

Legal Communication & Rhetoric: JALWD

Fall 2012 / Volume 9

.....

ARTICLES & ESSAYS

A Shift to Narrativity

Derek H. Kiernan-Johnson

A Shift to Narrativity

Derek H. Kiernan-Johnson*

I. Introduction

Since its founding in the middle of the last decade,¹ Applied Legal Storytelling (AppLS) has struggled to define its scope and substance.² At the heart of this struggle has been the meaning of three key terms: *story*, *narrative*, and AppLS's current flagship term, *storytelling*. In an introduction to the symposium issue from the first AppLS conference, Ruth Anne Robbins questioned "whether the term 'storytelling' is actually appropriate for the material that can fall into the category [of AppLS scholarship]."³ Although storytelling, Robbins noted, is an "everyday concept" that might be seen as "client-centered and concrete," she wondered whether it might be too narrow to adequately capture what AppLS scholars hoped to do "to help our students and practitioners."⁴ For, unlike the term "story" in "storytelling," which is generally limited to "specific people and events," the term "narrative" is a "broader word" that can "encompass abstract entities such as the basis for analogizing factual scenarios in some forms of legal reasoning."⁵ Robbins then concluded by

.....

*© Derek H. Kiernan-Johnson 2012. Legal Writing Professor, University of Colorado Law School. Deepest thanks to the organizers of and participants at the *Applied Legal Storytelling Conference, Chapter 3: Trail Blazing on the Great Divide*, held at the Sturm College of Law at the University of Denver, where many of the ideas behind this article were initially presented and debated; to Melody Daily, Susan Bay, Joan Magat, Ruth Anne Robbins, and other editors of this journal for their thoughtful comments, patience, and hard work; to my research assistant, Robbie Scott; to my son Ronan and daughter Kelsey for creating the space for me to work on this project from home; and to my wife, Eileen, for patiently allowing me to point out the narrativity in everything around us, even during our precious date nights.

¹ See Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 Leg. Writing 3, 4 (2008) (noting that the first AppLS conference in London, 2007, was inspired by the *Power of Stories* conference at the University of Gloucester, 2005). Accord Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17, 17 (2008).

² See generally Robbins, *supra* n. 1.

³ *Id.* at 14.

⁴ *Id.*

⁵ *Id.*

“look[ing] forward to the next conference and next symposium issue . . . to help answer these questions.”⁶

None of the presentations at or articles from the second AppLS conference addressed this issue squarely.⁷ This question was, however, the subject of a plenary discussion at the third conference.⁸ This article aims to keep that conversation moving forward by suggesting a shift in our vocabulary, away from a focus on *story*, *narrative*, and *storytelling*, toward a new concept, *narrativity*.

Although it remains important for AppLS scholars to continue to think carefully about the objects of our inquiry—*story* and *narrative*—as well as about methods of creating or conveying them—*storytelling* and *narrating*, to name just two—it is more important to think, rhetorically and pragmatically, of what quality these objects or processes add to a legal text or performance. And to do so with a new word, one that isn’t burdened by the ambiguities and negative associations that plague the first three, and that more accurately captures what AppLS scholars seek to investigate and share. To, as this article’s title suggests, shift our focus to *narrativity*.

II. Why Our Vocabulary Matters

Some readers may wonder what the fuss is all about. Does AppLS really need to think about how to use words such as *narrative*, *story*, and *storytelling*? It may, for several reasons:

First, inconsistent use of key terms among AppLS scholars can create confusion, both internally and externally. Externally, those outside of AppLS may misconstrue what we’re trying to do, which can have concrete consequences. For example, several participants at the third AppLS conference voiced frustration at both (1) getting colleagues to understand what AppLS is and how it might be relevant to their own work, and (2) getting administrators to take seriously, and pay for, research and travel expenses related to “storytelling.”

Internally, language confusion may stunt AppLS’s growth. As Jane Baron and Julia Epstein have argued with respect to the use of these terms in legal scholarship generally, the “undisciplined use” of terms such as

6 *Id.*

7 See Paul L. Boley Law Library, Lewis & Clark Law School, *Lewis & Clark Law School Podcasts, Applied Legal Storytelling Conference—Chapter Two: Once Upon a Legal Story Agenda*, <http://lawlib.lclark.edu/podcast/?p=1712> (accessed Mar. 27, 2012).

8 See Program, *The 2011 Applied Legal Storytelling Conference, Chapter 3: Trail Blazing on the Great Divide 2* (July 8–10, 2011) (available at <http://www.law.du.edu/documents/storytelling-conference/conference-schedule.pdf>). The interactive plenary, “Refining our vocabulary: ‘narrative’ and ‘story(telling),’” took place on Friday, July 8. *Id.*

“story” and “narrative” allows for “exaggeration in the claims—pro and con—made about the importance of storytelling in law.”⁹ AppLS gains nothing by having its defenders and critics talk past one another. The points of tension should be plain. If AppLS is to develop a deep, meaningful body of work, it must confront its potential weaknesses and limitations.

Second, in addition to avoiding confusion, critical thinking about vocabulary can have a tremendous constitutive impact on a new approach such as AppLS. As Professor Terrill Pollman has argued with respect to legal writing, developing specialized, professional vocabulary, what might be called “good jargon,” is crucial to the maturation of an emerging field.¹⁰ For it is through creating and using specialized language that scholars in a new field make meaning, helping to establish that field’s substance.¹¹ As Pollman notes, “The very process of creating and refining a language also creates and refines the principles that form the basis of the new area. Substance emerges from that process.”¹²

Finally, whatever stage of development a field is in, examining “the language practices” within a disciplinary practice, as Professor Christopher Rideout has noted, makes “more visible the underlying epistemologies and ideologies that compose those disciplinary values.”¹³ Thus what AppLS scholars mean by terms such as *storytelling* cannot help but shape both AppLS’s substance and its values. If AppLS aspires to be a rigorous, substantive discipline, it must take its key vocabulary and the effects of its vocabulary choices seriously.

