Attorneys for the Damned: Using Legal Storytelling to Facilitate Zealous Representation of Unpopular, Unlikeable, or Infamous Clients

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Once Upon a Time: The Influence of Narrative in Legal Writing

IN THIS ISSUE:
Letter from the President
Narrative in Law and Life: Some Frequently Asked Questions (FAQ’s)
Harold Anthony Lloyd
Marriage Equality on the Arc of Civil Rights History: A Broad Historical Narrative
Charles R. Calleros
Everafter: The Stories Told About U.S. v. Virginia
Abigail Perdue
Finding Perspective In The Institution
Ruth Anne Robbins
Attorneys for the Damned: Using Legal Storytelling to Facilitate Zealous Representation of Unpopular, Unlikeable, or Infamous Clients
Camille Lamar Campbell
“Gender Degradation”: New Words to Tell an Old Story
Kristen Konrad Tiscione
FROM THE DESK OF THE LEGAL WRITING SPECIALIST
Everything Old is New Again: Using IRAC to Teach Basic Writing Skills
Stephanie Juliano
Brief-a-Palooza
Amy Bitterman
Turning Student Opinions into Compelling Narratives: An Assignment for Upper-Level Legal Writing Electives
Jill Barton
J.D. Stories
Deborah Jones Merritt
BOOK REVIEW: Storytelling for Lawyers
Diane Kraft
News and Announcements
Attorneys for the Damned: Using Legal Storytelling to Facilitate Zealous Representation of Unpopular, Unlikeable, or Infamous Clients.

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“If you just learn a single trick, Scout, you’ll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view . . . until you climb inside his skin and walk around in it.”

—Atticus Finch, To Kill a Mockingbird

“You can only protect your liberties in this world by protecting the other man’s freedom.”

—Clarence Darrow, addressing the court in People v. Lloyd

“Judy’s gift is that she sees the people she represents as human beings when they are monsters to everyone else . . . [s]he was able to see the humanity in my brother, to find it in spite of the horrible, horrible things he’d done, and it helped to save his life.”

—David Kaczynski, brother of Unabomber Ted Kaczynski, describing attorney Judy Clarke

Atticus Finch. Clarence Darrow. Judy Clarke. Three very different attorneys—a fictional attorney who inspired a generation of elementary and high school students to pursue law and two real-life attorneys who inspire other attorneys to use law as a social justice tool—with one very important thing in common: they gained notoriety for zealously representing unpopular, unlikeable, or infamous clients.

Tom Robinson, Atticus Finch’s innocent African-American client, is the literary archetype of an unpopular client. In depression-era Alabama, a client such as Robinson, accused by a white woman of rape, was a social pariah: someone who was presumptively guilty and someone who most white lawyers would only begrudgingly represent. Instead of shunning his unpopular client, Atticus Finch mounted a zealous defense, one that challenged deeply-engrained social mores [i.e., that a white woman’s rape accusation always trumps an African-American man’s protestations of innocence] by inviting an all-white, male jury to reject “the evil assumption that all Negroes
lie, all Negroes are basically immoral beings, all Negro men are not to be trusted around [white] women."6

John Scopes, Clarence Darrow’s admittedly guilty client in the famous “Scopes Monkey Trial,”7 is an archetypal unlikeable client. In 1925, Tennessee high school students began the day praying to a Christian God, and their teachers faced prison time for teaching evolution.8 Like Atticus Finch, Clarence Darrow’s zealous defense of his client’s First Amendment right to embrace a scientific theory inconsistent with the dominant religious ideology—an unlikeable pedagogy widely viewed by many Southerners and Midwesterners as sacrilege—invited the American public to re-evaluate what had once been an irrefutable assumption that the biblical creation story was the only acceptable explanation of how the universe began.9

Boston Marathon Bomber Dzhokhar Tsarnaev, Unabomber Ted Kaczynski, and child-murderer Susan Smith,10 are just a few of Judy Clarke’s archetypal infamous clients. The death penalty has been a staple of American justice since the 1600s.11 And Clarke’s clients have committed crimes that are seemingly tailor-made for the death penalty—bombing innocent participants at an iconic American sporting event,12 disguising lethal bombs in seemingly benign postal packages,13 and murdering one’s own children to regain a lover’s affection.14 However, much like Atticus Finch and Clarence Darrow, Judy Clarke invites modern-day society to re-evaluate its acceptance of the death penalty by humanizing some of the nation’s most notorious criminals.

