Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending

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OF VICTIMS, VILLAINS AND FAIRY GODMOTHERS:
REGNANT TALES OF PREDATORY LENDING

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Draft, not for circulation

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**ABSTRACT**

The subprime mortgage crisis has exposed a system of predatory and irresponsible lending on a scale we are only beginning to comprehend. Those initially harmed in this crisis – the canaries in the coal mine – were largely low-income people of color. As the crisis has unfolded, the potential solutions available to such borrowers seem to privilege one kind of legal story over all others: the story of the poor person as a victim in need of rescuing.

In order to win, therefore, lawyers who represent these clients often fall back on a default narrative about their clients as unwitting or irresponsible victims in high-stakes, crisis-driven stories that take place in the winner-take-all context of litigation. These narratives begin at the moment of crisis, and not at any time before. In addition, these narratives do not take the long view of this crisis or its effects. As such, these stories reinforce the status quo, by focusing attention on the victims’ bad choices and unscrupulous lenders, cabining the particular crisis as an unfortunate confluence of events rather than a part of the larger picture of a system that reinforces poverty.

But it does not have to be that way. Looking through the lens of narrative theory, my paper constructs counter-stories about those who find themselves faced with home foreclosure: stories that envision the individual clients’ broader context, and their agency within that context; stories that imagine the clients’ ability to look and plan ahead. I perform this analysis by suggesting that these situations present lawyers with the opportunity to tell many different – competing, alternative, serial – but equally “good” stories. The choices about which of those stories to tell and how to tell them are complex and nuanced, and depend on multiple variables that need to be weighed by both the lawyer and the client.

The piece concludes by suggesting that a lawyering theory that is open to this multiplicity of stories – and does not privilege one among them -- contributes to constructing lawyering models that empower all kinds of client narratives. This approach thus allows those who would otherwise assume victim roles in adversarial narratives to contribute in constructing narratives that do not necessarily involve them having to be rescued. And it helps lawyers see their power and responsibility to construct these stories collaboratively with their clients, and thus to move the law in a direction that recognizes the clients as something other than victims.
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INTRODUCTION

The mortgage crisis has made sad stories of dispossession ubiquitous. Some of those faced with the loss of their homes have found lawyers who are helping them negotiate imminent foreclosures. These cases turn on a complex morass of laws dealing with lending practices. Perhaps as important, these cases depend on the stories the lawyers tell about their clients. Some stories are more likely to get the attention of the public and lenders and result in settlements that may favor the borrower and save their homes. These same individual stories, however, in the long run, may fail to address the larger story that the mortgage crisis has revealed, a story that, if untold, promises to create even greater harm for the poor and dispossessed. This article is about the power of narrative in dealing with predatory lending cases and the larger consequences of the stories lawyers tell in those cases.

Over the past two years, we have learned more than we thought we would ever need to know about subprime lending and securitization and ballooning interest rates and bundling loans. Just from listening to National Public Radio and reading the newspaper, we can speak with some authority about the demise of mortgage-backed securities and foreclosure rates. And we have learned a bit about the difference between a legitimate subprime loan gone bad and a predatory loan. So the story I begin with is one that has become familiar to us all:

4 In the early months and years of what we are now calling the “subprime mortgage crisis,” we distinguished between predatory lending and “legitimate” subprime lending. As has become clear over the past several years, even “legitimate” subprime lending can result in disastrous consequences certainly for borrowers, and even, eventually, for lenders. As a result, what I talk about in this piece as a “predatory lending narrative” has actually been subsumed into the broader subprime lending narrative. See David Reiss, Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market, 33 Fla. St. U. L. Rev. 985 (2006), see also David Reiss & Baher Azmy, Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002, 35 Rutgers L.J. 645 (2004).
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Helen realized there was no way she could pay her new mortgage and manage her mounting credit card debt. She was afraid the bank was going to come and take her house and her credit cards. She had been hearing on the radio and TV that there might be something she could do to get out of the loan. She called a lawyer and told him the story about how she came to refinance her house, and how now she needed help figuring out what to do next.

For many years and in many law reviews now, we have been reading and writing about the relationship between narrative and story and the law. I add my voice once again to this discussion by examining more closely this idea that as representors of clients, lawyers are constructors and tellers of stories. Specifically, I examine the

5 “Helen” is a version of a client I had while supervising in a general civil advocacy clinic in 2004 and 2005. While many details have been changed to maintain “Helen’s” anonymity, her basic situation and its resolution was as I describe it herein. The stories presented here should, therefore, be taken as “true.”


8 Binny Miller and others have suggested that there is a difference between the two terms “narrative” and “story” – that “story” involves the “raw material” of life, while
process lawyers go through and the choices lawyers make in figuring out what stories to tell and how to tell them.

The metaphor of the lawyer as constructor and teller of stories leads us to make room for the possibility of a multiplicity of stories. This concept, which I call narrative theory, does not tell lawyers which stories to tell or how to tell them. Lawyers have to make those decisions on their own, dependent on a variety of factors, including the law, the facts and the client’s goals.

In spite of that, however, the current legal response to the mortgage crisis, as represented by the potential solutions available to people like Helen, tends to privilege one kind of story over all others: the story of the poor person as a victim in need of rescuing. Lawyers who represent poor people often fall back on this default narrative in the high-stakes, crisis-driven, winner-take-all context of litigation. These narratives begin at the moment of crisis, and not at any time before. In addition, these narratives do not take the long view of this crisis or its effects. As such, these stories reinforce the status quo, by focusing attention on the victims’ bad choices and unscrupulous lenders, cabining the particular crisis as an unfortunate confluence of events rather than a part of the larger picture of a system that reinforces poverty.

But it does not have to be that way. Narrative theory allows us to examine and deconstruct the stories that media and lawyers are telling about the mortgage crisis. Having thus revealed these stories as ones that, when told without reflection and intention, do little, if anything, to change the status quo, narrative theory further shows lawyers how to tell different stories in a way that reveals the mortgage crisis as merely a symptom of a much larger systemic problem, a problem that lawyers themselves can play a part in remedying. In the face of the biggest economic, housing, health care and education crisis since the Great Depression, when low and middle-income people are under threat from all sides, anti-poverty lawyers must be more conscious than ever about

“narrative” is the construction of meaning from that raw material. Miller, supra note 8. In this piece, I refer both to narrative and to the act of “storytelling.”

9 This kind of narrative does not exist exclusively in the predatory lending realm, but rather represents the dominant kind of “poor peoples’” law. For example, the landlord/tenant case begins with the eviction notice and ends with the resolution of the action; the child welfare matter begins when the client’s children are taken from her, or the report is filed with the social service agency, and ends when the matter is resolved; the domestic violence case begins with the client’s call to the police, or with her appearance in court and ends when the restraining order is issued. See, e.g. Lucie White, Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G, 38 Buff. L. Rev. 1 (1990).
the kinds of solutions they work toward. Their stories must be clear, persuasive and expressive of the context so that change can encompass this larger picture, this larger story.

Looking through the lens of narrative theory, my paper constructs counter-stories about those who find themselves faced with home foreclosure: stories that envision the individual clients’ broader context, and their agency within that context; stories that imagine the clients’ ability to look and plan ahead. I perform this analysis by suggesting that Helen’s situation presents lawyers with the opportunity to tell many different – competing, alternative, serial – but equally “good” stories. The choices about which of those stories to tell and how to tell them are complex and nuanced, and dependent on multiple variables that need to be weighed by both the lawyer and the client. To illustrate this point, I choose to tell two possible stories and examine the factors that go into such choices. These choices and the stories they result in teach us about the process of practicing law in a way that empowers clients, and might result in a legal framework that makes room for the multiplicity of their stories.

In Part One, I tell Helen’s story against the backdrop of the laws regarding predatory lending. Part Two begins to explore the metaphor of the lawyer as storyteller by deconstructing the elements of a story, and then by deconstructing the story the lawyer tells about Helen. In Part Three, I offer alternative constructions of Helen’s situation, and suggest that lawyers can be more active in wrestling with the law to make it conform to our clients’ lives rather than vice-versa.

The piece concludes by suggesting that a lawyering theory that is open to this multiplicity of stories – and does not privilege one among them -- contributes to constructing lawyering models that empower all kinds of client narratives. This approach thus allows those who would otherwise assume victim roles in adversarial narratives to contribute in constructing narratives that do not necessarily involve them having to be rescued. And it helps lawyers see their power and responsibility to construct these stories collaboratively with their clients, and thus to move the law in a direction that recognizes them as something other than victims.

PART ONE: THE PREDATORY LENDING STORY

Many of the subprime mortgage cases are being handled pro bono by lawyers who do not regularly practice in the area. Imagine that Helen is directed to such a lawyer. Her situation appears to him to have many of the indicators of what could be a successful case:

She had heard about the refinancing opportunity in a radio commercial, which promised not only a lower interest rate than she was currently paying, but also $300 of free groceries and cash back to pay off credit card debts. She contacted the company and a man came out to her house and helped her fill out a mortgage application. She believed it was for a fixed rate mortgage, but at the time of the closing, it had changed to an adjustable rate. Once the new rate kicked in, she was unable to make her payments. She’s missed two and is afraid the bank is going to come and take her house. That’s why she called the law office.

