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# The Law is Made of Stories

## Erasing the False Dichotomy Between Stories and Legal Rules

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*The universe is made of stories, not of atoms.*  
—Muriel Rukeyser

### Introduction

Christopher Columbus Langdell, the first dean of Harvard Law School, famously claimed that law should be treated as a science.<sup>1</sup> Legal scholars have long understood that Langdell should not be taken literally,<sup>2</sup> and that legal rules differ from the laws of mathematics or physics.<sup>3</sup> Nonetheless, we cling to certain vestiges of Langdell's viewpoint.

When lawyers think of legal reasoning, we think chiefly of rule-based reasoning and analogy, of deductive and inductive reasoning with the addition of policy and custom. Stories are typically seen only as a tool for persuasion, even in recent scholarship that explores the role of storytelling in legal practice.<sup>4</sup> Scholars working in this area generally agree our legal

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\* Lecturer in Law, SUNY Buffalo Law School. This article had its genesis during an informal discussion of Gerald Lopez's *Lay Lawyering* at the third biennial Applied Legal Storytelling conference, and I am grateful to Linda Edwards for encouraging me to read one of her articles and write about my own ideas. I am also deeply grateful to Christine Bartholomew, Guyora Binder, John Schlegel, Jim Gardner, Lynne Mather, Lise Gelernter, and Joe Gerkin for their insightful feedback on a draft of this article, and to SUNY Buffalo Law School for supporting the work with a summer research grant.

<sup>1</sup> Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts* vi (1871). Although Langdell is widely identified with the idea that law is a science, the idea predates his appointment as Dean by many years. See e.g. Frederick Ritso, *An Introduction to the Science of Law* 17 (1815).

<sup>2</sup> John Schlegel, for instance, has suggested that Langdell was an "essentially stupid man who clung onto a simple idea with the tenacity that only the stupid can muster." John Henry Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing its Tail?* 12 Ger. L.J. 67, 67–68 (2007).

<sup>3</sup> See e.g. Steven D. Jamar, *This Article Has No Footnotes: An Essay on RFRA and the Limits of Logic in the Law*, 27 Stetson L. Rev. 559, 560 (1997) (noting that inductive and deductive reasoning cannot be used in law with "mathematical rigor").

<sup>4</sup> Much of that work was produced in conjunction with a series of biennial conferences on "Applied Legal Storytelling." See *infra* nn. 28–29 and accompanying text. For a bibliography listing some of the scholarship, see Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 Leg. Comm. & Rhetoric: JALWD 99, 135–37 (2012) (listing articles through September 2011).

system “is not founded on narrative reasoning” but on “a commitment to the rule of law.”<sup>5</sup> Narrative reasoning is thus seen as being distinct from and subordinate to other forms of reasoning deemed more logical and more “legitimate.”<sup>6</sup>

In this article I challenge the prevailing view with a two-part thesis. First, I suggest that the dichotomy between stories and rules is false and that every governing legal rule—very rule by which a decisionmaker can grant a remedy, impose a punishment, or confer some benefit—has the underlying structure of a *stock story*,<sup>7</sup> a story template stated in general terms. In other words, the elements of the rule correspond to the elements of a story and have a logical relationship that qualifies as a “plot.” Second, the analytical moves we think of as rule-based reasoning are often a form of narrative reasoning, in which the story in a given set of facts is compared to the stock story embedded in the rule. It follows that lawyers do not rely on stories simply because they are persuasive. They do so because every governing rule *demand*s a story: a story is embedded in the rule’s structure, and the rule can be satisfied only by telling a story.

Other writers have suggested that legal rules sometimes take the form of a story, but they have stopped short of the claims I make here. Gerald Lopez used stock stories to show that problem-solving by lawyers can be seen as an instance of ordinary human problem-solving.<sup>8</sup> And Linda Edwards notes that opposing lawyers in a civil case may present competing narratives “cast as the story-forms of a cause of action and a defense.”<sup>9</sup> Edwards recognizes that legal rules are often the product of a narrative in which some aspects of the story are omitted while others “are given legal significance.”<sup>10</sup> But Edwards is also emphatic in her assertion that “[r]ules are not narratives.”<sup>11</sup>

On that last point, I respectfully disagree. My thesis is that every governing legal rule is literally a form of narrative, in which the essential elements of a story—events, characters, and plot—have been reduced to general terms. In a very real sense, the law is made of stories: lawmakers

5 Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 369 (2d ed. 2008).

6 Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 Leg. Comm. & Rhetoric: JALWD 149, 150 (2012).

7 As H. Porter Abbott notes, some narrative theorists prefer the term “masterplot” in place of “stock story.” H. Porter Abbott, *The Cambridge Introduction to Narrative* 46–49 (2d ed. 2008). But some legal scholars have used the term “master story” for stories that “serve as the template for understanding the world and as the tutor for acting in it.” Michael Goldberg, *Against Acting “Humanely,”* 58 Mercer L. Rev. 899, 905–06 (2007). See also Linda L. Berger, *How*

*Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 So. Cal. Interdisc. L.J. 259, 262 (2008–09). To minimize confusion, I will use “stock story” rather than “master story” or “masterplot.”

8 Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 2 (1984).

9 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7, 30 (1996).

10 *Id.* at 42.

11 *Id.* at 22.

enact legal rules because they wish to dictate how some categories of real-life stories should end.<sup>12</sup> For the sake of brevity my thesis is limited to governing rules, though I recognize that other rules have the structure of stock stories, including many of the secondary rules by which governing rules are adopted and enforced.<sup>13</sup>

A skeptical reader may ask why this matters. Many trial lawyers and law professors have long understood that stories are valuable,<sup>14</sup> but they consistently treat storytelling as a persuasive technique and as a way to help jurors organize and understand the “vast amounts of information” presented to them during a trial.<sup>15</sup> In recent years, legal scholars and practitioners have typically grounded their use of storytelling by referring to research in neuroscience and concepts from cognitive psychology.<sup>16</sup> As Ruth Anne Robbins, Steve Johansen, and Ken Chestek explain in their textbook on storytelling and persuasive legal writing, “humans are hardwired to remember information when it is delivered as part of a story.”<sup>17</sup> My thesis suggests that the roots of storytelling run deeper still and are grounded in the very nature of law itself.

In addition, recent scholarship on “Applied Legal Storytelling” has been limited by self-imposed constraints. The scholarship is rich with important insights, but it adheres to the dichotomy between stories and rules and often relies on a narrow definition of *story*. By doing so, the scholarship leaves a large tract of theoretical ground unexamined. In a sense, these scholars proceed like explorers who vow to journey only north and east, but never south or west. As a response, this article is intended as a compass rather than a map, and it will raise more questions than it can answer.

My thesis rests on four core concepts: *narrative reasoning*, *rules*, *story*, and *stock story*. The article begins by considering each concept in turn. Section I discusses three distinct “storytelling” movements in legal scholarship and the prevailing view of narrative reasoning. Section II considers the essential traits of governing legal rules. Section III considers the

<sup>12</sup> One need only think here of “Megan’s Law” and innumerable other statutes enacted in response to a specific event. See e.g. Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 Ind. L.J. 315 (2001).

<sup>13</sup> See *infra* nn. 58–62 and accompanying text (discussing H.L.A. Hart’s distinction between primary rules of obligation and secondary rules of recognition); see also Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* 266–79 (2000) (discussing what they call the “narratives of legitimation”).

<sup>14</sup> Robert Burns, for instance, has written extensively about the role of narrative and storytelling in trial. See Robert P. Burns, *Narrative and Drama in the American Trial* 1–3 (Nw. U. Faculty Working Papers No. 201, 2012) (available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/201>) [hereinafter *Narrative and Drama*]; Robert P. Burns, *A Theory of the Trial* (1999) [hereinafter *Theory of the Trial*].

<sup>15</sup> Burns, *Narrative and Drama*, *supra* n. 14, at 5.

<sup>16</sup> See e.g. Ruth Anne Robbins, Steve Johansen & Ken Chestek, *Your Client’s Story: Persuasive Legal Writing* 37–44 (2013).

<sup>17</sup> *Id.* at 37.

essential traits of stories and explains why a definition of *story* used in some scholarship is inadequate. It also defines *stock story*, a term legal scholars have used too loosely. The first part of the thesis emerges in section IV, where the article uses examples to demonstrate that stock stories are embedded in the structure of governing legal rules. Section V sets out the second part of the thesis and redefines narrative reasoning to include many analytical moves we would typically label as rule-based reasoning. The conclusion suggests that stories are central to law and legal reasoning in ways that lawyers and legal scholars have yet to fully explore.

In the end, this article aims to encourage a shift in the way that lawyers talk about stories. As Steven Johansen notes, those conversations are often accompanied by a certain unease. We recognize that stories are persuasive, but also sense that they cannot be trusted, that stories “may be *too* powerful, or perhaps *inappropriately* powerful.”<sup>18</sup> Perhaps this sense of unease, and our adherence to the dichotomy between stories and rules, has prevented us from fully understanding the role stories play in legal theory and practice. We can be better scholars, better lawyers, and better teachers if we understand that stories are not simply a tool for persuasion: they are embedded in the structure of law itself. In a very literal sense, no one can make laws or practice law without telling stories.

## I. Legal Storytelling and the Concept of Narrative Reasoning

Textbooks on legal writing and analysis invariably teach first-year students that rule-based reasoning is central to “thinking like a lawyer.” If these books discuss narrative reasoning—and many do not<sup>19</sup>—they present it as a tool for persuasion, as a way for lawyers to shape the facts, organize information, and motivate judges or juries to sympathize with a client’s situation.<sup>20</sup>

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<sup>18</sup> Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 63–64 (2010). One writer has argued that “[t]he characteristics of narrative are in many ways incompatible with the work” juries must do in the context of a trial. Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 Geo. L.J. 281, 335 (2013). Though Griffin believes stories introduce bias and error, she does not conclude courts should exclude them. Instead, she argues that changes to the trial process could increase the reliability of jury verdicts.

<sup>19</sup> Though discussions about drafting a statement of facts must deal with storytelling at least implicitly, many books do not include a sufficiently explicit discussion of stories or narratives to warrant including those words in the index. See e.g. Charles R. Calleros, *Legal Method & Writing* (4th ed. 2002); Christine Coughlin, Joan Malmud Rocklin & Sandy Patrick, *A Lawyer Writes: A Practical Guide to Legal Analysis* (2d ed. 2013); Michael R. Fontham, Michael Vitiello & David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2d ed. 2007); Laurel Curry Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, & Writing* (5th ed. 2010); Nancy L. Schultz & Louis Sirico Jr. *Legal Writing and Other Lawyering Skills* (5th ed. 2010).

