

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2016

Speaking of Stories and Law

Linda H. Edwards

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Law and Philosophy Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Edwards, Linda H., "Speaking of Stories and Law" (2016). *Scholarly Works*. 1000.

<https://scholars.law.unlv.edu/facpub/1000>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Legal Communication & Rhetoric: JALWD

Fall 2016 / Volume 13

ARTICLES & ESSAYS

Speaking of Stories and Law

Linda H. Edwards

Speaking of Stories and Law

Linda H. Edwards*

[F]orget definition, forget assumption, watch. We inhabit, we are part of, a reality for which explanation is much too poor and small.

—Marilynne Robinson¹

In a recent article about the relationship of narrative² to law, Stephen Paskey gives us much food for thought.³ I applaud much of the article. Most importantly, I agree with what may be the article’s key stance—that “stories are central to law and legal reasoning in ways that lawyers and legal scholars have yet to fully explore.”⁴ As Paskey correctly points out, “stories are not simply a tool for persuasion: they are embedded in the structure of law itself. In a very literal sense, no one can make laws or practice law without telling stories.”⁵ From its title (*The Law is Made of Stories*) to its final paragraph⁶ and on nearly every intervening page,⁷ the article reminds us that law and narrative are inextricably linked. The

* E.L. Cord Foundation Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I am grateful to Stephen Paskey for his serious treatment of my now-twenty-year-old exploration of narrative’s roles in traditional legal argument. Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51 (2014) (commenting on Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996)). With all the excellent scholarly work that has been done on narrative in the intervening years, it is indeed an honor to be considered as still in the game. My thanks also to Linda Berger, Dan Edwards, Joan Magat, and Terry Pollman for their extraordinarily helpful comments on earlier drafts.

¹ MARILYNNE ROBINSON, *WHEN I WAS A CHILD I READ BOOKS: ESSAYS* 7 (2013).

² Some scholars have offered distinctions between “narrative” and “story.” These distinctions can be helpful for other purposes. I hope those scholars will forgive me for here using the terms essentially as synonyms.

³ Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JAWLD 51 (2014).

⁴ *Id.* at 54.

⁵ *Id.*

⁶ *See id.* at 82 (“Stories thus lie at the very heart of law. They are not secondary to rules, nor are they simply (or even principally) a tool for persuasion.”).

⁷ For example, the article describes legal stories as “embedded in” rules, *id.* at 52, 78, and as having “deep roots in” or being “grounded in” the nature of law. *Id.* at 79. It claims that rules themselves “demand” stories, *id.* at 52; “embody” stories, *id.* at 76, 78; and are “the product of stories,” *id.* at 80. The article asserts that rules “[have] the underlying structure of a *stock story*,” *id.* at 52 (emphasis in original), and “can be satisfied only by telling a story,” *id.* at 52, 78. It claims that “a governing rule is a rule about stories.” *Id.* at 78.

article concludes that “the law is made of *both* stories and rules.”⁸ I couldn’t agree more.

On other pages, *The Law is Made of Stories* seems to take a different position—not that rules are *made of* stories but that rules *are* stories.⁹ Stories and rules are the same thing, the article asserts, and any perceived differences are simply illusory matters of form. The article observes that no one else has yet staked out this bold position, and as far as I know, that claim is true. After characterizing existing narrative scholarship as having “stopped short” of collapsing distinctions between rules and stories,¹⁰ the article redefines the topic’s key terms: “rules,” “stories,” “stock stories,” and “narrative reasoning.”¹¹ It then applies these new definitions to a set of examples, aiming to show that any perceived dichotomy between rules and stories is false.¹²

These three moves—the characterization of existing scholarship, the instrumental redefinition of key terms, and the set of examples offered to debunk distinctions—give me pause. What follows are some thoughts, respectfully offered as a concurring opinion, about these moves and about the points of disagreement between Paskey’s *The Law is Made of Stories*¹³ and my own earlier work in *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*.¹⁴

I. Mapping the Scholarly Terrain

The Law is Made of Stories describes three eras of narrative scholarship and equates each era with a particular substantive approach. The first era, the outsider narratives of the 1980s, is characterized as “aim[ing] to break taboos, celebrate diversity, and ‘challenge established ways of thinking’ by telling the stories of people who had long been outside the

8 *Id.* at 82 (emphasis in original).

9 For example, the article states,

Edwards recognizes that legal rules are often the product of a narrative. . . . But Edwards is also emphatic in her assertion that “[r]ules are not narratives.” On that last point, I respectfully disagree. My thesis is that every governing legal rule is literally a form of narrative, in which the essential elements of a story—events, characters, and plot—have been reduced to general terms.”

Id. at 52. Paskey emphasizes that “[a] governing rule . . . is, in fact, still a narrative[.]” *id.* at 72 (emphasis in original), “a stock story.” *Id.* at 72 (emphasis omitted).

10 *Id.* at 52 (“Other writers have suggested that legal rules sometimes take the form of a story, but they have stopped short of the claims I make here.”).

11 *Id.* at 59–71 & 76–78.

12 *Id.* at 71–76. The article’s subtitle is *Erasing the False Dichotomy Between Stories and Legal Rules. Id.*

13 *Id.*

14 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996) [hereinafter Edwards, *Convergence*].

legal academy.”¹⁵ A second era, set primarily in the 1990s, is said to have focused on “theoretical and practical work on the role of storytelling in trial practice.”¹⁶ Finally, the article sees today’s Applied Legal Storytelling (ALS) as a third era. Legal writing faculty are the primary authors of this work, which focuses on “pedagogy and practice” and aims to produce scholarship directly relevant to the practice of law.¹⁷ Paskey likens ALS scholars to “explorers who vow to journey only north and east, but never south or west.”¹⁸

Narrative scholarship to date may be vulnerable to this implicit criticism and to some other conceptual misunderstandings because narrative explorers are only beginning to map the terrain. Without a conceptual frame of reference for the work of other scholars, we may be less likely to understand and appreciate each other’s work, and we may also mistake the theoretical home ground of the points we want to make. The time may have come, then, for us to develop a conceptual map of the field. What follows is a tentative first step—one offered with the suggestion that we try it out, knowing that we can alter, supplement, and refine it in the years to come.¹⁹ More immediately, identifying the territory narrative scholars have so far explored may help us think more clearly about the question of whether rules are made of stories or are themselves stories. This working draft of a narrative map is tentative to be sure, but even so, in the words of Meryl Streep, it’s complicated.²⁰

Over the years, scholars have explored narrative’s relationship with law by examining topics of at least three types: (1) the jurisprudential role of narrative as a universal preconstruction, underlying most forms of human thought, including rules of law; (2) the role of narrative in public law talk—what we say and how we reason in briefs and judicial opinions; and (3) the role of narrative in the lawyering task of persuasion.²¹ Though

¹⁵ Paskey, *supra* note 3, at 55 (quoting Kim Lane Scheppele, *Forward: Telling Stories*, 87 MICH. L. REV. 2073, 2073–74 (1989)).