But what if these attorneys had been willing only to represent clients with whom they shared a personal affinity, a similar political ideology, or a similar racial background? Atticus Finch’s client wouldn’t have received the impassioned defense that challenged jurors to re-examine their stereotypes about African-American men; Clarence Darrow’s client would’ve been banned from teaching evolution; and Judy Clarke’s clients would most likely have been summarily executed without the world getting a glimpse of their humanity. In short, had these attorneys refused to represent their clients simply because they were unpopular, unlikeable, or infamous, then they would’ve missed their opportunity to become social engineers.

The attorney’s identity as a social engineer is the crown jewel of a profession that has historically been publicly maligned.15 The concept of the attorney as a social engineer is most often attributed to Charles Hamilton Houston, the architect of the litigation strategy in Brown v. Board of Education.16 According to Houston, a lawyer was “either a social engineer or . . . a parasite on society.”17 He defined a social engineer as “a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the [sic] underprivileged citizens.”18 The NAACP’s litigation strategy in Brown was the culmination of a masterful social engineering effort. Its goal was not simply to harness the power of the Equal Protection Clause to defend zealously its unpopular and unlikeable clients, the parents of African-American students denied entry to the school of their choice because of race, but to eradicate de jure segregation from the nation’s schools, an educational policy jeopardizing the constitutional rights of all African-American students.19

Lawyers who embrace their function as social engineers typically represent unpopular, unlikeable, and infamous clients.20 These kinds of unconventional clients often have personal affinities or social and political ideologies that differ from mainstream society.21 However, students often have a skewed notion of the lawyering process that compels them to want only to represent clients whose personal affinities or social and political ideologies are consistent with those that they, their families, or their peers deem acceptable. Students’ unwillingness to represent clients with different affinities and ideologies decreases the likelihood that they will embrace their role as social engineers. Given the profession’s reverence for social engineering, legal writing professors have a vested interest in preparing students to embrace this facet of their professional identity.22

Introducing novice legal writers to fundamental legal storytelling23 principles increases the likelihood that they will embrace their role as social engineers. Legal stories convey themes or lessons that transmit universally shared experiences.24 Consequently, legal stories help students empathize with clients whose affinities and ideologies differ from their own. When students empathize with their clients, they create engaging legal stories that decision-makers find persuasive. What follows are two techniques that help students build effective legal stories for unpopular, unlikeable, or infamous clients:
**VISUALIZE THE CLIENT**

“A vision is not just a picture of what could be; it is an appeal to our better selves and a call to become something more.”

—Psychotherapist, Dr. Cathryne Maciolek, discussing the power of visualization

Visualization is the first technique for building persuasive legal stories for unpopular, unlikeable, or infamous clients. The palpable psychological discomfort that students feel when we require them to write briefs for unconventional clients stems from a lack of empathy. Visualization techniques help students develop empathy. Clinical psychologists define visualization as “a cognitive tool accessing imagination to realize all aspects of an object, action or outcome.” Visualization helps students overcome psychological barriers to find commonalities that trigger empathetic responses.

Consider the following scenario: For the first persuasive writing assignment of the semester, my students represent a client objecting to her ex-husband’s petition to relocate their child to another state. The client, a litigation associate at a large national law firm, works in excess of ninety hours per week. The client is ambitious. At the initial interview, she tells the class that her goal is to become the firm’s first female managing partner. Because of her career ambitions, the client voluntarily relinquished custody in exchange for liberal visitation on weekends and holidays. The client’s ex-husband, also an attorney, works for a small law firm where he typically works twenty hours per week.