A. The Law

There are three categories of lenders in the market: those who make prime loans; those who make subprime loans; and those who engage in predatory lending. Lenders in the prime mortgage market provide mortgages to low risk borrowers with strong credit histories. Legitimate subprime lenders lend to borrowers who have experience

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11 This is by no means an exhaustive discussion of predatory lending or the subprime lending crisis. For such discussions, see, e.g. Kathleen Engel & Patricia McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, (2002); see also Kurt Eggert, Held up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 Creighton L. Rev. 503, (2002). This recitation of the law is meant merely to provide a backdrop or framework for the story that follows. On its face, predatory lending is a contract dispute. Based on that assumption, basic contract defenses include fraud, mental incompetency, incapacity, infancy, duress, undue influence, and mistake. See E. Allan Farnsworth, Contracts § 4 (2d ed. 1990). Beyond these basic contracts defenses, which are usually too narrowly construed to permit relief, Congress passed the Home Ownership and Equity Protection Act of 1994 (HOEPA) as an amendment to the Truth in Lending Act statute. The Truth in Lending Act requires disclosures about the terms and cost of consumer credit. The Truth in Lending Act was amended to add the Home Ownership and Equity Protection Act (HOEPA). The HOEPA requires limitations on the amount of home loans, as well as substantial disclosure requirements. The Act also bans equity stripping and other abusive practices within mortgages.


13 Engel & McCoy, supra note 9.
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shopping for credit but for some reason do not have good enough credit to borrow from prime lenders.¹⁴ And predatory lenders make mortgages available to people who do not have experience in borrowing and who are closed off from the prime and legitimate subprime loan markets due primarily to their poor credit rating.¹⁵ While at one time, common discourse differentiated between the latter two kinds of loans – legitimate subprime and predatory – the mortgage crisis the country finds itself in now reveals that at least in the last couple of years, most if not all subprime loans have layers of “illegitimacy” and have contributed to the meltdown of the mortgage system.¹⁶ For purposes of this analysis, however, I am focusing specifically on predatory loans.

There is no exact definition of “predatory lending.”¹⁷ Rather predatory loans can be recognized by how they are structured and whom they benefit and hurt.¹⁸ Among the most common and recognizable predatory mortgages are: loans structured in ways that result in seriously disproportionate net harm to borrowers; loans involving fraud or deceptive practices; loans that lack transparency yet are not actionable as fraud; loans that require borrowers to waive meaningful legal redress; loans with disproportionately high interest rates; loans given based on assets rather than income, whose primary purpose is foreclosure; loans with adjustable interest rates that are not easy to predict.¹⁹

¹⁴ Engel & McCoy, supra note 9. Of course we’ve seen recently that even these “legitimate” lenders make some very bad loans that are costing the country. See Aubrey Cohen Subprime mortgage ‘rip off’ has legitimate roots, SEATTLE POST INTELLIGENCER, November 18, 2008.
¹⁶ See Reiss, Subprime Standardization, supra note 6; see also Reiss & Azmy, supra note 6.
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Predatory lenders target low income neighborhoods and potential borrowers or homeowners based on race and social status.20 They use marketing tools that deceive and trick borrowers who are shut out from the legitimate mortgage markets to get them to sign on to loans they will not be able to repay.21 As we know, even the most legitimate mortgage loan in the world is difficult to understand. Predatory loans tend to be even worse, written deliberately in dense legalese over multiple pages and copies.22 Agents and brokers secure the loans by telling the potential borrowers that if they do not sign the papers now they will miss out on the deal.23 Because the class of borrowers who are targeted by these lenders has little access to the legitimate prime and subprime markets, it is hard for these potential borrowers to shop around and judge for themselves whether the loan they are being offered is a good one or not.24 And that is precisely the point. Predatory lenders purposely target low income borrowers who do not know any better.25

Federal and state laws can and have been used to get at some of these practices and some of these lenders.26 The most common federal statutes used to combat predatory lending are: the Truth in Lending Act (TILA)27 which requires lenders to make certain disclosures to borrowers;28 the Real Estate Settlement Procedures Act (RESPA),29 which covers all federally related loans and requires that very particular procedures be followed at the time of the closing of the loan, and which prohibits fee-splitting among and kickbacks to agents and brokers;30 the Home Equity Protection Act (HOEPA), which sets limits on the amount

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20 Often, these lenders use Home Mortgage Disclosure Act (HMDA) data to identify areas of cities in which there is minimal or no lending activity by prime lenders. See Engel & McCoy, supra note 9.
21 Id.
22 Id.
23 Id.
24 Id. See also McCoy, supra note 19; Davenport, supra note 19.
25 Engel & McCoy, supra note 9; see also McCoy, supra note 19; Davenport, supra note 19.
28 Id. This is not particularly effective against predatory lenders because even if the lenders technically make the required disclosures, they do so in convoluted and opaque ways, capitalizing on the borrower’s lack of sophistication and inability to understand the terms of the loan. See Davenport, supra note 19.
29 Id. While there is no private right of action under RESPA for failing to make mandatory disclosures, such claims may be able to be incorporated into state consumer protection claims, which often cover RESPA violations.
of home loans, and requires substantial disclosures by lenders;\(^{31}\) the Equal Credit Opportunity Act (ECOA)\(^{32}\), which prohibits discrimination in lending on the basis of race, public assistance, etc.;\(^{33}\) and the Fair Housing Act (FHA)\(^{34}\), which prohibits discrimination by the lender, and can be used to make reverse redlining claims in these cases.\(^{35}\)

In addition, most states have consumer protection statutes and other statutes that regulate the mortgage and lending industry, many of which can be used in predatory lending claims.\(^ {36}\) And finally, common

\(^{31}\) Home Ownership and Equity Protection Act 15 U.S.C. § 1639, (1994) (The HOEPA requires limitations on the amount of home loans, as well as substantial disclosure requirements. The Act also bans equity stripping and other abusive practices within mortgages)


\(^{33}\) Id. The ECO guidelines state: “When You Apply For Credit, A Creditor May Not...

(1) Discourage you from applying because of your sex, marital status, age, race, national origin, or because you receive public assistance income. (2) Ask you to reveal your sex, race, national origin, or religion. A creditor may ask you to voluntarily disclose this information (except for religion) if you’re applying for a real estate loan. This information helps federal agencies enforce anti-discrimination laws. You may be asked about your residence or immigration status. (3) Ask if you’re widowed or divorced. When permitted to ask marital status, a creditor may only use the terms: married, unmarried, or separated. (4) Ask about your marital status if you’re applying for a separate, unsecured account. A creditor may ask you to provide this information if you live in "community property" states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. A creditor in any state may ask for this information if you apply for a joint account or one secured by property. (5) Request information about your spouse, except when your spouse is applying with you; your spouse will be allowed to use the account; you are relying on your spouse’s income or on alimony or child support income from a former spouse; or if you reside in a community property state. (6) Inquire about your plans for having or raising children. (7) Ask if you receive alimony, child support, or separate maintenance payments, unless you’re first told that you don’t have to provide this information if you won’t rely on these payments to get credit. A creditor may ask if you have to pay alimony, child support, or separate maintenance payments. See Facts for Consumers: [http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm) (Last visited November 16, 2008).

\(^{34}\) Fair Housing Act , 42 U.S.C. 3601 (1968).

\(^{35}\) Id. (in years past, there was a real estate term called "redlining" which referred to the practice of marking off areas that had a high minority population as a bad area to make loans, and that made it difficult if next to impossible to obtain financing, but since the passage of the FHA the term reverse red-lining refers to the practice of over lending to minority populations.) See also, Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, (2000).

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law claims of fraud and breach of contract can sometimes be used in these cases.37

Because there is no one animal called “predatory lending,” these federal and state remedies fall short of providing comprehensive relief for the victims, or deterrence for the perpetrators of these practices.38 There appears to be a basic predatory lending story for the borrower. It goes something like this: unscrupulous, devious, shady lenders target vulnerable members of the population who had no access to other lenders and trick them into signing on to loans they cannot afford so the lenders can steal their homes. Also, the borrowers themselves – the victims – are often complicit in some way, or at the very least, looking for that deal that seems too good to be true, even in the face of its obvious impossibility.

B. The Facts

Against this backdrop of the law, the lawyer will meet with Helen and counsel her a bit on the laws that might be able to help her; and he will do some more fact gathering to flesh out her particular predatory lending story.