¹⁶ *Id.* at 55.

¹⁷ *Id.* at 56.

¹⁸ *Id.* at 53. This allegory of a map is reminiscent of Plato’s allegory of the cave, in which Plato compared people unschooled in his theory of forms to prisoners in a cave, unable to turn their heads. A fire is burning behind them, but they see only the wall of the cave. Puppeteers hold up puppets behind the prisoners, casting shadows on the cave’s wall. Seeing only the shadows, the prisoners think that they are seeing the objects themselves.

¹⁹ We will continue to fill in other terrain on the map, but I deal here with the three types of topics that are most relevant to the questions addressed in *The Law is Made of Stories*. I admit that in this postmodern world, the idea of a conceptual map may be inherently flawed, but the lack of even an impressionistic overview of the field can lead us into difficulty, as this article will explain, and obscure other fertile ground for exploration.

²⁰ A popular cultural description of modern relationships, used as the title of the 2009 movie, *It’s Complicated*, starring Meryl Streep, Steve Martin, and Alec Baldwin. *IT’S COMPLICATED* (Universal Pictures 2009).

²¹ Many of the best articles on narrative have explored more than one type of topic and have also explored the pedagogical question of how to teach narrative in law school classrooms.

some decades have seen more of one kind of work than another, publication dates do not correlate smoothly with these three categories. Each decade since at least the 1970s has included scholarship of each type. The differences are simply matters of topic, audience, and purpose. We begin with the first type because preconstructions generally precede all conscious reasoning processes, including reasoning in law.

A. Type One: Jurisprudence—It’s Stories (and Other Frames) All the Way Down.²²

At least since the publication of James Boyd White’s *The Legal Imagination*²³ in 1973, scholars have been exploring the idea that law is not merely the product of mandatory authority, as the formalists would have us believe. Nor is it merely the product of policy combined with power, as the realists might suggest. Rather, law ultimately is the product of commonly shared narratives and other cultural frames that form the soil from which all legal principles grow.²⁴ Robert Cover was another early voice pointing out this foundational role for narrative. The 1983 publication of *Nomos and Narrative*²⁵ marked a milestone in narrative thought, when Cover famously observed, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”²⁶

Other scholars in rhetoric soon joined the work on narrative’s foundational role. For example, in 1987, Peter Goodrich published *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*.²⁷ Goodrich explored the “preconstructions, preferred meanings, [and] rhetorical and ideological dimensions” that account for law.²⁸ These preconstructions include the cultural myths, metaphors, and meta-narratives that frame the way those in power see the world. Such implicit but largely unrecognized²⁹ frames account for enforceable legal commands.

22 “It’s turtles all the way down” is a common jest in response to the problem of infinite regression in cosmology, perhaps originating with the mythological idea that the world rests on four elephants that are standing on a very large turtle. In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia referred to his favorite version of the myth:

In our favored version, an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies “Ah, after that it is turtles all the way down.”

Id. at 754 n. 14.

23 JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973). White is generally considered to be the father of the law and literature movement.

24 “Rhetoric” is probably the best umbrella term for this multifaceted understanding of law’s foundations and functions.

25 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

26 *Id.* at 4.

27 PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* (1987).

28 *Id.* at 204.

Critical theorists such as Richard Delgado³⁰ and Mari Matsuda³¹ continued the exploration of narrative and power. Unlike formalists and realists, these scholars unearthed the hidden narratives that form the foundations of many legal principles, contrasting the narratives of power with the narratives of oppression. By unmasking the dominant cultural narratives that produce the law, critical theorists demonstrated that law is built on narrative. They used outsider stories not just to break taboos or celebrate diversity.³² Rather, they used outsider stories to reveal the dominant narratives from which law has been formed. Inherent in the work of critical theorists, then, was the idea that the law is made of stories—that dominant narrative perspectives account for the legal rules that traditional discourse purports to state as neutral and objective.

The key difference between traditional law-talk and oppositionist critique is that [the] controlling myths, metaphors, and meta-narratives are kept implicit in traditional law-talk. We don't speak of those things. We confine the discourse to rationalist, scientific, putatively objective language. As oppositionists and rhetoricians have pointed out, it is in the interests of those in power to limit law to this "self-protective" view. But to oppositionists and at least some rhetoricians, such traditional law talk is only an attempt to justify a result chosen for other and often unstated reasons. In a way comparable to a psychoanalyst looking for what lies beneath an explicit behavior, oppositionists try to look deeper to ask what is really going on.³³

Moving into this century, scholars looked to cognitive science to analyze law's narrative pre-constructions. In 2003, Steven Winter published *A Clearing in the Forest*.³⁴ Winter relied on cognitive studies, philosophy, and literary theory to show that legal analysis is not a matter of traditional analytic skill, using seemingly neutral forms of reasoning like rules,

29 Law "appropriates the meaning of other discourses and of social relations themselves, while specifically denying that it is doing so." *Id.*

30 See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) ("[M]indset [is] the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.").

31 E.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparation*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (explaining that critical theory considers law to be a process of legitimizing what might otherwise seem illegitimate).

32 Paskey, *supra* note 3, at 55.

33 Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 CONN. PUB. INT. L. J. 43, 48–49 (2013) (internal citations omitted) [hereinafter Edwards, *Where Do the Prophets Stand?*].

34 STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001). We might consider narrative its own form of preconstruction, or we might consider it to be a theoretical subset of metaphor, as Winter is inclined to do. But either way, the point is that human decision-making does not begin with rule-like articulations of legal commands but rather with pre-constructions such as narratives.

policies, and principles, but rather of imaginative mental processes such as narrative and its first cousin, metaphor. Like scholars before him, Winter sees these frames as foundational to articulated principles like legal rules.

Type-one scholarship continues unabated, including within legal writing scholarship. Linda Berger's work has shown narrative's jurisprudential role as part of the rhetoric of law and has analyzed foundational narratives in several areas of law.³⁵ For example, in *Studying and Teaching Law as Rhetoric: A Place to Stand*,³⁶ Professor Berger presents the view that rhetoric (including the role of narrative) is a useful jurisprudential stance for both studying and teaching law. In other articles, she has analyzed the culturally embedded narratives that influence custody decisions³⁷ and the metaphors that have constrained Supreme Court decision-making in the area of corporate law.³⁸

Some of my own work has attempted to unmask foundational narratives. For example, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools* argues that law is based on largely unstated narrative perspectives masquerading as neutral rules and principles.³⁹ The article uses the opinions of the Fourth Circuit and the United States Supreme Court in *Hamdi v. Rumsfeld*⁴⁰ to demonstrate the role of the myth of redemptive violence in law creation. It agrees with critical theorists in finding that "[d]ominant myths and other such frames have been instrumental in building and maintaining the master's house and are among the master's most important tools. Therefore, logically, they are part of 'law,' just as the unseen foundation is part of a house."⁴¹

The point of this type-one scholarship is jurisprudential; it explores the narrative roots of human decision-making, including in law. As scholars have pointed out, people perceive new information through a preexisting frame, often a story,⁴² and then construct legal principles to

³⁵ E.g., Linda L. Berger, *The Color-Blind Constitution: Choosing a Story to Live By*, 2016 MICH. ST. L. REV. (forthcoming 2016) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666076; Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L. J. 275 (2011).

