

**IT'S ALL IN HOW YOU TELL IT:
REVIEWING PHILIP N. MEYER'S, *STORYTELLING FOR
LAWYERS* (OXFORD: 2014)**

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INTRODUCTION

Christopher Columbus Langdell might not deserve the blame, but he generally gets it anyway. Langdell, of course, famously introduced the casebook method of legal education in the 1870s,¹ and remarkably—or perhaps I should say embarrassingly—most law schools still use it as the primary means for educating law students.

Casebooks are not inherently bad, of course, but the whole reason Langdell introduced this method was because of his belief that law is a science.² Indeed, but for this premise, choosing to learn legal doctrine principally by reading cases would make no sense. As it turns out, Langdell did not actually invent either the casebook method or the notion that law is a science, so perhaps the fault really lies with Leibniz, Bacon, or even Descartes, but it doesn't really matter who's to blame.³ What matters is that at the very core of modern law is the idea that there is a logical structure residing at the center of most every legal dispute, and that we can understand that structure simply by becoming aware of the major and minor premises from which the conclusions will syllogistically and ineluctably follow.

This idea, aside from being somewhere between 150 and 400 years old, is completely wrong. Of course, we have known it is completely wrong for nearly a century now, dating back at least to the dawn of Legal Realism, but even the Realists could not completely shed the formalist model. Instead, what they showed was that law is both rationally and causally indeterminate; their goal, therefore, was to identify external factors (social, economic, and so forth) that explained legal outcomes.⁴ In other words, as Brian Leiter has demonstrated,⁵ the Realists adhered to the same idea of “legitimate” legal argument that lay at the heart of the formalist approach.

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1. M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 95 (1986).

2. *Id.* at 120.

3. *See id.* at 99 (describing the origins of the law-as-science approach).

4. Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 51, 57 (Martin P. Golding & William A. Edmundson eds., 2005).

5. *Id.* at 52.

What they overlooked, every bit as much as the formalists, is the extent to which law is arational.⁶

Nobody overlooks this feature of law any more. Every lawyer now knows that winning depends on more than having the tightest syllogism. It depends on moving the audience, or the decision-maker; and accomplishing that movement is only partly a function of logic. It also includes what can be thought of as an appeal to a pre-rational instinct or emotion. We have certain beliefs just because we have them,⁷ and successful lawyers know that legal victories come from appealing to those very beliefs.

So how do lawyers do that? They tell stories, of course. Philip N. Meyer's splendid book, *Storytelling for Lawyers*,⁸ is both an explanation of this phenomenon and a master class on what makes an effective story and how to construct one.

Meyer's book comes at a propitious moment in legal education. Around a decade ago, West Publishing began its so-called *Stories Series*: books that tell the stories behind canonical cases in a variety of legal disciplines, including torts,⁹ contracts,¹⁰ education law,¹¹ ethics,¹² and so on. By my count, the series now covers some three dozen doctrinal areas—including areas like evidence and tax where one might be forgiven for thinking stories do not matter much.¹³

Meyer's book is part of this emerging attention to the role that narrative plays in how cases turn out—and how legal doctrine therefore develops—but it is also, and more importantly, an assessment of how narrative works: of why some stories have the power to move, while others fall flat. In a sense, what Meyer has done is pulled back the curtain on storytellers. If the Legal Realists uncovered the real-world forces and powers that were erstwhile exerting an unseen influence on supposedly scientific law, Meyer has done them one better. He has shown that law and legal doctrine evolve at the granular or atomic level—the level of individual cases, individual disputes, individual stories. And his magisterial volume

6. What I mean here by *arational* is simply the extent to which legal outcomes depend on non-rational (which is not to say irrational) factors.

7. I discuss this idea at some length and collect authority in David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990).

8. PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* (2014).

9. TORTS STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

10. CONTRACTS STORIES (Douglas G. Baird ed., 2007).

11. EDUCATION LAW STORIES (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

12. LEGAL ETHICS STORIES (Deborah L. Rhode & David Luban eds., 2006).

13. See List of *Stories Series* Titles, WEST ACADEMIC, <http://www.westacademic.com/Professors/ProductSearchResults.aspx?searchtypeasstring=KEYWORD-SEARCH&tab=1&keywords=stories+series> (last visited Nov. 16, 2014).

homes in on the features of stories that make some of them work, while others simply spin their wheels.