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38 Recognizing the shortcomings in these statutes, various scholars and practitioners have proposed either alternative legislation, or alternative readings of current legislation to better address the problem of predatory lending. For example, Frank Lopez suggests that the Fair Housing Act might be the best bet under current law. Frank Lopez, Using the Fair Housing Act to Combat Predatory Lending, 6 Geo. J. Poverty L. & Pol’y 73 (1999) Pat McCoy and Kathleen Engel propose a new cause of action for breach of duty of suitability (suitability for brokers or lenders to make loan to a person based on the data and expertise they have) to compensate victims of predatory lending. See Engel and McCoy, supra note ???. Cecil Hunt suggests various remedies but lands on economic hate crime as a remedy for punishing predatory lenders that target racial minorities. Cecil J. Hunt, In the Racial Cross-hairs Reconsidering Racially targeted Predatory Lending Under A New Theory of Economic Hate Crime, 35 Univ. of Toledo L. Rev. 211 (2003). See also Davenport, supra note 19. And of course, Congress has proposed new legislation, in light of the subprime mortgage crisis, to prevent such loans in the future. H.R. 3915: Mortgage Reform and Anti-Predatory Lending Act of 2007, (2007); H.R. 2061: Predatory Mortgage Lending Practices Reduction Act (introduced April 26, 2007); H.Con.Res. 391. Recognizing the disparities that are associated with predatory lending abuses in minority communities and expressing the sense of the Congress that as new abuses continue to emerge, such laws should ensure that all those responsible for representing and protecting families have the authority to act to address these new problems. (introduced July 17, 2008).
Suppose he learns that Helen was a black woman suffering from diabetes and high blood pressure, dependent on social security and Medicare. Her husband, Samuel, was a black man who struggles daily with alcoholism. They had been married for about thirty years. They were both in their early fifties. Helen stopped going to school when she was thirteen and reads at about an eighth grade level, and certainly did not understand the technical language found in mortgage documents. Samuel completed high school but was functionally illiterate and never read any of the mortgage contracts. Helen essentially ran the household, including the financial aspects, though Samuel often squandered their funds on alcohol. Samuel had been an alcoholic the whole time they had been married.

Helen and Samuel owned their house, which was in a very poor, predominantly African-American neighborhood. One of the things Helen really liked about the neighborhood was the local community radio station, which she listened to all the time. Several months before contacting the law office, she began hearing a particular advertisement several times over the course of every day. A company was offering deals for refinancing houses in her neighborhood.

After hearing this commercial multiple times, Helen became intrigued by the possibility. Her primary interest in refinancing was to pay off various outstanding credit card bills and lines of credit. She was also lured by the offer in the ad that she would receive $300 in free groceries from the mortgage lender.

Helen called the company to discuss the possibility of refinancing her home. She told the broker she spoke to, Mr. Robinson, that she was interested in applying for a fixed-rate mortgage. He came to Helen and Samuel’s home and interviewed them, using the answers they gave to fill out the loan application on the spot. The Good Faith Estimate that he gave them at the time of the application confirmed that they had applied for a loan at the fixed rate of 6.25%.

Samuel was visibly intoxicated during this, and all interactions with the broker. Helen told the lawyer that he was routinely drinking seven or eight forty ounce bottles of malt liquor (“forties”) every day, and that the day of the application was no different. In the course of filling out the loan application, Helen specifically informed Mr. Robinson that Samuel would likely lose his job soon, which in fact he did.

Several weeks after they had filled out the application, Mr. Robinson called Helen and told her over the phone that because of her
poor credit rating, she was not eligible for the fixed-rate loan and would have to take a variable rate loan. He told her that the monthly payment would be approximately $1,000. When Helen balked at that, Mr. Robinson offered to lower the amount to $900 per month. He told her she would never find such a good deal for her house but that if she did not jump on it now, it would disappear. She eventually agreed to the $900 a month, knowing it would be a real struggle to make those payments.

Helen never received anything in writing rejecting her application for the fixed rate loan; nor did she ever fill out another application for an adjustable rate loan.

Helen knew at the time that she and Samuel would not be able to afford the loan at the new adjustable rate. She felt, though, that she had to refinance in order to cover her credit card debts and other lines of consumer credit. She asked Mr. Robinson to confirm that the loan amount would be enough to pay off these debts. Mr. Robinson promised it would – she was to receive $15,000 in cash from the transaction. He told her to call the credit card companies and let them know she was getting ready to borrow money from her sister to pay off her debts. She did so.

At the closing, Samuel was once again visibly intoxicated. In fact, he was holding and drinking from a “forty” throughout the entire process. The copies of the loan Helen received at the closing were unsigned. The closing documents were dated three days earlier than the date of the actual closing. Helen was not provided with copies of various documents that she requested, including signed copies of the closing documents. She never received either the $15,000 in cash, or the $300 in free groceries. She believed that her old mortgage had been paid off and that she now had a new one at the new adjustable rate, because her monthly payments had gone up to the $900.

By the time she contacted the law office, she was two months behind in her mortgage, being unable to afford the $900 per month, and her credit card bills remained as high as ever.

C. The Law Suit

This transaction has all the elements of a good juicy predatory lending story: Big bad subprime mortgage company targets poor black neighborhood, enticing clients with free groceries and promises to pay off credit card debt. This particular client was not only poor and black, she was also disabled and barely educated; her husband was an alcoholic
who was drunk throughout the whole thing, and couldn’t read. The slick broker who came to her house played bait and switch with the terms of the loan and then turned up the heat when she started to balk, all along banking on getting the house out of the deal.

The lawyer would draft a complaint against the original lender and mortgage broker based on the tools available to him: parts of the Truth in Lending Act (TILA); provisions of the state Consumer Protection Procedures Act; provisions of the Real Estate Settlement Procedures Act (RESPA); and common law fraud and contract claims. After months of discovery and motion practice, the case would probably settle, with the defendants agreeing to rescind the loan and forgive the two months of nonpayment. Helen’s mortgage would go back to being what it was before she contacted the company. It would be as if the whole thing never happened.

**PART TWO: LOOKING AT THE STORY MORE CAREFULLY**

The lawyer chose to tell the story he told about Helen’s situation because he understood it to be the story the law required him to tell in order to protect Helen’s house from foreclosure. And indeed, the various laws against predatory lending do seem to imagine stories just like Helen’s: situations where poor people have lost out either to the System, or to individual rich folks. The solutions offered by these laws are solutions to high stakes problems. They tend to kick in only at the moment of crisis, and not at any time before. And they tend to address only the immediate crisis and not its underlying causes. In order to benefit from these policies, therefore, plaintiffs need to assume the posture of victim in this high stakes, winner-take-all, reactive system. The stories these plaintiffs tell are therefore victim stories.

How the lawyer frames the facts of his case is a significant choice. It is often mistakenly treated as an inevitable framing. He might

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41 I suggest that predatory lending is not the only place where this is the case. It is beyond the scope of this article to explore more fully, but many of the laws that “protect” poor people are structured this way: Their homes are going to be foreclosed; their children are going to be taken away; their medical care is going to deplete their assets. See, e.g., Juliet M. Brodie, Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda, 20 Wash. Univ. J. of L. & Pol’y 201 (2006); Lucie White, “Notes on the Hearing of Mrs. G”, supra note?? Another wonderful example of this is bankruptcy. Elizabeth Warren, What is a Women’s Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics, 25 Harv. Women’s L.J. 19 (2002).
have had good reason to make this choice, but it was, nevertheless a choice. That’s what lawyers do: we choose what stories to tell and how to tell them;\textsuperscript{42} and in so doing, we choose not to tell other stories.

For many years and in many law reviews now, we have been reading and writing about the relationship between narrative and story and the law.\textsuperscript{43} I would like to examine more closely this idea that as representors of clients, lawyers are constructors and tellers of stories. Specifically, what is the process lawyers go through and the choices lawyers make in figuring out what stories to tell and how to tell them?

My analysis of this process involves three lines of inquiry: first, what are the components of a story; second, what choices can and does a lawyer make about the story she tells; and third, how does she make those choices? In considering each of these questions in turn, I construct a theory of lawyering based on storytelling that can help us both to understand how lawyers practice our craft, and also to engage in that practice with intentionality and awareness of the consequences of our choices.\textsuperscript{44}

A. What Is A Story

Thinking about the practice of law as a practice of storytelling gives us the opportunity to look behind and between and over and under the black letter rules that comprise “the law.”\textsuperscript{45} In those interstices, we find facts and language and structure and ideas that go well beyond the holding of an opinion or the mandate of a statute.\textsuperscript{46} By treating law as narrative, we discover not only “how law is found but how it is made.”\textsuperscript{47}

Cultural psychologist Jerome Bruner describes the act of storytelling as so instinctive, so intuitive, as to render an explanation of how we do it close to impossible: “We stumble when we try to explain,

\textsuperscript{42} Grose, “Persistent Critique” supra note 8.
\textsuperscript{43} See supra note 8 and sources cited therein.
\textsuperscript{44} In doing so, I join a rich and well-established movement of scholars who have been deconstructing and analyzing these concepts. See supra note 8 and sources cited therein. See also Toni Massaro, Empathy, Legal Storytellings and the Rule of Law: New Words, Old Wounds, 87 Mich. L. Rev. 2099 (1989); Stephen Ellmann, Empathy and Approval, 43 Hastings L. J. 991 (1992); Michelle S. Jacobs, People from the Footnotes: The Missing Element in Client-Centered Counseling, 27 Golden Gate U. L. Rev. 345 (1997); Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984); Peter Brooks & Paul Gewirtz, LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Yale University Press, 1996).
\textsuperscript{45} Amsterdam & Bruner, supra note 8.
\textsuperscript{46} Brooks & Gewirtz, supra note 44.
\textsuperscript{47} Id.
to ourselves or to some dubious other, what makes something a story rather than, say, an argument or a recipe. And yet, if lawyers are to be effective legal storytellers – the kind who explain not only how law is found, but also how it is made – we must be able to overcome this asymmetry between doing and understanding what we do. We must be able to describe – if only to ourselves, so we can do it again – what goes in to the making of a story.

