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## Introduction

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# Introduction

*To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.<sup>1</sup>*

This edition of the Roger Williams University Law Review is dedicated to the important area of legal scholarship known as narrative jurisprudence. The articles that follow are as diverse as the term “narrative,” and the related topic of the relationship between law and storytelling, might imply.

Narrative describes a different way of looking at things. It seeks to expose the existence of the dominant paradigm, and then it seeks to topple it.

[It] embraces concreteness or contextualism and rejects formalism and universalism. Thus, rules in and of themselves do not dictate outcomes. Instead, rules informed by reason—practical reason learned through

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

experience—create expertise. This new form of scholarship decries the use of analytic reasoning, reasoning not guided by practice or experience, as second-best.<sup>2</sup>

The legal field is an insular one. With its own set of rules, both of conduct and of language, the legal profession lies particularly prey to the seductive path of the status quo. It has been done this way for so long that there appears no great reason to change things. For this reason, there is a great lack of introspection. There is also a tendency to fail to make observations outside the confines of the law, to look at the causes and effects of decisions, of arguments, of the rules that make up the great and venerable legal cannon. And so we remain an island.

But we should not remain an island; the importance of narrative is in its ability to coax us off of it. The American legal profession affects the lives of every single person living in the United States every single day. When one becomes a lawyer, one takes an oath to uphold the Constitution of the United States of America, and that of the state in which one takes the bar. The oath also contains the following: "I will never reject, from any consideration personal to myself, the cause of the defenseless, or oppressed, or delay anyone's cause for lucre or malice. . ." In order to uphold that oath, a lawyer must be able to identify the cause of the defenseless, or oppressed; this task is impossible if the lawyer never looks inside to see what motivates him or her, and never looks outside the profession to gain perspective on the hopes, dreams, fears, and histories of those with whom we share space in this country.

That said, it seems appropriate to spend just a moment talking about *our* perspective. Roger Williams University School of Law is the only law school in Rhode Island. Roger Williams, the founder of our state and our law school's namesake, called our state a "lively experiment" in religious liberty, in tolerance and in freedom. Legal narrative also represents a new and lively experiment in the field of law and this Law Review is glad to be part of that experiment with this edition. Richard Delgado, one of

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2. Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 813 (1994).

the leading thinkers in this area, who has written extensively and movingly about the importance of narrative<sup>3</sup>, sums up our perspective perfectly:

Telling stories invests texts with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses. Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs. All movements for change must gain the support, or at least the understanding, of the dominant group. . .<sup>4</sup>

This edition of the Law Review is split into three distinct sections. The first section includes a selection of articles that employ, in one way or another, the narrative method. These articles explore the relationship between law and storytelling, whether these stories come from poems or the tales of Harry Potter. The second section of the edition is comprised of articles written by individuals who gathered at Roger Williams University School of Law in the Fall of 2005 to participate in another lively experiment: *A Symposium on Sentencing Rhetoric: Competing Narratives Post-Booker*. The third section includes sentencing transcripts by judges who participated in the symposium. These transcripts illuminate how judges wrangle with the different stories, or narratives, offered by the various "players" at a criminal sentencing.

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3. See, e.g., Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter Delgado, *Plea for Narrative*]; Richard Delgado, *On Telling Stories in School: A Reply to Farber & Sherry*, 46 VAND. L. REV. 665 (1993) [hereinafter Delgado, *Reply*]; Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) [hereinafter Delgado, *Rodrigo's Final Chronicle*]; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991), Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994).

4. Delgado, *Plea for Narrative*, *supra* note 3, at 440.

Each in their own unique way, the articles in the first part of the edition deal critically and fully with the issue of perspective, and each provides an alternative way of looking at the status quo, a counterstory to the legal majoritarian tale in a given context.<sup>5</sup> Stephanie Weinstein's piece examines race, a context familiar to legal narrative, but applies its lessons to a modern context – the post 9/11 world and the war on terrorism.<sup>6</sup> In so doing, Weinstein explores the darker side of audience, and the pragmatic side of speaking to that audience. Arthur Wolfson contributes a thoughtful book review that examines narrative as a device for thinking about the law, and suggests that it may be used in new and yet to be exploited ways.<sup>7</sup> Wolfson examines, in his analysis of Richard Delgado and Jean Stefancic's new book, the way in which the story of being a lawyer has become ingrained and stale, and details ways in which creative narrative breath may be breathed into the profession itself. Both Wolfson and Weinstein were students of Richard Delgado and Jean Stefancic at the University of Pittsburgh Law School, and bring a rich and varied perspective to this edition of the Law Review.

