THE CONVERGENCE OF ANALOGICAL AND DIALECTIC IMAGINATIONS IN LEGAL DISCOURSE

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I. INTRODUCTION

The dialogue over the role of narrative in the making and interpreting of law and in legal practice is often stalemated by a failure to appreciate the complex and sometimes subtle relationship between narrative and other forms of legal reasoning. Does narrative theory regard narrative and rules as polar opposites? Does it assert that judges create law simply by picking the story that most appeals to that particular judge, without measuring it against an articulated standard? Does it assert that lawyers can win cases by presenting a sympathetic story, without regard for the governing rule of law? If so, the notion is unsettling in the extreme, and it is no wonder that conversations about narrative and law are so difficult.

Law is not the only discipline in which rules and stories have sometimes failed to communicate. Literary critic Andrew M. Greeley, speaking about religious heritage, refers to the distinction between the "poetic" (by which he means narrative) and the "prose" (by which he means doctrinal):

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> A heritage contains many different versions of its story; it is convenient for my purposes to group them (or most of them) under the headings of the poetic and the prose traditions or the popular and the high traditions. The former is the tradition of experience and story, the latter the tradition of catechism and creed. The former may be relatively unreflective or may have been subjected to reflection between the first and the second naiveté. It is the tradition that shapes the world view of ordinary people, has a logic and structure of its own, and at various times and places may have only a tenuous connection with the high tradition — often because only a tenuous connection is either possible or necessary (in the era, for example, when most Christians were illiterate peasants living in isolated villages).
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> The latter is the version of the story told by religious adepts, leaders, thinkers teachers, philosophers, and theologians. It is systematic, rationalized (given its first principles), elaborate, detailed, reflective, precise, prosaic, and formal. It may often be boring but it is necessary and not merely a necessary evil, necessary because humans must reflect on their experiences and find (what seem to be) rational grounds for accepting them. It is also necessary so that some group of deputized decision makers within the community have final authority to determine whether a given version of the story is truly compatible with the heritage. To put the matter somewhat differently, the two traditions must critique one another; the popular tradition will critique the high tradition for what often seems its bloodlessness and arid rationality, and the high tradition will critique the popular tradition for its wildness, its unrestrained emotion, its transient and self-deceiving enthusiasm. Without the watchful guidance of the high tradition, the popular tradition may slip over the boundaries that separate religion from magic; in the absence of the energy and vitality of the popular tradition, the high tradition will find itself talking to empty churches or meeting houses.[1]

Greeley links the poetic and the prose traditions to David Tracy's[2] "analogical" and "dialectic" imaginations.[3] Analogical imagination finds meaning in story and metaphor.[4] Dialectic imagination

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[1] Andrew M. Greeley, RELIGION AS POETRY 49 (1995).

[2] David Tracy, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM (1981).

[3] Greeley, *supra* note 1, at 50-51 (1995).

[4] Tracey uses both "dialectic" and "analogical" more broadly than their standard meanings would support. His use of "analogical" is not to be confused with the analogical reasoning of the law, as described in Section II. By "dialectic," Tracy means not only the reconciliation of thesis and antithesis, but more generally linear, logical

is suspicious of meaning found in story and metaphor, preferring instead meaning found from systematic reasoning, particularly through juxtaposition of theses and antitheses. Greeley's point, and the point of this article, is that poetry and prose (stories and rules) must remain in constructive relationship with each other. Rules restrain narratives; narratives restrain rules. Each needs the insight of the other.

This article explores the relationship between narrative and other forms of legal reasoning. It first examines the role of narrative in law creation — in how judges decide questions of law. What is the jurisprudential relationship between narrative on the one hand and rules, precedents, norms and policies on the other? Next, the article discusses the role of narrative in legal hermeneutics. How does the theoretical, jurisprudential role of narrative in law creation implicate what practicing lawyers *do* with rules and how lawyers *use* rules in a particular case? Finally, the article explores the place of narrative in law study. Where and how, in legal education, should narrative thrive?

II. THE ROLE OF NARRATIVE IN JURISGENESIS: IS THERE A NET ON THIS COURT?[5]

A. STRANDS OF LEGAL REASONING[6]

Law is created by evaluating the litigant's story against something outside itself — perhaps a rule, a line of authorities, a set of norms or policies. In other words, the stories of litigants must be judged by external criteria that offer some assurance of a result that is reasoned, fair, functional, and consistent with moral values and meanings. To generate the appropriate external criteria for a particular dispute, judges use at least five forms of reasoning: rule-

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analysis based on articulated principles. By "analogical," he means the use of imagery to approximate truths and values which cannot be precisely expressed without distortion.

[5] Use of this metaphor, in reference to free verse, has been attributed to Robert Frost: "I've given offense by saying I'd as soon write free verse as play tennis with the net down." John Bartlett, FAMILIAR QUOTATIONS 625 (1992). The rhetorical structure is borrowed from Stanley Fish, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

[6] The term "reasoning" is used broadly in this article to encompass its pre-enlightenment meaning. The older concept of "reason" employed here embraces the full scope of human capacity for discerning truth and meaning, including the analytical, dialectical, analogical and mythopoeic.

based reasoning; analogical reasoning; policy-based reasoning; consensual normative reasoning;[7] and narrative reasoning.

Rule-based reasoning generates criteria from the express language — that is, the grammatical structure and the commonly accepted meanings of the terms — used in the authoritative enunciation of an existing rule of law. Even rules from outside the jurisdiction can function appropriately as decisional criteria both because they represent the best efforts of another judge to resolve the same question and because, all other things being equal, the result for a litigant should not depend on the happenstance of geography.

Judges also use analogical reasoning to generate relevant criteria Analogical reasoning reaches a conclusion by showing relevant factual similarities or dissimilarities between the present case and similar cases. Analogical reasoning usually functions together with rule-based reasoning, as a partner in the effort to define the rule's terms; but analogical reasoning also can function without a governing rule of law because litigants in similar situations should be treated in similar ways, even when a mandatory rule does not require this result. This commitment to fairness, understood as treating relevantly similar people similarly, lies at the heart of the common-law tradition.

Policy-based reasoning identifies criteria for law creation by asking which result would best encourage desirable results and discourage undesirable results beyond the bounds of the present dispute. Judges know that hard cases can make bad law.[8] The criteria generated by policy-based reasoning facilitates consideration of the extent to which a contemplated rule would work well both for future litigants and for the society as a whole. Policy-based reasoning may rely upon non-legal, non-moral disciplines such as sociology, economics, and political science to define sound social policy.[9]

Consensual normative reasoning supports law-making that is consistent with customary and generally recognized practices. A classic example of criteria generated by consensual normative reasoning can be found in *Ghen v. Rich*,[10] where the court created a rule defining property rights in a beached whale, in part by reference to the commonly accepted business practices of whaling on Cape Cod.

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[7] In LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (1996), I treated consensual normative reasoning as a part of narrative reasoning, but for purposes of this article, it is helpful to discuss these forms of reasoning separately.

[8] Easy cases can make bad law as well, for they permit us to mask the moral remainder of the rejected claim.

[9] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921).

[10] 8 F. 159 (D. Mass 1881).

Consensual normative reasoning approaches law-making backwards, deciding where to pour concrete walkways by looking for the paths already worn in the grass. It recognizes the legitimate expectations born of normative behavior, and it values the experiential wisdom developed from custom and practice.

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. The *paideic* process of defining a meaningful world of moral order is accomplished in each culture through the telling and re-telling of foundational narratives, often mythic, rather than through state-made rules. As Robert Cover explains:

> We inhabit a *nomos* — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. . . . In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.[11]

According to Cover, the function of the state in law-creation is imperial rather than *paideic*. Its role is not so much to create meaning as to clarify and preserve meanings already created by narrative communities. In clarifying these meanings, the state makes explicit and functional what the narrative leaves implicit and too obscure to use for resolving disputes.[12]

Cover demonstrates this process of jurisgenisis by identifying the clashing *paideic* narratives in *Bob Jones University v. United States*.[13] There the I.R.S. had denied tax-exempt status to the University because University policy discriminated in admissions on the basis of

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[11] Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

[12] In selecting and preserving a particular narrative meaning, the state shuts down competing meanings that are incommensurable with the selected meaning. However, the state must maintain the health of the competing narrative communities to insure a continuing and dynamic source for choices of meaning. *Id.* at 40 - 44.

[13] 461 U.S. 574 (1983).

race. The agency maintained that tax-exempt status was not available to schools with discriminatory admissions policies. According to Cover, the University's argument was grounded in its narrative of insular autonomy, identifying the dispute as a matter of religious freedom. Cover identifies the competing narrative, offered by the I.R.S., as one of constitutional redemption, characterizing the issue as a matter of equality.[14] The Court selected the meaning defined by the narrative of constitutional redemption, ruling that an institution may not enjoy a charitable exemption if the institution's policies are "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[15]

Strong competing cultural narratives[16] are at the heart of the most troublesome and recurring legal issues. For instance, part of the struggle on matters of affirmative action and other racial issues lies in the clash between the narrative of redemption on the one hand and the narratives of equality (ironically) and of no-nonsense American efficiency and tough frontier spirit on the other.[17]

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[14] See Cover, *supra* note 11, at 35.

[15] 461 U.S. 574, 592. Cover's critique argues that the Court's ruling failed to achieve the overarching imperial necessity of maintaining healthy narrative communities from which to select meanings. For Cover, the preservation of healthy narrative communities is a public benefit itself sufficient to justify the state's cooperation in the offense of one narrative community against the conscience of another.

[16] It may be possible to describe the *Bob Jones University* conflict as occurring within a single narrative, a narrative that itself encompasses unresolved conflicts and inconsistencies. In other situations, disputes may exist between differing world views embodied in different narratives, between different moral perspectives encoded in a single narrative, or between different views as to how a particular moral perspective should be applied in the case at hand.

[17] See, for instance, majority and dissenting opinions in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), a case applying the Civil Rights Act of 1964 to the salmon fishing industry in Alaska. The operative narrative for the majority is that of American no-nonsense industrial efficiency and tough frontier spirit—the virtue of getting a massive and difficult job done in a primitive physical environment and under serious time constraints with no time to spare for humanistic concerns about whether employees are happy with their accommodations. Compare this narrative perspective with that of Ken Kesey's SOMETIMES A GREAT NOTION, where the protagonist family successfully delivers their timber to the mill, despite the physical dangers and hardships caused by union sabotage. In contrast, Justice Blackmun's dissent adopts the narrative of redemption. For him, this is a story about the perpetuation of "plantation economies," *id.* at 662, and harkens back to all of the stories of race set in the Old South. Justice Blackmun challenges the majority's abdication of that narrative: "One wonders whether the majority still believes that race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was. *Id.* at 662.

