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Narrative Reasoning and Analogy:
The Untold Story

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I. Introduction

Philosophers, legal theorists, and scientists long have proffered complex accounts of analogical reasoning, and why and when it is rationally compelling, especially in legal argument.[1] So, too, much is written about how narrative reasoning or, more broadly, the narrative form of communication, is deployed for the purpose of persuasion, including, of course, in the law.[2] Though each of these threads has been explored at great length separately, there is little discussion of how these two forms of reasoning work together. Indeed, it is quite commonplace to insist not only that narrative reasoning and analogical reasoning are distinct forms of reasoning, but that they are so dichotomous as to be functional opposites

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1 *See e.g.* Edward H. Levi, *An Introduction to Legal Reasoning* (U. of Chi. Press 1949) (providing a classic account of legal analogy); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 923 (1996) (citing accounts of analogy by, among others, J.S. Mill); Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind*, 223–58 (U. Chi. Press 2001) (discussing and applying cognitive science approaches to analogy in the realm of law).

2 *See* Jerome Bruner, *Making Stories: Law, Literature, Life* (Farrar, Straus and Giroux (2002). More recently, Applied Legal Storytelling, a subgenre within legal education that itself cuts across disciplines, has investigated through several successful international conferences and legal publications the potential for merging narrative theory with legal skills courses, and the specific role of storytelling in the realm of legal persuasion. Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 Leg. Writing 3 (2008). *See also* Volume 7 of J.ALWD (Fall 2010), which was devoted entirely to topics in metaphor and narrative.

and therefore impossible to combine.[3] This separation has a long history that depends on a more abstract and pervasive problem: the tendency to categorize narrative reasoning as a "lesser" form of argument that is not as rational or detached as more "logical" forms of reasoning.[4] As a result, the forced binary between logical reasoning on the one hand and narrative reasoning on the other is revealed most clearly by those who seek to demonstrate the central importance of "storytelling"—its persuasive force and propensity for conveying meaning—in the practice of law. By virtue of attempts to demonstrate that narrative reasoning is as least as powerful a tool for accomplishing the goals of persuasion and legal communication as are more "traditional" forms of legal reasoning, a false and problematic binary becomes further embedded, and the chasm between more and less legitimate forms of reasoning grows wider still.

Narrative reasoning is a powerful persuasive tool, but it does not necessarily end where more "rational" forms of argument begin. Rather, the two very often overlap.[5]

Narrative reasoning is frequently used to present many kinds of legal arguments to legal audiences. Many of those extend well beyond the category of emotional appeals. For example, narrative reasoning and "rule synthesis," or "rule explanation," are integrally bound up with one another, in that a legal writer typically must illustrate through narrated examples how a legal rule has operated in prior cases.[6] Policy-based reasoning, too, often reveals narrative roots even though its complex make-up engages some of the most nonnarrative forms of reasoning, such as "aesthetic principles, scientific models, social organization, economic analysis, efficiency concerns, political realities, and predictable psychological reactions."[7] For present purposes, however, I want to focus on analogical reasoning and suggest that narrative reasoning is not independent of it; rather, narrative reasoning often underwrites and complements analogical reasoning. Indeed, analogical reasoning at its best depends on the effective telling of

3 Kenneth Chestek, for example, in a presentation based on his recent article on the topic posited that narrative reasoning is necessary to reform the law in part because *logos alone cannot argue for something that is new or not established.* Kenneth D. Chestek, Address, *Storytelling: It's a Good Thing* (How Rhetoric Shapes the Law Conference, Indiana U. Sch. of Law, Indianapolis, Ind. Oct. 14, 2010) (discussing Kenneth D. Chestek, *Judging by the Numbers: An Empirical study of the Power of Story*, 7 J.ALWD 1 (2010).

4 As Martha Nussbaum notes, this divide has very deep roots in Western philosophy, and specifically in the "'ancient quarrel' between the poets and philosophers presented in Plato's *Republic* and continued in many subsequent debates." Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* 6 (Oxford U. Press 1990).

5 For example, a lawyer can create a mini-narrative to compare by analogy the "old," or established, precedent in an effort to move toward the new. One can accomplish this on an individual basis through one-to-one analogies to specific precedent (as Edward Levi discussed, *see supra* n. 1), or on a larger, group-oriented basis through the process of explanatory synthesis.

6 Section III of this article discusses this thread in more detail.

7 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7, 25 (1996).

a story of the law: the story of the law's evolution to the point where a rule is announced, or the synthesis of the legal rule and principles that are explained to a reader based on having constructed a story about how those rules or principles fit together. Case-by-case analogies and distinctions necessarily are a part of this process and thus an integral piece of the puzzle, which depends deeply on narrative reasoning in ways that have been underexplored.[8]

This article examines the relationship between narrative reasoning, or storytelling, and analogical reasoning. It advances similar goals of contributors to the Applied Legal Storytelling community,[9] but it does so in a different way. Rather than argue for greater respect for storytelling and recognition of its persuasive prowess, it suggests that efforts to elevate storytelling may be further reinforcing a dichotomy that itself is fundamentally flawed. Such efforts to force this dichotomy simultaneously miss an opportunity to champion narrative reasoning from precisely the opposite direction: by exploring just how many, if not most, forms of reasoning actually depend on narrative.

Section II of this article begins by exploring a landscape of definitions often deployed to explain what we mean when we invoke the term "story." Though at first blush that inquiry may seem like an obvious one, it actually presents several analytical quandaries of its own. The line between narrative and nonnarrative forms of reasoning is difficult to draw with any precision, and the fact that it seems to be constantly shifting, depending on the user's purpose, lends support to my argument that its very placement is problematic, if not illusory. Section III considers one very common way in which logical reasoning and narrative reasoning seem impossible to disentangle in practice: when explaining the applicable law requires something more than simply stating controlling rules. Precisely within the confines of arguably the most logos-dependent sections of a legal document, we see stories being told. In section IV I extend the example used in section III to analogical reasoning and posit that analogies likewise depend deeply on narrative, so much so that cabining them to a separate realm of reasoning misses an opportunity to see just

8 *Id.* at 23–24. Edwards argues that analogical reasoning is explicitly narratival, whether it is functioning without reference to a rule of law or, in its stronger form, when it is combined with rule-based reasoning. In the latter use, rule-based reasoning defines the legally relevant categories of similarities or differences, and analogical reasoning narrates the connections (or lack thereof).