This concern is especially acute for AppLS because *narrative*, *story*, and *storytelling* are terms of art in other academic fields, such as literary theory, narrative theory, and narratology (which overlapping fields I will, following Peter Brooks, collectively refer to as “literary narratology”).¹⁴ While AppLS scholars need not adopt any of the literary narratologists’ definitional approaches, they should at least be conscious of those definitions’ basic contours and depart from them only deliberately. Also,

9 Jane B. Baron & Julia Epstein, *Is Law Narrative?* 45 Buff. L. Rev. 141, 145 (1997).

10 Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking about Legal Writing*, 85 Marq L. Rev. 887, 889–90 (2002).

11 *Id.* at 890.

12 *Id.* at 924.

13 J. Christopher Rideout, *Discipline-Building and Disciplinary Values: Thoughts on Legal Writing at Year Twenty-Five of the Legal Writing Institute*, 16 Leg. Writing 477, n. 12 (2010).

14 For examples of technical definitions of our terms in each of these three overlapping fields, see e.g. J. Hillis Miller, *Narrative*, in *Critical Terms for Literary Study* 66–79 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed., U. of Chi. Press 1995) (literary theory); *Narrative and Story-Discourse Distinction*, in *Routledge Encyclopedia of Narrative Theory* 344–48, 566–67 (David Herman, Manfred Jahn & Marie-Laure Ryan eds., Routledge 2005) (narrative theory); and “narrative,” “story,” and “telling,” in Gerald Prince, *A Dictionary of Narratology* 58–61, 93, 97–98 (rev. ed., U. of Neb. Press 2003) (narratology).

to the extent that AppLS seeks to be interdisciplinary, drawing contributors not just from various components of the legal academy, bench, and bar, but also from across academia, its scholars should have a sense of how potential cross-campus colleagues might use these words.

A full taxonomy of *story*, *narrative*, and *storytelling* is beyond the intent and scope of this article. Instead, the next section, sketches three approaches to using these terms, with the goal of providing sufficient context to enable the reader to understand the importance, outlined in section III, of shifting AppLS's focus away from questions of *story*, *narrative*, and *storytelling* to a new conceptual framework oriented around a new word: *narrativity*.

III. Possible Approaches to *Story*, *Narrative*, and *Storytelling*

The meaning of AppLS's current flagship term, *storytelling*, depends on the meaning of its root word, *story*. And the meaning of that word is bound up with the meaning of another word, *narrative*.¹⁵ This part proposes three overarching approaches to how AppLS scholars might more deliberately use the related terms *story* and *narrative*. These approaches are the "perfect synonym," "imperfect synonym," and "differentiation" approaches.¹⁶ Although each approach has its advantages, none is completely satisfactory, and all suggest the need to move our focus to something new.

A. The perfect-synonym approach

AppLS scholars following a perfect-synonym approach would treat *story* and *narrative* as semantically identical, interchangeable, perfect synonyms for one another. Which word to use in a particular instance would be a

Untangling the relationship between these three field names is another vocabulary problem, one that need not be addressed here. I instead refer to scholarship from any of three fields as "literary narratology" and its contributors as "literary narratologists." This usage I credit to Peter Brooks, who has used this terminology consistently in his scholarship. See Peter Brooks, *Narrativity of the Law*, 14 L. & Lit 1, 1–2 (2002) [hereinafter Brooks, *Narrativity of the Law*]; Peter Brooks, "Inevitable Discovery"—Law, Narrative, Retrospectivity, 15 Yale J.L. & Humanities 71, 72 (2003); Peter Brooks, *Narrative in and of the Law*, in *A Companion to Narrative Theory* 415 (James Phelan & Peter J. Rabinowitz eds., Blackwell Publ. 2008) [hereinafter Brooks, *Narrative in and of the Law*]; Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?* 18 Yale J.L. & Humanities 1, 2 (2006) [hereinafter Brooks, *Narrative Transactions*]; Peter Brooks, *Literature as Law's Other*, 22 Yale J.L. & Humanities 349, 361 (2010).

¹⁵ Robbins, *supra* n. 1, at 14.

¹⁶ I've chosen this last term fully cognizant of what Pierre Schlag has called the "dedifferentiation problem" in law. See Pierre Schlag, *The De-Differentiation Problem*, 41 Contl. Phil. Rev. 35 (2009) (available at <http://ssrn.com/abstract=975810>). Addressing Schlag's arresting arguments is well outside the scope of this article and probably well outside the proper scope of AppLS.

decision guided purely by stylistic concerns, such as cadence, alliteration, and the like. This is the approach Robbins explicitly follows in her introduction to the symposium issue following the first AppLS conference, up until the last few paragraphs, where she then tees up the *story*-versus-*narrative* vocabulary question.¹⁷

The perfect-synonym approach has the advantage of being easy to implement. It also reflects a common understanding of our two words, at least as expressed in major dictionaries. For example, the Oxford English Dictionary's primary definition for *story* is "a narrative."¹⁸ And, after outlining a now obsolete meaning, the OED's second definition for *narrative* states that a narrative is "an account . . . a narration, a story"¹⁹ Dictionary.com's primary definition for both terms is even more referential: a "story" is "a narrative" and a "narrative" is "a story."²⁰

The perfect-synonym approach also answers, perhaps, Robbins' concern that *narrative*, as a broader category, would better capture what AppLS seeks to encompass than does the narrower term, *storytelling*.²¹ For if story is narrative and narrative is story, then storytelling is narrative telling. Thus, through this transitive sleight-of-hand, AppLS's scope would, at least on the surface, be sufficiently corrected.