The cultural narratives at work in Cover's analysis of *Bob Jones University* grew largely from the historical and mythical events and patterns that form the self-identities of particular narrative communities. However, narratives are also drawn from the lives of real-life, fictional, and stereotypical individuals. Such stories, often mediated through print and film, can capture their hearers, shifting them to a particular narrative perspective. These stories, too, can create the context within which the stories of the litigants in a pending case are evaluated.[18]

One can challenge a narrative on many grounds. If the narrative's authority depends on its historicity, one can dispute the historical accuracy of a narrative's underlying facts. One can re-tell the story from a different narrative perspective. One can argue that a particular narrative is more or less encompassing than its proponents claim or that there exists no unified narrative (cultural identity) for a particular community. For instance, some would claim that the American people share a narrative, while others would claim that the narrative commonly attributed to the American people is simply the narrative of its most powerful subculture. Foundationalists sometimes argue that humanity shares a common narrative, while others including deconstructionists suspect that no common narrative perspective exists among human cultures. These debates are important for refining our understanding of differing narrative perspectives, but they do not call into question the thesis that narrative impacts law-creation. If a law-creator sees a legal dispute from a particular narrative perspective, that narrative will play its role in law creation, whether or not the story is historically accurate; whether or not it is the narrative best able to make sense of the facts; and whether or not it is shared by those to whom the newly-made law will apply.

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While the forms of reasoning we associate with rules, analogy, policy, consensual norms, and narrative play a role in law-creation, seldom does a particular form of reasoning operate alone. Rather, the criteria generated by these forms usually function together as different

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[18] The rules of evidence and the permissible scope of closing argument may prevent explicit courtroom reference to a narrative other than the litigation story itself, but if the decision-makers (the judge or jury) know of the narrative, it is in the courtroom nonetheless.

strands of the net against which the litigant's facts are measured.[19] Consider, for instance, the case of *Pierson v. Post*.[20] Post had been fox hunting with his dogs on unpossessed land. He and his dogs had located a fox, and they were in hot pursuit of the animal. Along comes Pierson, who sees that Post has found a fox and is after it. In full view of Post, Pierson swoops in and takes the fox. The New York court was presented with a case of first impression: Since a property right in a wild animal is acquired only by possession, does pursuit constitute sufficient possession to establish a property right in the animal?

The majority and dissenting opinions in the case certainly demonstrate rule-based reasoning. Both judges considered articulated rules from other jurisdictions, even though those rules were not binding on the New York court. Judge Tompkins began with Justinian and other "ancient writers," citing to at least four different articulations of rules relating to the acquisition of a property right in a wild animal. Though he did not articulate them, Judge Livingston claimed to have examined rules articulated by Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, and Blackstone, and ultimately argued for a rule that "comports also with the learned conclusion of Barbeyrac."[21]

Both judges relied on criteria generated by policy-based reasoning as well. After discussing other authorities, Judge Tompkins supported the majority's decision with policy criteria. He announced that pursuit was not enough, justifying the decision solely "for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and

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[19] Judges use these forms of reasoning in two ways — to decide the question of law and to write an opinion that justifies that decision. In deciding the question (the decision-*making* phase) one or two of these forms of reasoning may be primarily responsible for the judge's decision. A nuanced reading of the subsequent opinion may yield clues to the particular form of reasoning that was most influential in the judge's decision-making process. However, seldom will the opinion be completely trustworthy in pinpointing the form(s) of reasoning directly responsible for the judge's decision because in the opinion-*writing* phase, judges do not write to provide an "objective" analysis of a legal question. Rather, the primary rhetorical task of a judicial opinion is to persuade. The opinion is the judge's defense of the decision the judge has already made. Thus, the judge's written opinion is a *post hoc* persuasive document, much as the advocate's briefs are persuasive documents. In both kinds of documents, the writer bolsters the justification for the preferred result by using all available forms of reasoning, not merely the forms the writer personally finds determinative.

[20] 3 Cai. R. 175, 2 Am. Dec. 264 (Sup. Ct. N.Y. 1805).

[21] *Id.*

subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation."[22]

Judge Livingston's dissent used policy criteria to reach the opposite conclusion. After examining diverse authorities, Judge Livingston announced his preference for the policy of favoring a "middle course." He concluded that a property right to the animal should attach if the hunter has a reasonable prospect of taking the animal. Much of the support he offered for this conclusion was based on policy. After a lengthy discussion of the evils of the "wild and noxious," "pernicious and incorrigible" fox and his "cunning and ruthless" career, Judge Livingston argued that the court should adopt a rule that would give "the greatest possible encouragement to the destruction of" foxes. But who "would keep a pack of hounds" and "at peep of day . . . mount his steed, and for hours together . . . pursue the windings of this wily quadruped", Judge Livingston asked, "if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?"[23] Since foxes must be killed, and since no one would hunt foxes if other hunters are allowed to do what Pierson did, Judge Livingston reasoned that the court should fashion a rule to prohibit conduct like Pierson's.

Judge Tompkins used analogical reasoning as well, even though the analogies were to cases from other jurisdictions. He distinguished the situation in *Pierson v. Post* from those in several English cases on the grounds that the English cases arose either under statutes or as disputes between a hunter and the owner of the land on which the prey was found. Later in the opinion he distinguished another English case, *Keeble v. Hickeringill*,[24] on the grounds that it was an action for disturbing plaintiff's exercise of a private franchise.[25]

Judge Tompkins seemed especially persuaded by consensual normative reasoning. He observed that any group of fox-hunters "would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard* would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has

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[22] 2 Am. Dec. at 267

[23] 3 Cai. R. 175.

[24] 11 East 574 Eng. Rep. 1127, 11 Mod. 74, 130, 3 Salk. 9 (Queen's Bench 1707).

[25] 2 Am. Dec. at 267.

sanctioned, and which must be well known to every votary of Diana."[26]

Finally, both judges also found narrative reasoning significant. Judge Tompkins seemed to be influenced by the values compromised by the defendant's behavior, though for him, policy-based reasoning trumped the story. The initial factual recitation describes the events leading to the dispute: "[W]hilst [Post was] there hunting, chasing and pursuing the [fox] with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off."[27] Judge Tompkins's opinion reflects sympathy for the values breached by the litigation facts: that Post and his dogs were in hot pursuit; that Pierson knew it; that Pierson purposefully killed the fox; and that he did it brazenly, in full sight of Post; and that he killed and took the fox "to prevent [Post from] catching" it. Subsequently, while announcing the majority's decision, Judge Tompkins explicitly criticizes Pierson's actions as "uncourteous" and "unkind" — terms expressly reminiscent of the chivalrous values conveyed in Arthurian legend — and he seems to feel a need to apologize for a ruling that condones them.[28]

Judge Livingston was also persuaded by the narrative values and themes in the story. He characterized the facts and the legal issue in the same sympathetic way that Judge Tompkins did. His preference for requiring Pierson to justify his position to a tribunal of other fox-hunters implies reliance on values implicated in the story. He describes Pierson's actions as "interfering" and "shouldering" *Post's* "spoil," as Agamemnon created havoc for the strong-greaved Achaians by taking Brise'is, Achilleus's captive concubine, a spoil of war.[29] He characterizes fox hunters as people who invest great effort and expense in their sport; and "husbandmen" as hard-working and diligent food-providers[30] who are at the mercy of marauding predators; and of the

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[26] 3 Cai. R. 175. To the extent that Judge Tompkins was persuaded by the notion that a rule of law will function more efficiently if it is consistent with existing custom, this is consensual normative reasoning. To the extent that Judge Tompkins found moral value and meaning encoded in these practices, they constitute a narrative of fox hunting and his reliance on the customs represents narrative reasoning as well.

[27] 2 Am. Dec. at 264.

[28] *Id.* at 267.

[29] Homer, THE ILIAD (Richard Lattimore, transl., 1951).

[30] Oft did the harvest to their sickle yield,
Their furrow oft the stubborn glebe has broke!
How jocund did they drive their team afield!
How bowed the woods beneath their sturdy stroke!

fox himself as a thief and a murderer.[31]

Thus, as *Pierson v. Post* demonstrates, judges use the tools of rule-based reasoning, analogical reasoning, policy-based reasoning, consensual normative reasoning, and narrative reasoning to generate appropriate criteria for law-creation. Using a set of criteria generated from the combined functioning of these forms of reasoning creates a stronger and more reliable external measuring net for law-creation than does reliance on criteria generated from any single form of reasoning alone. However, occasionally a judge will use only one of these forms of reasoning to justify a particular legal result. Cases relying almost solely on narrative reasoning can provide an opportunity to examine more closely the role of narrative in jurisgenisis. The following section explores law-creation when narrative reasoning functions alone.

B. Narrative Reasoning as a Single Strand

Narrative reasoning acts alone in law-creation in two situations: (1) the unusual case in which the judge reasons directly from the narrative to a legal result without articulating and applying a rule; and (2) the situation in which the judge uses parts of the narrative to construct and then apply a legal rule.

First, the unusual situation in which the judge reasons directly from the narrative to a legal result without the intermediate step of creating and applying a legal rule. An example of such a case is *Marsh v. Chambers*.[32] Prior Establishment Clause cases had established a three-pronged rule for evaluating a challenged religious practice. The rule requires the court to decide (1) whether the practice has a secular purpose; (2) whether the practice has a primary effect of advancing or inhibiting religion; and (3) whether the practice fosters excessive government entanglement with religion. If the practice fails any prong of this test, it is prohibited by the Establishment Clause.

In *Marsh*, the plaintiff challenged the Nebraska legislature's practice of beginning its sessions with an invocation offered by a state-paid chaplain. The District Court began it's discussion of the issues by telling a version of the story of ceremonial prayer. The District Court's version of the story describes a history fraught with conflict:

Thomas Gray, *"Elegy Written In a Country Churchyard,"* in IMMORTAL POEMS OF THE ENGLISH LANGUAGE (Oscar Williams ed., 1952).

[31] 3 Cai. R. 175.

[32] 463 U.S. 783 (1983).