9 Participants in this community include legal professionals and academics who are interested in and committed to emphasizing the role of storytelling in legal practice and pedagogy. The community has sustained a rich dialogue over three popular international conferences since 2007. Information on the most recent conference, held at the University of Denver in July 2011, can be found at Sturm College of Law, *Storytelling Conference*, http://law.du.edu/index.php/storytelling-conference (accessed Mar. 22, 2012). I presented an earlier version of this paper at that conference and am greatly indebted to numerous participants and organizers not only for specific feedback, but more generally for their inspiration and support.

how pervasive in and significant to legal analysis narrative reasoning ultimately is. Finally, I conclude by suggesting that a deeper understanding of the relationship between narrative and nonnarrative forms of reasoning may have significant pedagogical upsides as we confront the perennial problem that students seem to have making fact-to-fact comparisons meaningfully rich and persuasive.

II. What's the Story?

Defining "storytelling," it turns out, is difficult. In fact, it is one of the more-challenging terms that this article and other contributions to the Applied Legal Storytelling field are exploring.[10] The term, it seems, evades exactitude. Yet too loose or vague a definition is problematic, for without some identifiable, constant characteristics, we are left with an "I know it when I see it" standard that is impossible to analyze, evaluate, or use pedagogically. In her 2008 article, *An Introduction to Applied Storytelling and to this Symposium*, Ruth Anne Robbins explains that most legal writing academicians appreciate that stories convey meaning in the daily practice of law. Storytelling, she states, is not merely a "'legal writing skill,'" but the "backbone of the all-important theory of the case, which is the essence of all client-centered lawyering."[11] Robbins demarcates several "wings" of the storytelling movement: one that focuses on archetype theory, as she does; one that is interested in the intersection of law and literature; and one that is more generally interested in the persuasive value of narrative as a tool for practicing law. A mixed bag, indeed, as Robbins recognizes, but likewise, an opportunity to initiate and continue a conversation about the importance and power of storytelling in legal reasoning. Even though, she writes, "law is allegedly about something other than stories," when "law" is equated with "logic" and "reasoning," stories nevertheless are there to guide those colder principles.[12] "[S]tories or narratives . . . are cognitive instruments and also means of argumentation in and of themselves."[13]

These statements reveal the first of three interrelated trends apparent in defining the surprisingly elusive concepts of narrative and storytelling. That is, "story" and "narrative" are used interchangeably, and they are defined *against* the less animated principles of hard logic. Kenneth Chestek's recent work on this topic is emblematic of this trend. In an

10 *See e.g.* Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 Leg. Commun. & Rhetoric: JALWD 81 (2012).

11 Robbins, *supra* n. 2, at 3.

12 *Id*. at 6.

13 *Id*. (citing Peter Goodrich, *Narrative as Argument*, and David Herman, *Narrative as Cognitive Instrument*, in *Routledge Encyclopedia of Narrative Theory* 348–50 (David Herman et al. eds., Routledge Taylor & Francis Group 2005).

article appearing in Volume 7 of this journal, Chestek differentiates between "logical argumentation" and "the form of a story" as part of establishing the groundwork for an empirical project that explored the persuasive value of storytelling, or the extent to which emotional, or empathetic, reasoning influences judges.[14] To do so, Chestek surveyed appellate practitioners, judges, law clerks, and law professors about the persuasive effect of two "logos briefs" and two "story briefs" in a fictitious case. Each side of the case was supported by one logos brief and one story brief; the study's respondents were randomly assigned to a side and provided one of each kind of brief.[15] The "logos" briefs, also characterized as "information-based narratives," were intentionally sparse, focusing only on the legally relevant facts and tightly on legal precedent and logical reasoning.[16] The "story briefs" are seemingly a bit more difficult to characterize. We know from Chestek's description that their fact sections were very different from their logos-brief counterparts: more time was spent in each brief establishing a plot—context about how the hypothetical controversy arose and each client's goal—and the thematic focus around which the facts and arguments were organized.[17] The study concluded that judges are rarely if ever persuaded by logic alone. Rather, the stories framing the legal dispute in his test briefs proved to do at least some of the persuasive work, irrespective of the side to which a reader was assigned.[18] Chestek's conclusions, indeed many aspects of the undertaking itself, are important for practitioners as well as for academics who teach persuasion. But the segregation of "storytelling" into one category and "logical reasoning" into another—even for the very understandable purpose of proving that stories are in our DNA[19]—has the unfortunate fallout that this first trend represents: narrative reasoning and other forms of arguably more "logical" legal reasoning are two separate things, that the former is housed largely in fact statements whereas the latter can be divorced from narrative structure and thematic influence.

A second trend, not inconsistent with the first, is to distinguish between storytelling and narrative theory. More specifically, "storytelling" is used to describe the actual practice of telling stories, and "narrative theory" is used to refer to the *nature and process* of storytelling at a higher level of abstraction.[20] Related to this rather practical separation between

14 Chestek, *supra* n. 3, at 3.

15 *Id*. at 10, 17.

16 *Id*. at 10.

17 *Id*. at 11–16.

18 *Id*. at 32.

19 "Stories are natural; they are the way humans have communicated and learned for thousands of years." *Id*. at 35.

storytelling and narrative are a series of additional common observations about what constitutes a story. For example,

> Most dictionaries define a story as *a narrative account of a real or imagined event or events*. Within the storytelling community, a story is more generally agreed to be a specific structure of narrative with a specific style and set of characters and which includes a sense of completeness. Through this sharing of experience, we use stories to pass on accumulated wisdom, beliefs, and values. Through stories we explain how things are, why they are, and our role and purpose. Stories are the building blocks of knowledge, the foundation of memory and learning. Stories connect us with our humanness and link past, present, and future by teaching us to anticipate the possible consequences of our actions.[21]

So, for this author, a story is a narrative that evokes a sense of completeness. It includes characters who share experiences for the purpose of passing on wisdom from the past and teaching us to anticipate consequences in the future. Also useful in distinguishing story from narrative are the three fundamental characteristics of a story that Kendall Haven identifies: (1) it is character-based, (2) the character has a goal, and (3) the character must overcome obstacles to achieve that goal.[22] Other commonly accepted features of story are that it has a plot—a beginning, middle and end; a point of view; and conflict and resolution.[23] This second trend, in other words, attempts to reduce the concept of a "story" to a particular kind of narrative that satisfies a particular set of arguably objective, qualifying criteria.