Despite these potential advantages, the perfect-synonym approach is not without its limitations. First, it lacks vigor. The English language is a treasure trove of near-synonyms, words that can express subtle shades of meaning in profound ways. For a field that is trying to develop a specialized, professional vocabulary—about communication itself—to throw away a potential distinction between story and narrative seems both wasteful and lazy. Furthermore, as explained below, *narrative* and *story* are treated as distinct, specialized terms of art in other fields such as literary narratology. To the extent AppLS scholars aspire to interdisciplinarity, collapsing a potential distinction between these two words won't help us either to be taken seriously by colleagues across campus or to draw effectively from scholarship in other fields. Finally, the perfect-synonym approach would foster, rather than ameliorate, the confusions outlined in Part I.

17 Robbins, *supra* n. 1, at 6.

18 *Oxford English Dictionary* vol. XVI, 799 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Oxford U. Press 1989) (available at <http://www.oed.com/view/Entry/190981>) [hereinafter "Story," *Oxford English Dictionary*].

19 *Oxford English Dictionary*, <http://www.oed.com/view/Entry/125146> (3d ed., Oxford U. Press 2003) [hereinafter "Narrative," *Oxford English Dictionary*].

20 Dictionary.com, *narrative* and *story*, <http://dictionary.reference.com/browse/narrative>, <http://dictionary.reference.com/browse/story> (accessed Mar. 28, 2012).

21 Robbins, *supra* n. 1, at 14.

B. Imperfect-synonym approaches

The next option, the “imperfect synonym” approach, can be seen as falling along a continuum from strong to weak. Under a strong imperfect-synonym approach, either the word *story* or the word *narrative* would be strongly preferred over the other; under a weak approach, the preference would be less forceful, moving closer to a personal choice and flirting with the edges of the first, perfect-synonym approach. Unlike a perfect-synonym approach, however, under even a very weak imperfect-synonym approach, the choice between *story* and *narrative* would be guided by more than stylistic concerns.

Some AppLS scholars might choose *story* as their dominant word because it is plain, earthy, Anglo-Saxon,²² unpretentious, and reflects values to which AppLS aspires. But *story* may be too plain, connoting things childish, unserious, or even deceptive.²³ These disadvantages necessarily infect AppLS’s current flagship term, *storytelling*.²⁴ Furthermore, as *storytelling* connotes, for many, the normative, advocacy field of oppositional scholarship, that word has unavoidable political overtones that might further restrict AppLS’s appeal.²⁵

For these reasons, other AppLS scholars favor *narrative*. *Narrative*, in contrast to *story*, is more fancy, more Latinate/Romance,²⁶ more abstract and academic sounding. It feels weightier, more serious, more prestigious, which is not to be discounted for a fledgling field championed primarily by nontraditional, nontenured faculty.²⁷ *Narrative*, rather than *story(telling)*, may be more likely to resonate with our colleagues and be supported by our administrators, helping to expand the scope of involvement and support for AppLS.

Furthermore, whereas many literary narratologists assign distinct, technical meanings to both *story* and *narrative*, *narrative* is the dominant,

22 Anglo-Norman, technically. “Story,” *Oxford English Dictionary*, *supra* n. 18.

23 E.g. *Webster’s Third New International Dictionary of the English Language, Unabridged* 2253 (Merriam-Webster 2002) (defining “story,” in part, as “an account of some incident or event; *often*: a tale written or told esp[ecially] for the entertainment of children” and as a “fib, lie, falsehood”).

24 See e.g. *Oxford English Dictionary* vol. XVI, 800 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Oxford U. Press 1989) (available at <http://www.oed.com/view/Entry/190989>) (defining *storytelling* as “[t]hat tells stories, in various senses of the sb.; addicted to anecdote; exercising the art of the story-teller in literature or otherwise; *colloq.*, lying, mendacious”).

25 See e.g. Foley, *supra* n. 1 (arguing that Applied Legal Storytelling is not inherently political); Brooks, *Narrative in and of the Law*, *supra* n. 14, at 415–17; Richard A. Posner, *Legal Narratology*, 64 U. Chi. L. Rev. 737, 743 (1997) (arguing that “the entire audience for oppositional legal scholarship, besides a restive and largely unimpressible captive audience of law students, will consist of persons who are already part of the opposition”).

26 Middle French, in fact. “Narrative,” *Oxford English Dictionary*, *supra* n. 19.

27 This is also a concern for AppLS’s tenurable contributors. Cf. Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 Leg. Writing 521, 544 (2010) (“Pleasing a tenure committee or traditional faculty may lead legal writing professors to choose topics outside the field, and this choice may stunt the growth of the national conversation on legal writing.”).

more significant term. For example, though the reference work *Critical Terms for Literary Study* devotes an entire chapter to the term *narrative*, not only does it lack any entry for *story*, the word *story* doesn't even appear among its +1000-word index.²⁸ *Storytelling* is likewise conspicuous by its absence.²⁹

Because of its dominance and ubiquity, however, *narrative* may be too popular a choice for AppLS. Peter Brooks has suggested that the term has become "trivialized through overuse."³⁰ Gerald Prince goes further, claiming that *narrative* has become "a hedging device, a way to avoid strong positions."³¹ One might, for example, say *narrative* instead of *explanation* or *argument* because it is more tentative; or substitute it for *theory*, *hypothesis*, or *evidence* because it is less scientific; or, to avoid being seen as judgmental, use it when one really means to say *ideology*.³² So too with terms more specific to legal writing, such as *theme* and *theory of the case*. If our goal is to clarify the meaning of AppLS's key vocabulary, placing front and center a word so taxed, so ambiguous, so overused as *narrative* might not be the best first step.

Even were *narrative* to be carefully defined within a specialized AppLS vocabulary, it might still be too abstract, too ponderous for AppLS. *Narrative* might be a fine word for fields such as what Jane Baron has called "humanist" law-and-literature scholarship, which aims to show how reading literature can help uplift and humanize lawyers.³³ And Peter Brooks may strike just the right tone for the pages of the *Yale Journal of Law and Humanities* when he muses over questions such as, "Could one say that law needs a narratology?"³⁴ AppLS, however, aspires to be concrete, accessible, and useful to lawyers, judges, and students. A focus on terms such as *narrative* and *narratology* may cut against those goals. The constitutive impact of such language choices is unavoidable, and tension about word choices may echo tensions within AppLS about its practical goals and its aspirations to academic seriousness and credibility.