> The turmoil over the proper interplay between government and religion in America antedates the Constitution and has been continual throughout the Republic's history. The struggle has been to find that decent accommodation which allows full virility of government within its distinct sphere and full virility of religion within its distinct sphere. When the spheres have overlapped, sparks have often flown.[33]

The District Court detailed the conflicts that began at least with the Constitutional Congress in 1774 and continued until the time of the pending case. After telling this story of a nation conflicted about the role of ceremonial religion, the District Court applied the existing three-part rule and concluded that use of the invocation itself did not violate the Establishment Clause, but the payment by the State did.[34] The court's decision matched the story it told. The story was one of a nation torn between two narratives, and the court reached a conflicted result: part of Nebraska's practice was permissible and part was not.

On appeal, the Eighth Circuit Court of Appeals compressed the story of ceremonial religious practices into just two sentences with no articulated narrative thesis. It then applied the three-part rule and concluded that all aspects of the Nebraska practice violated all three prongs of the rule.[35] Again the court's decision matched the compressed story it told. The Eighth Circuit's rendition contains no reference to a conflicted nation; nor does it lend any importance to the history or current widespread use of such practices. For the Eighth Circuit, the story of ceremonial practices seemed to play as little a part in the result as the space the court took to recite it. This court was far more focused on applying the applicable rule as it had been announced and interpreted by precedent.[36]

In this rule-based posture, the case came to the Supreme Court. One would expect the Court to apply the existing three-part rule; or to modify the rule and then apply the modified rule; or to overturn the rule, announce a new rule, and apply that new rule. The Court did none of these. Instead, after a one-sentence description of the basis for the Eighth Circuit's holding, the majority never again mentioned a rule of law. The Court reasoned directly from the facts of the narrative in precisely the way one would expect it to reason from a rule.

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[33] 504 F. Supp 585, 587 (D. Neb. 1980).

[34] *Id.*

[35] 675 F.2d 228, 234 (8th Cir. 1982).

[36] The rule and the interpreting precedent had, of course, resulted from the adoption of a different narrative perspective.

The Court began its discussion with a statement of its narrative thesis: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[37] Then, over five pages, the Court proceeded to relate in detail its own version of the story of this "deeply embedded" tradition, beginning with earliest colonial times. The Court does not omit reference to opposition, but its story is not about a conflicted nation. Rather, the Court uses the recurring opposition to tell quite a different story — a story of considered resolution. In the Court's story, the opponents of ceremonial religious practices raised the issue so that it could be resolved after careful and full deliberation.[38] In the Court's narrative, the nation's carefully considered resolution to the question has approved ceremonial religious practices. The Court concludes its story with a restatement of its narrative thesis. This time the narrative thesis is directly and expressly linked, without any intervening rule, to the legal conclusion it compels:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[39]

Having announced this legal conclusion with regard to ceremonial religious practices in general, the Court concluded its discussion by disposing of the specific challenges to the Nebraska practice: that for sixteen years Nebraska had employed the same chaplain representing the same denomination; that Nebraska paid the chaplain with tax funds; and that the prayers were all from the "Judeo-Christian tradition."[40] However, once again the Court operated entirely on a *factual* level, without applying a rule of law. The Court disposed of these potentially problematic individual facts by reference to the larger narrative: "Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice."[41] Once again, the narrative plays the role normally played by a rule of law. Rather than

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[37] 463 U.S. at 786.
[38] *Id.* at 791.
[39] *Id.* at 792.
[40] *Id.* at 793.
[41] *Id.* at 792.

evaluating the factual challenges by applying a rule, the Court evaluates the facts by a direct comparison to the historical practices of Congress.[42]

Reasoning directly from a narrative to a legal result, as the *Marsh* Court did, invites a judge to listen to the litigants' stories, decide which party has presented the most compelling individual or cultural narrative, and enter judgment for that party. The judge's task is simply to reach the "best" result. But that kind of resolution does little to assure these and future parties that their cases have been and will be decided on articulable, fair, and reasonable grounds. A judge must not only decide the case between the present litigants, but do so in a way that offers some degree of protection from individual caprice. Rules constrain such unbridled subjectivity.

Even groups whose narratives are not well represented by existing rules receive some degree of protection from the process of rule articulation. If we assume that the law-creator will decide the case based on an oppressive narrative, the law-creator will be acting from the perspective of that narrative whether or not she articulates a rule. At least if the law-creator articulates a rule, the process will require the law-creator to justify the rule and place some reasonable limitations upon it. Therefore, even groups shackled by rules based on the dominant narratives enjoy some degree of protection by virtue of those very rules.

To the extent possible, a legal result should provide stability, consistency, and clarity. It should promote efficiency, so future citizens can act in ways that prevent the need for litigation and so future judges can decide future cases more quickly, without repeating all of the first judge's deliberations. Reasoning directly from a narrative to a legal result without explicitly articulating any rule for the decision accomplishes none of these things.[43] Therefore, judges rarely decide cases based solely on narrative reasoning without at least using that reasoning to create and articulate a rule of law.

This second use of narrative reasoning — using the reasoning to create and announce a rule of law — is more common. In this

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[42] The *Marsh* Court may also be said to have implicitly relied on consensual normative reasoning. However, the explicit argument was narrative based, and the values served by consensual normative reasoning were not so strongly implicated here as in a case of business customs on which people had come to rely. The *Marsh* Court also invoked some cursory analogical reasoning which will be discussed in the next section.

[43] Justice Brennan's dissent effectively points out some of these difficulties with the majority opinion. *Id.* at 795-822. In the process, Justice Brennan tells a narrative with a theme quite different from the narrative adopted by the majority.

situation, the judge uses parts of the narratives presented by the facts to create or modify a legal rule. Then the judge applies that rule to reach a result in the pending case. Often the rule provides evidence of its narrative origin by its presentation in a casuistic, "if - then" structure, a blatantly narratival form. A rule in a casuistic structure describes a set of circumstances and then pronounces a result: If A, B, and C occur, then Y is the legal conclusion. Bernard Jackson describes this structure as incorporating a "conditional sentence in which the *protasis* (the premises of a syllogism) expresses a hypothetical fact situation (the conditioning facts), while the apodosis (the main clause of a conditional sentence) states the conditioned consequences."[44]

Consider, for instance, the rule defining the elements for a cause of action based on fraud. A common articulation of the rule provides that a defendant has perpetrated a fraud if:

1. the defendant made a representation;
2. the representation was false;
3. the defendant knew the representation was false when making it;
4. the defendant intended that the hearer rely on the representation;
5. the hearer did rely;
6. the reliance was justified;
7. damage resulted.

These elements tell the story of a plaintiff entitled to relief in a cause of action for fraud. If one could locate the first successful fraud case articulating these elements, one would probably find that these elements tell the story of that individual plaintiff.

Rules born of narrative seldom arrive fully formed. After a judge has created a legal rule from a narrative, the rule is often modified by future narratives. In subsequent cases, the narratives of future litigants bump up against the rule created from the narratives of the first set of litigants, with the result that the rule becomes more and more refined. In resolving the tensions between present narratives and the original narrative (now in the form of the rule), judges define terms, add criteria, and develop exceptions.

For instance, the articulation of the elements for a fraud claim might not have originally included all of the seven listed elements. That first court might have stated the elements more simply, perhaps

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[44] Bernard S. Jackson, *Narrative Models in Legal Proof*, in NARRATIVE AND THE LEGAL DISCOURSE 158, 167-69 (David R. Papke, ed., 1991).

articulating only that the defendant must have made a false representation and the hearer must have relied upon it to her damage. The elements requiring that the defendant knew of the falsity, that the defendant intended that the hearer rely, and that reliance was justified may have been added to the rule when the stories of subsequent litigants raised those issues for the first time.

Thus, subsequent stories call into question the adequacy of the rule crafted from the first story. Each succeeding story refines the rule further, as new plot twists test or define the existing rule.[45] Must the defendant have actual knowledge of the falsity or will reckless disregard be enough? Must the representation be express or can failure to speak be sufficient? Is "reasonableness" judged by an objective or a subjective standard? Must the defendant be of the age of majority or can a minor who has reached a lesser age, an age of discretion, be held responsible for a false representation? At each stage, the newly-created or newly-modified rule becomes the standard for evaluating future litigation stories. In this sense, the rule comes to constitute a form of literary criticism.

This does not mean that rules are to be read as if they were literature. Stanley Fish, along with others, observes that rules must be read differently from literature.[46] But neither does one read an essay of literary criticism as if it were itself a literary work governed by the same aesthetic standard used to judge the work critiqued. Rules are not narratives, but they are in significant part codified explications of the points of narratives, some of which are explicit and some of which form a silent sub-text of legal doctrine.

If the stress created by the tension between the rule and the present narrative becomes too great, judges abandon the rule. Most commonly, they abandon the rule by overturning it and creating a new rule that will serve both the prior and the present narratives. However, occasionally, judges simply decline to apply the rule, as demonstrated by the majority opinion in *Marsh v. Chambers*.[47]

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[45] Referring to how precedent constrains future judges, Ronald Dworkin compares this process to the "chain novel" in which a series of authors write succeeding chapters, with each author increasingly constrained by prior authors. Increasingly, the authors must discover what is implicit in prior chapters, rather than create something new. Ronald Dworkin, *Law As Interpretation*, 60 TEX. L. REV. 527, 542 (1982); *see also* Jackson, *supra* note 44.

[46] Stanley Fish, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 294-311 (1989).

[47] 463 U.S. 783 (1983).

Thus, narrative reasoning itself plays a significant part in the creation of common law rules.[48] However, narrative reasoning alone is inadequate to justify a particular legal rule and the resultant legal decision. It is an inefficient way of making a point, and sometimes that point is not clear or easily identified.[49] Narrative reasoning, functioning alone, is vulnerable to an even more fundamental attack. Narrative reasoning does not attempt to answer the most important question: how the judge decides which parts of the litigant's narratives will be represented in the new rule and which will not. It will not do to respond that narratives call for rules faithful to the more-or-less unarticulated values and themes expressed in the cultural narratives against which the particular judge evaluates the dispute. Rules must be based on more than subjectively selected parts of the narratives of the litigants first before the court. Without a better answer to this question, narrative theory cannot provide assurance of predictability, stability, fairness, consistency, and efficiency. The following section explores a better answer to this question, and it shows that the narrative building blocks of a newly-created rule are not limited to pure narrative reasoning.

C. The Role of Narrative in Other Forms of Reasoning

While narrative reasoning is one of several forms of reasoning judges use to create a rule, the role of narrative in jurisgenesis is not limited to narrative reasoning. Other forms of legal reasoning have narrative roots as well, though in each case the reasoning is several steps removed from the narrative.