³⁶ Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 3 (2010).

³⁷ Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009). This article also proposes ways to use rhetorical analysis to construct competing narratives in custody disputes, a type-three endeavor. See *B. Type Three: Persuasion—Narrative as a Lawyering Tool* (*infra* notes 57–75 and accompanying text).

³⁸ Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).

³⁹ Edwards, *Where Do the Prophets Stand?*, *supra* note 33.

⁴⁰ *Hamdi v. Rumsfeld*, 316 F. 3d 450 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴¹ Edwards, *Where Do the Prophets Stand?*, *supra* note 33, at 48. See also Linda H. Edwards, *The Humanities in the Law School Curriculum: Courtship and Consummation*, 50 WAKE FOREST L. REV. (forthcoming 2016).

⁴² See, e.g., Charles Fried, *The Artificial Reason of the Law or: What Layers Know*, 60 Tex. L. Rev. 35 (1981); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 29 (1991).

engineer the story's ending. Narrative is foundational to all forms of traditional law talk, including rules, policies, and other seemingly objective reasons. We build rules from shared narratives. Thus, narrative is step one of law creation. In this kind of narrative scholarship, then, scholars have long contended that many, perhaps most dialectical claims, including rules, are made of stories.

B. Type Two: Legal Discourse—How We Speak About Law

As we have seen, type-one scholarship explores narrative as a preconstruction—an often unacknowledged frame that determines which legal outcomes we will embrace, at least initially. Type one is interested in our choices rather than our discourse about those choices. For example, the narrative perspective known as the myth of redemptive violence can be said to prompt us to think that the Commander in Chief should win and Hamdi should lose.⁴³ In type one, as a matter of jurisprudence, narrative scholars have shown that stories, not rules, are “where the real action is.”⁴⁴

Once we choose a side, however, we must justify that choice, and we should also check that choice against authority, policy, and principle. The scholarship of type two analyzes these justifications. Here we explore the express reasoning that judges use to explain their decisions—that is, the way we write and speak about legal outcomes. In traditional legal analysis, lawyers and judges most often look to rule-based reasoning, analogies, distinctions, policies, principles, and expressly stated client stories.⁴⁵ Type-two scholarship analyzes the role of narrative in legal discourse, the language of lawyers and judges. In other words, type-two scholarship is a form of meta-discourse.

Scholars who have written about type-two topics have largely agreed that in legal discourse, lawyers must speak about these other forms of reasoning without acknowledging their narrative roots. Lawyers must speak and write as if rules are dominant and narrative is subordinate. Thus, Michael Smith has observed that the legal system “is not founded on narrative reasoning” but on “a commitment to the rule of law.”⁴⁶ Christy DeSanctis has found type-two narrative reasoning to be distinct from and subordinate to other forms of reasoning thought to be more logical and

43 These three types of narrative scholarship are radial categories rather than classical categories. In application, the distinctions among them are matters of distance and direction rather than binary characteristics. See Linda H. Edwards, *The Trouble With Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181 (2014).

44 Edwards, *Where Do the Prophets Stand?*, *supra* note 33, at 73.

45 Edwards, *Convergence*, *supra* note 14, at 9–13.

46 MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 369 (3d ed. 2013).

legitimate.⁴⁷ Traditional legal discourse sees narrative as powerful but in need of constraint. Steve Johansen thus writes that narrative “may be *too* powerful” to operate alone.⁴⁸ In *Convergence*, I agreed.⁴⁹

It is beyond dispute that in the American system of legal discourse—the conventional rhetoric in which lawyers must write and speak—narrative is not “the golden ticket.”⁵⁰ We may like it or we may not, but that is how it is. Lawyers *use* narrative in all conventional forms of reasoning, but they do not announce that they are doing so. Type-two scholarship, then, identifies narrative’s implicit roles in law’s conventional discourse. It explores narrative’s unstated roles in rule formation, analogy, disanalogy, policy, and principle.⁵¹

Some type-two topics deal only with express discourse without exploring its unstated narrative roots. For example, when textbooks for law students introduce the forms of legal reasoning lawyers use,⁵² they are functioning as such type-two texts.⁵³ Their purpose is to teach students to write and speak appropriately in the relevant discourse community. Therefore, first-year legal writing textbooks do not explore the type-one jurisprudential role of narrative as a preconstruction. Nor do they have the luxury of explaining all the unstated narrative influences in traditional forms of reasoning. First-year legal writing texts are teaching new law students the language of the law. They are not teaching the theoretical analysis of that lexicon. Texts for upper-level courses can go deeper, but the primary goal of even these texts is still to teach law students to speak and write in the language of the law.⁵⁴

Other type-two topics look beneath express discourse to unearth narrative roots. These topics explore how express forms of legal reasoning are constructed. The discussion in *Convergence* is primarily this kind of

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

48 Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 63–64 (2010) (emphasis in original).

49 Edwards, *Convergence*, *supra* note 14, at 40, 50.

50 ROALD DAHL, *CHARLIE AND THE CHOCOLATE FACTORY* (1964).

51 Edwards, *Convergence*, *supra* note 14; DeSanctis, *supra* note 47, at 149.

52 See, e.g., CHRISTINE COUGHLIN, JOAN MALMUD, AND SANDY PATRICK, *A LAWYER WRITES* 135–49 (2008) (rules & analogies); LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 55–63 (4th ed. 2015) (rules, analogies, policies, principles, customs, inferences, and narrative); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 4–7 (6th ed. 2014) (rules, analogies, policy, and narrative); RICHARD K. NEUMANN, JR. & KRISTEN K. TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 9–16, 117–20 (7th ed. 2013) (rules, analogies).

53 When these same texts shift to the topic of persuasion, they are functioning as type-three texts. See *B. Type Three: Persuasion—Narrative as a Lawyering Tool* (*infra* notes 57–75 and accompanying text).

