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# LEGAL STORIES WITHOUT VILLAINS

Alison Peck

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# LEGAL STORIES WITHOUT VILLAINS

Alison Peck*

## ABSTRACT

*Lawyers have always been storytellers, and cognitive science is increasingly demonstrating that human beings are wired to learn through story. But legal stories may have a dark side if, as theorists have recently suggested, stories motivate pro-social action by reinforcing in-group identification and out-group hatred. In an increasingly divided polity, are we doomed to stories that drive us toward social disintegration? A solution to the legal storyteller's dilemma may be found in an ancient source: Aristotle's* Poetics*. By crafting legal stories that track the elements of the Tragedy as described by Aristotle and adapted by modern storytellers from Broadway to Hollywood, legal storytellers may use the powerful and inevitable mechanism of story to create a body of "legal* Poetics*" in which gripping obstacle, drama, and crisis require no Other to act as villain. This brand of legal storytelling has the power to move audiences to pro-social action in law and policy without further dividing society into the dangerously rigid us-versus-them division that currently threatens to harden into intractable conflict.*

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## INTRODUCTION

Like all nationhood, what we call "the United States" in the twenty-first century is a function of story. Crafted by separate news channels and available twenty-four hours a day in your living room or on your mobile device, the story weaver tells a searing tale of truth and justice (on our side), and of villainous deeds and ruinous plots (on their side). In this story, there is no doubt, no mistake, no ambiguity. And the logic of the story would seem irrefutable—if only there weren't another story weaver on the next channel, equally impassioned, equally prolific, and equally convincing to an equal number of people, telling a tale of similarly dire moral stakes. Only this time, the "enemy" bears an outrageous resemblance to . . . *us*?

Storytelling theorists have long touted the power of story to move audiences by accessing their empathy.[1] Because stories activate our empathy circuits, these narratologists argue, they have formed the glue that has enabled large societies—thousands, millions, sometimes even billions of people—to engage in pro-social collective action. More recently, however, theorists have pointed to what Fritz Breithaupt has called "the dark sides of empathy."[2] In order to encourage the storyteller's view of pro-social behavior, stories pit the sympathetic (or at least relatable) protagonist against some defined "Other"—a person, group, or class that represents the darkness against which our hero strives.[3] And the better the story, whether fact or fiction, the more it changes the beliefs and behaviors of the audience.[4]

If stories are necessary but inevitably divisive, we are all in deep trouble. The ubiquity of the grand story, of whatever flavor you desire, would seem to doom us to deeper division and eventual rupture. In 2026, the story of Red versus Blue plays loudly, but the same dynamic is evident in other contemporary stories: White versus Black, native versus immigrant, West versus East, capitalist versus communist,

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[1] *See, e.g.*, MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE xvi–xviii (1995).

[2] *See* FRITZ BREITHAUPT, THE DARK SIDES OF EMPATHY 37–74, 161–200, 201–20 (2019) (exploring several "dark sides" to what is usually assumed to be a beneficent phenomenon, including "self-loss" (e.g., Stockholm syndrome), sadistic empathy, and "vampiristic" empathy (e.g., helicopter parenting)).

[3] *See, e.g.*, PETER BROOKS, SEDUCED BY STORY: THE USE AND ABUSE OF NARRATIVE (2022); JONATHAN GOTTSCHALL, THE STORY PARADOX: HOW OUR LOVE OF STORYTELLING BUILDS SOCIETIES AND TEARS THEM DOWN 5–12 (2021). Breithaupt would associate this "dark side" of story with empathy-blocking mechanisms including intuitive moral judgment and negative attribution. *See* BREITHAUPT, *supra* note 2, at 84–85.

[4] *See* Melanie C. Green & Timothy C. Brock, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. PERSONALITY & SOC. PSYCH. 701 (2000).

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corporate versus populist. In each story, to *be* a story, there would seem to be a good guy, "us," and a bad guy, "them."

In *The Story Paradox*, Jonathan Gottschall worries about this feature of story, which he calls "in-group amity, out-group enmity."[5] Our storytelling instincts evolved in a world where small communities depended for survival on group norms established and reinforced through stories of justice and cooperation by the in-group against the out-group.[6] In that world, in-group amity and out-group enmity may have been a necessary recipe for survival. But what happens when a culture evolves to depend upon cooperation with vast groups of strangers for the culture's survival, but its story instinct remains at the hunter-gatherer stage? "[I]n multicultural and multiethnic societies, the tendency for the story to serve as a tool not only of tribal formation but also of tribal division remains undiminished," Gottschall writes. "And, allowed to run its course, it leads to intense tribal conflicts *within* a society, leading plausibly to outcomes like cultural balkanization and even civil war."[7]

In searching for a solution to this problem, Gottschall recommends that we strive for "history without villains."[8] We are morally superior to our ancestors who killed, persecuted, and enslaved, Gottschall argues, only in the sense that we were born into a society that has already concluded that those actions are morally wrong.[9] Had we been born in an earlier place and time, odds are very high that we, like our forbearers, would see those actions as necessary, even virtuous. And we too engage in behaviors we consider morally valiant that our progeny may abhor; future generations may condemn us, for example, for the way we demonized one another in our stories. To tell stories that do not divide and destroy, according to Gottschall, demands that we have "empathy for the devil."[10]

For our society to survive, our stories must evolve beyond righteous and rigid tales of us-versus-them. But how do we tell stories without villains, given that our brains are wired for stories of conflict, stories of right and wrong? Gottschall points hopefully to the film *Babel*, in which all the characters experience problem after problem while nevertheless acting in good faith.[11] But, as narratologists have

[5] GOTTSCHALL, *supra* note 3, at 129.

[6] *Id.* at 129–30.

[7] *Id.* at 130.

[8] *Id.* at 141–43.

[9] *Id.* at 143–44.

[10] *Id.* at 143–44.

[11] *Id.* at 142.

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repeatedly demonstrated, stories that do not require moral choice by the protagonists—stories of mere bad luck—do not captivate us, transport us, or move us to pro-social action, which is the very purpose of story. And as neurologists are increasingly demonstrating, this need appears to be innate and universal.[12] Is Gottschall's vision even possible? Is there a formula for stories without villains that will still do the pro-social work that story is designed to do?

The problem is a ripe one for legal scholars and law schools. Since the 1970s, the legal academy has embraced various storytelling movements designed to challenge the hermetic claims of legal formalism to ownership of "the law." These movements—critical legal studies, law and literature, and applied legal storytelling—strive to tell stories. In many of these stories, the traditional power holders in the legal system, especially White men, capitalists, and western colonialists, are the villains who perpetrate crimes against those marginalized by these power systems. Recently, however, the academy itself has been cast as the villain in a different story, one that insists that legal storytellers are merely oppressive power brokers of a different hue. In this story, legal storytellers themselves oppressively impose their moral worldview using the threat of exclusion from their ivy-covered entryways to power and the bludgeon of public moral shaming against any who would challenge their story, even from within and even at the margins. It seems there is no hotter battleground for storytellers than storytelling itself.

If neurologists are right that human beings are all hard-wired to tell stories with morals, we cannot simply resort to the solution that Plato proposed in *The Republic*: To build the perfect society, banish all the storytellers.[13] Fortunately, Plato's student Aristotle took a more pragmatic approach to story. In his *Poetics*, Aristotle distilled and crystallized the art of story, outlining principles that are still cited and built upon by screenwriters, playwrights, and other storytellers today.[14]

This Article proposes that legal scholars increase their focus on a distinct type of legal storytelling, one derived from principles as old as Aristotle's *Poetics*. Through character-driven narratives about the making and evolving and unmaking of the law, such artful stories, which might be called a *Poetic* legal narrative, offer a way out of the dangerous us-versus-them thinking into which so much modern storytelling invites us.

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[12] Edward F. Pace-Schott, *Dreaming as a Story-Telling Instinct*, 4 FRONTIERS IN PSYCH 1, 1 (Apr. 2013).

[13] *See* PLATO, THE REPUBLIC 595a–b (G.R.F. Ferrari ed., Tom Griffith trans., 2000).

[14] *See* THE POETICS OF ARISTOTLE (Samuel Henry Butcher trans., 4th ed. 1895) [hereinafter POETICS]; *see also infra* notes 70–103 and accompanying text.

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The goal of this Article is to describe the characteristics of the *Poetic* legal narrative and how this type of artful story can deconstruct the binaries that currently bedevil the law and legal reform: Us/them, good/evil, just/unjust, red/blue. Part I describes the problem in terms first developed by conflict resolution scholars in the latter half of the twentieth century to describe and untangle what they called "intractable" or "entrenched" conflicts. Lest we hope to follow Plato and banish story from the legal landscape altogether, Part II dives into the emerging neurological evidence in support of the universality of story as the primary learning tool in the human brain. Part III turns to the possibility of story as holding its own solution, identifying the elements of story derived from Aristotle's *Poetics* through modern storytelling in cinema and elsewhere. Part IV explores the ways that the artful story differs from the propagandistic one, especially the unique value of paradox and its appearance in myth and modern culture. Part V elaborates the details of the *Poetic* legal narrative, including the unique role of the legal scholar, the characteristics legal *Poetics* must or might include, and some early prototypes.

It is no wonder that legal scholars have sought to change the law through storytelling. If story is indeed a universal facet of the human brain, the wonder is that the law succeeded in keeping story at the margins (and in the English Departments) for so long. If the law must make room for story, legal scholars have a critical role to play in developing a type of legal storytelling that creates rather than destroys. The work of creating a true legal *Poetics* will be long, but it may be the only way to ensure that the arc of history continues to bend toward justice.

## I. AFFECTIVE POLITICAL IDENTITY AND IDENTITY-BASED CONFLICT

Before evaluating story's potential as a solution, it may be helpful to outline the anatomy of the problem. Political science research suggests that something measurable has changed in our political landscape in the twenty-first century. In 1960, only four percent of people said that they would be upset if their child married someone of a different political party.[15] In 2010, one-third of Democrats and one-half of Republicans would have been upset by the cross-partisan marriage.[16] Shanto Iyengar and colleagues have described this as a phenomenon of "affective

[15] *See* Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 416 (2012).

[16] *See id.* at 405.