Analogical reasoning is explicitly narratival, for it compares the present story to the stories of other litigants in other cases. Occasionally analogical reasoning functions without reference to a rule of law. For example, in *Marsh* the majority opinion compares the Nebraska practice with the practices challenged in three prior opinions: "[L]egislative prayer presents no more potential for establishment than the provision of school transportation, [citation], beneficial grants for higher education, [citation], or tax exemptions for

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[48] Statutory law is created in part from narrative as well. Legislative committees hear stories from the lives of the witnesses that testify before them, from lobbyists, and from constituents. Sometimes the impetus for the legislative effort is driven by a particular story. For example, Jim Brady's story played a pivotal role in the passage of the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921 & 922 (1994).

[49] See, David O. Friedrichs, *Narrative Jurisprudence and Other Heresies*, *in* NARRATIVE AND THE LEGAL DISCOURSE 45 (David R. Papke ed., 1991).

religious organizations, [citation]."[50] In such cases, analogical reasoning can even be said to be a form of narrative reasoning.

However, analogical reasoning not undertaken as a vehicle for interpreting an announced rule is vulnerable to the same attack as is pure narrative reasoning. Without a governing rule, analogical reasoning cannot in any reasoned manner identify which similarities and which differences have or should have legal significance. Thus, without applying a rule of law and considering the policies served by that rule, the majority's analogies between legislative prayer and other practices such as school transportation, educational grants, and tax exemptions cannot identify the factual similarities that justify a similar legal result. Nor can the analogy offer any assurance that the many *dis*similarities between legislative prayer and these other practices are devoid of legal significance.

The most common and most reliable use of analogical reasoning cures this legitimate objection by functioning in the context of rule-based reasoning. This variety of analogical reasoning is the result of combining the narrative reasoning inherent in comparing stories with the rule-based reasoning that defines the legally relevant categories of similarities and differences. Justice Brennan's dissenting opinion in *Marsh* offers several examples of such analogical reasoning. The dissenting opinion uses the *Lemon* rule to identify the three factual categories that have legal relevance. Then the opinion can point out similarities to the facts of other cases with some assurance that the similarities have some reasoned significance. For instance, Justice Brennan compares the *purpose* of legislative prayer with the *purpose* of posting the Ten Commandments;[51] the *primary effect* of legislative prayer with the *primary effect* of school prayer;[52] and the *entanglement* involved in legislative prayer with the *entanglement* involved in aid to sectarian schools.[53]

In the context of a governing rule, analogical reasoning can also point out legally significant differences. For example, in the process of applying the entanglement prong of the *Lemon* test, the Eighth Circuit's *Marsh* opinion compares the *Marsh* facts with the facts and legal result in *Bogen v. Doty*,[54] an earlier Eighth Circuit case which had based the approval of opening county board meetings with prayer

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[50] 463 U.S. at 791.
[51] 463 U.S. at 797 (citing *Stone v. Grisham*, 449 U.S. 39 (1980)).
[52] 463 U.S. at 798 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)).
[53] 463 U.S. at 799 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).
[54] 598 F.2d 1110 (8th Cir. 1979).

on the facts that the practice required no expenditure of money and that no evidence indicated that the county had preferred one denomination over another. In its *Marsh* opinion, the Eighth Circuit wrote: "The [*Marsh*] prayer practice also entangles the state with religion in precisely the manner warned of in *Bogen*. By using state monies to compensate the same minister for sixteen years and to publish his prayer books, the state engenders serious political division along religious lines."[55]

Consensual normative reasoning also grows from narrative roots because it compares the litigant's story with the stories that are customary in similar situations. For instance, in *Ghen v. Rich*, the court told the story of how whaling was customarily conducted on Cape Cod. The court described the physical realities that commonly prevented a fisherman from hauling in the catch immediately upon killing it, and described the practice the whaling industry had developed to deal with these difficulties. The court relied upon the accepted practice to fashion a rule consistent with it.

Next, consider policy-based reasoning, perhaps the most complex of the forms of reasoning. Policy-based reasoning relies on many components that are not directly narratival: aesthetic principles, scientific models, social organization, economic analysis, efficiency concerns, political realities, and predictable psychological reactions. However, even policy-based reasoning has narratival roots. First, much of policy-based reasoning is a way of articulating and valuing the stories of non-parties. These non-parties may be real characters or hypothetical characters designed to represent the interests of other real groups. But much of policy-based reasoning is directly drawn from the stories of these real or fictional characters. For instance, in *Pierson v. Post*, the majority based its rejection of the claim of Post's individual story on the imagined stories of future fox hunters who would be arguing with each other, perhaps coming to blows, and prolonging their disputes with litigation over whether hunter A or hunter B had been first in pursuit of the fox. The majority decided that it was more important to prevent these future stories than to redress the inequities of the present individual stories.[56]

The policy-based reasoning that forms almost the entire basis of the dissent in *Pierson v. Post* is even more directly narratival. Judge Livingston spent more time describing the stories of three non-parties or groups of non-parties than he spent in describing the stories of

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[55] 675 F.2d 228, 235 (8th Cir. 1982).

[56] 2 Am. Dec. at 267.

Pierson and Post. The recitation of the story of one of those groups — the detailed description of virtuous fox hunters losing their hard-earned prey to usurpers — mirrors the individual story of Post, so we could conclude that this policy rationale is simply another way of relying on Post's narrative. However, Judge Livingston also articulates the narrative of the "husbandmen" when he describes how the career of the fox plays havoc with the work of these "most useful of men."[57] The hypothetical stories of the husbandmen thus weighed on Judge Livingston's deliberations though the husbandmen were not parties to the present case, nor would they be parties to future cases governed by the rule the court would adopt. And we cannot overlook the character who is arguably the most important of all in Judge Livingston's opinion — the fox himself — for it is this character whose story of thievery and murder seems most to engage Judge Livingston's passions.

Second, the cognitive process of realizing the existence of these other stories is a narratival activity. Gary Saul Morson, a leading scholar of Russian and comparative literature, has dubbed this activity "sideshadowing."[58] Sideshadowing defines a field of possible stories, not what *did* happen but what *might* have happened. These other possible stories shadow the actual stories, and demand adjudicative attention. Realizing what did not, but might have happened in the pending case, is part of the process of realizing and evaluating these other possible stories. And considering these other possible stories frees the law from a result that might have seemed preordained by the stories of the present litigants. Thus, part of the value of policy-based reasoning is to loosen the grip of the individual narratives and enlarge the narrative options to include other possible stories.

Third, policy-based reasoning includes consideration of moral principles, and as Robert Cover has explained, moral value originates in myth and cultural narrative.[59] Like Cover, moral theologian Stanley Hauerwas argues that our convictions about how we ought to behave socially and politically are rooted in values encoded in cultural narratives which define and form our character.[60] For instance, the retribution value in criminal justice is found in countless tales of blood feuds, such as Achilleus' slaying of Hektor to avenge Patroklos.[61] The

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[57] 3 Cai. R. 175.

[58] Gary S. Morson, NARRATIVE AND FREEDOM: THE SHADOWS OF TIME 6-9 (1994).

[59] Cover, *supra* note 11.

[60] Stanley Hauerwas, A COMMUNITY OF CHARACTER (1981).

[61] Homer, THE ILIAD, (Richard Lattimore, transl., 1951).

value of considering the circumstances driving the criminal is found in *The Eumenides*, where the Athenian jury acquits Orestes for matricide in light of his duty to avenge his father and the fact that he acted under the compulsion of Apollo.[62] And the hope for rehabilitation as fruit of mercy is found in *Les Miserables* where the Bishop's forgiveness of Jean Valjean transforms Valjean from a thief into a hero.[63]

The remaining form of reasoning, rule-based reasoning is essentially structuralist rather than narratival. However, if the task of interpreting and refining rules is to be undertaken in a spirit of fidelity to the rule's source and purpose rather than as a form of technical word play, then rule-based reasoning must be conducted in a larger context, a context which comprehends the narratival forms of analogy, customary norms, and policy as well as the values conveyed by cultural narrative and the litigation story itself. The court does not disregard the meaning of words in order to preference one of these alternative sourses of authority. Rather the court discerns the meaning of words in the light of those sources of authority.

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This section has explored the jurisprudential relationships between narrative and other forms of legal reasoning. It has concluded that narrative plays an important role in law-creation, but that it cannot, alone, offer the assurances that a fair and effective judicial system must offer. Narrative is always present as a potent force in the functioning of more dialectic forms of reasoning, whether or not the law-creator realizes its effect. However, since dialectic forms of reasoning have no inherent narrative perspective of their own, they are vulnerable to being co-opted into the service of corrupted narratives. When the operative cultural narrative is unarticulated, its perspective defines the unstated and often unrecognized narrative assumptions that privilege some aspects of a litigant's story over others. To the extent that the cultural narrative remains unrecognized, its role in jurisgenesis remains covert, and reasoned discussion of how the values of the narrative should shape the law is essentially foreclosed. Further, rules formed from "bloodlessness and arid rationality"[64] risk straying too far from operative cultural narratives and thus failing to

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[62] Aeschylus, AESCHYLUS I: ORESTEIA, (David Grene & Richard Lattimore, transl., Press, 1953).

[63] Victor Hugo, LES MISERABLES (Lee Fabnestock & Norman MacAfee transl., 1987).

[64] Greeley, *supra* note 1.

function effectively. Thus, law-creators must recognize, rather than deny, the narrative process already at work in jurisgenesis.

However, narrative reasoning needs the restraint of the dialectic process. The cutural narrative (the measuring narrative) is not static. Not only is cultural narrative, by definition, perpetually in flux,[65] but the very process of evaluating a particular litigation story by reference to a measuring narrative alters the measuring narrative itself. Thus, not only is the litigation story evaluated from the perspective of the larger narrative, but the larger narrative's perspective is constantly re-evaluated by new litigation stories. This magnificent process is part of the beauty and functionality of the common law system, but left unchecked, its perpetual movement would not provide the measure of predictability and stability that a body politic requires. Further, analogical process, vulnerable as it is to "transient and self-deceiving enthusiasm,"[66] must be checked against relevant dialectic criteria.

Thus, narrative reasoning and the other forms of legal reasoning must function together, complementing and constraining each other, much as Greeley's religions of prose and poetry complement and constrain each other. Law is finally a human enterprise, expressing human values and guiding human conduct. As Tracey has demonstrated, the human mind reasons, perceives, and imagines both analogically and dialectically. The process of jurisgenesis arises from both dialectic and analogical processes in order that law may play its role in human living, which is likewise both dialectic and analogical.