Finally, a third trend in defining storytelling is perhaps best described as a combination of the first two: narrative and storytelling are equated, and the relationship between the characters in the story and the personal experiences of the audience is emphasized. "Stories (which some scholars refer to as 'narrative reasoning') work," Chestek writes, "because they allow readers to imagine for themselves how the protagonist might be feeling and relate that feeling to the readers' own experiences."[24]

20 *See* Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ALWD 37, n. 1 (2010) (explaining, though, that she uses the nouns "narrative" and "storytelling" interchangeably).

21 Natl. Storytelling Assn., *What is* Storytelling*? A Definition discussed by members of the National Storytelling Association*, http://www.eldrbarry.net/roos/st_defn.htm (accessed Mar. 22, 2012).

22 Kendall F. Haven, *Story Proof: The Science Behind the Startling Power of Story* 79 (Libs. Unlimited 2007) (cited in Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J.ALWD 63, n. 1 (2010).

23 *See* Johansen, *supra* n. 22, at 65.

24 Chestek, *supra* n. 3, at 2.

This contention is the touchstone for Chestek's empirical experiment and the basis for what he seeks to disprove: that "[a]ppealing to judges' emotions is misguided."[25] The same proposition has been studied by scholars seeking to explore the role of empathy in judicial decision-making.[26] The specific proposition is attributed to Justice Antonin Scalia and Bryan Garner in their popular text, *Making Your Case: The Art of Persuading Judges*, though it is a sentiment much more widely held.[27] Scalia and Garner drive a wedge between logos and pathos even further: "Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions;"[28] rather, "persuasion is possible only because all human beings are born with a capacity for logical thought."[29] "A more productive discussion," Chestek responds, ". . . might begin by . . . studying how [personal] experiences might (or might not) inform the application of legal principles to result in a just decision." Chestek observes that "[t]he role of empathy, or emotional reasoning, in judicial thinking is a controversial question. . . . [A]re judges actually influenced by . . . pathos-based appeals?"[30] Thus, in part because of the premise that gives rise to his study, Chestek ultimately works with a definition of story that is largely structural: a form for presenting a pathos-based appeal.[31]

Pathos is, of course, one of three rhetorical appeals that together constitute one of Aristotle's most well-known intellectual contributions from the *Rhetoric*. The others are *logos*, or an appeal to the soundness of an argument, its proof and evidence; and *ethos*, or an appeal to the authority or character of the speaker. But each of these three modes of persuasion rarely if ever stands on its own. For example, a speaker's *ethos* is enhanced by the soundness of her argument and, *vice versa*, the use of strong evidence demonstrates the speaker's knowledge and mastery of the topic, further underscoring her credibility.

25 Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 32 (Thomson/West 2008) (quoted in Chestek, *supra* n. 3, at 4. As Chestek notes, too, to be fair, Scalia and Garner admit that "there is a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge's emotions uninvited." *Id*. at n. 13 (quoting Scalia & Garner, *supra* this note, at 32).

26 *See e.g.* Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 Mich. L. Rev. 2099 (1989); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 Cardozo L. Rev. 133; *see also* Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 Leg. Commun. & Rhetoric: JALWD 173 (2012).

27 Scalia & Garner, *supra* n. 25, at 32. *See also* Chestek, *supra* n. 3, at 1, 4.

28 Scalia & Garner, *supra* note 25, at 32 (quoted in Chestek, *supra* n. 3, at 4).

29 *Id*. at 41 (quoted in Chestek, *supra* n. 3, at 4).

30 Chestek, *supra* n. 3, at 2.

31 Chestek foregrounds "personal experiences" as a central term and the lens through which he posits that humans necessarily see the world—a lens immediately connected back to *pathos*, or the rhetorical appeal to empathy or emotion. *Id*. at 2.

None of the three appeals was, for Aristotle, preferable to the other two. However, a preoccupation with science and the methodology of scientific reasoning to which Aristotle and, more centrally his predecessor Plato were in part responding in their works tended to exalt practical reasoning—or a detached *rationality*—over other forms of thinking. Yet, even for Aristotle, cool practical reasoning unaccompanied by emotion was actually was less reliable—if not deceptive. Aligning herself with Aristotle, Martha Nussbaum, in confronting the subversion of the literary style as hopelessly marred by irrationality, challenges the view that rationality detached from emotion is superior.[32] Nussbaum's project in *Love's Knowledge* is not unlike Chestek's. Her essays call into question the dichotomy between the rational and the emotional: "The idea that rational deliberation might draw on and even be guided by [the influence of the emotions and the imagination] has sometimes even been taken (in both ancient and modern times) to be a conceptual impossibility, the 'rational' being defined by opposition to these 'irrational' parts of the soul."[33] Chestek is interested in probing and disproving precisely this opposition, which animates Scalia and Garner's claim that "[g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions."[34]

The notion that the literary *form* is somehow lacking in rationality, if only because its form is presented predominantly in the structure of a narrative, is a proposition that requires analysis of the deep prejudices underlying why this would be so. "A view of life is *told*[,]" writes Nussbaum; "[l]ife is never simply *presented* by a text; it is always *represented as* something."[35] So this is Chestek's central project: to demonstrate that stories are forms of argument. But, then, why construct such a structured separation between cool, rational logic and other modes of persuasion? And why circumscribe the universe of the story from the universe of that which is an allegedly "harder core" type of reasoning?

As it is, the very definition of "story" that Chestek employs is quite broad—broad enough to encompass *more* than appeals to emotion: "A detailed, character-based narration of a character's struggles to overcome obstacles and reach an important goal."[36] What distinguishes stories from "information-based narratives," he explains, is that stories include more context and present a form of structuring information that a reader will find engaging.[37] In that Chestek expands the definition of storytelling to

32 Nussbaum, *supra* n. 4, at 40–41.

33 *Id.* at 76.

34 Scalia and Garner, *supra* n. 25, at 32.

35 Nussbaum, *supra* n. 4, at 5.

36 Chestek, *supra* n. 3, at 8 (citing Haven, *supra* n. 21, at 79).

"narrative reasoning"[38] yet confines stories to narratives that entail empathetic aspects, he limits storytelling—perhaps narrative reasoning more generally—and other forms of arguably more "rational" reasoning to separate spheres. Moreover, the strict reliance on legal precedent that so centrally defined the "logos briefs" in Chestek's study is *itself* a form of "harder core" *analogical* reasoning, because finding similarity or difference to precedent is such an integral and fundamental step in the Anglo-American legal decisionmaking process.[39] In part for this reason, analogical reasoning should not be so categorically excluded from the definition of storytelling.

