, at 7.

39 Binny Miller has written extensively about the construction of case theory, which is the incorporation of law and facts and client goals into a story that can be used to drive a case or an organizing campaign. See Binny Miller, *supra* n. 10, at 487–88 (describing case theory).

40 See Grose, *supra* n. 35.

41 David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 463 (1981); see also Scheppele, *supra* n. 2, at 2089 (discussing "point of viewlessness").

42 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2421 (1988).

43 This is true regardless of the forum or kind of matter—litigation, planning, transactional, mediation, or negotiation.

44 Delgado, *supra* n. 42, at 2416–18; see also Lopez, *supra* n. 2.

And this selectivity applies to the “how” too. The law might define what is relevant (and I say “might” deliberately), but it cannot define “how the relevant facts, in a particular case, are to be expressed.”⁴⁵ It is up to the lawyer to figure out what words to use, with what emphasis. A lawyer’s statement of facts thus “reflects—by its inclusions and exclusions, the emphasis of its sentence construction, and the structures of its argumentation—choices.”⁴⁶ Lawyers make choices about the other technical elements of a story as well: when the story should begin and when it should end, how quickly or slowly the action should move, how fleshed out each character should be. Kim Lane Scheppele provides wonderful examples of choices judges make in the “how” of their stories (for appellate opinions are of course stories), both about word choice (“lightly choke” v. “heavy caress”)⁴⁷ and framing (beginning with the defendant’s childhood rather than beginning with the night of the crime).⁴⁸

Thus, stories are not “recipes for stringing together a set of ‘hard facts.’”⁴⁹ Rather storytellers first *construct* the facts and then construct the stories⁵⁰ by sorting through what is out there and figuring out both what to say and how to say it, based on the storyteller’s own perspective about “what matters.” Narrative is not a linear framework structure into which events are slotted but instead a set of events that can be organized into alternative narratives, and the choice among them depends on perspective, circumstances, and interpretive frameworks.⁵¹ And those choices are governed by what we care about. Thus, the “fabric of narrative reflects the shape of our concerns.”⁵²

C. Attention to Narrative Theory Makes Us Better Lawyers

For lawyers, figuring out “what matters” is a complex and nuanced process.⁵³ When we choose what story to tell and how to tell it, we must

⁴⁵ Bernard Jackson, *Narrative Theories and Legal Discourse in Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy, and Literature* 27 (1994).

⁴⁶ *Id.*

⁴⁷ Scheppele, *supra* n. 2, at 2086.

⁴⁸ *Id.* at 2094–96.

⁴⁹ Amsterdam & Bruner, *supra* n. 13, at 111.

⁵⁰ *Id.* at 116.

⁵¹ Amsterdam & Bruner, *supra* n. 13, at 140–41. Although it is not exactly what I am talking about here, there is a rich body of scholarship on assumptions and lawyer biases that affect the way in which facts are understood. See e.g. Grose, *supra* n. 35, and sources cited therein.

⁵² Amsterdam & Bruner, *supra* n. 13, at 124.

⁵³ Depending on the kind of relationship the lawyer has with the client, and the kind of lawyer he is, the client might play a significant role in helping to choose and craft the story the lawyer tells on her behalf, or she might take a more background role. See e.g. Carolyn Grose, “Once Upon A Time, In a Land Far, Far Away . . .”: *Lawyers and Clients Telling Stories About*

work thoughtfully and responsibly to reconcile and balance various facets of “what matters.” What lawyers must appreciate is that when we choose to tell a particular story in a certain way, we are shaping future stories. If the story we present is persuasive, then other stories will be shaped to fit that “winning” story. The legal process reifies what it recognizes as actionable harms, essentially making law. When constructed and told without contextual awareness or intention, some stories may end up making very bad law.

Understanding storytelling is a way to understand persuasion. We persuade by telling stories that decision makers believe and adopt. Narrative theory is so compelling partly because stories are elemental to human interaction—we recognize and react to them instinctively.⁵⁴ So my suggestion that lawyers use narrative theory in their practice is not a suggestion that lawyers do anything radically different, just that they harness what they’re already doing in some systematic and intentional way. If as they listen to their clients, something doesn’t make sense, or they find themselves wondering about the absence or presence of a particular character, or they imagine how they might feel in a similar situation, narrative theory suggests that they should recognize those reactions as important clues. Lawyers should use these clues to help guide their ongoing pursuit of the client’s narrative and to work with the client to construct a story that will engage the decision maker’s curiosity and compassion without triggering his disbelief or dismissal.