III. The Role of Narrative in Legal Hermeneutics: Is There A Rule in This Case?

Lawyers are storytellers. At every turn, lawyers find themselves creating and telling stories — narratives of their client's lives and of their own. Understanding narrative's crucial formative and transformative power teaches us why stories play such a fundamental role in the practice of law. Lawyers have long understood these instrumental roles of narrative,[67] but these roles seem unrelated to much of legal education. Doctrinal legal education focuses on rules, policies, and authorities analyzed abstractly rather than as part of the legal landscape facing a present client and a pending dispute. Many

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[65] Cover, *supra* note 11 at 15-19.

[66] Greeley, *supra* note 1.

[67] Paul Reidinger, *"Spinning Yarns: Academics ponder what trial lawyers already know — the value of a good story,"* ABA JOURNAL, June 1996, at 102.

practitioners maintain that the academy's focus underestimates the impact of facts, including facts that theoretically are not relevant to the legal issue.

The conversation between the practicing bar and the academy on this topic, to the extent that a conversation exists at all, is seldom helpful. The conversation tends to stall at the point that proponents for the importance of rules and proponents for the importance of facts engage in debate about how determinative each is to a legal result. The conversation posits situations in which the client has a sympathetic story but an unfavorable rule of law, or vice versa. The question posited: which is more likely to prevail, the rule or the sympathetic story?

The conversation fails in at least one important way: it assumes that doctrinal legal reasoning and legal storytelling are two unrelated lawyering skills, often in competition with each other. The conversation fails to realize that doctrinal legal reasoning and narrative skill must be executed as a seamless whole, and it fails to move on to a more productive conversation: how this can be done.

The goal of this section is to explore the relationship between doctrinal legal reasoning and narrative skill in law practice. The first subsection describes the role of narrative in the litigation process as a whole. The second subsection explores the process of yoking this litigation narrative together with doctrinal reasoning in service to a client.

A. Narrative in the Litigation Process

Law is created from the critical telling and re-telling of stories. Consider this common scenario of litigation: Client A tells Lawyer A a story about a wrong he has suffered. The plot line is complete up through the initial client interview, but it does not yet have a resolution. Lawyer A edits the story to fit within a particular story-form (a cause of action); tells it to the alleged wrongdoer in a way that seems to call for the resolution the client seeks; and asks the alleged wrongdoer to supply that resolution (a demand letter).

Upon hearing Lawyer A tell the story, the alleged wrongdoer (Client B) visits another lawyer (Lawyer B) and tells a different version of the story. Not surprisingly, Client B's story seems to call for a resolution quite different from the resolution Client A and Lawyer A seek. Upon hearing Client B's story, Lawyer B edits it to fit into another particular story-form (a defense); and tells that version of the story to Lawyer A (a response to the demand letter), thus justifying an alternative resolution to the plot.

Having heard these two versions of the story, the lawyers and clients evaluate the competing narratives, now cast as the story-forms of a cause of action and a defense. They explore whether the plotlines of each can be established by admissible evidence (the price of admission to the storytelling forum, the courtroom). They ask themselves which narrative is most compelling, most effective at calling forth a resolution. If Lawyer A and Client A believe that their story might prevail, Lawyer A files a Complaint.

During pretrial stages, both lawyers explore the evidence that will be available to them (the building blocks of the plotline) and ask to hear the story from the perspective and in the voice of the other characters in the story (through depositions and other discovery). As the lawyers hear these stories, the lawyers continue to work on their versions of the story, editing here and there or perhaps even re-casting the story entirely. At each point, these new understandings of the stories determine the settlement postures of the litigants.

Finally, after months or years of re-visioning the story, the lawyers are finally ready to tell it to the critical audience, the judge or jury. Each lawyer uses testimony and documents to bring the pieces of the plot into the storyline. From those pieces each lawyer tells the best story the plotline will support, finally completing the telling of the story during closing argument.

But the storytelling does not end with closing argument, for while the lawyers have been bringing in the pieces of the plotline, the audience (judge or jury) has been busy creating one or more stories of its own. Sometimes that story is nearly identical to the story told by one of the lawyers. Sometimes it is a third story, entirely different from the stories either side completed in closing argument. If the audience is a jury, individual members may have devised several unarticulated stories, differing in plot and in theme not only from the lawyers' stories but from each other's as well.

Then the audience deliberates. If the audience is a jury, the individual story-creators in the group tell and re-tell their versions of the story to each other. This process of telling and re-telling their versions of the story is the vehicle both for completing the creation of each version and for evaluating each version. The jurors tell the stories until the group can choose the version that seems most true to the evidentiary plotline and to the group's experience. Part of the mystery of the jury system stems from the fact that we seldom discover what these other competing narratives were or which particular narrative carried the day and justified the verdict.[68]

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[68] It would seem that understanding the basis for jury verdicts should be at the heart

If the audience is a judge, the opportunities for evaluating the competing narratives are more limited. The judge may try telling several versions of the story to a law clerk or another judge, but most of the judge's evaluation of the competing stories must occur within the judge's own unarticulated thoughts. If the judge drafts the Findings of Fact and Conclusions of Law,[69] the judge might use the drafting of that document to help work out the judge's own version of the story — the version that will be determinative. Ultimately, though, that document will be primarily an advocacy document designed to justify the judge's decision.

If the case is appealed on the merits, the lawyers re-tell the same story or tell a somewhat different story. For instance, if the judge created her own version of the story, a version different from the story told by either lawyer, the lawyer for the prevailing party may tell, on appeal, a story designed to support the *judge's* story rather than the story the lawyer told in closing argument. The lawyer for the unsuccessful party will tell a story designed primarily to refute the *judge's* story rather than the story told by the lawyer for the prevailing party at trial.

Once again, the audience, the appellate panel, may create one or more competing narratives. During deliberation, individual judges advocate one of the versions, and the panel must select among them. Then one of the judges writes an opinion to support the majority's version, and other judges may write to support other versions. These appellate decisions are a form of literary criticism of the various versions of the story offered by the advocates or by the judges themselves. If the case is sent back to the trial level for further proceedings, the lawyers again become storytellers, this time perhaps constrained by rulings from the appeal.

The description of the role of narrative in the litigation process is, of course, an incomplete description of litigation, for it does not account for the crucial role of rules, precedent, and policy. Presumably juries are constrained by jury instructions setting out the applicable rule of

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of legal scholarship; yet little scholarly work has been done in this area. But recently some scholars have begun studying the stories that account for trial verdicts. *See, e.g.*, Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61 (1995).

[69] Some judges draft this document themselves; some decide the general parameters of the decision and delegate the drafting task to a law clerk or to the lawyer for the prevailing party.

law.[70] Certainly judges are constrained by rules, both at the final decision-making stage and during pre-trial motions. How does all the lawyers' litigation storytelling relate to what lawyers do with rules?

B. Narrative in Rule Articulation

Since the outcome of a case will depend on both the applicable rules of law and the material facts, the lawyer's task is to present law and facts that fit each other, together calling for a favorable legal result. When the story and the rule do not seem to fit so favorably, the lawyer must hold the story and the rule in tension, and then strive to resolve that tension. The lawyer does this in two ways: by revising the narrative until it fits the rule as closely as possible; and by re-articulating and re-structuring the rule until it fits the narrative as closely as possible. Both tasks must be accomplished within the limits imposed by the case. The task of revising the narrative is limited by the evidentiary facts.[71] The task of re-articulating the rule is limited by the degree to which the relevant authorities have formalized a particular articulation of the rule and by the degree of specificity of the announced articulation. While sometimes these limitations effectively eliminate the possibility of achieving a fit, more often they simply raise the level of skill required to accomplish it.

The first of these tasks, revising the story to improve its fit with the rule, is guided by the elements of the rule itself. The lawyer may not have to think expressly about narrative principles, but a lawyer's success in story-creation is affected by the breadth of the lawyer's narrative repertoire and the degree of the lawyer's immersion in those narratives. It is from this repertoire that the lawyer draws for "sideshadowing" — that is, imagining other possible narratives that could describe the client's present situation.[72] The lawyer's narrative

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[70] It is difficult to assess the impact of jury instructions on jury results. Even assuming that jurors are willing to be more persuaded by abstract legal principles than by the equities they perceive in the facts, procedural restraints and other factors may significantly limit the impact of the instructions. Some such limitations are: timing of the presentation of the instructions (post-evidence; post-closing argument); procedural limitations on their use (refusal to allow the jury to take the written instructions with them when deliberating); and limitations imposed by the cognitive skills and physical condition of jurors (strength of auditory learning skill; attention deficit; physical tiredness).

[71] Of course the re-fashioning of the narrative must be accomplished within the parameters of ethical responsibility.

[72] My use of the term here may be slightly different from Morson's, but my use is consistent with his. By "sideshadowing" Morson means imagining what else could have

repertoire is built from the individual narratives which the lawyer has encountered and from the lawyer's sensitivity to cultural narratives. The larger the lawyer's narrative repertoire and the deeper the lawyer's encounters with those stories, the greater the lawyer's ability to use the evidentiary facts to shape a narrative that fits the rule.

Further, a lawyer's skill in story-creation can be strengthened by a conscious understanding of the structure and technique of narrative. As Greeley points out, narrative (the poetic tradition) has a logic and a structure of its own, a logic and a structure that differ in significant ways from those of the dialectic imagination.[73] While the explication of narrative principles is beyond the scope of this article, the study of narratival logic and structure and its application to legal advocacy is a scholarly accomplishment long overdue.

The second task — the task of articulating and structuring a rule in a manner that improves its fit with the client's story — should already be at the center of doctrinal legal education. In law practice, doctrinal legal reasoning using a common law rule requires the lawyer to articulate the rule announced in the case and to place it in a structure that will become the structure of the legal analysis.[74] For instance, in a fraud case the lawyer articulates the rule created by the case and places it into a structure that will become the structure of the legal analysis:

A defendant has perpetrated a fraud if:

a. the defendant made a representation;
b. the representation was false;
c. the defendant knew the representation was false when making it;
d. the defendant intended that the hearer rely on the representation;
e. the hearer did rely;
f. the reliance was justified;
g. damage resulted.

The lawyer applying a set of facts to this rule, articulated in this structure, will explain each of these seven elements and will apply each to the facts. To the extent that the judge writing the governing opinion has already articulated the rule unambiguously, the judge's

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happened. Here I mean imagining how other narratives could describe what *has* happened.