Whichever word is given preference and with whichever amount of force, an imperfect-synonym approach will still suffer from one of the

28 Miller, *supra* n. 14, at 66–79, 469–486 (index).

29 *Id.*

30 Quoted in Marie-Laure Ryan, *Toward a Definition of Narrative*, in *The Cambridge Companion to Narrative* 22, 22 (David Herman ed., Cambridge U. Press 2007) (citing William Safire, *On Language: Narrative*, 5 N.Y. Times Mag. 36 (Dec. 5 2004)).

31 *Id.* (citing Gerald Prince, *Revisiting Narrativity*, in *Grenzüberschreitungen: Narratologie im Kontext* [Transcending Boundaries: Narratology in Context] 43, 45 (Walter Grünzweig & Andreas Solbach, eds., Gunter Narr Verlag Tübingen 1999)).

32 Prince, *supra* n. 31, at 45.

33 Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 Yale L.J. 1059, 1063–64 (1999).

34 Brooks, *Narrative Transactions*, *supra* n. 14, at 24.

drawbacks of the perfect-synonym approach: The loss in potential richness and precision that giving distinct meaning to these words brings. That loss is not, however, a risk under the third type of approach: differentiation.

C. Differentiation approaches

This final category encompasses all definitional approaches to *story* and *narrative* for AppLS that would not treat them as synonyms, perfect or imperfect, but rather as two distinct words with specialized meanings. These meanings could be invented whole-cloth. More likely and prudently, they would be aligned with, or at least based upon, existing definitions from a different field or elsewhere in the literature.

1. Kendall Haven's approach

One differentiation approach that several AppLS scholars have used is to follow the definition of *story* used by story consultant Kendall Haven in his book *Story Proof*.³⁵ Haven defines *story* narrowly, as a

1. detailed
2. character-based
3. narration
- 4 of a character's struggle
5. to overcome obstacles
6. and reach
7. an important goal.³⁶

Haven also defines narrative, and does so broadly, to include plot-based event descriptions and even data sets.³⁷ As an example of a text that would be, under Haven's definitions, a narrative but not a story, Haven offers "science writing," which, as an "information-based narrative," assumes readers with adequate topical knowledge and personal experience to create context and relevance for themselves, and who therefore want only "new essential information."³⁸

35 Kendall F. Haven, *Story Proof: The Science behind the Startling Power of Story* (Libs. Unlimited 2007) (definitions followed by, e.g., Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1, 8, 34 (2010); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 65 (2010)).

36 *Id.* at 79 (enumeration mine). Steve Johansen has improved Haven's definition by reorganizing and reframing it. Under Johansen's three-part formulation, story is distinguished from other forms of narrative because it is (1) character based, (2) the character has a goal, and (3) the character must overcome obstacles to reach that goal. Johansen, *supra* n. 35, at 65 (citing Haven, *supra* n. 35, at 79).

37 Haven, *supra* n. 35 at 79.

38 *Id.* at 79–80. Ken Chestek has made explicit what some might see as a possible connection between Haven's description of science writing and the writing in a typical legal brief. Chestek, *supra* n. 36, at 10.

Haven also defines our third word, *storytelling*. This definition is even more limiting than his character-focused definition for story. In refuting claims that his book is about storytelling, rather than about story, Haven defines storytelling as “orally telling a story to a live audience.”³⁹ This definition might reflect a common understanding of what it means to be engaged in storytelling, and might accord with what most people would expect upon seeing an advertisement for a professional storyteller or meeting such a person at a cocktail party.

But for Applied Legal Storytelling, if it is to retain that moniker, Haven’s definition of storytelling makes a differentiation approach based on his work either limiting or awkward. It would be limiting because adopting it along with the rest of Haven’s model would confine AppLS to the study of how lawyers tell a story orally to a live audience. Yet refraining from adopting Haven’s definition of storytelling, attempting to excise it from his larger work while retaining his other definitions and structures, would be awkward, as scholars following this approach would need to constantly explain and justify their selective use of and departure from Haven’s model.

Even without the complication of working around Haven’s definition for storytelling, his other definitions might pose problems. To the extent that AppLS seeks to be inclusive, to attract a broad swath of contributors and readers, Haven’s character-driven definition of story may be too narrow. It might exclude, for example, Linda Edwards’s work exploring how “lawyers and judges also tell stories about the law itself.”⁴⁰ One answer to this concern might be to stretch the definition of “character” to encompass that kind of work, but doing so might cause that term to then bump up against or even eclipse other concepts needing careful articulation and handling in AppLS, such as “actor,”⁴¹ “theme,”⁴² “plot,”⁴³ and “legal doctrine.”

2. Borrowing from literary narratology

Haven’s popular work aside, a larger question regarding options under a differentiation approach involves what AppLS can and should borrow from literary narratology. Literary narratologists have been busy working out definitions for terms such as *story* and *narrative* since at least the

39 Haven, *supra* n. 36, at viii.

40 Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 883, 884 (2010).

41 See e.g. Mieke Bal, *Narratology: Introduction to the Theory of Narrative* 112–13 (3d ed. U. Toronto Press 2009) (distinguishing the individuated, anthropomorphic term “character” from the broader term “actor”); accord Prince, *supra* n. 14, at 2–3, 12.

42 Prince, *supra* n. 14, at 99 (distinguishing “theme” from “character”).

43 *Id.* at 73 (distinguishing “plot” from both “theme” and “character”).

heyday of structuralism in the middle of the last century.⁴⁴ It may therefore be quite appropriate, even advisable, for AppLS to draw from this oasis of scholarship.