This approach is distinct from letting a lawyer’s own values and judgment guide the story construction process. Instead, narrative theory helps lawyers harness our natural curiosity and skepticism. Although imagination and common sense are valuable tools for listeners and storytellers, such tools need to be used carefully. If they are used with intention and awareness of the choices underlying story construction, then they will be used in ways that do not allow the lawyers’ voice to dominate or overwhelm the client’s and that do not lead to the making of law that the lawyer did not anticipate or intend through the adoption of miscon-structed stories.⁵⁵

I can anticipate the usual reaction to suggestions that we use more theory in our practice: “how can I possibly do all this? I don’t have time; I can barely get the client’s facts out in the first interview, let alone do all

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Ethics (And Everything Else), 20 Hastings Women’s L.J. 163, 188–90 (2009); Gerald Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Westview 1992); White, *supra* n. 9; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clin. L. Rev. 427 (2000).

⁵⁴ Robbins & Johansen, *supra* n. 1.

⁵⁵ Grose, *supra* n. 16.

this narrative theory stuff.” But the reality is that lawyers do all this anyway; we just don’t know we’re doing it, and we are therefore not doing it as intentionally, and as effectively, as we could be. If we don’t understand the choices we make so that we can make them intentionally, we will fail in our effort to persuade the decision maker, or we will persuade the decision maker to act in a way that ultimately does not benefit our client, or future clients.⁵⁶ All of which is to say: using narrative theory is a way to understand that we are making these choices, and it helps us to make them intentionally, which in turn leads us to become better lawyers.

II. The Pedagogy of Narrative and Storytelling

Legal education is at an important crossroads. The Carnegie Report⁵⁷ and *Best Practices for Legal Education*⁵⁸ describe legal education as deficient in actually producing competent professionals.⁵⁹ By bringing together theory, doctrine, skills and values, narrative theory and storytelling practice help students develop as the more fully integrated lawyers that these reports envision.⁶⁰

A. The Pedagogical Theory

Indeed, many teachers are using particular kinds of stories or storytelling exercises to teach specific doctrine or skills.⁶¹ In addition, scholars and professors use works of literature to focus their students’ attention on particular values like anti-racism, justice, cross-cultural competence (voice of outsiders), ethics, creativity, and compassion.⁶² James Elkins and other

56 *Id.*

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

58 Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* (Clin. Leg. Educ. Assn. 2007).

59 “Potential clients should be able to hire any licensed lawyer with confidence that the attorney has demonstrated at least minimal competence to practice law. Doctors’ patients reasonably expect that their doctors have performed medical procedures multiple times under the supervision of fully qualified mentors before performing them without supervision. Clients of attorneys should have similar expectations, but today they cannot.” *Id.* at 26.

60 Sullivan, *supra* n. 57, at 123.

61 See e.g. Caron, *supra* n. 3; Foley, *supra* n. 6; Timothy S. Hall et al., *Harry Potter, Law, and Culture*, 12 Tex. Wes. L. Rev. 427, 464–68 (2005); Davis, *supra* n. 3; McKenzie, *supra* n. 6, at 265–69; Mitchell, *supra* n. 2; Douglas W. Maynard, *Narratives and Narrative Structure in Plea Bargaining*, in *Narrative and the Legal Discourse* 102, 105 (David Ray Papke ed., Deborah Charles Publications 1991); Katherine Holmes Snedaker, *Storytelling in Opening Statements: Framing the Argumentation of the Trial*, in *Narrative and the Legal Discourse*, *supra*, at 132; Caplow, *supra* n. 3; Chestek, *supra* n. 3; Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 Quinnipiac L. Rev. 1 (2004); Tovino, *supra* n. 3; Robert Dinerstein, Stephen Ellmann, Isabelle Gunning & Ann Shalleck, *Lawyers and Clients: Critical Issues in Interviewing and Counseling* (West 2009).

62 See e.g. Willem J. Witteveen, *Reading Vico for the School of Law*, 83 Chi.-Kent L. Rev. 1197 (2008); MacDowell, *supra* n. 2, at 312, 316, 332; Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 Wake Forest L. Rev. 323 (1995); Phyllis Goldfarb, *So Near and Yet So Far: Dreams of Collaboration Between Clinical and Legal Writing Programs*, 4 J. ALWD 35 (2007); Spencer, *supra* n. 2; Maatman, *supra* n. 2; Rose, *supra* n. 6, at 38–39, 55–56; James R. Elkins,

narrative theory scholars from the early 1990s suggest that the study of literature should be added to the law school curriculum to help the imagination of students in challenging the apparently objective and machine-like character of the law.⁶³ I build on this idea by suggesting that a pedagogy built around narrative theory and storytelling practice can help students understand that there is no such thing as the monolithic Law, rules that are simply discovered or found out there somewhere. Instead, law comprises a series of stories—ever changing—and those stories are constructed not by some objective external Decision Maker in the Sky, but by lawyers, lawyers who once were law students.