54 LINDA H. EDWARDS, *READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD* 230–323 (2012) (categories, metaphor, & narrative); SUSAN E. PROVENZANO, SARAH O. SCHRUB, CARTER G. PHILLIPS & JEFFREY T. GREEN, *ADVANCED APPELLATE ADVOCACY* 249–69 (2016) (rhetoric & framing); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING*, 35–47, 197–217 (3d ed. 2013) (illustrative narratives, metaphor).

type-two discussion. The article recognizes the express use of narrative as a form of reasoning in traditional legal discourse⁵⁵ but also recognizes hidden roles for narrative in the creation of rules, analogies, and policies.⁵⁶ As I read it, *The Law is Made of Stories* is also a type-two discussion, exploring the narrative roots of rules as lawyers and judges use them. Whatever the points of disagreement between these two articles, disagreements to be shortly discussed, they are, or should be, located here on the conceptual map.

C. Type Three: Persuasion—Narrative as a Lawyering Tool

Scholarship at type two analyzes narrative's role in the basic forms of legal reasoning, that is, the express forms of reasoning judges employ to justify their decisions. The goal is to understand and use the language of the law. Closely related, type-three scholarship explores the ways lawyers use narrative to persuade. Type three includes the work of scholars writing about all stages of legal process, including both trials and appeals. Thus, type three includes scholarship from the 1990s⁵⁷ as well as current ALS scholarship.⁵⁸ When textbooks for law students make the shift into persuasion, they are functioning as type-three texts.⁵⁹

Much of this scholarship explores the ways in which lawyers craft and present the stories of their clients.⁶⁰ For instance, Bennett and Feldman's 1981 treatise, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*, explored the use of trial narratives as an essential part of litigation practice.⁶¹ Tony Amsterdam and Randy Hertz explored the narrative art of making a closing argument to a jury.⁶² Brian Foley and Ruth Anne Robbins have identified a set of plot templates for writing a fact statement in a brief.⁶³ Robbins has also applied the hero archetype to writing fact statements.⁶⁴ Ken Chestek has explored competing client narratives in six cases challenging the Affordable Care

55 Edwards, *Convergence*, *supra* note 14, at 17–23.

56 *Id.* at 23–27.

57 Paskey, *supra* note 3, at 55–56.

58 *Id.* at 56.

59 Several excellent texts are designed specifically for the persuasion portion of a first-year legal writing course. *See, e.g.*, MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* (4th ed. 2014); RUTH ANNE ROBBINS, STEVE JOHANSEN, & KEN CHESTEK, *YOUR CLIENT'S STORY* (2013).

60 The express use of narrative can be derivatively relevant to predictive analysis as well, of course, since predictive analysis must evaluate the persuasive impact of a narrative on a legal decision-maker.

61 W. LANCE BENNETT AND MARTHA FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

62 Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55 (1992).

63 Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L. J. 459 (2001).

64 Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006).

Act, arguing that those narratives help account for the resulting decisions and suggesting ways in which lawyers can choose narrative strategies to improve case outcomes.⁶⁵ Chris Rideout has explored the persuasive impact of narrative coherence, correspondence, and fidelity.⁶⁶

Some type-three scholarship has explored both ethical and practical limits on traditional ideas about persuasive storytelling. Steve Johansen has written about narrative ethics both in the typical litigation context and when dealing with clients.⁶⁷ Jeanne Kaiser has pointed out the ethical and practical difficulties inherent in advocacy when the events of the case do not match well with traditional ideas of telling a compelling story.⁶⁸ In *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, Pamela Wilkins explored the cognitive implications of the typical defense narrative argument against a sentence of death.⁶⁹ In *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High-Stakes Dilemma*,⁷⁰ I explored a counter-intuitive narrative strategy when representing an unsympathetic defendant on a constitutional challenge to the death penalty.⁷¹

Scholarship of this type can explore even the use of the stories of non-parties. For instance, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*⁷² analyzes the increasing use of stories from a variety of non-parties to create a broader narrative context on appeal and to counteract naïve stereotypes about social issues of our day.

Finally, type-three scholarship can explore the uses of narrative to present the stories of the law itself. *Once Upon a Time in Law: Myth, Metaphor, and Authority*⁷³ examines the legal arguments in the briefs from two canonical constitutional law cases. It argues that the Petitioner's Brief in *Miranda v. Arizona* presents its legal argument implicitly as a

65 Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 99 (2012).

66 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53 (2008).

67 Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L. J. 961 (2006); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

68 Jeanne Kaiser, *Where Truth and the Story Collide: What Legal Writers Can Learn From the Experience of Non-Fiction Writers About the Limits of Storytelling*, 16 LEGAL WRITING 163 (2010).

69 Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012).

70 Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High-Stakes Dilemma*, 66 MERCER L. REV. 425 (2015).

71 The article argues that establishing a rhetorical connection with the judge is more important than telling a trite client story that appears to try to justify horrendous crimes. When the only client story to be told is a story the judge has heard too many times and will likely reject, the lawyer should avoid appearing to tell that story. *See id.*

72 Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327.

journey story⁷⁴ and the Respondent's Brief in *Bowers v. Hardwick* presents its legal argument implicitly as a rescue story.⁷⁵

* * * * *

The work of all these scholars, taken together, provides the start of a conceptual map, and clarifying the map's terrain can help us understand and appreciate each other's work. Once we see that other scholars were writing about topics with different goals, audiences, and purposes, we may be less inclined to critique them for failing to write about the topic we would have chosen. And as the next sections will discuss, a conceptual map may also help us locate the theoretical home ground of the points we want to make in our own work. Locating our own work might, therefore, relieve the perceived need to reach for arguments we cannot sustain. Finally, a conceptual map may help us notice relationships among topics of various types, revealing new territory for exploration. All of those inquiries will deepen the field and expand our understanding of narrative's role in law.

II. Epistemological Limits of Definitions

The Law is Made of Stories summarizes some of the definitional debates about the meaning of the term "story" and then offers new definitions for "rules," "story," "stock story," and "narrative."⁷⁶ Similar debates have occurred both within legal scholarship⁷⁷ and in literary studies.⁷⁸ But I confess that I am skeptical about how well we can analyze important issues by redefining terms and then applying those newly defined terms to the questions of the day.

First, as a matter of epistemology, definitions are usually constructed by human beings in order to support or advance their own project. For instance, I agree with Paskey that Kendall Haven's definition of "story" is "narrow and value-laden" because "Haven is not trying to define story generally" but rather "aims to describe the stories that best suit his

73 Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 885 (2010).

74 *Id.* at 891–98.

75 *Id.* at 898–907.

76 Paskey, *supra* note 3, at 59–71, 76–78.

77 For example, Derek H. Kiernan-Johnson has suggested the term "narrativity" as a move away from old debates about whether a particular legal text is a story and toward questions of degree, type, and balance of narrative influence. Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81 (2012). Kiernan-Johnson's suggestion strikes me as perceptive and potentially helpful in molding the future of the study of narrative's role in law.