One differentiation approach offered by literary narratology distinguishes between three terms: *story*, *discourse*, and *narrative*. In Seymour Chatman's classic structuralist formulation, narrative = story + discourse.⁴⁵ That is, story and discourse are the two main components of narrative: the what and the way; the raw material of narrative and how that material is presented; more formally, narrative's "content plane" and "expression plane."⁴⁶

Applying this distinction to an appellate context, one could think of the record on appeal along with the universe of potentially relevant law, or at least those portions of both sources marked to some extent by certain qualities of narrativity, as "story," that is, as the "what" of potential narratives in that case. The various techniques parties might use to present that material, both in written briefs and in oral arguments (again to the extent those choices are marked to some degree by narrativity), would be "discourse." Together, the story and discourse, the content and expression, would form each party's "narrative." When the court writes its opinion, it would do the same, selecting from the "story" content—which now contains not just the law and record on appeal but the parties' briefs and arguments—and presenting its decision through the discursive methods of judicial opinion writing.

Literary narratology also offers a definition for *telling*, which, along with *showing*, together constitute the two "fundamental kinds of distance regulating narrative information."⁴⁷ Within this framing, "telling" involves more overt narration, is more distant, and is less immediate and mimetic than showing.⁴⁸ This distinction aligns with our common advice to students to "show, don't tell."

The distinction between telling and showing, however, raises a potential problem for Applied Legal Storytelling. If AppLS confines *story*

44 This history can also be traced farther back, to the work of Vladimir Propp in the late 1920s, or, like all things it seems, even back to Aristotle. See *New Perspectives on Narrative Perspective* 2–3 (Willie van Peer & Seymour Chatman eds., State U. of New York Press 2001) [hereinafter *New Perspectives*]. The 1960s, however, is the more tangible starting point. E.g. David Herman, *Histories of Narrative Theory (I): A Genealogy of Early Developments*, in *A Companion to Narrative Theory* 19–20 (James Phelan & Peter J. Rabinowitz eds., Blackwell Publ'g. 2008).

45 See Seymour Chatman, *Story and Discourse: Narrative Structure in Fiction and Film* 9 (Cornell U. Press 1978). The second term, "discourse," collapses an earlier distinction between "plot" and "narration" in a three-part articulation. See e.g. H. Porter Abbott, *Story, plot, and narration*, in *The Cambridge Companion to Narrative* 40–41 (David Herman ed., Cambridge U. Press 2007).

46 See Chatman, *supra* n. 45, at 19–20. See also "discourse" and "story" in Prince, *supra* n. 14, at 21, 93.

47 Prince, *supra* n. 14, at 97–98.

48 *Id.* at 98.

to narrative's content, saving *discourse* for the means of arranging and transmitting it, and if showing is preferred to telling, then is "storytelling" in AppLS not only too narrow a term ("story-") but also off-center ("telling")? Even if AppLS scholars were to shift or expand the meaning of "telling" toward something closer to "showing," would that be sufficient? Both telling and showing focus on the author, the narrator, and his or her finished product.⁴⁹ This focus makes perfect sense for a scholarly field concerned mainly with literature. Yet AppLS, with its practical, rhetorical bent, is much more concerned with how a story is heard, how it is received by its intended audience. And in its pedagogical aspirations AppLS may be more interested in exploring how this can be taught effectively, to focus less on storytelling and more on story making or story building.⁵⁰

Although literary narratology offers definitions for both telling and showing, narrative and story, its definitional landscape is neither as clear nor as settled as it might appear. For example, in their *Handbook of Narrative Analysis*, Luc Herman and Bart Vervaeck outline three distinct, contradictory approaches to defining our three keywords before proposing a fourth (their own).⁵¹

The vocabulary confusion in AppLS's potential field of import extends to the issue of definitionality itself. In addition to scholarship critiquing existing definitional approaches and then offering up new approaches for further critique, there are sharp debates within literary narratology about the efficacy of trying to define words like *narrative* at all.⁵²

D. Limits to transferability and definitionality

These debates within literary narratology suggest several things. First, despite having a fifty-year head start on AppLS, literary narratology is still

49 "Author" and "narrator" are slightly different things, and more terms that might need AppLS-specific definitions. See e.g. James Phelan, *Rhetoric/Ethics*, in *The Cambridge Companion to Narrative*, 203, 204 (David Herman ed., Cambridge U. Press 2007).

50 Robbins, *supra* n. 1, at 7 ("The best that we can do for our lawyers (I am including judges and professors in that category) is to create a rich, and yet accessible, dialogue about how, why, and when legal stories can be used in our profession.").

51 To summarize this confusion, the three existing approaches that Herman and Vervaeck outline are those of Shlomith Rimmon-Kenan, Gérard Genette, and Mieke Bal. Each of these theorists uses terms that roughly track the three terms at issue here—in order, *story*, *narrative*, and *storytelling*. Yet what Rimmon-Kenan calls *story*, Genette calls *histoire*, and Bal calls *fabula*. *Story* is, in contrast, the term Bal uses for the second term, which Genette deems *récit* and Rimmon-Kenan calls *text*. *Text*, however, is the name Bal uses for his third term, which both Genette and Rimmon-Kenan instead refer to as *narration*. Herman & Vervaeck cut through (or perhaps add to) this vocabulary thicket by proposing a fourth approach, whose three key terms are *story*, *narrative*, and *narration*. Luc Herman & Bart Vervaeck, *Handbook of Narrative Analysis* 45 (U. of Neb. Press 2001).

