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Storytelling for Lawyers: Disappointing and Dated

Philip N. Meyer, *Storytelling for Lawyers*

Brian J. Foley, reviewer

Book Review

Storytelling for Lawyers: Disappointing and Dated

Storytelling for Lawyers

Philip N. Meyer (Oxford University Press 2014), 256 pages

Brian J. Foley, Reviewer*

Storytelling for Lawyers is a frustrating read. It provides insightful analysis of selected popular and legal stories, but it lacks a coherent purpose. The jacket description promises the book will provide "a narrative tool kit" and "practical tips for practicing attorneys that will help them craft their own legal stories," which is the reason most busy lawyers will buy it. But author Philip N. Meyer backs away from that description in his introduction, stating a more tentative, less-helpful aim:

> [L]awyers, law students, and academic generalists may benefit from this exploration. This book provides a guide for the journey. It is not, however, a storytelling cookbook; there are no easy-to-follow recipes for effective legal storytelling. Instead, the text identifies and foregrounds the components of a story and visits principles of storytelling craft useful to lawyers.[1]

He repeats this retreat as well in his "Final Observations": "These stories, and the other popular and law stories excerpted in this book, are

* Attorney and co-founder and co-organizer of all five Applied Legal Storytelling biennial conferences. I thank my wife, M.G. Piety, for reviewing drafts, and Joan Ames Magat, Nantiya Ruan, and Jeffrey Jackson for their outstanding and helpful editing.

1 PHILIP N. MEYER, STORYTELLING FOR LAWYERS 3 (2014).

2 *Id*. at (208).

not models or recipes in a storytelling cookbook. They serve as illustrations, and suggest lessons, themes, and techniques that can be borrowed or recycled for use in future cases."[2]

Indeed, there is no "how-to," no hypotheticals teaching lawyers to craft a story in a particular case, where the lawyer is circumscribed by legal rules, factual realities, and strategic concerns. The lessons are gleaned mostly from Meyer's expert close readings of extant legal stories, readings that are more about narrative than about law. The reader is left with the sense that the book should have been entitled *Lawyers as Storytellers*, the title of a 2012 presentation by Meyer at a Law and Literature conference,[3] and part of the title of the 1994 *Vermont Law Review* symposium[4] that Meyer draws upon heavily in *Storytelling for Lawyers*. Ultimately, the book comes across as a labor of love, a deep dive into Meyer's personal favorite literary and legal stories, which show that lawyers often tell stories using sophisticated literary techniques. It is misleadingly titled as a how-to book.

Nevertheless, there is much to be learned from Meyer's analysis of stories. Meyer addresses plot, character, voice, point of view, details and images, and, admirably, more arcane topics such as "rhythms of languages," "scene and summary," "quotations and transcripts in effective legal storytelling," setting, and narrative time.[5] Unfortunately, however, the stories seem to have been chosen according to no particular criteria and without consideration of the book's audience: pragmatic lawyers from a wide variety of practice areas seeking to learn storytelling for a competitive advantage. All the legal-storytelling examples come from criminal law and torts, a disappointing limitation, given that the book jacket implies there will be examples of storytelling in "complex financial securities case[s]," and given that Meyer begins his Introduction recalling how, as a practicing lawyer, "[m]ost of my time was spent telling stories. I spoke to insurance adjusters and parole officers, to attorneys representing clients with adverse interests, to government bureaucrats."[6] Another

3 This was the title of Meyer's talk in the program. Program, Vermont Bar Association and Marker Law Mediation, Literature and the Law Conference (June 14–15, 2012) (program available at http://markerlawmediation.com/files/Literature_and_the_Law_-_June_2012_-_Vermont.pdf) (accessed December 7, 2014). Meyer's full title was "Lawyers as Storytellers: Cinematic Influences Upon a Defendant's Closing Argument in a Complex Criminal Case" (discussing Jeremiah Donovan's 1991 closing argument for Louis Failla, discussed infra). The title, and Meyer's notes, are available at http://www.markerlawmediation.com/files /vbapresjune2012.pdf (accessed December 7, 2014).

4 The symposium was called "Lawyers as Storytellers and Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law." According to Meyer's Introduction to the symposium issue, the idea explored was that "our legal culture is a storytelling culture." Philip N. Meyer, Will You Please be Quiet, Please? Lawyers Listening to the Call of Stories, 18 VT. L. REV. 567 (1994).