I teach skills, doctrinal, and clinical courses, and I use narrative theory in all three, all with the same goal: to help students recognize that as lawyers, they are not only hearers and tellers of stories, but also, and perhaps most important, constructors of stories. A pedagogy that relies on this theory leads students to realize that The Law itself is a set of stories that have been adopted by decision makers and that those stories have been constructed by none other than lawyers.⁶⁴

Ann Shalleck describes narrative theory as a way “to further our understanding of both the dynamics in relationships between lawyers and clients and the nature of the law that gets created through that interaction.”⁶⁵ As mentioned earlier, I hope that my students will learn the doctrine of custody or *intervivos* transfers in my Family Law or Trusts and Estates courses, that they will begin to understand the goals of direct and cross examination in my Advocacy course, and that they will gain confidence in the practice of filing Articles of Incorporation or drafting a Health Care Directive in my Legal Planning Clinic. But the storytelling exercises I use in all three kinds of courses are designed to go beyond the particular skills or doctrine on which each course is centered. The storytelling exercises are designed to challenge students to deconstruct the story they are hearing or telling, to gain understanding of that story’s substantive and technical elements, and to recognize the choices that lawyers must make to construct a story that is persuasive and compelling and likely to further their client’s goals.

Introduction to Symposium, Pedagogy of Narrative, 40 J. Leg. Educ. 1 (1990); Nussbaum, *supra* n. 5, at 278; Foley, *supra* n. 6, at 19, 34; David Ray Papke, *Discharge as Denouncement: Appreciating the Storytelling of Appellate Opinions*, 40 J. Leg. Educ. 145 (1990); Menkel-Meadow, *supra* n. 6, at 787, 792–794 (2000); Ledwon, *supra* n. 6, at 123, 130.

⁶³ See e.g. Elkins, *supra* n. 6, at 55, 58; Witteveen, *supra* n. 62, at 1222; Richard K. Sherwin, *Pathologizing Professional Life: Psycho-Literary Case Stories*, 18 Vt. L. Rev. 681, 686–687 (1994).

⁶⁴ See David Ray Papke, *Part One: Legal Education—Introduction*, in *Narrative and Legal Discourse*, *supra* n. 61, at 9.

⁶⁵ Dinerstein, Ellmann, Gunning, & Shalleck, *supra* n. 56, at 3.

B. My Pedagogical Practice

Regardless of their official content, most of my classes explore narrative theory and storytelling practice. That is, they include discussions about what stories are and what makes them “good”—the “what” and the “how.” In addition, my students spend time focusing on the elements of the story and the choices that resulted in the story’s substance and structure.

These discussions and exercises recur throughout the semester so students have the opportunity to revisit the concepts at higher and higher levels of complexity, resulting, at the end of the semester, in an understanding of the practice and theory of storytelling as an essential component of their roles as lawyers and participants in the development of the legal system. Thus, I use a “spiral theory” (as opposed to a “parachuting-in theory”) of teaching these ideas. In addition, I use these ideas across content and skills, not only in litigation contexts and not only in clinic or traditional skills courses. The remainder of this section will describe the exercises and discussions I use in a required upper-level skills course called Advocacy, a legal planning clinic, and two traditional “doctrinal” courses.

1. Storytelling Practice in Advocacy Class

In many ways, this is the easiest and most obvious context in which to teach the uses of storytelling. What began as a trial advocacy course has evolved to include other forms of advocacy, but the course revolves around a series of oral exercises that track the trial experience, beginning with taking a deposition and concluding with a full-blown (albeit shorter than typical) trial.

The storytelling theme emerges in the very first class as I describe the “universal tasks of lawyering” as “hearing stories, constructing stories, and telling stories.” I tell my students that this “storytelling framework” is more than a metaphor: it is a practical method of unpacking what lawyers do (hear, construct and tell stories) and how to do it well, in whatever context the students end up practicing law. We then begin the process of identifying and exploring the substantive and technical elements of a story, introducing the ideas of the “what” and the “how” of stories.⁶⁶ The theory and practice re-emerge in subsequent classes on case theory, direct and cross examination, opening statements, and closing arguments.