[73] Greeley, *supra* note 1.

[74] Linda H. Edwards, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, Chs. 2-10 (1996).

articulation controls. However, to the extent that the judge has not foreclosed other articulations or structures, the lawyer's analytical task is to articulate and structure the rule in a way more favorable to the client's narrative.

Narrative is not an actor here, but rather a director. The task is to articulate a rule that will give legal significance to the favorable parts of the client's story. The narrative themes the lawyer has created from the client's story direct the kind of rule for which the other forms of legal reasoning strive. Narrative says to the other forms of legal reasoning, "Here are the themes and values implicit in the client's story. Give me a rule that creates legal significance for these themes and values." Then rule-based reasoning, policy-based reasoning, analogical reasoning, and consensual normative reasoning go to work to articulate and justify the rule the narrative needs. As Stanley Fish, referring to literary criticism, explains:

> It is often assumed that literary theory presents a set of problems whose shape remains unchanging and in relation to which our critical procedures are found to be more or less adequate; that is, the field of inquiry stands always ready to be interrogated by questions it itself constrains. It seems to me, however, that the relationship is exactly the reverse: the field of inquiry is *constituted* by the questions we are able to ask because the entities that populate it come into being as the presuppositions — they are discourse-specific entities — of those questions.[75]

Translating Fish's terms into the context of legal reasoning, we may assume that the embedded meaning of the text of a case remains unchanging and that our articulation of that meaning can be found to be more or less adequate; that the case stands ready to be interrogated by questions it itself constrains. However, actually the meaning of the rule is *constituted* by the questions we are able to ask about it. In law practice, narrative teaches the lawyer what questions to ask about the rule.[76] Narrative creates the presuppositions that call into being the meaning of the rule. Thus, the rule is a discourse-specific entity.

For example, consider the rule governing whether a court will enforce a covenant-not-to-compete, and assume that the governing authority in the jurisdiction is *Coffee System of Atlanta v. Fox*.[77] The *Fox* opinion devotes several pages to discussing the standards relevant to deciding whether to enforce a restrictive covenant. The part of the opinion that most closely approaches announcing a rule is this:

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[75] Fish, *supra* note 5, at 1.

[76] See, for example, the questions posed by subsequent fraud cases, *supra* pp. 21-22.

[77] 176 S.E.2d 71 (Ga. 1970).

> An examination of the decided cases on restrictive covenants reveals that this court has customarily considered three separate elements of such contracts in determining whether they are reasonable or not. These three elements may be categorized as (1) the restraint in the activity of the employee, or former employee, imposed by the contract; (2) the territorial or geographic restraint; and (3) the length of time during which the covenant seeks to impose the restraint.[78]

After some additional general discussion, the opinion compares each of these three terms from the covenant at issue with their counterparts from other cases in which covenants were enforced. The opinion concludes that the three terms in the pending case are similar to the terms of covenants that were enforced in prior cases, and therefore that this covenant is enforceable as well.[79]

A lawyer constructing the rule from *Fox* is likely to articulate and structure the rule like this:

> A restrictive covenant will be enforced if the following terms are reasonable:
>
> a. the nature of the activities restrained
> [comparison of the nature of the restraint at issue with the nature of the restraint in prior cases]
> b. the territory in which the restraint operates
> [comparison of the territory of the restraint at issue with the territory in prior cases]
> c. the duration of the restraint
> [comparison of the duration of the restraint at issue with the duration of the restraint in prior cases]

Certainly this articulation, structuring, and application of the rule is reasonable, and may be, on first reading, the most obvious explanation of *Fox*.

However, a lawyer working with a particular narrative might need to articulate, structure, and apply the *Fox* rule differently. Consider this narrative:[80] Elizabeth Watson founded, owned and operated Carrolton Company which, since its creation, has been the only retailer of in-home health care equipment in the rural area it serves. Its closest competitor is 150 miles away. One year ago Watson

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[78] *Id.* at 73-74.

[79] *Id.* at 74-75.

[80] An expanded version of this example can be found in Linda H. Edwards, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, Chs. 4, 5, 17 & 21 (1996).

sold Carrolton to its present owners, a group of investors from another state. Watson stayed on, accepting employment in a sales position for the company. One of the terms of the sale was Watson's agreement not to compete against Carrolton for three years after leaving Carrolton's employ. The covenant prohibits her from making sales contacts on behalf of any competing business, and the restriction covers the three counties surrounding Carrolton's headquarters.

When Watson owned Carrolton, she used a reasonable markup, so customers paid fair prices. She tried to be responsive to customer needs in other ways as well. She operated the business as a responsible commercial citizen of the community. However, the new owners of Carrolton have taken a different approach. Aware of the lack of competition in the area, they have substantially raised prices. They ignore customer requests and complaints, knowing that customers have nowhere else to go for the health care equipment they need. Watson became increasingly frustrated as she watched the slow destruction of the business reputation she had built over many years.

This frustration has prompted Watson to leave Carrolton and form Acme. Acme has begun to compete with Carrolton in the three prohibited counties, and Watson has begun to make sales contacts for Acme. Startup costs for a health care equipment retailer are high. Watson is dealing with those costs in two ways: She has incurred substantial personal debt to pay some of the costs, and she has postponed some of the costs by planning to start small, selling equipment in only several of the categories of products currently sold by Carrolton. In the first two years of business, Acme will do well to break even. It cannot expect to garner more than 20 percent of Carrolton's business in the particular products it will sell and none of Carrolton's business in other categories. The loss of that much business would still leave Carrolton with healthy profits.

Carrolton has filed suit against Watson, seeking to enforce the covenant not to compete. Watson's lawyer finds *Fox* and articulates and applies the *Fox* rule as set out above. The lawyer compares the nature, scope, and duration of the Carrolton covenant to those particular terms from prior cases. Imagining the result of this approach, the lawyer realizes that Watson's story will not fare well. These three terms of the Watson covenant are similar to the covenants enforced in a number of prior cases. Worse yet, a rule articulated and applied as described above does not attribute legal meaning to Watson's most compelling facts: the facts describing the needs of the public and the relative needs of the parties. A review of prior case law shows that restrictions of similar lengths of time, in similar geographic areas, limited to restricting sales contacts for competing businesses

have been upheld as reasonable. With this rule articulation, Watson's lawyer will not be able to present Watson's compelling personal goals and the strong public policy that represents the heart of Watson's position. The rule as set out above does not privilege Watson's narrative. It is a narrowly constructed rule that gives legal meaning only to three particular terms of the covenant. Further, its hermeneutical approach relies heavily on simplistic analogical reasoning — comparisons of Watson's three terms with those of prior cases, without consideration of whether the surrounding situations were similar. The court approaches these prior covenants as establishing a "yardstick" that allows for a form of consensual normative reasoning. Watson's lawyer needs to return to *Fox* to try to articulate and structure a rule that can encompass Watson's story. Watson's story needs a larger (in a narrative sense) and more flexible rule. As Fish might say, Watson's story changes the questions the lawyer must ask about the rule in *Fox*.

So Watson's lawyer returns to the *Fox* opinion in search of language about the needs of the public and the relative needs of the parties. In the general discussion of the standards for deciding enforceability, the lawyer finds a quotation from an earlier case, reasserted with approval by the *Fox* court:

> It has been said that no better test can be applied to the question of whether a restrictive covenant is reasonable or not than by considering whether the restraint "is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. . . . There can be no doubt that an agreement that during the term of the service, and for a reasonable period thereafter, the employee shall not become interested in or engage in a rival business, is reasonable and valid, the contract being otherwise legal and not in general restraint of trade. This is the rule followed by an majority of the American Courts and is supported by reason . . . . This court seems to be committed to the rule that the contract must be limited both as to time and territory, and not otherwise unreasonable. If limited as to both time and territory, the contract is illegal if it be unreasonable in other respects. And, with respect to restrictive agreements ancillary to a contract of employment, the mere fact

> that the contract is unlimited as to either time or territory is sufficient to condemn it as unreasonable."[81]

Watson's lawyer notices that the sentence beginning "This court seems to be committed" provides the opportunity to expand the list of terms to be evaluated ("and not otherwise unreasonable"). However, Watson's facts do not identify any other terms that might be unreasonable, so this enlargement of the rule's reach, alone, will not solve Watson's problem.

Re-reading the opinion and exploring the possible meanings of its terms, the lawyer realizes that the narrowly articulated version of the rule only identifies which terms must be reasonable, but it does not attempt to articulate how the reasonableness of those terms will be gauged. Perhaps that is the function of the language about the needs of the public and the relative needs of the parties, and perhaps the lawyer can articulate a version of the rule that includes those considerations. The key term, "reasonable," is a term normally much more flexible than the mechanistic application over which it seems to preside in *Fox*. Usually reasonableness considers all of the circumstances of a set of facts. So, the lawyer articulates a second version of the rule and its hermeneutical approach:

> A restrictive covenant is enforceable only if its terms are reasonable when evaluated against the needs of the public and the relative needs of the parties:
>
> a. the nature of the activity restrained
> 1. assess the needs of the public
> 2. assess the needs of the parties
> b. the scope of the restriction
> 1. assess the needs of the public
> 2. assess the needs of the parties
> c. the duration of the restriction
> 1. assess the needs of the public
> 2. assess the needs of the parties
> d. Any other terms of the covenant
> 1. assess the needs of the public
> 2. assess the needs of the parties

Now the lawyer has succeeded in articulating a rule that gives legal meaning to the more compelling parts of Watson's narrative, but the cooperative work of narrative and other forms of legal reasoning is

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[81] 176 S.E.2d at 74 (citing *Shirk v. Loftis Bros. & Co.*, 97 S.E. 66, 68. (1918)).

not yet completed. The lawyer must try to maximize the legal meaning and narrative impact of Watson's facts. Evaluating the second version of the rule, the lawyer realizes that the primary rhetorical focus of the second version remains on the particular terms. This rhetorical focus can be minimized by structuring the rule first according to the criteria rather than according to the terms. The lawyer articulates a third version of the rule:

> A restrictive covenant is enforceable only if its terms are reasonable when evaluated against the needs of the public and the relative needs of the parties:
>
> a. the needs of the public
> 1. the nature of the activities restrained
> 2. the scope of the restraint
> 3. the duration of the restraint
> 4. any other terms
> b. the needs of the parties
> 1. the nature of the activities restrained
> 2. the scope of the restraint
> 3. the duration of the restraint
> 4. any other terms

Now the rule creates legal meaning for the theme and supporting facts of Watson's narrative, and it maximizes the rhetorical impact of Watson's more compelling facts. The lawyer's questions, prompted by Watson's story, have called into being a meaning for the rule that allows the rule to answer those very questions. This meaning will allow narrative reasoning to do its best work, unlimited by a narrow articulation of the governing legal standard.