In Part I, I will briefly summarize the structure and argument of Meyer's book. In Part II, I will offer some reflections on his conclusions.

I. WHAT MAKES A GOOD STORY?

Meyer's book begins with a brief argument: namely, that a legal case embeds a narrative architecture. A legal argument, he says, is actually a story, even if the story is disguised, hidden beneath jargon, ostensible objectivity, and neutral principles. Meyer does not spend long on this argument, however, because he knows the argument is uncontroversial. Instead, his major objective in the opening section of the book is to situate his approach to storytelling in the context of other examinations of narrative structure and strategy.

There is an important caveat that Meyer makes explicit: He is not endeavoring to identify or provide a formula; as he puts it, he is not writing a cookbook containing recipes. In certain genres, of course, there are strategies akin to formulas—think of horror movies or romance novels. Law, though, is not a narrow enough discipline for a single, simple formula to work. So instead, Meyer teases apart the components that are present in most all types of successful¹⁴ stories and then suggests how practicing lawyers, once cognizant of the role those components play, can use that awareness to craft more effective narratives.

What most lawyers are, therefore, are craftsmen, and Meyer's aim is to assist them in better executing their craft. A reader coming to this book and hoping for a paint-by-numbers manual on how to tell an effective story will be disappointed. A reader who is instead looking for a sophisticated exploration of themes that most good stories have in common and of how those stories can work in legal settings will be both satisfied and richly rewarded.

If there were a guild for all the practitioners of the craft, it would be known as the guild for human storytelling. It would include journalists, dramatists, most novelists, and, of course, lawyers. It might include some visual artists, and it would certainly also include many musicians. Although all the members of the guild would have some common aims, the elements of the craft would vary from one subdiscipline to another. Journalists, for

14. I suppose one could discuss at length the definition of "successful" here, but I am using the term, as I believe Meyer does, in a purely pragmatic sense: A successful story is one that works. Generally (but not always), whether the story works will be reflected in the outcome of the legal dispute of which the story was a part.

example, would focus on the so-called “Five W’s” (who, what, when, where, why). For Meyer, the elements of the lawyer’s craft would find their initial incarnation in the literary critic Kenneth Burke’s so-called pentad. Burke articulated five key terms of dramatism.¹⁵ These five terms were then reconfigured by Anthony Amsterdam¹⁶ and tailored to legal storytelling.¹⁷ They comprise: scene, cast and character, plot, time frame, and human plight.¹⁸

Meyer takes Amsterdam’s formulation, tweaks it a bit, and organizes his book accordingly. He devotes two chapters to plotting; two to character development; two to scene (or what Meyer calls style and place); and one to timing. In putting flesh on the bones of this thematic outline, Meyer examines two trials in great detail and draws lessons from a long list of novels, essays, and films as well. The breadth of learning reflected in these pages—which moves with ease from Tobias Wolff’s *This Boy’s Life*, to Kathryn Harrison’s *While They Slept*, to the films *High Noon* and *Jaws*, to legal briefs in death penalty cases, among many other examples—is simply staggering. The choices Meyer makes, however, are spot on, illustrating his argument with clarity and succinctness.

Meyer confesses to drawing from movies in part because he likes movies (he teaches a course on film). But there is a more strategic reason for this choice as well: His intended audience (lawyers and law students) are more apt to be familiar with major exemplars of storytelling in movies than in the great books; and the same goes for the audience of those lawyers (i.e., jurors). When Meyer discusses novels, for example, he tends to talk a bit about what the books are about; when he discusses film, he proceeds as if the reader already knows the story. As a quintessential example of the art of storytelling, Meyer uses Gerry Spence’s strategy in the Karen Silkwood case¹⁹—familiar to many because of the film starring Meryl Streep—and Jeremiah Donovan’s defense of Louis Failla,²⁰ a reputed mob figure charged with, among other crimes, wire fraud and conspiracy to commit murder.