5 MEYER, *supra* note 1, at viii.

6 *Id.* at 1.

disappointing limitation is that all the legal-storytelling examples are drawn from modes of discourse where it has been long understood that lawyers engage in storytelling: judicial opinions, closing arguments, rebuttals, or statements of facts in United States Supreme Court briefs. There are no examples of storytelling in client interviews, pretrial motions, voir dire, openings, direct- or cross-examination, or, for that matter, in negotiations, business transactions, dealing with news media, argument sections of briefs, or client meetings.[7]

The examples in the book are dated. The two movies Meyer relies on to teach plot are *High Noon* (1952) and *Jaws* (1975). The two closing arguments that serve as the primary examples of legal stories date from 1979 and 1991. Why not use more-recent examples, given that the book's Introduction states that "the nature of the trial itself is changing rapidly"?[8] Meyer goes so far, in fact, as to state that "[t]here has been a reinvention of the ways stories are told, and this affects the stories themselves."[9] Readers will naturally wonder whether these decades-old stories would persuade juries in the age of PowerPoint, YouTube, and shrunken attention spans.

The two dated closing arguments serving as primary examples are also problematic because they are unique. Gerry Spence's victorious closing argument and rebuttal in the 1979 Karen Silkwood case, to which Meyer devotes a full chapter and references throughout the book, capstoned an epic, eleven-week trial that dealt with events that became the subject of a 1983 Hollywood blockbuster movie starring Meryl Streep.[10] The defendant corporation was so evil that Spence apparently maintained his credibility despite telling the jury, "I couldn't get over it—I couldn't sleep—I couldn't believe what I had heard. I don't know how it affected you. Maybe you get so numb after a while . . . . [T]his case is the most important case, maybe, in the history of man."[11] Many readers will wonder, here and in other excerpts, Did Spence cross the line? Can *I* get away with that? Answer: Probably not. Most trials are not so epic, most claims for punitive damages are not so strong, and most lawyers are not so

7 In recent years, there have been several law-review articles about storytelling in a variety of legal postures and contexts. *See, e.g.*, J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015). *See also* RUTH ANNE ROBBINS, STEVE JOHANSEN, AND KEN CHESTEK, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING (2012).

8 MEYER, *supra* note 1, at 6.

9 *Id*.

10 *Silkwood* (ABC Motion Pictures, 1983) ("The story of Karen Silkwood, a metallurgy worker at a plutonium processing plant who was purposefully contaminated, psychologically tortured and possibly murdered to prevent her from exposing blatant worker safety violations at the plant.") http://www.imdb.com/title/tt0086312/ (accessed December 5, 2014).

11 MEYER, *supra* note 1, at 46 (quoting MICHAEL LIEF, H. MITCHELL CALDWELL, AND BENJAMIN BYCEL, LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 135–36 (1998)).

Gerry Spence—and other lawyers could get into trouble emulating his histrionics.

Jeremiah Donovan's 1991 closing argument for Connecticut two-bit mobster Louis Failla, to which Meyer devotes a chapter and discusses throughout the book, was sensational, gripping, and highly creative, but it likewise seems too exceptional to serve as a useful teaching tool. The FBI had intercepted a treasure trove of incriminating statements by bugging Failla's Cadillac. Failla didn't testify at the trial. Donovan, however, built his closing around presenting what he claimed Failla was actually thinking, but did not say, when he made the damaging statements, using a "thick pad of exhibits"[12] with contrasting cartoon speech and thought bubbles.[13] Meyer states, "Although Failla has never taken the stand to testify at trial, Donovan effectively testifies on Louie's behalf and articulates his thought processes and motives . . . ."[14] Meyer tells us that "Donovan's storytelling strategy is so engaging and seamless that it is not broken by the prosecution's objection that there is no evidence to substantiate Donovan's assertions about Failla's thought process."[15]

Readers will wonder, Can good storytelling trump legal rules? We learn later in the book that one of the prosecutors, in rebuttal, lambasted Donovan's ploy: "[T]hat's [going] too far . . . . [T]hat's not the evidence, and you know that's not the evidence. *That's lawyers' games. Lawyers' games.*"[16]

Did Donovan cross the line? Meyer never answers this question, never addresses the prosecutor's *legal* argument.[17] Further elaboration by Meyer would have been helpful here and may have made the book's heavy

12 MEYER, *supra* note 1, at 107. These days, a lawyer would probably use a computer. Meyer does not address the use of technology in courtroom storytelling.

13 *See id*. at 107–09.

14 *Id*. at 107.

15 *Id*.