My favorite set of exercises is the basis for a class called “using facts to persuade.” In the class, I briefly describe the relevant facts of a coerced confession case: in 1958 in North Carolina, an African-American man,

66 See Amsterdam & Bruner, *supra* n. 13, at 110–64 (discussing the power of narrative).

Elmer Davis, confessed to the rape and murder of a white woman.⁶⁷ My colleague and I play the lead roles during the following hypothetical direct examination that takes place at an imagined suppression hearing to determine whether the confession was coerced:

Prosecutor: Lieutenant, who was in charge of overseeing the interrogation of Mr. Davis?

Witness: I was.

Prosecutor: Is there a Department protocol for interrogation of prisoners?

Witness: Yes.

Prosecutor: Please describe that protocol to the judge.

Witness: We limit interrogations to twice daily, once in the morning and once later in the day.

Prosecutor: What procedure did you follow for the interrogation of Mr. Davis?

Witness: We followed that Departmental protocol. I typically interrogated Mr. Davis in the morning, and another officer questioned him later in the day.

Prosecutor: Did that procedure vary?

Witness: No, we followed that procedure the entire time Mr. Davis was in custody, up until the time he confessed.

I then ask the students to identify the state's theory of the case and what facts the prosecutor sought to elicit in support of that theory. They quickly come up with the theory as being that the confession was not coerced, supported by the facts that there was a policy against around-the-clock questioning and that the policy was followed. They are persuaded by this story. For the moment.

My colleague and I then engage in another direct examination in the same suppression hearing, this time conducted by the defense attorney, with the defendant as the witness.

Defense Attorney: Mr. Davis, how long were you in jail before you gave the statement to the police?

Defendant: Sixteen days.

⁶⁷ The exercise is based on Kim Lane Scheppele's *Foreword* to the Michigan Law Review's volume on legal storytelling, back in 1989. In the article, Scheppele describes two cases that ended up in the U.S. Supreme Court, one involving the rape of a woman, the other involving the allegedly coerced confession of a black man. She contrasts the appellate court decisions in both cases with the Supreme Court opinions, illustrating points about language and framing as important tools of persuasive storytelling. See Scheppele, *supra* n. 2, at 2086–97.

Defense Attorney: Please describe the cell where you were being held.

Defendant: It was a small cell in the back of the jail, with a bed and a chair. There was a little window out into the jail yard.

Defense Attorney: Was there a clock in the cell?

Defendant: No.

Defense Attorney: Did you have a wristwatch?

Defendant: No, they took my watch away from me when they put me in jail.

Defense Attorney: During that sixteen days, how often did the police question you?

Defendant: Pretty much all the time.

Defense Attorney: When you say “pretty much all the time,” what do you mean?

Defendant: After I woke up in the morning, one of them would come in and start asking me questions. That would go on all morning and then he’d leave. Then after a while another one would come in and start up all over again.

Defense Attorney: Was it light out while you were being questioned?

Defendant: Sometimes it was.

Defense Attorney: And was it ever dark out while you were being questioned?

Defendant: Sure it was.

Defense Attorney: How long did that kind of questioning go on?

Defendant: Every single day until they got me to sign this statement.

Again, I ask the students to identify the defendant’s theory of the case and the facts the lawyer elicits in the direct examination to support that theory. Again, they quickly come up with a theory: this time, the theory is that the confession was coerced because the defendant felt that he was being subjected to constant interrogation. The facts that support that theory are that he didn’t know what time it was and that he was questioned while it was light and while it was dark.

The point of these two role plays, a point that the students grasp immediately, is that the facts in both stories are “true”—there was a protocol observed during the interrogations (twice a day, between 7:30 a.m. and 11:30 p.m.), and the officers in this case followed that protocol; and the defendant’s only sense of time was based on the changing light outside his window, and he was questioned while it was light and while it was dark. The prosecutor can therefore argue that the interrogation was “repeated” or “sporadic,” and not coerced; therefore, it should be admitted into evidence in the trial. The defense, however, can argue that the interro-

gation was “constant” and therefore created a kind of duress that resulted in the defendant’s confession. Thus coerced, the confession should be suppressed.

Because all the “facts” are “true,” the students recognize that the attorneys for both parties have had to make choices about what facts to select to persuade the decision maker that the attorney’s particular story is the one to be believed and thus adopted by the court. The exercise demonstrates the lesson that the “true story”—“what really happened”—is not something objective and static, waiting to be “found” by a good investigative lawyer. On the contrary, “what really happened” is determined by the decision maker’s adoption of one or the other of the stories the lawyers have offered. And those stories are, in turn, constructed by the lawyer with the goal of persuading the decision maker. The law is made by the choices the lawyers make.