<sup>20</sup> One textbook on persuasive legal writing is centered on the use of storytelling. Robbins, Chestek & Johansen, *supra* n. 16. A number of other books include at least a brief discussion on storytelling as a tool for persuasion. See e.g. Mary Beth Beazley,

The concept of “narrative reasoning” is a relatively new addition to legal theory. In the 1970s, scholars began using literary theory and literary criticism as a tool to understand and evaluate laws and legal institutions.<sup>21</sup> Within that scholarship, there have been three distinct “storytelling” movements, each of which has focused on the act of telling stories in the context of law. While those movements have different aims, they use narrative reasoning as a strategy for persuasion.

The first storytelling movement arose in the 1980s, largely in the context of feminist legal theory and critical race theory. The authors aimed to break taboos, celebrate diversity, and “challenge established ways of thinking” by telling the stories of people who had long been outside the legal academy.<sup>22</sup> The terms *narrative* and *story* were thus associated with “outsider” stories could challenge and disrupt a dominant group’s discourse about the law.<sup>23</sup>

The second storytelling movement includes a broad range of both theoretical and practical work on the role of storytelling in trial practice.<sup>24</sup> These articles focus on the role of narrative in a lawyer’s theory of the case and on the ways that storytelling plays out in a courtroom “drama,” from the opening statements to the closing arguments.<sup>25</sup> As Robert Burns

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*A Practical Guide to Appellate Advocacy* 181–84 (3d ed. 2010) (briefly discussing narrative theory in connection with the statement of the case); Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, *Writing for Law Practice* 199–205 (2d ed. 2010) (discussing narrative as a tool for writing facts persuasively); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 300–01 (6th ed. 2009) (discussing stories in the context of developing a persuasive theory); Smith, *supra* n. 5, at 32–34 (advocating that legal writers should combine “illustrative narratives” with rules when explaining rule-based analysis).

**21** For a comprehensive discussion and evaluation of the “law as literature” movement, see generally Binder & Weisberg, *supra* n. 13.

**22** Some of the best-known works were published in a symposium volume by the Michigan Law Review. See Kim Lane Scheppele, *Forward: Telling Stories*, 87 Mich. L. Rev. 2073, 2073–74 (1989). See also Binder & Weisberg, *supra* n. 13, at 201–09, 246–52 (summarizing and critiquing the political claims of this scholarship).

**23** See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2411–16 (1988). Mari Matsuda’s call for legal sanctions against acts of racist hate speech is typical of this scholarship. In making her argument, Matsuda moves between stories of the deep psychological injuries suffered by people subjected to racist speech on one hand, and the stories told by civil libertarians on the other, with the aim of respecting both sets of stories. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320, 2356 (1989).

**24** The literature on storytelling in the context of trial practice is more extensive than the other storytelling movements. For a few of the many examples, see Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. Sch. L. Rev. 55 (1992); David Ball, *Theater Tips and Strategies for Jury Trials* (2d ed. 1997); Todd A. Berger, *A Trial Attorney’s Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant’s Successful Appellate Review*, 4 Drexel L. Rev. 297 (2012); Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. Rev. 877 (2009); Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. Ill. U. L. Rev. 1 (2001); Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth, and Justice in the Modern Courtroom Drama*, 25 UALR L. Rev. 503 (2003); Steven Lubet, *The Trial as a Persuasive Story*, 14 Am. J. Tr. Advoc. 77 (1990); James W. McElhaney, *The Story Method*, 18 Litig. 49 (1991); Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence’s Closing Argument in The Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 Clin. L. Rev. 229 (2002); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?* 6 Clin. L. Rev. 85 (1999); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 Stan. L. Rev. 39 (1994); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. Rev. 239 (2012); Laura Gardner Webster, *Telling Stories: The Spoken Narrative Tradition in Criminal Defense Discourse*, 42 Mercer L. Rev. 553 (1991).

explains, a lawyer preparing for trial must create “a double helix of norms,” with “[o]ne strand . . . dominated by narrative and the other by informal logical inference or argument.”<sup>26</sup> For Burns, these two strands of rhetoric appeal to different audiences: the narrative strand appeals to the trier of fact, while the “logical” or argumentative strand appeals primarily to the trial judge and appellate courts in their respective roles as entities who must “police” the rule of law.<sup>27</sup>

The third storytelling movement consists largely of scholarship by faculty who teach legal writing. The initial articles appeared in the 1990s, but the movement gained steam through a series of biennial conferences on “Applied Legal Storytelling,” the first of which was held in 2007.<sup>28</sup> These conferences have generated dozens of articles on the use of stories in legal pedagogy and practice, with the stated aim of producing “[s]cholarship that is [directly] relevant to the practice of law.”<sup>29</sup>

The meeting point for these movements lies in *narrative reasoning*, a term introduced by Linda Edwards in a 1996 article on “the complex and sometimes subtle relationship between narrative and other forms of reasoning.”<sup>30</sup> Her central point is that narrative reasoning and rule-based reasoning are not in conflict. Instead, they restrain each other and “must remain in constructive relationship . . . .”<sup>31</sup> Her analysis parallels the double helix envisioned by Burns, as well as Robert Cover’s assertion that we inhabit a *nomos*, or “normative universe,” in which “law and narrative are inseparably related.”<sup>32</sup>

Edwards sets out a model of legal reasoning with five distinct “strands”: rule-based reasoning, analogical reasoning, policy reasoning, “[c]onsensual normative reasoning” (or custom), and narrative reasoning.<sup>33</sup> These strands are “external criteria” against which a litigant’s story is compared, and they provide “some assurance of a result that is reasoned, fair, functional, and consistent with moral values and meanings.”<sup>34</sup>

As Edwards defines it, rule-based reasoning “generates criteria from the express language” of a rule, relying on grammatical structure and the

<sup>25</sup> See e.g. Burns, *Theory of the Trial*, *supra* n. 14, at 103–23 (analyzing the role of storytelling in the opening statements of one trial).

<sup>26</sup> *Id.* at 36.

<sup>27</sup> *Id.* at 37.

<sup>28</sup> The 2007 conference was organized to continue a dialogue that began two years earlier at a conference on the *Power of Stories* held at the University of Gloucester. For more on the history of the first two conferences, and on the relationship between Applied Legal Storytelling and the much broader body of scholarship on “law and literature,”

see Ruth Anne Robbins, *An Introduction to Applied Storytelling* and to this Symposium, 14 *Leg. Writing* 3, 3–12 (2008).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> Edwards, *supra* n. 9, at 7.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> Robert M. Cover, *Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4–5 (1983).

<sup>33</sup> Edwards, *supra* n. 9, at 10–11.

<sup>34</sup> *Id.* at 9.

commonly accepted meaning of the rule's words.<sup>35</sup> Her view is consistent with textbooks on writing and reasoning intended for first-year students, which often equate rule-based reasoning with deductive reasoning, syllogisms, and formal logic.<sup>36</sup> It is also consistent with the various paradigms for legal analysis (IRAC, CREAC, and so on), all of which involve *applying a rule* to a particular set of facts to reach a *conclusion*.<sup>37</sup>

The fifth strand of reasoning—narrative reasoning—had not previously been defined in legal scholarship.<sup>38</sup> As Edwards explains,

Narrative reasoning evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode. It asserts, "X is the answer because that result is consistent with our story." Cultural narratives define the moral value and meaning of actions and events by setting them in the context of a narrative structure.<sup>39</sup>

In a legal context, these narratives may be drawn from the facts of a client's case, the lives of real or fictional individuals, and "the historical and mythical events and patterns that form the self-identities of particular narrative communities."<sup>40</sup> But where the first storytelling movement used outsider stories to challenge dominant ways of thinking, the second and third see stories as a rhetorical device to be used in individual cases.

Edwards regards rule-based reasoning as something distinct from narrative reasoning, a way of thinking that "is essentially structuralist rather than narrational."<sup>41</sup> And though she concludes rules are not narratives, she explains that "they are in significant part codified explanations of the points of narratives, some of which are explicit and some of which form a silent sub-text of legal doctrine."<sup>42</sup> Edwards also recognizes that stories can play an important role in other strands of reasoning.<sup>43</sup> She ultimately suggests that a rule cannot be interpreted "in a spirit of fidelity

<sup>35</sup> *Id.* at 10.

<sup>36</sup> For a particularly thorough discussion of the power of syllogistic reasoning, see James A. Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* 4–7 (2d ed. 2007); see also David S. Romantz & Kathleen Elliott Vinson, *Legal Analysis: The Fundamental Skill* 65–81 (2d ed. 2009).

<sup>37</sup> See e.g. Coughlin et al., *supra* n. 19, at 82–83 (comparing different variations of the paradigm for legal analysis).

<sup>38</sup> The author's search for the phrase "narrative reasoning" on Hein Online, Westlaw, and Lexis revealed a few scattered references earlier than the article by Edwards, but those sources use the phrase as a common-sense shorthand for the process of explaining a decision by writing a narrative. See e.g. James C. Babin, *Federal Source Selection Procedures in Competitive Negotiated Acquisitions*, 23 Air Force L. Rev. 318, 334 (1983).

<sup>39</sup> Edwards, *supra* n. 9, at 11.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Id.* at 27.

<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Id.* at 23–24.



to the rule's source and purpose" without considering narratives, not only through analogical reasoning but also as an embodiment of policy or custom.<sup>44</sup>

This understanding of narrative reasoning—and the premise that rules are not narratives—has been widely accepted within the Applied Legal Storytelling movement.<sup>45</sup> Ken Chestek's work on the role of narratives in persuasive writing and judicial decisionmaking is a typical example.<sup>46</sup> For appellate lawyers, Chestek suggests, the power of a narrative rests largely on its emotional appeal, an appeal that supports but does not supplant a lawyer's logical arguments.<sup>47</sup> Following Richard Neumann's distinction between "justifying" (which Chestek decodes as "rule-based") and "motivating" (decoded as "norm-based") arguments, Chestek characterizes narrative reasoning as a set of norm-based arguments that "motivate a judge to want to rule in a party's favor."<sup>48</sup> Other writers likewise see narrative reasoning as a technique that supplements rule-based reasoning, a way to "fill the cognitive gap left by overreliance on pure logic."<sup>49</sup> For these scholars, *narrative reasoning* and *storytelling* are interchangeable terms,<sup>50</sup> and although stories display a certain "logic," they belong to the realm of pathos rather than logos.