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polarization," in which our political beliefs define not just how we vote or what we think of the issues, but who we think we are.[17]

Once our politics became fused with our identities, political differences came to resemble what conflict resolution scholars have called "identity-based conflicts."[18] These writers, many of whom practiced dispute resolution in settings ranging from family court mediation to international peace conferences, sought to distinguish a certain class of deeply entrenched conflicts from the types of resource-based conflicts around which dispute resolution theory had emerged.[19] Unlike resource-based conflicts, identity-based conflicts could not be approached through traditional techniques like mediated bargaining and trade-offs, which assumed that parties viewed the conflict "rationally," that the concrete matter in dispute was the "real" issue, and that the parties were actually interested in resolving the dispute.[20] When a conflict involves a perceived threat to the participants' identities, none of these assumptions may hold, and a different model of conflict resolution is required.[21]

In 1989, conflict resolution scholar Terrell Northrup identified four stages to identity-based conflict.[22] When another group's behavior, values, or beliefs challenge a participant's "core constructs," Northrup observed, parties register a deep sense of threat, which may appear outsized compared with the resources at issue or the parties' previous investment in them.[23] In response to this threat, the participant in an identity-based conflict often moves to a second stage, in which they begin to reject any information inconsistent with their core constructs through distortion, either forcing a new meaning upon the information or denying its existence.[24] At the third stage in an identity-based conflict, the distortion turns

[17] *See* Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POLI. SCI. 129 (2019); *see also* LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018) (describing identity-based politics).

[18] *See* JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICT IN NATIONS, ORGANIZATIONS, AND COMMUNITIES 23 (1997); *see also* Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, *in* INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 55, 43 (Louis Kriesberg et al. eds, 1989).

[19] *See, e.g.*, Northrup, *supra* note 18, at 56–61.

[20] *Id.* at 56–57.

[21] *Id.* at 58–61.

[22] *Id.* at 68–76.

[23] *Id.* at 64.

[24] *Id.* at 68.

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outwards.[25] The participant becomes increasingly rigid in their thinking, dividing the world into in-group and out-group, and attributing good motives to the in-group and evil motives to the out-group.[26] As negotiator Jay Rothman has said, "if the other side is perceived as a dangerous adversary threatening or frustrating identity needs, the common starting place is to draw a line in the sand between Us and Them. Each side feels relatively blameless, and each sees the opponents as aggressive, perhaps even evil."[27]

From this third stage of "rigidification," the conflict will often perpetuate itself. People confronted with distortion of their views and rigid characterization of their motives will usually become more distortive and rigid in return.[28] This behavior, paradoxically, will tend to validate the distortion.[29] "If the 'enemy' was not truly devious and aggressive before the distortions began," Northrup observed, "they certainly begin to behave just like 'enemies' in response to the distortions."[30] And round and round it goes, each side convinced that the other side started it, that the other side perpetuated it.

Tellingly, many conflict resolution scholars have sought to use story-based techniques as an alternative to traditional bargaining in approaching identity-based conflicts.[31] Narrative mediation, in particular, uses story as a device to move beyond the apparent issues in the dispute and focus instead on the words and language people use to talk about it. As John Winslade and colleagues have written, "[w]e might begin to develop a curiosity, not so much about the exact facts of the matter, but about the

[25] *Id.* at 71.

[26] *Id.* at 71–72.

[27] ROTHMAN, *supra* note 18, at 23. Rothman describes identity-based conflict formation in several steps, including blaming, polarizing, attributing, and projecting. *Id.* at 23–28. This process of justifying the "self" and demonizing the "other" appears consistently in the work of conflict resolution scholars. *See, e.g.*, Elizabeth E. Bader, *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 PEPP. DISP. RESOL. L.J. 183, 189 (2010). For a case study of these dynamics in the context of opinions about the Israel-Palestine conflict on a popular Israeli social media site in 2017, see Tal Orian Harel, Jessica Katz Jameson & Ifat Maoz, *The Normalization of Hatred: Identity, Affective Polarization, and Dehumanization on Facebook in the Context of Intractable Political Conflict*, 6 SOC. MEDIA + SOC'Y 1 (Apr.–June 2020).

[28] Northrup, *supra* note 18, at 72.

[29] *Id.* at 73–74.

[30] *Id.* at 75.

[31] Jessica Senehi, *Constructive Storytelling: A Peace Process*, 9 PEACE & CONFLICT STUD. 41, 45 (2002).

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ways in which each participant organizes the details into a story."[32] Other techniques invite parties to tell their stories in a setting outside the formal bargaining process. The listening circle (also called peacemaking circles or restorative justice circles) is inspired by practices used in many native cultures, especially in North America.[33] Essentially about community, listening circles are entirely voluntary processes that allow each participating individual an opportunity to tell his or her personal story as a key element of community connectedness and conflict resolution.[34] Dispute resolution processes pioneered by mediators Jay Rothman and Johann Galtung also expressly make space for participants to tell their stories, without sugarcoating antagonism.[35] The goal of these approaches is to create a dynamic space to move through antagonism to empathy and creativity.[36]

## II. THE PSYCHOLOGY OF STORY

In sensing that story might hold a key to unlocking entrenched identity-based conflicts, twentieth-century conflict resolution scholars anticipated discoveries about the universal architecture of story in the human brain that scientists are now beginning to elucidate.[37] This research suggests that Aristotle got the better of his teacher when it came to the question of story. Dangerous though it may be, human beings are hard-wired for story; we're better off trying to understand and use it conscientiously than to banish it.

Cognitive science, an interdisciplinary field embracing neuroscience, artificial intelligence, psychology, linguistics, anthropology, and philosophy, uses theoretical, experimental, and computational methods to understand intelligence and the function

[32] John Winslade, Gerald Monk & Alison Cotter, *A Narrative Approach to the Practice of Mediation*, 14 NEGOT. J. 21, 24–25 (1998).

[33] *See* Robert B. Coates, Mark Umbreit & Betty Voss, *Restorative Justice Circles: An Exploratory Study*, 6 CONTEMP. JUST. REV. 265, 265–66 (2003); *but see* Roger Mac Ginty, *Indigenous Peace-Making Versus the Liberal Peace*, 43 COOP. & CONFLICT 139 (2008) (arguing that Western forms of peace-making are largely incompatible with indigenous peace-making forms).

[34] Coates et al., *supra* note 33, at 268.

[35] *See* ROTHMAN, *supra* note 18, at 22–23; Wilfried Graf, Gudrun Kramer & Augustin Nicolescou, *Conflict Transformation Through Dialogue: From Lederach's Rediscovery of the Freire Method to Galtung's 'Transcend' Approach*, J. ENTWICKLUNGSPOLITIK 55, 57 (2006).

[36] *See* ROTHMAN, *supra* note 18, at 10; Graf et al., *supra* note 35, at 57.

[37] *See* Alejandra Obando Yar, Carmen Moret-Tatay & José Vicente Esteve Rodrigo, *The Science of Story Characters: A Neuroimaging Perspective on Antagonists in Narrative Engagement*, 19 FRONTIERS IN HUM. NEUROSCIENCE, 19 May 2025, at 1.

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of the mind.[38] One branch of cognitive science has explored the ways that the mind perceives and responds to narrative structures. In 1986, cognitive science pioneer Jerome Bruner observed, "In contrast to our vast knowledge of how science and logical reasoning proceed, we know precious little in any formal sense about how to make good stories."[39] Recently, however, technological advancements have begun to allow cognitive scientists to connect some of the dots by charting the way different narratives affect oxygenation of different parts of the brain (using functional magnetic resonance imaging, or fMRI) or blood flow to different brain areas (using positron emission tomography, or PET).[40] As this research evolves, it adds new dimensions to the long-held understanding that the human brain learns through story.

So hard-wired are we to understand the world through story that our brains will struggle to make up stories in the unlikeliest of places. In one classic study, researchers showed participants an animated video of geometric shapes (two triangles and a circle) moving on a screen around a large open rectangle.[41] When asked to describe the video later, all but one of the participants personalized the shapes, ascribing to them motivation, goals, emotions, and social interactions.[42] In a recent update to the study, researchers divided participants into two groups, one that watched the video of the geometric shapes and another that only listened to a narrative story that corresponded to the behavior of the shapes, while researchers collected fMRI data from both groups.[43] Regardless of whether they viewed the animation or heard the story, participants who interpreted the narratives in similar ways showed similar neural activity in the default mode network, a region of the

[38] Paul Thagard, *Cognitive Science*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Winter 2023), https://plato.stanford.edu/archives/win2023/entries/cognitive-science/ [https://perma.cc/JX54-EBGF].

[39] JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 14 (1986).

[40] Kanji Matsukawa, Kana Endo, Ryota Asahara, Miho Yoshikawa, Shinya Kusunoki & Tomoko Ishida, *Prefrontal Oxygenation Correlates to the Responses in Facial Skin Blood Flows During Exposure to Pleasantly Charged Movie*, PHYSIOLOGICAL REPS., Nov. 2017, at 1.

[41] Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 AM. J. PSYCH. 243, 244 (1944).

[42] *See id.* at 246. In a typical response, one man said, "A man has planned to meet a girl and the girl comes along with another man. The first man tells the second to go; the second tells the first, and he shakes his head. The two men have a fight, and the girls starts to go into the room to get out of the way and hesitates and finally goes in. She apparently does not want to be with the first man." *Id.* at 246–47.

[43] Mai Nguyen Tamara Vanderwal & Uri Hasson, *Shared Understanding of Narratives Is Correlated with Shared Neural Responses*, 184 NEUROIMAGE 161, 161 (2019).

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brain that shows increased activity when "mentalizing," or thinking about other minds.[44]

These mental activities, which researchers call "Theory of Mind," involve making sense of the world by making sense of others,[45] and we're hard-wired to do it when provided with the right kinds of stories. A story can make us literally feel a character's emotions—sweating, weeping, or raising our fists in triumph—but only if the story requires us to fill in a few gaps, inferring the mental states of the characters. These Theory of Mind stories bilaterally activate the temporal poles of the brain, associated with social and emotional processing for memory, far more than "physical stories," which describe all necessary information without requiring mental inferences, and more than random unlinked sentences.[46] In addition to discerning the characters' emotions, we also infer their intentions and motivations,

[44] *Id.* at 167–68; *see also* Rogier B. Mars Franz-Xaver Neubert, MaryAnn P. Noonan, Jerome Sallet, Ivan Toni & Matthew F.S. Rushworth, *On the Relationship Between the "Default Mode Network" and the "Social Brain,"* 6 FRONTIERS IN HUMAN NEUROSCIENCE, Art. 189 (June 2012). An earlier generation of cognitive psychologists, influenced by Ferdinand de Saussure's theory of *langue* over *parole* or Noam Chomsky's theory of universal grammar attempted to allocate brain functions to particular regions of the brain. *See* Paul Armstrong, *Neuroscience, Narrative, and Narratology*, 40 POETICS TODAY 395, 408–10 (2019). A more recent trend has abandoned this effort in favor of tracing neural networks, or patterns of activity across a wide range of brain regions, and mapping interactions between the brain, the body, and stimuli from the external environment. *See id.*; *see also* ALVA NOË, ACTION IN PERCEPTION 1 (2004) ("Perception is not something that happens to us, or in us. It is something we do. . . . The world makes itself available to the perceiver through physical movement and interaction."). For succinct overviews of the contemporary neuroscience of story, see Perry Reed, *Your Brain on Story*, MEDIUM (Sept. 8, 2023), https://medium.com/@perryartreed/your-brain-on-story-eca32b3b55c2 [https://perma.cc/9D4M-HZXZ]; Emily Falk, *Why Storytelling Is an Important Tool for Social Change*, L.A. TIMES (June 27, 2021), https://www.latimes.com/opinion/story/2021-06-27/stories-brain-science-memory-social-change [https://perma.cc/C9SP-CAK7]; Stanford, *Your Brain on Story*, YOUTUBE (Mar. 30, 2015), https://www.youtube.com/watch?v=zGrf0LGn6Y4 [https://perma.cc/5793-WN8G]. For a slightly older but more extended summary written for teachers, see KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY (2007).