Once these questions have defined this version of the rule, Carrolton's lawyer can unseat the rule only by challenging these unstated narrative questions that have defined it. In Fish's terms, Carrolton's lawyer must dislodge the questions that called into being Watson's rule articulation.[82] However, this will be a difficult task. Watson's lawyer has articulated a meaning for the rule that unmasks the implicit and culturally problematic limitations of the first version. Carrolton's lawyer would have to argue that the rule prohibits a judge from considering all of the circumstances of the case, including the needs of the public or the relative needs of the parties. But the

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[82] Fish observes that "[t]o the degree that [the initial] argument was influential . . . it constrained in advance the form any counter argument might take." Fish, *supra* note 76 at 2-3.

cultural narrative values the kind of fact-sensitive, contextual inquiry invited by Watson's rule articulation. Since the cultural narrative would probably reject this limitation, Watson's lawyer predicts that the judge would reject it as well.

Thus it is that the poetic and the prose traditions need each other.[83] For the reasons discussed in Section II, narrative is not sufficient, on its own, to justify a particular legal result. It cannot free itself from the clutches of a negative governing rule of law merely by telling a compelling story. Without a rule that gives legal significance to the narrative's key facts, the narrative cannot even be told, because the rules of evidence constrain the plotline to those facts that are relevant to the governing rule. However, the other forms of legal reasoning, the forms preferred by the dialectic imagination, cannot identify the characteristics of the preferred articulation of the rule. In Fish's terms, they often cannot ask the critical questions that will create a more favorable meaning for the text of the rule. In Tracey's terms, analogical imagination must supply the vision, and dialectic imagination must shoulder much of the work of implementing that vision. In Cover's terms, the paideic must create the meaning and the imperial must maintain it.[84]

IV. NARRATIVE AND LEGAL EDUCATION

The role of narrative in law-creation, doctrinal legal reasoning and the practice of law raises for the academy the question of how legal education should teach narrative skills. This section explores the value of teaching narrative skills and some pedagogical ideas for developing them.

A. The Value of Narrative in Law Study

The value of teaching narrative in law study is as varied and encompassing as the roles narrative plays in law creation and legal practice. While this article has dealt only with the role narrative plays in law creation and in doctrinal legal reasoning, the teaching of narrative's roles in these processes carries benefits that extend beyond those topics and across the spectrum of law study and law practice.

One advantage of purposeful attention to narrative skill is its assistance in implementing a comprehensive and useful jurisprudential

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[83] Greeley, *supra* note 1.

[84] Cover, *supra* note 11.

focus. Even when law schools approach legal doctrines from positivist, realist, or formalist perspectives, students must be shown the dynamic, pliable, and heuristic (as opposed to deterministic) nature of rules. Narrative interpretation, along with pedagogies that focus on the other forms of legal reasoning, helps students to grasp these qualities of legal doctrine and better enables them to engage the text of the law critically and creatively.

Discovering that law is pliable, whether the discovery is brought about through challenging Socratic hypotheticals or consideration of alternative narrative perspectives, breathes life into the study and the practice of the law. Rather than taking the form of fixed, dead letters on the page, law takes on new life. Law is re-created each time a lawyer articulates and structures the rule and envisions the client's narrative. As David Ray Papke observes, law "ceases to be limited, settled and formal and becomes instead fluid, contested and even contradicted. . . . We can more freely enjoy and participate in the ongoing process of re-creating the law. Bearing legal narrative in mind, we can understand law not as restriction and control but rather as a realm of possibilities."[85]

Recognition of the critical relationship between the lawyer and the text of the law imposes a significant responsibility on the lawyer. Explaining the impact of a comparable critical relationship between reader and text in the field of literary criticism, Stanley Fish writes:

> [The idea that meaning is generated in the interaction between the text and the reader] had many consequences. First of all, the activities of the reader were given a prominence and importance they did not have before: if meaning is embedded in the text, the reader's responsibilities are limited to the job of getting it out; but if meaning develops, and if it develops in a dynamic relationship with the reader's expectations, projections, conclusions, judgments, and assumptions, these activities (the things the reader *does)* are not merely instrumental, or mechanical, but essential, and the act of description must both begin and end with them. In practice, this resulted in the replacing of one question — what does this mean? — by another — what does this do? — with "do" equivocating between a reference to the action of the text *on* a reader and the actions performed *by* a reader as [the reader] negotiates (and in some sense, actualizes) the text. This equivocation allowed me to retain the text as a stable entity at the same time that I was dislodging it as the privileged container of [all] meaning. The

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[85] David Ray Papke (ed.), NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 5 (1991).

> reader was now given joint responsibility for the production of a meaning that was itself redefined as an event rather than an entity. That is, one could not point to this meaning as one could if it were the property of the text; rather, one could observe or follow its gradual emergence in the interaction between the text, conceived of as a succession of words, and the developing response of the reader.[86]

The cooperative meaning-creating venture shared by text and reader describes the lawyer's task in doctrinal legal reasoning, whether the task requires prediction or persuasion. Legal education must teach law students to become the kind of interactive, meaning-creating readers Fish describes. This teaching goal requires analyzing legal doctrines within the context of a pending set of question-generating facts and a desired legal result.

Students who think of law as a set of fixed rules think of lawyers as mechanics. Students who see law as a dynamic web of relationships — relationships of stories to rules to policies to customs and practices to other stories — can see law practice as an art form that demands and deserves a lifetime of "practice." They can see lawyers as artists whose work is creative and alive and whose responsibilities require the dedication of all aspects of their natures.

Seeing a rule as the product, the "prescriptive point,"[87] of a narrative from which some parts of the story are omitted and other parts are given legal significance also creates an opening for developing a sensitivity to the narratives of outsiders to the structures of legal doctrine. As students explore the changes of meaning that result from changes in rule articulation and structure, they begin to see that rules are codifications of a particular narrative perspective. Students may then wonder what other narrative perspectives are available and why the law-creator selected this one.

Narrative skill is critical to another fundamental lawyering skill — the ability to create and communicate a narrative that makes sense of both a client's situation and the lawyer's role in it. Practicing lawyers put the cases from their law practice — and their roles in them — into stories. When I defended a large corporation that had discharged an employee, I created a story about my role. The main character in my story was the plant manager, a fallible human being who had made a mistake he could not even now admit. He badly needed another human being to stand beside him, to be willing to be

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[86] Fish, *supra* note 5, at 2-3.

[87] Cover, *supra* note 11.

identified with him in the face of the growing hostility of the small town that was his and his family's home. In that story, I was the lawyer who rose to stand beside him as the verdict was read. In the very act of losing the case, I was performing my most important duty.

The lawyer who represented the plaintiff had created a different story. That story was about the way a large corporation had cruelly mistreated a long-time employee. The lawyer was the avenger. His job was to wield the sword of justice, to right a wrong that had been suffered by a loyal and hardworking husband and father.

Both of our stories were true, but both were incomplete. His story did not include a frightened and humiliated man, now the target of a town's retribution. My story did not include a virtuous but helpless former employee wanting only the financial resources to care for his family, an exemplary employee for many years. Whatever had happened on the day of his discharge, in my story, the plaintiff was now the one acting out of cruelty and desire to hurt another human being. He now wanted revenge and as much money as he could get, preferably more than he would have earned had he stayed in the tedious job he had held for twenty years.

The stories we created allowed us each to make sense of our roles as attorneys in the case. My story allowed me to come to terms with defending an action that personally I could not condone. His story allowed him to come to terms with his role in unraveling the personal and professional life of a man he barely knew. In troublesome cases like this one, lawyers use stories to provide for themselves a role more palatable than the role they would be playing in the story told by the opposing party. But even in more comfortable cases, lawyers still create stories to justify the hours they invest, for we all need to believe that our work has meaning.[88]

Narrative skills also enable us to comprehend the narrative perspectives of others, such as opposing parties, witnesses, and decision-makers. When stories teach lawyers about differing narrative

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[88] There is a danger in the stories we create, for these stories begin to define who we are. The more I defended corporations in employment cases, the more willing I became to excuse troublesome behavior by bosses and the more judgmental I became about employees. In other words, I became increasingly unable to hear a different story. Over the years I knew him, the lawyer for the plaintiff, who cultivated a specialty of plaintiff's employment cases, became less and less able to hear an employer's story. Not only was this a serious professional weakness in each of us, but it began to change us on a more fundamental level. And the changes were not good. See generally, Jack L. Sammons, Jr. and Linda H. Edwards, *Honoring the Law in Communities of Force: Terrell and Wildman's Teleology of Practice*, 41 EMORY L.J. 490, 503-511 (1992).

perspectives, they teach about how people react, think, and feel; about what motivates them. This understanding of human reaction is vital lawyering knowledge, for nearly every legal matter requires an understanding of clients, judges, juries, other litigation parties, witnesses, other lawyers, or parties to a transaction.

This narrative task implicates client counseling as well. Clients need lawyers who will listen to their stories, for it is in the telling that the client can make her own sense of the facts. Then, as the lawyer and client consider settlement or prepare for trial, the lawyer may need to help the client hear other stories from the facts, for until the client hears these other stories, she cannot really know what she wants. The degree to which the lawyer is able to help the client hear other stories depends in part on the lawyer's narrative skill and in part on how willing the lawyer has been to hear the client's story.

Narrative plays a role in nearly every lawyering task. Law study cannot afford to shirk a skill so vital to law practice.

B. Pedagogies For Teaching Narrative Skill

All kinds of courses — doctrinal, legal writing, and clinical courses — can and should devote attention to narrative skills. To think about how a narrative focus can be included more purposefully in any of these settings, it is helpful first to identify some pedagogical decisions necessary for teaching narrative skills more effectively.

First, we need time. An inevitable cost of deepening course instruction in one area is the loss of some breadth of course coverage. But if we are serious in believing that the real value of law study is not learning a set of rules but is rather learning a thinking process, then we must be willing to devote course time to teaching more deeply than broadly.