One scholar, though, has begun to chip away at the demarcation between narrative and other forms of reasoning.<sup>51</sup> Whereas Edwards asserts that analogical reasoning is "several steps removed from . . . narrative,"<sup>52</sup> Christy DeSanctis sees a more direct connection. DeSanctis emphasizes that analogical reasoning, at its best, "*must* [] be embedded in a storytelling framework . . . and thus does not mark an analytic space where narration is absent."<sup>53</sup> In doing so, she "suggests that efforts to elevate storytelling may be further reinforcing a [flawed] dichotomy," and that narrative reasoning might be better championed by exploring the

44 *Id.* at 27.

45 *But see* DeSanctis, *supra* n. 6, at 149–50.

46 Chestek, *supra* n. 4, at 102; Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 *Leg. Writing* 127 (2008).

47 Chestek, *supra* n. 46, at 130–31.

48 Chestek, *supra* n. 4, at 102 (quoting Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 309 (6th ed. 2009 Aspen Publishers 2009)).

49 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, 255, 263–65 (2009).

50 *See e.g.* Chestek, *supra* n. 4, at 102.

51 DeSanctis, *supra* n. 6, at 149–50.

52 Edwards, *supra* n. 10, at 23.

53 DeSanctis, *supra* n. 6, at 171 (emphasis added).

ways in which “many, if not most, forms of reasoning actually depend on narrative.”<sup>54</sup>

This article takes up the challenge laid down by DeSanctis and aims to erase the dichotomy between narrative and governing rules.

## II. The Essential Traits of Governing Rules

For over a century, scholars have vigorously debated the nature of law and legal rules. Under the “classical orthodoxy” of Langdell and other formalists, rules were seen as “objective tests” and were framed so decisions would follow without controversy when the rules were applied to particular facts.<sup>55</sup> At the other extreme, some legal realists suggested that rules are little more than “playthings,” an after-the-fact justification for decisions grounded in policy and social values.<sup>56</sup>

Whatever their role in the reasoning process, governing legal rules inherently possess three key traits: (1) the rules refer to people, things, events, and circumstances; (2) those references are stated in general terms; and (3) the elements of the rule necessarily have a logical coherence.<sup>57</sup>

The first and second traits can be stated as a single observation: legal rules necessarily include *general* references to some combination of people, things, events, and circumstances. H.L.A. Hart explained that a system of laws includes two types of rules: the “primary rules of obligation” (those that govern human conduct) and the secondary “rule[s] of recognition” (those that determine how primary rules are adopted, interpreted, and enforced).<sup>58</sup> Within this framework, the primary rules are “general rules” of social obligation expressed in terms that “refer to *classes* of person[s], and to *classes* of acts, things, and circumstances.”<sup>59</sup> In a textbook aimed at first-year students, Steven Burton makes the same point: a legal rule, he explains, “is a general statement of what the law permits or requires of *classes* of people in *classes* of circumstances.”<sup>60</sup> By

<sup>54</sup> *Id.* at 151.

<sup>55</sup> Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 11–12 (1983).

<sup>56</sup> Karl Llewellyn concisely captured this rule-skepticism: “[R]ules . . . are important . . . so far as they help you see or predict what judges will do . . . . That is all their importance, except as pretty playthings.” Karl Llewellyn, *The Bramble Bush* 5 (3d ed. 1960).

I will not discuss this debate in detail or take a position. But for a thorough account of the “interpretive crisis” in U.S. legal theory, see Binder & Weisberg, *supra* n. 13, at 28–111. Binder and Weisberg conclude the conventional division of legal thought between a formalist era and realist era is misleading, and that the two eras are best seen

as separate “strands of a single Progressive discourse.” *Id.* at 111.

<sup>57</sup> Each of these traits is also essential for a *stock story*—indeed, they define what a stock story is and how it differs from other cognitive structures by which we organize knowledge. See *infra* sec. III.

<sup>58</sup> H.L.A. Hart, *The Concept of Law* 97–98 (1961).

<sup>59</sup> *Id.* at 121.

<sup>60</sup> Steven J. Burton, *An Introduction to Law and Legal Reasoning* 13 (2d ed. 1995). Black’s Law Dictionary similarly defines a legal rule as “a general norm mandating or guiding conduct in a given type of situation.” *Black’s Law Dictionary* 1330 (7th ed. Bryan A. Garner, ed., 1999).

their nature, rules “operate from a position of generality” and apply to more than one case.<sup>61</sup> What is not so obvious is that Hart and Burton are speaking of rules by which a decisionmaker can grant a remedy, impose a penalty, or confer some benefit.<sup>62</sup>

For Hart, society’s inability to anticipate or describe all possible circumstances means a *general* rule of law must necessarily be indeterminate.<sup>63</sup> If an ordinance dictates that “no vehicle may be taken into a public park,” someone must decide what counts as a “vehicle.”<sup>64</sup> A fully operational Humvee qualifies, but what about a Humvee mounted on a pedestal,<sup>65</sup> or a skateboard with an electric motor?<sup>66</sup>

In Hart’s view, every rule has a “core of settled meaning” and a “penumbra” of indeterminacy, a group of harder cases that arguably lie within the rule’s shadow.<sup>67</sup> To the extent that Hart’s metaphor implies a kind of fuzzy formalism, Steven Winter and others have argued that the “core” is less settled than Hart suggested, and that “easy” cases seem easy only because the rule’s terms have a widely accepted cultural meaning.<sup>68</sup> As Winter suggests, even the most straightforward decision under the “no vehicles in the park” rule necessarily relies on a shared cultural understanding about the nature and purpose of a “park,” an understanding that has shifted radically since the 19th century.<sup>69</sup> Nonetheless, the meaning of most rules is far from fixed, and Hart’s distinction between “core” and “penumbra” can be a useful metaphor for the degree to which a rule’s terms are open to interpretation.<sup>70</sup>

The third point emphasizes that governing rules necessarily have a particular logical structure. In a legal writing textbook, Deborah

61 Burton, *supra* n. 60, at 14. I have used *governing rule* as a shorthand for these rules, but recognize that others might label them differently.

62 Some legal rules are merely descriptive: for instance, the federal statute which states that “[t]he term ‘alien’ means any person not a citizen or national of the United States.” 8 U.S.C. §1101(a)(3). See e.g. Neumann, *supra* n. 20, at 11 (distinguishing between rules that are mandatory, prohibitory, discretionary, and declaratory).

63 Hart, *supra* n. 58, at 125–26.

64 The hypothetical rule prohibiting vehicles in a park was the subject of a famous exchange between Hart and Lon Fuller. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

65 Fuller used the example of a vehicle on a pedestal in his challenge to Hart’s analysis. See Fuller, *supra* n. 64, at 662–63.

66 The website of “Boosted Boards” bills its motorized skateboards as the “The World’s Lightest Electric Vehicle.” <http://www.boostedboards.com> (accessed Aug. 6, 2013).

67 Douglas Lind, *Logic, Intuition, and the Positivist Legacy of H.L.A. Hart*, 52 S.M.U. L. Rev. 135, 150–51 (1999) (quoting H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *Essays in Jurisprudence and Philosophy* 49, 64 (1983) (discussing what Hart called the “problems of the penumbra”).

68 Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 201–02 (2001) (hereinafter *Clearing*).

69 *Id.* at 204–06.

70 But see J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ALWD 155 (2010) (discussing the dangers of a poorly expressed metaphor).

Schmedemann and Christina Kunz explain that governing rules can be framed as a conditional “if/then” statement, a logical structure in which consequences follow from certain conditions. For a mandatory rule without exceptions, the structure could be expressed

IF the required factual conditions exist,  
THEN the specified legal consequences will result.<sup>71</sup>

Beyond this conditional structure, governing rules invariably possess a logical coherence: the people, things, events, and circumstances referenced by the rule have a logical relationship to each other. By its nature, a rule of social obligation must include a person, entity, or thing; the circumstances under which the particular conduct is required, permitted, or prohibited; a decision by a decisionmaker; and the consequences of that decision.

Against this backdrop, the paradigm for legal reasoning involves comparing the facts of a case to the authoritative text of a rule and reaching a conclusion as to how the rule applies.<sup>72</sup> Sometimes, the facts fall within a rule’s widely accepted core meaning: if the speed limit on a road is thirty miles per hour, it does not require a detailed analysis to conclude that someone driving fifty is speeding. But for cases that fall within a rule’s perceived “penumbra,” the process is more complex. In a sense, rule-based reasoning is focused on the core of a rule’s meaning, and the other analytical techniques that law schools teach are tools for assessing the scope of the penumbra, and whether a particular set of facts falls within that shadow.<sup>73</sup> But regardless of debates about legal theory and the character of rules, rule-based reasoning is deemed central to legal analysis.

### III. The Essential Traits of Stories and Stock Stories

Beyond this understanding of governing rules, my thesis also requires an understanding of what we mean by *story* and *stock story*. Among literary narrative theorists, the precise definition of *story* is still very much in debate.<sup>74</sup> James Phelan and Peter Rabinowitz suggest that no definition

<sup>71</sup> See Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 12–18 (2d ed. 2003).

<sup>72</sup> For instance, as Michael Smith explains in his textbook on *Advanced Legal Writing*: “[l]egal disputes are resolved by looking at the relevant rule of law and precedent and applying these legal authorities to the facts of the present dispute.” Smith, *supra* n. 5, at 369.

<sup>73</sup> See e.g. Gardner, *supra* n. 36, at 7–9 (explaining that in legal argument, analogical reasoning is essentially a way of proving the minor premise of a syllogism).

<sup>74</sup> Abbott’s introduction to narrative provides a concise and lucid discussion of the central ideas and debates. See generally Abbott, *supra* n. 7.

is “best” because any definition will “highlight[] certain characteristics of individual narratives while obscuring and even effacing others.”<sup>75</sup> And yet one cannot effectively claim that something is (or is not) a *story* or *stock story* without a common understanding of what those words mean. For purposes of my thesis, the definitions matter: it is difficult to see the stock story embedded in a rule if one defines *story* narrowly and in a way that obscures a story’s essential traits, or if one focuses too much on the way a story is told and not on the story’s content.