[45] *Theory of Mind*, AM. PSYCH. ASS'N: APA DICTIONARY OF PSYCH., https://dictionary.apa.org/theory-of-mind [https://perma.cc/65AW-WDH6] (last visited Mar. 24, 2026).

[46] H.L. Gallagher, F. Happé, N. Brunswick, P.C. Fletcher, U. Frith & C.D. Frith, *Reading the Mind in Cartoons and Stories: An fMRI Study of "Theory of Mind" in Verbal and Nonverbal Tasks*, 38 NEUROPSYCHOLOGIA 11 (2000). In Gallagher and colleagues' Theory of Mind story, for example, a burglar drops his glove; a policeman sees the glove, picks it up, and calls for the man to stop; the burglar gives himself up. The non-Theory of Mind story describes two long-warring enemy powers, the first with stronger foot soldiers and artillery, the second with stronger air power, who meet in battle in heavy fog; the army with stronger foot soldiers and artillery wins. *Id.* at 12.

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their beliefs and sense of self-agency, and even the way the characters mentalize other characters (a Theory of Mind Theory of Mind, as it were).[47]

If you've ever had the sensation of getting up from an action movie and feeling your own body pumped full of energy, it may be because our minds appear to use the same brain regions and functions to imagine actions as to actually do them.[48] Motor cortex and muscle tissue can be stimulated by imagining actions, and experimental evidence suggests that consuming narratives about actions may have the same effect.[49] Other research has shown correlations in how the brain responds to changes in story elements (like changes in location, cause, or timing) and how it responds to analogous events in the real world.[50] This evidence suggests that we don't just perceive stories, we literally consume them.

This experience of physically experiencing the world of story characters contains an embedded paradox. When we perceive action in a story, we use this "kinesic intelligence," or our ability to "discern and interpret body movements," but we cannot literally receive "kinesthetic sensations," which can only be felt directly.[51] Receiving kinesic information requires empathy. It is also solipsistic, since we must necessarily understand the story actions by reference to our own felt sensations. Narrative theorist Paul Armstrong says these narrative relations "have the power to reconfigure our sense of the world" because "[t]hey are . . . dynamic and unpredictable enactments of the paradox of the alter ego, the doubling of the 'real

[47] The left frontal gyrus, a ridge on the frontal lobe, is involved in understanding characters' intentions, while the dorsal medial prefrontal cortex is especially engaged when discerning a characters' motivations. *See* P.C. Fletche, F. Happé, U. Frith, S.C. Baker, R.J. Dolan, R.S.J. Frackowiak & C.D. Frith, *Other Minds in the Brain: A Functional Imaging Study of "Theory of Mind" in Story Comprehension*, 57 COGNITION 109 (1995); Nuria Y. AbdulSabur, Yisheng Xu, Siyuan Liu, Ho Ming Chow, Miranda Baxter, Jessica Carson & Allen R. Braun, *Neural Correlates and Network Connectivity Underlying Narrative Production and Comprehension: A Combined fMRI and PET Study*, 57 CORTEX 107 (2014). The important role of the temporoparietal junction, which is not language-dependent, in comprehending self-agency suggests that people understand stories through mentalizing, not language processing. *See* Ye Yuan, Judy Major-Girardin & Steven Brown, *Storytelling Is Intrinsically Mentalistic: A Functional Magnetic Resonance Imaging Study of Narrative Production across Modalities*, 30 J. COGNITIVE NEUROSCIENCE 1298 (2018). Brain regions involved in mentalizing a characters' mentalizing of others include regions that govern self-consciousness, interpret sensory information, and handle spatial memory.

[48] Armstrong, *supra* note 44, at 402.

[49] *See* Lawrence Barsalou, *Grounded Cognition*, 59 ANN. REV. PSYCH. 617, 628 (2008).

[50] *E.g.*, Christopher Baldassano, Uri Hasson & Kenneth A. Norman, *Representation of Real-World Event Schemas during Narrative Perception*, 38 J. NEUROSCIENCE 9689, 9689 (2018) (conducting a study in which subjects' brains activated more strongly when watching a chronological video than a video that was not chronological).

[51] *See* GUILLEMETTE BOLENS, THE STYLE OF GESTURES: EMBODIMENT AND COGNITION IN LITERARY NARRATIVE 1–3 (2012).

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me' of my kinematic sensations that I experience while reading and the 'alien me' of the world I set in motion as I empathize and identify with the actions of the text."[52]

Good stories matter because we take action when we connect with a character's goals, emotions, and self-agency. In one study, researchers showed participants two videos about a man and his two-year-old son.[53] The first video showed clips of the father and son in the hospital, and the narrative revealed that the son suffered from terminal brain cancer.[54] The video concluded with the father dedicating himself to staying emotionally close to his son "until he takes his last breath."[55] The second video showed clips of the father and son together while the father described a day at the zoo without mentioning the child's illness (though he is bald from chemotherapy).[56] Watching the first video, but not the second, led to an increase in empathy and a forty-seven percent increase in oxytocin.[57] In a subsequent game that measured participants' generosity, those with higher empathy and oxytocin levels made more generous monetary offers toward strangers than those who didn't show such increases.[58]

We know a good story when we feel it: We lose track of time, place, and self; we enter the characters' world and emerge feeling changed (and temporarily disoriented). Researchers describe this as a story's ability to "transport" the receiver, its power to immerse the receiver in the narrative world by capturing the receiver's attention, imagery, and feelings.[59] A story receiver may be transported by the story's "coherence," or causal links between a character's goals, actions, and events.[60] We may also be transported by a story with intricately developed characters; dramatic intensity or wide and varying emotional range; a suspenseful or dramatic plot; or a

[52] Armstrong, *supra* note 44, at 423.

[53] Jorge A. Barraza & Paul J. Zak, *Empathy Toward Strangers Triggers Oxytocin Release and Subsequent Generosity*, 1167 ANNALS N.Y. ACAD. SCI. 182, 183 (2009).

[54] *Id.* at 185.

[55] *See* Paul J. Zak, *Why Inspiring Stories Make Us React: The Neuroscience of Narrative*, CEREBRUM (Jan.–Feb. 2015) at 1, 4.

[56] Barraza & Zak, *supra* note 53, at 185.

[57] *Id.* at 188.

[58] *Id.* at 183.

[59] Melanie C. Green & Timothy C. Brock, *In the Mind's Eye Transportation-Imagery Model of Narrative Persuasion*, *in* NARRATIVE IMPACT: SOCIAL AND COGNITIVE FOUNDATIONS 315, 317–18 (Melanie C. Green, Jeffrey J. Strange & Timothy C. Brock eds., 2002).

[60] When coherence fails—when we don't get what we expect—dopamine levels drop. *See* Wolfram Schultz, *Predictive Reward Signal of Dopamine Neurons*, 80 J. NEUROPHYSIOLOGY 1, 4 (1998).

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high level of psychological realism (we *know* these people, even though they occupy a fantasy world).[61] Apart from features of the story itself, stories transport us more easily if we recognize the characters and situations related, and maybe even more so if we're experiencing some of the story conditions in our own lives.[62] Sometimes it depends on the fit between story modality and audience—I love reading novels while you may prefer movies.[63] And some of us may just get lost in a story more easily than others.[64]

Good stories can decrease counterarguing by the receiver by appearing more entertaining than persuasive.[65] And even when our minds are impaired by stress or fatigue, we can retain and respond to stories much better than we can to fact-driven information.[66] It hasn't been lost on policymakers that these features make stories potentially powerful forces for good or for ill. The Department of Defense pumped adrenaline into the science of narrative when it funded studies to understand the impact of stories in defense contexts, such as a story's potential to treat Post-Traumatic Stress Disorder or, on the flip side, to increase radicalization.[67] Researchers who design entertainment-based educational interventions have noted the ethical obligations to use stories responsibly in light of research showing that story receivers may base decisions on irrelevant as well as relevant similarities—for

[61] Melanie C. Green, *Transportation into Narrative Worlds*, *in* ENTERTAINMENT-EDUCATION BEHIND THE SCENES: CASE STUDIES FOR THEORY AND PRACTICE 87, 93–94 (Lauren B. Frank & Paul Fazone eds., 2021).

[62] *Id.* at 94 (citing Melanie C. Green, *Transportation into Narrative Worlds: The Role of Prior Knowledge and Perceived Realism*, 38 DISCOURSE PROCESSES 247 (2004); Leigh Ann Vaughn, Kathryn E. Childs, Claire Maschinski, Nicoll Niño & Rachael Ellsworth, *Regulatory Fit, Processing Fluency, and Narrative Persuasion*, 4 SOC. & PERSONALITY PSYCH. COMPASS 1181 (2010)). The story receiver's trust in the protagonist causes a release of oxytocin. *See* Zak, *supra* note 55, at 7; *see generally* Paul J. Zak, Robert Kurzban & William T. Matzner, *Oxytocin Is Associated with Human Trustworthiness*, 48 HORMONES & BEHAV. 522, 522 (2005).

[63] *See* Melanie C. Green, Sheryl Kass, Jana Carrey, Benjamin Herzig, Ryan Feeney & John Sabini, *Transportation across Media: Repeated Exposure to Print and Film*, 11 MEDIA PSYCH. 512 (2008); John T. Cacioppo, Richard E. Petty & Chuan Feng Kao, *The Efficient Assessment of Need for Cognition*, 48 J. PERSONALITY ASSESSMENT 306 (1984).

[64] Green, *supra* note 61, at 95.

[65] *Id.* at 90.

[66] *See* Jason C. Coronel, Matthew B. O'Donnell, Elizabeth C. Beard, Roy H. Hamilton & Emily B. Falk, *Evaluating Didactic and Exemplar Information: Noninvasive Brain Stimulation Reveals Message-Processing Mechanisms*, 49 COMMC'N RSCH. 1, 19 (2019).

[67] Zak, *supra* note 55, at 11; *see generally* Madhumita Venkataramanan, *Darpa Explores the Science of Storytelling*, WIRED (Apr. 13, 2011), https://www.wired.com/2011/04/darpa-explores-the-science-of-storytelling/ [https://perma.cc/H5CL-EPK4] (discussing the Defense Advance Research Projects Agency's "Narrative Networks" project).