I use this case for another exercise as well, also involving a direct examination, this one having to do with the decisions lawyers must make about when to start their stories. We move forward in time a bit and are now at the trial. Let’s say the judge at the suppression hearing allowed the confession to come in. The same police officer is about to take the stand, and I ask the students to brainstorm about when and where to begin the direct examination. How, in other words, should the prosecutor frame the story this witness can tell? Almost invariably the students suggest that the examination should begin with a description of the murder Mr. Davis is alleged to have committed and his subsequent arrest, and the examination should end with his confession. The students want to draw a very tight frame around the story this witness will tell, and, indeed, the story the prosecution tells at this trial is itself a very tightly framed story: Davis did this horrible thing. How do we know? Because he told us.

My colleague and I then engage in another direct examination of Mr. Davis, playing the role of the defense counsel:

Defense Counsel: Mr. Davis, where did you grow up?

Defendant: Here in Alabama in Jefferson, just five miles from here.

Defense Counsel: Do you remember the first time a policeman ever talked with you?

Defendant: Yes.

Defense Counsel: Tell the jury about that, please.

Prosecutor: Objection, relevance?

The role play ends here as I ask the students to make arguments to the court about why this line of questioning will lead to relevant information.

To answer that question, the students must articulate the defense attorney's case theory as well as how the defendant's story on direct fits into that case theory. The case theory continues to be that the defendant's confession was coerced (even if the jury doesn't buy this argument, the defense attorney is laying the groundwork here for appealing the judge's ruling at the suppression hearing).

So how, I ask the students, is the defendant's first contact with the police relevant? It doesn't take them long to get there—the story of the defendant as a poor black kid in the south at the dawn of the civil rights movement, a young man who is afraid of the police due to frequent and intimidating questioning, provides context and support for the case theory. The background story helps the decision maker make the leap to coercion and duress. Again, the lawyer has made choices about how to frame and structure the story he is telling to persuade the decision maker to adopt his particular story and thus make law that takes that story into account.

Through the lens of direct examination, students explore the practice of storytelling, and through the lens of narrative theory, they explore the practice of direct examination. Experimenting with choices about how to use particular facts; choices about how to frame the exam, when it should begin and when it should end; choices about what language to use, and what evidence to highlight leads the students to recognize that the practice of direct examination is nothing more or less than the practice of telling a persuasive story. It is a practice that takes place in a particularized (and often stilted) way, yes, but one that requires intentional and consistent choices to construct a persuasive and compelling story for the decision maker. Direct examination, in other words, is not just about asking non-leading questions.

2. Storytelling Practice in Clinic

In addition to the Advocacy course, I teach a Legal Planning Clinic in which students represent nonprofit organizations seeking tax planning assistance as well as clients who are poor or elderly or both and who are seeking assistance with end of life planning, financial planning, Medicaid and Medicare planning, and planning to meet housing needs.

Having spent the first 15 years of my legal career either practicing or teaching in a litigation context, I imagined that teaching a transactional and non-adversarial client representation clinic would require considerable adjustment in my teaching. And while certainly I have had to learn a lot about the substance of the law we work with in the clinic, as well as the technicalities of the various kinds of practice, I have been pleasantly

surprised by how well the pedagogical methods I used in the adversarial, litigation context translated.

Put simply: narrative theory and storytelling practice work just as well for me in a Legal Planning Clinic as they have in a civil litigation clinic. The connective tissue is that of persuasion: from arguing to a jury to negotiating a contract to filing a form for tax exempt status to drafting a will, lawyers seek to persuade others to act in a way that benefits their clients. What is essential for law students to understand, therefore, is how to persuade; and as the earlier sections of this piece explore, a very effective method to teach persuasion is the exploration and understanding of narrative theory and storytelling practice.

Thus, my syllabus is organized around six Tools of Advocacy: Case Theory, Timekeeping/Billing Practices, Interviewing and Counseling, Listening, Forms, and Closing Letters. In each of these units, students are asked to work with narrative and storytelling, either explicitly in the assignment for the class, or implicitly in the class discussion and debriefing. The idea is that each of these tasks requires persuasion of some kind, directed to some audience. Thus, narrative and storytelling help the students deconstruct and reconstruct the particular task consistent with its goal of persuading; in addition, using the theory and practice helps the students recognize their role as constructor of the story that must persuade, see the choices they have, and understand how to make those choices intentionally, so as to meet the goal of persuading.