The legal storytelling movements have taken different approaches to definitions. The scholarship on outsider stories was “undisciplined” in using key concepts, and terms like *story* were not defined.<sup>76</sup> Conversely, the definitions used in literature on storytelling in trial practice vary widely. At one extreme, practitioner-oriented materials might crudely define a story as “a drama about a person’s life involving a conflict between a hero and a villain.”<sup>77</sup> Robert Burns, on the other hand, characterizes trial narratives as “the story of events, actors, backgrounds, actions, and motives organically related to express a moral-political significance, a human meaning.”<sup>78</sup> Burns also offers a fairly complex explanation of *story* by the literary theorist Paul Ricoeur, but his focus is more on the effect of a story than on structure or strict definitions.<sup>79</sup>

Within the Applied Legal Storytelling movement, some scholars have defined *story*, but they have largely avoided work by literary theorists.<sup>80</sup> Instead, these scholars often rely on a definition offered by Kendall Haven, a self-described “master storyteller.”<sup>81</sup> I take yet another approach, choosing to identify the essential traits of a legal story by drawing quite selectively from the work of some literary theorists.

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<sup>75</sup> James Phelan & Peter J. Rabinowitz, *Narrative as Rhetoric*, in David Herman et al., *Narrative Theory: Core Concepts & Critical Debates* 3, 5 (2012).

<sup>76</sup> Jane B. Baron & Julia Epstein, *Is Law Narrative*, 45 *Buff. L. Rev.* 141, 145 (1997). That said, the purpose for which these scholars used stories did not require a precise definition: they were using stories to make a point, rather than examining the characteristics of stories or assessing whether a particular text counts as a story.

<sup>77</sup> Dominic J. Gianna & Lisa A. Marcy, *Winning in the Beginning by Winning the Beginning*, 39 *Brief* 40, 45 (2010).

<sup>78</sup> Burns, *Theory of the Trial*, *supra* n. 14, at 36.

<sup>79</sup> *Id.* at 50–52 (citing Paul Ricoeur, *The Narrative Fiction*, in *Hermeneutics and the Human Sciences* (John B. Thompson ed. and trans. 1981)).

<sup>80</sup> See Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 *Leg. Comm. & Rhetoric: JALWD* 81, 84–91 (2012) (summarizing relevant scholarship). Kiernan-Johnson advocates using the term *narrativity*, largely because Haven’s definition is narrow and the definitions used by literary theorists are unsettled. *Id.* at 81–82. But any definition of *narrativity* necessarily relies on the definition of *narrative*. See e.g. David Herman et al., *Routledge Encyclopedia of Narrative Theory* 387 (2005) (defining *narrativity* as “the set of properties characterizing narratives and distinguishing them from non-narratives”). Moreover, as H. Porter Abbott notes, *narrativity* itself “is a vexed issue,” and discussions of *narrativity* “can quickly become a tangled web.” Abbott, *supra* n. 7, at 25. Thus, while *narrativity* is a useful concept, it is not a substitute for *narrative* and *story*.

<sup>81</sup> See e.g. Chestek, *supra* n. 4, at 102; Johansen, *supra* n. 18, at 64.

Whatever else a story may be, it necessarily includes events and entities bound by a logical structure that qualifies as a “plot.”<sup>82</sup> Beyond that, a useful, working definition of *story* in a legal context should

- (1) distinguish between the substance of a story and the way the story is told,
- (2) include an expansive sense of plot,
- (3) recognize that the main “character” may be an inanimate object or idea, and
- (4) account for the storyteller’s audience and purpose.

This is not a complete account of a story: it ignores important issues in narrative theory, including focalization,<sup>83</sup> the role of time,<sup>84</sup> and so on.<sup>85</sup> Nonetheless, I rely on literary theorists because they offer valuable insights on the nature of stories.

The first trait may be the most crucial: a useful definition of *story* should distinguish between the content of a story and the way the content is expressed. The work of structural theorists is grounded in this distinction. Broadly speaking, they define *narrative* as the representation of events in any medium.<sup>86</sup> Every narrative, in turn, has two components: the *story* and the *narrative discourse* (or *discourse*). The *story* is a set of logically and chronologically related events caused or experienced by characters (or entities).<sup>87</sup> The *narrative discourse* is the manner in which the events, entities, and other elements of the story are presented.<sup>88</sup> The distinction between *story* and *discourse* is a distinction between content and form, or “plot and presentation.”<sup>89</sup> To paraphrase Seymour Chatwin, “the story is the *what*” a narrative depicts; the “discourse[,] the *how*.”<sup>90</sup>

<sup>82</sup> See Jonathan Culler, *Literary Theory: A Very Short Introduction* 84–85 (1997).

<sup>83</sup> Focalization refers to “the lens through which we see characters and events in the narrative.” It is similar to, but more precise than, the vague and often disputed notion of “point of view.” Abbott, *supra* n. 7, at 73–74. For a detailed discussion of the concept, see Mieke Bal, *Narratology: Introduction to the Theory of Narrative* 145–65 (3d ed., 2009).

<sup>84</sup> Gérard Genette, for instance, discusses the temporal qualities of narrative at length, principally in terms of order and duration. Gérard Genette, *Narrative Discourse: An Essay in Method* 33–112 (Jane E. Lewin trans., 1980).

<sup>85</sup> For a thorough discussion of narrative theory and narrative criticism in the context of law, see Binder & Weisberg, *supra* n. 13, at 201–91.

<sup>86</sup> See e.g. Abbott, *supra* n. 7 at 13–20; Seymour Chatman, *Story & Discourse: Narrative Structure in Fiction and Film* 19–20 (1978).

<sup>87</sup> My choice of words here borrows from Mieke Bal. Relying on Russian formalists, Bal suggests that a “narrative text” is composed of the “*story*” and the “*fabula*,” but she uses the term “story” differently than other theorists, and the term “fabula” does not correspond to discourse. In her analysis, the *fabula* is “a series of logically and chronologically related events that are caused or experienced by actors,” while the story is the “content of that text, and produces a particular manifestation, inflection, and ‘coloring’ of the *fabula*.” Bal, *supra* n. 83, at 5; see also Abbott, *supra* n. 7, at 241 (defining “story” as “a chronological sequence of events involving entities”).

<sup>88</sup> Abbott, *supra* n. 7, at 15–16.

<sup>89</sup> Culler, *supra* n. 82, at 81.

<sup>90</sup> Chatman, *supra* n. 86, at 19.

This framework was developed by theorists who study fiction but is equally useful for nonfiction. As Dorrit Cohn explains, a fictional text is a nonreferential (or self-referential) narrative: the text “creates” the world to which it refers by referring to it.<sup>91</sup> And whereas some elements of the story may be “true”—certain people or places may exist—in some important way the “world” of the story does not exist outside the text.<sup>92</sup> By contrast, a work of nonfiction refers to and is bounded by a world that exists independently from the text.<sup>93</sup> A work of nonfiction is thus subject to judgments about “truth” or “falsity,” but a work of fiction is not.<sup>94</sup>

In a legal context, the structuralist framework of *narrative*, *story*, and *narrative discourse* marks important and useful distinctions. Without those distinctions, it is more difficult to talk about how a lawyer might present differing versions of a single story in the same case. It is also more difficult to talk about the difference between the “brute facts” of a client’s case, the differing stories a lawyer might construct from those facts, and the way the chosen story is presented to a particular legal audience.

In the context of law, the story–discourse distinction reveals a critical truth. Within the constraints of a particular genre,<sup>95</sup> the author of a fictional work has considerable latitude to invent events, entities, and situations.<sup>96</sup> Lawyers, however, are bound by the evidence. And once a factual investigation is complete, the lawyer’s role is primarily a matter of shaping the *narrative discourse* through which a client’s story is told—a discourse that may differ sharply depending on the audience and the lawyer’s purpose. When competing lawyers craft different stories from the same body of evidence, they do so by making choices about the evidence and witnesses they will present, and the conclusions they will draw from these sources. But once a lawyer has decided which story to tell, such choices are a matter of *discourse* rather than *story*.

The practical value of the story–discourse distinction is evident in assessments of witness credibility. Whether a witness’s testimony is “true”

91 Dorrit Cohn, *The Distinction of Fiction* 9 (1999).

92 Cohn recognized, of course, that works of fiction need not be entirely self-referential and often refer to real people and real places while describing fictitious events. *Id.* at 15. For instance, Elliot Roosevelt, the son of Franklin D. and Eleanor Roosevelt, wrote a series of novels casting his mother as a crime-solving detective, with titles like *Murder in the Lincoln Bedroom*. Elliot Roosevelt, *Elliot Roosevelt’s Murder in the Lincoln Bedroom: An Eleanor Roosevelt Mystery* (2000). But while fiction can refer to the world outside the text, it does not do so exclusively, and references to that world “are not bound to accuracy” Cohn, *supra* n. 92, at 15.

93 *Id.* at 15–17.

94 *Id.* at 15.

95 The term *genre* is typically understood to mean a set of “narratives typically linked not only by formal conventions but also by a common purpose or social function.” Binder & Weisberg, *supra* n. 13, at 215. The concept is broader than *stock story*: a particular genre may encompass a number of stock stories.

96 See e.g. Charles McGrath, *Great Literature? Depends Whodunit*, N.Y. Times, <http://www.nytimes.com/2008/02/03/week-in-review/03mcgrath.html> (Feb. 3, 2008) (discussing the expectations of those who read genre fiction).

depends on whether the story's elements accurately refer to things in the world.<sup>97</sup> But in the absence of contradictory evidence, whether the testimony is "credible" is largely a function of discourse. Trauma survivors—including sexual-assault victims and refugees—often have difficulty telling their stories in a way that judges or juries would deem credible. If a witness is suffering from symptoms of trauma, the witness's story may be fragmented, repetitious, emotionless, nonchronological, and lacking in important details.<sup>98</sup> All of this is discourse rather than story, and none of it is a reliable indication of whether the story is true.<sup>99</sup>

Ultimately, the distinction between story and discourse matters because it underscores that stories may be found in unexpected forms and places. If we insist that stories must be told a particular way, we will find stories only where we expect them, and we may not see the stock stories embedded in governing rules.