Starting with the basics, what is a story? Anthony Amsterdam and Jerome Bruner provided a great service to the world of legal scholarship with their book *Minding the Law* in which they translated literary theory and rhetoric into terms understandable to the contemporary legal (as opposed to literary) scholar. As described therein (and as we all know, instinctively and intuitively), stories are comprised of:

- **A “steady state”** -- that is, a state “grounded in the legitimate ordinariness of things.”

- **The “trouble”** – that is, something that happened to disrupt the “legitimate ordinariness.”

- **Efforts at redress,** to cope or come to terms with the disruption.

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48 Jerome Bruner, *Making Stories: Law, Literature, Life*, 3-4 (Havard University Press 2003); see also Schepepele, *supra* note 8 (“gifted practitioners know without reflection how to make accounts into legal narratives the way native speakers of a language know how to express thoughts in grammatical sentences. But that does not mean that those who can do it know how to describe systematically what they have done.”).


51 Amsterdam & Bruner, *supra* note 8; see also Rubinson, *Client Counseling*, *supra* note 45; Brooks & Gewirtz, *supra* note 44; Bellow & Minno, *supra* note 45; Miller, *Their Lives*, *supra* note 50; Cunningham, *supra* note 50; Alfieri, *supra* note 27; Rubinson, *Client Counseling*, *supra* note 45; Miller, *Teaching Case*, *supra* note 50; Grose, *Benetton*, *supra* note 8; Cover, *supra* note 50; Farber & Sherry, *supra* note 8.

52 Id. at 113.
REGNANT TALES OF PREDATORY LENDING
Carolyn Grose
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- outcome/resolution

- coda or moral – a “retrospective evaluation of what it all might mean” – which returns the audience from the “there and then of the narrative to the here and now of the telling.”

Taken together, these five elements make up what we call “the plot” of the story — the “what happened and why” of the story. Plots usually fit into particular “genres” — “mental models representing possible ways in which events in the human world can go.” In other words, the story is recognizable to the reader or listener almost from the outset, causing him or her to register it as a comedy or tragedy or drama, etc. These are established or stock scripts that we recognize and expect to resolve in certain ways.

Making the plot move, of course, are the Characters -- free agents, with minds of their own, rendered by external details, who engage in the “what happened and why” of the story. Theodore Leitch describes characters as “trope[s] for human identity,” and, like plots, characters tend to register with readers or listeners as familiar, each one expected to embody one or more general truths. Thus we expect to encounter and to recognize heroes, villains, lovers, enemies, good guys, bad guys, clowns, tragic figures, protagonists, antagonists, etc.

Plot and character make up what I call the “what” of the story – something happened to someone and the story is about how to fix it. In addition to these substantive components is what I call the “how” of the story. These are the technical pieces that literally make the story go: timing, framing, pace, language, when the story begins, when it ends, what gets described fully, what gets left out, setting, organization, and structure. As much as plot or character, these elements make the story

53 Bruner, supra note 45 at 20.
54 See Leitch, supra note 50 (Plot consists of action and teleos. It is a trope for human experience; something more than just an intelligible sequence of events.) See also Peter Brooks, READING FOR THE PLOT (1984).
55 Amsterdam & Bruner, supra note 8 at 133. (Genres are tools of narrative problem-solving that can shape human encounters and institutional arrangements).
56 Id.
57 Id.; see also Lopez, supra note 44.
58 Bruner supra note 45, see also Leitch, supra note 50.
59 Leitch, supra note 50.
60 Id.
61 Id.
62 See Amsterdam & Bruner, supra note 8; see also Schepple, supra note 8.
what it is, delivering it to the reader or listener in a form that he recognizes and responds to.

B. How Lawyers Tell Stories

Narrative theory requires exploration beyond this essential deconstruction of a story, however. Each one of those elements – character, plot, genre, timing, framing, rendering of detail, pacing, etc. – represents one if not more than once choice about the kind of story to tell and how to tell it. In order to know how to tell a story, then, lawyers need to understand the choices we make and why we make them.

Lawyers are particular kinds of storytellers, influenced by variables unique to their role as tellers of their clients’ stories. In that role, as makers of legal arguments, we decide what story to tell and how to tell it “guided by some vision of what matters.” Put another way, in order to figure out what story to tell and how to tell it, the lawyer must weigh three substantive factors, the same factors that make up the theory of the case: the law, the facts and the client’s goals. In addition, of course, the lawyer must consider contextual factors, e.g. the audience, the forum, availability of resources, personality of the client and potential supporting or detracting characters in the story, etc. The lawyer must also take into consideration particular cultural norms and values in deciding among different stories and ways of telling them. And finally, the lawyer must consider factors personal to him in determining what story to tell and how to tell it: is he comfortable in a courtroom, can he pull off a humorous narrative, does he do better in a more formal or less formal setting, does the client’s situation raise personal moral or ethical concerns, etc.

When a lawyer drafts a statement of facts, for example, she does not simply record the known universe of “relevant” facts in an interesting and persuasive way. Indeed, there is no such thing as an

63 Martha Minow, in Brooks & Gewirtz, supra note 44 at page ??.
64 Grose, Persistent Critique, supra note 8.
65 Amsterdam & Bruner, supra note 8
66 Binny Miller has written extensively about the construction of case theory, which is the incorporation of law and facts and client goals into a story that can be used to drive a case or an organizing campaign, etc. Binny Miller, Give Them Back Their Lives: Client Narrative and Case Theory, 93 Mich L.J. 485 (1994).
67 At a more subtle level, though, lawyers make choices based on other things as well. Each of these elements of narrative themselves is a portal into cultural and personal norms and values. In order to understand what is behind these stories, we can ask: what norms does the script embody, what vicissitudes derail the script, what consequences follow the derailment? Amsterdam & Bruner, supra note 8.
68 Id.; see also Grose, Persistent Critique, supra note 8.
absolutely neutral description of the facts.69 As lawyers, we engage in fact-gathering repeatedly – at initial client interviews, after we’ve done some legal research, in anticipation of the other side’s argument – and then we “pick and choose from available facts to present a picture of what happened”70 that most accurately reflects our sense of what matters. And the other lawyers involved do exactly the same thing, with exactly the same pool of facts, but emphasizing different details, drawing different inferences, resulting in quite a different picture.71

This goes for the story’s “how” too. The law might define what is relevant (and I say “might” deliberately), but it cannot define “how the relevant facts, in a particular case, are to be expressed.”72 It is up to the lawyer to figure out what words to use, with what emphasis. A lawyer’s statement of facts thus “reflects – by its inclusions and exclusions, the emphasis of its sentence construction, and the structures of its argumentation – choices.”73 Lawyers make choices about the other technical elements of a story as well: when the story should begin and when it should end, how quickly or slowly the action should move, how fleshed out each character should be, etc. Kim Lane Scheppele provides wonderful examples of choices judges make in the “how” of their stories (for that is, of course, what appellate opinions are) both about word choice (“lightly choke” v. “heavy caress”)74 and framing (beginning with the defendant’s childhood v. beginning with the night of the crime).75

Thus, stories are not “recipes for stringing together a set of ‘hard facts.’”76 Rather storytellers construct the facts that comprise the stories77 by sorting through what is out there and figuring out both what to say and how to say it, based on the storyteller’s own perspective about “what

69 David Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 463 (1981); see also Scheppele, supra note 8 (re: point of viewlessness).
70 Delgado, supra note 8 at 667.
71 Id.; see also Lopez, supra note 44.
73 Id.
74 Scheppele, supra note 8.
75 Id.
76 Amsterdam & Bruner, supra note 8 at 111.
77 Id. at 116. (Endogenous theory of narrative – that narrative constructs a world “not just according to how the world is, but according to its own categories.” Endogenous theories can be called constructivism – the world is constructed by mental activity, not found out there by the senses. Plight-modeling theory of narrative – narrative form translates knowing into telling. Legal narratives tend to conform – narratives model characteristic plights of particular groups. Cultures convert plights and aspirations into narrative forms that represent both the expected steady state and the expected trouble).
Narrative is not a purely logical argument because there is not one right solution. A set of events can be organized into alternative narratives and the choice among them depends on perspective, circumstances, and interpretive frameworks. And those choices are governed by what we care about. Thus the “fabric of narrative reflects the shape of our concerns.”