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example, that a character shares their hobbies, not just suffers from the health condition that the segment seeks to highlight—or may not know what lessons to draw from a story at all.[68] Narrative researchers have also advocated for the use of story to encourage social change.[69]

## III. THE STRUCTURE OF STORY FROM ARISTOTLE TO STALLONE

Audiences of novels, screenplays, and network series know the generative power of story. We flock to the theaters, submerge ourselves in the pages, binge on Netflix, and emerge with a new sense of what's possible. To good stories, we return again and again, reimagining, reawakening. Screenwriting expert Robert McKee says story is "not a flight from reality but a vehicle that carries us on our search for reality, our best effort to make sense out of the anarchy of existence."[70]

What makes a story good? Good stories are true, but they are not always factual, and a statement of facts is not always Truth. Story, whether fiction or nonfiction, can be no more than a vehicle for Truth. "Big 'T' truth," McKee says, "is located behind, beyond, inside, below the surface of things, holding reality together or tearing it apart, and cannot be directly observed."[71] We squint and strain, and sometimes, when the light falls just right, we catch a glimpse of something we recognize on a primordial level. What McKee describes is one aspect of the inherent paradox of art: Through features like rhythm, timbre, and nuance, it manages to present the unpresentable.[72]

Philosophers and storytellers since Aristotle have defined the elements of story,[73] and most modern theorists of story still build from the *Poetics* and the six

[68] *See* Green, *supra* note 61, at 95–96.

[69] *See* Falk, *supra* note 44. As an example, Falk cites Raj Jayadev's criminal justice reform program involving "participatory defense." *Id.* (citing Raj Jayadev, *Community-Powered Criminal Justice Reform*, TEDX BINGHAMTON UNIVERSITY (Mar. 2018), https://www.ted.com/talks/raj_jayadev_community_powered_criminal_justice_reform?subtitle=en [https://perma.cc/9MBN-A8SL]).

[70] ROBERT MCKEE, STORY: STYLE, STRUCTURE, SUBSTANCE, AND THE PRINCIPLES OF SCREENWRITING 24 (1997).

[71] *Id.* at 24.

[72] *See* Bert Olivier, *The Paradoxes of Art*, 28 S. AFR. J. ART HIST. 199, 205 (2013) (citing JEAN-FRANÇOIS LYOTARD, THE INHUMAN: REFLECTIONS ON TIME 140 (Geoffrey Bennington & Rachel Bowlby trans., 1991)).

[73] Daniel T. Willingham, *The Privileged Status of Story*, AM. EDUCATOR 43, 43 (Summer 2004).

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core elements of what he called "Tragedy."[74] Of those six elements—plot, character, thought, diction, song, and spectacle—Aristotle emphasized the primacy of plot (*mythos*) in defining Tragedy.[75] Tragedy is an imitation of human life, Aristotle proposed, and a human life consists essentially of action.[76] Action arises and is linked to character, but (as the work of immature artists shows, Aristotle thought), a plot with insufficient character development may still contain the stuff of Tragedy, while a fully defined character without a series of actions does not.[77]

A plot must be coherent in terms of the relatedness of the events, their completeness when taken together, and the magnitude of the sequence as a whole. The relevant events cannot be simply the full events of the character's life. To be a plot, a sequence of events must have unity, what we might call a causal link. When the audience understands the climax as a probable or inevitable consequence of the event that initiates change and the actions the protagonist takes in response to it, the events form a complete plot. To communicate to an audience, the events must be of a certain magnitude—not so small that they barely register, nor so large that the audience cannot perceive them all as a whole.[78] Implicit in this structure, a plot must have a sense of "universality" or inevitability. Unlike history, which describes events that actually happened, the goal of a plot (even when using historical figures and events as material) is to describe what would probably happen when certain events occur to a certain type of person. It is this probability or necessity that arouses either pity or fear in the audience—pity when the protagonist is virtuous, and fear when an unhappy protagonist is like ourselves.[79]

Aristotle defined plots as either simple or complex.[80] Events that simply cause change, sometimes by chance, without changing the protagonist's world are simple; they do not provide enough drama on which to build a tragedy.[81] In a complex plot, the events begin with a sudden "Reversal of the Situation" (*peripeteia*) that disrupts the steady state of the protagonist, move through a sequence of events provoked by

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[74] *See, e.g.*, KENNETH THORPE ROWE, WRITE THAT PLAY 27–28 (1939); *see also* Ian Parker, *The Real McKee Lessons of a Screenwriting Guru*, NEW YORKER (Oct. 20, 2003), https://www.newyorker.com/magazine/2003/10/20/the-real-mckee [https://perma.cc/E5RG-RARN].

[75] POETICS, *supra* note 14, at VI. 15–18, 1450 a 38–b 5.

[76] *Id.* at VI. 2–7, 1449 b 35–1450 a 10.

[77] *Id.* at I. 7–19, 1450 a 25–40.

[78] *Id.* at VII.4–7, 1450 b 36–1451 a 14.

[79] *Id.* at X.1–XI 5, 1451 a 37–1451 b 33.

[80] *Id.* at X, 1452 a 11–1452 b 32.

[81] *Id.*

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and predictable from the reversal, and lead to a climax of recognition (*anagnorisis*) that permanently alters the protagonist's understanding of the world.[82] Building on Aristotle's description, modern storytelling theorists have articulated that the Reversal of the Situation may occur on three different psychic levels—inner, interpersonal, and extra-personal.[83] Simple stories occur on only one level; complicated ones on two levels.[84] In the most complex (and mesmerizing) plots, the reversal produces conflict on all three levels.[85]

Not just any conflict will do. The conflicting forces on each level must be almost—but not entirely—an even match. Perfectly balanced forces lead to deadlock, and without movement, there is no story. Steeply imbalanced forces result in a landslide victory for the weightier one, and the story ends before it begins. The outcome must be uncertain, but the movement, from the moment of initial conflict, is inevitable.[86] Aristotle knew this: In the *Poetics*, he said every story must have a beginning, a middle, and an end.[87] An event of beginning "does not itself follow anything by causal necessity," but once it occurs, something has to follow.[88] An ending follows from previous events but does not necessarily lead to anything more; events in the middle must flow inevitably from the beginning and lead inevitably to further action.[89] A lawyer might call this linkage "causation."

The second key element, character (*ethos*), represents the individual. Aristotle's tragic hero was a person of noble qualities with relatable human flaws that contribute to his downfall.[90] Characters represent certain types, so that the audience both relates to the character and understands the character's actions as necessary or predictable responses to the reversal. In the *Poetics*, the tragic hero is of noble lineage.[91] Aristotle thought that the character type should, like a painting, be "true to life and yet more beautiful," both inviting identification and ennobling the character traits.[92] If the

[82] *Id.* at X.1–5, 1452 a 12–1452 b 8.

[83] MCKEE, *supra* note 70.

[84] *Id.*

[85] *Id.* at 41–42.

[86] *See* ROWE, *supra* note 74, at 27–28.

[87] POETICS, *supra* note 14, at VII.2–3, 1450 b 26–28.

[88] *Id.*

[89] *Id.*

[90] *Id.* at XV.8, 1454 b 10–14.

[91] *Id.*

[92] *Id.*

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American ideal has led to a certain democratization of the protagonist, the artificial beauty of the Hollywood actor might be a vestige of Aristotle's call for ennoblement of the protagonist.

In the intersection of plot and character lies what Aristotle called Tragedy and contemporary storytellers call drama. Complications in the story arise when antagonism arises between the protagonist's primary value and the negative values that pull against it.[93] Antagonism may be the result of a contrary value or from a contradictory value; more compellingly still, it may arise from the compound negative, the negation of the force that negates the primary value.[94] For example, if freedom's contrary value is constraint and its contradictory value is enslavement, its compound negative might be living in a prison of one's own making.[95]

The protagonist must face not just choice but dilemma. A choice between binaries, good/evil, right/wrong, does not sustain enough tension to propel a story.[96] To transport the audience, the protagonist must be forced to choose between "irreconcilable goods" or between two or more nearly unthinkable options.[97] The protagonist struggles between want and not-want, experiencing both and unable or unwilling to choose either, as complications push the stakes ever higher. When the protagonist forever surrenders all competing realities, choosing one irreversible path, the story ends.[98]

This philosophical content of the story, Aristotle explained, is conveyed through what he called Thought (*dianoia*) and expressed through Diction (*lexis*).[99] Thought may include a range of ideas: proof or refutation of a premise, the arousal of certain emotions, or "the suggestion of importance or its opposite."[100] Dramatic plots, like dramatic speeches, may seek to convey emotion, importance, or probability; the difference, Aristotle emphasized, is that plots must convey these things through the incidents themselves—in modern terms, a story must show rather

[93] MCKEE, *supra* note 70, at 319.

[94] *Id.* at 319–33.

[95] *Id.* at 327.

[96] *Id.* at 248–49.

[97] *Id.* at 249.

[98] *Id.*

[99] POETICS, *supra* note 14, at XIX, 1456 a 33–1456 b 19.

[100] *Id.* at XIX.3, 1456 a 33–38.

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than tell.[101] Aristotle devoted much space in his short essay to questions of diction or style. The ideal language, he thought, should be "clear without being mean."[102] Diction based on words or phrases that are far more "lofty" or unusual than ordinary speech becomes a mere riddle to the audience, but a style that uses only commonplace words and phrases misses the opportunity for both precise clarity and for an experience that rises above the ordinary.[103]

The same principles that Aristotle outlined in antiquity are used by modern writers of screenplays and the newer, long-form story dramas available through streaming platforms like Netflix. Consider a familiar example, the movie *Rocky*.[104]

In the beginning, Rocky Balboa occupies a certain place in the world: a small-time boxer loan-sharking for the local organized crime syndicate. But inside, Rocky is no gangster; he talks to his fish and courts the shyest and most honest girl in the neighborhood. He desires to be something bigger than a bruiser. One day, an event occurs that causes a Reversal of the Situation: In need of a good storyline for his next fight, Apollo Creed, the reigning heavyweight champion, decides to invite a local contender to fight him, and he chooses Rocky based on his nickname, "The Italian Stallion" (which Rocky freely admits he gave himself). Suddenly, Rocky faces a choice, which he initially resists but then accepts, realizing it may be his only shot to rise above his circumstances. Soon, however, a gap opens between Rocky's desire and his situation: He is nowhere near fit enough or skilled enough to compete with Creed. Mickey, a local trainer who never saw much potential in Rocky before, offers to train him. Again, a gap opens between Rocky's desire—to be somebody—and his circumstances, which now require him to submit to the training methods of a man who previously disdained him as a nobody. On a personal level, Rocky's new opportunity raises the jealousy and disdain of his new girlfriend's brother, Paulie. Instead of being brought down to Paulie's level, he raises Paulie to his own by hiring him to be his promoter. The night before the fight, Rocky can't sleep until he arrives at a moment of Recognition: the self-respect he seeks won't come from victory but from standing up against Creed until the final bell. On the day of the fight, Rocky gets Creed's attention with an early knockdown, and then sustains a serious contest.