In the first class of the semester, students break up into pairs and take turns describing to each other a significant personal experience. The students can pick their own significant event, and the range is always enlightening—from the birth of a baby to the death of a dog to marriage proposals to sports events. After the first telling, the students play musical partners and tell the stories that they have just heard to their new partners, as if the event they are describing happened to them; the stories have become their own, in other words. They shift partners a third time, and finally, the third (and last) student to have heard the story tells the story as if the experience were the student's own.

We then debrief each story from a variety of perspectives. Students report feeling very self-conscious and worried about saying something inaccurate in front of the person whose story it was; they also report a desire to make the story's "main character" sound "good" and to make the story sound interesting to the audience. They also identified their discomfort—ranging from self-consciousness and embarrassment to frustration and anger—while hearing their own stories being told by a third person to the rest of the class.

We also explore whether the final story had omissions or embellishments and try to trace when those occurred. The students brainstorm reasons for such alterations of the story: memory loss on the part of the hearers and tellers; gap-filling by a subsequent teller based on the teller's assumptions about what had actually happened in the story; attempts by the subsequent teller to make the story more interesting to the audience; mishearing by the subsequent teller, which in turn could be based on a kind of gap-filling based on assumptions.

Building on this brainstorming, I ask the students why I engaged them in this exercise in the first class. They quickly recognize the exercise as a kind of ice-breaker—we have, after all, just learned something important about everyone in the class, as determined by what story each student chose to tell. Therefore, we all know each other a little, or a little better.

The students also quickly recognize the empathy-building facets of the exercise: they can imagine how it might feel for a client to describe her legal problem to a lawyer she's never met before, and they better understand how it might feel for a client to sit in court, or at a mediation or negotiation, and hear her story told to an audience.

When pushed a bit more, students begin to see how the exercise might help them think about and perform their roles as lawyers who represent clients: How, in a client interview, do they listen to their client as she tells her story? Do they listen for the facts, for the point, for the emotion of the client's story? How well do they remember the client's story after she's gone? When they review their notes and reconstruct her story, might they fill in gaps based on assumptions they make about the client's life? What kinds of assumptions are those? Are they well founded, or are they based on misinformation or stereotype? When they construct the story for its next telling, what kinds of choices do they make about what to include and what to leave out? Are those choices intentional, based on their client's goals and the lawyer's belief about how best to meet those goals, or are they made without awareness, again based on assumptions or rote practice?

This simple exercise, then, and its subsequent debriefing, sets up the whole semester by helping us all get to know each other a bit more, beginning to awaken the students' compassion toward their clients, and, most relevant for this discussion, framing our exploration in terms of narrative theory and storytelling practice. The exercise thus begins the students' process of coming to see themselves as professionals who hear, construct, and retell stories, and, in so doing, make choices about how to do so. They begin to see that when made with intention, those choices can result in stories that are persuasive, compelling, and respectful of their clients; and when made without intention, those choices can result in

stories that fail to achieve their client's goals or fail to reflect their lives in a way that feels familiar and comfortable to the client.

This exploration continues through the semester in various classes. The assignment and class that feels the most challenging, and ultimately satisfying, for me is "Tools of Advocacy: Forms as Persuasion." In preparation for that class, I ask the students to read an article by Sandra McKenzie in which she describes the importance of storytelling in drafting wills.⁶⁸

The assignment continues:

Consistent with the ideas presented in that article, plus those we've been talking about all semester, write one of the following for one of your live client matters:

a "narrative description" for a [IRS] Form 1023;

a will;

a power of attorney;

a health care directive.

You will be asked to read what you write in class, and also to hand it in to me. Your colleagues will critique you on how persuasive and compelling your story is. Think of each other and me as the decision maker or fact-finder whom you are trying to convince to act on your client's behalf. Thus the idea of the "form" as "persuasion."

This assignment should be completed individually. Even if you and your partner are using the same client matter, please do not work together on your written product. Part of what will be interesting in class will be to see how two people approached the same client story.

As the students read their "stories," the class discussion tends to develop two distinct threads. The first is an exploration of audience. In this discussion, the students imagine the context in which the various forms would be read (the story heard), by whom, and for what purpose. What, in other words, does this form need to persuade someone to do, and who is that someone?

Thus, we imagine bank officers reading powers of attorney and having to decide whether or not to release funds to a particular individual; we imagine health care directives being read by doctors in faraway hospitals, agonizing over the kind of treatment to provide to a comatose patient; we imagine IRS agents in cramped offices laboring through stacks of tax

68 McKenzie, *supra* n. 6, at 257–59.

documents, wondering whether a particular non-profit organization was connected enough to some public purpose to grant its application for tax exempt status.