Chestek's own definition of storytelling, though not explicitly tied to pathos, acknowledges the necessary nexus between storytelling and humanity. We respond to stories perhaps because embedded in them are patterns of thought that enable semantic productivity. In other words, stories *work* because they present us with circumstances that we recognize, with characters to whom we can relate because we can imagine ourselves in their shoes. Thus, stories enable us to "explain how things are, why they are, and our role and purpose."[40] This means of explaining through empathy, it seems, is precisely the response Chestek envisions that his story briefs produce better than his logos briefs.

But if the ability to tap into underlying patterns of thought is what is so attractive about storytelling, then one must ask whether it is *only* storytelling that reveals this dynamic. Stated otherwise, is it the narrative itself—the presentation of a character-based narration of that character overcoming an obstacle—that is so attractive and powerful? Or is it instead the mere fact that stories are operating metaphorically—at a level of cognition that describes everything about the way we process information but nothing that is consciously explicit? Indeed, much *logical* reasoning is structured metaphorically.[41] Linda Berger has written about this relationship in several contexts, including the interaction of metaphor and narrative within the context of child-custody disputes.[42] For her, metaphor and narrative are essential for persuasion and understanding, a point with which Chestek might not disagree. Our cognitive thought processes are so inherently metaphoric for Berger, however, that she

37 *Id*. at 9.

38 *Id*. at 2.

39 In his foundational text, *An Introduction to Legal Reasoning*, Edward Levi makes much the same point: the basic pattern of legal reasoning is reasoning by example, or reasoning from case to case. Levi, *supra* n. 1, at 1. See *infra sec.* IV for a more detailed discussion of this process.

40 Natl. Storytelling Assn., *supra* n. 20.

41 Winter, *supra* n. 1, at 55–56.

42 *See e.g.* Linda Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259 (2009). There, Berger concludes that the cognitive setting for such disputes is outmoded and thus interferes with the ability of judges to attend to more complex parent-child relationships. *Id*. at 260.

makes no separation between pathos and logos-driven texts. For her, metaphor is deeply fundamental to all thought and expression. And it is on this point that metaphor and narrative theory cohere. "Storytelling is said to be central to our ability to make sense out of a series of chronological events otherwise lacking in coherence and consistency: '[w]e seem to have no other way of describing "lived time" save in the form of narrative.'"[43] Although I would characterize this claim as permitting storytelling and logical argumentation to occupy the same arena, the two nevertheless remain in distinct spheres. Berger quotes Jerome Bruner as supporting this separation: "A good story and a well-formed argument are different natural kinds. Both can be used as means for convincing another. Yet what they convince *of* is fundamentally different: arguments convince one of their truth, stories of their lifelikeness."[44]

In furtherance of this proposition that the orbits of stories and arguments differ, Berger offers a synthesis of several strands of narrative theory. Narrative entails theme, discourse, and genre. Theme incorporates a plight, characters, and consciousness of the plight organized into a structure that has a beginning, some development, and an ending. Discourse carries out a more universal theme through language that evokes a specific time, place, person, and event. Genre refers to different kinds of cultural or archetypical story plots.[45] But, at bottom, a narrative does more than simply put logical arguments into narrative form; it does what Chestek initially posits as his central area of inquiry. That is, it enables readers or listeners to gain some ability to relate to the characters and their plights. Is this merely the same appeal to pathos articulated differently? On this point, Berger's turn to Steven Winter is illuminating. In Winter's view, narrative is understood in terms of metaphor; all narrative is metaphor because when you tell a story, you are asking the reader or listener to see one thing in terms of another.[46]

But if narrative and metaphor are so linked, then why are narrative, the centerpiece of which is enabling the reader or listener to see one thing as another, and *analogical reasoning*, presumably an agreed-upon component of logocentric, or well-formed, argument, so incongruent? If narratives can contain and even become metaphors, especially as users seemingly deploy them precisely to evoke in the mindset of readers and listeners the sense that one story should inform, or even dictate the outcome of, another, then why do we continue to draw a line between

43 *Id*. at 266 (quoting Jerome Bruner, *Life as Narrative*, 71 Soc. Res. 691, 692 (2004)).

44 *Id*. at 267 (emphasis added) (quoting Jerome Bruner, *Actual Minds, Possible Worlds* 11 (Harv. Univ. Press 1986)).

45 *Id*. at 267.

46 *Id*. at 268 (citing Winter, *supra* n. 1, at 106–13).

storytelling and "other types" of (arguably more "rational"?) argument structures?

These definitional trends, almost impossible to disentangle from each other, establish a starting point for my effort, which is to further probe the dichotomy between storytelling and narrative on the one hand and logos or rational argument on the other. My claim is that continued reliance on this dichotomy conceals, rather than elucidates, the potential relationship between narrative reasoning and logical reasoning more broadly. In addition, this demarcation may undermine the very purpose of those who defend storytelling's legitimacy in the legal arena, which in part is to suggest that stories really do *work*: they work to activate deep frames—cognitive principles that are so fundamentally a part of our identity that, once activated, evoke subconscious reactions that can lead us to make real decisions.[47] Indeed, much has been written recently about the interaction between narrative and persuasion, specifically about how strongly narrative reasoning assists the human brain in contextualizing past experiences to establish a framework for predicting future outcomes.[48] It does so by engaging all three rhetorical appeals: to the emotions of the audience, to its evaluation of the credibility of the speaker, and to its assessment of the legitimacy of the information received. If narrative reasoning speaks to all three rhetorical appeals, then the fear Plato and others have expressed regarding the propensity for its too-subjective, *literary* stance to displace the merit of dispassionate reasoning should fall by the wayside. If narrative reasoning assists in establishing an interpretive framework for the functioning of all three appeals, why, then, is narrative reasoning still largely defined by contrast to logos? Moreover, why is analogical reasoning especially still confined to the logos orbit, beginning only where narrative reasoning ends?

III. Revealing the Plot

That what storytelling or narrative is fails to crystallize after these various attempts to unpack each term is evidence that the universe of ways in which we might understand the scope of each term, and its potential relationship to nonnarrative forms of reasoning, remains unexhausted.

47 *See generally* George Lakoff & Mark Johnson, *Philosophy In The Flesh: The Embodied Mind and Its Challenge to Western Thought* (Basic Books 1999). *See also* Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left By Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 Willamette L. Rev. 255, 257 (2009).