For lawyers, then, figuring out “what matters” is a complex and nuanced process. When we choose what story to tell and how to tell it, we must work hard and with awareness to reconcile and balance these various facets of “what matters.”

C. Deconstructing Helen’s Story

What lawyers must appreciate is that when we choose to tell a particular story in a certain way, we are shaping future stories. If the story we present is persuasive, then other stories will be shaped to fit that “winning” story. This process reifies what the legal system recognizes as actionable harms, essentially making law. Such reification may prevent a deeper look at the problem we are trying to solve, which can have significant consequences for those affected by that underlying problem.

The winning “predatory lending” story, which the lawyer told about Helen, in its most caricatured, boils down to this:

Once upon a time there was a poor disabled black woman who lived in a house in a bad part of town, with her poor alcoholic black husband. Along came a slick mortgage broker who offered her a great deal on her house and promised to help her pay off all her debts so she could live happily ever after. She felt very tempted by the offer and took it, even though she knew in her heart that it was too good to be true. Of

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78 Amsterdam & Bruner, supra note 8. Though it is not exactly what I am talking about here, there is a rich body of scholarship on assumptions and lawyer bias etc. affecting shape of concerns. See, e.g., Grose, Persistent Critique, supra note 8 (and sources cited therein).
79 Amsterdam & Bruner, supra note 8 at 124.
80 Depending on the kind of relationship the lawyer has with the client, and the kind of lawyer he is, the client might play a significant role in helping to choose and craft the story the lawyer tells on her behalf; or she might take a more background role. See, e.g. Carolyn Grose, Once Upon A Time, In a Land Far, Far Away: “Lawyers and Clients Telling Stories About Ethics (And Everything Else) forthcoming 20 Hastings Women’s L.J. --- (2009). Gerald Lopez, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE (1992); Lucie White, Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice, 1 Clin. L. Rev. 157 (1994); Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 Clin. L. Rev. 427 (2000).
course, it was too good to be true. The slick mortgage broker took her money and got her to sign the papers and then he disappeared. The poor disabled black woman never got the money to pay off her debts, and ended up even poorer than she was before. So she and her poor alcoholic black husband need the government to come in and undo the deal the slick mortgage broker conned her into so she can go back to being only as poor as she was before, and live happily ever after like that.

Helen’s “steady state” was: living beyond her means, buried in credit card debt, in a house in a bad part of town. The “trouble” comes along in the shape of the mortgage broker (more on him in a minute) conning her into a refinance deal she can’t afford. The resolution of the story returns Helen to her original steady state – “only as poor as she was before.”

We recognize a number of characters in this story, and they help us figure out what kind of story it is. The most prominent are Helen and Samuel as the victims, identifiable by their poverty, their lack of education, their lack of ability (both physical and mental) and their desire to do better for themselves. They represent a certain kind of victim – not the totally innocent one like Cinderella, but rather the one who wants to better herself a bit sneakily and ends up getting into trouble, like the husband and wife who have three wishes and end up turning each others’ noses into sausages, only to have to use their final wishes to turn them back into noses.

We also recognize the villain in the story: the mortgage broker, identifiable by his slickness, his insistence, his persistence, and of course, the fact that he cheats and lies and makes off with their hard-earned house. But again, he is not pure evil like the Wicked Witch of the West, but rather manipulative and clever, playing on the Victims’ own weaknesses. And we recognize the fairy godmother in the story, in the form of the Law (as the “magic wand”) and the lawyer (who wields the wand), identifiable by her power to swoop down and undo the deal the foolish victims got themselves into. With a wave of the “magic wand” (the laws against predatory lending), the lawyer removes the sausages from Helen’s and Samuel’s noses, and they are left with no more wishes, but with their noses back to normal.

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81 Charles Perrault, FAIRY TALES, (University Press, 1903) (This version introduces the Cinderella most widely accepted, including her glass slipper and fairy godmother).
We learn through these characters that this story is not a fairy tale, but rather a morality tale – a “careful what you wish for” story. Much like the sausage story, this one warns Helen and Samuel, and through them, us, not to try to get more than we are entitled to through our own hard work and honest means, and to be content with our lot as is. Otherwise we’ll end up losing our houses or with sausages for noses.

Written literally in the language of predator and prey, the story is framed tightly around the loan itself. We learn very little about Helen and Samuel as characters in their own lives, other than as victims of the predatory lending scheme. They have been boiled down to the caricatures of the poor, black, disabled, alcoholic victims. And we learn very little about the plots of their lives beyond that scheme. The story provides historical background only to flesh out Helen and Samuel’s roles as victims and Mr. Robinson’s role as villain; and only those details necessary to make compelling the argument that the fairy godmother government should come in to right the wrongs. The complaint the lawyer drafted tells the very simple story about the predatory loan and its effect on the plaintiffs.

And it was successful: faced with the threat of the fairy godmother swooping down and waving her magic wand, the defendants agreed to settle the case and the plaintiff was returned to her pre-trouble steady state.

PART THREE: OTHER STORIES

The lawyer told this story – an adversarial story about victims and perpetrators -- in this way – in the form of a complaint in the particularized context of a law suit – because he identified Helen’s situation as a mortgage crisis, and indentified the legal remedies available to ameliorate that crisis. Those remedies – the various laws against predatory lending practices – in turn dictated the kind of story the lawyer told, and the way he told it. They determined for the lawyer “what matters” in Helen’s case.

The lawyer understood Helen’s goal to be not to have her house foreclosed; he appropriately researched the law of predatory lending and

83 This story is consistent with the stories we’ve heard in the press about these predatory loans and their victims. See, generally, Foreclosures Hit Rural America, But Quietly, October 7, 2008, NPR Morning Edition; Black Households Hit Hard by Mortgage Crisis, January 15, 2008, NPR Tell Me More; Joshua Michael Stolly, Subprime Lending: Ohioans Fall Prey to Predatory Lending at Record Levels, What Next?, 34 Ohio No. U. L. Rev.289 (2008).
gathered the facts in light of the law he found. Helen was behind in her mortgage payments and told the lawyer that she needed help to save her house. Helen herself understood that to be the only remedy. The lawyer thus told the story he felt he needed to tell in order to get the remedy the law provided in a situation like Helen’s, and he told it in such a way as to fit in to the legal requirements of the particularized context in which he was telling it.

The fact that this story did not completely or adequately describe Helen or Samuel or their relationship or their lives, or that it played on ugly racial and class stereotypes might have given the lawyer pause. He liked Helen a lot based on their few meetings. But he felt that the legal remedies available to Helen defined the story he had to tell. It was a story about a crisis with very high stakes that required intervention in order to salvage the victim’s house.

A. The Realm of Possibilities

But what about Helen’s underlying goals of getting cash and paying off her debt, the very pressures that got her into the loan to begin with? Has this solution really improved Helen’s lot in life? This immediate crisis has been averted, but what is to prevent another similar crisis from happening at some point in the near future?

The basic premise that lawyers choose what stories to tell and how to tell them is not just about facts or framing or language, it’s also about the law itself. The law is not just there, waiting for us to come along and plug our clients’ lives into it, or the other way around (plug it in to our clients’ lives). The process lawyers go through to make choices about what story to tell and how to tell it is in fact what constructs the law.

Lawyers make the law by telling stories about our clients’ lives. This is the most powerful part of the storytelling metaphor: by being sensitive to narrative, we begin to see the law differently: “it ceases to be limited, settled and formal and becomes instead fluid,

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84 See Grose, Benetton, supra note 8; see also Grose, Persistent Critique, supra note 8.
85 Brooks & Gewirtz, supra note 44 (“how stories are told, listened to, received, interpreted – how they are made, operated, enacted – these are issues by no means marginal to the law nor exclusive to theory; rather, they are part of law’s daily living reality.” Storytelling “provides an occasion for considering which principles should guide us and a way of discovering how the prevailing principles came to be.” See also Robert Weisberg, Proclaiming Trials as Narratives: Premises and Pretenses, in Brooks & Gewirtz, supra note 44 at 62 (“Telling a legal narrative . . . motivate us to be the artificers of our own law.”).
contested and even contradicted." And by seeing ourselves as storytellers about, *inter alia* the law, we begin to understand that the law is not objectively created and applied, but rather that it is subjective and constructed by us.87

As storytellers about the law, lawyers are powerful actors in the legal system who can and must make choices about the kind of stories to tell and therefore the kind of law we make. As such, we “participate in the ongoing process of re-creating the law. Bearing legal narrative in mind, we can understand law not as restriction and control but rather as a *realm of possibilities.*”88

What is the realm of possibilities in Helen’s case? What other stories could the lawyer have told?

He could have told another kind of “victim” story: one that played less on racial and economic stereotypes, one that defined the defendants more broadly and sought greater remedies, one that developed the client’s character as more of a change agent than a helpless victim.