52 See David Rudrum, *From Narrative Representation to Narrative Use: Towards the Limits of Definition*, 13 *Narrative* 195 (2005); Marie-Laure Ryan, *Semantics, Pragmatics, and Narrativity: A Response to David Rudrum*, 14 *Narrative* 188 (2006); David Rudrum, *On the Very Idea of a Definition of Narrative: A Reply to Marie-Laure Ryan*, 14 *Narrative* 197 (2006) [hereinafter Rudrum, *Reply to Ryan*]; Marie-Laure Ryan, *In Defense of Definition*, <http://users.frii.com/mlryan/rudrumresponse.htm> (accessed Mar. 30, 2012) [hereinafter Ryan, *Counter-reply to Rudrum*].

very much unsettled in both its subject matter and vocabulary.⁵³ To the extent AppLS chooses to incorporate definitions and scholarship from such a field, it will have to choose which definitions and scholarship to incorporate and why. To graft aspects of literary narratology onto AppLS, scholars will have to think carefully about how differences between the host and target might complicate the operation. For despite similarities between law and literature and, more narrowly, between literary narratology and Applied Legal Storytelling, there are significant differences between these disciplines, differences in audience, purpose, context, and consequence. As Robert Cover reminds us, unlike the interpretation of literary texts, “Legal interpretation takes place in a field of pain and death.”⁵⁴ Much of what makes AppLS different from at least certain kinds of law-and-literature scholarship is its practical, applied dimension. It would be a shame, in an attempt to shore up the “S” in AppLS, to lose its “App.”

Second, even if the grafts were to hold, there might not be much for AppLS to borrow. Given the intense, continuing debates within literary narratology over both their definitions and the idea of definitionality, underlying limitations may be at work. As literary narratologist Gérard Genette suggests, the word *narrative* may simply be inherently ambiguous.⁵⁵ Something about the terms *story* and *storytelling* may also elude linguistic definition. Though there may be sign systems that can capture our concepts, that system might not be language.

But a search for definitional clarity may be much ado about nothing. AppLS may not need to define its terms, and striving to do so may erode its applied nature. Thus it may be that a Potter Stewart approach is best.⁵⁶ As literary narratologist David Rudrum has noted when discussing his own field’s problems with definitionality, “Wrangling about the kind of terms we use in defining narrative is simply not an activity that most of us bother with: we take our knowledge of such things for granted, and . . . most readers of narrative can differentiate between a cartoon and an instructions manual as easily as they can differentiate between a hawk and a handsaw.”⁵⁷

Additionally, Rudrum notes, attempting to define terms like *narrative*, even in an established field like literary narratology, creates a significant

53 See *New Perspectives*, *supra* n. 44, at 2 (“[D]espite half a century of research, we must confess the limitations in our understanding of narratives.”).

54 Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

55 Gérard Genette, *Narrative Discourse: An Essay in Method* 25 (Jane E. Lewin trans., Cornell U. Press 1980).

56 See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (refusing to define “hard-core pornography” because the term “may be indefinable,” and no definition is needed because “I know it when I see it.”).

57 Rudrum, *Reply to Ryan*, *supra* n. 52, at 198.

danger: “[D]efinitions can all too easily foster a myopic view of one’s subject. They run the risk of imposing narrowness and hierarchization on the field”⁵⁸

Such a risk is particularly acute for AppLS. Unlike literary narratology, unlike even legal writing—which although a new field, is one with several decades of development behind it whose scholars are now entering a third generation of growth and development⁵⁹—AppLS is a sapling, with roots less than a decade old.⁶⁰ Furthermore, many AppLS scholars lack the employment protections of tenure, and AppLS’s major journals are peer-reviewed and peer-edited. These realities create, at the very least, a dangerous perception of semantic policing. A perception that there is a preferred vocabulary within AppLS could stifle innovation and discourage interest in a field that aspires to inclusiveness, diversity, and a broad tent. AppLS isn’t yet sure what it wants to become. Even if we are to refine our vocabulary, it may be too early to do so.

Hence, because our key terms may be undefinable, attempts to define them may have serious negative consequences, and crafting definitions may be unnecessary, claims in section I of this article (“Why our vocabulary matters”) may just “melt, [t]haw, and resolve . . . into a dew.”⁶¹ Perhaps what is more helpful to AppLS than further exploration of possible meanings for *story*, *narrative*, and *storytelling* is a shift in focus—a shift away from questions of which legal objects are or are not “stories” or “narratives,” away from what activities constitute legal “storytelling,” toward a focus on the *quality* these objects and activities add to legal texts and performances—a shift to narrativity.

IV. Narrativity

Narrativity, as proposed here for the specific purposes of AppLS, is a top-level quality of a legal text or performance. Other such top-level qualities might include, depending on context, logical soundness, organizational cohesion, comprehensiveness, grammatical soundness, document design, oral delivery, polish, and brevity. Such qualities often complement one another—a brief can be both logically sound and grammatically sound without compromising either quality. But they can also compete against one another, as comprehensiveness and brevity sometimes do.

58 *Id.* at 200.

59 See Berger, Edwards & Pollman, *supra* n. 27.

60 The term AppLS was coined in 2005, and the first AppLS conference was held in 2007. Robbins, *supra* n. 1, at 4–5.

61 William Shakespeare, *Hamlet*, act 1, sc. 2, 10–11 (Tauchnitz 1843).

There are several advantages to shifting AppLS's focus to *narrativity*. First, the word itself has semantic and associative benefits. As outlined above, *story*, *narrative*, and *storytelling* are all imperfect and taxed by overuse, ambiguity, and negative associations. In contrast, *narrativity*, as a new term, is free of such baggage. Yet it is not so new, so strange, as to be unrecognizable as an English word. To the extent it elicits a reaction among AppLS scholars' colleagues, administrators, and audiences, it might fall nicely between too lofty a word, such as *narratology*, and too low a word, such as *storytelling*.

Second, *narrativity* is both more inclusive and accurate than *storytelling*. *Narrativity's* root word, *narrative*, is broader than *storytelling's* root, *story*, and thus more likely to capture the breadth of material falling within AppLS's purview. Additionally, it lacks the miscues and constraints imposed by *-telling*.