The second trait is also crucial: a useful definition of *story* should include an expansive concept of "plot."<sup>100</sup> In a broad sense, a story's *plot* involves a narrative arc, a sequence of events with some sense of movement.<sup>101</sup> As Jonathan Culler puts it, the defining trait of plot is a transformation, and "a resolution that marks the change as significant."<sup>102</sup> While Aristotle identified six basic plots,<sup>103</sup> other theorists—most notably Vladimir Propp and Northrup Frye—have mapped a more complex range of plot typologies.<sup>104</sup> Gustav Freytag famously depicted the plot of a

<sup>97</sup> Philosophers refer to this premise as the "correspondence" theory of truth." John R. Searle, *Mind, Language and Society* 5, 12–15 (1998).

<sup>98</sup> See Judith Herman, *Trauma and Recovery* 175–81 (1997).

<sup>99</sup> The trial testimony of a woman who survived the 1911 Triangle Shirtwaist Company fire is potentially a striking example. During the criminal prosecution of the company's owners, Kate Alterman testified that a coworker died after unsuccessful attempts to open a locked fire door. On cross-examination, defense attorney Max Steuer asked Alterman to tell her story several times, and each time her testimony was highly repetitive and used turns of phrase that were inconsistent with her background as a working-class immigrant. Steuer later argued that Alterman's testimony had been coached, and the jury acquitted the defendants. There is no question that Steuer's cross-examination was quite skillful, but it is also quite possible Alterman was telling the truth. Given that Alterman had witnessed the horrific death of coworkers and narrowly escaped death herself, she was almost certainly suffering from serious psychological trauma. The fact that her testimony was repetitive and coached does not mean that the basic facts were false—if Alterman was suffering from trauma, it may not have been possible for her to testify otherwise. For a thoughtful discussion of Steuer's cross-examination of Alterman, see e.g. Ian Gallacher, *Thinking Like a Nonlawyer: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 Leg. Comm. & Rhetoric: JALWD 109, 133–39 (2011).

<sup>100</sup> For some literary theorists, a story does not necessarily include a plot. For instance, E.M. Forster insisted that "The king died, and then the queen died" is a "story" while "The king died, and then the queen died of grief" is a "plot" But as Chatwin and others suggest, our minds typically search for a plot even where one is not expressly provided. Given the statement, "The king died, and then the queen died," we are likely to infer a causal relationship unless we are told otherwise. Chatman, *supra* n. 86, at 45–56.

<sup>101</sup> Gerald Prince, *A Dictionary of Narratology* 73–74 (rev. ed., 2003) (defining "plot" and "plot typology"); see also Robbins, Chestek, & Johansen, *supra* n. 16, at 103–13 (discussing plot and conflict in the context of writing a brief).

<sup>102</sup> Culler, *supra* n. 82, at 84.

<sup>103</sup> See Chatman, *supra* n. 86, at 85.

<sup>104</sup> See Binder & Weisberg, *supra* n. 13, at 210–12 (discussing the concept of plot).



tragedy as a pyramid with rising and falling action, one that builds to a climax and ends in catastrophe.<sup>105</sup> Other writers conceive of plot as a sequence that proceeds from equilibrium through disruption to resolution,<sup>106</sup> and still others regard plot as any sequence of events with a causal relationship.<sup>107</sup>

In a legal context, a useful definition of story should not be bound by a narrow sense of plot, one limited to a particular narrative arc. The plot of a story about breach of contract may distinctly differ from the plot in a burglary case, which in turn may differ from the plots in a negligence case, a child-custody dispute, or a claim for asylum. Some scholars in the Applied Legal Storytelling movement have drawn valuable insights from plots that are common in classical mythology—“the archetypal hero’s journey,” for instance<sup>108</sup>—but the range of potentially useful plots is expansive.

The third essential trait of legal stories is straightforward: a useful definition of *story* should encompass stories in which the plot centers on an inanimate object or idea rather than a person or an entity capable of human-like action. As Derek Kiernan-Johnson emphasizes, the concept of “character” should be broad enough to include work by Linda Edwards and others who explore how lawyers and judges tell stories about the law itself.<sup>109</sup> It should also be broad enough to include stories in which the plot centers on real property, or on a tangible object such as a single printed copy of James Joyce’s novel *Ulysses*.<sup>110</sup>

Finally, a useful definition should account for a lawyer’s audience and purpose. As Kiernan-Johnson notes, lawyers and legal scholars are deeply “concerned with how a story is heard,” and are likely to focus less on “storytelling” than on “story making or story building.”<sup>111</sup> In other words, given the evidence, how does a lawyer effectively construct a story that best suits a client’s goals and the chosen strategy for achieving those goals?

105 See Prince, *supra* n. 101, at 36 (discussing Freytag’s pyramid).

106 See e.g. Binder & Weisberg, *supra* n. 13, at 209 (explaining that story is a sequence of events “in which some sort of equilibrium is first disrupted and then restored”).

107 See e.g. Robbins, Chestek, & Johansen, *supra* n. 16, at 46; Abbott, *supra* n. 7, at 41–44.

108 See e.g. Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 Seattle U. L. Rev. 767 (2006).

109 Kiernan-Johnson, *supra* n. 80, at 89; see also Linda H. Edwards, *Once Upon A Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 883 (2010).

110 One notable example involves the U.S. Government’s efforts to ban the sale of James Joyce’s novel. See *United States v. One Book Called Ulysses*, 72 F.2d 705 (2d Cir. 1934).

111 Kiernan-Johnson, *supra* n. 80, at 91.

In recent years, some scholars have adopted a rhetorical approach to narrative theory. James Phelan and Peter Rabinowitz view “narrative primarily as a rhetorical act rather than as an object.”<sup>112</sup> In that spirit, they define narrative to include the speaker, audience, and purpose: “Narrative is somebody telling somebody else, on some occasion, and for some purposes, that something happened to someone or something.”<sup>113</sup> The goals of these theorists mesh well with those of the Applied Legal Storytelling movement: Phelan and Rabinowitz are interested in the effects of narrative on the audience, and the ways in which a narrative is shaped to suit a particular audience and purpose.<sup>114</sup> But their definition is also too broad, because the phrase “something happened to someone or something” does not necessarily include a plot.

One alternative would be to fashion a definition from the structuralist and rhetorical strands of narrative theory with the addition of a broad sense of plot. By doing so, we might arrive at something like this:

- A narrative is someone communicating a story to someone else on some occasion for some purpose.
- A story is something that happened to someone or something, with results or consequences that are significant to the storyteller’s purpose.<sup>115</sup>
- The narrative discourse is the manner in which a story is presented, including the medium (oral or written), the selection of elements, the sequence in which the elements are presented, the level of detail, and the language by which the elements are described.

These definitions include the four essential traits just discussed, but they are only suggestions; other definitions might be equally useful.

By these standards, however, the definition often used in the Applied Legal Storytelling movement has certain shortcomings. In Kendall Haven’s view, a story is “[a] detailed character-based narration of a character’s struggles to overcome obstacles and reach an important goal.”<sup>116</sup> Haven’s

112 Phelan & Rabinowitz, *supra* n. 75, at 3.

113 *Id.* (emphasis omitted). Mieke Bal also includes the speaker and audience in her definition of narrative: “A narrative text is a text in which an agent or subject conveys to an addressee (‘tells’ the reader) a story in a particular medium . . . .” Bal, *supra* n. 83, at 5.

114 Phelan & Rabinowitz, *supra* n. 75, at 4–5.

115 As a test of this definition, consider the six-word story often attributed to Hemingway: “For sale: baby shoes, never worn.” See David Haglund, *Did Hemingway Really Write His Famous Six-Word Story?* [http://www.slate.com/blogs/browbeat/2013/01/31/for\\_sale\\_baby\\_shoes\\_never\\_worn\\_hemingway\\_probably\\_did\\_not\\_write\\_the\\_famous.html](http://www.slate.com/blogs/browbeat/2013/01/31/for_sale_baby_shoes_never_worn_hemingway_probably_did_not_write_the_famous.html) (accessed March 10, 2014). Though a reader is left to wonder precisely what happened, there’s no question that something happened to someone, and with consequences that evoke an emotional response.

116 Kendall Haven, *Story Proof: The Science Behind the Startling Power of Story* 79–80 (2007) (emphasis omitted).

concept of plot is narrow and value-laden; there are innumerable other plots a story might follow, even in law. For instance, before I began teaching, I litigated denaturalization and deportation cases against men who had assisted in Nazi persecution by serving as guards at Nazi concentration camps or members of Nazi killing squads. The law in those cases required the Government to tell a story about the defendant, but it was not a story that conformed to Haven's model.<sup>117</sup> In case after case, we told stories about the defendant's abhorrent behavior, and we rarely lost.<sup>118</sup> We also told stories about the victims of Nazi persecution and the U.S. Government's pursuit of justice. But the defendant was always the main character, the defendant's actions were always the central plot, and the stories of the victims were secondary.

Haven's definition also fails to distinguish between the substance of a story and the way the story is told—his demand for a "detailed" and "character-driven" account is a matter of discourse rather than story. The problem is that Haven is not trying to define story *generally*; instead, he aims to describe the stories that best suit his rhetorical purposes.<sup>119</sup> But if legal scholars wish to be interdisciplinary,<sup>120</sup> and to account for every story a lawyer might tell and the different ways of telling each story, Haven's definition will not suffice.

In their textbook on persuasive writing, Robbins, Chestek, and Johansen offer a modified version of Haven's definition: they define *story* as "[a] character-based and descriptive telling of a character's efforts, over time, to overcome obstacles and achieve a goal."<sup>121</sup> But this definition also does not embody the distinctions between *narrative*, *story*, and *narrative discourse*, and it continues to limit a story's plot to the character's active efforts to overcome obstacles and reach a goal.

117 In most of these cases, the Government was required to prove that the defendant "advocated or assisted in the persecution of any person because of race, religion, or national origin . . ." *E.g. United States v. Reimer*, 356 F.3d 456, 457–58 (2d Cir. 2004). The law thus required only that we establish the existence of victims. The stories of specific victims—for instance, the testimony of concentration-camp survivors—were useful but not legally required.