78 Paskey, *supra* note 3, at 61–62.

rhetorical purposes.⁷⁹ The problem is unavoidable, however. When we try to define a term, we do so from our own rhetorical situation. We cannot help it. Haven did that; I feel sure that I have done that; and Paskey did it too. It is possible to read *The Law is Made of Stories* as saying that current definitions do not support the thesis that stories and rules are the same thing, and therefore we should choose different definitions in order to support the thesis we prefer.⁸⁰

That inescapable subjectivity is part of the reason that definitions make for unreliable epistemology, and this concern leads to my second. Paskey says that “[t]he concept of a *stock story* is too valuable to use loosely,”⁸¹ but I wonder whether the concept is too valuable to use precisely. In the epigram to this essay, Marilynne Robinson counsels us to forget definitions and instead to simply “watch.”⁸² She reminds us that precise and careful explanations are “too poor and small” to explain reality.⁸³ I think she may be right. If I fell into this error twenty years ago, I repent. I hope that today’s readers will construe *Convergence* as merely a “finger pointing at the moon.”⁸⁴

Third, I am skeptical about using definitions to separate content from form.⁸⁵ That division seems necessarily artificial because ideas and their verbal expression are fundamentally indivisible.⁸⁶ As I read him, Paskey wants to distinguish “story” (by which he means “events, entities, and situations”)⁸⁷ and “discourse” (by which he means “the way the content is expressed”).⁸⁸ While that debate has a long history in literary scholarship, its applicability in law may not be so obvious. What is unclear to me is

⁷⁹ *Id.* at 67–68 (emphasis omitted).

⁸⁰ *The Law is Made of Stories* makes its case for new definitions by stating,

[O]ne cannot effectively claim that something is (or is not) a *story* or *stock story* without a common understanding of what those words mean. For purposes of my thesis, the definitions matter: it is difficult to see the stock story embedded in a rule if one defines *story* narrowly

* * * * *

I take yet another approach, choosing to identify the essential traits of a legal story by drawing quite selectively from the work of some literary theorists.

Paskey, *supra* note 3, at 62 (emphasis in original).

⁸¹ *Id.* at 70 (emphasis in original).

⁸² ROBINSON, *supra* note 1, at 7.

⁸³ *Id.*

⁸⁴ An ancient Buddhist simile explains that doctrine is like a finger pointing at the moon; one should take care not to

focus too much on the pointing finger instead of the moon to which it points.

⁸⁵ The debate over the extent to which content and form can be distinguished has a long history, beginning at least as far back as Plato’s description of “forms” and Aristotle’s objections. That debate far exceeds not only the scope of this essay but also my own expertise. I mean only to here raise a cautionary note.

⁸⁶ RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 20 (1989) (“[T]he world does not provide us with any criterion of choice between alternative metaphors, . . . we can only compare languages or metaphors with one another, not with something beyond language called ‘fact.’”).

⁸⁷ Paskey, *supra* note 3, at 64.

⁸⁸ *Id.* at 63. For Paskey, a “story” is defined as “something that happened to someone,” resulting in “consequences that are significant.” *Id.* at 67. “Narrative discourse” refers to “the manner in which a story is presented, including the medium (oral or written), the selection of elements, the sequence in which the elements are presented, the level of detail, and the language by which the elements are described.” *Id.*

where *The Law is Made of Stories* would place the story's theme and narrative perspective. The same "events" can be used to tell very different "stories," as every lawyer knows. A storyteller perceives events as making a particular narrative point. Then the storyteller communicates that narrative point in part by making choices about such matters as structure, word selection, omission, and inclusion. If we remember that boundaries are loose, perhaps we can think of such choices as matters of form. But if *The Law is Made of Stories* imagines an unembodied story that exists outside language or even a story that is a series of events devoid of a narrative point, I cannot agree. All events are perceived within a language. In fact, it is language and the resulting narrative point that makes events into stories. The article may, however, be arguing for a definitional distinction here in order to set up its later claim that differences in form should not obscure similarities of content.⁸⁹ If that is its ultimate point, I certainly agree.⁹⁰

These three methodological concerns suggest that we should be cautious about trying to prove a thesis primarily by creating new definitions or choosing one existing definition over another simply because that definition better serves the purpose of our thesis. But of course we will have to *use* those very terms in our discussion about the relationship of stories to rules, so this suggestion cannot resolve anything. It simply cautions that we should hold our favorite definitions lightly, remaining open to what we can directly observe.

III. Rules and Stock Stories

The Law is Made of Stories does not seem to be saying that rules are stories in the sense we normally use the term. By "story," we normally mean a series of *particular* events that happened to *particular* people in a *particular* set of circumstances. Instead, as I read it, the article takes the position that rules are *stock* stories. The article distinguishes stock stories from stories,⁹¹ describing stock stories as recurring story templates—models for how a story might be told.⁹² In a stock story, key elements are stated generally. Stock characters are placed in a stock situation and described in a stock structure.⁹³

89 *Id.* at 65.

90 See *infra* note 105 and accompanying text.

91 A "stock story is independent of the way story is defined. The essential point is that the event, entities, and plot are expressed in *general* terms . . ." Paskey, *supra* note 3, at 70 (emphasis in original).

92 *Id.*

93 *Id.* A concept missing from the article's description of stock stories, however, is that in a stock story, these characters and situations are used to make a stock narrative point. See *infra* notes 107–20 and accompanying text.

The article's first thesis, then, is that a legal rule "has the underlying structure of a stock story."⁹⁴ This strikes me as a valuable contribution to the type-two conversation about narrative. *Convergence* explored the common-law process as a narrational activity, where judges use the stories of prior cases "to create and announce a rule of law."⁹⁵ It presented the "if-then" structure of many rules as "a blatantly narrational form."⁹⁶ It observed that a rule in that structure "describes a set of circumstances and then pronounces a result: If A, B, and C occur, then Y is the legal conclusion."⁹⁷ As an example, *Convergence* used the elements of a common-law cause of action for fraud:

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.⁹⁸

Convergence observed that "[t]hese 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."⁹⁹ The story of the original plaintiff becomes the rule. *Convergence* also accounted for the process of refining and supplementing common-law rules using the stories of subsequent cases, since "[r]ules born of narrative seldom arrive fully formed."¹⁰⁰ It showed that "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."¹⁰¹ What *Convergence* did not do, and what Paskey has done, is to recognize that a conjunctive rule¹⁰² such as the rule on fraud functions like a stock story. The rule and a stock story share certain traits, including that both identify generally expressed elements with a logical relationship to each other.¹⁰³

94 Paskey, *supra* note 3, at 52; see also *id.* at 71–76.

95 Edwards, *Convergence*, *supra* note 14, at 20.

96 *Id.* at 21.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 22.

102 A conjunctive rule is a rule with required elements. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, *supra* note 52, at 17; EDWARDS, *LEGAL WRITING AND ANALYSIS*, *supra* note 52, at 80. See also *infra* notes 107–10 and accompanying text.