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[101] *Id.* at XIV.2, 1453 b 1–11.

[102] *Id.* at XXII, 1458 a 18–19.

[103] *Id.* at XXII.1–10, 1458 a 18–1459 a 14. Story in performance—Aristotle's medium—also includes song (melos) that enhance emotional impact and scenery (*opsis*) or visual elements that help to convey meaning and engage the audience. *See id.* at VI.7, 1450 a 8–10. Because this article focuses on legal scholarship, which is primarily delivered through written media, song and scenery will be left for future treatment. If a *Poetic* legal narrative is developed, however, it would provide ample material for dramatic rendition.

[104] ROCKY (Irwin Winkler & Robert Chartoff, 1976).

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At the end of fifteen rounds, Creed is declared the winner, but Rocky has won his inner battle.

Rocky's primary value is dignity. Through the series of events that begin with the invitation to fight Creed, Rocky faces its contrary value, indignity (such as being mocked by Creed or insulted by Paulie), and its contradictory value, humiliation (such as being compelled by poverty to work for the Mafia). But the greatest danger to Rocky—the negation of the negation—lies in the possibility that he might give up on himself. Self-betrayal is the negation of the negation for Rocky. By staying on his feet, Rocky refuses to give in to others' negative perceptions of him and proves to himself that even a poor Philadelphia club fighter of modest intelligence is entitled to full human dignity and self-worth.

Rocky's marginal social status turns Aristotle's formulation of the high-born hero on its head, but this subversion is distinctly American. In the lore of a "nation of immigrants" infused with Jeffersonian ideals, the tenacious immigrant, the valiant commoner, possesses greater inherent nobility than the European nobleman with his unearned prestige. In this respect, Rocky may in fact represent an Aristotelian hero in New World garb: The gentle giant, the hardworking immigrant, the heavy with the heart of gold, ennobled in the sense that he represents the prototypical American. We understand the type well enough to know that Rocky cannot settle for the bit part that "the neighborhood" and Creed attempt to cast him in. But it is Rocky's character set in the middle of the events—the poverty, the challenge, the failure, the drive, and ultimately the fight—that creates the plot. And it is the widening gap, at first, between Rocky's attempt to claim his dignity and the way the circumstances appear to be unfolding against him that creates the drama.

## IV. ART VERSUS PROPAGANDA: TOWARD HISTORIES WITHOUT VILLAINS

We all know *Rocky* tells a great story. Who doesn't love a tale of triumph of the loveable underdog? But *Rocky* represents more than just a transportive two hours at the movies. Mapping *Rocky* onto the elements of the *Poetics*, we can trace the line through to a definitive distinction between stories that will divide a culture—which I call "propagandistic" stories—and stories that have the power to unite it.

### *A. The Paradox of the* Poetics

Rocky represents the classic hero because he triumphs in the end. In describing Tragedy, Aristotle was describing a different type of hero, the tragic hero: A good person, not a villain, but with relatable frailties that finally spell his undoing.[105] But

[105] POETICS, *supra* note 14, at XV, 1454 a 15–28.

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the Rocky example is a viable one for exploring the Aristotelian hero, because, for Rocky no less than for Oedipus or Medea, the *real* battle lies wholly within himself.[106] Rocky literally defines his quest that way: The question, he finally recognizes, is not whether Creed will beat him (for he surely will). The question is whether Rocky will believe in himself, stand up for himself, literally, to the bitter end. He does, and we will never forget him for it.

That is not to say that other characters don't present deliberate obstacles to the hero's realization of his inner quest; they do, and they must or there is no story, only coincidence and fate. But those characters pose obstacles for their own reasons, reasons that would be perfectly logical (though not always morally sound) in the context of their own story, which we rarely see but a good writer or actor will know viscerally. Apollo Creed is a rival, not a villain, who comes back as Rocky's coach in *Rocky III* (and we learn more about his own story in *Creed*).[107] Indeed, it is surely no coincidence that Rocky's "opponent" in this match bears the name of a god known by the Greeks for the protection of boys and the rite of initiation of young men.[108] Paulie, Rocky's brother-in-law, is a gadfly but a familiar one; frequently small-minded and venal, he represents to Rocky what Rocky himself might become if he falters in his quest to claim his dignity in his own eyes. When Rocky lifts Paulie up rather than giving in and sinking down, he achieves an intermediate victory toward his goal of claiming his full dignity. (In Adrian's image of Rocky, Rocky sees a reflection of what that dignity, once achieved, might look like.)

In this sense, the *Poetics* and the Aristotelian hero hold promise for what Gottschall seeks: a history without villains. In following the *Poetics*, we can distinguish between stories that rise to the level of art, and their alternative, propagandistic stories. Superficially, the propagandistic story may resemble the artful one of the *Poetics*. We may meet the hero in his ordinary world, experience with him the event that creates a Reversal of the Situation, watch as this event combines with his character to lead him to necessary and predictable reactions. We may cheer for him when he takes action and cry for him when his actions open ever-wider gaps between the object of his desire and his attainment of it. He may experience a start of Recognition that allows him to redefine his approach, renew his attempt, and finally overcome the resistance to arrive at a new world.

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[106] *See* SOPHOCLES, OEDIPUS THE KING (Gilbert Murray trans. 1946); EURIPIDES, THE MEDEA (Gilbert Murray trans. 1906); *see also* POETICS, *supra* note 14, at XIII.2–4, 1452 b 32–1453 a 20.

[107] CREED (Ryan Coogler, 2015).

[108] *See* FRITZ GRAF, APOLLO (2008).

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But in a propagandistic story, the hero's quest is always valiant, and his motives are always pure. If the hero has foibles and frailties, they exist only at the margins to make him more interesting; they do not affect his goals or his pursuit of them. Obstacles and challenges come largely or entirely from outside of himself—he is challenged by villains, by circumstance, by his own (physical) frailty in the face of danger, but never by any serious suspicion that he may not possess the moral fortitude to achieve his objective, or that his objective may be morally fraught in ways he does not realize. He is the Good Guy.

For a story to have a Good Guy, it must, by definition, also have a Bad Guy, because drama comes from obstacles and the Good Guy can never be the obstacle. Here is what Gottschall calls "the story paradox": stories can inspire pro-social collective action, but they often do so by dividing the world into Good Guys and Bad Guys and encouraging the audience to identify with and act like the Good Guys, including or especially by vanquishing Bad Guys.[109]

This effect of the propagandistic story has always been a lived phenomenon. When I was growing up in the 1970s, kids still played "cowboys and Indians" with Lone Ranger action figures. It would take another generation to even have a cultural Recognition that the people cast as villains in that folk drama had their own story, and in the context of that story their actions (and those of the cowboys) took on a completely different character. Today, we play "cowboys and Indians" by turning on any one of many political news channels or simply by consuming the material fed to us by social media algorithms. In the stories we consume, our group is always the "cowboys."

The Aristotelian story needs no Bad Guys. In a story with a tragic hero, the lack of need for a villain is obvious: Although the oracle foretold Oedipus's fate, the oracle is not a villain.[110] Nor is Oedipus a mere victim of fate.[111] The flaw that leads to Oedipus's downfall is his own refusal to consciously address his doubts about his parentage; he chooses, irrationally, to interpret the oracle's answer to his questions about his parentage as confirmation that those who raised him are his true parents.[112] By refusing to deal with his doubt and fear about his parentage, he willingly takes a series of actions that prove the oracle's prophecy correct.[113] The oracle does not

[109] GOTTSCHALL, *supra* note 3, at 21, 149.

[110] *See* SOPHOCLES, *supra* note 106, at 46.

[111] *See generally* E.R. Dodds, *On Misunderstanding the 'Oedipus Rex*,*'* 13 GREECE & ROME 37 (1966).

[112] *See* SOPHOCLES, *supra* note 106, at 55.

[113] *See id.* at 58.

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deprive Oedipus of free will but merely predicts his fate, a fate that follows from his unwillingness to face the possibility that he is not the son of Polybus and prince of Corinth.[114] Oedipus is not evil, he is willingly blind to facts that will challenge his sense of identity—a failing that many audience members will recognize in themselves with an ominous chill.

As *Rocky* illustrates, however, an Aristotelian story that substitutes a classic (triumphant) hero needs no villain either. As a matter of character, Oedipus and Rocky are morally similar. Like Oedipus, Rocky is flawed—when we meet him, he is threatening local business owners, using his petty power to survive at other people's expense. Mickey is arguably justified in considering Rocky a bum. And like Rocky, Oedipus wants to do better than his apparent fate; he abhors the thought of killing his father and marrying his mother so much that he flees to Thebes. For both Oedipus and Rocky, the evil against which they must battle comes not from outside but from within, from their own eminently human frailties. From the moment of the reversal of their situation (the oracle prophecy, the offer to fight Creed), each is tested to the limit to see if he will overcome his flaws. The only difference is that Rocky has a moment of recognition just in time that what he really needs is not victory but dignity, and he claims it by staying on his feet. Oedipus, unwilling to open his eyes to reality, recognizes too late that the prophecy has come true—and he blinds himself with his mother/wife's gold pins.

### *B. Art and the Paradox of the Human Condition*

The structure of story as defined in the *Poetics* offers an invaluable touchstone for a culture seeking to write itself a history without villains. A story with an Aristotelian plot and character is never about villains and always about the villainy that lies within, often just out of our conscious sight (as Oedipus symbolizes). This line, I contend, separates the artful story from the propagandistic one. It is a much more reliable distinction than trying to judge the apparent merits of the hero's quest, because our judgment is deliberately skewed by the propagandistic story; this is its defining feature. No matter how justified the hero may seem, no matter how honorable his quest, no matter how evil the forces aligning against him, a story that ignores the duality within the hero himself ignores the human condition. While such stories may be (and often are) riveting, exciting, moving, or motivating, they cannot be defined as art because they deny the paradox of the human condition.

That paradox has been captured in stories from folklore to modern Western culture in the persona of the trickster, who goes by many names. The Greeks called

[114] *See id.*

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him Hermes; the Norse, Loki.[115] To natives of the North American Plains and the Southwest he sometimes appeared as Coyote; to Northern Pacific, Raven or Mink or Blue Jay.[116] In Japan, he has been called Susa-no-o; in West Africa, he was Eshu to the Yoruba, Ananse to the Ashanti.[117] African-American folklorists knew him as Bre'r Rabbit.[118] Franchot Ballinger says trickster "derives his power from wandering in paradoxical reality rather than from living in the cracks of classification where all the life can be squeezed from him."[119] His wanderings, according to Karl Luckert, reveal "the many-sidedness of what is."[120]

Lewis Hyde says *Trickster Makes This World*, because his hijinks are as generative as they are destructive; he generates through destruction.[121] In the Tsimshian trickster story cycle, Raven comes to earth to feed the people on fish and berries and finds the world in darkness. The people are distressed, and Raven too is troubled; how can he find enough to eat in this lightless world? Raven puts on his raven skin, flies through the hole in the sky, and turns himself into a leaf, which is

[115] William G. Doty, *A Lifetime of Trouble-Making: Hermes as Trickster*, *in* MYTHIC TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS 46 (William J. Hynes & William G. Doty eds., 1993); DANIEL MCCOY, THE VIKING SPIRIT: AN INTRODUCTION TO NORSE MYTHOLOGY AND RELIGION 25 (2016).