118 For an example of the story in one case I litigated, see *United States v. Kumpf*, 438 F.3d 785, 792 (7th Cir. 2006) (finding that a concentration-camp guard had assisted in Nazi persecution and was thus barred from admission to the United States). Our strategy was remarkably successful. The office in which I worked—the Justice Department's Office of Special Investigations—has been described "as the most active and successful" unit of its kind "in the world." United States Holocaust Memorial Museum, *Office of Special Investigations*, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007105> (accessed Mar. 10, 2014).

119 Haven, *supra* n. 116, at vii–viii, 18–19.

120 Haven's book is aimed at a lay audience, and at one point he dismisses, without comment, the writings of Claude Levi-Strauss, Noam Chom[|]sky, Vladimir Propp, Paul Ricoer, and Roland Barthes, among others. *Id.* at 19. For this reason, and some of the reasons mentioned in the text, Haven's definition may be viewed unfavorably by scholars in other disciplines.

121 Robbins, Chestek, & Johansen, *supra* n. 16, at 38. Chestek used the same definition in his most recent article. Chestek, *supra* n. 4 at 102.

Beyond the definition of story, my central thesis also requires careful thought about what we mean by *stock story*, a term legal scholars have used loosely but have not defined. Gerald Lopez introduced the concept in *Lay Lawyering*, the seminal 1985 essay in which he used stock stories about two people hailing a cab in Manhattan to illustrate how problem-solving by lawyers can be seen as “an instance of human problem-solving.”<sup>122</sup> As Lopez explained, a *stock story* is a kind of “knowledge structure,” one that “embod[ies] our deepest human, social and political values,” enables us to “interpret the everyday world with limited information,” and helps “us make choices about asserting our own needs and responding to other people.”<sup>123</sup> A stock story thus enables us to “carry out the routine activities of life” without constantly analyzing or questioning what we do.<sup>124</sup>

The problem is that Lopez did not distinguish between knowledge structures that meet the requirements of a story and those that do not—perhaps because he drew his ideas from the social sciences.<sup>125</sup> Without defining “story,” Lopez wrote interchangeably about “stock stories” and “stock structures”—the second term a much broader concept that includes “stock characters,” “stock theories,” and various sorts of “scripts” and “schemas.”<sup>126</sup> But the terms are not interchangeable: all stock stories are stock structures, but the great majority of stock structures do not meet the requirements of a story.

Writing a few years later, Stephen Winter used the term “idealized cognitive model” (ICM) to broadly describe stock knowledge structures.<sup>127</sup> For Winter, an ICM is a “cultural model”<sup>128</sup> we use to organize knowledge, and the concept is broader than a stock story. For instance, the words *bachelor* and *lie* (in the sense of making a false statement) each embody an ICM.<sup>129</sup> Winter noted that the concept of an ICM and Lopez’s account of stock stories both draw from the same social-science research,<sup>130</sup> but he did not define *stock story*, either, and every subsequent use of the term in

122 Lopez, *supra* n. 8, at 2.

123 *Id.* at 3 n. 1.

124 *Id.* at 3.

125 *Id.* at 3 n. 1, 5 n. 3–4 (listing sources).

126 *Id.* at 3 n. 1, 5. In his essay, Lopez focused on two distinct “stock stories”—the “grab-a-cab story,” which describes the process of hailing a taxi, and the “first-in-time story,” which dictates who gets a taxi if more than one person wants it. *Id.* at 5–7.

127 Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1152–53 (1989).

128 *Id.* at 1152.

129 *Id.* at 1153–54.

130 *Id.* at 1152 n. 145.

legal scholarship harkens back to Lopez or the social-science literature on which he and Winter relied.<sup>131</sup> And, like Lopez, the authors of both textbooks<sup>132</sup> and law-review articles<sup>133</sup> have often used “stock story” interchangeably with terms that refer to other types of knowledge structures.

The concept of a *stock story* is too valuable to use loosely, and a more precise definition is needed. In his *Dictionary of Narratology*, Gerald Prince does not define *stock story*, but his definitions of *stock character* and *stock situation* are instructive. A stock character is a recurring character, a conventional *type* that has few attributes and embodies a particular quality or role.<sup>134</sup> Similarly, a stock situation is a conventional situation, “a standard set of states and events” that can range from the particular (“the birthmark that reveals kinship”) to the more general (“the rags-to-riches” plot).<sup>135</sup>

A stock story, then, is a conventional story type, a story stripped of all but essential details. The key elements of the story—events, entities, and consequences—are stated generally, and are thereby reduced to stock structures (a stock character, for instance) or to an idealized cognitive model. A stock story is a recurring story template or “story skeleton,”<sup>136</sup> a model for similar stories that will be told with differing events, entities, and details. In literature, the Cinderella story and the Horatio Alger rags-to-riches story are classic examples.<sup>137</sup>

This understanding of *stock story* is independent of the way *story* is defined. The essential point is that the events, entities, and plot are expressed in *general* terms, and the logical relationship between the elements remains intact. In a sense, a stock story is an archetype, but not necessarily an archetype that draws from classical mythology.<sup>138</sup> As the

131 Richard Delgado used the term in a different way. In the context of struggles for racial reform, Delgado set out to show how stories construct reality, and to explain how the counter-stories of social “outgroups” can challenge a society’s “received wisdom.” Delgado, *supra* n. 23, at 2412–13. For Delgado, a society’s “stock stories” are stories told by the dominant group, the mindset by which that group’s members “justify the world as it is, that is, with whites on top and browns and blacks at the bottom.” *Id.* at 2413.

132 A recent textbook on persuasive writing, for instance, informs students that “stock structures” are “sometimes called ‘stock stories,’ ‘idealized cognitive models,’ or ‘schema.’” Ruth Ann Robbins, Steve Johansen, & Ken Chestek, *supra* n. 16, at 61. Another textbook uses the term “schema” to refer to these cognitive blueprints, but adds in a footnote that “‘schemas’ have also been termed ‘frames,’ ‘scripts,’ and ‘stock stories.’” Stephen Krieger & Richard K. Neumann Jr., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, & Persuasive Fact Analysis* 141 n. 4 (4th ed., 2011).

133 See e.g. Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client’s Case*, 34 *Hastings Commun. & Ent. L.J.* 187, 188 (2012); Steven J. Johansen, *supra* n. 18, at 63, 86; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *Leg. Writing* 53, 70 (2008); Robbins, *supra* n. 28, at 14 (2008).

134 Prince, *supra* n. 101, at 92, 103 (defining “stock character” and “type”).

135 *Id.* at 92 (defining “stock situation”).

136 The term “story skeleton” was proposed by Roger Schank. Roger C. Schank, *Tell Me A Story: Narrative and Intelligence* 147–88 (1990).

137 See Abbott, *supra* n. 7, at 46–48.

distinction between *story* and *narrative discourse* makes clear, a story can be told in many different ways. And in the context of law, a stock story can—and often does—take the form of a governing legal rule.

#### IV. A Governing Legal Rule Has the Structure of a Stock Story

Each concept—narrative reasoning, rules, stories, and stock stories—is tied directly to two parts of my thesis: one, that governing rules have the structure of stock stories; and, two, that narrative reasoning should be redefined—the analytical moves we typically label as rule-based reasoning are often a form of narrative reasoning.

Among both lawyers and scholars, the dominant view holds that rules are not narratives, and that they each belong to a different way of reasoning.<sup>139</sup> But do they? A careful reading of the process by which judges make common-law rules implies otherwise. In *An Introduction to Legal Reasoning*, Edward Levi described that process,<sup>140</sup> one that Robert Cover called *jurisgenesis*.<sup>141</sup> As Levi explained,

The basic pattern of legal reasoning . . . is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar fact situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.<sup>142</sup>

That is one way to describe *jurisgenesis*, but Levi's account can easily be reframed as a lesson about the creation and use of stock stories. Stated in those terms, the process involves stripping the story in the first case to its bare elements, stating those elements generally, and then comparing the resulting stock story to the story in the second case.

Linda Edwards is more explicit about the role of stories in the creation of common-law rules. After delineating the difference between rule-based and narrative reasoning, Edwards suggests that common-law rules are

<sup>138</sup> The term *archetype* is often associated with "journey stories" and other common plot structures in mythology. See e.g. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 883, 886–91 (2010). More broadly, an archetype is simply "[a] basic model from which copies are made; therefore a prototype." J. A. Cuddon, *The Penguin Dictionary of Literary Terms and Literary Theory* 53 (C.E. Preston, ed., rev. 4th ed. 1999).

<sup>139</sup> Edwards, *supra* n. 9, at 27.

<sup>140</sup> Edward H. Levi, *An Introduction to Legal Reasoning* 2–6 (1949).

<sup>141</sup> Cover, *supra* n. 32, at 4.

<sup>142</sup> Levi, *supra* n. 140, at 1–2.

often the “product” of a narrative in which some aspects of the story are omitted while others are “given legal significance.”<sup>143</sup> As Edwards explains, the rule thus created “provides evidence of its narrative origin by its presentation in a causistic ‘if-then’ structure, a blatantly narrational form.”<sup>144</sup>

In a sense, I am simply picking up the point Edwards made and carrying it a large step farther. A governing rule created by this process does not simply provide evidence of its narrative origin: *it is, in fact, still a narrative*. The essential traits of a governing rule directly correspond to the essential traits of a stock story. Each consists of elements, including entities, things, events, or circumstances. The elements are expressed in general terms and have a logical relationship. And in each case, there is a plot: for governing rules, a legal result; for stock stories, a significant consequence.

Once one has learned to look for the stock story in a governing rule, the story embedded in some rules seems obvious. For example, consider this sentence:

A person was convicted of burglary after he broke into and entered the dwelling of another in the nighttime with the intent to commit a crime therein.

We might long for more detail, but the sentence is a *stock story*: it includes a plot (the conviction follows from the entry), and the essential elements of the story (events, entities, etc.) are each stated generally, as a type rather than a specific person, entry, or dwelling. A lawyer will also recognize that the sentence incorporates the common-law rule for burglary.

The same points are true when a governing rule is codified as a statute. Consider, for instance, the statutory rule for third-degree burglary in New York state: “A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.”<sup>145</sup> The following chart maps the rule’s text to the elements of the stock story embedded in the rule:

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<sup>143</sup> Edwards, *supra* n. 9, at 42.

<sup>144</sup> *Id.* at 21.

<sup>145</sup> N.Y. Penal L. Ann. § 140.20 (WL current through L.2014, chapters 1 to 3).