103 Paskey, *supra* note 3, at 72.

The Law is Made of Stories then takes what it describes as “a large step farther,” claiming that “[a] governing rule . . . does not simply provide evidence of its narrative origin: *it is, in fact, still a narrative.*”¹⁰⁴ The article supports the claim by observing that governing rules and stock stories can be expressed in the same structural format. But to say that a rule and a stock story share a structure is not necessarily to say that a rule *is* a stock story. Two things are not the same merely because they use the same structure, as *The Law is Made of Stories* correctly points out in distinguishing content from form.¹⁰⁵ The article argues that a governing legal rule is a story because it has the same structure as a stock story.¹⁰⁶ One could just as easily say that a stock story is a rule because it has the same structure as a rule.

What’s more, the formal structures of stock stories and conjunctive rules, while similar, are not the same. Stock stories are models for how to tell a story about past events. A story told according to that template will be retrospective. The plaintiff did this; the defendant did that. But rules as we commonly understand them are prescriptive or proscriptive, using conditional language. They are not retrospective. Once we convert the story about fraud into a conjunctive rule, it will take a somewhat different form, using language like “If elements one through seven happen, then the defendant will be liable for fraud,” or “A person is prohibited, on pain of civil liability, from acting in the manner described in elements one through seven.”

Another formal difference between stock stories and rules is that of neutrality. A stock story is a template for relating something that has happened, describing it in a way that communicates the preferred normative resolution for those parties. The story is about a particular person. After hearing that person described according to elements one through seven, we all know how that person’s story should end: she should be required to make amends. The key function of the stock story is that it tells us what to think of that particular person. But a rule takes a neutral position. It says nothing about a particular person, especially not the person to whom it will be applied. It simply says that *if* that person was like these other people in prior cases, the resolution should be the same. So my first hesitation about the article’s “large step further” is that while conjunctive rules and stock stories use similar (though not identical)

104 *Id.* (emphasis in original).

105 *Id.* at 63 (relying on the work of structural theorists to claim that “[t]he first trait may be the most crucial: a useful definition of *story* should distinguish between the content of a story and the way the content is expressed. . . . The distinction between *story* and *discourse* is a distinction between content and form . . .”) (emphasis in original).

106 *Id.* at 71.

structures, that similarity does not answer the relevant question. It does not necessarily mean either that rules are stock stories (the article's claim) or that stock stories are rules (which could equally follow).

Second, stock stories function as commonly accepted cultural scripts. They are ubiquitous in the culture, like the stock story of the deadbeat dad or the absent dad who is consumed with his career. These are stock stories because, culturally, we accept them as story-types and we are likely to see events from the perspectives of those stock stories. *The Law is Made of Stories* seems to agree, citing to the Cinderella story and the Horatio Alger story as examples of stock stories.¹⁰⁷

Some conjunctive rules are indeed made from such stock stories. Take, for example, the stock story of the greedy caregiver. The stock story, common in shared cultural knowledge, goes something like this: An elderly and infirm person hires a live-in caregiver. As the patient becomes more vulnerable, the caregiver begins to limit the patient's contact with the outside world and especially with family members. Soon the caregiver is in nearly complete control of the patient's life. She tells the patient untruths about the patient's family and portrays herself as the only person who truly cares about the patient. Soon, she persuades the patient to change her will, disinheriting the family and bequeathing all of the estate to the caregiver. For good or for ill, this is a cultural stock story.

Not surprisingly, this stock story has resulted in a conjunctive common-law rule¹⁰⁸ called "undue influence," which, if proven, can allow recovery of the estate for the wronged family members. The common-law conjunctive rule usually goes something like this:

- A person exercised undue influence if
1. the testator was susceptible to undue influence,
 2. the person had the opportunity to exercise undue influence,
 3. the person had the motive to influence the testator to exercise undue influence, and
 4. the testator's disposition was the result of the influence.¹⁰⁹

Other conjunctive rules, however, are not based on stock stories. Consider, for example, this conjunctive rule setting out the elements

.....

¹⁰⁷ *Id.* at 70.

¹⁰⁸ Much of the discussion here and elsewhere centers on common-law rules because in the common-law process, the construction of a rule from a story is often more clear, but statutes can be constructed from stories as well. For example, consider the category of statutes known as "Megan's laws," which require notification when a convicted sexual offender moves into a neighborhood. Those statutes were enacted largely as a result of the national outcry over the tragic death of Megan Kanka.

¹⁰⁹ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, sec. 8.3, cmt. f (2003).

necessary to prove mental capacity to make a will. A testator must be capable of

1. knowing the nature and extent of her property,
2. knowing the natural objects of her bounty,
3. knowing the disposition she is making of her property, and
4. relating these elements to each other to form an orderly desire for the property's disposition.¹¹⁰

Most of us would consider this four-element test a rule. Yet at least as far as I can see, this rule is not built from a culturally shared stock story. It may well be built from the stories in prior cases, but I cannot discern the roots of a story-type we all know—one that we soak up as part of our cultural common knowledge.

So far we have been talking only about conjunctive rules—rules that list required elements. *The Law is Made of Stories* uses the burglary rule and the negligence rule as examples of rules commonly articulated with a conjunctive (if-then) structure.¹¹¹ But conjunctive rules provide the easy examples. As support for the thesis that rules are actually stories, aggregative rules and balancing rules are much more troublesome.

Aggregative rules establish a legal standard and often include a non-exclusive list of factors.¹¹² *The Law is Made of Stories* gives us an example of an aggregative rule¹¹³ that identifies the best interests of the child as the standard in a custody proceeding.¹¹⁴ The statute provides a nonexclusive list of factors for assessing the child's best interests, including (a) the child's health, safety and welfare; (b) any history of abuse; (c) the nature and amount of parental contact; and (d) drug or alcohol abuse.¹¹⁵ The article argues that we can see a stock story in the statute by rephrasing its language as “. . . a court may grant custody to either parent, or to both parents jointly, if it would be in the child's best interests to do so.”¹¹⁶ The article claims that this statement is a stock story because there are four characters (a child, two parents, and the judge); an event (presumably the court proceeding); and a plot (meaning that significant consequences will arise from the court's decision).¹¹⁷ In other words, two parents are before the court, each asking for custody of the child.

110 See *id.*, sec. 8.1.

111 Paskey, *supra* note 3, at 72–74.

112 EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, *supra* note 52, at 17–19; EDWARDS, *LEGAL WRITING AND ANALYSIS*, *supra* note 52, at 80–82. If two flexible standards are juxtaposed in contrast to each other, the rule is a balancing rule. An example is the discovery rule that balances the burden of production of documents

against the likely benefit. *Id.*; see *infra* note 122 and accompanying text.