Finally, if, as Linda Edwards has put it, narrative pervades all aspects of the law including the analysis of legal authorities, if it is the ocean in which we, as fish, all live and swim,⁶² then binary inquiries into which legal texts or performances are or are not *stories* or *narratives* is unhelpful, if not nonsensical. It may be quite useful for a literary narratologist to ask whether a certain text, such as a list of the patients a doctor sees in a day, is or is not a literary *narrative*. Such a theorist might also explore whether certain speech acts, such as a gate agent at an airport announcing which seating sections are currently cleared to board, constitute the *telling* of a literary *story*. Such questions may also be germane to certain areas of law-and-literature scholarship.

AppLS, however, seeks to add something new. The legal texts and performances it focuses on are those likely to be encountered in actual legal practice: real legal briefs, real oral arguments, all marked, to some degree, by *narrativity*.⁶³ Thus the more-accurate questions for AppLS, and the sorts of questions that are more likely to be useful to its intended audiences, are not whether a particular legal text or performance is or is not a *narrative*, or whether it does or does not involve *storytelling*, but rather questions of degree, type, and balance. Practical, rhetorical questions such as, What kind? How much? At what risk or cost? In other words, questions of *narrativity*.

Thinking in terms of *narrativity* may, in fact, be what AppLS scholars are already doing, although without explicitly framing things that way. Take, for example, Ken Chestek's *Judging by the Numbers: An Empirical*

62 Edwards, *supra* n. 40, at 884.

63 Marie Laure-Ryan's "fuzzy set" approach to narrative and *narrativity* may therefore be something that could be adapted to AppLS. See e.g. Ryan, *supra* n. 30, at 28–31.

Study of the Power of Story.⁶⁴ The stated goal of that study was “to measure whether a brief with a strong strand of story reasoning, woven in with the logos-based argument, would be more persuasive than a ‘pure logos’ brief.”⁶⁵ Although it could be said that the pure-logos brief didn’t contain any story while the story brief did contain a story, it would be more natural to view both briefs as containing stories, with the story brief marked by a much higher degree of narrativity.

The results of Chestek’s study also reveal the danger of too much narrativity. When top-level qualities compete with one another, one may crowd out the other, thereby diminishing the text’s overall persuasiveness. For most of the subjects in Chestek’s study, this wasn’t a problem. Approximately two thirds of the study’s subjects found the story brief, with its increased narrativity, to be more persuasive than the pure-logos brief.⁶⁶ But comments from the remaining third of the study’s subjects,⁶⁷ who deemed the “pure logos” brief to be more persuasive, suggest that the story brief went too far, that it suffered from too much narrativity, at the expense of other top-level qualities and to the detriment of the brief as a whole. For some readers the story brief’s narrativity came at the cost of brevity, focus, and relevance. Those readers saw the story brief as including “irrelevant facts” and an “annoying” level of detail, while the pure logos brief was “cut-to-the-chase and no-nonsense” and “concise and to the point.”⁶⁸

The danger of too much narrativity is two-fold. First, as some of the Chestek survey respondents’ comments suggest, there is the issue of balance. Too much narrativity may call attention to itself, distracting the reader or laying bare the fact of persuasion, or may simply cut against other communicative goals such as brevity and relevance.

Second, there is the danger of overpersuasiveness—the danger that narrativity may be too effective in persuading its audience, raising ethical concerns about its use. Steve Johansen’s work, most recently his “Colonel Sanders” article, while framed in terms of *stories* and *storytelling*, can be viewed as exploring the ethical dangers of too much *narrativity*.⁶⁹ So too

⁶⁴ Chestek, *supra* n. 35.

⁶⁵ *Id.* at 8.

⁶⁶ 64.2%, more precisely. *Id.* at 19. This percentage would have been even higher if not for the skewing effect of the law-clerks subgroup, whose preferences were evenly split between the two briefs. *Id.* at 20.

⁶⁷ 30.5%, skewed again by the law clerks. *Id.* at 19–20. The remaining percent of total readers, 5.3%, reported that neither brief was more persuasive. *Id.* at 19.

⁶⁸ *Id.* at 23–24.

⁶⁹ Johansen, *supra* n. 35, at 64 (questioning whether stories “may be *too* powerful or, perhaps, *inappropriately* powerful” such that “storytellers . . . cross the line from effective and appropriate persuasion to inappropriate manipulation.”); accord Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961 (2006).

the work of Peter Brooks, who has claimed that not just the exclusionary rule, but rather “all the rules of evidence” are motivated by the law’s concern over and desire to cabin the power of narratives.⁷⁰

To the extent that the quality of narrativity has long been operating in the law without being identified as such, it is more than just a fancy new term for scholarly play. Instead, its artful manipulation may be something that effective attorneys have always done, without needing a vocabulary or theory to frame what they’re doing.⁷¹ This reality could suggest that there’s no need for a new word, especially given AppLS’s existing vocabulary entanglements.⁷²

Or it could suggest that narrativity is just the sort of “good jargon” that AppLS needs, not only for itself but also for its intended audiences.⁷³ Effective attorneys who have always manipulated narrativity unconsciously would no doubt benefit from a more conscious understanding of what exactly they’ve been doing and how to do it both more effectively and more consistently. AppLS scholars, with a focus on narrativity, can help them.

Supervising attorneys—whether professors, partners, or judges—might struggle with identifying for themselves, let alone articulating to their students, associates, or law clerks, what exactly is wrong with a draft that has been submitted to them. Other top-level qualities in the draft might be fine. The writing might be analytically sound, thorough, carefully organized, clear, concise, and polished. But not satisfying. Not complete. Attempts to grasp what exactly is lacking, let alone explain how that deficit might be filled, may be frustrating for both supervisor and supervisee. Narrativity offers both a common vocabulary and basic framework to help move things forward. For the law teacher, narrativity might even find its way into a grading rubric.