16 *Id*. at 150 (quoting Assistant United States Attorney John Durham, Transcript of Government's Rebuttal Closing Argument at 50–51, *United States v. Bianco*, No. H-90-18 (D. Conn. Mar. 26, 1990) (emphasis added by Meyer).

17 Meyer was not using the prosecutor's rebuttal to address whether Donovan's argument was proper but was making a different point. Meyer's only explanation for the legal basis of Donovan's strategy of "testif[ying] on Louie's behalf" (107) is buried in an endnote in the previous chapter, a quote from the trial transcript where Donovan argues to the jury that it may draw reasonable inferences about a person's intent (220, n. 57).

18 For example, Meyer does not include Donovan's own reflections about the ethics of legal storytelling, which Donovan shared at a symposium where he discussed his closing for Failla:

> The problem with storytelling is that in reviewing the police investigative reports you get a plausible defendant's story in mind. As you want so much to tell the story, you may not only ignore contrary pieces of evidence that ought to be considered, but you will also influence your client, your client's friends and relatives, and your other witnesses to tell the story in a way that is most helpful to you. I suppose much of that is proper, but there is a line somewhere, and if you cross over that line you are no longer effectively advocating for your client as a storyteller, but you are evading your responsibility as a finder of truth.

Jeremiah Donovan, *Some Off-the-Cuff Remarks About Lawyers as Storytellers*, 18 VT. L. REV. 751, 761–62 (1994). Unfortunately, this sort of crucial discussion of the interplay between the evidentiary and legal limitations on lawyers-as-storytellers is missing throughout Storytelling for Lawyers.

reliance on Donovan's strategy as an example of legal storytelling less confusing.[18] Many readers will likely suspect that the judge permitted Donovan to proceed over the prosecutor's objection not because he was in fact adhering to the rules of evidence, or because of the "engaging and seamless"[19] storytelling, but because it was so obvious that the storytelling could be discredited and dismissed as a desperate effort for a doomed defendant after a two-month trial—"lawyers' games."

But there's an even bigger problem with Meyer's reliance on Donovan's closing. Most readers will naturally believe throughout *Storytelling for Lawyers* that Donovan's closing argument, lauded by Meyer as "masterful,"[20] and "compelling,"[21] and otherwise praised throughout the book, worked legal alchemy on the jury and was therefore a successful, even monumental, legal story, because it is not until the end of the book that Meyer tells us that *Failla was convicted*. Meyer, however, seems unfazed by this fact, which he mentions only casually while declaring victory for Donovan:

> Although Failla is convicted, Donovan's story is successful with the various audiences he seeks to reach: Failla receives leniency from the judge, who departs from the federal sentencing guidelines in sentencing Failla. Of equal importance is the way Donovan's story redeems and explains Failla's words and deeds in the eyes of both his real family and his adopted mob family.[22]

This controversial, even confusing, claim of victory is made without citation or additional explanation. Unfortunately, Meyer doesn't cite Donovan's own law-review article about his closing, in which Donovan explained that he was trying to convince the jury, but felt it was unlikely he would achieve a complete acquittal.[23] Instead, Donovan said, his objectives were more modest: to prime the judge to give Failla a lighter sentence, to make Failla look good in his family's eyes ("I had to persuade the Failla family that Louis did not conspire to kill the father of his own grandson."[24]); to avoid denigrating Failla in the eyes of his codefendants as having to have a court-appointed lawyer because of his indigence, in contrast to their high-priced lawyers from New York and Boston; and to help Failla's codefendants by making the actual murder victim in the case, a mob boss, look despicable and dangerous.[25]

19 MEYER, *supra* note 1, at 107–09.

20 *Id*. at 7.

21 *Id*. at 149.

22 *Id*. at 208.

23 Donovan, *supra* note 18, at 752.

24 *Id.* at 753–54.

25 *Id.* at 754–55.

But why didn't Meyer simply use a different closing argument, one that clearly *worked*? It's one thing to show that some lawyers, such as Donovan, may be Hollywood-caliber storytellers; it's quite another to show that they are able to deploy storytelling techniques *to win cases*, not merely to achieve abstruse goals in a dead-on-arrival case. Moreover, Meyer apparently forgot that he himself was highly skeptical immediately after Donovan's performance, as he wrote in 1996, in an article that he does not cite in *Storytelling for Lawyers*:

> I recall a distinct feelings [sic] of both admiration and skepticism. It was just like the feeling that I have sometimes when I see an effective Hollywood movie that manages to subvert my intellect, and then later see through the sleight of hand as I emerge from the darkness of the theater.[26]

What lawyer intent on winning a case would feel comfortable drawing from Donovan's losing closing argument from a quarter century ago, one that left Meyer himself skeptical and fully able to "see through the sleight of hand"? Meyer should have included this skepticism in *Storytelling for Lawyers*. Or, better, he should have focused on a more unequivocally successful example of legal storytelling.