The lawyer could also have widened his frame a bit in telling the story so that the fact-finder learned more about Helen and Samuel. He could have provided more historical background of the subprime lending crisis to place this particular loan in a social and political and economic context. He could have described the villains more broadly to include not only the slick mortgage broker, who was, after all, just a minnow in the subprime lending war,89 but also the various lending institutions that made this loan and others like it possible. He could even have told a story that named the FDIC and other federal oversight agencies as the bad guys.

In all of these stories, the essential plot structure and characters remain consistent – Helen and Samuel are the victims, living in their house above their means, they’re conned by some bad guys into a loan they cannot afford, and the Fairy Godmother (in the form of the law and the lawyer) swoops down and gets them back to their pre-trouble steady-

87 Id.; see also Grose, *Persistent Critique,* supra note 8.
88 Papke, supra at 89 (emphasis added).
state, maybe with a little extra cash, so they end up a bit better off than when they started.

The genre of these stories also remains essentially the same: they are good-guy/bad-guy stories with varying degrees of blame placed on the victim relative to the villain. They are stories that take place in and around a crisis that needs to be resolved. The morals of all of them are also the same: if you are living beyond your means and get into a situation that seems too good to be true, it probably is, and you’re going to need help getting out of it. Not quite the sausage story, but certainly not the innocent Cinderella story either.

Finally, these stories all take place against the same essential backdrop and in the same context: the laws against predatory lending and the specter of a lawsuit define the stories’ plot, characters and structure. The stories are still written in the language of predator and prey; there are still good guys and bad guys; they are still framed tightly around the loan – what background facts are given are only those that explain the characters’ behavior or the applicability of the law to this situation. The essential narrative structure – steady state, trouble, resolution, moral – is consistent among all of these stories, as well as the story the lawyer told initially.

B. Another Kind of Story

What if we changed the narrative structure of Helen’s situation by fiddling with her steady state and the trouble that disrupted it and the resolution she sought? Wouldn’t that affect the rest of the story’s plot – the resolution itself and the moral of the story? Wouldn’t it change who the characters were? Might it alter the story’s genre? And what about the story’s structure – how it is framed, organized, where it begins, where it ends?

Imagine the following scenario:

Helen realized there was no way she could pay her new mortgage and manage her mounting credit card debt. She was afraid the bank was going to come and take her house and her credit cards. She had been hearing on the radio and TV that there might be something she could do to get out of the loan. She called a lawyer and told him the story about how she came to refinance her house, and how now she needed help figuring out what to do next.

The lawyer sat down with Helen and learned that she and her husband Samuel owned their home, and had been employed for many
years, but recently had been having a hard time making ends meet. So gradually, Helen, who had always run most aspects of the household, began putting things on credit cards and installment plans. As long as she made the payments every month she couldn’t see the harm. But lately, she had started to miss payments, or not to be able to make them fully, and the balances were adding up.

When she realized she was paying back more in interest than she had spent on any particular thing, she decided to try to refinance her house, lured by the infamous commercial on the radio. Because the new monthly payments turned out to be more than her original mortgage, Helen was now two months behind in paying the mortgage.

She felt overwhelmed by the burden of juggling all the different accounts, and scared by the phone calls and threatening letters she had started to get. She wished there were something she could do to prevent the debt from continuing to escalate.

The lawyer felt compelled by Helen and her story and wanted to help her. He asked her to gather together and bring him all the documents she had associated with the refinancing, and all her credit card statements and her installment plan receipts and her bank statements and her pay stubs and Samuel’s pay stubs and anything else she might have that had anything to do with money. Helen asked if she should bring her grocery receipts and stuff like that, and the lawyer said absolutely – anything she had that could help him get a complete picture of their financial situation. They made an appointment to meet again in a couple of days, once Helen had gathered all her material.

In the meantime, the lawyer did some research into consumer protection and contract law and banking and real estate law. He did not find a particular case or statute that would make Helen’s problem go away, but he began to feel that maybe he could cobble something together. Before doing that, though, he wanted to learn more about Helen and her life, and he wanted to talk to her more about what she wanted.

At the next appointment, the lawyer told Helen he was not sure exactly what laws he could use to help her, but that he wanted to figure out a way to work with her to make her financial situation feel more manageable. He suggested that they go through all the bills and financial documents together and see what they could come up with. He also told Helen he wanted to know more about her life so he could understand better what she wanted.
Helen had kept meticulous records of what she and Samuel spent, what they made, and what they owed. Over the next several hours – and two subsequent meetings when Helen brought in documents she either had not yet received, or had since discovered – the lawyer pored through these records, while Helen narrated them, filling in gaps when prompted by the lawyer’s questions or her own sense that further explanation might be needed. Here is the picture that emerged:

Helen and Samuel had known each other their whole lives. Because Samuel was a couple of years older than Helen (both were in their mid-50s), he never much gave her the time of day, and it was his younger sister Jeannie whom Helen used to spend every waking moment with. But once Helen became a teenager, Samuel started to notice her and the two began dating before either one was twenty. Samuel joined the service on his 21st birthday, and went off to Vietnam right away. He came home almost two years later and they got married.

Until about three years ago, Samuel worked regularly as a carpenter and continued to be active in the army reserves. Helen herself had always loved kids and had worked with them for as long as she could remember. She left school after 8th grade so she could help her mother take care of her eight younger siblings, and she started getting jobs as a paid nanny for other people, or as a helper in day care centers. She and Samuel tried for many years to have children, but never succeeded. Not having children of her own has been one of Helen’s biggest disappointments.

With both of them working steadily, plus Samuel’s veteran’s pay, Helen and Samuel managed to get by pretty well, and about ten years ago, figured they had enough money saved to buy the house they had been living in as renters for almost their entire marriage. They even got a pretty decent fixed rate mortgage.

Things had gotten harder over the past 3 years. Helen, who had always struggled with her weight and had a history of obesity and diabetes in her family, had grown increasingly infirm, and finally had to confront the reality that she could no longer get around well enough to work with kids, or really do anything much on her own outside the house. She started to get social security disability benefits, which helped, but didn’t fully replace the income she could make taking care of other peoples’ kids.

Samuel too had fallen off in his ability to make money. Helen says that Samuel was never the same after he got back from the war. Nothing physical, but she said something seemed sort of broken inside
him. She thought he started to drink pretty much right away. She didn’t much care because he never got violent and the beer seemed to take the edge off and make it possible for him to be in the world with her. Over the past three years, though, his drinking had gotten in the way of his work, and he could not seem to hold down jobs for very long. There were long stretches when his only income was his army benefits, and those did not replace his carpentry earnings.

So Helen turned to credit cards and installment plans and then refinanced the house, and that was how they got where they are now.

As he gathered this information from Helen, the lawyer began imagining the role he could play in helping Helen resolve at least the financial struggles she had come in with. They punched numbers into the calculator to get a sense of what Helen and Samuel could count on for income, and what they absolutely needed to spend every month. The lawyer came to understand that for a homebound woman not to have access to television, for example, was an unreasonable sacrifice, so cutting out cable was not an option. And Helen came to understand, for example, that monthly trips to Atlantic City were not possible, but that once she got some of her debt paid off, they could start going every 6-8 weeks. Consistent with these kinds of understandings, Helen and the lawyer developed both a short term and a long term budget that would allow her and Samuel both to live and to continue to pay down their debts so they could avoid having either to declare bankruptcy or to get into another credit crunch.

At the same time, the lawyer began working on the debts themselves. Because of the threat of foreclosure, the lawyer started with the mortgage. On the advice of a local nonprofit agency that acted as both a watchdog of banks and mortgage brokers and a counselor for low-income clients in mortgage crisis, the lawyer bypassed the mortgage broker and initial lender, and focused on tracking down the current holder of Helen’s mortgage, using Helen’s monthly mortgage statements as a kind of trail map.

Once the lawyer found the current lender, he proposed a simple solution to the mortgage crisis: “rescind the loan, refinance at a fixed rate with monthly payments that Helen could afford, and avoid the financial and logistical costs of foreclosure, and having a bad loan on your books.” The lender countered with a probationary six month loan at the lower rate, during which time Helen had to make all her payments on time and in full. If she did so, the loan would convert to a 30 year loan at the fixed rate. The lawyer agreed, provided the lender would
The lawyer didn’t stop there. He spoke to the individual credit card companies, using various forms of persuasion depending on the size and nature of the debt, and on his sense of the personality on the other end of the phone. He managed to have some of the debts discharged completely, but mostly he had them consolidated and reduced, negotiating interest-free, low monthly payment plans over the next six to twelve months.

After about two months of working with the lawyer, all of Helen’s debts had been resolved – either discharged or packaged into a payment plan. Helen was no longer receiving threatening letters, she had a mortgage she could manage, and she felt in control of her finances.

C. Deconstructing This Story

This story about Helen and Samuel is a very different one from the predatory lending story, both substantively and technically.

First, the plot: Helen’s “steady state” is simply living her life, struggling to make ends meet on limited resources and mounting expenses. The “trouble” is Samuel’s increased inability to work steadily, and Helen’s increased infirmity, resulting in rising credit card and consumer debt and a mortgage she can’t afford. And the resolution, rather than returning Helen to the pre-trouble steady state, is a transformation into a new steady state – one with financial stability and a long-term plan to maintain it.