⁷⁰ Brooks, *Narrativity of the Law*, *supra* n. 14, at 2, 6 (internal quotation marks omitted).

⁷¹ See 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, 459 (2001).

⁷² See e.g. xkcd: A Webcomic of Romance, Sarcasm, Math, and Language, *Standards: How Standards Proliferate*, <http://xkcd.com/927/> (accessed Mar. 30, 2012).

⁷³ As Terry Pollman has noted, “[J]argon may serve a helpful pedagogical purpose by developing a new language for the new ideas, or new combinations of old ideas, that legal writing professionals use to teach. Moreover, if language and writing create meaning, as modern rhetoricians, literary theorists, and composition theorists maintain, the process of creating language in a new area of study may actually create the substance, whether spoken in the classroom or written in texts and articles.” Pollman, *supra* n. 10, at 922.

⁷⁴ Gerald Prince, writing in 1999, called the study of narrativity “the most significant task of narratology today.” Prince, *supra* n. 31, at 50. David Rudrum credits Prince with having introduced “narrativity” as a defined term in English in Prince’s *A Dictionary of Narratology*. David Rudrum, *Narrativity and Performativity: From Cervantes to Star Trek*, in *Theorizing Narrativity* 253, 254 (John Pier & José Ángel García Landa eds., Walter de Gruyter 2008) (citing Prince, *supra* n. 14, at 65). In the same year that Prince first published *A Dictionary of Narratology*, he also explored the term in the article *Revisiting Narrativity*, *supra* n. 32.

The concept of narrativity also offers AppLS scholars cutting-edge material from literary narratology to draw from.⁷⁴ Narrativity has been the subject of both a thick monograph⁷⁵ and a hefty compendium volume, the latter which, just published in 2008, features contributions from a global cast of fourteen narratologists.⁷⁶ Literary narrativity scholarship also explores issues likely to resonate within AppLS, such as “what kind of narrativity-pertinent features . . . [do] different groups favor”? And “what stages do we go through in acquiring the capacity to manipulate narrativity?”⁷⁷ There is also a rhetorical orientation to some of that work, such as David Rudrum’s suggestion to frame “narrativity as an action successfully achieved (or not), in terms of a set of conventions shared and defined by a community . . . shifting the emphasis from structure, form, or logic, to the more pragmatic question of use.”⁷⁸

As with our initial three words, there is always the danger that, in trying to build up AppLS through a focus on narrativity, we risk restricting its reach and stunting its growth. As Rudrum points out, this is a “danger inherent in all definitions—that of setting up a view of the subject that is at best narrow, and that at worst foregrounds certain kinds of text over and above others.”⁷⁹

This danger, however, is worth facing. Without exclusion and foregrounding, Marie-Laure Ryan notes in response to Rudrum, “narratology becomes a ‘theory of everything,’ which really means a theory of nothing.”⁸⁰ And despite the limitations of our language to capture perfectly a concept as elusive as narrativity, there is a “heuristic value [to] imperfect definitions.”⁸¹

So too in Applied Legal Storytelling. AppLS rightly aspires to openness, inclusiveness, and the camaraderie of a big tent. But its methodology, vitality, and disciplinarity will ultimately benefit from a more careful use of language. AppLS scholars should continue to think

75 Philip J. M. Sturgess, *Narrativity: Theory and Practice* (Clarendon Press 1992) (over 300 pages in length).

76 *Theorizing Narrativity*, *supra* n. 74 (over 450 pages in length). The various contributions in this compendium range from Gerald Prince’s elaboration of narrativity into three distinct subsidiary concepts: “narrativehood,” “narrativeness,” and “narratability,” to David Rudrum’s pointed critique of the whole definitional enterprise. *Id.* at 19–23 (Prince), 253 (Rudrum). Rudrum’s critique is different from that of Galen Strawson, who, in his article “Against Narrativity” does not critique narrativity as a term within narratology but rather challenges two normative claims in moral philosophy, what he calls the “psychological Narrativity thesis” and the “ethical Narrativity thesis.” Galen Strawson, *Against Narrativity*, 17 *Ratio* 428, 428 (2004) (available at http://lhc.ucsd.edu/mca/reviews/against_narrativity.pdf).

77 Prince, *supra* n. 31, at 50.

78 Rudrum, *supra* n. 75, at 275. See also James Phelan, *Narrative as Rhetoric: Technique, Audiences, Ethics, Ideology* (Ohio State U. Press 1996).

79 Rudrum, *Reply to Ryan*, *supra* n. 52, at 202.

80 Ryan, *Counter-reply to Rudrum*, *supra* n. 52.

81 *Id.*

critically about the objects of our inquiry—*story* and *narrative*—as well as the means of creating or conveying them—such as *storytelling* and *narrating*. But they should do so with a new word, one that captures and nurtures the unique rhetorical and pragmatic perspectives AppLS brings to legal scholarship.

That new word, *narrativity*, will likewise not be above further elaboration and critique. Some AppLS scholars may, following Gerald Prince, choose to break *narrativity* into specific components,⁸² while others, following Marie-Laure Ryan, may prefer a fuzzy-set approach.⁸³ Some skeptics may instead follow Rudrum, and push us on both the stability of our definitions and the costs of constructing them.⁸⁴ Others, I hope, will resist a shift to *narrativity* entirely and spring to the defense of *storytelling* as AppLS's central focus and flagship term.

Where these conversations take AppLS, what they make AppLS, remains to be seen. To quote the article that inspired this one, "I look forward to the next conference and next symposium issue of a law journal to help answer these questions."⁸⁵

.....

⁸² These subsidiary components are *narrativehood*, *narrativeness*, and *narratability*. *Supra* n. 76.

⁸³ *Supra* n. 63.

⁸⁴ *E.g. supra* nn. 74, 76.

⁸⁵ Robbins, *supra* n. 1, at 14. The fourth AppLS conference will be held in July 2013, in London.