The contrast Meyer draws between Donovan’s strategy in the Failla trial and Spence’s strategy in the Silkwood case is revealing and partially

15. MEYER, *supra* note 8, at 4.

16. Meyer dedicates his book to Amsterdam, one of his mentors and one of the great contemporary legal academicians, best known as a death penalty lawyer who argued *Furman v. Georgia*, 408 U.S. 238 (1972). The Court’s decision in *Furman* did away with capital punishment in the United States, albeit only briefly. *Id.* at 239–40.

17. MEYER, *supra* note 8, at 4.

18. *Id.*

19. *Id.*

20. *Id.* at 4–5.

designed to show that there is no single mold for effective storytelling. Thus, whereas Spence's suit on behalf of Karen Silkwood circled back over and over again to the concept of strict liability²¹ (a legal concept with no obvious analogy outside tort doctrine), Donovan virtually eschews law and legal doctrine altogether in structuring his case, and this choice is apparent in his closing argument.²² For Spence, strict liability is a "mantra";²³ for Donovan, the government's effort to snare his client was comedic.²⁴ If Spence appeals time and again to a specific legal principle, Donovan appeals just as often to the jury's familiarity with the drama of the mundane.

For his part, Meyer shows how each choice, although vastly different from the others, was a deeply considered and perfectly executed decision. In Spence's representation of Karen Silkwood, for example, he makes plain what he wants the jury to do—what he believes the jurors are morally required to do.²⁵ It is a strategy that superficially appears to be largely about a legal principle, but that simultaneously and disarmingly has the moral anchor of a Sunday sermon. In contrast, in Donovan's representation of Failla, he presents a rich story of Failla's character and the human forces Failla was pulled between, all as a device to evoke sympathy for him.²⁶ But Donovan does not actually finish the story; he does not explicitly tell the jury what he believes the law requires it to do.²⁷ He trusts the ability of the jurors to reach the conclusion favorable to his client, but that trust reflects a confidence on his part that in telling Failla's story, he has communicated his client's character in a way the jurors will intuitively understand.²⁸ If Spence is the church pastor here, Donovan is one of the authors (the first author, actually) of a chain novel.²⁹ Both are leading the jury, but in radically different ways.

In parsing both these paragons of storytelling, Meyer calls attention to how the storyteller moves between first- and third-person narrative; how

21. *Id.* at 33–35.

22. *Id.* at 90–114.

23. *Id.* at 94.

24. *Id.*

25. *Id.* at 34.

26. *Id.* at 101.

27. *Id.*

28. *Id.* at 109.

29. For a helpful understanding on how a chain-novel constrains writers of subsequent chapters, see, for example, RONALD DWORKIN, *LAW'S EMPIRE* 229–32 (1986). That Dworkin's metaphor is controversial in jurisprudential circles seems irrelevant here. But for a fine analysis of the controversy, with special attention to both Dworkin and Stanley Fish, see Judith M. Schelly, *Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama)*, 73 CALIF. L. REV. 158 (1985).

even within the third-person telling, there is movement between third-person subjective and third-person objective; and the use of storyteller omniscience.³⁰ He compares Donovan's strategy with the writer Frank McCourt, who, in his magisterial memoir *Angela's Ashes*, makes the reader a collaborator with the author in constructing the narrative.³¹

The courtroom battle over defining the defendant's character is not entirely a matter of deploying facts about the defendant's life; it is also a matter of conveying the surrounding circumstances, the context so to speak, of the protagonist's life. Here, in addition to allusions to *High Noon* and *Jaws*, Meyer parses work by Joan Didion, W.G. Sebald, and Kathryn Harrison.³² I want to linger particularly on Meyer's use of the Harrison story because he discusses it in the context of a capital case, a category of storytelling I return to in the following section.

Both Gerry Spence in the Silkwood trial and Jeremiah Donovan in his defense of Louis Failla construct an environment that is the backdrop for the conflict. To be sure, the environment is important, critical even, but it is part of the background. In Spence's narrative, the environment pits small-town, rural America against colossal corporate intruders.³³ In Donovan's story, a gang-related turf war is the setting where Failla found himself.³⁴ These settings are crucial to every part of the stories, particularly their character development, and Spence and Donovan choose to emphasize them because the jurors are familiar with, if not the exact environments, then similar ones. The jurors can therefore better understand the protagonists by virtue of their knowledge of the environments in which the protagonists operate.