48 *See* Sheppard, *supra* n. 47, at 257; Berger, *supra* n. 42, at 262–63; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion,* 14 Leg. Writing 53, 59 (2008).

However differentiated (or not) from each other as a definitional matter, in practice, logical reasoning and narrative reasoning can be difficult to disentwine.

Arguably, the most logos-influenced section of an attorney's written analysis of a legal issue is her explanation of the legal rule or rules governing that issue. Rule-based reasoning is fundamental to legal discourse of all types; thus, communicating such analysis effectively is an essential skill, whether the specific task is to explain the substance of a rule or argue for its expansion or limitation. Though a "slam-dunk" case might require little other than articulating the governing legal principle or standard, most issues—certainly any novel ones—require synthesizing rules from different cases, or different sources, such as a statute and the case law that interprets it. Telling a story about how multiple sources should be read together is a fundamental skill in avoiding simply laundry-listing cases in digest fashion. When no single case governs the situation at hand, presenting the thematic threads that enable the author and thus the reader to understand a series of cases or other combination of sources necessarily requires some narration.

Suppose, for example, that the applicable legal issue to address is whether a toy gun is a "dangerous weapon" when used in robbing a bank.[49] The federal armed-bank-robbery statute provides that a person may be guilty if he uses "a dangerous weapon or device" in committing the crime.[50] Though the weapon need not be a firearm, the use or unlawful carrying of a firearm in connection with another federal criminal offense subjects the offender to more-serious punishment.[51] A toy gun does not fit the definition of a "firearm," but the question is whether it falls within the definition of a "dangerous weapon or device." The statute provides the basic rule:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.[52]]

Until 1986, several circuit courts had held that this section was violated only if the robber used a loaded, operable gun. But in *McLaughlin v. United States*, the Supreme Court held that even an unloaded handgun

49 This example is derived from *United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989).

50 18 U.S.C. 2113(d).

51 18 U.S.C. 924(c)(1)(A).

52 18 U.S.C. 2113(d).

53 476 U.S. 16 (1986).

constitutes a dangerous weapon under the statute.[53] Still, the question remained whether a gun incapable of ever being operated as a firearm should be treated the same way. Answering that question effectively, not to mention persuasively, requires something more than a simple string citation or restatement of the statute and *McLaughlin*. Rather, it should be obvious that both because the legal doctrine has changed over time, and because the specific question at issue has not been addressed, some analytical framework is necessary.

One way to establish such a framework is to tell the story of the evolution of the law, which is precisely what the Ninth Circuit did in *Martinez-Jimenez* when it confronted the question whether a toy gun "counts" under the statute. It is impossible to imagine its doing otherwise. Any discussion of a legal doctrine's evolution of a legal doctrine would necessarily rely on some narration—some discussion of what the law was (the past), what the circumstances are that engage that past (the present), and what the outcome should be going forward (the future). This articulation is virtually identical to the notion that stories form the building blocks of knowledge precisely because they follow this trajectory in least two respects.[54] First, to narrate a story effectively entails making organizational choices that will help communicate the information to the reader or listener in a comprehensible way. To the extent that a literal past-present-future chronology is followed, it makes perfect sense that the narration will "work" in part because this sequencing is a familiar and concrete way to understand the progression of a series of events or experiences. Second, even when a particular narrative does not follow a past-present-future chronology, narratives involve—indeed, they rely on and function effectively because of—the invocation of other templates or patterns for producing meaning. Either way, narrative is a tool for producing meaning—a tool whose utility increases with the abstractness and unfamiliarity of the concepts narrated.[55]

The Ninth Circuit's analysis begins with a quote from *McLaughlin* that addresses the meaning of the statutory term "dangerous weapon": "[T]he display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon."[56] Next, the opinion proceeds to explain the Supreme Court's rationale:

54 *See supra* sec. II.

55 Jennifer Sheppard discusses narratives as invoking schemas and as schemas themselves as a precursor to her argument that narrative techniques can be used to draft more persuasive appellate briefs and motion memoranda. Sheppard, *supra* n. 47, at 260–62. Whereas she focuses on how to develop a story for one's client by attending to, e.g., theme, conflict, and character development, here I am more interested in considering the story the law tells (and the story told about the law).

56 *Martinez-Jimenez*, 864 F.2d at 666 (quoting *McLaughlin*, 476 U.S. at 17–18) (emphasis omitted).

> The *McLaughlin* opinion recognizes that the dangerousness of a device used in a bank robbery is not simply a function of its potential to injure people directly. Its dangerousness results from the greater burdens that it imposes upon victims and law enforcement officers. Therefore an unloaded gun that only simulates the threat of a loaded gun is a dangerous weapon. The use of a gun that is inoperable and incapable of firing also will support a conviction . . . .[57]

The Ninth Circuit is doing more than stating rules before it moves on to its analysis of whether use of a toy gun merits the same or a different conclusion. It is providing exactly the sort of contextual framework necessary to justify the extension of an existing rule to a new set of circumstances. The framework relies on cognitive knowledge structures, "schemas," which are essentially simplified and familiar mental categories.[58] Here, the relied-upon schemas include the following: "guns cause fear when displayed"; "guns suggest that violent activity is afoot"; "guns cause harm if they are used to bludgeon."[59]

This technique of narrative illustration is quite common, not to mention necessary and effective in legal writing. Why the technique is popular has to do with tenets of cognitive psychology.[60] The communicative capacity of narrative is tied to how we understand and process information, which is influenced deeply by how we live in and experience the world. Steven Winter writes,

> [Narrative] engage[s] the audience in the cognitive process by which it regularly makes meaning in its day-to-day world. . . . [T]he process of making sense of the projected experience of the story [is] mimetic of the process by which humans always make meaning. The audience "lives" the story-experience, and is brought personally to engage in the process of constructing meaning out of another's experience.[61]

Accordingly, Michael Smith recommends that legal writers combine illustrative narratives with rules when engaging in rule-based analysis,

57 *Id*. *See also United States v. York*, 830 F.2d 885, 891 (8th Cir.1987), *cert. denied*, 484 U.S. 1074 (1988); *United States v. Goodheim*, 686 F.2d 776, 778 (9th Cir.1982).

58 Schemas and their influence on the law is discussed at length in Ronald Chen & Jon Hansen, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103 (2004).

59 *See McLaughlin*, 476 U.S. at 17–18 ("[T]*he display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue.* Finally, a gun can cause harm when used as a bludgeon.").