Both the steady state and the trouble are subtle and slow-moving, almost intertwined. There is no clear moment when things shift from “okay” to “not-okay” – this is a crisis that was slow in the building and slow in the unbuilding. And the story is not over when Helen comes to the law office. In fact, part of the plot of the story is the relationship between Helen and the lawyer – together they identified and worked toward the transformation that resolved the trouble.

The main character is still Helen, but she is not the victim we met earlier. Rather, she is an empowered black woman who is struggling in the face of life’s challenges – the challenge of poverty, the challenge of disappointment, the challenge of devastation caused by war, the challenge of a loved one’s alcoholism, the challenge of poor health. We recognize in this protagonist not the wife whose nose turns into a
sausage, but rather someone closer to Willie Loman\textsuperscript{90} or George Bailey\textsuperscript{91} – a character who works hard, has made arguably some poor choices, but who is not trying to pull anything over on anyone, or get something she does not deserve.

There is no villain in this story, nor is there a fairy godmother who swoops down to fix the mess everyone has gotten into. But just as the relationship between Helen and the lawyer is part of the plot, the lawyer himself is a character in the story. He is not the traditional litigator, out to defeat the bad guys, though, because of course there are no bad guys per se. Rather, the lawyer’s role is as Helen’s guide, her advisor and counselor\textsuperscript{92} helping to negotiate with creditors (negotiations which of course could have broken down and ended up in litigation), but also to put together a financial framework that she and Samuel could live with.\textsuperscript{93}

\textsuperscript{90} See Arthur Miller, \textit{DEATH OF A SALESMAN} (1949)
\textsuperscript{91} See Frank Capra, “It’s a Wonderful Life” (1946)
\textsuperscript{92} See Model Rules of Prof’l Conduct R. 2.1; Model Rules of Prof’l Conduct R. 2.3; Model Rules of Prof’l Conduct R. 2.4.
\textsuperscript{93} In addition to the various proposals and current legislation aimed to remedy the plight of victims of predatory lending, various scholars and policymakers are calling for new and different approaches, focused on things like financial education. Surveys have shown that low income consumers do less comparison shopping and know less about personal financial issues than those consumers in higher income brackets. Because the market itself – and particularly the loan market – is so opaque, folks who do not have market or financial savvy are at a strong disadvantage, and more likely to fall prey to the high interest, high stakes loans. A solution to this would be to offer educational opportunities targeted at low-income communities to give families and individuals in those communities more information that they can use to shop around and recognize predatory or other bad loans. \textit{See, e.g.,} Matt Fellows, \textit{Making Markets an Asset for the Poor}, 1 Harv. L. & Pol’y Rev. 433, 453 (2007). Many states offer general financial literacy courses in high school and beyond. \textit{Id. at 453; see also} Laurie A. Burlingame, \textit{A Pro-Consumer Approach to Predatory Lending: Enchanced Protection Through Federal Legislation and New Approaches to Education}, 60 Consumer Fin. L. Q. Rep. 460, 485 (2006) (describing, “harnessing the power of the online environment” both to provide information to would-be borrowers and to keep would-be lenders accountable (and thereby less unscrupulous?). In addition, state and local initiatives are springing up to provide more appropriate financial services to low-income people. For example, the city of San Francisco has formed a partnership with 20 banks and credit unions whereby the financial institutions are working together to design banking products that will more effectively meet the needs of low income consumers, thus reducing the lure of high-priced, often predatory alternatives. Fellows, \textit{supra} at 447. Michael Barr and Rebecca Blank propose that government and financial institutions develop a range of financial service products specifically designed to help low and middle income households meet their financial needs of receiving income and paying bills. \textit{See Michael S. Barr, Financial Services, Saving and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey}, Third Annual Conference on Empirical Legal Studies Papers 30. (March 30, 2008). (Available at SSRN: \url{http://ssrn.com/abstract=1121195}). Rather than
The moral of this story is more complicated than that of the predatory lending story, perhaps because the story itself is more nuanced, less caricatured. It derives from the facts of Helen and Samuel’s actual, lived, reality – their history, their struggles, their worries, their desires. It is driven by Helen’s vision for a future with greater economic stability and less financial stress. The story is about the protagonist and her husband getting their affairs in order and taking a realistic and pragmatic look at what they can afford and what they cannot afford and preparing to do what they can to make that work. As a reward for that hard work and pragmatism, their burden is lightened – some of their debts get discharged, some get reduced, some get stretched out. Just as there are no good guys and bad guys, there are no winners and losers. Helen and Samuel tighten their belts a bit and their creditors accept 50 cents on the dollar. And they all live happily ever after.

The story is different also because it is not written down anywhere (except here). It is a story that Helen and the lawyer spun together over the course of their relationship. Pieces of it were uncovered in the initial client interview, and then in the subsequent fact-gathering. Other parts evolved as the lawyer worked with Helen to develop a plan for discharging or consolidating the debts. And still others emerged as they constructed a budget and imagined the next months and years to come. As such, it is a fluid story, one that is flexible and changing.

Finally, this story is not a case. It does not take place against the backdrop of litigation or a judge’s ruling. As such the role of the law is very different from what it was in the predatory lending story. While traditional bank accounts, which usually have overdraft and other hidden or back-end fees, they propose accounts and services that are more holistic and realistic, and responsive to their actual needs. See Barr, supra at 31. In addition, Jeanne Charn has done a number of projects describing alternative kinds of legal services that could be provided to help clients either stay in their at-risk homes, or move out and into more stable financial situations. See, e.g., Jeanne Charn, Preventing Foreclosure: Thinking Locally, Investing in Enforcement, Playing for Outcomes, (March 2004)(Draft on file with the author).

\*94 See Grose, Once Upon a Time, supra note 80.

95 As a relatively recent crossover from the world of litigation to the world of “legal planning” and transactional work, I was curious about whether this term was used in the latter context. I ran a query on the law clinic listserv and the transactional/business clinic listserv and discovered that no, it is not, except by crossovers like me. In the non-litigation context client work is described as “matters,” “files,” “projects,” etc. When pushed to explain the differences between those kinds of terms and the term “case,” non-litigation lawyers described a “case” as more narrow, driven by the context and rhythm of the courtroom, and with a definite beginning and end. The other terms represented more open-ended and self-defined kinds of lawyering work for clients.
in the first story, or set of stories, the lawyer worked hard to fit Helen’s facts into what he understood the law to require, in this second story, the law took a back seat to the facts and lived context of Helen’s life.

Rather than striving to fit those facts into some predetermined substantive and technical context, the lawyer gathered Helen’s facts first – heard her story, pored through her documents, consulted with her about

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96 I am reminded here of the famous scene in “Anatomy of a Murder” where Jimmy Stewart, as the defense attorney, coaches his client to come up with a story that would fit into a murder defense:

“Defense Attorney (DA): There are four ways I can defend murder. Number one, it wasn’t murder . . . . Number two, you didn’t do it. Number three, you were legally justified . . . . Number four, the killing was excusable.

Defendant (D): Where do I fit in to this rosy picture?

DA: I’ll tell you where you don’t fit – you don’t fit in to any of the first three.

D: What are you telling me to do?

DA: I’m not telling you to do anything. I just want you to understand the letter of the law.

D: Go on.

DA: Go on with what?

D: Whatever it is you’re getting at.

DA: You know, you’re very bright Lieutenant. Now let’s see how really bright you could be.

D: Well I’m working at it.

DA: All right now because your wife was raped you’ll have a favorable atmosphere in the courtroom. . . . What you need is a legal peg so the jury can hang their sympathy in your behalf. You follow me?

D: Uh huh.

DA: What’s your legal excuse Lieutenant? What’s your legal excuse for killing Barney Quill?

D: Not justification?

DA: Not justification.

D: Excuse, just excuse. What excuses are there?

DA: How should I know? You’re the one who plugged Quill.

D: I must have been mad.

DA: How’s that?

D: I said I must have been mad.

DA: No, bad temper’s not an excuse.

D: I mean I must have been crazy. Am I getting warmer?

DA: Okay see you around.

D: Am I getting warmer?

DA: I’ll tell you that after I talk to your wife. In the meantime, see if you can remember just how crazy you were.”

ANATOMY OF A MURDER (Columbia Pictures 1959).