In a death penalty trial, the environment plays a related but different function in the narrative. To understand why, it is important to remember that a death penalty trial is actually two trials. Although they are called "phases," the so-called guilt phase and the so-called punishment phase are truly two separate trials. At the first phase, the jury answers a factual question: Did the defendant do it? If the jury convicts the defendant of a crime that makes him eligible for death, then the second trial, or phase, commences. At the end of the second phase, the jury will have to answer a

30. MEYER, *supra* note 8, at 138.

31. *Id.* at 144. Incidentally, Meyer's examination of Donovan's tactics has itself been the subject of close analysis, and Donovan as well has written about his choices. See Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195, 237-38 (2009); Jeremiah Donovan, *Some Off the Cuff Remarks About Lawyers as Storytellers*, 18 VT. L. REV. 751, 756-57 (1994).

32. MEYER, *supra* note 8, at 157-84.

33. *Id.* at 175.

34. *Id.*

normative question instead of a factual one: Ought the defendant be executed, or instead be given a less severe punishment?³⁵

A death penalty lawyer's job at the punishment phase is to help the jury understand how the defendant's background shaped, and even caused, his behavior. A jury that understands how a murderer came to commit his crime will be more open to imposing a sentence less severe than death. The environment in a death penalty narrative, therefore, is not simply a *scene*; it is actually a *force* that shapes the protagonist.³⁶ In Spence's narrative, the bad guy was the big corporation.³⁷ In Donovan's narrative, the bad guy was a mob figure.³⁸ In a death penalty narrative, the bad guy is the environment itself.

Meyer examines Kathryn Harrison's *While They Slept*, a book about a family named Gilley.³⁹ While a married couple slept, their son Billy murdered them.⁴⁰ Meyer quotes, at some length, Harrison's description of the home environment where Billy and his sister were reared.⁴¹ There were brutal beatings and psychological torture; there was physical confinement that made escape from this setting impossible; there was a dread that hung over the children; and there was a relentlessness to the floggings from their father.⁴² It is perhaps too much to say that Harrison's narrative pushes the reader close to wishing the parents dead;⁴³ it is not too much to say that the narrative causes even the most ardent death penalty supporter to understand how Billy's environment was a force—the enemy—that shaped him.

Meyer argues that the lawyers in the case of *Eddings v. Oklahoma*⁴⁴ employed the same narrative technique and strategy exhibited in Harrison's telling of Gilley's story.⁴⁵ Like Harrison's story, the *Eddings* case involved a youthful and abused offender.⁴⁶ Sixteen-year-old Monty Eddings and his sister were running away from home when Eddings shot and killed a police

35. I discuss what happens at each of these phases in greater detail in a lecture that can be found online. See David R. Dow, *What is the Value of Killing Someone? Lecture at the UP Experience Conference*, YOUTUBE (Nov. 19, 2012), <https://www.youtube.com/watch?v=jjgCx9iGsfm8>.

36. MEYER, *supra* note 8, at 176.

37. *Id.* at 175.

38. *Id.*

39. *Id.* at 176.

40. *Id.*

41. *Id.* at 176–78, 179–81.

42. *Id.*

43. Meyer does suggest, in the analysis of Donovan's closing argument, that Donovan was leading the jury to the conclusion that the murder victim, Billy Grasso, in fact deserved to die. See *id.* at 114.

44. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

45. MEYER, *supra* note 8, at 181–83.

46. *Id.* at 181.

officer who approached the car in which the two siblings were fleeing.⁴⁷ Years later, in *Roper v. Simmons*, the Supreme Court would hold that the Eighth Amendment forbids the execution of offenders who were younger than eighteen when they committed homicide,⁴⁸ but Eddings did not have the protection of that rule.⁴⁹ Consequently, the objective of Eddings's lawyers was to create the same visceral understanding of what Eddings had endured that Harrison created in her narrative of Billy Gilley.⁵⁰ The techniques they used—quoting opinions of mental health professionals, observations of neighbors, recollections of those who knew young Eddings—were largely the same.⁵¹ But whereas Harrison's success depended on the readers actually reading her book, the Oklahoma courts ruled that the factors identified by Eddings's lawyers were not germane; put differently, if they had been given a copy of Harrison's book, they would have stopped reading.⁵² No narrative can work if nobody hears it.