During the brainstorming session immediately following the interview, a few students insult the client, calling her a “disgrace,” some even refer to her as “dead beat” or “scum bag.” Not everyone insults the client, but everyone is upset that I’m “making” them represent her. Perplexed, they ask questions such as “What kind of mother puts a job before her child?” “Why won’t she just move?” “Why won’t she consider petitioning for custody and stopping the relocation?”

As this vignette demonstrates, the client doesn’t meet the class’s, or perhaps even society’s, definition of a good mother—a woman willing to sacrifice everything for her child. The client’s unwillingness to risk losing a highly coveted partnership brands her with a scarlet letter, transforming her into an unpopular and unlikeable client. Because the class is blinded by its prejudices, it can only see one story: the client is a bad mother who isn’t entitled to prevail in her efforts to prevent the child’s relocation.

Visualization helps students move beyond their prejudices and build a plausible counter-story about why the client is entitled to relief. I begin the visualization process by highlighting areas of commonality. In the custodial relocation example, the most obvious commonality is the client’s profession: the students are aspiring lawyers, and the client is a lawyer. Another more subtle commonality is that most first-year students have experienced the same sort of familial tensions that the client is experiencing.

After exploring these commonalities in a modified Socratic dialogue, I ask questions that invite students to use their law school experiences as a scaffold for understanding the client’s dilemma:

- Are there any limits to what you would do to achieve success as a lawyer? If so, what are they?
- If you were faced with the client’s legal dilemma, how would you handle it? Assume that the client was a loved one or close friend, would that change your answer?
- What would you have to know about the client to help you understand why she voluntarily relinquished custody or why she’s not interested in petitioning the court for full custody, even if full custody would prevent a battle over the child’s relocation?

Next, I attack the class’s explicit and implicit biases, asking questions that examine stereotypes about motherhood:

- What are some stereotypes about mothers who relinquish custody of their children or who work in professions that have been traditionally dominated by men?
- Do these stereotypes apply to working fathers? Should they? Why or why not?
- Does society have different expectations for male and female attorneys when it comes to work life balance? If so, what are they?

Identifying stereotypes removes students’ psychological blinders and creates the foundation for empathetic responses to unpopular, unlikeable, or infamous clients.
FIND THE STORY

“There just didn’t seem to be anyone or anything that Atticus couldn’t explain. Though it wasn’t a talent that would arouse the admiration of any of our friends, Jem and I had to admit he was very good at that . . . .”
—Jean “Scout” Finch, To Kill a Mockingbird

Building plausible stories to explain the actions of unpopular, unlikeable, or infamous clients is another effective technique. Using core societal values embedded in relevant legal rules, effective legal storytellers create plausible explanations for the actions of unconventional clients. Just as visualization facilitates empathy, building plausible stories around core societal values facilitates persuasion. Linking arguments to core societal values facilitates persuasion because a court or legislative body determined that these core societal values were so important that they created civil or criminal sanctions for those who act in ways that undermine those values.

Effective legal storytellers create theories and themes to communicate how the client’s case is consistent with core societal values. A theory unifies arguments, and a theme is a brief catch-phrase summarizing the theory. A good theme engages the decision-maker’s emotions and then, once hooked, the decision-maker can “hear” the advocate’s theory about why the client is entitled to relief. In this way, theme and theory work in tandem to create a framework for persuasive legal stories.

Consider this scenario: For the second persuasive writing assignment of the semester, my class represents a non-profit religious organization that operates a shelter for homeless teens. The organization has been sued for firing a popular youth counselor because she had a child out-of-wedlock, an activity that violated the organization’s religious teachings. For many students, the new client’s religious teachings are radically different from their beliefs about human sexuality—namely, that age and maturity level, not marital status, are more relevant criteria for evaluating the propriety of sexual activity. The philosophical difference between the client’s religious teachings and the students’ secular beliefs make this new client as unpopular and unlikeable as the ambitious client in the custodial parent relocation example. After visualizing areas of commonality and working through questions that challenge explicit and implicit biases about premarital sex, the class is ready to identify core societal values and then use those values to create a plausible explanation for the client’s personnel decision. The professor can help students identify core societal values by asking the following questions:

- What is the underlying purpose of the rule?
- Are any key ideas, concepts, or values reflected in the rule?
- What is the underlying message of those key ideas, concepts, or values?
- Do external sources such as secondary authorities, case law, or legislative history provide any clues about important ideas, concepts, or values reflected in the rule?