97 See Brooks & Gewirtz, supra note 44 at 31; see also, Grose, Persistent Critique, supra note 8; Peggy C. Davis, Law and Lawyering, Legal Studies with an Interactive Focus, 37 N.Y.L. Sch. L. Rev. 185, 186 (1992); Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L. J. 1603(1989).
her concerns – and then found legal means and methods to interact with those facts in order to achieve Helen’s goals. Also, the law itself was no magic wand. Sure, the lawyer engaged in legal research and came up with some consumer protection and other regulatory tools that he could use as leverage with creditors. But what helped Helen resolve her “trouble” was the lawyering he did in the form of fact-gathering, investigation, client counseling, negotiation, contract-drafting, letter-writing. Unbundled from the law – whatever the law was – these legal skills helped Helen and Samuel and all the rest of the characters in this story live happily ever after.\footnote{When I presented an earlier version of this piece, and indeed, in the case rounds discussions of the actual client’s situation, some form of this question was raised: Is this really legal work, helping clients figure out budgets and consolidate credit card balances? A discussion of the difference between law and social work, let alone the problems with multi-disciplinary practice is beyond the scope of this piece, but Nathalie Martin at the University of New Mexico School of Law has done some work on training law students to be proficient in financial terms to be able to provide a form of financial counseling to their clients. See, e.g. Nathalie Martin, Poverty, Culture and the Bankruptcy code: Narratives from the Money Law Clinic, 12 Clinical L. Rev. 2003 (2005). Her website is also a wonderful resource: http://finlit.unm.edu/Financial%20Literacy%20SOL%20Class.html (last visited January 18\textsuperscript{th}, 2009). See also Jeanne Charn & Rebecca Sandefur, Learning from Service: Using Service-Embedded Research to Improve the Practice and Target of Legal Assistance, (2005) (draft on file with author); and infra note?? about lawyering for poor people v. rich people.}

\textbf{D. Imagining That Everything Is Relevant}

In telling these two stories, I suggest that lawyers, in representing their clients, could do more to imagine the universe of problems and solutions before settling on one story. People tend to define problems by what solutions might be available. Put another way, we recognize the “trouble” in part by understanding its possible resolution. That is certainly what happened in the first story: Helen’s story was constructed to fit in to the lawyer’s understanding of how it could be resolved, based on the currently existing predatory lending laws.\footnote{Ann Shalleck’s Interviewing and Counseling chapter (draft on file w/ author)}

The second story, though, developed in a different way. Neither the lawyer nor Helen were clear on what the solution was, and the lawyer indicated as much to Helen at their second meeting. But he did not say, “Therefore, there is no point in your being here because I can’t help you;” or, “I can help you with the juicy predatory lending case, but not with the other problems because they’re not really legal problems.” Instead, he told her he was not sure what he could do for her, what legal remedies might be available, but that he was interested in working with
her to figure it out. The “trouble” was defined simply as what it was: a stack of cancelled checks and credit card bills and nasty letters from creditors. It was only one piece of her life, not her whole life, not what defined Helen. Thus the solution emerged from that stack of papers, slowly and piece by piece, until the client’s trouble had been resolved.

These two stories reveal that context can change everything – it can change the plot and characters of the story; it can change the genre and moral of the story; it can change how the story is framed, when it begins and when it ends; it can change the role of the law and the role of the lawyer in constructing the story. And we learn that by being open to these different plots and characters and genres and morals, as the lawyer in the second story was, lawyers might find themselves freed up from a particular role, or a particular relationship with the law, and able to construct stories in a different way with their clients.\footnote{See Davis, supra note 98 at 186-187, Grose, Persistent Critique, supra note 8; see also Grose, Once Upon A Time, supra note 80.}

Lawyers are not the only ones who need to be freed up in this way. Why, do we imagine, did Helen in the first story not insist that the lawyer deal with her credit card debt as well as her mortgage crisis? I suggest it is because she did not believe that she had a story to tell to a lawyer, let alone one that would entitle her to any legal relief. In Helen’s world, folks go to lawyers armed with their crisis stories: the child welfare worker has driven away with their kids; they have received an eviction notice; their husbands have beaten them up. In her mind, no less than in the lawyer’s, laws that work for poor people do so only at the moment of crisis, when they are the most vulnerable, the most desperate, and the most in need of that fairy godmother.\footnote{As Claudia Angelos remarked at the Clinical Legal Theory Workshop where I presented an earlier version of this piece, this really is an issue for lawyers for poor people. Lawyers for rich people (and certainly for corporations) do this kind of preventative or planning work all the time. Why do we frame it differently for poor people?}

And as a result, the stories available to clients like Helen are exactly the story the first lawyer told: the story about the victim who needs to be rescued, even though we know that behind that story, there are a multitude of others that could be told, that might result in a more satisfying, long-term, empowering solution for the client. Because of what Helen and the first lawyer believed about the role of the law in the lives of poor people, those stories don’t end up getting told.
This article began with the proposition that lawyers are not only storytellers, but also active participants in the construction of stories, by choosing what story to tell and how to tell it.\textsuperscript{102} What the two stories have illustrated, however, is that lawyers must act with greater awareness and intentionality about the choices we make in constructing and telling the stories we do.

In particular, we need to see ourselves as more powerful in relation to The Law, recognizing it as only one among many elements in the stories we hear, construct and tell. We must have the confidence to wrestle with the law to have it fit in to our clients’ lived realities, rather than funneling our clients’ lived realities into what we understand the law to require.\textsuperscript{103} We learn that by having the law define the story, we miss the point. If we want to do anything about what created the circumstances in which predatory lenders could find prey, we need to be open to hearing and telling different stories in different ways.

A concrete way to do this would be to begin with the proposition that everything our client tells us is “relevant;”\textsuperscript{104} that every trouble our client comes to us with will lead to some resolution (because we know all stories have to end somehow); and that we as lawyers have the skills to figure out how to get there.\textsuperscript{105}

\begin{footnotes}
\item[102] See supra note 8; supra note 94.
\item[103] I am reminded here of Lucie White’s description in “Notes on the Hearing of Mrs. G” of the process the lawyer went through in “choosing” which story to tell at the hearing – the “estoppel” story or the “life necessities” story. See supra note?? That piece was the first to articulate the theory of collaborative lawyering or critical lawyering theory that the client is actually an expert in her own life, and should be seen as such by the lawyer.
\item[104] Davis, supra note 98 at 186,187, and 188.
\end{footnotes}
CONCLUSION

I too made choices about what stories to tell and how to tell them. And I made those choices with a particular intent: to make stark the differences between the two stories, and what those differences might tell us about our craft as lawyers.

The first story was one framed by the litigation; as such it was adversarial and crisis-driven, with very high stakes. There were clear winners and losers, good guys and bad guys. The second story, on the other hand, was one framed by the relationship between the lawyer and the client; as such it was more slow-moving and fluid. The characters were more nuanced and the story evolved in such a way as to make real change and progress seem possible.

The lawyer in the first story was written to seem less reflective about and hamstrung by his understanding of the law. He represented the default reaction I am suggesting that lawyers should not have when working with their clients to construct stories about the intersection between the clients’ lives and the law. The lawyer in the second story, on the other hand, was written to seem more reflective, more collaborative, and more holistic in his approach to working with the client to solve the trouble she came in with. This lawyer represented the reactions I am suggesting lawyers should have in working to construct stories with their clients that both accurately reflect their clients’ lives and succeed in achieving their goals.

But let me be clear about my point: it is not that high-stakes litigation based storytelling is bad and that lawyers who tell such stories are necessarily unreflective and unholistic; nor is it that the kind of storytelling that took place in the second story is good and that lawyers who tell those stories are necessarily reflective and holistic.

On the contrary, my point is that all lawyers and all lawyering have the potential to be both reflective and holistic (and unreflective and unholistic). My point is that none of these stories should necessarily,
automatically, unreflectively be privileged as the default story to tell. My point is that lawyers should be open to hearing everything our clients tell us as relevant – and that means not only the facts, but also the goals and desires that go along with those facts – and that lawyers should recognize our power as constructors of stories to work with our clients to fit our understanding of the law and our lawyering skills into those facts and goals and desires.

These two stories are both equally possible. They are, perhaps, serial, not alternate stories. If lawyers work with clients like Helen to hear and tell stories that address their actual goals and to come up with long-term, empowering solutions to their problems, new clients will come to us seeking such solutions. If lawyers start telling these stories more, we will hear them more; and if we keep telling them, others will start hearing them too. And that is how the law changes.

This is an article, ultimately, about using the narrative framework as a way to expose lawyering technique. The lens of narrative theory is a variable lens: it can widen when necessary to better understand and achieve the client’s goals; it can contract when a narrower view better presents the client’s stories. Likewise, the skills lawyers employ are variable skills – they can be used to bully, to persuade, to smooth over, rough up, when necessary to better understand and achieve our clients’ goals.

Being open to narrative allows the lawyer to acknowledge the complexity of the problem presented, and to incorporate the context in which it arises. Lawyers seek to hear and understand the stories told to us by the client or clients, and offer to tell our own, with an eye toward collaboratively constructing new stories that address the clients’ goals and concerns. This approach to solving problems recognizes the agency of the client, but makes room for the reality that agency might mean very different things to different people. Being open to narrative in this way allows Helen and Samuel -- the individuals at the center of those problems -- to determine what kind of stories to tell, when to tell them, and what role they want to play in the stories they construct.

And in fact, that is what they were. In “real life,” the student lawyers who represented “Helen” told her predatory lending first, and then, the following year, a team of students worked with her to get her credit and debt situation in shape to avoid bankruptcy or another housing crisis.