Professors Edward Eberle and Bernhard Grossfeld contribute a piece that gets to the very heart of what narrative is all about – language. Within the American legal profession, lawyers use words to achieve desired outcomes, weaving them through facts and precedent, history and exhortation. Words are the tools of the trade, and without them, truly, we are nothing. But do the words used in courtrooms or in legal briefs rise to the level of poetry?

So, the question is: what about the relationship of law and poetry? Does poetry inform law? Does law inform poetry? These questions are worth asking and pursuing because we as lawyers know that there is a range of phenomena and forces that influences and drives a culture on which law sits. The words (or ABCs) of law are

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5. Arthur M. Wolfson, *The Lessons of Narrative: A Review of How Lawyers Lose Their Way: A Profession Fails its Creative Minds* by Jean Stefancic and Richard Delgado, 11 ROGER WILLIAMS U. L. REV. 431, 434-36 (2006).

6. Stephanie Weinstein, *A Needed Image Makeover: Interest Convergence and the United States' War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403 (2006).

7. See generally Wolfson, *supra* note 5.

just the bare statements of ideas or rules that, like the skin of a piece of fruit, gain real meaning only from interaction with the culture in which they operate. In this respect, we might think of law, especially its words, as the software which can function effectively only within the operating system of a culture.<sup>8</sup>

Words may be the bread and butter of a lawyer, but it is only in how they are heard that dreams are realized. We can use all of the words in the world, but without dedicated attention to the ears of our audience, and serious thought into why people hear things in such different ways, the best argument will fall on deaf ears.

Aaron Schwabach provides a fascinating look at the stories that we are telling the next generation of legal thinkers in the United States by examining the rule of law as portrayed in the popular series of books about the trials and tribulations of a certain Harry Potter. In so doing, Professor Schwabach adds to the “them” of audience, and proffers some ideas on what the next generation is, in fact, hearing when it listens to our stories. Indeed, by telling these stories, we tell many underlying stories.

The law of Harry’s world is important to our world for at least two reasons. First, Harry’s world provides an entirely constructed universe, a laboratory in which legal thought-experiments can be conducted without real-world consequences. Second, literature shapes law: For every real-life model of advocacy, adjudicative, and rule-making roles that the average first-year law student has, there are a hundred fictional models, from Atticus Finch to, well, Albus Dumbledore. The readers of Harry Potter will internalize its portrayals, particularly the uncertain quality of justice in a lawyerless society, and someday bring them to the practice of law.<sup>9</sup>

These four articles all present us with clear and convincing evidence of the existence of competing narratives in our world. They exhort us to step out of the confines of the story we have

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8. Edward Eberle & Bernhard Grossfeld, *Law and Poetry*, 11 ROGER WILLIAMS U. L. REV. 353, 354 (2006).

9. Aaron Schwabach, *Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World*, 11 ROGER WILLIAMS U. L. REV. 309, 310-11 (2006) (internal citations omitted).

always been told. They encourage us to examine our own stories, to examine where that has brought us, and where it should bring us in the future.

In the second portion of the edition, those participants who generously contributed their time, their voices and their perspectives to a unique examination of the vitally important topic of criminal sentencing contribute their written work. Professor Ian Weinstein, in relaying his own history and perspective to the reader as a backdrop against which to understand his point of view said this:

I sought every chink and groove in the seemingly smooth edifice of the Guidelines and asked every judge in front of whom I appeared to release a bit of the now dammed up waters of discretion to bathe each of my clients in the cool waters of mitigation. Many were happy to release a trickle and often, at least in the beginning, we splashed around a good deal at sentencing.<sup>10</sup>

It seems to speak almost wistfully of a bygone era when the conversation was robust and the lines of communication open. The symposium was aimed, at least in part, at starting that conversation up again, as is this edition as a whole.<sup>11</sup> Indeed, we all have historical roots, and we have perspectives and stories of our own that we bring to any table at which we sit. This edition is a small contribution to the growing body of scholarship that recognizes, and in fact celebrates, this important shift away from the mentality of the island that has for far too long plagued the legal profession.

Bridget Longridge\*

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10. Ian Weinstein, *The Historical Roots of Sentencing Variation* 11 ROGER WILLIAMS U. L. REV. 495, 496 (2006).

11. Please see the introduction to the symposium written by Professor David Zlotnick for some real insight into the experience of attending the symposium, and to get a sense of just how important it was to gather these voices together. David Zlotnick, *Symposium on Sentencing Rhetoric: Competing Narratives in the Post-Booker Era*, 11 ROGER WILLIAMS U. L. REV. 449 (2006). A lively experiment, indeed.

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