60 *See* Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 31 (2d ed., Aspen Publ'rs 2008).

61 Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2277 (1989) (quoted in Smith, *supra* n. 60, at 31).

such as by including with a statement of a general rule a narrative illustrating how the rule operated in a prior case.[62] Unsurprisingly, this cognitive explanation matches precisely Chestek's proposition that "[s]tories . . . work because they allow readers to imagine for themselves how the protagonist might be feeling, and relate that feeling to the readers' own experiences."[63] Similarly, we should not find it surprising that this explanation drawn from the literature of cognitive psychology maps well onto the definition of *pathos*, or one's ability to connect to the emotions of the audience. Indeed, it is precisely the emotional reaction to a robbery in progress that gives meaning to the conclusion that the court draws and imagines its audience will find compelling: namely, that such a situation engenders fear and can lead to violence whether or not the item in the robber's hand is capable of dispensing bullets.

Indeed, when the Sixth Circuit confronted a case requiring that it evaluate whether a Styrofoam sandwich box reasonably could be construed as a dangerous weapon, namely a bomb, it noted specifically that the inquiry turns on whether, under the circumstances of a robbery, a reasonable person would consider the object in question as one capable of inflicting death or serious bodily harm.[64] In other words, the test is not intrinsic to the item or to the perception of the person brandishing it; rather, the perspective is that of the victim, who is bound to interpret a robbery in progress in accordance with expectations about what such a situation might entail.

Now, assume that the new legal issue is whether a desk lamp counts as a dangerous weapon. At first blush, a desk lamp does not fall into either of the first two schemas mentioned above: a lamp generally does not cause fear when displayed, nor does it suggest that violent activity is afoot. However, a lamp *does* cause harm if it is used to bludgeon, and one might also argue based on applicable circumstances that a desk lamp held in a perpetrator's hand above his head when confronted causes fear and suggests ensuing violent activity. Accordingly, one might imagine synthesizing these schemas into the explanation of the governing rule, i.e., the definition to be applied for "dangerous weapon." Such synthesis necessarily would include illustrative examples from prior cases holding that nontra-

62 *See* Smith, *supra* n. 60, at 33; *see also* Michael D. Murray & Christy Hallam DeSanctis, *Legal Writing and Analysis* 151–53 (2d ed., Found. Press 2009). There, we explain that, in both predictive and persuasive legal writing, a writer can greatly facilitate a reader's understanding of how a rule does (or should) work by illustrating how it has worked in actual situations. But beyond simply presenting a rule—or listing seriatim cases in which the rule was applied—the goal is to digest, synthesize, and ultimately present illustrative principles that contextualize and, indeed, *narrate* the given factual circumstances for the reader in a cohesively interpretive manner.

63 Chestek, *supra* n. 3, at 2.

64 *See United States v. Rodriguez*, 301 F.3d 666, 668 (6th Cir. 2002).

ditional items constituted "dangerous weapons" if they could be used to bludgeon, or if their display was likely to cause fear or suggest violence.

Narrative reasoning is evident even when it might be considered no longer useful to explaining or illustrating a synthesized rule. Of course, legal analysis presents myriad opportunities to reengage the story told in the fact section of a legal opinion, brief, or other persuasive legal document; a client's story should and very often does extend to the argument.[65] But even a recitation of the law itself, the fundamental jumping-off point for rule-based analysis often entails narrative reasoning. Logical reasoning, in other words, entails narration. Even the most formalistic structural paradigms for presenting legal analysis, such as IRAC and its progeny—which dictate that the Rule must be identified and explained before it can be applied—presuppose that narrative reasoning will be entailed.

IV. A New Narrative

For the Ninth Circuit in *Martinez-Jimenez*, having presented the story of the law's evolution, the necessary next step was to articulate how a toy gun would or would not satisfy the legal parameters the court had set forth, or the particular story that it had told. Schemas are, of course, invoked here, too, for the goal—whether in predicting or persuading—is to articulate convincingly that the rule is or is not satisfied on the new set of facts. In the toy-gun example, the Ninth Circuit relies on the schemas that it announced in conjunction with its explanation of the legal landscape to buttress the conclusion that toy guns can be dangerous weapons too:

> A robber who carries a toy gun during the commission of a bank robbery creates some of the same risks as those created by one who carries an unloaded or inoperable genuine gun. First, the robber subjects victims to greater apprehension. Second, the robber requires law enforcement agencies to formulate a more deliberate, and less efficient, response in light of the need to counter the apparent direct and immediate threat to human life. Third, the robber creates a likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators. Therefore the greater harm that a robber creates by deciding to carry a toy gun is similar to the harm that he creates by deciding to carry an unloaded gun.[66]

65 *See* Sheppard, *supra* n. 47, at 283; *infra* sec. IV.

66 *Martinez-Jimenez*, 864 F.2d at 666–67.

The resulting conclusion—that a toy gun *is similar to an unloaded real gun*—follows logically, given the relied-upon schemas. The narration here is patent, as the court offers a kind of mini-story that achieves its goal, namely that a comparison between a toy gun and a real gun given the circumstances of a robbery suggests a correspondence such that the two objects should be treated the same in the eyes of the law.

This conclusion fits squarely into the definition of *analogy*: the "inference that if two or more things agree with one another in some respects they will probably agree in others."[67] The challenge, of course, is to identify what the two things agree upon, to determine whether those agreed-upon similarities are significant, and then to draw the reader or listener to conclude that the comparison is sufficient to conclude that the two things should be treated in the same way. So the ultimate goal in comparing the toy gun to the real gun is to determine whether the two should be treated the same in the eyes of the law. One could easily make legitimate comparisons between legally *in*significant features and still have an analogy. If, for example, I had an heirloom holster that I wanted to give my nephew as a gift, and my question was whether a toy gun would fit in the holster, I might compare the size and shape of the real gun that the holster once housed to determine whether the toy gun would work for it. Though that would answer the question whether the toy gun would fit for this purpose, it would obviously say nothing about whether a toy gun should be deemed a dangerous weapon in the circumstances of the case previously described. Rather, the point of comparison—the legally significant point about whether the toy gun could cause the same degree of apprehension and thus incite the same potential harm as a real gun—must come down to why the analogy is offered. That those circumstances would not necessarily have to be *narrated* in order to be persuasive, if not simply understood, seems anathema to the enterprise of teaching the critical importance of a skill that relies in such substantial part on training students to see and understand the important of nuance.