Perhaps the most compelling aspect of Meyer's exploration of narrative is how he over and over homes in on elements of a story that hold the reader, that make it nearly impossible for the reader (or listener) not to remain with the storyteller until the end. In the Silkwood case, it was Spence's recurring theme, his mantra.⁵³ In the Failla case, it was Donovan's humor and playfulness.⁵⁴ There is no formula, as I have said, but there is a commonality in all these stories: The listeners are drawn in. I suspect many people have done as I have done and refused to put down a dreadfully written book, or walk out of a movie filled with embarrassingly bad dialogue, for the simple reason that we need to know how the story turns out. A legal storyteller obviously does not want her listener to hang around for no other reason than getting to the end, because, of course, the listener to the legal story (i.e., the judge or jury) effectively writes the end. But at the same time, the ending will almost inevitably be unfavorable if the listeners are squirming in their seats during the telling.

Almost all great writers have one thing in common: They are prodigious readers. They may well be born with talent, but they hone that talent by immersing themselves in what other writers have created. What Meyer has achieved with this book is to create an immersion pool for lawyers, a place where they can go to be surrounded not only with

47. *Id.*

48. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

49. MEYER, *supra* note 8, at 181.

50. *Id.* at 184.

51. *Id.* at 181.

52. *Id.*

53. *Id.* at 94.

54. *Id.* at 95.

examples of terrific storytelling, but with an expert storyteller as a tour guide who explains what makes the stories terrific.

II. BUT WHY *SHOULD* THE STORY MATTER?

One is probably best advised to be cautious when attempting to discern a writer's motives from her or his biography. Nevertheless, I am inclined to eschew caution for a moment and highlight two aspects of Meyer's career. First, he has an MFA from the writer's workshop at the University of Iowa, one of the country's most elite writing programs. The graceful writing in this book reflects that pedigree. Second, as a practicing lawyer, he worked (and works) in the field of criminal law.

There are, of course, many legal settings where the jurors chosen to resolve a dispute will have no familiarity whatsoever with the relevant legal doctrine, and many cases where the jurors will have no ability to place themselves in the shoes of the litigants. Think of an antitrust suit between Apple and Samsung, for example, or a financial dispute between two billionaires. But, despite the fact that jurors might regularly find the nature of the dispute before them or the lifestyles of the litigants to be well beyond the margins of their imagination, there remains something uniquely foreign about criminal trials. A typical juror will not have personal experience with, say for example, multiple vacation homes or private jets, but that same juror can certainly imagine what it would be like to be mega rich; just ask anyone who buys a lottery ticket what she will do with the hundreds of millions of dollars if she wins, and she will be able to tell you immediately.

Sitting as a juror in a criminal case is different. Imagining what it would be like to be rich is a much simpler, or at least a much more achievable, mental exercise than imagining what it would be like to be a rapist, or a pornographer, or a cold-blooded murderer. The most infamous white collar criminals in legal history do not elicit near the revulsion of the typical street thug. And being repulsed by a crime or a criminal is simply the flip side of not being able to imagine being in anywhere near the position of the accused wrongdoer. In other words, if there is any group of lawyers who must master narrative to be successful, it is those who represent the defendants who are most foreign to juries: violent criminals.

I want to focus here for a moment on capital crimes in particular, because while storytelling is, as Meyer shows, always germane, it is literally a matter of life and death in capital cases. A defense lawyer's job in any criminal case is to confront the government's case and demand that it prove the defendant guilty beyond a reasonable doubt. But in a death penalty case there is another, more important, aspect of the lawyer's job: to

save the client's life. And if that is going to happen, it is going to be because of the story the lawyer tells at the sentencing phase of the trial.⁵⁵

With that imperative in mind, I want to briefly tell two stories. And then I want to ask you to think about what should happen to the protagonists in each of these stories.