Second, we need clients, or at least pedagogic techniques that can bring students as close as possible to clients. Presentation of a hypothetical set of facts simply by orally describing those facts sacrifices the detail necessary to create even the skeleton of a story. Presenting a more comprehensive written set of distilled facts allows greater detail, but a written description significantly limits the potential of the exercise because it nearly always deprives students of the challenge of creating a narrative perspective themselves rather than adopting the narrative perspective inherent in the factual description they receive. To develop narrative skill, a student must learn to craft a narrative not from a set of canned facts but rather in

the way lawyers must: from interviewing a living, breathing client with a legal problem.[89]

Third, ironically, we need to teach more thoroughly the linear structures of the dialectic imagination. Specifically, we need to teach students to recognize the common rule structures[90] so that we can also teach the narrative perspectives and rhetorical implications of one rule structure as opposed to another.[91] While the teaching of rule structures is extraordinarily helpful for learning the skills necessary to the dialectic imagination, it is also important for learning to capitalize on the insights of the analogical imagination. A legal narrative, no matter how skillfully developed, must work in concert with a governing legal rule. It is the rule that provides the rhetorical setting for telling the narrative. Thus, the importance of narrative in law practice actually increases the premium on linear, dialectic reasoning. The more a student realizes the importance of fitting the governing rule to a compelling narrative, the better the student must be at using the dialectic imagination to construct from the available authorities a matching version of the rule.

The challenge of constructing a *favorable* rule articulation is greater than the challenge of constructing the most *obvious* rule articulation. To articulate and structure a rule that creates legal significance for a client's narrative perspective, a lawyer must perceive the narrative perspective of a particular rule articulation. What ills or dangers does the rule, thus phrased, seem to be designed to prevent? What benefits does it seem to be focused on preserving? What groups of people does it seem to protect? Constrain? What sort of factual situation seems to have been the law-creator's paradigm? And how does the present client's story match these concerns, fears, paradigms? This is the stage at which Watson's lawyer realized that Watson's story would not fare well when evaluated from the narrative perspective of the first version of the rule.

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[89] Of course, it would be even more helpful to take the fact-gathering process further to include interviewing witnesses; searching out and reviewing documents; and visiting the scene of the action.

[90] The most common rule structures are (1) rules that set out a test using mandatory elements, such as the rule listing the elements of fraud; (2) rules that set out alternative tests, that is, rules that call for the *apodosis* if any one of the listed circumstances exists; (3) rules that set out a flexible standard guided by certain criteria or factors; (4) rules that set out a balancing test, balancing countervailing considerations against each other (5) rules with one or more exceptions.

[91] For a more detailed explanation of common rule structures and their impact on a client's narrative theme, see Linda H. Edwards, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (1996) and the Teacher's Manual accompanying the text.

If the rule, thus articulated, is not particularly favorable to the client's facts, students next must learn to use whatever opportunities the authorities allow to re-articulate and re-structure the rule. This stage requires creativity — an openness to other possible visions of the rule's narrative perspective. This stage also puts doctrinal legal reasoning to its most difficult test, for the student must recognize and use each form of legal reasoning available to justify the preferred narrative perspective. For example, Watson's lawyer envisioned a rule articulation that adopted an equitable narrative, doing the most justice possible for all parties involved and maximizing the spirit of compromise.

One of the most common techniques for changing the narrative focus of a rule is to try to rearticulate it as a rule with factors or as a balancing test rather than as a list of elements or alternatives. Another common technique is to look for and use equitable, flexible articulations of standards such as "reasonableness," "burdens," "benefits," "needs," "interests," "substantial," "importance," and "fitness." Such flexible standards may be implicit in rules that superficially appear to be absolute.[92] These structures and articulations are far closer to the narrative model than are rule structures with mandated lists or alternatives and articulations using more easily and "objectively" measurable standards. As Bernard Jackson has observed:

> The further the form of the "rule" moves from the narrative model to a purely abstract, conceptual formulation, the more we are likely to encounter difficulties in both the application of law to fact and the interpretation of general rules, notwithstanding the clarity of the words in which the rule is expressed. This is not merely a function of the need to take individual considerations into account in the act of adjudication. It is a matter of the non-conceptualized elements which attach to narrative models, and which are lost when [narrative models] are translated into purely abstract, conceptual language.[93]

Once the rule is re-articulated in the most favorable manner justifiable from the authorities, the lawyer must fine tune the rule's structure to increase its rhetorical emphasis on the favorable aspects of the rule. For example, Watson's lawyer revised the rule's structure

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[92] Such as the Sherman Anti-Trust Act's prohibition of "any contract in restraint of trade" which the Supreme Court promptly held to mean "any unreasonable restraint." *Standard Oil Co. V. United States*, 221 U.S. 1 (1911).

[93] Jackson, *supra* note 44, at 171.

to increase the rhetorical and analytical emphasis on the equitable considerations and to decrease the rhetorical and analytical emphasis on the particular terms. In both of these last two steps, linear reasoning and creative thought must work in partnership. This process of lawyerly reasoning, that is, a reasoning process that marries the analogical and dialectic imaginations, is a skill that law study should teach expressly.

Finally, we need to test the skills we teach if we expect students to take those skills seriously. Doctrinal examinations typically test the student's ability to articulate a series of governing rules, apply those rules to a sparsely stated set of facts, and articulate the policy considerations implicated by the rules and their interpretation. Certainly, these abilities are necessary and should be tested. However to stimulate the growth of creative lawyering, we also need exercises that require students to articulate two possible rule structures from the same legal authority and to apply those differing rule structures to the same set of facts. We need to test the student's grasp of narrative perspectives and their implications for legal hermeneutics.

In addition to these pedagogical strategies, law courses and curricula offer other opportunities for teaching narrative skills. Here are a few such opportunities:

Doctrinal Courses

1. Throughout the course, ask students to identify the various forms of reasoning present in the opinions they read. For the narrative reasoning they find, ask students what cultural narratives, such as those reflected in novels, film, TV, this narrative reasoning seems to be drawing upon.

2. Occasionally, ask students to develop arguments of their own in which they try to use all fives forms of reasoning. If the arguments are written, select several examples, distribute copies to the class, and invite the class to evaluate the effectiveness of each form of reasoning and to suggest ways to improve the argument's effectiveness.

3. Introduce students to the basic rule structures and to the idea of articulating rules in a recognized rule structure. Then, be alert for cases that could support more than one articulation and structure for the governing rule. Use the first of those cases to demonstrate the process of articulating more than one rule version. Then, for other such cases, divide the class in half and ask each half to articulate a version of the rule on behalf of opposing parties in a hypothetical case. Compare and discuss.

4. Ask students to write a persuasive fact statement that matches a hypothetical client's story to the rule they have defined from the cases. Have students share their fact statements with the class and discuss them.

5. Ask students to write a Question Presented on behalf of each party in the assigned case. A strong Question Presented in a brief will encapsulate the client's narrative phrased in the most favorable way possible. The Question Presented is the "theory of the case" in a nutshell, and it is heavily fact-dependent.[94] Have students share their Questions Presented with the class and discuss them.

6. Use a text that includes some treatment of narrative, if only in canned facts as part of periodic problem sets.

7. On the course examination, test students' facility with the five forms of legal reasoning, perhaps by asking students to write out an argument, including a fact statement, on a particular issue. Evaluate the argument based in part on how well the student was able to use each form of reasoning. This question would cover fewer legal issues but would better test depth of analysis.

8. Be alert for opportunities to explore the possible narrative roles of the lawyers in the cases covered in course readings.

Legal writing courses:

Legal writing courses can use many of the ideas listed under doctrinal courses. Legal writing courses also can teach narrative skills in additional ways.

9. Teach narrative techniques effective for writing fact statements and for presenting facts in oral arguments.[95] Examples of narrative components that can be used to present a compelling narrative include ordering of events, theme, characterization,

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[94] For instance, A and B below demonstrate competing Questions Presented in the Watson/Carrolton case, the first on behalf of Carrolton and the second on behalf of Watson: A: Is a covenant-not-to-compete enforceable where the covenant was a bargained-for term of the sale of a business, where the term was negotiated as part of the agreement to allow the seller to continue working for the business, and where the sale specifically included the company's customer lists and good will?
B: May a large, established business enforce a covenant-not-to-compete where the covenant would eliminate all competition within the market area and where the prohibited activity would affect only four percent of the covenant-holder's profits?

[95] Linda H. Edwards, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, Ch. 21 (1996); Richard K. Neumann, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE, Chs. 13, 18, 23 (2nd ed., 1994); Mary B. Ray & Barbara J. Cox, BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING, Ch. 8 (1991).

development of scene, use of detail, narrative voice, mood, and metaphor.

10. Use examples of effective fact statements from sample briefs and oral arguments, identifying the techniques that work well and those that do not.

11. Explicitly teach the narrative and consensual normative reasoning that is often the basis for an effective Question Presented and for a compelling "theory of the case."

12. Encourage students to develop a special awareness of the importance of characterization, in part by asking students to describe orally, in class, the character they see each party or witness to be.

Clinics:

Clinics are well-suited for intensive and realistic work on narrative:

13. Thoroughly practice opening and closing statements to a jury.

14. Teach informal advocacy, such as that required to persuade government officials to take action or that required to negotiate with an opposing party.

15. Explicitly teach the skill of recognizing possible narrative perspectives of other parties.

Law and Literature Courses:

Courses in Law and Literature have unique opportunities for developing narrative skills, among them:

16. Read and study narratives in both literature and legal scholarship.

17. Discuss the relationship of the assigned narratives to any relevant legal rules.

18. Present the class with several legal rules and ask them to write or orally describe the narrative(s) that might have created each rule.

19. Read and discuss stories of the lives of real lawyers. Recognize the narrative themes and perspectives in those stories and discuss how those narrative themes and perspectives might apply to the students' future practices.

V. CONCLUSION

Narrative and doctrinal reasoning are not in competition. Rather each needs the other. Legal reasoning is incomplete without the soil of narrative from which the reasoning grows and to which it will return. On the other hand, narrative must operate within the constraints of a governing legal rule that provides a reasonable degree of stability, rationality, and predictability. And that governing rule must be supported also by the other pillars of legal reasoning — analogical, policy-based, and consensual normative reasoning — to provide some assurance that the governing rule will function well in a number of varying narrative contexts.

Further, narrative and doctrinal reasoning must work together in articulating and structuring a rule that will give legal significance to the client's narrative. Within the constraints of the applicable authorities and those of the interpretive community of the law, the lawyer must develop the client's narrative and must construct a rule to support that narrative. This lawyerly reasoning requires more than using the text of the authority, taken to have the meaning that first occurs to the reader. Good legal reasoning requires reflection and imagination. Narrative, in its many roles, can inspire that reflection and imagination.