113 The article does not use the term, however.

114 Paskey, *supra* note 3, at 74–75 (reviewing Cal. Fam. Code § 3020(a) (West 2014)).

115 Cal. Fam. Code § 3011 (West 2016)

116 Paskey, *supra* note 3, at 75.

117 *Id.*

But the statute cannot be considered a story simply because it applies to parties in a judicial proceeding. It does not describe any possible plot, as does the fraud rule. It is certainly fair to say that “the rule demands a story.”¹¹⁸ Each of the parties no doubt will craft and present a story from past characters, events, and circumstances. Those competing stories might even be built from stock stories so as to be more convincing. The mother might construct a story based on the stock story of an absent father, consumed with work and perhaps his extramarital affairs. The father might construct a story based on the stock story of a stay-at-home mother who has become addicted to prescriptions drugs. Each of these stories would be using a culturally shared stock story in order to be more persuasive (a type-three observation). But the rule itself simply identifies the legal standard and invites the parties to tell the story of their choice. Stating the relevant legal standard as the child’s best interest¹¹⁹ does not include a plot with a narrative arc, as do the Cinderella story and the Horatio Alger story.¹²⁰

Perhaps it would be helpful here to suggest a concept about the study of rules. *The Law is Made of Stories* correctly realizes that rules come in different varieties and that these differences might matter. But to categorize rules, the article selects a two-part taxonomy that does not tell us much about how stories and rules relate: Hart’s distinction between “primary rules of obligation” (legal commands governing human conduct) and “secondary rules of recognition” (legal commands about how rules of obligation are adopted, interpreted, and enforced).¹²¹ I would suggest that the article is right to suspect that differences among rule-types might matter to its topic, but the legal academy’s long-standing distinction between “rules” and “standards” might be a more useful vehicle for exploring the implications of different kinds of rules.

Legal scholars have long explored the distinctions between legal commands described as “rules” and those described as “standards.” The primary distinction depends on the extent to which the legal command provides explanatory content before the parties act. For instance, in *Rules Versus Standards: An Economic Analysis*,¹²² Louis Kaplow offers an example of a “rule”: the legal command that drivers must not exceed 55 miles per hour on a particular highway. A “standard,” on the other hand, would be the alternative legal command that drivers must not drive at an

118 *Id.*; See also Edwards, *Convergence*, *supra* note 14, at 28–32.

119 Paskey, *supra* note 3, at 75.

120 *Id.* at 70.

121 *Id.* at 59–60.

122 Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 559–60 (1992).

excessive speed. The former legal command (the “rule”) determines what an excessive speed would be and does so before the driver takes the wheel. It selects a speed without reference to particular circumstances, such as weather, road conditions, the type of vehicle, or the driver’s skill and experience. The latter legal command (the “standard”) does not select a particular speed in advance. Rather, it establishes a more flexible “standard” that postpones the decision about whether a driver was speeding, in part in order to leave room for these other more contextual considerations.¹²³ For our purposes, we might say that the “rule” implicitly incorporates typical story-facts in which a speed greater than 55 would be excessive. A “standard,” on the other hand, invites a variety of stories about what might be an excessive speed.

When legal writing professors speak of rules, we generally do not mean to distinguish between “rules” and “standards” in this sense. Thus, *The Law is Made of Stories* uses the term “rule” to include both “rules” and “standards” as they are distinguished elsewhere in the academy. But perhaps it would be useful for us to consider this fundamental distinction and the implications it might raise for the question of whether rules are stories. It may also be helpful to note that the term “rule” as used outside legal writing scholarship roughly correlates to the term “conjunctive rule” and that the term “standard” roughly correlates to the terms “aggregative rules” and “balancing rules” as used here.

Where does all this talk about rules leave us? While a rule (whether conjunctive, aggregative, or balancing) is not itself a story, a rule does identify the narrative point the parties should try to make with the stories they will construct—the *moral of their stories*, as it were.¹²⁴ If, in our custody dispute, the mother constructs and presents a story based on the template of an absent father consumed with work, the moral of her story will be that awarding custody to such a father would not be in the child’s best interests. If the father constructs and presents the story of a stay-at-home mother addicted to prescription drugs, the moral of his story will be that a custody award to the mother would not be in the child’s best interests. These stories will be distinctly different stock stories, however. Thus, we might say that the rule suggests the moral of a story but leaves to each party the choice of what kind of story—including possibly what kind of stock story—to tell.

123 *Id.*

124 See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 113–14 (2000) (A plot usually concludes “by drawing the then-and-there of the tale . . . into the here-and-now . . . through some *coda*—say, for example, Aesop’s characteristic *moral of the story*.”) (emphasis in original).

IV. Speaking of Narrative Reasoning

In its final substantive section,¹²⁵ *The Law is Made of Stories* argues its second thesis: that narrative reasoning must be redefined because “the analytical moves we think of as rule-based reasoning are often a form of narrative reasoning, in which the story in a given set of facts is compared to the stock story embedded in the rule.”¹²⁶ The section critiques prior authors as taking the position that narrative reasoning is a discrete strand of analysis separate from reasoning based on traditional modes such as rules, analogies, and policies. It maintains that the prevailing view, which presumably includes the view expressed in *Convergence*, “would place rule-based reasoning entirely within the paradigmatic [dialectic] mode, and narrative reasoning entirely within the narrative [analogic] mode, thereby drawing a sharp line between the two forms of reasoning.”¹²⁷

If that is what *Convergence* seems to say, then I did not write the article clearly enough. The goal in *Convergence* was to show the work of narrative in all forms of reasoning judges routinely use. Every single express justification for a court’s creation and application of a legal rule (a type-two question) has narrative roots. These justifications are not themselves stories, but they are—all of them—made of stories. Thus, as a matter of type-two analysis, narrative is omnipresent within the paradigmatic mode, and we do not need to redefine the term “narrative reasoning” in order to make that point. Further, as a matter of type-one analysis, scholars have long shown that narrative and other pre-constructions form the starting point of all paradigmatic thought.¹²⁸

When I used the term “narrative reasoning” in *Convergence*,¹²⁹ I was uncertain about the choice, primarily because since the Enlightenment, “reasoning” has commonly been used to refer only to systematized, rationalized, formal and semiformal thought such as reliance on rules, analogies, and policies.¹³⁰ Since the Enlightenment, any meaning we discern by narrative has been expressly excluded from the traditional idea of “reasoning.” The Enlightenment meaning of “reasoning” refers only to those conclusions for which we can state seemingly neutral reasons, in

125 Paskey, *supra* note 3, at 76–78.

126 *Id.* at 52.

127 *Id.* at 76.