### Chart 1: Third-Degree Burglary in New York State

| Rule Text                                 | Story Element   |
|---|---|
| A person                                  | The main character  |
| is guilty of burglary in the third degree | A consequence, and both an implied character and an implied event |
| when                                      | A logical connector that introduces an if–then structure          |
| he  | The main character  |
| knowingly                                 | The character’s state of mind                                     |
| enters or remains                         | The character’s act; an event caused by the character             |
| unlawfully                                | A trait of the preceding event                                    |
| in  | A logical connector   |
| a building                                | A setting or thing  |
| with                                      | A logical connector   |
| intent to commit a crime therein          | The character’s state of mind, and an intended event              |

New York’s statutory rule for third-degree burglary thus meets the requirements of a stock story: the rule includes characters (the burglar and the decisionmaker), at least two events (the act of entering or remaining and the judgment), and a consequence (the conviction). There is also a plot: the elements are logically related, and the conviction follows directly from other elements. One might also say that the act of entering or remaining in a building unlawfully is a disruption of equilibrium, the conviction a resolution.

The logical relationships are encoded in the rule’s language and grammatical structure. In some instances, the relationship is signified by a specific word. In the New York burglary statute, for instance, the preposition “in” signifies the relationship between an event (entered or remained) and the setting (a building). In other instances, the relationship is signified by the rules of grammar. For example, the logical relationship between the character (“a person”) and an event (“entered or remained”) is evident from the subject–verb relationship of the relevant words.

But what happens if the legal result is removed: is the remaining text still a story? Without the result, the statute reads, “A person knowingly enters or remains in a building unlawfully with the intent to commit a crime therein.” Thus altered, the statute is merely the description of an event and not a *story*. The absence of a plot is striking, and a reader might well ask, “But what happened next?”

For the burglary statute, then, the legal result is essential to the story, and the story is not complete until a decisionmaker has ruled. But there



are governing rules for which a complete story exists without the legal result. Consider this statement of the common-law rule for negligence, in which the result is italicized:

*“To establish a defendant’s negligence, a plaintiff must show the existence of a duty, a breach of that duty, and that the breach was a proximate cause of the plaintiff’s injury.”*<sup>146</sup>

If the result is omitted, the remaining text is still a story. There are two characters (plaintiff and defendant), and an event (the acts or omissions of the defendant). There is also a plot—the causal relationship between defendant’s conduct and plaintiff’s injuries.

Though these governing rules are different, the burglary rule is not something less than a stock story simply because the legal result is essential to the plot. The difference lies in the posture of the story when a complaint or indictment is filed. For the burglary rule, the story is in progress, and the trier of fact must decide *how the story will end*. For the negligence rule, a complete story has already happened, and the trier of fact must decide *whether the ending should be changed*. In either case, there has been a disruption of some equilibrium, and the legal result marks the final resolution.

The stock stories in the burglary rule and the negligence rule are relatively easy to see. For other governing rules the story is harder to find, and the relationship between the plot and the legal result may be strikingly different. For the burglary rule, the conviction follows from prior events in an if–then causal relationship. And though the conviction itself has consequences (for instance, they defendant may be incarcerated), they are not part of the rule or the stock story.

But some legal rules are forward-looking, and the legal result is more concerned with future consequences than with past events. For such rules, the embedded stock story is not so much a story about things that have happened, but a story about things that *might* happen if the court rules a particular way. The “best interests” standard in child-custody disputes is one example. The law varies from state to state, but the following summary of California law on custody determinations in divorce cases provides a useful example:

In a divorce proceeding, “the court has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning ... [t]he custody of minor children of the marriage.”<sup>147</sup> In doing so, welfare

146 *Solan v. Great Neck Union Free Sch. Dist.*, 842 N.Y.S.2d 52, 53 (App. Div. 2d Dept. 2007) (citations omitted) (emphasis added).

147 Cal. Fam. Code Ann. § 2010 (WL current with urgency legislation through Ch. 3 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot).

of children shall be the court's primary concern in determining the best interest of children."<sup>148</sup>

The statute also lists factors to be considered in assessing a child's best interests, including the health, safety and welfare of the child, a history of physical abuse or substance abuse by either parent, and the character of the child's contacts with each parent.<sup>149</sup>

At first glance, the stock story embedded in these rules may not be obvious. But as narrative theory teaches, a story consists of certain elements—events, entities, and a plot—while the narrative discourse, the manner in which a story is expressed, can vary enormously. The embedded story may be easier to see if the child custody rule is expressed like this:

In a divorce proceeding, a court may grant custody to either parent, or to both parents jointly, if it would be in the child's best interests to do so.<sup>150</sup>

Regardless of how the rule is stated, it embodies the essential traits of a stock story. There are four characters—a child, two parents, and the court. There is an event and a plot: a significant change in circumstances will follow from the court's decision. And while the "best interests" standard is broad and vague, it necessarily implies both prior events (for instance, the child's contacts with each parent) and possible future events that may affect the child's welfare.

The forward-looking nature of the rule and the "best interests" standard vastly expand the range of stories the parties might tell, but the rule still embodies a stock story, no less so than the burglary rule or the Horatio Alger in literature. In a sense, the stock story embedded in the child custody rule might be characterized as a kind of "speculative fiction," in which the parties extrapolate from established facts into an imagined future. As a practical matter, it would be impossible for a lawyer to predict the court's decision or make an argument for a particular result without telling a story. The rule demands a story, and the only questions are what story the lawyer will tell, and how that story might be told most effectively.

Once one understands both the essence of a story and the distinction between *story* and *discourse*, one can see the stock story embedded in any governing legal rule. For instance, Ken Chestek has written about the

<sup>148</sup> Cal. Fam. Code Ann. § 3020(a) (WL current with urgency legislation through Ch. 3 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot).

<sup>149</sup> Cal. Fam. Code Ann. § 3011 (WL current with urgency legislation through Ch. 3 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot).

<sup>150</sup> For simplicity, this version omits the possibility that custody may be awarded to someone other than the parents. See Cal. Family Code § 3041 (West).

stories told by litigants who argued that a particular federal statute violated the Commerce Clause.<sup>151</sup> The legal rules in these cases form a stock story about the constitutional authority of Congress, the enactment of a statute beyond that authority, and the legal impact of that event. And if a court dismisses a case for lack of standing, it simply means the plaintiff is not a character in the story demanded by the rule.

## V. Narrative Reasoning Redefined

The second part of my thesis follows from the first. If governing legal rules have the structure of stock stories—if those rules are, in fact, a form of narrative—then the concept of narrative reasoning must be redefined. Following Edwards, legal scholars have treated narrative reasoning as a discrete strand of analysis, one separate from reasoning based on rules, analogies, policy, or custom.<sup>152</sup> But narrative reasoning is better understood as a meta-category of reasoning, one that cuts across traditional boundaries.

The perceived dichotomy between rule-based reasoning and narrative reasoning has deep roots. In *Actual Minds, Possible Worlds*, psychologist Jerome Bruner suggests that there are two distinct modes of cognitive function, each of which orders experience in different ways. The “paradigmatic or logico-scientific” mode, he explains, “attempts to fulfill the ideal of a formal, mathematical system of description and explanation. It employs categorization . . . and the operations by which categories are established, idealized, and related one to the other to form a system.”<sup>153</sup> The “narrative mode,” on the other hand, “deals in human or human-like intention and action and the vicissitudes and consequences that mark their course.”<sup>154</sup> In Bruner’s view, the two are complimentary, but “[e]fforts to reduce one mode to the other or to ignore one at the expense of the other inevitably fail to capture the rich diversity of thought.”<sup>155</sup>

The prevailing view would place rule-based reasoning entirely within the paradigmatic mode, and narrative reasoning entirely within the narrative mode, thereby drawing a sharp line between the two forms of reasoning. But if governing legal rules embody stock stories, this dichotomy does not fit what lawyers do when they apply a governing rule

151 See Chestek, *supra* n. 4 at 105–09.

152 See *supra*, nn. 38–44 and accompanying text. *But see* DeSanctis, *supra* n. 6, at 171 (suggesting that analogical reasoning “does not mark an analytic space where narrative is absent”).

153 Jerome Bruner, *Actual Minds, Possible Worlds* 12 (1986).

154 *Id.* at 13.

155 *Id.* at 11.

to a set of facts and reach a conclusion. In a legal context, the concept of narrative reasoning is better understood to be *a process of systematically comparing and contrasting narratives for the purpose of reaching a conclusion*, either about what the law is (or should be) or how the law applies to a given set of facts.

This broader idea of narrative reasoning is inspired by the work of Robert Bullough and Kerrie Baughman on the use of stories in teacher development.<sup>156</sup> In that context, teachers compare and contrast their stories with those of other teachers to seek insights into their identity and professional development. The act of narrative reasoning is a source of self-knowledge, a way for teachers to talk about who they are and who they wish to be.<sup>157</sup>

When narrative reasoning is used in law, the purposes and conclusions are different, but the process likewise centers on a systematic comparison between stories. Narrative reasoning encompasses several different analytical moves, depending on one or all of these factors: whether a client's story is compared to and contrasted with the stock story embedded in a governing rule (a type of rule-based reasoning), the story in a previously decided case (a type of analogical reasoning), a story about the social impact of a rule (a type of reasoning based on policy or custom), or the social and moral values embedded in a cultural narrative ("narrative reasoning" as Edwards defined it). The following charts illustrate the point: the first reflects the standard view of narrative reasoning, while the second reflects my proposed redefinition.

### Chart 2: Five Strands of Legal Reasoning (following Edwards)

Rule-based reasoning

Analogical reasoning

Policy-based reasoning

Constructive normative reasoning (custom)

**Narrative reasoning**

<sup>156</sup> See Robert V. Bullough Jr. & Kerrie Baughman, *Narrative Reasoning and Teacher Development: A Longitudinal Study*, 26 Curriculum Inquiry 385 (1996) [hereinafter *Narrative Reasoning*]; Robert V. Bullough Jr. & Kerrie Baughman, *Thinking about "Thinking about 'Narrative Reasoning'": A Rejoinder to Annie Davies*, 28 Curriculum Inquiry 485 (1998); see also Max van Manen, *Pedagogy, Virtue, and Narrative Identity in Teaching*, 24 Curriculum Inquiry 135 (1994).