Our first case involves a man I will call Joe. Joe was an average student from an average middle-class home. His father had served two tours of combat in Vietnam and developed a drinking problem when Joe was young. He was verbally and physically abusive to Joe and Joe's mother, but the two stayed together. Joe played football and ran track, and he graduated from high school but had little interest in college. He enlisted in the Army and served for four years. He was honorably discharged and never saw combat. While in the army, he married, and he and his wife had a young son. Joe worked as a forklift operator at an economically struggling factory. He felt sustained economic pressure, and when his son was two years old, his wife began having an affair.

One afternoon Joe came home early because he was laid off that morning. He found the baby asleep in his nursery and his wife in bed with another man. Joe exploded in rage. He grabbed a handgun that he kept in the house and fired at his wife and her lover. He missed them both. He then shot his sleeping boy through the heart and put the gun to his own head. It misfired. By the time he ejected the cartridge and reloaded the gun, his house was surrounded by a SWAT team. The police did not yet know the baby was dead. For four hours they negotiated with Joe, who sat on the steps to the house with the gun pressed against his temple. He eventually surrendered. Before his trial, a psychiatric expert appointed by the court diagnosed him as suffering from post-traumatic stress disorder. Joe was convicted of murder and sentenced to death under a law that allowed the death penalty for those who kill children under the age of six. It ought not to matter to the story, but Joe is black, a fact obvious to the jurors in his case.

Our second case involves a woman I will call Joanna. She was a single mother of a two-year-old daughter. Joanna was an alcoholic and a drug addict. She drank heavily while pregnant and regularly used crack. She worked as a prostitute and became involved with her pimp. She had sex with a parade of men while her young daughter slept in a crib at the foot of the bed. Although Joanna and her pimp did not marry or even live together,

55. Meyer dedicates his book both to his family and to Anthony G. Amsterdam, whose understanding of narrative in death penalty cases and ability to construct successful ones is legendary. Meyer and Amsterdam are co-authors of *Making Our Clients' Stories Heard: A Guide to Narrative Strategies For Appellate and Postconviction Lawyers* (Admin. Office of the U.S. Courts, 2009).

Joanna hoped for a future with him. He, however, did not want children and told Joanna that her daughter was an impediment to their having a relationship. In time, Joanna became pregnant and believed her pimp was the father. She successfully managed to hide the pregnancy from him, and she delivered the baby privately, in her home, with no medical assistance. She took the infant, placed duct tape across his mouth and nose, put him inside a plastic garbage bag, and threw the bag into a dumpster behind her apartment complex. The baby was discovered dead sometime later; the cause of death was asphyxiation. The crime was committed before the use of STR DNA analysis, and Joanna, though initially a suspect, was never charged.

Three years later, Joanna took her daughter, now five years old, and threw her into a drainage ditch, apparently anticipating she would drown in the shallow water. The young girl rolled into a mound of fire ants. She was discovered by a jogger, still alive, and rushed to the hospital, where she survived despite suffering anaphylactic shock as a consequence of hundreds of ant bites. Joanna was arrested. While in jail awaiting trial, investigators used new technology to perform further DNA analysis of the duct tape found years before covering the young infant's mouth and nose. The results incriminated Joanna, and she was charged with capital murder.

Which, if either, of our protagonists, Joanna or Joe, should face the death penalty? Which should be executed for her or his crime? Should they both be executed? If you are not a death penalty supporter, then think instead about whose punishment should be more severe. Whether you are a death penalty opponent or proponent, whose crime is worse, or are they equally bad?

Neither of these stories happened exactly as I have described, but both happened largely as I have reported. Joe was executed; Joanna was sentenced to life in prison. We could talk about the elements of death penalty doctrine that contributed to that outcome, but I want to focus instead on the stories. I knew the outcome of both cases, and so I stressed the aspects of Joe's story that might have been spun at trial by his lawyer into a narrative designed to save his life; and I stressed the aspects of Joanna's story that might have been spun at her trial by prosecutors into a narrative designed to produce a death verdict. And if I succeeded, then at least some readers of this essay believe Joe's punishment was too severe. Now, I had an advantage in telling the story, not only in the way the storyteller always has the advantage of creating the scenes and the timing and constructing the characters, but also because I was familiar with both cases. I also believed (and still believe) that, objectively speaking, Joanna's

crime was worse. I was able to privilege my belief in my telling of the story.