[116] *See* STITH THOMPSON, TALES OF THE NORTH AMERICAN INDIANS xx, xxi, 19–24, 64–77 (1966).

[117] *See* ROBERT D. PELTON, THE TRICKSTER IN WEST AFRICA: A STUDY OF MYTHIC IRONY AND SACRED DELIGHT 5 (1980); Robert S. Ellwood, *A Japanese Mythic Trickster Figure: Susa-no-o*, *in* MYTHIC TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS, *supra* note 115, at 141; Robert D. Pelton, *West African Tricksters: Web of Purpose, Dance of Delight*, *in* MYTHIC TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS, *supra* note 115, at 123; Christopher Vecsey, *The Exception Who Proves the Rules: Ananse the Akan Trickster*, *in* MYTHIC TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS, *supra* note 115, at 106.

[118] Franchot Ballinger, *The Euro-American Picaro and the Native American Trickster*, 17 MELUS 21, 32-33 (Spring 1991–Spring 1992). Gathering trickster scholarship would be a monumental task; as one commentator said, "[m]ore has probably been written about 'tricksters' than about any other single category of character that appears in the myths and folktales of the world." Michael P. Carroll, *The Trickster as Selfish-Buffoon and Culture Hero*, 12 ETHOS 105, 105 (Summer 1984). Stith Thompson's *Tales of the North American Indians* generated much trickster scholarship by gathering and disseminating trickster myths from various traditions, but Thompson offered little commentary. *See* THOMPSON, *supra* note 116, at xv-xxiii. Paul Radin popularized the trickster myth in his 1956 treatise, THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY. For a historical overview of trickster mythology collection and interpretation, see William G. Doty & William J. Hynes, *Historical Overview of Theoretical Issues*, *in* MYTHIC TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS, *supra* note 115, at 13.

[119] Ballinger, *supra* note 118, at 33.

[120] *See* Karl W. Luckert, *Coyote in Navajo and Hopi Tales*, *in* NAVAHO COYOTE TALES: THE CURLY TÓ AHEEDLÍINII VERSION 10 (Karl W. Luckert ed., 1984) (explaining the historical and academic significance of the Tricker's wanderings); *see also* Ballinger, *supra* note 118, at 33–34.

[121] *See* LEWIS HYDE, TRICKSTER MAKES THIS WORLD: MISCHIEF, MYTH, AND ART 6–7 (1998).

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eaten by the daughter of the chief of heaven. She becomes pregnant and bears his child, a baby who incessantly cries out. The wise beings advise the chief that the child wants the Daylight-Box that hangs on his wall. They give it to the delighted child, who plays with it until they all become unconscious of him, then he dashes with it out the door and down again through the hole in the sky. He breaks the box and gives daylight to the people.[122]

As both creator and destroyer of opportunity, Hyde suggests, trickster both exploits and blocks passageways. Raven brings light by flying through the hole in the sky to heaven and back again; the Zulu trickster Thlókunyana, associated with the weasel, eats the leopard's children, lures the vengeful mother into his hole, then darts out from a separate, unknown entrance and sets spears at both ends, killing the leopard as she tries to follow.[123] The passageway (in Greek, *poros*) becomes an *aporos* or snare, and gives birth to the English word "aporia," which in logic means a proposition with evidence both for and against it, a contradiction.[124]

In modern European thought, Swiss psychologist Carl Jung saw the mythical trickster figure as a manifestation of the "collective unconscious," or the foundations of the human psyche. In European folklore, he saw evidence of the trickster figure in Mercury, precursor to the Greek Hermes, with "his fondness for sly jokes and malicious pranks, his powers as a shape-shifter, his dual nature, half animal, half divine, his exposure to all kinds of tortures, and—last but not least—his approximation to the figure of a savior."[125] Jung observed vestiges of the trickster mythology in descriptions of medieval church festivals with remnants of pagan rituals, including the *festum fatuorum*, in which masqueraders invaded the mass disguised as animals and women, performed dances and lewd songs, played dice, and ate greasy food from a corner of the altar; and the *festum asinarium*, in which French parishes paraded an ass into church to symbolize Mary's flight into Egypt and parishioners brayed out loud after each part of the high mass.[126] Many of these rituals survive in the customs and antics of carnival.[127]

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[122] *See id.* at 46–47; *see also* THOMPSON, *supra* note 116, at 22–24.

[123] THOMPSON, *supra* note 116, at 48–49.

[124] *See* HYDE, *supra* note 121, at 48–49.

[125] Carl Jung, *On the Psychology of the Trickster Figure*, *in* PAUL RADIN, THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY 195, 195 (1956).

[126] *See id.* at 195–99.

[127] *See id.* at 202.

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On the individual level, Jung saw the image of the trickster in what he called the "shadow," the unknown opposing force to the "ego," or conscious personality.[128] According to Jung, "the shadow personifies everything that the subject refuses to acknowledge about himself and yet is always thrusting itself upon him directly or indirectly—for instance, inferior traits of character and other incompatible tendencies."[129] Because the ego denies or fails to recognize the existence of the shadow, these inferior traits show up as jinxes, gaffes, and faux-pas.

In the ego's tendency to deny the shadow, Jung described a process strikingly similar to the identification-threat-distortion-rigidification cycle described in identity-based conflicts.[130] While some aspects of the shadow could be brought into conscious awareness, Jung believed, those aspects that appeared as "projections" onto others proved deeply resistant to integration.[131] Since projection originates from the shadow, the individual on the conscious level believes themselves not to be acting at all.[132] "[I]n this case both insight and good will are unavailing," Jung wrote, "because the cause of the emotion appears to lie, beyond all possibility of doubt, in the *other person*."[133] The trickster in his modern disguise of ego and shadow, Jung suggests, is what prompts us to look for villains in our stories.

Denying any claim of artfulness to the hero/villain story does not deny the possibility of evil or the need to oppose it and is not a vote for moral relativism. To the contrary, Jung maintained that the failure to acknowledge the paradoxical ego/shadow nature of every human personality (yes, that includes our own) undermines the capacity for moral reasoning.[134] Practicing clinical psychology in postwar Central Europe, Jung found that the tendency to submerge the shadow on the individual level led to its appearance in magnified form and even personification on the cultural level.[135] A culture whose stories ignore or deny the paradox of the

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[128] *Id.* at 204.

[129] 9 C.G. JUNG, *Archetypes and the Collective Unconscious*, *in* 9.1 COLLECTED WORKS OF C.G. JUNG, ¶ 513 (Sir Herbert Read et al., eds., R.F.C. Hull, trans., 1959).

[130] *See supra* notes 18–30 and accompanying text.

[131] 9.2 C.G. JUNG, *Aion: Researches into the Phenomonology of the Self*, 9.2 COLLECTED WORKS OF C.G. JUNG ¶ 16 (R.F.C. Hull, trans., 1959).

[132] *Id.* ¶ 17.

[133] *Id.* ¶ 18 (emphasis in original).

[134] Jung, *supra* note 125, at 206–07.

[135] C.G. JUNG, *Psychotherapists or the Clergy*, *in* 1 THE COLLECTED WORKS OF C.G. JUNG ¶ 531 (Sir Herbert Read, Michael Fordham, M.D., M.R.C.P., Gerhard Adler, PhD & William McGuire eds., R.F.C. Hull trans., Princeton University Press 2d ed. (1957)).

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human condition does so at the risk of lapsing into what Hyde calls "unconscious cruelty masked by inflated righteousness."[136]

In Jung's terms, the recognition of the ego/shadow duality of the human personality was the beginning of the process of "individuation," through which the "self" emerges.[137] "Once one has experienced a few times what it is like to stand judgingly between the opposites," Jung wrote, "one begins to understand what is meant by the self. Anyone who perceives his shadow and his light simultaneously sees himself from two sides and thus gets in the middle."[138] Recognizing this duality is the beginning of wisdom.

## V. THE *POETIC* LEGAL NARRATIVE

Legal scholarship urgently needs a Recognition of its own. The story paradox in the law demands a new type of legal storytelling, one that centers on Aristotelian heroes (classic or tragic) and follows the structure described in the *Poetics*. This section explores the background, the characteristics, and some potential models for this *Poetic* legal narrative.

### *A.* Peripeteia*: The Legal Storytelling Movements*

The Reversal of the Situation, one might argue, occurred by the early 1980s, when Critical Legal Studies (CLS) scholars began to tell stories in the voices of those outside the law, those over whom the Leviathan ruled.[139] The law, they perceived, was not and had never been the rational, scientific endeavor that Anglo-American common law portrayed itself to be and jealously insisted upon as the terms of engagement.[140] CLS scholars deliberately hijacked the project, inserting individualized narratives, often nonfiction first-person accounts that torpedoed the veil of rationality that they perceived around the law and revealed messy, individual,

[136] HYDE, *supra* note 121, at 11.

[137] C.G. JUNG, *Definitions*, *in* 1 THE COLLECTED WORKS OF C.G. JUNG, *supra* note 135, ¶ 757.

[138] C.G. JUNG, *Good and Evil in Analytical Psychology*, *in* 1 THE COLLECTED WORKS OF C.G. JUNG, *supra* note 135, at ¶ 872.

[139] *See* ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK (Verso 2015) (1983).

[140] Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 578 (2006).

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human lives suffering just behind it.[141] The protagonist was typically a victim who, assailing victimhood, rails in rebellion against the powerful.[142]

Other flavors of legal storytelling gradually entered the academy alongside CLS. In the 1980s and 1990s, Law and Literature scholars began to teach the application of hermeneutics to legal texts.[143] Over time, these explorations tended to be categorized into several branches: law *in* literature, as in *Bleak House* or *Crime and Punishment*; law *as* literature, in which any legal text might be analyzed through the lens of narratology; and one branch principally concerned with the stylistics of narrative.[144] Still another group of scholars met in 2007 and began self-consciously re-deploying narrative as a tool through which practicing lawyers could shape legal argument.[145] This field, Applied Legal Storytelling, has gained prominence in clinical teaching; many clinical teachers now encourage students to structure and evaluate their work through the lenses of character, setting, triggering event, theme, masterplot, and closure.[146] Applied Legal Storytelling borrowed insights from CLS by consciously crafting the "outsider" experience for expression within legal channels and deployed some methods from legal hermeneutics by carefully analyzing legal presentations using the elements of narrative.[147]

None of these legal storytelling movements, however, have focused on the dangers of the "story paradox," the tendency of story to motivate pro-social action by dividing the world into "us" and "them." The consequences of this oversight have now been amplified by those who benefit from division politically, economically, or socially. Law and policy discussions in the public sphere now almost always begin with a sorting of the participants into Red and Blue tribes. Once clothed in their affective identity robes, participants quickly repair to their respective corners and all hope for reasoned debate is extinguished before the discussion begins. Legal storytellers did not invent the story paradox and could not have foreseen the way it

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[141] *See generally* UNGER, *supra* note 139.