The students generate these scenarios based on what they have come to learn about their clients' lives, the relevant law, and how the world works. Based on this knowledge, they can imagine what story they might need to tell, and how they might need to tell it to persuade these particular decision makers to act.

The second discussion thread focuses on how the goals of the particular clients for whom the forms were drafted affected the drafting. This part of the discussion brings the focus back from some future scenario with characters and a setting we don't yet know, but can imagine, to the here and now and the current real life of this particular client and her needs and personality. For example, one team of students represented a woman who felt like she had control over very little in her life—she was a homebound elderly individual with diminishing memory and increasing paranoia. By the students' own description, their client was a "control freak" who wanted her legal planning documents to anticipate and resolve every possible scenario she and her lawyers could imagine. The health care directive they drafted, therefore, was significantly longer and more detailed than might have been necessary to persuade some future doctor to act, but it told a story on behalf of this client that she felt adequately represented her future needs and wishes. Thus, the students were able to connect drafting these forms—whichever ones they were—with case theory, recognizing that the law and facts and client goals that went into developing their case theory also drove the construction of the story they told in the form they drafted.

The common theme of both threads, of course, is that both audience and client goals inform the choices lawyers make about what story to tell and how to tell it. By imagining these characters and settings and plots, the students moved from seeing their jobs in drafting these forms as simply checking boxes and filling in blanks, to constructing stories that accurately reflected their client's goals and that would be likely to persuade some future decision maker to act in a way that was consistent with those goals.

The students recognize that by imagining the future scenarios, they are engaging in gap filling, but they have come to learn that such gap filling, when done intentionally and consistently with their clients' goals, is not only acceptable, but ultimately necessary to render a story (in the form of a form) that will persuade some future decision maker.

Inevitably I have some students who have simply downloaded the statutory forms and presented them to the class filled out with their clients' names and other relevant information. In the face of the critique—

ideally from a classmate, but, if necessary, from me—that these forms don’t really tell their client’s story, the students fall back on the defense that the form has fulfilled the statutory requirement and therefore should be valid.

I ask these students again to imagine the scenario in the future when this form needs to be used. Let’s say it’s a health care directive, and the doctor is refusing the treatment that the incapacitated client wants. Of course, someone can take the doctor to court and get an emergency court order, but what happens in the meantime? What if it is a life-and-death situation? How has the client been served by this health care directive that arguably meets the statutory requirements, but doesn’t ultimately persuade the future decision maker?

The students’ response turns out to be a version of the classic law-saturated lens so many law students and lawyers see through. This exercise helps them see that by having the law define the boundaries of the whole story, they might miss the point of the story they should be telling. Through this, they begin to see themselves as more powerful in relation to The Law, recognizing it as only one among many elements in the stories lawyers hear, construct, and tell. Thus, they gain the confidence to wrestle with the law to have it fit into their clients’ lived realities, rather than funneling their clients’ lived realities into what they understand the law to require.⁶⁹

3. Storytelling Practice in “Doctrinal” Courses

In response to an earlier version of this article, a colleague of mine who teaches first-year doctrinal courses suggested that he doesn’t use the idea of storytelling in his courses because he doesn’t believe his job is to teach persuasion. That, he says, is the pinnacle of the pyramid, and he is focusing on the pyramid’s base: the teaching of analysis. Is there room for my narrative theory and storytelling practice in that realm? Absolutely. But these discussions now focus not only on how to persuade a decision maker in the future, but also on how a particular decision maker was persuaded in the past. How and why, in other words, did the custody and child support and inter-generational wealth transfer laws come to be constructed?⁷⁰

Thus, I teach narrative theory and storytelling practice in my Family Law and Trusts and Estates courses as well, in very much the same way as in my other courses and for very much the same reasons. We spend a lot

⁶⁹ See Grose, *supra* n. 16.

⁷⁰ At the conclusion of the workshop at which I presented this piece and he made these comments, my colleague was sufficiently convinced of the utility of these concepts that he left the workshop “filled with new ideas for how to teach property!”

of time throughout the semester talking about the “what” and the “how” of stories, and my students spend a lot of time constructing stories themselves.

An exercise I use often in my Family Law class, for example, is the “point of view” exercise. I have students read an appellate opinion and identify the elements of the story—the characters, the plot, the genre, the moral, the frame, the setting, the organization, and the point of view. I then break the class up into character groups and have each group re-tell their story from its character’s point of view, filling in any necessary details about each of these elements.

We debrief each story and identify how the elements are similar or different depending on from whose point of view the story is told. How is the story that is told from the father’s point of view different from the one that is told from the mother’s point of view, from the child’s point of view, from the social worker’s point of view? What elements of the story change depending on whose character is telling the story?