But what do the stories have in common? Both stories have at their core the murder of a child. In many jurisdictions, including the jurisdiction where these crimes occurred, the murder of a child makes the murderer eligible for the death penalty. But if the legal principles doing the heavy lifting in both cases—that it is especially heinous to murder children, and that those who murder children should therefore be punished especially harshly—are the same, then why should there be different outcomes simply based on whether the defense lawyer in one case tells a better story than the defense lawyer in the other?

To be fair (or at least less unfair), one aspect of death penalty cases that makes them unique is that, in a line of decisions reaching back to the late 1970s, the Supreme Court ruled that the Eighth Amendment guarantees defendants facing death the opportunity to place before the jury any aspect of their lives they believe militates against execution. Furthermore, the jury must be able to give effect to that evidence—meaning that the jury must be permitted, under the Eighth Amendment, to spare a defendant from death simply because it is moved by the defendant's story.⁵⁶ Justice Scalia, along with many others, has consistently criticized this line of cases precisely because he believes it creates an unequal and haphazard application of a legal principle.⁵⁷

But what neither my unease nor Justice Scalia's scathing critique acknowledges is that what is different about capital punishment is not that stories matter in death penalty jurisprudence but not elsewhere; rather, what is different about capital punishment is that, when death is a possible punishment, the Constitution mandates the relevance of stories. Put another way, there is always potential conflict between even-handed application of a legal principle and being swayed by a story. But perhaps where the Eighth Amendment is concerned, that conflict is embedded in the Constitution itself. Why, though, should it be tolerated elsewhere?

56. This aspect of the Eighth Amendment and its application to capital cases was first articulated in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), but has been reiterated often since. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (reiterating this application of the Eighth Amendment to death penalty sentencing).

57. E.g., *Callins v. Collins*, 510 U.S. 1141, 1141–42 (1994) (Scalia, J., concurring) (noting ostensible inconsistency between the *Furman* and *Lockett* lines of cases); *Walton v. Arizona*, 497 U.S. 639, 665–67 (1990) (Scalia, J., concurring in part).

CONCLUSION

Professor Meyer does not say that it should. And I admit to having no idea where he stands on the normative question of whether or how much stories ought to matter. He takes the world, the legal world at any rate, as he finds it; and he describes that world clearly, provocatively, and superbly. Indeed, in Meyer's final chapter, he discusses the theme with which I began: that law schools continue to embed Langdell's formalism, often to the detriment of their students.⁵⁸

Part of Meyer's ambition is to unsettle some legal storytelling conventions. Toward the end of his book, for example, he challenges the tendency to try to tell stories in strictly chronological order. Borrowing from Kurt Vonnegut's *Slaughterhouse Five* and returning again to Jane Austen's *Emma*,⁵⁹ Meyer insists that the effort of law students to tell stories in a purely linear fashion is not only naive and misinformed, but in fact inconsistent with how humans experience the world and with the language we use to describe it.⁶⁰

As a lawyer and a writer, I think Professor Meyer is spot on—not only on the question of timing and linearity, but equally with his keen understanding of why narrative works, and what distinguishes a good narrative from a bad one. But I confess unease at Professor Meyer's further point that narrative matters, and matters decisively, in numerous cases across a broad swath of legal domains. I am confident he is right, but the necessary implication of his argument is that principles matter less than I believe they ought to.

Perhaps it is time for me, and many others, to stop pretending that there is not a man behind a curtain. Perhaps. But it might also be time for judges and other decision-makers to identify and apply legal principles in a more neutral manner—where the just outcome is not determined by who can tell the best story. That the goal is almost certainly unachievable seems an insufficient reason for not striving to attain it.

58. MEYER, *supra* note 8, at 204.

59. *Id.* at 60–61, 187–92.

60. *Id.* at 184–85.