[142] *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Viagro Press Ltd. 1993) (1991).

[143] GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

[144] *See id.* at 150–51, 157–58.

[145] Christopher Rideout, *Applied Legal Storytelling*, 12 LEGAL COMM. & RHETORIC: JALWD 247, 247 (2015).

[146] *See id.* In the WVU Immigration Law Clinic, we use these concepts as articulated by Carolyn Grose and Margaret E. Johnson in LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS (2017).

[147] Rideout, *supra* note 145, at 248.

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would be amplified through social media and the twenty-four-hour news cycle. But the seeds of the problem were and remain there within the legal story as long as legal storytellers hew to familiar approaches.

My own search for an answer to the story paradox arose out of teaching and practicing immigration law in a conservative state. I felt offended by the immigration rhetoric of the Trump administration and the reasoning of many of the Department of Justice (DOJ) and Immigration and Customs Enforcement (ICE) officers our clinic interacted with. But although I couldn't see it with full clarity through my blue-tinted glasses, I began to realize that the stories I consumed must distort my loved ones' experiences as much as the stories they consumed distorted mine. Unable to reconcile my identity as a respectful wife/daughter/friend/neighbor with my identity as an advocate for immigrants, I found myself desperately seeking an alternative.

### *B. Mythos: Searching for Villains in the Life of the Law*

I began to stumble unwittingly in the direction of legal *Poetics* seven years ago when I found myself puzzling over a question at the intersection of my immigration law and administrative law courses: Why were the "immigration courts" an office of the Department of Justice? The basic facts were easy to find: In June 1940, as part of an extensive reorganization of the executive branch and in anticipation of the Second World War, President Franklin D. Roosevelt sent a reorganization plan to Congress that moved the immigration offices from the Department of Labor, where they'd been since that department's creation in 1913, to DOJ.[148] Predating the Central Intelligence Agency and lacking any central mechanism to deal with sabotage threats, Roosevelt had concluded that only DOJ, with its investigatory expertise in the Federal Bureau of Investigation, could manage the job of catching and removing spies as war in western Europe escalated.[149]

That answered the 'when' and 'how' questions, and as I read, I found that the journalists and historians who write most narrative histories of the law had stopped there. But to a lawyer, that didn't really answer the 'why' question. Due process concerns about biased adjudication by agencies seemed obvious here. Why should we have lawsuits initiated by the United States decided by the law enforcement agency of the United States? Similar concerns have motivated recent challenges to

[148] *Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223* (May 22, 1940), *reprinted in* 5 U.S.C.A. § App. 1 Reorg. Plan V (West 1940).

[149] *Id.*

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agency adjudication brought by conservative parties.[150] Did anyone with a law degree in 1940 raise these issues? Why were they resolved as they were?

What I wanted, I realized, was to explore the human dimensions of the law, including but not limited to the politics of lawmaking. Lawyers know viscerally that the law is not an object that exists *a priori*, like a diamond to be mined and polished and placed on display. The law is a living thing, created and recreated and uncreated by human beings, sometimes without knowing it. The qualities and relationships and feelings and happenstances of those human beings come together to form what we call "the law." Even after the law is written, it is still living, evolving, not just in the decisions of judges and adjudicators but in the public consciousness. A law that accommodations can be separate but equal, for example, can be viable in 1896 and dead on arrival in 1954.[151] Even where the words of the law don't change, the ground can shift underneath them, changing their meaning: In 1911, "due process" meant freedom *from* law but later came to mean freedom *through* law.[152] I wanted to understand the human beings whose outlooks had motivated the reorganization plan that put the immigration functions in DOJ.

As I went looking through the archives for answers, I thought I might find a "villain." I soon found myself tracing the footsteps of Sumner Welles, under secretary of State during the FDR administration (and a longtime friend of the Roosevelts; as a child, Welles had held Eleanor Roosevelt's train in the future president's wedding).[153] In his third term, Roosevelt had been waffling on the issue

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[150] *See* Securities and Exchange Commission v. Jarkesy, 603 U.S. 109 (2024) (striking down agency adjudication of fraud cases without jury trial); *see also* Andrew Kreighbaum, *Composting Business Lodges Latest Attack on DOL Law Judge System*, BLOOMBERG LAW (Sept. 17, 2024), https://news.bloomberglaw.com/daily-labor-report/composting-business-lodges-latest-attack-on-dol-law-judge-system [https://perma.cc/9TE7-VAXM] (describing a challenge to the system that allows the Labor Department to adjudicate violations by an employer hiring workers on seasonal visas); Daniel Wiessner, *US Labor Department's In-House Anti-Bias Cases Unconstitutional, Lawsuit Claims*, REUTERS (Sept. 10, 2024), https://www.reuters.com/legal/government/us-labor-departments-in-house-anti-bias-cases-unconstitutional-lawsuit-claims-2024-09-10/ [https://perma.cc/7SW4-B9Q3] (describing a claim against the Labor Department challenging the agency's administrative proceedings for enforcing anti-discrimination requirements for federal contractors as unconstitutional).

[151] *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding "separate but equal" services mandate of state law provided equal protection of law), *with* Brown v. Board of Education, 347 U.S. 483 (1954) (holding separate public schools are inherently unequal and in violation of Fourteenth Amendment).

[152] *Compare* Lochner v. New York, 198 U.S. 45 (1905) (holding New York regulation of bakers' working hours violated Fourteenth Amendment guarantee of liberty), *with* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Civil Rights Act against due process challenges).

[153] *See* Christopher D. O'Sullivan, *Sumner Welles, Postwar Planning, and the Quest for a New World Order*, GUTENBERG-E, http://www.gutenberg-e.org/osc01/frames/fosc04.html [https://perma.cc/BDR5-JJDA] (last visited Mar. 24, 2026).

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of moving immigration to DOJ, despite pressure from Congress to do so.[154] As a 1939 State Department report had advised him, Roosevelt understood that moving immigration to DOJ would likely "create in the public mind a confusion between immigration matters and criminal matters," possibly leading to overzealous investigation and enforcement.[155] Two attorneys general warned him against it (including Robert H. Jackson, who as a Supreme Court justice would write a famous dissent condemning the internment of Japanese Americans in the *Korematsu* case).[156]

Roosevelt understood that there "were very definitely two sides to the case," as he later told Congress.[157] It was Welles who, in May 1940, presented to the president a memorandum and confidential cover letter that convinced him to make the move.[158] In confidence, Welles told the president that immigration should be moved to DOJ because, among other administrative concerns "[t]here are various aspects of naturalization and of immigration problems, such as deportation, in which the *collaboration and cooperation of the courts* are essential."[159] Welles also thought that immigration investigation and enforcement should be handled by the FBI under the supervision of the attorney general.[160] Overlooking the separation of powers questions raised by these rationale, Roosevelt included the transfer in the reorganization plan he sent to Congress two weeks later.[161] Although a draft of the message filed with Welles' memo emphasized that the plan was an emergency measure and should be reconsidered after the exigency had passed, Roosevelt's final

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[154] *See* ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 66–76 (2021).

[155] *See* Memorandum for attorney general re: suggested transfer to Department of Justice of functions relating to the administration of the immigration and naturalization laws, Nov. 28, 1939, OF 285c, Franklin D. Roosevelt Library, Hyde Park, NY (May 18, 1940 OF 15d) (on file with author).

[156] The DOJ memorandum had been prepared for attorney general Frank Murphy and, after Murphy's appointment to the U.S. Supreme Court in January 1940, was forwarded to Roosevelt by Robert H. Jackson, who replaced Murphy as attorney general. *See* Letter from Robert H. Jackson to FDR, Feb. 9, 1940, OF 285c, FDR Library.

[157] *See* President Franklin D. Roosevelt, Press Conference at the Whitehouse (May 21, 1940 4:02 PM) (transcript available on the FDR Library Website under Series 1: Press Conference Transcripts), http://www.fdrlibrary.marist.edu/archives/collections/franklin/?p=collections/findingaid&id=508 [https://perma.cc/4VHV-F29T] (last visited Mar. 24, 2026).

[158] Letter from Sumner Welles to FDR, FDR Library.

[159] *Id.* (emphasis added).

[160] *Id.*

[161] 86 Cong. Rec. 6637 (1940).

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message to Congress deleted any suggestion that the measure was intended to be temporary.[162]

To be sure, I thought Welles' recommendation was wrong, and history has proven so. Postwar historians have determined that the Nazi threat of a "fifth column" of spies that would sabotage governments from within was a hoax perpetrated by Nazi propaganda minister Joseph Goebbels to undermine Allied morale.[163] But as I followed Welles' footsteps, I gained sympathy with him and understood why he felt compelled to recommend that immigration enforcement be linked with war preparations. Since the president himself was unable to withstand extensive travel through Europe, in the spring of 1940, he sent his trusted advisor, Welles, to exercise diplomacy on his behalf among the belligerents.[164] On that mission, Welles met directly with British Prime Minister Neville Chamberlain, Italian dictator Benito Mussolini, Nazi dictator Adolf Hitler, and Reich officials Joachim von Ribbentrop and Hermann Göring.[165] The tone of the meetings with the Nazi party leaders was bone-chilling even to Welles, an experienced diplomat and tireless under secretary of State.[166] Passing Nazi guards on his way to the meetings, Welles found their faces "subnormal in their startling brutality."[167] The verbatim statements made to Welles by von Ribbentrop and later by Hitler were, in Welles' opinion, "an amazing conglomeration of misinformation and deliberate lies."[168] Contemplating these interviews on his way back to Berlin after receiving a tour of the stolen artwork in Göring's palace, Welles knew that only the threat of U.S. intervention held any chance of forestalling Hitler's agenda.[169] And he knew that

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[162] *Compare* Draft Message to Congress, OF 15d, FDR Library (May 20, 1940), *with* 86 Cong. Rec. 6637 (1940).