Thus, as a practical matter, the purpose of teaching what it means to construct a meaningful, predictive or persuasive legal analogy seems impossible to divorce from the skill of effective storytelling. The impossibility of such separation is supported by a synthesis of Edward Levi's and Steven Winter's work on the process of analogical reasoning as it applies

67 Merriam Webster, *analogy*, http://www.merriam-webster.com/dictionary/analogy (accessed Mar. 24, 2012). The second definition proposes that the resemblance in particulars is to two things otherwise unlike. In legal reasoning, the second definition seems less useful because part of the enterprise is to align or drive a wedge between two things, regardless. In other words, it seems not to matter whether the two things compared are actually like or unlike; rather, it is the goal of the author to describe why one or the other is so.

68 Winter, *supra* n. 1, at 257.

to the law. If Levi is correct that finding similarity or difference is the key step in the legal process, and if Winter, citing Levi, is correct that judicial decisionmaking is an open-ended process in which judges constantly make "case-by-case judgments of similarity that do not necessarily square with one another,"[68] then how can logical reasoning (which presumably includes analogical reasoning) and narrative reasoning can be so easily relegated to different cognitive, if not practical, spheres. Indeed, Winter's citing Levi is in part a rejection of the notion that the "logic of deracinated principles" ever stands on its own.[69] Of course, this proposition alone raises a multitude of embedded intricacies that further complicate both the puzzle and certainly any discussion of what analogical reasoning is and the value that it offers to the process of legal decisionmaking. The logical form of legal arguments is one of the most well-known "fault lines of jurisprudential debate . . . ."[70] The question of the rational force of "legal exemplary reasoning,"[71] Scott Brewer's term for what Levi called reasoning from case to case, has been the subject of much philosophical investigation that has centered, ironically, not on a dichotomy between analogical reasoning and narrative, but on the shortcomings of analogy as a "logical" form of argument in the first place. The benchmark for logical reasoning in this debate is deductive reasoning, or reasoning from a rule or set of premises to a conclusion. Brewer explains that the historical underpinnings of this jurisprudential fault line were Legal Realists' tethering their critique of deductivism to Anglo-American law's reliance on analogical reasoning.[72] In other words, analogical reasoning and deductive (arguably more "purely" logical) reasoning more often have been pitted against each other than combined into one category and measured against other forms of argument, such as narrative reasoning.

So, whereas Brewer's goal is to explain why analogies are convincing, what he elucidates about analogies proves to be compelling fodder for the attempt to take analogical reasoning into the sphere of storytelling. "[T]he defining feature of 'analogical,' 'exemplary' reasoning is the use of examples in the process of moving from premise to conclusion . . . ."[73] The problem that piques Brewer's interest is how or why similarity (or difference, in the case of distinctions, or reverse-analogical reasoning) is rationally compelling?[74] Indeed, there are myriad ways in which one thing may be like or different from something else. For example, a suitcase is like an automobile in that both can be used to transport items. Both can be locked to preclude access. Even if "having wheels" is the touchstone of the

69 *Id*. at 256.

70 Brewer, *supra* n. 1, at 930.

71 *Id.*

72 *Id*. at 931; *see also* Winter, *supra* n. 1, at 256–57.

73 Brewer, *supra* n. 1, at 934.

74 *Id*.at 932.

inquiry, then these days a suitcase and an automobile would seem to have a lot in common. But, generally speaking, a suitcase is far more mobile and is so without electric or gas power; it usually can be lifted with reasonable human strength. Many suitcases fit into a plane's overhead compartment; no car that I know of would make it through an airport magnetometer. A suitcase could cause some damage if abandoned in the fast-lane of I-95, but an abandoned car is likely to cause significantly more. The point is that we could generate a list of all of the reasons why a suitcase is like an automobile and all of the reasons why it is not, but a legitimate analysis of the comparison will depend—as it did with the toy gun and Styrofoam-sandwich-box examples above—on the circumstances giving rise to the comparison. Thus, a suitcase might be subjected to the same set of rules as a car if the legal issue involves authorization to search a container, but the officer who tickets a person rolling a suitcase down the sidewalk for failing to stop for a school bus surely would face psychological testing.

This illustration reveals that analogical reasoning is also cabined by logical parameters: "Analogy is the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively."[75] Brewer's conclusion on this point, though, is what is most significant for present purposes:

> [C]ontext plays a vital role both in the cognitive phenomena that are broadly thought of as "analogy," and in the best explanation of those phenomena. . . . [T]he context in which an analogical argument is offered significantly shapes the structure of that argument.[76]

Not only is Brewer's observation accurate, but it virtually tips its hat to the importance of narrative. What *is* this context, if not a series of thoughts or observations linked together linguistically and with some sense of an ultimate agenda or question giving rise to the need to draw the analogy in the first place? Is that cohesion not utterly dependent on some ability to narrate a set of circumstances intent on the goal of concluding that the comparative features of the things compared do or do not justify their being treated alike? In other words, how do we get at the "context in which an analogy is offered" if *not* by narration? Apparently, the two cannot be bifurcated so neatly.

There are at least two other possibilities for why an analogy might be constructed for analytical purposes, and each case is deeply connected to storytelling. One way, as in the automobile–suitcase example, involves first narrating the premise of the analogy, or explaining the circumstances

75 *Id*. at 952–53.

76 *Id*. at 926.

to which an analogy will be drawn or from which it will be distinguished. This, of course, typically occurs in the paragraph or paragraphs where the rule and its key components are explained.[77] Then the analogy itself is drawn to or distinguished from the circumstances presented. This use of analogical reasoning has been recognized as the "most reliable" of its narratival uses, because it "is the result of combining the narrative reasoning inherent in comparing stories with the rule-based reasoning that defines the legally relevant categories of similarities and differences."[78] In other words, "no example can serve as an example without a rule to specify what about it is exemplary."[79]

To be effective, the analogy itself requires narration, and this technique is often under-appreciated by novice legal writers. Take, for example, a case whose issue is whether the annoyance of cigarette smoke can form the basis for an implied-warranty-of-habitability claim by a tenant against a landlord. Presume—as is true in many jurisdictions—that the most on-point cases related to the intrusion into one's living space of a wafting-through-air, not-quite-physical substance involve noise. A good explanation of the legal landscape will explain why courts have considered noise to be intrusive so as to support a claim for breach of the implied warranty of habitability. An analogy may be drawn: "smoke is like noise," so supporting the conclusion that smoke, too, would substantiate such a claim. Though common, the basic likeness of smoke to noise is not as effective as it would be if the analyst explained *why*—or narrated through the full thrust of the analogy. Smoke is like noise because its presence can interfere with enjoyment of outside spaces, such as porches and balconies, in the same disruptive manner. Smoke is like noise because the affected party's enjoyment of her premises is equally compromised. A dinner party at the affected apartment is as thwarted by excessive smoke infiltration as it is excessive noise infiltration. If the court in *A v. B* was convinced that noise generated off-premises could nevertheless intrude into an apartment, then so should it conclude that smoke emanating from an apartment below could waft into the apartment above. Though ubiquitous, analogical reasoning of this kind is an often-noted weak spot in law students' and junior attorneys' writing. The weakness is usually described as the tendency to be overly conclusive for numerous reasons, not the least of which is the failure to highlight specific and relevant facts while explaining the operative rule, then not quite closing the loop by stating

77 *See id.* at 959.