This is different from the traditional Socratic method of analyzing cases by having students present the different arguments of the parties because it goes beyond the written opinion, the story that has been adopted by the decision maker. In this exercise, students imagine other possible stories, stories that weren’t ultimately adopted by the decision maker, and they deconstruct the choices lawyers might have made in telling those other stories and in telling the story that was ultimately adopted. Thus, students analyze not only the law that exists, but also how it came to be made through the arguments of the parties.

In Trusts and Estates, I introduce the “forms as persuasion” idea early on and return to it with each new instrument the students encounter. I also use a version of the “point of view” exercise described above: I have students work in groups to draft a series of wills, all with the same assets and potential beneficiaries, but in different contexts. One group is drafting the will for their client’s eyes only; another is drafting the will to read to the beneficiaries; and a third group drafts a will that the group will have to defend against a challenge. In debriefing each will, the rest of the class identifies its context and audience as well as its characters, plot, framing, and organization. This exercise reveals how context and audience change the story’s content and structure and how essential it is to imagine all three (if not more) audiences when making choices about the story’s content and structure.

In both of these courses, my goal in using these exercises is certainly to have students engage with the doctrine I am teaching in the course, whatever it is. But the exercises challenge them to do so in an active way that allows them to recognize the law as comprising stories that have been

constructed by lawyers and adopted by decision makers. The exercises also lead students to recognize themselves as the future constructors and adopters of stories, in other words, as future makers of law.

III. Conclusion: Trial by Ordeal

To make the point that this kind of pedagogy can be used and useful across the curriculum, I offer a final set of exercises, built around a video on YouTube called “Trial by Oil.”⁷¹ The video documents the “trial” of a man who has been accused of stealing yams from another member of his community. The “trial” involves having both men—the accused and the accuser—stick their hands in boiling oil. Whoever is able to do so without getting burned is telling the truth; the other one is lying.

I have used this clip in two ways. First, I have the students simply watch the clip and then describe in writing “what happened” in the clip. Each student then presents his or her re-telling of the story, and we identify the various narrative elements of each of their versions—who the characters are, what the plot is, when the story begins, when it ends, how it is resolved, what the story’s moral is. We talk a bit about the choices each student made, either consciously or not, about the substance of his or her story, as well as its technical elements. This simple exercise gets students deconstructing the “what” and “how” of a story as made up of distinctive elements that are the product of choices the storyteller has made.

Another way I have used this clip is to briefly tell the story ahead of time—much as I did at the beginning of this section—and provide a student lawyer or lawyers (depending on how big the class is) for each of the main characters. Thus, students “represent” the accused man, the accuser, the tribal chief, and the community. After the students watch the clip, I tell them to describe “what happened”—to tell the story—from the point of view of their assigned character. Each student or group of students then presents its character’s story and we debrief the narrative elements—plot, character, point of view, framing, moral, and resolution. And again we identify and explore the choices each student made, either consciously or not, about the substance of his or her story as well as its technical elements.

But wait. Haven’t I forgotten to provide an important piece of information about these exercises? I haven’t said what course I use them in.

⁷¹ *Trial by Oil*, available at http://video.nationalgeographic.com/video/player/places/countries-places/togo/togo_trialbyoil.html (accessed May 3, 2010).

And that is precisely the point. Using the clip in these ways gets students engaged in deconstructing a story and exploring what makes that particular story compelling or not. As with many of the other exercises I've described, the debriefing gives me and the students the opportunity to explore what lies underneath their choices and how important it is to make such choices with intention and awareness.

These exercises help students work with narrative theory and storytelling practice, and they lead them to a greater understanding of their roles as storytellers and constructors of stories, based on their client's point of view and goals. Couldn't, therefore, these exercises—or others like them—be used in a “skills” course on trial practice, appellate practice, or alternative dispute resolution; in a “clinic” seminar on client interviewing or counseling or case theory; in a “doctrinal” course on comparative law, tribal law, civil procedure, criminal procedure, constitutional law? Shouldn't we be teaching the skills of persuasion and critical thinking in every course?

Law is made through the telling and the believing of stories. Thus, all lawyering involves some kind of persuasion, and all persuasion involves some kind of storytelling. To be effective professionals, lawyers need to know how to construct and tell stories. That means they need to recognize stories as constructed, and they need to recognize themselves as constructors of stories. Law teachers, therefore, need to help law students develop these skills across the curriculum because they are skills that lawyers will need to use in all facets of their practice as responsible and effective professionals.