After grappling with these questions, the class identifies a core societal value, brainstorms arguments, and develops a theory and theme:

Core Societal Value: Employer autonomy

Arguments: An interpretation of the promissory estoppel exception that would transform an indefinite, casual remark praising the plaintiff’s job performance into a promise of lifetime employment jeopardizes the autonomy at the core of the at-will employment doctrine.

This Court should align itself with appellate courts in neighboring jurisdictions and abolish any exception to at-will employment that unduly burdens the defendant’s autonomy to fulfill its organizational mission of rescuing troubled children.

Theory: Recognizing an exception to at-will employment in this case would unduly burden the defendant’s autonomy by jeopardizing its mission to rescue troubled teens.

Theme: “The community suffers when the exception swallows the rule.”

Notice how the core societal value, theory, and theme work in tandem to create a plausible explanation about why this unpopular and unlikeable client should prevail. Instead of appearing to be an authoritarian bully whose personnel decision was based on antiquated notions of human sexuality, the client morphs into a caregiver. When viewed within this context, its decision to fire the employee is primarily...

FALL 2015 | LEGAL WRITING INSTITUTE | THE SECOND DRAFT | 27
about protecting its vulnerable clientele, not its religious teachings. Shifting the focus from religion to the client’s secular organizational mission eases the classes’ psychological discomfort. Armed with a plausible counter-story about why the client is entitled to relief, students are less distracted by their personal feelings about premarital sex, more focused on defending the client’s autonomy, and better equipped to write a compelling brief.

Using the storytelling techniques described in this article eases the psychological discomfort students often experience when representing unpopular, unlikeable, and infamous clients. Once freed from their psychological blinders, students will have an “Atticus Finch-like” ability to build powerful legal stories for unconventional clients. Who knows? That unassuming student sitting in the back row of your class might become the next Clarence Darrow or Judy Clarke.

NOTES
8. Id.
18. Id.
20. See supra, pp. 2-3 (discussing Clarence Darrow and Judy Clarke).
21. Id.
22. See Douglas L. Colbert, Clinical Professors’ Professional Responsibility: Preparing Law Students to Embrace Pro Bono, 18 Geo. J. On Poverty L. & Pol’y 309, 310-11 (2011) (describing the law as a profession that “claims a special responsibility for the quality of justice” and arguing that law professors must prepare the current generation of law students to embrace the public service aspect of the profession); Linda F. Smith, Fostering Justice Throughout the Curriculum, 18 Geo. J. On Poverty L. & Pol’y 427, 433-34 (2011) (arguing that “[e]very course in the law school curriculum should be analyzed to see if it might be retooled to foster justice and public service.”)
23. Legal storytelling is an approach to persuasive writing which recognizes that effective written advocacy uses core societal values embedded in legal rules as the foundation of powerful legal stories that explain why the client should prevail. Camille Lamar Campbell & Olympia Duhart, Story-craft: A Primer for Writing Persuasive Legal Stories (forthcoming winter 2016) (manuscript at 14) (on file with authors).
26. Id.
27. Id.
28. A former student or the colleague typically plays the role of this fictional client.
29. Supra note 25.
30. Lee, supra note 1, at 65.
31. Core societal values are things, ideas, or concepts that a particular society collectively believes are important. See Campbell, supra note 23, at 8.
32. Id.
33. Id.; see also, Kenneth D. Chetek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J. ASSN’L Legal Writing Directors 1, 14-16 (2010).
35. For example, the client’s religious beliefs inform its corporate identity, and many students also have strongly-held beliefs that inform their personal identities. Another more subtle commonality is that, like our new client, many first-year students also have strongly-held beliefs that influence their behavior towards others.
36. An in-depth discussion of the process of extracting core societal values from legal rules is beyond the scope of this article. However, see Campbell, supra note 23, at 40-43, for a detailed discussion about methodology.