78 Edwards, *supra* n. 7, at 24 (citing as examples several instances of Justice Brennan's dissent in *Marsh v. Chambers*, 463 U.S. 783, 797–99 (1983)).

79 Brewer, *supra* n. 1, at 974.

why or how the comparisons to (or divergences from) the facts at issues are meaningful.

A second way in which the connection between storytelling and analogy is important is when a narrative and an analogy are entirely contiguous—i.e., when the story itself is the focus of the consequent comparison or analogy to be drawn. This is analogical reasoning without reference to a rule.[80] In purely literary terms, one might call this kind of reasoning allegorical rather than analogical,[81] because the thing to which one points in comparison often has a double meaning: "There is an overt meaning—the story told—and then a meaning underneath that needs to be decoded. The overt meaning is a vehicle for the expression of the covert meaning."[82] In many ways, this version of the analogical narrative itself is more covert, or at least more implicit than explicit, because the author is not necessarily drawing a fact-to-fact comparison, as in the toy-gun case. Rather, the author is presenting a narrative, presumably persuasive on its own terms, the upshot of which becomes a kind of directive to do here what was done in a previous instance. Perhaps even one step farther removed is the relatively frequent invocation either of Biblical parables or of other mini-stories to suggest that the outcome of a case should follow the outcome of the story being told. The use of Biblical parables as driving factors in legal decisionmaking is worthy of its own article, and so I will put that to the side for now. Instead, I want to highlight an exchange in a case that at first blush would seem to implicate only pure logos.

Even cases that at first blush would seem to implicate only logos may rely on analogous story, such as allegory or parable. In *AT&T Corp. v. Iowa Utilities Board*,[83] the primary issue was one of statutory interpretation—specifically, addressing the statutory definitions in the Federal Communications Act of 1996, which wholly restructured the telecom market, of "necessary" and "impair" as related to local phone-service providers. The pivotal question was whether access to proprietary elements of an established telephone carrier's system was "necessary" and whether not having access would "impair" a market entrant's access to the local phone-service market. This setting, both legally and factually, might

80 Edwards, *supra* n. 7, at 23–24.

81 Allegories and parables are often confused, and for some good reason given that parables have been studied at length as metaphors. For an informational yet user-friendly comparison of the two, *see* George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. Rev. L. & Soc. Change 225, 233–37 (2007). Taylor explains that allegories have "educative, didactic, informative function[s]. [They] proceed[] on the basis of a double meaning." *Id*. at 234. The specific language of an allegory is not of central importance, especially once the underlying meaning is discovered, whereas the same is not true of a parable, the specific language of which always remains paramount. *Id*. at 236.

82 *Id*. at 234.

83 525 U.S. 366 (1999).

strike most readers as falling within a realm where storytelling necessarily has no place. Yet the Justices do tell stories for the purpose of persuading their colleagues, if not their ultimate audience, that they have arrived at the correct interpretation of the law. Justice Souter, in his concurring opinion, wrote,

> The words "necessary" and "impair" are ambiguous in being susceptible to a fairly wide range of meanings, and doubtless can carry the meanings the Commission identified. If I want to replace a light bulb, I would be within an ordinary and fair meaning of the word "necessary" to say that a stepladder is "necessary" to install the bulb, even though I could stand instead on a chair, a milk can, or eight volumes of Gibbon. I could just as easily say that the want of a ladder would "impair" my ability to install the bulb under the same circumstances.[84]

To which Justice Scalia responded,

> True enough (and nicely put), but the proper analogy here, it seems to us, is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not, "within an ordinary and fair meaning of the word," "necessary," nor does its absence "impair" one's ability to do the job."[85]

How are the Justices here *not* positing their own analogies as narratives? Certainly, each is structured in narrative form, and both seem to indicate that there is a particular story to be told that supports his vision of the outcome. This kind of storytelling frames the legal discussion of the case at issue; it also offers a way to contextualize and justify each Justice's rationale. At bottom, the exchange also suggests that the mini-stories about light-bulb accessibility are analogies in which narratives are necessarily embedded and are the very things proffered for support of the logical, legal conclusions to be drawn from them. Indeed, even the most strictly textually minded of Justices seem not at all adverse to telling a story that points to the "right" outcome of his own embedded narrative.

This observation underscores the thesis of this article: narrative reasoning is ubiquitous and lies at the heart of legal reasoning more generally. Narrative reasoning is employed not merely for the purpose of telling a client's story, whether that opportunity presents itself in the statement of facts or is threaded through the argument. Both are laudable goals, but narration extends well beyond that endeavor and is impossible

84 *Id*. at 399 (Souter, J., concurring). **85** *Id*. at n. 11.

to disentangle from even the most logos-centric view of what the law is and legal reasoning has to offer.

V. Conclusion

Analogical reasoning—indeed, all "logical" forms of reason—at its best *uses* storytelling and thus does not mark an analytic space where narration is absent. Whether such reasoning invokes pathos seems to be a secondary question. Any text, however reasoned, may appeal to logos, ethos, or pathos, but these appeals are not rhetorical characterizations that should alone describe an argument or text's adherence to a storytelling paradigm. Rather, each of these rhetorical appeals is strengthened by the story in which it is framed. An analogical argument—whether explicit or implicit—can, and often must, be embedded into a storytelling framework to be effective. If we see a particular weakness in our students' ability to use the facts, to get their hands dirty with the cases in a way that will ultimately prove more analytically sound or persuasive, then perhaps the gap to be filled is one in which storytelling, or narrative reasoning, fits nicely and has much to offer.

LC&R:JALWD