[163] *See* LOUIS DE JONG, THE GERMAN FIFTH COLUMN IN THE SECOND WORLD WAR 213 (C.M. Geyl trans., Routledge & Kegan Paul Ltd. 1956) (1953). The only attempt at sabotage undertaken by the Nazis in the United States, dubbed Operation Pastorius, was over before it started when one of the participants, a German-American waiter named George Dasch, insisted on speaking to FBI director J. Edgar Hoover and disclosing the entire plan. *See* David A. Taylor, *The Inside Story of How a Nazi. Plot to Sabotage the U.S. War Effort Was Foiled*, SMITHSONIAN MAGAZINE (June 26, 2017), https://www.smithsonianmag.com/history/inside-story-how-nazi-plot-sabotage-us-war-effort-was-foiled-180959594/ [https://perma.cc/3DRQ-HW7R/].

[164] *See* Stanley E. Hilton, *The Welles Mission to Europe, February-March 1940: Illusion or Realism*, 58 J. AMER. HIST. 93, 93 (1971).

[165] *See* SUMNER WELLES, THE TIME FOR DECISION 73–147 (1944).

[166] *Id.* at 105.

[167] *Id.* at 75.

[168] *Id.* at 76.

[169] *Id.* at 73.

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intervention was far from assured in the isolationist climate that still prevailed in Congress and much of the country.[170] Reading his memoirs, my blood ran cold too. If I'd walked in Welles' shoes through the capitals of Europe in the spring of 1940, I realized, I'd probably have felt the same way.

Only much later did I realize that my experience, exploring this story as told in the historic record, gripped me because it held many of the elements of a *Poetic* legal narrative: a relatable but flawed hero (or several); a dilemma caused by a change of events; and a moment of critical inner choice. There actually was no "villain" in my story. The Nazi threat was background, a triggering event, but the real conflict was an inner one: Whether Welles, or Roosevelt, or the United States, should choose a policy of treating immigration as a cousin of crime to stop what they believed was an imminent threat, even knowing such a move would likely lead to frequent overzealousness and might be hard to change once accomplished. As immigration law and politics have only become increasingly divisive in the years since I discovered their story, I began to see the pattern by tracing the breadcrumbs left by Aristotle.

### *C.* Anagnorisis*: Building a Legal* Poetics

What does a legal story without villains look like?

A *Poetic* legal narrative is a character-driven, full-length work of narrative fiction or narrative nonfiction about lawmaking, legal processes, and law in society. The protagonist need not be born into power, but he must combine a certain nobility of character with an apparent and relatable human flaw or weakness. The critical feature of the *Poetic* legal narrative is that the primary source of conflict must come not from external events but from the dilemma that the triggering event provokes in a character who protects or overlooks that particular flaw in themselves. At the point of crisis, the events must force a choice on the part of the protagonist, for a character that is ultimately just a victim of fate does not fulfill Aristotle's definitions of the *Poetic* story. The audience must be able to easily identify the protagonist's weakness and understand that weakness as something they themselves do or might also possess.

The plot must have a beginning—an event that challenges the protagonist, upsetting their pre-story world. To function as a beginning, that event must also require the protagonist to take action in response to it, and that action must be predictable and necessary based on what the audience knows about the character (and themselves). With this identification, the audience must hope for the protagonist to recognize their flaw and the way it drives them further from what they seek. With

[170] *Id.* at 75–97.

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this buy-in, the audience should rejoice if the character does achieve a recognition and reach a triumphant climax—or shudder when the protagonist fails to achieve a recognition before the climax delivers him the final blow. *WE did it!*, rejoices the audience as the classic hero prevails; *there but for the grace of God*, thinks the audience as the Tragic version of the story ends.

The *Poetic* legal narrative requires a long-form medium. As Aristotle noted, such a story must be of the right "magnitude"—not so short that it passes by the audience too quickly, nor so long that the audience cannot perceive it as an integral story.[171] Plays, movies, and books probably qualify. Serial works like those aired on streaming channels or podcasts seem also to be understood by audiences to tell a cohesive story, up to a certain length (perhaps several seasons). New media will continue to test these limits, but the touchstone will remain Aristotle's description of magnitude.

While these narratives are often fictional, they need not be. For Aristotle, the key difference between history and "poetry" was not the writing in verse or in prose, nor was it the treatment of a factual versus a fictionalized subject.[172] The works of Herodotus might be put into verse and would still be history, while a Tragedy based entirely on historical persons and events still would be poetics. "The true difference," Aristotle wrote, "is that one relates what has happened, the other what may happen."[173] The writer of "poetry"—including a *Poetic* legal narrative—seeks to portray "the universal," that is, what any person with certain relatable characteristics will predictably do under a given set of challenges.[174] Historical people and events often make excellent subjects for poetics because "what is possible is credible."[175]

In these respects, the *Poetic* legal narrative is like any other narrative based on the *Poetics*. The key distinction, of course, is that the *Poetic* legal narrative must explore some aspect of the law. In this respect, legal scholars have something important to add to the existing genre of narrative nonfiction written by journalists and historians, and to legal novels written by non-lawyers, precisely because they are *legal* scholars. Stories written by non-lawyers are less likely to engage with the stuff that centrally occupies the work of the legal professional: the crafting of the *words* in which the law is encapsulated, conveyed, deployed, and manipulated, and

[171] POETICS, *supra* note 14, at XXIV.3–6, 1460 a 4–6.

[172] *Id.* at IV.1–7,

[173] *Id.* at IX.2, 1451 b 8–10.

[174] *Id.* at IX.3, 1451 b 10.

[175] *Id.* at IX.6, 1451 b 15–20.

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the way that meanings change over time, even when the words or authoritative interpretive texts do not. As scholars whose lives are occupied with the meaning and import of changing "*and*" to "*or*," lawyers are best suited to recognize and convey the human drama surrounding such choices. What did "*and*" represent to the factions that proposed it? Who snuck in that "*or*" at the eleventh hour, and what sacred world view did that quick stroke of the pencil express? Who was asleep or unaware of the consequences of such a change, and why? Historians, journalists, and novelists are rarely motivated by or focused on such issues, while lawyers live and die by them. The legal hermeneutics introduced by law and literature scholars does include analysis of such language choices after the fact, but legal hermeneutics does not undertake to tell a story of the law as a living and ongoing human drama in story form. Only a handful of historians and journalists had focused on FDR's transfer of immigration from Labor to State, probably in part because they would not have been as aware of or troubled by the due process implications of the move.[176] Legal scholars are best suited to notice these issues, to realize the complex human dimensions behind these choices, and to explore them through narratives that bring the consequences to life.

Earlier legal storytelling movements usually captured some, but not all, elements of the *Poetics*. Some were probably too brief to have the magnitude Aristotle envisioned. An introductory personal essay in a law review article, or an opening statement to a jury, probably lack sufficient magnitude to qualify as *Poetic* legal storytelling. A short book chapter may come closer but may still leave insufficient room for the "middle"—the actions and complications and further actions that initially move the protagonist further from his goal—which is necessary to fully transport the audience into the protagonist's dilemma. More importantly, both these types of legal storytelling typically imply a "villain," or at least a primarily external obstacle: The protagonist was harmed by a law or legal system that was obtuse or imprecise or deliberately discriminatory; the plaintiff was harmed by the defendant (or the defendant is now harmed by being unjustly dragged by the plaintiff through this legal proceeding). At most, the storyteller might concede what might be (and sometimes is) termed "contributory negligence," but the primary error or obstacle is said to lie outside of themselves.

Traditional legal histories, arising partially out of a different discipline with different tenets than law, are more likely to acknowledge that obstacles and challenges often arise in small or large part from the failures and flaws of the legal

[176] Reform proposals have been circulating in law and policy debate, however, for decades. *See, e.g.*, U.S. COMM'N IMMIGR. REFORM, 105TH CONG., BECOMING AN AMERICAN: IMMIGRATION & IMMIGRANT POLICY 180 (Sept. 30, 1997), https://babel.hathitrust.org/cgi/pt?id=mdp.39015042140791&seq=9 [https://perma.cc/96HN-U8FZ].

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actors involved. Histories fail to fulfill the dictates of the *Poetics* in other ways, however. First, histories do not always follow a particular protagonist. The "ensemble cast" of, say, a war may be critical to understanding those events but not particularly transportive in the way Aristotle was aiming for. More importantly, Aristotle expressly distinguished between history and *Poetics* on the grounds that history tells the particular, while story tells the universal.[177] Detailed historical accounts may serve important purposes of their own, but they don't necessarily serve to transport the reader into a world of *Poetics*. That is not to say that legal history can never do so—if it does, it is likely blazing the trail of a legal *Poetics*.

Biographies, unlike general histories, do focus on one or a small number of actors, including (in effective biographies) their flaws and how they affected some of the goals the subject pursued. In this way, legal biography probably bears the closest resemblance to a *Poetic* legal narrative of any form of legal storytelling. Like legal history, however, the biography usually fails to stand up to Aristotle's distinction between history and poetry. The goal of the biography is to examine what happened to a particular person. In its particularity, it may not seek to ask the question posed by the *Poetics*—what would *probably* or *necessarily* happen if a given type of person were placed under certain circumstances. A *Poetic* legal narrative would share many common traits with a legal biography, but the *Poetic* treatment might focus more on universal than particular traits and experiences of the subject, and would choose events to bring into focus based on their tendency to produce a relatable reaction rather than the particular action taken by the subject. Finally, a biographer may be less focused on a lesson the subject needed to learn to overcome a central flaw or failure of character and more on the particularized effects that individual had on society.

## CONCLUSION

In arguing for legal stories without villains, I do not deny that there are some actors whose actions were so depraved as to be villainous. The point is that such morally depraved actors rarely act alone. Understanding even the most destructive actions in history requires that we pan back and account for the many people who supported or failed to stop the immoral acts. From that perspective, it's easier to see that their behaviors, like ours, are shaped by their circumstances—and by the stories they consumed. A close look at those stories will reveal the common—and relatable—human flaws or frailties that led not just a single depraved individual but an entire group or nation to fall into the error that led to calamity.

[177] *See* POETICS, *supra* note 14, at X.1 – XI 5, 1451 a 37–1451 b 33.

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A history without villains can and does include a clear-eyed examination of destructive and disastrous decisions. As Jung suggested, such an examination begins not with us-versus-them condemnation but with a recognition of the ego/shadow paradox of the human condition.[178] Because story is the vehicle through which humans make sense of the world and because of story's unique power to present the unpresentable, the right kind of story offers a prism through which this human paradox can be glimpsed and the disasters of history (and history in the making) can be better judged. In the *Poetics*, Aristotle outlined the type of story that has the power to capture the paradox of the human condition.[179]

In the hands of legal scholars, the Aristotelian story may be shaped into a *Poetic* legal narrative—stories that have the power to shape a better legal system precisely by acknowledging the paradoxical ego/shadow duality of all human beings and the laws they live into existence. In the entrenched conflict that characterizes much of law and politics today, this call for legal scholars to develop a robust legal *Poetics* is not esoteric. It may be the most urgent task we face.

[178] Jung, *supra* note 135, at ¶ 522.

[179] *See* POETICS, *supra* note 14.

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