128 See *supra* notes 22–42 and accompanying text.

129 Edwards, *Convergence*, *supra* note 14, at 9–10; Paskey, *supra* note 3, at 56.

130 Edwards, *Convergence*, *supra* note 14, at 8–9 (explaining David Tracy’s concept of “dialectic” imagination); see also *id.* at 9 n.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 mythopoetic.”).

other words, reasons we have generalized into commonly applicable principles.¹³¹ In law, such reasons most often are rules, analogies, and policies. Because I believed that most or perhaps all human understanding originates in the poetic mode and is only later translated into rules and policies, I thought perhaps we could use the term “narrative reasoning” as a small act of civil disobedience against the hegemony of dialectical thought.¹³²

To explore the idea further, *Convergence* discussed narrative reasoning alongside other forms of reasoning traditionally used in legal discourse. As I hope is clear, *Convergence* is a type-two discussion of the *express* ways judges justify their decisions. It is not a discussion about narrative as a preconstruction, which would be a type-one exploration of the ways in which narrative and other frames are the cognitive and jurisprudential starting points for all other forms of reasoning.¹³³ Nor is it a type-three discussion of narrative as a tool of persuasion.¹³⁴ Rather, its goal was to explore narrative’s multiple roles *in the way judges articulate their reasons for creating, amending, or applying a legal rule*. To be true to its topic, *Convergence* identified forms of reasoning by examining the forms expressly used in judicial opinions. It demonstrated that on occasion, judges “reason” directly from a narrative without the intervening step of creating a neutrally stated legal rule.¹³⁵ But more commonly, judges justify their choice of a legal rule by discussions of authority, policy, and the facts of the case before them. *Convergence* identified the implicit roots of narrative in all of these other forms of express legal reasoning.¹³⁶

Like other works before and since, *Convergence* aimed to shed light on the relationship, sometimes implicit, sometimes not, between narrative and rules. This is a subtle topic, which may be explored from various perspectives. To make its case that “narrative reasoning” should be redefined, *The Law is Made of Stories* cites the work of Jerome Bruner as authority for what the article calls the “perceived dichotomy between rule-based reasoning and narrative reasoning.”¹³⁷ Bruner is presented as seeing

131 “[P]rinciples should be general. That is, it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions.” JOHN RAWLS, *A THEORY OF JUSTICE* 131 (1971).

132 “[I]t has long been a part of the Western philosophical tradition to prefer the abstract and the universal over the particular and the contextual.” Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 682 (1994) (reprinted with permission, 6 J. ALWD 88, 89 (Fall 2009)).

133 I took my turn at that type-one topic in Edwards, *Where Do the Prophets Stand?*, *supra* note 33.

134 My type-three offerings have been EDWARDS, *READINGS IN PERSUASION*, *supra* note 54; Edwards, *Advocacy as an Exercise in Virtue*, *supra* note 70; Edwards, *Hearing Voices*, *supra* note 72; and Edwards, *Once Upon a Time in Law*, *supra* note 73.

135 Edwards, *Convergence*, *supra* note 14, at 17–23.

136 *Id.* at 23–28.

137 Paskey, *supra* note 3, at 76.

the paradigmatic and narrative modes as complementary, but cautioning that “[e]fforts to reduce one mode to the other or to ignore one at the expense of the other inevitably fail to capture the rich diversity of thought.”¹³⁸

I am not sure whether *The Law is Made of Stories* intends to dismiss Bruner’s work as wrong or whether it takes the position that we have misapplied Bruner to legal discourse. If the former, Bruner is a daunting target to choose. His book *Actual Minds, Possible Worlds* is generally recognized as one of the most influential works of the twentieth century. Even more daunting, dismissing Bruner may also require dismissal of such giants of legal theory as Bruce Ackerman, Derrick Bell, Ronald Dworkin, Charles Fried, Bernard Jackson, John Rawls, Herbert Wechsler, and Patricia Williams, and perhaps even philosophers such as Descartes, Kant, Nietzsche, and Plato.¹³⁹ I am no expert in philosophy—legal or otherwise. I know only enough to suggest that we should not lightly reject the work of so many foundational thinkers of western civilization, especially not without authority and a compelling set of rationales. On the other hand, if the article aims to say that Bruner is right but we have misapplied him to law, that case would need to be made expressly as well. Without more, it is difficult to see why Bruner’s warning against reducing one mode to the other (for instance by claiming that rules are stories) could apply to other contexts but not to law.

What might be going on here? Perhaps *The Law is Made of Stories* arises from the accurate intuition that legal reasoning is rooted in narrative and other preconstructions—that ultimately nearly everything begins as narrative. That is a type-one point that has been and continues to be explored from jurisprudential, rhetorical, and cognitive perspectives. We can support that claim from ample literature on narrative as preconstruction. The article also notes that conjunctive rules and stock stories can function in similar ways, that is, as templates for the kinds of situations in which the law will intervene. That is a type-two point, and it is a useful addition to our understanding of how we talk about law. Finally, the article argues that rules *are* stories in part because rules *call for* stories. It asserts that stories are the most important form of persuasion available to the parties and that lawyers cannot practice law without telling stories (type-three points). While these observations are true, they do not suggest that rules *are* stories. Using them to argue that point conflates the type-two question of how we construct rules with type-one questions of

138 *Id.* (quoting JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 11 (1986)).

139 See generally Sherwin, *supra* note 132, at 89–94.

primacy and type-three questions of persuasion. If we clarify narrative's different kinds of influence, we can prove narrative's foundational role in rule-based reasoning by using the literature of all three types rather than by claiming that rules *are* stories.

V. Conclusion

We have barely begun to explore the ways in which narrative may relate to law, but it is already clear that the relationships are multiple and complex.¹⁴⁰ Narrative functions as a preconstruction, probably the most ubiquitous and important of them all. In that role, it provides the frame through which we see all legal issues and within which all our discourse occurs. Narrative is also a powerful tool for many lawyering tasks; it may be the most powerful tool of persuasion a lawyer can use.

Narrative also plays key roles in the express justifications judges use to explain their construction and application of rules. We can think of these roles in multiple ways. On the question of narrative's relationship to merely *one* of those express justifications—rule-based reasoning—I suspect that, ultimately, we will see that neither extreme is correct. Rule-based reasoning is not the opposite of narrative, nor is it the same as narrative. Rather, it is a mode of reasoning constructed from multiple narrative raw materials. The exploration of these narrative raw materials will, I hope, continue to engage us for years to come.

I want to close with a note of gratitude for *The Law is Made of Stories*. While I have here offered a concurring opinion on some of its points, I remain grateful for its insights and for its contribution to the field. The article provides compelling support for the foundational idea that rules are made of stories, and it invites us to look more deeply than we have yet done at the convergences of narrative and law. When we do, we may conclude that stories and rules are each incomplete standing alone. Rules grow from and return to the soil of narrative, but narrative needs the stability, rationality, and predictability of rules.¹⁴¹ The more we understand this symbiotic relationship, the better we will understand both the legal system and the important work of lawyers within it.

.....
 140 Edwards, *Convergence*, *supra* note 14, at 7 (referring to “the complex and sometimes subtle relationship” between narrative and law).

141 *Id.* at 50.