<sup>157</sup> Bullough & Baughman, *Narrative Reasoning*, *supra* n. 156, at 389–90.

### Chart 3: Five Strands of Narrative Reasoning

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*The facts of a case are compared to and contrasted with*

- A story      embedded in a governing rule
- A story      in an factually analogous court decision
- A story      about public policy
- A story      about social custom
- A story      about cultural and moral values

As redefined here, narrative reasoning is arguably the dominant mode of thinking about the law. If types of legal reasoning are stratified, it is not a hierarchy that places rule-based reasoning at the top and narrative reasoning at or near the bottom. It is, instead, *a hierarchy among different types of stories*, in which the top position is occupied by the stock stories embedded in governing rules. Such stories carry more weight than the stories in analogous court decisions, which in turn carry more weight than stories about policy, custom, or a particular group's cultural and moral values.

Once we learn to see narrative reasoning in this way, it becomes possible to find stories at work in unexpected places. Levy's analysis of *jurisgenesis* can be read as a lesson in the creation and use of stock stories: each step of the process involves comparing stories to reach a conclusion. The same could be said for Langdell's case method of teaching. In a sense, that method asks students to derive a stock story from prior cases and to reach legal conclusions by comparing the stock stories to the stories in yet further cases.

When a society creates general rules of social obligation, whether by statute or common law, it attempts to force real-life stories, with all of their messy details, into the paradigmatic mode of thinking. But the resulting rules still embody stock stories, and they can be satisfied only by telling a story. The Pythagorean theorem<sup>158</sup> is a rule about the three sides of a right triangle, and it cannot be applied to circles or squares. In the same sense, a governing legal rule is a rule about stories, and it cannot be applied to something that is not a story.

## VI. Conclusion

Many lawyers and legal scholars have long understood that stories are important to the practice of law. If nothing else, this article offers a novel

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<sup>158</sup> The Pythagorean theorem describes the mathematical relationship between the sides of a right triangle. See Alexander Givental, *The Pythagorean Theorem: What Is It About?* <http://math.berkeley.edu/~giventh/papers/eu.pdf> (accessed Mar. 12, 2004).

explanation as to *why* that is true, one grounded in both legal and literary theory. Stories and storytelling have deep roots in the nature of law itself, and the growing body of scholarship on applied legal storytelling cannot be dismissed or belittled with the charge that the work is merely practical rather than theoretical. This article also raises more questions than it answers. Readers may wonder, for instance, what the thesis means for legislative drafting or procedural rules, or how the analysis might apply to conflicting common-law rules or to particular areas of law, such as secured transactions. As noted at the outset, I intend here to open new fields for inquiry without attempting to map the terrain. But I do offer a few closing insights for scholars, practitioners, and law teachers.<sup>159</sup>

Though governing rules have the structure of stock stories, we should not forget that rules are much more than stories: they are an embodiment of social and political power, an expression of will and command. As Robin West cautions, the adjudication of legal disputes is not primarily an interpretative act. Instead, adjudication is an “imperative” act, one that has more in common with “the commands of kings . . . than it has with other things we do with words, such as create or interpret novels.”<sup>160</sup> Legal rules may embody a stock story, but they do so for a very particular purpose.

I have described stock stories without reference to the “author,” but the creation of stories is not a passive act. As Richard Delgado suggests, stories are told by particular social groups for particular purposes, and the stories told by a socially dominant group will differ from those told by outsiders.<sup>161</sup> The act of creating a story invests the story with meaning, with social assumptions as well as moral and cultural values. As Gerald Lopez noted, “stock stories embody our deepest human, social and political values.”<sup>162</sup> The same is true for governing legal rules.

All narratives, whether fiction or nonfiction, are necessarily incomplete. A recent reprint of Tolstoy’s *War and Peace* runs to 1300 pages,<sup>163</sup> but it recounts only a fraction of the events, characters, and things that comprise the full story suggested by the actual text. The process of storytelling is one in which the *author*<sup>164</sup> must choose which events, characters, and things to include. If the story is conveyed in

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<sup>159</sup> The author is especially grateful to John Schlegel and Guyora Binder for the conversations and comments that inspired many of the thoughts in this section.

<sup>160</sup> Robin West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 *Tenn. L. Rev.* 203, 207 (1987).

<sup>161</sup> Delgado, *supra* n. 23, at 2411–16.

<sup>162</sup> Lopez, *supra* n. 8, at 3.

<sup>163</sup> The 2008 Vintage Classics reprint edition is 1296 pages. Leo Tolstoy, *War and Peace* (2008).

<sup>164</sup> Narrative theorists take great pains to distinguish the *author* of a story from the story’s *narrator*. As Mieke Bal notes, “[t]he narrator of *Emma* is not Jane Austen.” Bal, *supra* n. 83, at 15.

language, the author must also choose the words by which those elements are described.<sup>165</sup> A story's meaning is encoded in large part through this process of selection and description. The same is true for the process of creating a governing rule, regardless of whether the rule's "author" is a court or a legislature.

As Linda Edwards astutely explained, governing legal rules are the product of a narrative in which some aspects of the story are omitted while others are "given legal significance."<sup>166</sup> At common law, this process begins with the story before the court. In *Dillon v. Legg*, for instance, the California Supreme Court crafted a rule about a bystander's ability to recover for the negligent infliction of emotional distress after considering a particular story in which a mother witnessed her daughter's death at the hands of a negligent motorist.<sup>167</sup> But statutory rules are also the product of stories. New York's statutory right of privacy<sup>168</sup> was enacted after the New York Court of Appeals refused to provide a remedy to a woman whose picture had been used in advertisements for flour without her consent.<sup>169</sup> And even when legislators do not draft a statute with a particular story in mind, they nonetheless think about the sorts of stories that will ultimately come before the courts.

In a recent student note, Jessica Mayo explores the "victim narrative" in U.S. asylum law, and how narratives crafted by lawyers intersect with both the law and the lived experience of asylum applicants. Mayo describes that experience as "an impossibly complex tangle of different points of view, stream-of-consciousness reactions, and limited perception."<sup>170</sup> The client's story will often "be disjointed and non-chronological," and the lawyer's task is to shape the story "into a coherent narrative that fits the framework" of asylum law.<sup>171</sup>

The task of doing so is a matter of shaping not the *story*, but the *narrative discourse*. And the challenges faced by the lawyer are complicated by the stock story embedded in asylum law's governing rules. As Mayo explains, asylum law requires a "certain homogenization of claims" and appears to reward an "iconic" victim. The law thus pressures

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<sup>165</sup> See e.g. Robbins, Chestek, & Johansen, *supra* n. 16, at 47, 50, 130–31 (discussing the description and selection of details as a storytelling technique).

<sup>166</sup> Edwards, *supra* n. 9, at 42.

<sup>167</sup> *Dillon v. Legg*, 68 Cal. 2d 728 (1968).

<sup>168</sup> N.Y. Civ. Rights L. Ann. §§ 50, 51 (WL current through L. 2014, chapters 1 to 3).

<sup>169</sup> See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

<sup>170</sup> Jessica Mayo, Student Author, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 Wash. U. L. Rev. 1485, 1496 (2012).

<sup>171</sup> *Id.* at 1504–05.

applicants to assume a victim identity, “an ‘extremely limiting’ role that ‘leaves no room for any other features of an person’s identity,’”<sup>172</sup> including the applicant’s courage and hopes for the future. It also demands that the applicant take an adversarial stance toward the country of her nationality.<sup>173</sup> All of this, and more, was embedded in asylum’s governing rules—in asylum law’s *stock story*—through the process of selection and description.

It is commonplace to suggest that the “success” (or even the “genius”) of Western democracies depends heavily in their commitment to the “rule of law,” to the idea that law is a formal system of rules.<sup>174</sup> The professional identity of lawyers and law teachers is also bound up in this concept.<sup>175</sup> We believe that law operates primarily in the paradigmatic mode and that this way of thinking is what lawyers do foremost and best. Lawyers typically do not think of themselves as professional storytellers. To do so would—in the conventional view—devalue what lawyers do, and perhaps also undermine the conventional justifications for law’s authority. But even there, on the question of law’s legitimacy, there are stories. As Guyora Binder and Robert Weisberg emphasize, legal authority is grounded in narrative, and law must become narrative “when we ask the most fundamental questions about its legitimacy.”<sup>176</sup>

The art of practicing law well demands considerable skill with stories, and not merely when lawyers are making persuasive arguments. The specialized knowledge of lawyers includes the ability to identify an authoritative legal text, and to understand how and why the text is authoritative. But a competent lawyer must also understand the type of story the text demands and must see the stock story embedded in the rule as well as in the values and assumptions the story encodes. A lawyer must also see the different stories that might be fashioned from the evidence, choose an effective story, and assess the best way to present that story to a particular audience—the best way to shape the story’s narrative discourse. The

172 *Id.* at 1505 (quoting Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 290).

173 *Id.*

174 In a message to members of the Colorado Bar, for instance, the president of the state’s bar association wrote, “The genius of our system of government is not in having a democracy, but rather in having a constitutional democracy, based on the rule of law.” Steve C. Briggs, *Colorado Bar Association President’s Message to Members: Separation of Powers, the CBA, and the LPC*, 33 Colo. Law. 23 (2004).

175 Binder and Weisberg observe that “[w]hen lawyers and legal scholars liken law to narrative, they are offering what a linguist might call a performative remark—they are not so much describing law as they are dramatically presenting themselves as having a particular moral character with respect to law.” Binder & Weisberg, *supra* n. 13, at 202. But it is also true that when lawyers and legal scholars talk about “the rule of law” or describe their work as being grounded in logic rather than narrative, they are saying as much about themselves as they are about law.

176 *Id.* at 282.



lawyer's task is to construct and tell a story that conforms to the stock story in the rule, furthers the client's goals, refutes competing stories, and, when possible, preserves the client's sense of identity and well-being.

Stories thus lie at the very heart of law. They are not secondary to rules, nor are they simply (or even principally) a tool for persuasion. Though law students may balk at the idea— they expect to learn about rules, rather than stories—it is not an exaggeration to suggest that the skills taught by law schools have as much to do with narrative and stories as they do with logic and rules. If the law is made of *both* stories and rules (and it is), those who practice, teach, and write about law must think still more deeply about the role of stories in law and legal practice.