A problem with the book as a whole is that it heavily recycles Meyer's previously published scholarship, at all times without attribution or citation. For example, it turns out that Meyer already has analyzed Donovan's closing argument for Failla in several law-review articles. (He analyzed it in the first place because he had "scrupulously attended the entire [13-week-long] trial" after a student, a police detective, told him of it.[27]) Oddly, Meyer mentions these articles analyzing Donovan's closing for Failla only at the end of the book,[28] and he inexplicably does not provide their titles or cite them anywhere. The lack of citation is glaring, given that the book incorporates parts of these articles; in fact, some passages in the book are reproduced almost verbatim from Meyer's previously published

26 Philip N. Meyer, *"Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 93, 955–56 (1996).

27 MEYER, *supra* note 1, at 205.

28 *See id*.

29 For example, pages 90–91 come from Meyer's "*Desparate* [sic] *for Love": Cinematic Influences Upon a Defendant's Closing Argument to a Jury*. Text on pages 94–95 and 104 come, with some changes, from Meyer's *"Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*. Meyer also previously published a law-review article about Spence's closing in the Silkwood case, which he likewise recycles in the book without citation or attribution in *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Arguments in* The Estate of Karen Silkwood v. Kerr-McGee, Inc., 9 CLINICAL L. REV. 229 (2002). There is similar recycling without citation or attribution by Meyer, in chapters 2, 4, 6 and 7 of the book, from his article *Vignettes From a Narrative Primer.* 12 LEGAL WRITING 229 (2006). For example, pages 228–29 of the book recycle, at times verbatim,

scholarship.[29] The ethical and scholarly propriety of such recycling aside,[30] Meyer, by retreading such familiar ground, has squandered an opportunity to analyze more-current legal stories that have never been analyzed (and to compare them to more-current movies and novels), which would have helped support his claims about the ubiquity of legal storytelling and would have added to the canon of stories for lawyers to study.

Another flaw in Meyer's scholarship is that the book does not mention or cite any of the recent scholarship on legal storytelling. Only a handful of legal scholarship is cited by Meyer, the most recent being a law-review article from 2007.[31] More than half of the material on legal storytelling that Meyer cites is authored or coauthored by Anthony Amsterdam, to whom Meyer dedicated the book. Such selectivity creates the misleading impression that Amsterdam and Meyer are two of a very small number of lawyers studying storytelling, when the field of legal storytelling has grown enormously in recent years.[32]

Another scholarly flaw is that the book does not cite or mention any recent psychological studies showing the persuasive power of stories.[33] An examination of this work would have helped Meyer make his case about the importance of legal storytelling more strongly.

Meyer's deep dives into popular and legal stories are fascinating for anyone who has not already read his previously published scholarship. But readers should be forewarned that, unfortunately, Meyer's emphasis throughout the book is more on the literary, rather than legal, value of these stories—which is not terribly helpful for attorneys looking for practical advice about using storytelling to win real-life cases.

pages 241–43 of *Vignettes*. Many of the same (dated) examples are analyzed both in the book and in *Vignettes*, such as Truman Capote, *In Cold Blood*; Norman Mailer, *The Executioner's Song*; Tobias Wolff, *This Boy's Life: A Memoir*; Joan Didion, *The White Album*; *Riggins v. Nevada*, 504 U.S. 127 (1992); *Williams v. Taylor*, 529 U.S. 362 (2000); Leonard Michaels, "The Hand." Meyer also extensively used *High Noon* to explain plot in *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877 (2008), and to some degree in *Making the Narrative Move*, 9 CLINICAL L. REV. 229 (2002), in which he also used *Jaws* for this purpose.

30 *See* Miguel Roig, Ph.D., *Avoiding Plagiarism, Self-Plagiarism, and Other Questionable Writing Practices: A Guide to Ethical Writing*, U.S. Department of Health and Human Services, Office of Research Integrity, *available at* http://ori.hhs.gov/sites/default/files/plagiarism.pdf (last accessed May 17, 2015).

31 *See* John H. Blume, Sheri L. Johnson, and Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1090 (2007) (cited in Meyer (213 n. 23)).

32 *See, e.g.*, Rideout, *supra* note 7.

33 An accessible introduction is KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY (2007).